

VICTORIAN PARLIAMENT LAW REFORM
COMMITTEE

**THE POWERS OF ENTRY, SEARCH,
SEIZURE AND QUESTIONING BY
AUTHORISED PERSONS**

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Australia**

Law Reform Committee

**Inquiry into the Powers of
Entry, Search, Seizure and
Questioning by Authorised
Persons**

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CHAIRMAN'S FOREWORD

It has been said that of all Australia has to offer, nothing is more important than its institutions which enshrine our values and govern our freedoms. The Law Reform Committee's Report on the Powers of Entry, Search, Seizure and Questioning by Authorised Persons reviews elements of the difficult balance between the public interest in effective law enforcement and the right of individuals to privacy. The Report considers the appropriate level of government control of individual and commercial activities. While often an area in which the public has little interest and even less knowledge, it nevertheless pervades almost every aspect of our lives. From the macro level of food safety and public health, the protection of the environment and the management of valuable resources, to the micro level of the neighbour's dog and the accuracy of the petrol bowser you fill your car from, authorised persons, or inspectors, have a significant impact on the public's wellbeing.

The Committee was required to consider the purpose, effectiveness, fairness and consistency of a number of legislative provisions granting powers to authorised persons. While purpose and effectiveness can be largely measured in objective ways, fairness is a much more subjective concept. The Committee took the view that the starting point for our deliberations should be that incursions into civil liberties and restrictions of individual and commercial activity should be as limited as possible. Indeed the Committee made this concept of parsimony in the grant of powers the first of the principles which it has developed to guide agencies and law makers.

The further major theme of the Committee's inquiry was that of seeking consistency. The reference was a large undertaking due to the number of Acts that contain relevant powers. In total the Committee identified more than 120 such Acts. Our investigations showed that the various Acts had mostly been developed independently of each other and that very little, if any, thought had been given to the benefits of consistency. Recent amendments, however, indicate that this issue is now gaining currency. The reference required that consistency be considered in terms of its current existence and its future desirability. With the number and diversity of Acts under

consideration this proved to a large extent to be an exercise in classification and reduction. Acts designed to regulate similar activities were grouped together for comparison. Large groups of Acts were then considered by reference to selected examples. The development of common principles which would be relevant to the wide diversity of areas encompassed within those Acts was a challenging task. In the Committee's view the resulting principles will be an important tool in improving consistency.

The powers of Public Transport inspectors were the most contentious which the Committee dealt with and also generated the most submissions. Here the Committee needed to balance the rights and liberties of transport users with the need to provide revenue protection to maintain a viable public transport system. The Committee found many of the issues raised by this Act atypical of issues raised by other Acts containing inspectors' powers. The Act is dealt with in some detail in the Report because of its currency and the level of community concern relating to it.

In bringing together the many strands of this Report the Committee relied heavily on evidence received in public hearing and in written submissions. The Committee is indebted to the many witnesses who appeared at our public hearing and to the authors of the written submissions received. The Parliamentary Committee system provides an excellent opportunity in our Parliamentary democracy for the public to have their views heard in a formal arena. While valuing the contributions by government departments and non-government organisations the Committee particularly welcomes contributions from members of the public.

I would like to thank the Members of the Committee for their contribution to the development of this Report. I would also like to thank the Committee staff, Merrin Mason, Kristin Giles and Jaime Cook for their excellent research, analytical and organisational contributions towards the completion of this Report.

I commend the Report to the Parliament.

Murray Thompson, MP
Chairman
May 2002

FUNCTIONS OF THE COMMITTEE

PARLIAMENTARY COMMITTEES ACT 1968

- 4E. The functions of the Law Reform Committee are –
- (a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or rules of practice of a House of the Parliament;
 - (b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required to do so by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

TERMS OF REFERENCE

The Governor in Council, acting under section 4F(1)(a)(ii) and 4F(3) of the **Parliamentary Committees Act 1968** and on the recommendation of the Attorney-General, by this Order requires the Law Reform Committee to inquire into, consider and report to the Parliament on the following matters:

1. The purpose, effectiveness, fairness and consistency of provisions in Victorian legislation dealing with the exercise of powers including:
 - the power to enter premises or vehicles;
 - the power to search premises or vehicles;
 - the power to seize any thing;
 - the power to question any person or to require a person to provide any documents (and the extent to which that person may rely upon the privilege against self-incrimination)-

by authorised persons (including members of Victoria Police where those members are acting as authorised persons) for the purpose of monitoring compliance with the law or for investigating actual or suspected breaches of the law, having regard to the policy objectives of the relevant legislation.

2. Whether there should be a greater degree of consistency in the future development of such powers in Victoria, having regard to different legislative models (including criminal laws of general application, licensing provisions, legislation designed to protect public health and safety and the environment and emergency powers) and to the need to match powers with the risk and gravity of the offence to which the powers are directed.

In conducting the Inquiry the Committee is to have regard to:

- a. The Senate Standing Committee for the Scrutiny of Bills Fourth Report of 1999, Entry and Search Powers in Commonwealth Legislation, 6 April 2000.
- b. Such other legislation, case law, reports and materials as are relevant to the Inquiry.

- c. The experiences of competent authorities administering legislation containing powers of entry, search, seizure, and the ability to ask questions or require the provision of information.
- d. Complaints data relating to the use of such powers (for instance, data held by the Ombudsman, Victoria Police or other government agencies)

The Committee is requested to make its final report to the Parliament by the first day of the Autumn 2002 Parliamentary sittings.

Dated 18 April 2001

Responsible Minister:

STEVE BRACKS MP

Premier

LIST OF RECOMMENDATIONS

Chapter 3: The purpose of inspectors' powers

Recommendation 1

That, as a matter of general principle, powers of entry, search, seizure and questioning only be conferred for the purposes of:

- *monitoring compliance with the legislation;*
- *investigating a suspected offence under the Act; and*
- *responding to genuine and clearly defined emergencies.*

Recommendation 2

That Victorian Acts conferring powers of entry, search, seizure and questioning on authorised persons:

- *clearly state the purpose of every provision which confers powers on authorised persons; and*
- *contain separate provisions for each identified purpose.*

Chapter 4: The effectiveness of inspectors' powers

Recommendation 3

That the Department of Justice, with the relevant government departments, provide a response to the following proposals obtained in evidence:

- (a) *The Environment Protection Act 1970*
- *enhanced information gathering powers;*
 - *the power to enter residential premises under warrant;*

- *inspection and testing powers; and*
 - *the granting of expanded powers to Environmental Health Officers under the Environment Protection Act 1970.*
- (b) *Re-consideration of the distinction between licensing and non-licensing Acts in the Fair Trading area and, in particular, consideration of the introduction of pro-active monitoring powers into the non-licensing Acts.*
- (c) *Local Government Act 1989*
- *introduction of arrest powers*
- (d) *Domestic (Feral and Nuisance Animals) Act 1994*
- *clarification of the definition of seizure in section 77 and the reasonable excuse provision in section 76(2).*
- (e) *Taxation Administration Act 1997*
- *introduction of positive mandatory injunctions.*
- (f) *Gaming No. 2 Act 1997*
- *amendment to reflect the distinction between professionally organised or promoted charities and church or local charities.*

Recommendation 4

That the Department of Natural Resources and Environment provide a response to the proposals suggested by the RSPCA in evidence before the Committee.

Recommendation 5

That the Prevention of Cruelty to Animals Act 1986 be amended to:

- *require inspectors to produce their identification automatically rather than merely on demand.*

- *require inspectors automatically to produce a card setting out their name or identifying number, title, the organisation employing them and information on the relevant complaints mechanism.*
- *provide that persons should not be found guilty of obstructing an inspector unless, as soon as practicable under the circumstances, the inspector has:*
 - *clearly identified him or herself;*
 - *informed the person of his or her rights; and*
 - *warned the person that a failure or refusal to comply with a request could constitute an offence.*
- *differentiate more clearly between powers granted for the purpose of acting in emergencies and those which inspectors can exercise where they reasonably suspect that an offence under the Act has been committed.*
- *require inspectors to obtain a warrant for the investigation of suspected offences except in clearly defined emergencies.*
- *specifically preserve the privilege against self-incrimination in relation to questioning by inspectors.*
- *make provision for an internal complaints mechanism and reporting requirements in accordance with recommendations 28 and 31-33.*

Recommendation 6

That the Prevention of Cruelty to Animals Act 1986 and the internal practices of the RSPCA be further reviewed in the light of all general principles and relevant recommendations in this Report.

Recommendation 7

That the Government review the policy and process for the prosecution of offences under the Prevention of Cruelty to Animals Act 1986.

Recommendation 8

That DNRE and council officers be trained in relation to companion animal issues so that such officers can effectively use the powers under the Prevention of Cruelty to Animals Act 1986.

Recommendation 9

That the Ombudsman Act 1974 be amended to ensure that the inspectorate function of the RSPCA is formally subjected to the oversight of the Ombudsman.

Recommendation 10

That the RSPCA publicise its complaints, reporting procedures and enforcement philosophy, in line with Recommendations 15 and 20.

Recommendation 11

That the Prevention of Cruelty to Animals Act 1986 be amended to specify that inspectors cannot be authorised until they have completed approved training and that the retention of authorisation be contingent upon an approved program of in-service and ongoing training.

Recommendation 12

That the Memorandum of Understanding between DNRE and the RSPCA be amended to specifically address the issue of training and to ensure ministerial and departmental oversight of the training of RSPCA inspectors.

Recommendation 13

That agencies that have not already done so develop an enforcement philosophy as a written document.

Recommendation 14

Evidence of compliance with recommendation 13 should be contained in the 2003/2004 annual report of agencies.

Recommendation 15

That agencies ensure that their enforcement philosophies or strategies are as transparent and well publicised as possible, preferably by means of publication and distribution among those affected by the legislation.

Recommendation 16

That Acts clearly set out the process of authorisation of inspectors or cross-reference to the Act which does.

Recommendation 17

That authorisation provisions be as specific as possible. In particular that:

- *legislation not confer inspectors' powers on a recipient categorised merely as a member of a particular Department or organisation.*
- *inspectors' powers not be conferred on a particular recipient simply because it is the most economically or administratively advantageous option.*
- *agencies have clear and appropriate qualification requirements and educational and training standards for their inspectors.*

Recommendation 18

That, where non-government employees are authorised as inspectors, strong safeguards relating to monitoring and reporting on inspectors' activities and access to complaints mechanisms must be included.

Recommendation 19

That all Acts conferring relevant powers on inspectors require inspectors to produce identification automatically.

Recommendation 20

That all Acts conferring relevant powers on inspectors require inspectors automatically to produce a card setting out their name or identifying number, title, the agency employing them as well as information on the relevant complaints mechanism.

Recommendation 21

That all Acts conferring relevant powers on inspectors provide that persons should not be found guilty of obstructing an inspector unless, as soon as practicable under the circumstances the inspector has:

- *clearly identified him or herself;*
- *advised the person of the inspector's powers under the legislation as well as of the*
- *person's rights;*
- *warned the person that a failure or refusal to comply with a request could constitute an offence.*

Recommendation 22

That agencies have appropriately tailored training in place for their authorised officers.

Recommendation 23

That a standards unit be established within Government to ensure that training offered by agencies meets agreed minimum standards .

Recommendation 24

That all Acts conferring relevant powers on inspectors provide that inspectors should not be formally authorised until they have completed appropriate and monitored training.

Recommendation 25

That all Acts conferring relevant powers on inspectors provide that the retention of authorisation be contingent upon approved programs of in-service and ongoing training.

Chapter 5: The fairness of inspectors' powers

Recommendation 26

That powers of entry, search, seizure, questioning and to require the production of documents should only be contained in primary, not subordinate legislation.

Recommendation 27

That the Government examine existing Acts and regulations to identify which provisions granting powers of entry, search, seizure, questioning and to require the production of documents are currently in subordinate legislation, with a view to moving such provisions to the principal Act.

Recommendation 28

That the requirement for internal complaints mechanisms relating to inspectors' powers be enshrined in legislation.

Recommendation 29

That the standards unit within Government set minimum standards for internal complaints mechanisms.

Recommendation 30

That the Government give consideration to improving the transparency and effectiveness of the Victorian Ombudsman for complaints about inspectors.

Recommendation 31

That agencies be required to collect and maintain records of figures of usage of the inspectors' powers they administer.

Recommendation 32

That agencies be required to report to Parliament annually, preferably as part of their Annual Report, in relation to the use of inspectors' powers and complaints received.

Recommendation 33

That the government consider what information should be contained in the report and issue guidelines to agencies on this matter. The Committee recommends that the report on this issue include information and, as far as practicable, statistics on the following matters:

- *the incidence of the use of inspectors' powers;*
- *number of complaints against inspectors received and whether they were resolved, are still pending etc;*
- *information on the type of complaints received (by use of case studies); and*
- *statistics on penalty infringement notices and or prosecutions launched by the agency.*

Recommendation 34

That the following principles in relation to the privilege against self-incrimination be reflected in all legislation containing inspectors' powers:

a) Information as to rights

- *persons who are to be questioned by an inspector should, prior to such questioning, have their rights and obligations explained to them, including their right to rely on the privilege against self-incrimination.*

b) *The privilege in relation to questioning*

- *as a general principle, all legislation should specifically preserve the privilege against self-incrimination in relation to questioning.*
- *without limiting the generality of the above, individuals should not be able to rely on the privilege to avoid giving a name and address and verifying information where the legislation gives the inspector the power to ask for these details.*

c) *The privilege in relation to documents*

- *as a general principle, a person who has been asked by an inspector to produce a document or other item should not be able to rely on the privilege against self incrimination unless the production of the document would require the person to identify, locate, reveal the whereabouts of, or explain the contents of, the document or item.*
- *in particular, the privilege should not allow natural persons to refuse or fail to produce documents which the person is required to keep pursuant to legislation.*
- *persons who have exercised their right to rely on the privilege should not have that fact used in evidence against them in any subsequent criminal proceeding.*
- *documents in relation to which privilege is claimed should be carried before a justice to be dealt with according to law and the privilege may be argued before that justice.*

d) *Abrogation of the privilege against self-incrimination*

The privilege may be abrogated only where:

- *it has been shown to be absolutely necessary for the adequate functioning of the relevant law; and*
- *any answers given or documents or items produced are not admissible in evidence in any subsequent criminal proceeding, except where false answers are given.*

Recommendation 35

That, as a general principle, the application of legal professional privilege (whether it applies or is abrogated) be clarified in statutes containing inspectors' powers.

Recommendation 36

That agencies ensure that they have a protocol in place for the seizure of documents over which legal professional privilege is claimed.

Recommendation 37

That the Government immediately clarify the operation of section 464 of the Crimes Act 1958 in relation to whether and when inspectors without any power of arrest must nevertheless comply with the section.

Recommendation 38

That, where relevant, the obligation of inspectors to comply with section 464 be enshrined in legislation.

Recommendation 39

That agencies ensure that education on the requirements of section 464 of the Crimes Act 1958 is part of their training programs for relevant authorised officers.

Recommendation 40

That the standards unit referred to in Recommendation 23 ensure that agencies are providing certain minimum standards of training to their inspectors on compliance with section 464.

Recommendation 41

That the Magistrates' Court review the Register required to be kept pursuant to section 57 of the Magistrates' Court Act 1989, to allow warrants issued under particular Acts to be more readily identifiable.

Recommendation 42

That the Department of Justice consider the possibilities for enhancing the clarity and transparency of search warrant provisions in Victorian legislation conferring powers on authorised persons by listing them in the Magistrates' Court Act 1989 or in new stand-alone legislation, giving particular consideration to the model of the Search Warrants Act 1985 (NSW).

Recommendation 43

That search warrant provisions contain protections including, but not limited to:

- *announcement before entry; and*
- *that a copy of the warrant is to be given to the occupier.*

Recommendation 44

That Statutes conferring coercive powers on authorised officers contain other common protections, including:

- *exactly what matters the search warrant must cover;*
- *a sun-set clause on warrant validity;*
- *procedures for dealing with disputed seizures;*
- *time limits for the return of material seized.*

Chapter 6: Obstruction of authorised officers and police assistance*Recommendation 45*

That, as a matter of general principle, all Acts should contain provisions which make it an offence to obstruct or impersonate authorised officers.

Recommendation 46

That, where it is envisaged that the assistance of the police may be necessary, the Act specifically name the police rather than merely make a general reference to "such other assistance as is necessary" or similar words.

Recommendation 47

That Acts specify that inspectors may seek assistance from police if they are obstructed or believe on reasonable grounds that they will be obstructed in the exercise of their functions.

Recommendation 48

That, as a matter of general principle, mandatory police assistance provisions are inappropriate.

Recommendation 49

That the Government develop a protocol for agencies dealing with suspected offences not related to the legislation covering their operations.

Recommendation 50

That consideration be given to conferring on inspectors a limited power to preserve a scene for a set period of time if they encounter clear evidence of crimes which are not within the scope of their own powers.

Chapter 7: The powers of public transport inspectors

Recommendation 51

That Transport Companies ensure that they maintain a consistent and even-handed approach to the enforcement of the Transport Act 1983, in particular by training transport inspectors not to target particular groups of the Community.

Recommendation 52

That Transport Companies ensure that transport inspectors receive training in how to deal appropriately with people who do not speak English as a first language, people with an intellectual disability, and those who rarely use the public transport system.

Recommendation 53

That the Office of the Director of Public Transport commission independent research to establish the extent of fare evasion.

Recommendation 54

That the distinction between detention and arrest in the Transport Act 1983 be clarified to differentiate the circumstances under which the powers can be exercised and to more clearly define the persons who can exercise these powers.

Recommendation 55

That, the Transport Act 1983 be amended to allow inspectors to detain persons only for the purpose of asking for their names and addresses where the inspector suspects on reasonable grounds that an offence against the Act has been or will be committed, and for obtaining verifying information.

Recommendation 56

That, the Transport Act 1983 be amended to require that inspectors use the power of arrest rather than detention , on the grounds that the person has committed an offence under the Act, where a person refuses to give a name and address or where the inspector suspects on reasonable grounds that the information given is false and it is not subsequently verified

Recommendation 57

That Transport Company inspectors receive mandatory training prior to accreditation on the use of detention and arrest powers, including the application of section 464 of the Crimes Act 1958 to arrest situations, and that they receive ongoing training as a condition for retaining accreditation.

Recommendation 58

That Transport Companies develop or improve transport system design and procedures to assist people to comply with their obligation to buy a ticket under the Transport Act 1983.

Recommendation 59

That Transport Companies develop or improve procedures which provide inspectors access to frequently updated lists of out of order ticket machines.

Recommendation 60

That only where reasonable attempts have been made to verify a passenger's claim that a machine is not functioning should inspectors ask for a name and address.

Recommendation 61

That existing transport network communications systems, including the red button security arrangements in operation throughout the metropolitan train network, be adapted for use by members of the public to report malfunctioning ticket machines and that consideration be given to utilising the same system to record the names of people who endeavoured to purchase a ticket but were unable to do so.

Recommendation 62

That the Transport Act 1983 be amended to allow authorised officers to demand verification of names and addresses of passengers where they believe on reasonable grounds that the passenger has given a false name and / or address.

Recommendation 63

That, subsequent to the Act being amended as per Recommendation 62, signs be placed at stations, tram and bus stops informing passengers of their obligation to verify their name and address if they are found without a valid ticket on public transport.

Recommendation 64

That any verification information establishing true identity be sighted only and not recorded.

Recommendation 65

That the public transport ticketing system be improved urgently in order to enhance ticket availability and reduce fare evasion opportunities.

Recommendation 66

That the Ombudsman Act 1974 be amended to ensure that the inspectorate function of the Transport Companies is formally subjected to the oversight of the Victorian Ombudsman.

Recommendation 67

That a separate public transport unit be set up within the Office of the Victorian Ombudsman to consider complaints concerning the public transport system, including complaints relating to the actions of authorised officers employed by Transport Companies.

Recommendation 68

That the Government give consideration to introducing a common identification badge for authorised officers employed by the Transport Companies.

Recommendation 69

That the Transport Act 1983 be amended to preserve specifically the privilege against self-incrimination with the exception of the requirement to give a correct name and address and verifying information.

Chapter 8: Consistency of inspectors' powers

Recommendation 70

That reference to a system of national co-operation, whether formal or informal, should not operate as a complete or automatic justification for failure to comply with the principles set out in Chapter 2.

Recommendation 71

That, as a matter of general principle, warrants be required for the investigation of suspected offences and for entry into residential premises.

Recommendation 72

That, as a matter of general principle, warrants not be required for the monitoring of compliance with primary legislation or in responding to genuine and clearly defined emergencies.

Recommendation 73

That the absence of a licence not automatically exclude any possibility for monitoring compliance with legislation.

Recommendation 74

That all provisions which allow inspectors to exercise their powers with the consent of the occupier contain the legislative safeguards contained in section 119(2) of the Fair Trading Act 1999.

Recommendation 75

That, where entry is gained with consent pursuant to any Act, that Act should not impose any penalty or disadvantage:

- *if an occupier fails to co-operate in the search*
- *where an occupier subsequently withdraws consent.*

Recommendation 76

That, as a general principle, where the powers of inspectors are comparable to the powers of police such as when they are investigating a suspected offence, their powers be no greater than the police powers contained in the Victorian Crimes Act 1958.

Recommendation 77

That authorised persons' powers of entry, search, seizure and questioning and the power to require the production of documents conform with the set of principles set out in Chapter 2.

Recommendation 78

That those principles relevant to determining the content of legislation be contained in stand-alone legislation.

Recommendation 79

That those principles relevant to the policy and procedure of agencies be developed into a set of procedural guidelines by each agency and that these guidelines be assessed by the standards unit to ensure consistency across agencies wherever possible.

Recommendation 80

That all new Acts conferring coercive powers on authorised persons adhere to the principles, unless there is a compelling reason for departure from the principles.

Recommendation 81

That whenever Acts containing inspectors' powers are reviewed or amended in the future, the inspectors' powers provisions are specifically reviewed with reference to the principles.

Chapter 9 – Perspectives from international jurisdictions

Recommendation 82

That in developing their enforcement philosophies agencies give consideration to matters addressed in the UK Enforcement Concordat.

EXECUTIVE SUMMARY

In this Report the Victorian Parliament Law Reform Committee evaluates the purpose, effectiveness, fairness and consistency of the powers of entry, search, seizure, questioning and to require the production of documents held by authorised persons under Victorian legislation. This analysis involves consideration of the difficult balance between the public interest in effective law enforcement and individuals' right to privacy, the integrity of their person and the possession of their property. In general, the Committee found that the balance is currently tipped in favour of the public interest: many existing inspectors' powers contain too few provisions designed to safeguard civil liberties and to ensure the transparency of the powers and the accountability of inspectors and the agencies employing them. Accordingly, many of the Committee's recommendations focus on legislative reforms to inspectors' powers provisions to address these concerns.

However, in the course of this Inquiry the Committee discovered that non-legislative internal practices of the agencies administering the powers can be just as important as the legislative provisions themselves. Factors such as the selection and training of authorised officers, complaints mechanisms and the "enforcement philosophy" of an agency can have a significant impact on questions of fairness, effectiveness and consistency of the powers. Several of the Committee's recommendations are thus directed towards these non-legislative factors.

Consistency of inspectors' powers

The Committee found that there is a notable lack of consistency across the numerous Victorian Acts containing inspectors' powers. Identifying ways to improve consistency among the various Acts was one of the Committee's main goals.

General principles

The Committee addresses the issue of consistency partly in the many recommendations which refer to provisions which all Acts should contain. However, the Committee's main contribution to the improvement of consistency of inspectors' powers is in the list of general principles contained in Chapter 2 of the Report. The Committee believes that all Acts conferring relevant powers on authorised persons should adhere to these principles, unless there is a compelling reason for departure from them.

In accordance with the Committee's findings and recommendations, some principles relate to legislation and other principles address issues of agency practice. The Committee believes that, to be effective, those principles which can properly be contained in an Act, should be enshrined in stand-alone legislation. Those principles relevant to the policy and procedure of agencies should be developed into a set of procedural guidelines by each agency and a standards unit should assess the guidelines to ensure consistency across agencies wherever possible.¹

Purpose and the impact on the extent of powers

The Committee believes that legislation should clearly state the purpose of every provision conferring powers on inspectors and should contain separate provisions for each identified purpose. The Committee identified three legitimate purposes for inspectors' powers, namely monitoring compliance with legislation; investigating suspected offences and responding to genuine and clearly defined emergencies.

In its examination of the purposes of inspectors' powers provisions the Committee encountered a high degree of inconsistency: some Acts contained no stated purpose, others clearly differentiated between powers exercised for monitoring purposes and powers exercised for investigation purposes, while others contained powers for monitoring and investigation in the same provision. In addition, the Committee found that, while agencies often acted in emergency situations, few Acts contained clearly defined emergency powers.

¹ In Recommendation 23 the Committee recommends that a standards unit be established within Government to ensure that training offered by agencies meets agreed minimum standards. In later recommendations the Committee notes that the standards unit could also have other functions.

The Committee believes that the purpose of the powers should be the main determinant as to whether inspectors should be required to obtain a warrant before exercising their powers. In Chapter 8 the Committee concludes that, as a matter of general principle, warrants should be required for the investigation of suspected offences and for entry into residential premises but should not be required for the monitoring of compliance with legislation and in cases of genuine and clearly defined emergencies.

Effectiveness of inspectors' powers

The Committee examines the effectiveness of inspectors' powers on a number of different levels, including the degree of satisfaction among agencies with their current powers and the "enforcement philosophy" adopted by agencies. The Committee also considers other factors which can impact on effectiveness such as the selection and training of authorised officers.

Enforcement philosophy

The Committee received evidence from many agencies that they used their coercive powers only as a "last resort" because they felt that a co-operative regulatory style is more effective than one which emphasises strict legal compliance with legislation at all times. Because of the impact which an enforcement strategy or philosophy can have on the use and effectiveness of inspectors' powers, the Committee believes that an agency's enforcement philosophy should be as transparent and well-publicised as possible, preferably by means of publication and distribution among those affected by the legislation.

Training

The selection and training of authorised officers is a vital component of the effectiveness, consistency and fairness of the use of inspectors' powers. The Committee believes that legislation should provide that persons should not be authorised as inspectors until they have received appropriate training. In addition, to ensure that agencies provide ongoing training to their inspectors, the retention of authorisation should be contingent upon approved programs of in-service and other ongoing training. The Committee is concerned that there is no objective way of

evaluating training programs. One key recommendation to address this problem is that the Government set up a standards unit to ensure that matters such as training offered by agencies meet agreed minimum standards.

RSPCA inspectors

One issue to which the Committee devotes considerable attention in Chapter 4 is the powers of inspectors employed by the RSPCA, one of only two groups of inspectors who are not government employees (the other one being authorised officers employed by the transport companies). The Committee recommends a number of amendments to the *Prevention of Cruelty to Animals Act 1986* which it believes currently falls short of the general principles outlined in Chapter 2 in a number of respects. The Committee also examines non-legislative aspects of the RSPCA inspectors' powers. In particular, the Committee believes that the RSPCA should publicise its complaints, reporting procedures and enforcement philosophy and that the *Ombudsman Act 1974* should be amended to ensure that the inspectorate function of the RSPCA is formally subjected to the oversight of the Victorian Ombudsman.

Fairness of inspectors' powers

The focus of Chapter 5 is on statutory, common law and procedural protections which accompany the powers of entry, search, seizure and questioning by authorised persons. In common with other parts of the Report, the Committee's recommendations are directed at both legislative reforms and the internal practice of agencies. In general, the Committee found that both the legislative protections and the supporting internal procedures against misuse of the powers need to be enhanced.

Location of powers and reporting requirements

The Committee believes that inspectors' powers should only be contained in primary rather than in subordinate legislation and that the Government should examine existing Acts and regulations to identify which provisions containing relevant inspectors' powers are currently in subordinate legislation, with a view to moving such provisions to the principal Act.

To improve transparency of the use of the powers and accountability of agencies administering the powers, the Committee recommends that agencies be required to maintain records of figures of the usage of the powers they administer and to report annually in relation to specified aspects of the use of the powers and the complaints received about inspectors.

Complaints mechanisms

The opportunity to have complaints about inspectors heard is another attribute of fairness and the Committee sees a need for complaints mechanisms to be a legislative requirement and for the standards unit referred to previously to set minimum standards for agency complaints mechanisms. In addition, the Committee believes that the Victorian Government should give consideration to improving the transparency and effectiveness of the Victorian Ombudsman in relation to complaints about inspectors.

The privilege against self-incrimination

The Committee found that many statutory provisions relating to the privilege against self-incrimination are inconsistent and ambiguous. The similarly inconsistent judicial interpretation of legislative provisions does not alleviate the shortcomings in the legislation. It is thus clear that legislative reform is desirable. The Committee believes that the privilege is an important common law right and element of fairness and hence that it should only be abrogated in exceptional circumstances. However, the Committee recognises that there is a distinction between questioning and documents and that, in relation to documents, it may be more appropriate that the privilege is abrogated. In addition, the Committee believes that the privilege in relation to questioning should not be used as a reason to avoid giving a name and address or verifying information where the legislation gives inspectors the specific power to ask for these details.

Warnings / Cautions

The Committee was concerned about evidence it received that inspectors lack an awareness of the custody, investigation and confessional evidence requirements contained in section 464 of the *Crimes Act 1958* which the Committee consider to be

important elements of fairness. It is currently unclear at what point inspectors must comply with the provisions of section 464 and the Committee believes that the *Crimes Act 1958* needs to be clarified in this regard. It is also important that agencies educate authorised persons about the requirements of section 464.

Privacy

The Committee believes that privacy and, in the light of the *Information Privacy Act 2000*, particularly information privacy, is another important right which must be balanced against the community interest in effective law enforcement. The Committee supports the development of internal systems for compliance with this Act in the context of inspectors' powers and for respecting other dimensions of privacy where relevant.

Search Warrants

The requirement to obtain a search warrant before exercising coercive powers is an important safeguard against the abuse of those powers. The Committee considers that the Department of Justice should examine possibilities for enhancing the clarity and transparency of search warrant provisions by listing them in the *Magistrates' Court Act 1989* or in new stand-alone legislation, giving particular consideration to the model of the *Search Warrants Act 1985 (NSW)*. The Committee also makes recommendations on the protections which search warrant provisions should contain, including the requirements of announcement before entry and that a copy of the warrant be given to the occupier.

Obstruction, police assistance and co-operation with police and other agencies

In order to ensure that inspectors are protected from obstruction, the Committee believes that all Acts should contain provisions which make it an offence to obstruct or impersonate authorised officers. In addition, as a matter of general principle, Acts should contain provisions allowing inspectors to request the assistance of police if they are obstructed or believe on reasonable grounds that they will be obstructed in the exercise of their functions. The Committee is of the view that police assistance provisions which allow agencies to require rather than merely to request the assistance of police are, as a matter of general principle, inappropriate.

The Committee also considered the question as to what authorised persons should do when they come across evidence of criminal activity which extends beyond the ambit of the Act they are enforcing. The Committee received evidence from some witnesses that current reporting of other offences occurs on a largely ad hoc basis. The Committee considers that it is inappropriate for the reporting of offences not related to inspectors' particular duties to be left to the discretion of individual inspectors. It is important that agencies have formalised systems in place, whether in the form of Memoranda of Understanding with other agencies with overlapping responsibilities or in the form of a procedure which authorised officers must follow when they come across evidence or activity which falls within the jurisdiction of another agency or the police.

Public transport inspectors

By far the most controversial inspectors' powers encountered during the Inquiry were the powers of authorised officers under the *Transport Act 1983* and these are singled out for particular scrutiny in Chapter 7 of the Report. Key issues addressed by witnesses before the Committee were the targeting of particular groups of the Community, the practice of requiring verification of names and addresses, the detention and arrest powers available to authorised persons and an external complaints mechanism for complaints about public transport inspectors.

Some witnesses alleged that certain groups of the Community were being unfairly targeted by inspectors, a claim one of the transport companies who appeared before the Committee denied. The Committee believes that transport companies should ensure that they maintain a consistent and even-handed approach to the enforcement of the *Transport Act 1983*.

After hearing evidence from witnesses from both sides of the public transport debate that authorised persons regularly request the verification of passengers' names and addresses, even though this is not a power under the *Transport Act 1983*, the Committee considered whether the insertion of a formal verification power into the Act would be appropriate. The Committee supports such an extension if transport companies give prior notice to users of public transport that they may be required to

produce identification in certain circumstances and if verification details are sighted only rather than recorded.²

After considering the complex arguments for and against the retention of detention and arrest powers, the Committee concludes that the obligation to pay fares on public transport would be difficult to enforce without these powers and that, accordingly, they should be retained. However, the Committee is aware of the inherent intrusiveness of detention and arrest and considers that it is vital that inspectors are appropriately trained to use the powers responsibly. The Committee makes various recommendations aimed at limiting and clarifying detention and arrest powers. Importantly, the Committee identified the increasing and extensive use by private transport officers of the intrusive powers of detention and arrest. It does not believe that the community wishes the use of these powers to be common practice. Such powers should be used as a last resort.

The major cause of the rise of the use of such powers is the current ticketing system. The Committee believes that this needs to be reformed as soon as possible. Transport companies should introduce appropriate incentives, additional ticket distribution points and positive education campaigns to increase conformity with ticketing laws and reduce the incidence of arrests for minor offences. In general, transport companies should strongly focus on reducing opportunities for fare evasion, in particular by improving the integrity and operability of the ticketing system.

In recognition of the difficult and in many ways unique enforcement problems facing the public transport sector, the Committee sees the need for a separate public transport unit within the Office of the Victorian Ombudsman to consider complaints concerning the public transport system, including complaints relating to the actions of authorised officers.

² The Committee notes that the power to demand verification is contained in the *Transport (Further Miscellaneous Amendments Bill) 2002*, currently before the Victorian Parliament.

CHAPTER ONE – INTRODUCTION

Background to the Inquiry

The Victorian Parliament Law Reform Committee (the Committee) received Terms of Reference from the Governor-in-Council on 18 April 2001 to consider and report on the powers of entry, search, seizure, questioning and to require the production of documents held by authorised persons under a wide range of Victorian Acts. The powers which fall within the scope of the Inquiry are clarified in the next section of this Chapter.

A key impetus for this reference was the Report of the Senate Standing Committee for the Scrutiny of Bills on Entry and Search Provisions in Commonwealth Legislation (the Senate Report.)¹ The terms of reference of the current inquiry specifically require the Committee to have regard to the Senate Report. One of the conclusions of the Senate Report was that:

[...] the principles in this Report should apply to all legislation, Commonwealth or not. It is highly desirable that high and common standards of civil life and liberty apply throughout Australia.²

One of the aims of this Report is to conduct a similar analysis of Victorian legislation and to draw conclusions about the purpose of inspectors' powers provisions and the current degree of effectiveness, fairness and consistency as well as to make recommendations on the future development of such provisions in this State.³

¹ Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 2000 (6 April 2000), p. 92. Pursuant to the terms of reference the Senate Committee was required to provide a “review of the fairness, purpose, effectiveness and consistency of right of entry provisions in Commonwealth legislation authorising person to enter and search premises.”

² Ibid, p. 92.

³ However, it should be noted that the terms of reference of the current inquiry go beyond the scope of the Senate Report, a point highlighted in the submission of the Legal Policy Unit of the Department of Justice: submission no. 26, p. 2: “We note that the reference given to the VPLRC is broader than the subject matter of the Senate Committee Report. The latter is limited to powers of entry, search and seizure, while the former includes powers of questioning and requesting the production of documents.”

Statutory provisions containing inspectors' powers have developed largely on an Act by Act basis relevant to the particular industry or situation. The Committee has identified over 120 Acts covering a range of subject areas.⁴ As a consequence there is little consistency in the provisions and little understanding in the general community and even among the legal profession as to the nature and extent of the powers. As one legal practitioner told the Committee:

I say with some confidence that even experienced criminal lawyers, if they were to get a call from somebody who was being subjected to coercive powers under many of those Acts, would not have come across them before and would have no idea how to advise a person of their rights and responsibilities under many of the Acts. [...] That in itself, in my respectful submission to the Committee, is of concern because the powers that are being canvassed in these provisions are important and coercive powers. They go to important principles of liberty and privacy. They have a long history of being protected by our criminal law.⁵

This Report thus marks the first step in the process of identifying, evaluating and proposing reforms to the coercive powers of inspectors in Victorian legislation.

Discussion Paper

In October 2001 the Committee released a Discussion Paper (the Discussion Paper) inviting submissions to the Inquiry. The Discussion Paper defined the parameters of the Inquiry and posed a series of questions to agencies and other interested organisations and individuals. The questions were largely based on the principles adopted by the Senate Report but also extended to issues not covered by that Inquiry. The additional issues covered by the Discussion Paper included the privilege against self-incrimination, legal professional privilege, privacy issues, the power to request a name and address and the associated powers of detention and arrest.

Terminology

The terms of reference refer to the powers of "authorised persons." However, a number of terms are used in the Acts, including "inspectors," "authorised officers,"

⁴ These are listed in Appendix 1.

⁵ D. Holding, *Minutes of Evidence*, 13 December 2001, p. 150.

“relevant employees”⁶ and others. To make matters more confusing, in some Acts more than one of these terms is used.⁷

Where reference is made to specific powers under a particular Act, the terminology used in that Act is adopted. In those sections of the Report in which the Committee comments on the powers more generally, the terms “authorised persons,” “authorised officers” and “inspectors” are used interchangeably. Similarly, to take account of the different terminology used in the Acts and to avoid unnecessary repetition, terms such as “the powers of entry, search, seizure and questioning by authorised officers,” “inspectors’ powers,” “coercive powers” and other variations of these terms are used interchangeably throughout the Report and have the same meaning.

Scope of the Inquiry

Jurisdictional Focus

This report focuses on Victorian legislation and practice. The large number of Acts and the broad scope of the terms of reference have limited the Committee’s ability to undertake detailed comparative analyses of other jurisdictions.⁸ The Report contains a chapter on overseas jurisdictions visited during the course of the Inquiry which concentrates on general enforcement issues as identified by the agencies visited.

In addition to its public hearings in Victoria, the Committee also travelled to New South Wales during its Inquiry. The Committee received 40 written submissions, heard evidence from 29 witnesses in Melbourne, met with 5 witnesses interstate and with 41 witnesses in 4 overseas jurisdictions.

Exclusions and Inclusions

The Committee has found it necessary to clarify the parameters of the Report because of the potential for confusion about which powers fall within the ambit of the Inquiry. The powers which are included in or excluded from the Inquiry’s scope are outlined below.

⁶ E.g. *Transport Act 1983*.

⁷ For instance, the *Trade Measurement (Administration) Act 1995* refers to both authorized officers and inspectors.

⁸ However, at an early stage of the Inquiry, the Committee attended meetings in Sydney for the purposes of gathering general information about interstate legislation and practice.

Exclusions from Scope

Police Powers

The terms of reference make it clear that the report is to focus on entry, search, seizure and questioning powers “by authorised persons (including members of Victoria Police where those members are acting as authorised persons).” In other words, the terms of reference specifically exclude police powers unless police officers are acting in their capacity as authorised persons under the legislation. The assistance agencies can request (and sometimes require) from Victoria Police in the use of their powers under the relevant Act is an example of police powers which are relevant to this Inquiry. The Committee considers the issue of police assistance to authorised persons in Chapter 6 of this Report.

Powers of the Sheriff’s Office and the Asset Confiscation Office

The Committee has determined that the powers of the Sheriff’s Office and the Asset Confiscation Office are beyond the scope of the Inquiry. The terms of reference require the Committee to report on the powers of authorised persons which are “for the purpose of monitoring compliance with the law or for investigating actual or suspected breaches of the law...” Neither the Sheriff’s Office nor the Asset Confiscation Office exercises its entry and seizure powers for these purposes.⁹

Powers of protective interveners, Chief Psychiatrist etc

The Department of Human Services argued in its written submission that the powers of protective interveners under the *Children and Young Persons Act 1989* and the special powers of the authorised officers of the Chief Psychiatrist under the *Mental Health Act 1986* do not fall within the ambit of the Inquiry:

The powers of protective interveners under the *Children and Young Persons Act 1989* [...] do not have the powers and functions of authorised officers as described within the Committee’s Terms of Reference with respect to “monitoring compliance with the

⁹ The Sheriff’s Office exercises its entry and seizure powers to enforce court orders as a sanction against those who do not comply with such orders. The role of the Asset Confiscation Office is to enforce confiscation orders under The *Crimes (Confiscation of Profits) Act 1986* and the *Confiscation Act 1997*. In other words, the purpose of their powers is quite different from the purpose of the powers of the other authorised officers considered in this Inquiry.

law or for investigating actual or suspected breaches of the law.” Their purpose is to protect children, not to investigate offences. [...]¹⁰

It is submitted that although the powers relating to the special powers of the Chief Psychiatrist [under the *Mental Health Act 1986*] authorise officers to enter premises, they are in a special category because they are designed to protect vulnerable persons.¹¹

In oral evidence before the Committee, Ms Deborah Foy, Acting Assistant Director of Legal Services explained the difference between legislation allowing the removal of a child or mentally ill person from their home and legislation which allows authorised officers to enter and search premises and seize objects or documents:

The next thing I will point out is that we perhaps think the *Children and Young Persons Act* and the *Mental Health Act* are somewhat different in the extent of their powers, and we have treated those two Acts as being in a separate category. One of the issues, of course, is that under the *Children and Young Persons Act* you can obtain a warrant from the Magistrates Court to remove a child from their home. That is significantly different to obtaining a warrant to search and inspect premises.¹²

The Committee is persuaded that, given the special purposes of the *Children and Young Person's Act 1989* and the *Mental Health Act 1986*, and the different type of powers they contain from the other legislation under consideration, they should be excluded from the scope of this Inquiry. However, the Committee notes that it excludes these powers mainly because the recommendations and principles in this Report may not go far enough to address the greater incursions of civil liberties which the powers in these Acts involve. The Committee considers that it is important that the powers of protective interveners and of the Chief Psychiatrist and authorised officers under the *Mental Health Act 1986* be subjected to even greater scrutiny than the powers of other authorised officers. In the Committee's view this issue merits further examination by the government.

Powers of the Ombudsman and of Boards

Upon close examination of the terms of reference the Committee has concluded that the powers of the Ombudsman and of various Boards such as the numerous medical boards, and the Legal Practice Board, fall outside the scope of this Inquiry. This is because such boards cannot properly be described as “authorised persons” in the sense conveyed by the terms of reference. Boards which have the power to conduct

¹⁰ Department of Human Services, submission no. 33, pp. 2-3.

¹¹ Ibid, p. 9.

¹² D. Foy, *Minutes of Evidence*, 12 December 2001, p. 1.

hearings are generally in a different category and hence different considerations may arise in relation to the key issues of purpose, effectiveness, fairness and consistency of such provisions.

On the other hand, the powers of inspectors employed by boards, such as Pharmacy inspectors with powers under the *Pharmacists Act 1974* are relevant to the Inquiry.

Inclusions to Scope

Request to Provide Name and Address

As noted in the Discussion Paper in relation to this Inquiry the Committee views the power to request an individual's name and address as a specific instance of the power to question which is often dealt with separately in the legislation.¹³ The power is important because it often triggers the associated powers of detention and arrest discussed below.

Associated Powers of arrest and detention

In researching the legislation which contains entry, search, seizure and questioning provisions, the Committee identified two additional associated powers:

- the power to arrest a person; and
- the power to detain a person.

As stated in the Discussion Paper, the Committee recognises that it is necessary to consider authorised officers' powers within their legislative context.¹⁴ Accordingly, where these powers are closely associated with the powers specifically referred to in the terms of reference the Committee will also give consideration to them. There are very few Acts which contain arrest powers. The Committee identified the following Acts:¹⁵

- *Heritage Act 1995*
- *Transport Act 1983*

¹³ Discussion Paper, p. 32.

¹⁴ Ibid, p. 42.

¹⁵ Ibid, pp. 42-25.

- *Wildlife Act 1975*
- *Fisheries Act 1995*

The *Health Act 1958* and the *Community Services Act 1970* allow the detention of authorised person but not their arrest.

The Committee's Methodology

Balancing rights, transparency, consistency

The terms of reference require the Committee to have regard to four key areas, namely the purpose, effectiveness, fairness and consistency of inspectors' powers provisions. In its analysis of each of these key areas the Committee has been guided by a number of principles. Foremost amongst these is the goal of achieving an appropriate balance between the public interest in effective law enforcement and the right of individuals to privacy, the integrity of their person and the possession of their property.¹⁶

Other important principles which have guided the Committee in formulating its recommendations are those of transparency and consistency of powers. Transparency refers to the need to ensure that not only are the powers effective and accompanied by appropriate safeguards, but also that they are clearly expressed in the legislation. The Committee's approach to achieving consistency of powers by reference to the different attributes of powers is examined in a later section of this Chapter.

Analysis of key Acts and the use of examples

The Committee has attempted to identify every Victorian Act which contains relevant powers. However, it has not scrutinised every Act in the same level of detail. Instead, the Committee has identified a number of key Acts which are listed in Appendix 2 of this Report. The Acts were chosen using the following broad criteria:

- level of usage and therefore impact on the Community;
- whether the Act contains "template" provisions which are also contained in similar legislation (these are identified in Appendix 2);

¹⁶ Ibid, p. 1.

- subject matter (care was taken to ensure that all key subject areas are represented in the list); and
- Acts about which there has been media coverage and community opinion expressed.

To assist in drawing conclusions on the issues of purpose, effectiveness, fairness and consistency the Committee has undertaken a detailed analysis of the key Acts. The questions formulated for the analysis were based largely on the principles outlined in the Senate Report.¹⁷

Examples to illustrate points will mainly be drawn from the analyses of the key Acts as well as from oral and written submissions to the Committee. A reference to one or two provisions to illustrate a particular conclusion does not imply that these are the only examples unless this is specifically stated. Due to the large number of Acts containing powers of entry, search, seizure and questioning it has not been possible to list every Act which contains a provision similar to the one used in the example.

Other relevant sources: Non-legislative factors relevant to the powers of authorised persons

While the starting-point for analysis of inspectors' powers is the legislative provisions themselves, there are various important issues in relation to which the statutes are silent or contain only limited guidance. One of the key conclusions of this Report is that non-legislative internal practices of the agencies administering the powers can be just as important as the legislative provisions themselves. Factors such as the selection and training of authorised officers, complaints mechanisms and the "enforcement philosophy" (such as whether authorised officers attempt to effect compliance through education and co-operation or by resorting to their coercive powers) can have a significant impact on questions of fairness, effectiveness and consistency of the powers. For this reason the Committee has taken evidence from witnesses in relation to these issues and has taken care to highlight them wherever relevant in this Report.

In addition, in several important areas, mainly affecting the power to question and to require the production of documents, protections of civil liberties are governed more

¹⁷ The Committee has also drawn on the written submission of Legal Policy, Department of Justice, submission no. 26, which formulated a number of general principles.

by the common law or other Statutes than by the Acts themselves. Such protections include the privilege against self-incrimination, legal professional privilege and information privacy. Wherever relevant, therefore, the Committee has considered the judicial interpretation of common statutory provisions or the operation of other legislation which places limits on the powers of inspectors.¹⁸

The relative cost of different enforcement regimes is a factor which may affect the decision to grant a particular power to an agency's inspectors. The Committee did not undertake a comparative analysis of costs, but has been aware of financial considerations when making recommendations. In some instances specific reference is made to cost.

Structure of the Report

In accordance with the structure of the terms of reference, the third, fourth and fifth chapters of the Report consider the:

- purpose;
- effectiveness; and
- fairness

of provisions in Victorian legislation dealing with entry, search, seizure and questioning and the power to request the production of documents. The Committee notes that, in practice, some of these categories may overlap and that some relevant issues are difficult to categorise under one of these four headings. For this reason, the Report defines the issues to be considered under each category at the start of every Chapter. In addition, the Committee has identified a small number of issues as "hybrid" matters which it has considered separately. These are the obstruction of authorised persons and the assistance of the police, a case study on the controversial powers of inspectors in the public transport area and the experiences of overseas agencies.

The Committee notes that the key issue of the consistency of Victorian legislation will be considered in all of these Chapters. However, Chapter 8 of the Report deals with the issue of consistency in more detail, considering, inter alia, the comments of the

¹⁸ See, for example, the *Information Privacy Act 2000*.

witnesses on the desirability of greater consistency, having regard to different legislative models.

Because of the importance of the issue of consistency, the Committee comments further on its approach to this issue below.

Achieving Consistency: Classification of powers

As already stated, one of the goals of this Inquiry is to explore options for making the powers more consistent and transparent across Acts and agencies. However, the Committee recognises that agencies have differing roles and needs and that a single identical set of inspectors' powers would not take account of these differences. Instead, the Committee aims to establish a certain level of consistency across the different Acts.

Currently, Acts vary widely, often containing quite different provisions covering similar powers or containing very different powers. Some Acts give more attention to the protection of civil liberties than others. In order to undertake the task of comparison it is necessary to consider the different ways of classifying Acts and the powers they contain. This process is also relevant to the analysis of purpose, effectiveness and fairness of the powers and the conclusions the Committee reaches in relation to these issues.

Different attributes of powers

The Committee has thus established three principal attributes of powers which allow classification. The first will be referred to as warrant / consent provisions and classifies powers according to when they can be exercised. This includes:

- powers which can only be exercised with the consent of the occupier / person subject to the powers; or
- powers which can only be exercised with a valid search warrant; and
- powers which can be exercised without a search warrant or consent.

The second attribute of the powers is more specific. This classification is by the types of specific powers available to inspectors. For instance, some legislation allows inspectors to seize items whereas others allow inspection only. A small number of

Acts allow inspectors to detain and / or arrest persons who refuse to give a name and address; others do not.

The third classification attribute is the extent of the protections accompanying the powers. Many of these protections and the extent to which they are contained in legislation are discussed in Chapter 5 on the fairness of inspectors' powers provisions. For instance, a number of Acts specifically preserve the privilege against self-incrimination whereas others specifically abrogate it or are silent on the issue.

Criteria for determining the choice of legislative provisions

What are the criteria for determining the choice of legislative provisions? For instance, when should a search warrant be required and when should entry be allowed without a search warrant? To some extent, the Acts the Committee has examined reveal that the current choices seem to be arbitrary – more a result of historical accident than any systematic classification. On the other hand, the Committee identified three main factors which can determine the extent of powers granted, namely the *purpose* of the powers, the *gravity of the "harm"* towards which the power is directed and whether an occupier/ person subject to the powers can be said to have given *implied consent* to inspection.

Purpose of the Powers

The Committee found that the purpose of powers can affect the consent / warrant provisions in legislation.¹⁹ For instance, where powers are exercised for the purpose of investigating a suspected breach of the legislation it is more likely that a search warrant will be required than where powers are exercised for the purpose of monitoring compliance with a licensing regime. On the other hand, the Committee identified a large degree of inconsistency in this area. For instance, a number of Acts identified in Chapter 3 of this Report contain powers for investigation and monitoring purposes in the same provision, and hence the same warrant / consent provision applies to both situations.

¹⁹ And to some extent the other attributes of the powers.

Gravity of the harm towards which the power is directed

Another factor affecting the extent of powers and penalties in legislation is the gravity of the harm towards which the powers are directed. The Committee heard evidence from some agencies that the harm towards which their powers were directed was so grave as to justify more intrusive powers than other agencies. The harm identified by such agencies included serious public health and environmental risks or emergencies or, in one case, organised criminal activity.²⁰

The need for *proportionality* between powers and penalties on the one hand and the level of harm on the other was often the basis of arguments both to retain or extend existing powers or to reduce them in some way. That is, agencies and other witnesses told the Committee that the powers need to be “matched” with, or proportional to, the level of harm they are intended to combat. It was argued that, the greater the level of harm, the greater the level of powers which is justified.²¹ But how do we determine the gravity of the harm towards which the powers are directed? The answer to this question depends on whether one takes an *expansive* or a *narrow* view of harm.

The powers of public transport inspectors, discussed in Chapter 8 of this Report, are a good example of how a particular view of harm can affect the level of the powers. As noted in that Chapter, the witnesses who took a narrow or individual view of harm told the Committee that the powers of detention and arrest in the *Transport Act 1983* were directed at combating a very minor harm – namely the non-payment of an individual public transport fare. According to this view, detention and arrest powers can be seen as out of proportion to the harm. On the other hand, witnesses who took a more expansive view of harm stated that the harm was not the non-payment of an individual fare but rather the viability of the whole public transport system. On this view of harm, detention and arrest powers may be seen as being in proportion.

The Committee believes that the purpose of the powers and gravity of the harm are important factors to be considered when determining the appropriate extent of inspectors’ powers. For instance, in Chapter 8 of this Report, the Committee concludes that, where powers are exercised for the purpose of investigating an offence, a search warrant should be required. However, where the powers are exercised for the purpose of monitoring compliance (usually and preferably in the context of a licensing regime) no warrant should be required. Similarly, an expansive

²⁰ This was abalone poaching which was used as a case study by the DNRE.

²¹ Whether this be broad powers or more specific powers as specified above.

view of harm informs the Committee's conclusion that public transport inspectors should retain detention and arrest powers pursuant to the *Transport Act 1983*.

Consent

An important issue in determining the extent of powers (and particularly warrant / consent provisions) is consent. Implied consent to monitoring compliance with licensing regimes was viewed by many witnesses (whose views are noted in Chapter 8) as a justification for allowing inspectors to enter without a warrant. This view was challenged by Consumer & Business Affairs Victoria which pointed out that the gravity of the harm was a more appropriate criterion for determining powers than the presence or absence of implied consent.²²

The Committee considers that the presence or absence of consent to a regime of coercive powers (for example, by entering into a licensing agreement) can be a useful factor in determining the appropriate extent of powers. However, it considers that it is generally a less important criterion than the other factors identified, namely the purpose of the powers and the gravity of the harm towards which the powers are directed. For instance, the Committee considers that, where powers are exercised for the purpose of investigating a suspected offence (rather than merely to monitor compliance), agencies should be required to obtain a search warrant regardless of whether the Act is a licensing or a non-licensing Act.

Committee's approach to attributes of powers

Warrant / Consent provisions

The Committee considers that whether or not a search warrant or consent is necessary to exercise coercive powers should depend mainly on the purpose for which the powers are exercised. For this reason, it is important that Acts clearly state the purpose for which the powers are granted and separate the powers according to the purpose. The practice of reducing powers for monitoring, investigation and emergency purposes to a single provision should be avoided.

²² In Chapter 8 the Committee notes CBAV's view that the risk and damage to consumers is just as great under a licensing Act as under a non-licensing Act: Consumer & Business Affairs Victoria, submission no. 32, p. 7.

In Chapter 8 of this Report the Committee elaborates on this conclusion and agrees with the view taken by the majority of witnesses that a valid distinction can be drawn between powers exercised for monitoring and powers exercised for investigation purposes.

Where the purpose of exercising the powers is to monitor compliance with legislation, the Committee considers that inspectors should not have to obtain a warrant. However, in such cases inspectors must still ensure that those subject to the powers are informed of their rights and that other provisions which protect the occupier / person subject to the powers are complied with.

The Committee believes that the investigation of a suspected offence or entry into residential premises should require a warrant, except in genuine and clearly defined emergency situations. The Committee is of the view that consent provisions can sometimes be an alternative to obtaining a warrant but has doubts about the utility of and the protection given by such provisions.

Civil liberties protections

Some protections considered in this Report vary according to the type of powers contained in a particular Act. For instance, a provision that a copy of the warrant must be provided to the occupier is only appropriate in Acts which contain search warrant provisions. Similarly, a provision which requires that a receipt be given for seized items is clearly only relevant where there is a power to seize documents or other items.

However, most protections are more general and not dependent on the provisions adopted in a particular Act. For instance, the requirement to set up a complaints mechanism or to report to Parliament on the use of the powers does not depend on whether a search warrant is required in the particular legislation.

The Committee takes the view that, as a matter of general principle, Acts containing inspectors' powers should contain all protections recommended in this Report unless:

- agencies can specifically identify why the protection should not apply in their particular case (such cases will be rare);
- the protection is not relevant to an agency's powers for practical reasons.

Specific entry, search, seizure and questioning provisions

The Committee notes that the functions and needs of individual agencies are different and that this affects the powers available to them. For instance, some agencies may have no need for a specific power of seizure. Similarly, most agencies have no need for specific powers of detention and arrest because identification of suspected offenders can be obtained through other means.

In Chapter 4 the Committee notes the additional powers sought by the agencies who gave evidence before the Committee. In addition, the Committee makes specific recommendations on the current and proposed powers of public transport inspectors, due to the large number of submissions received in relation to this issue. Specific recommendations are also made in respect of RSPCA inspectors.

The Committee also endorses the principles governing the grant of powers in the Senate Report. In particular, the Committee considers that agencies seeking specific powers should demonstrate the need for them before they are granted and that they must remain in a position to justify their retention.

In general, however, because of the breadth of this Inquiry and the need to consult more widely as to whether specific powers are needed in a particular regulatory regime, the Committee does not give detailed consideration to this attribute of inspectors' powers and does not make specific recommendations on this issue.

CHAPTER TWO - GENERAL PRINCIPLES

The Committee considered that an important outcome of this Report would be the development of a set of general principles which would apply to all coercive powers the Report considers. These principles are reproduced here to provide a clear idea of the direction of the Report. The body of the Report provides the analysis and discussion which led to the development of the Principles and also contains more specific recommendations.

Some of the principles are directed towards the amendment of legislation and are therefore intended for the consideration of legislative drafters; others are more relevant to the agencies' development of internal procedures such as training.

In line with earlier comments, the principles adopted by the Committee mainly relate to warrant / consent provisions and the protections associated with the powers. Several of the principles also appear as recommendations in the course of this Report. It was not possible to consider all principles in the same amount of depth. Accordingly, some of the principles are merely listed here. In drafting these principles, the Committee has drawn particularly on the Senate Report and the written submission by the Legal Policy Unit of the Department of Justice.

Legal Policy, whose submission discussed and added to the principles developed by the Senate Committee, noted that the principles provided for only limited inspectors' powers but that they could be varied if the agency could show good cause for doing so. It submitted that the principles should be seen as general guiding principles rather than as rigid rules:

It is important to note at the outset that the principles are generally cast as providing for a relatively limited regime of inspectors' powers. This is based on the principle that the State should be parsimonious when giving itself powers to interfere with the privacy and liberty of its citizens. However, it is envisaged that, where an agency can provide good reasons for a wider or more intrusive range of powers in certain circumstances, the principles can be departed from or varied. That is to say, Legal Policy's suggested principles form a default basis in the absence of good reasons for greater powers.

Moreover, as guiding principles, the principles do not purport to provide detailed rules to govern all circumstances, but are mostly cast at a relatively general level of basic principles. It is envisaged that the principles that may ultimately be decided upon will be intended primarily to govern the formulation and amendment of relevant legislation. It is also envisaged that such principles may also help in the formulation of the appropriate “ethos” that should attend the exercise of inspectors’ powers.¹

The Committee is strongly of the opinion that the State should be parsimonious when giving itself powers, as stated by Legal Policy.

The Committee also agrees with the comments of Legal Policy that the principles should be seen as guiding principles rather than as detailed rules to govern all circumstances. However, based on its research and evidence the Committee does sometimes make more specific recommendations.

Principles governing the grant of powers

- the State should exercise extreme restraint when giving itself powers to interfere with the privacy and liberty of its citizens;
- people have a fundamental right to their dignity, to their privacy, to the integrity of their person, to their reputation, to the security of their residence and any other premises, and to respect as a member of a civil society;²
- no person, group or body should intrude on these rights without good cause;³
- such intrusion is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process;⁴
- powers of entry, search, seizure and questioning and the right to request the production of documents are clearly intrusive, and those who seek such powers should demonstrate the need for them before they are granted, and must remain in a position to justify their retention;⁵

¹ Department of Justice, Legal Policy, submission no. 26, p. 2.

² Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 2000 (6 April 2000), p. 49.

³ Ibid.

⁴ Ibid.

⁵ Ibid with minor amendments to take account of the broader scope of the current terms of reference.

- when granting powers of entry, search, seizure, questioning and the right to request the production of documents, Parliament should do so expressly, and through primary, not subordinate, legislation;⁶
- in considering whether to grant powers of entry, search, seizure, questioning and the right to request the production of documents, Parliament should take into account the purpose of the powers and the object to be achieved as well as the degree of intrusion involved, and the proportion between the two – in the light of that proportion, Parliament should decide whether or not to grant the power and, if the power is granted, Parliament should determine the conditions to apply to the grant and to the execution of the power in specific cases;⁷
- Where the powers of inspectors are comparable to the powers of police such as when they are investigating suspected offences their power should be no greater than the police powers contained in the *Victorian Crimes Act 1958*.
- the powers of entry, search, seizure, questioning and the right to require the production of documents should only be conferred for the purposes of:
 - monitoring compliance with legislation;
 - investigating a suspected offence under the Act;
 - responding to genuine and clearly defined emergencies.
- Victorian Acts conferring powers of entry, search, seizure, questioning and the right to require the production of documents should:
 - clearly state the purpose of each provision which confers powers on authorised persons; and
 - contain separate provisions for each identified purpose.
- Legislation conferring inspection powers should specify the powers exercisable by and the obligations upon the officials carrying out the action as well as the rights, liabilities and obligations of persons who are subject to such action.⁸

⁶ Ibid with minor amendments to take account of the broader scope of the current terms of reference.

⁷ Ibid with minor amendments to take account of the broader scope of the current terms of reference.

⁸ Principle suggested by Legal Policy, Department of Justice, submission no. 26, p. 12, adapting a Senate Committee principle.

- Agencies should develop an enforcement philosophy as a written document and ensure that their enforcement philosophies are as transparent and well publicised as possible, preferably by means of publication and distribution among those affected by the legislation.
- Agencies must develop internal procedures for compliance with the *Information Privacy Act 2000*, the *Health Records Act 2001* and for respecting other dimensions of privacy.

Principles governing the authorisation of entry and search

Warrant Provisions

- Except in genuine and clearly identified emergency situations, warrants should generally be required where the purpose of the entry and search is the investigation of a suspected offence or for entry into residential premises.
- To ensure transparency, fairness and consistency Statutes containing search warrant provisions should always contain the protections including, but not limited to:
 - announcement before entry;
 - that a copy of the warrant is to be given to the occupier;
 - exactly what matters the search warrant must cover;
 - a sun-set clause;
 - procedures for dealing with disputed seizures; and
 - time limits for the return of material seized.
- The power to issue warrants should only be conferred on judicial officers. Justices of the Peace should not have this power, nor should a Minister or Departmental officer.⁹

⁹ Senate Report, above note 2, p. 50.

Principles relevant to judicial officers in the issue of warrants (as set out in *Tillett's case*)¹⁰

- When approached to issue a warrant, a judicial officer should act as an independent authority, exercising his or her own judgment and not automatically accepting the applicant's claim.
- The judicial officer has a discretion which should be exercised judicially. To enable the proper exercise of that discretion, the applicant should put forward adequate sworn evidence.
- The warrant itself should clearly state the findings of the judicial officer.
- Where the proposed inspection relates to a suspected offence, a particular offence should be specified, both in the application for the warrant and in the warrant, even where the statute simply uses the words "any offence" and makes no clear reference to a need to specify an offence.
- A warrant should not authorise the seizure of things in general, or things which are related to offences in general, but only the seizure of things by reference to the specified offence.
- A warrant may be struck down by a superior court for going beyond the requirements of the occasion.
- The time for execution of a warrant must be strictly adhered to.
- All warrants, whether executed or not, should be returned to the court of issue.

Principles relating to provisions for the purpose of monitoring compliance

- Warrants should not be required where the purpose of entry and search is to monitor compliance under a licensing Act or to respond to genuine and clearly defined emergencies.

¹⁰ All these principles are taken directly from the submission of Legal Policy, Department of Justice, submission no. 26, and are derived from the Senate Report principles (but with amendments and additions.) One principle relating to monitoring warrants has been left out.

- Licensing Acts should contain the following requirements:
 - inspectors' powers and the occupier's rights should be clearly explained in writing to prospective licensees at the time of entering into any licence;
 - where, following use of the powers for monitoring purposes, the inspector has reasonable grounds for suspecting that an offence has been committed, the inspector should be required to obtain a warrant for any subsequent searches.

Consent provisions

- Consent provisions should make it clear that consent must be genuine and ongoing and should impose no penalty or disadvantage if an occupier fails to cooperate in the search or subsequently withdraws consent.¹¹
- To ensure that an occupier's consent is genuine and informed, consent provisions in legislation should contain the safeguards contained in section 119(2) of the *Fair Trading Act 1999*.

Principles governing the choice of people on whom the power is to be conferred

- Acts conferring powers on inspectors should always refer to the authorisation process for inspectors or cross-reference to the relevant Act which does. Such authorisation provisions should be as specific as possible. In particular:
 - legislation must not confer inspectors' powers on a recipient categorised merely as a member of a particular Department or organisation.¹²
 - Agencies must have appropriate selection and training systems in place.

¹¹ Similar to principle in Senate Report, above note 2, p. 50.

¹² Based on Senate Committee principle, Senate Report, above note 2, p. 51.

- Agencies must have clear qualification and educational standards for the hiring of inspectors.
 - Inspection powers must be conferred only on those officials who have completed appropriate training.¹³
 - Inspectors must not be formally authorised until they have received appropriate training.
 - Satisfactory completion of in-service training and refresher programs must be compulsory for the retention of authorisation.
 - inspectors' powers must not be conferred on a particular recipient simply because it is the most economically or administratively advantageous option.¹⁴
- Acts should contain a provision requiring inspectors to produce identification automatically.
 - Acts should require inspectors to automatically produce a card setting out their name or identifying number, title, the agency employing them as well as information on the relevant complaints mechanism.
 - Persons should not be found guilty of obstructing an inspector unless, as soon as practicable under the circumstances, the inspector has clearly identified him or herself and warned the person that a failure or refusal to comply could constitute an offence.

Principles governing the manner in which the power to enter and search is exercised

- the powers of entry, search, seizure, questioning and to require the production of documents should be carried out in a manner consistent with human dignity and property rights;¹⁵

¹³ Department of Justice, Legal Policy, submission no. 26, p. 16 (based on Senate Committee principles).

¹⁴ Senate Report, above note 2, p. 51.

¹⁵ Ibid, p. 52.

- as a general rule, inspectors' powers should be exercised during reasonable hours and on reasonable notice, unless this would defeat the legitimate purpose to be achieved by the exercise;¹⁶
- Where the use of inspectors' powers is likely to involve force or physical interference with people and their property, it is preferable that this power be exercised only by, or with the assistance of, police officers.
- Acts should contain police assistance provisions which specify that inspectors may seek assistance if they are obstructed or believe on reasonable grounds that they will be obstructed in the exercise of their functions.
- Agencies should develop formalised systems for reporting suspected offences not related to the legislation administered by the agency to other Victorian and Federal agencies including the Victorian and Federal Police.
- Acts should contain provisions which make it an offence to obstruct or impersonate authorised persons.

Principles ensuring the protection of interests of persons subject to inspection¹⁷

- Persons who are to be questioned by an inspector should, prior to such questioning, have their rights and obligations explained to them.¹⁸
- In particular, inspectors must comply with the requirements of section 464 of the *Crimes Act 1958* and this obligation should be enshrined in legislation.

The privilege against self-incrimination

The Committee considers that the following principles should be reflected in all legislation containing inspectors' powers:¹⁹

¹⁶ Ibid.

¹⁷ Legal Policy drafted a number of new principles in recognition of the fact that the provision of documents and particularly questioning involve more active co-operation on the part of the occupier than do entry, search and seizure provisions. See: Department of Justice, Legal Policy, submission no. 26, p. 3, p. 26.

¹⁸ Ibid, p. 27.

¹⁹ These principles draw heavily on the submission of Legal Policy, Department of Justice, submission no. 26.

- Legislation should specifically preserve the privilege against self-incrimination in relation to questioning with any exclusions clearly identified. This should be done by specific reference to the privilege rather than by reference to the term “reasonable excuse.”
- persons who are to be questioned by an inspector should, prior to such questioning, have their right to rely on the privilege against self-incrimination explained to them.²⁰
- without limiting the generality of the above, individuals should not be able to rely on the privilege to avoid giving a name and address where the legislation gives the inspector the power to ask for these details.

The privilege in relation to documents

- a person who has been asked by an inspector to produce a document or other item should not be able to rely on the privilege against self incrimination unless the production of the document would “require the person to identify, locate, reveal the whereabouts of, or explain the contents of, the document or item.”²¹
- in particular, the privilege should not allow natural persons to refuse or fail to produce documents which the person is required to keep pursuant to legislation.
- persons who have exercised their right to rely on the privilege should not have that fact used in evidence against them in any subsequent criminal proceeding.²²
- documents in relation to which privilege is claimed should be carried before a justice to be dealt with according to law and the privilege should be argued before that justice.²³

Abrogation of the privilege against self-incrimination

- The privilege against self-incrimination may be abrogated only where:

²⁰ Ibid, p. 27.

²¹ Ibid.

²² Ibid.

²³ Ibid, p. 30.

- it has been shown to be absolutely necessary for the adequate functioning of the relevant law; and
- any answers given or documents or items produced are not admissible in evidence in any subsequent criminal proceeding, except where false answers are given.²⁴

Legal professional privilege

- The application of legal professional privilege (whether it applies or is abrogated) should be clarified in statutes containing inspectors' powers.
- Agencies should ensure that they have a protocol in place for the seizure of documents over which legal professional privilege is claimed.

Principles governing associated powers to detain and arrest

- Any power to detain and / or arrest persons without warrant should only be conferred on inspectors where:
 - it is absolutely necessary for the adequate carrying out of other duties which are themselves absolutely necessary for the adequate operation of the relevant law;²⁵ and
 - the relevant law is aimed at preventing a serious harm and the power to arrest is proportional to that harm.
- Any power to detain or arrest persons which is conferred on inspectors should be clearly specified in the relevant legislation and should be clearly delimited in terms of its activating conditions and its scope.²⁶
- Any arrest without warrant should only be effected by an inspector where the inspector reasonably suspects that the person arrested has committed an offence, and for one of the following purposes:

²⁴ Ibid. p. 30.

²⁵ Ibid, p. 36.

²⁶ Ibid.

- to ensure the appearance of the person before a court, where the inspector reasonably believes that the person would not otherwise so appear; or
 - for the safety and welfare of the public, where the inspector reasonably believes that the public would otherwise be at risk.²⁷
- Where practicable, police assistance should be obtained to effect an arrest.
 - Any person arrested by an inspector should be delivered to the police or taken to a court to be dealt with according to law within a reasonable time.²⁸
 - Any person who has been arrested by an inspector should be informed of his or her rights and obligations. In particular, inspectors should comply with the relevant requirements of section 464 of the *Crimes Act 1958*. Any refusal to answer questions or otherwise co-operate should not be used in evidence against the person in any subsequent criminal proceedings.²⁹
 - No person should be detained by an inspector without arrest, except for the specific purposes of demanding a name and address, and verification information where this is authorised by the Act.³⁰

Reporting requirements

- Agencies should collect and maintain records of figures of usage of the inspectors' powers they administer.
- Agencies should be required to report annually to Parliament preferably as part of their Annual Report in relation to the use of inspectors' powers and complaints received.

²⁷ Legal Policy, Department of Justice, submission no. 26, p. 36.

²⁸ Ibid.

²⁹ Developed from principle of Legal Policy, Department of Justice, submission no. 26, p. 37.

³⁰ Legal Policy notes that "this principle seeks to tightly delimit the circumstances in which a person may be detained without arrest by an inspector. Because simple detention, unlike arrest, does not entail bringing the person before a court, it is essential that any power to detain be very strictly limited, with immediate release being the presumed goal." Department of Justice, Legal Policy, submission no. 26, p. 37.

Complaints Mechanisms

- Legislation should contain a requirement to set up an effective and transparent complaints mechanism.

Principles relating to seizure of items³¹

Legislation conferring a power to seize documents or other articles should provide:

- that any material seized be itemised;
- that the occupier and any others affected be entitled to a copy of that itemised list and copies of any other business or personal records seized;
- that the occupier and others affected be entitled to receive copies of any video or audio recordings made, or transcripts of those recordings, within 7 days;
- a procedure for dealing with disputed seizures; and
- a time limit for the return of the material seized.

³¹ These principles are taken verbatim from the Senate Report, above note 2, p. 53.

CHAPTER THREE – THE PURPOSE OF INSPECTORS’ POWERS

In this Report the Committee considers the question of purpose on two levels: first, the purpose (or subject matter) of the Acts containing entry, search, seizure and questioning provisions and secondly, the purpose of the provisions themselves. Because the terms of reference direct the Committee to consider the purpose of the provisions, the emphasis in this Chapter will be on this sense of the word “purpose.” However, the subject matter of the Acts can have an impact on the type and scope of powers granted to inspectors. An examination of the different subject matter categories which the Acts fall into also provides a good starting point for analysis of issues such as consistency across Acts.

Classification of Legislation by Subject Matter

Acts containing entry, search, seizure and questioning powers and the power to require the production of documents broadly fall within the following subject matter categories. They are listed in order of the number of Acts in each category:

- Environmental Protection / Natural Resources;
- Fair Trading / Consumer Protection;
- Human Services / Health;
- Health Practitioner Regulation;
- Regulation of Utilities / Public Services;
- Casino / Gaming Control;
- Minerals and Petroleum Legislation;
- Occupational Health & Safety / Accident Compensation;
- Trade Measurement / Liquor Control;
- Audit / Tax Regulation; and
- Miscellaneous.

The Committee notes that some of these categories are fluid; some Acts may fall into more than one category. Some categories can also be classified into various sub-categories.¹ The list nevertheless provides a good indication of the principal types of subject matter of legislation in which inspectors' powers can be found. A list of the Acts in each category is contained in Appendix 1.

Classification of Purposes of Inspectors' powers

The main purposes for inspectors' powers the Committee identified are to:

- monitor compliance with the legislation including, but not limited to, compliance with licence conditions;
- investigate suspected breaches of the legislation; and
- respond effectively to emergency situations which may pose a risk to public health, safety and the environment.

The Committee notes that the first two purposes are referred to in the terms of reference which specifically require the Committee to consider powers by authorised persons “for the purpose of monitoring compliance with the law or for investigating actual or suspected breaches of the law [...]”

In this section the Committee examines these purposes with particular emphasis on:

- the way the purpose of the legislation can affect the nature and extent of powers granted to authorised officers;
- an examination of the legislation and, in particular, the extent to which the legislation clearly specifies the purposes for which the powers can be used and whether different purposes give rise to different powers.

Further areas of analysis are referred to in the course of this Chapter. For instance, the Committee also comments in passing on whether and to what extent agencies actually use the powers for the purposes identified. However, the use of powers is discussed in more detail in Chapter 4 of this Report which considers the effectiveness

¹ For instance, the submission of the Department of Human Services refers to four separate categories in the Acts it administers, namely Acts directed towards the protection of individual health and safety; Acts directed towards the regulation of activities of bodies which provide personal services; Acts directed towards the regulation of health professionals and Acts which regulate the public health effects arising from commercial or business activity: see Department of Human Services, submission no. 33, p. 3.

of inspectors' coercive powers and the importance of the enforcement philosophy adopted by agencies.

The importance of purpose

Identification of the purpose of provisions of entry, search, seizure and questioning powers is important because the *purpose* of such provisions often defines the *extent* of the powers granted. A case in point is the difference which frequently exists between powers granted for the two main purposes identified by the Committee— namely powers for *monitoring compliance* and powers for *investigating suspected offences*.

Powers granted for the purpose of monitoring compliance with legislation are often more extensive, and / or have fewer safeguards than powers for the purpose of investigating an offence. In particular, entry, search and related powers granted for this purpose frequently allow authorised persons to enter premises without a search warrant. In contrast, powers granted for the purpose of investigating complaints or suspected breaches of the legislation regularly require authorised officers to obtain a search warrant.

The Committee examines the rationale for having different powers depending on whether powers are for monitoring or investigation purposes in Chapter 8.

Examination of the relevant provisions

Provisions for monitoring compliance and investigating suspected offences

An examination of the legislation generally confirms that the two major purposes for inspectors' powers are monitoring compliance and investigating suspected breaches of the legislation. It also confirms that powers which are stated to be for monitoring purposes are generally more extensive than powers for investigative purposes.

However, the Committee's analysis of the legislation also reveals that:

- some Acts contain only one set of provisions which are stated to be for either monitoring or for investigative purposes but not for both (but the Committee

notes that wide monitoring powers can potentially also be used for investigatory purposes in the absence of any warrant or other provision containing coercive powers for the purpose of investigation of a suspected offence);

- some Acts contain separate sets of powers for monitoring and investigative purposes;
- other Acts contain only one set of provisions which are stated to be for multiple purposes, including both monitoring and investigative purposes; and
- some Acts are silent as to purpose.

In short, the Committee's research shows that there is relatively little consistency among the Acts on the question of purpose.

Acts which contain powers which are either for monitoring or for investigative purposes

Some Acts contain only one set of provisions which are stated to be either for monitoring or for investigative purposes. Acts which contain investigative provisions generally require the inspector to obtain a search warrant before exercising them whereas those containing provisions for monitoring generally allow entry without warrant.

This point is illustrated by the Health Professionals Acts which have recently been amended to conform to model legislation. In the new model provisions incorporated into ten Health Professionals Acts an inspector is allowed to enter for investigative purposes with a search warrant when he or she believes, on reasonable grounds –

- (a) that there is or has been a contravention of this Act or the regulations on the premises; or
- (b) that entry into or onto the premises is necessary for the purpose of investigating a complaint made under this Act which, if substantiated, may provide grounds for the suspension or cancellation of registration of a medical practitioner.²

The new Acts do not allow entry for monitoring purposes, a fact which has been criticised by some witnesses.³ In contrast in the yet to be reviewed *Pharmacists Act*

² For example, the *Medical Practice Act 1994*, section 93A.

1974, inspectors have the power to enter without a warrant “in order to ascertain whether the provisions of this Act and the regulations are being complied with.”⁴

In the Fair Trading area a similar distinction applies. In the non-licensing Acts such as the *Fair Trading Act 1999* inspectors only have the power to enter with a warrant if they believe on reasonable grounds that an offence has been committed.

Section 122 of the *Fair Trading Act 1999* allows entry and the exercise of other coercive powers by inspectors:

if the inspector believes on reasonable grounds that there is on the premises evidence that a person or persons may have contravened this Act or regulations.

The purpose of the powers is clearly investigation and the inspector is required to obtain a warrant or the consent of the occupier pursuant to section 119.

Absent from the *Fair Trading Act 1999* is an equivalent provision to section 82AH of the *Motor Car Traders Act 1986* (a licensing Act) which allows for entry without consent or warrant:

For the purpose of monitoring compliance with this Act or the regulations.

On the other hand, the Committee notes that the Act also contains a search warrant provision which allows entry for “the purpose of monitoring compliance with the Act or regulations” (s. 82AI). At first glance, this provision seems redundant given that inspectors can exercise similar powers without a warrant pursuant to section 82AH. However, section 82AH only allows entry and search of any premises “at which a licensed motor car trader is carrying on business at any time that the premises are open for business or between the hours of 9am and 5pm.” Pursuant to section 82AH(3)(c) a search warrant must state “whether entry is authorised to be made at any time of the day or night or during stated hours of the day or night.” Hence, the main difference between the sections is that the search warrant provision allows entry outside of business hours.

The Committee notes that Acts such as the *Pharmacists Act 1974* and the *Motor Car Traders Act 1986* are clearly more expansive than Acts which only allow use of the powers to investigate suspected offences. This is so because there appears to be no

³ For example, the Pharmacy Guild.

⁴ See section 19.

barrier to inspectors using their broad powers for investigation as well as for monitoring purposes.

While the Committee did not receive sufficient evidence on the issue to reach a concluded view, the potential for agencies to use “monitoring” powers for investigations where the inspector suspects that an offence has been committed, was highlighted in evidence given by the Pharmacy Board of Victoria during the public hearings:

Obviously there are reactive circumstances as a result of a complaint being made, be it an allegation of a breach of legislation or because of a dispensing error or something of that nature, whereas our routine inspections are about the monitoring of standards.⁵

Acts which contain separate sets of powers for monitoring and investigative purposes

Several Acts contain a set of powers inspectors may exercise for monitoring purposes (which can typically be exercised without a search warrant) and a set of powers they may exercise for the purpose of investigating suspected offences (which typically require inspectors to obtain a search warrant).

The *Accident Compensation Act 1985* contains the typical monitoring / investigation dichotomy. Section 240 sets out powers of inspection without a warrant:

For the purpose of determining whether the provisions of this Act or the *Accident Compensation (WorkCover Insurance) Act 1993* are being or have been contravened or generally of enforcing the provisions of this Act or the *Accident Compensation (WorkCover Insurance) Act 1993*.

In contrast, where inspectors have a ‘reasonable ground for suspecting that there are on particular premises any books which are relevant in determining whether any of the provisions of this Act or the *Accident Compensation (WorkCover Insurance) Act 1993* are being or have been contravened’ and wish to investigate the matter they must apply for a warrant pursuant to section 240A of the Act.

⁵ M. Marty, *Minutes of Evidence*, 13 December 2001, p. 127.

Acts which do not clearly distinguish between purposes

Acts allowing entry without warrant for purposes including investigation – but which also contain a warrant provision

The Committee came across a number of Acts which do not clearly distinguish between powers for monitoring and investigation purposes although they do contain entry provisions with and without a warrant. The *Casino Control Act 1991* is a case in point. Section 108 of that Act allows inspectors to enter without a warrant on various grounds, including for purposes which are clearly investigatory:

Section 108 (1) An inspector may do any one or more of the following-

if the inspector considers it necessary to do so for the purpose of obtaining evidence of the commission of an offence, seize any gaming or betting equipment or records; [...]

- (e) in a casino or a place entered under paragraph (d), search for, seize and remove and retain any gaming or betting equipment or records that the inspector considers will afford evidence of the commission of an offence reasonably suspected by the inspector.

Yet section 109 also allows inspectors to apply to a magistrate for a search warrant:

if the inspector believes on reasonable grounds that there are on any premises gaming or betting equipment or records –

- (a) in relation to which an offence has been, is being, or is likely to be, committed; or
- (b) that those articles may be evidence of an offence.

Other Acts in the casino and gaming control area contain a similar conflation of purposes in the entry without warrant and the search warrant provisions.⁶

Section 102 of the *Fisheries Act 1995* sets out similarly broad purposes for the powers of entry and inspection without a warrant. Sub-section (1) appears to limit the powers to monitoring purposes:

in the administration of this Act or for ascertaining whether or not the provisions of this Act, the regulations or a fisheries notice are being observed.

⁶ See, for instance *Club Keno Act 1993*. Section 13D allows entry, search etc without a warrant for purposes which include “the purpose of obtaining evidence of the commission of an offence against this Act, seize any machinery or equipment or documents relating to club keno games” yet also contains a search warrant provision (s. 13E) for investigation purposes.

Yet sub-section (2)(f) contains a purpose which appears to fit into the “investigative powers” category:

Searching for or seizing and removing or destroying any fish which the authorised officer or member of the police force believes on reasonable grounds are contaminated in a way, or are in a state, that might render them dangerous for the consumption by humans or animals.

In other words, it would seem that fisheries inspectors use the general entry powers whether or not they are monitoring compliance or investigating suspected breaches. This conclusion is supported by the fact that the search warrant provision contained in section 103 and referred to earlier in this Chapter, is confined to the search of dwelling houses rather than in all cases in which an inspector suspects that an offence has been committed. The Department of Natural Resources and Environment confirmed that warrants are generally only sought in relation to “dwelling houses:”

Situations where warrants are applied for involve inspections of dwellings, or parts of dwellings, where evidence is given on oath to the Magistrates’ Court specifying the intelligence, observations and other evidence of activities which appear to be in breach of the Fisheries Act.⁷

Acts which confer the same powers whether the powers are exercised for monitoring or investigation purposes

A few Acts confer the same powers on inspectors whether the powers are exercised for monitoring or investigation purposes.

Section 400 of the *Health Act 1958* is a case in point. That section allows authorised officers to enter and exercise the extensive powers enumerated in section 401 for the purposes of:

- (i) examining as to the existence of any nuisance or cause of offence [this purpose would appear to be an investigatory one];
- (ii) examining whether any of the provisions of this Act are being contravened;
- (iii) executing any work or making any inspection authorized to be executed or made by or under this Act; and
- (iv) generally, enforcing the provisions of this Act.

⁷ Department of Natural Resources and Environment, submission no 22S, p. 2.

Here, the dual purposes give rise to the same powers and there is no requirement to obtain a warrant.

Powers exercised for the purpose of responding to emergency situations

Powers granted for the purpose of immediate entry in emergency situations are less common, but nevertheless an important purpose of inspectors' powers provisions.⁸ Again it is clear that the purpose of the powers governs their scope: powers granted to facilitate quick action in emergency situations are generally more extensive than other powers. In particular the powers can be exercised without a warrant or consent. Agencies which are actually or potentially faced with emergencies stressed the importance of adequate powers to respond to such situations.

Once again the Committee identified inconsistencies among the Acts. A small number of Acts clearly identify emergency powers. Most Acts, however, do not make specific reference to emergency powers even though the evidence received from agencies made it clear that their authorised officers often have to respond to emergency situations.⁹

The Committee received evidence that, when faced with an emergency, inspectors often act with the consent of the occupier and therefore do not have to rely on their coercive powers.¹⁰ In addition, the Committee heard evidence from one agency that there had been no cause to use the powers because no emergency had yet arisen.¹¹ Inspectors' use of co-operation with occupiers in emergency situations before resorting to their coercive powers is discussed in the following chapter dealing with the effectiveness of powers and the "enforcement philosophy" adopted by agencies.

Agencies which frequently administer powers in emergency situations, such as the officers of the Department of Human Services and the Environment Protection Authority emphasised the importance of immediate access where authorised officers exercise powers to address an emergency.

⁸ Not least because emergency powers are one of the different legislative models referred to in the terms of reference.

⁹ The *Food Act 1984* and the *Health Act 1958* are examples.

¹⁰ Again, Environmental Health Officers with powers under the *Food Act 1984* and the *Health Act 1958* are examples of this.

¹¹ For example, the Chief Electrical Inspector has never used the enforcement powers under the Act. This is referred to further in the next section on "Examples of emergency powers in the legislation."

Dr. Carnie, the Director of the Disease Control and Research branch of the Department of Human Services stressed in oral submissions before the Committee that emergency situations call for greater powers:

There is the need to act extremely urgently in order to protect the public health. Whether it is seizing articles of contaminated food or disinfecting a cooling tower or disinfecting a swimming pool in relation to an outbreak of cryptosporidiosis, there is a need to act immediately. The issue about having to get consent or to make appointments and so on does not really arise in the context of urgent public health investigations of the sort that we are involved in for most of the time.¹²

Ms Deborah Foy, the Acting Assistant Director of Legal Services of the Department also highlighted the importance of far-reaching powers used in emergency situations:

Urgent action under public health legislation or the *Children and Young Person's Act* can prevent fatalities. Given that fatalities are the consequence of impossible delay or inaction, sometimes it is important that in public health legislation and the sorts of legislation we administer, the balance be tilted towards the public's interest rather than the individual's.¹³

The Environment Protection Authority also takes the view that where the purpose of their powers is to address an emergency, immediate access to premises is necessary:

The power of entry and the timeframe within which this power can be exercised is of fundamental importance. It is imperative that EPA officers be able to obtain immediate access to a premises from which pollution is occurring or is likely to occur.

In addition to the powers of entry, the ability to direct that immediate action be taken to abate and clean up pollution where it is believed that there is imminent danger to life, limb or to the environment, is integral to EPA's role. Due to the fact that pollution events occur without prior warning, response to them can seldom be planned. If EPA officers did not have the power to enter property immediately, but instead were required to take time to obtain a court ordered warrant, our capacity to protect Victoria's environment would be severely compromised.

Not only do officers require immediate access to premises in order to contain and abate the pollution, the nature of the incident may also necessitate access to relevant company documentation. For example, officers may need to quickly identify chemicals in order to determine appropriate clean up action, or to obtain stormwater drainage plans to ascertain potential sites of immediate environmental impact.¹⁴

Even witnesses who generally argued for greater protection of civil liberties, for example by advocating that inspectors should be required to obtain a warrant before

¹² J. Carnie, *Minutes of Evidence*, 12 December 2001, pp. 5-6.

¹³ D. Foy, *Minutes of Evidence*, 12 December 2001, p. 6.

¹⁴ Environment Protection Authority (EPA), submission no. 18, p. 7.

exercising coercive powers, agreed that emergencies may call for greater powers. Felicity Hampel of Liberty Victoria commented that:

the power to enter without a warrant should be restricted to emergencies – and they have to be real emergencies where there is no capacity because of the urgency to obtain a warrant – but given the facilities that the Magistrates Court has made available for out-of-hours grants of warrants they should be very restricted indeed. That is the general tenor: warrant unless there is an emergency [...] ¹⁵

Examples of emergency powers in the legislation

Although agencies stressed the importance of their inspectors having relatively unfettered powers when responding to emergencies, the Committee found comparatively few Acts which clearly identified emergency powers.

One example is section 89 of the *Gas Safety Act 1997* entitled “Emergency Access” which provides as follows:

- (1) An inspector may enter any land or premises at any time in an emergency if there is a threat to the safety of persons or property arising from a situation relating to gas.
- (2) If an inspector exercises a power of entry under this section, without the owner or occupier being present, the inspector must, on leaving the land or premises, leave a notice setting out-
 - (a) the time of entry; and
 - (b) the purpose of entry; and
 - (c) a description of all things done while on the land or premises; and
 - (d) the time of departure; and
 - (e) the procedure for contacting the Office for further details of the entry.

Section 124 of the *Electricity Safety Act 1998* contains a very similar provision allowing enforcement officers to enter:

any land or premises at any time in an emergency if there is a threat to the safety of persons or property arising from a situation relating to electricity.

While these emergency powers are clearly set out, the Committee received evidence from the Office of the Chief Electrical Inspector that the Office had not yet had any cause to use its coercive powers, including its powers of emergency access. Mr Driver, the General Manager of Use Safety commented that:

¹⁵ F. Hampel, *Minutes of Evidence*, 12 December 2001, p. 78. See also comments by Stephen Shirrefs, *Minutes of Evidence*, 22 February 2002, p. 260.

Although the office has the enforcement powers under the Act, the only time we have ever come close to using them was back in February 2000 when the electricity restrictions were in force¹⁶.

In contrast, the Acts regulating the authorised officers of the Environment Protection Authority and the Department of Human Services, whose representatives gave evidence that their enforcement officers often have to act in emergency situations, do not contain clearly defined emergency powers.

For instance, section 21 of the *Food Act 1984* which contains the general powers of inspectors, does not specify any purposes - emergency or otherwise - but simply refers to the various powers authorised officers may exercise “in the execution of this Act.”

Section 400 of the *Health Act 1958* does specify multiple purposes for the “Powers of inspection, seizure etc”¹⁷ but none of them appear to cover emergency situations.¹⁸ The only real reference to emergencies (although, again, the word “emergency” is not actually used) is in the *Health (Infectious Diseases) Regulations 2001* where, pursuant to regulation 11 the Secretary may (inter alia):

give any written direction to a medical officer of health or an environmental health officer that may be reasonably necessary for the purpose of limiting the spread of any case of infectious disease notified to that officer under regulation 10.

Regulation 15 sets out further extensive powers of the Secretary where he or she “believes that an outbreak of infectious disease may occur or has occurred.”¹⁹

Similarly, the purposes enumerated in section 55(IA) of the *Environment Protection Act 1970* which confers broad coercive powers on authorised persons do not make any explicit reference to emergency situations. Rather, the section emphasises the general purposes of ensuring compliance and protecting the environment:

- (1A) The purposes referred to in sub-section (1) are as follows –
 - (a) the prescribing of any matter under this Act or for any State environment protection policy or industrial waste management policy;

¹⁶ A. Driver, *Minutes of Evidence*, 13 December 2001, p. 121.

¹⁷ These are set out in section 401.

¹⁸ Although the purpose of “examining as to the existence of any nuisance or cause of offence” may come close.

¹⁹ *Health (Infectious Diseases) Regulations 2001*, Regulation 15. The Committee comments on the inappropriateness of significant coercive powers being contained in subordinate legislation (regulations) in Chapter 5 which considers the issue of fairness.

- (b) to determine whether there has been compliance with or any contravention of this Act or any works approval, licence, permit or any other notice or requirements whatsoever issued or made under this Act;
- (c) generally for administering this Act and protecting the environment.

Co-operation rather than coercion

The Committee notes that both the Department of Human Services and the Environment Protection Authority gave evidence that their authorised officers generally relied on the co-operation of occupiers and therefore did not have to resort to using their coercive powers. In its written submission, the Department of Human Services made the following comment about the powers of entry search and seizure of officers responding to health hazards:

In practice, however, once companies or people realise that they may be creating a health hazard, they are usually co-operative and it is generally not necessary to use the powers under the Health Act to address the concerns. The existence of these powers also encourage people to be co-operative.²⁰

As stated in the introduction to this section, a discussion of the extent to which inspectors use coercive powers and of agencies' law enforcement strategies will follow in the next chapter of this report which considers the effectiveness of the powers.

Conclusion

As the above analysis indicates, most inspectors' powers provisions refer to one or both of the key purposes of monitoring compliance with and investigating suspected breaches of the legislation. To this extent there is some uniformity in the legislation. However, the Committee's research also indicates that there is very little consistency among the Acts as to:

- whether the purposes of the relevant provisions are clearly stated; and
- whether the separate purposes of monitoring and investigation give rise to separate powers under the Acts.

²⁰ Department of Human Services, submission no. 33, p. 39.

In Chapter 8 of this Report the Committee expresses the view that, whether or not a search warrant is necessary to exercise the powers should depend mainly on the purpose for which the power is exercised. In the Committee's view powers exercised for the purpose of investigating suspected offences potentially have a greater impact on the privacy and liberty of individuals and should therefore generally require inspectors to obtain a search warrant which functions as an extra layer of protection for those subject to coercive powers. For this reason, and as already noted in the introduction, it is important that Acts clearly state the purpose for which the powers are granted and separate the powers according to the purpose. The Committee does not approve of provisions which conflate investigatory, monitoring and / or emergency purposes to a single provision.

The Committee also considers that it is important that emergency powers be clearly identified as such. The Committee is concerned that expansive powers which are justified on the basis that emergency entry is sometimes required can also be used in situations where there is no evidence of an emergency.

Recommendation 1

That, as a matter of general principle, powers of entry, search, seizure and questioning only be conferred for the purposes of:

- ***monitoring compliance with the legislation;***
- ***investigating a suspected offence under the Act; and***
- ***responding to genuine and clearly defined emergencies.***

Recommendation 2

That Victorian Acts conferring powers of entry, search, seizure and questioning on authorised persons:

- ***clearly state the purpose of every provision which confers powers on authorised persons; and***
- ***contain separate provisions for each identified purpose.***

CHAPTER FOUR - THE EFFECTIVENESS OF INSPECTORS' POWERS

Introduction

In this Chapter the Committee considers the effectiveness of provisions conferring entry, search, seizure and questioning powers and the power to require the production of documents on authorised persons. The term “effectiveness” can be understood in a number of ways. For instance it could raise issues such as whether there are effective legislative and other safeguards on the use of coercive powers. However, apart from two hybrid issues discussed below, effectiveness in the sense of effective safeguards will be considered in the next chapter of this Report which considers fairness.

This Chapter considers effectiveness in terms of whether the powers are effective in achieving the purpose for which they were granted. Are the powers sufficient to minimise the harm towards which the statute is directed or are there “gaps” in the powers which are inhibiting their effectiveness?

The views of the agencies administering and organisations affected by the Acts are a primary source for considering the question of effectiveness. Accordingly, this Chapter focuses on the witnesses’ views of the powers and, in particular, their views on the importance of their powers to their law enforcement function. A related issue to be considered is whether the agencies are satisfied with their current powers.

The two hybrid issues considered in this Chapter and alluded to above are:

- the extent to which the powers are actually used and the impact of the enforcement philosophy adopted by agencies to increase effectiveness; and

- other predominantly non-legislative factors which can impact on effectiveness, such as the selection and training of authorised officers.¹

The Committee has identified these issues as hybrid because they are relevant to the questions of fairness and consistency as well as to effectiveness. For instance, in a range of situations an emphasis on a co-operative approach to law enforcement may be the most effective way to ensure compliance. It may also be fairer in that it ensures that coercive powers are only used in more serious or urgent cases. Similarly, a well-trained authorised officer can no doubt enforce the relevant legislation more effectively. Yet, training can also enhance inspectors' awareness of the rights of the individuals who are subject to coercive powers and the consistency with which they use the powers. Where relevant, therefore, later sections of this Report which relate to fairness and consistency contain cross-references to this Chapter.

Importance of and level of satisfaction with current powers

The Committee found that most agencies either expressed general satisfaction with the current level of powers or argued for relatively minor extensions of those powers.² The Committee heard evidence from some agencies that they would be prepared to support certain amendments in line with the Senate Report guidelines to better safeguard individual rights.³ However, the predominant view seemed to be that effective enforcement would be impossible if powers were not at least maintained at their current level.

The Department of Human Services, which administers 23 Acts with entry, search, seizure and questioning powers, commented:

There is certainly no area where the issue of having insufficient power has arisen. There may be an issue as more communication occurs on an electronic basis, but particularly at the moment there does not appear to be a problem about electronic means and us not having access. We believe that our powers are sufficient and necessary.⁴

The Pharmacy Board is similarly satisfied with the current powers and considers them “the minimum necessary to carry out the obligations under the Act in the public

¹ Authorisation and identification procedures relate to selection and training and are therefore also analysed in this section.

² To be discussed in the next section of this Chapter.

³ To be discussed in the next Chapter of this Report.

⁴ D. Foy, *Minutes of Evidence*, 12 December 2001, p. 5.

interest.”⁵ Mr Alex Serrurier, the Chief Environmental Health Officer of the Ballarat City Council also emphasised the importance of the powers granted to Environmental Health Officers under various Acts, stating that:

We would find it very difficult if not impossible to be effective without powers of entry etc [...] The effect of removing these powers would be the frustration of having to either obtain search warrants for each inspection (several thousand per year) or have evidence concealed or not be unearthed due to refusal of entry. It is therefore most important that this power remains in the public interest.⁶

Agencies and interest groups in the environmental area also highlighted the importance of the current powers and noted that they are essential for the effective enforcement of the relevant Acts. The Victorian Abalone Divers Association (VADA) put this view particularly strongly:

VADA believes that the current powers provided for Fisheries Officers under the Fisheries Act are necessary to provide effective enforcement of the provisions of the Act and further believes that guidelines developed during or as a result of the Committee's deliberations should not reduce the current powers provided for Fisheries Officers.⁷

The Environment Protection Authority (EPA) similarly argued that:

EPA's task as the environment protector could not be performed without a range of powers including the powers of entry, powers to take samples, powers of seizure of documents, and the ability to question suspect offenders.⁸

In oral submissions before the Committee, Mr Warren, the Chief Prosecutor of the Offence Management Unit of the Department of Natural Resources and Environment (DNRE) drew a direct link between the current powers of inspectors under environmental legislation and the effective enforcement of that legislation:

Current enforcement powers allow our authorised officers to effectively investigate and prosecute offenders and offer deterrence and maintain a high compliance rate.⁹

Similarly, the State Revenue Office emphasised the nexus between the powers vested in the Commissioner of State Revenue and the effectiveness of its enforcement function:

⁵ Pharmacy Board of Victoria, submission no. 7, p. 1.

⁶ Alex Serrurier, Chief Environmental Health Officer, Ballarat City Council, submission no. 24, p. 1.

⁷ Victorian Abalone Divers Association, submission no. 20, p. 10.

⁸ Dr B. Robinson, *Minutes of Evidence*, 12 December 2001, p. 58.

⁹ Mr R. Warren, *Minutes of Evidence*, 12 December 2001, p. 46.

The State Revenue Office (“SRO”) believes that the powers of entry, search, seizure and compulsory questioning vested in the Commissioner of State Revenue (“the Commissioner”) are appropriate and necessary for the efficient and effective management of the State’s revenue collection function.¹⁰

Areas identified for reform

No analysis of the effectiveness of inspectors’ powers would be complete without considering whether there are any “gaps” in the powers which are impeding effective enforcement of the legislation. A number of agencies suggested amendments to current powers or the introduction of new powers which would assist their authorised officers to enforce the legislation.

This section focuses on the amendments to specific Acts sought by agencies or authorised officers. It does not consider any global amendments designed to safeguard the civil liberties of those subject to coercive powers more effectively (for instance, that search warrants should be required in all but exceptional circumstances). Such suggested amendments are more relevant to the goals of fairness and consistency than effectiveness and will therefore be discussed in later chapters of this Report. In addition, due to the number of submissions received in relation to the powers of inspectors in the public transport sector authorised under the *Transport Act 1983*, the Committee will consider proposed amendments to these powers in a separate chapter.

A caveat on recommendations

In this section, the Committee merely sets out the views of agencies as one indicator of the effectiveness of the legislation. Further analysis of and inquiry into the suggested amendments would be necessary in order to formulate any specific recommendations. Accordingly, the Committee does not make any concrete recommendations as to whether the agencies’ suggestions are appropriate and should be adopted.¹¹

The Committee notes that any concrete reform proposals arising out of the amendments suggested by agencies should be accompanied by the legislative

¹⁰ State Revenue Office, submission no. 23, p. 1.

¹¹ The exception to this is RSPCA inspectors authorised under the *Prevention of Cruelty to Animals Act 1986* in relation to whom the Committee does make concrete recommendations.

safeguards the Committee recommends in the section on fairness and must be considered in the light of the general principles outlined by the Committee in the second Chapter of this Report.

Amendments sought by the Environment Protection Authority

While the Environment Protection Authority “considers its current powers are adequate for most purposes,” it states that “there are some circumstances where additional powers are necessary and desirable.”¹² The amendments sought and the reasons given for such amendments are outlined below.

Enhanced information gathering powers

EPA told the Committee that there had lately been incidents when EPA officers “have been constrained with respect to their information gathering powers.”¹³

Documents that officers have had difficulty in obtaining access to primarily relate to information concerning corporate processes / business decisions / financial records that may provide important context or evidence of environmental crime but are not explicitly related to the waste or the manufacturing, industrial or trade process, and therefore arguably do not fall within the ambit of [the current] powers.¹⁴

EPA suggests expanding existing powers to enable it to serve a notice in writing on any person to require the person to provide information in connection with any matter relating to the powers, duties and functions under the *Environment Protection Act 1970* or any other Act.¹⁵ EPA notes that this power would be similar to section 193 of the *Protection of the Environment Operations Act 1997 (NSW)*.

EPA also outlined to the Committee a concern about the investigation of the liability of directors. According to EPA the information gathering powers under sections 54(1) and 55(3) of the Act have “in some cases been insufficient to ascertain whether a director has exercised due diligence in the performance of his or her duties.”¹⁶ EPA

¹² Dr B. Robinson, *Minutes of Evidence*, 12 December 2001, p. 59.

¹³ Environment Protection Authority, submission no. 18S, p. 2.

¹⁴ *Ibid*, p. 2.

¹⁵ *Ibid*.

¹⁶ *Ibid*, p. 3.

outlined two possible options for achieving an additional information gathering power.

The power to enter residential premises under warrant

EPA Chairman, Dr Robinson, supported this new power on the basis that, increasingly, criminal activities were being conducted from private dwellings to avoid detection:

We have no powers under warrant. We are able to enter private dwellings if pollution is occurring at that time, but obviously it is a sensitive issue in terms of private dwellings. What has happened in recent times is that in investigating deliberate criminal activities in relation to hazardous waste we have become aware that some companies operate and keep records within private dwellings, particularly where rural properties are concerned. So there is a need to access those, but that power needs to be constrained. Therefore we would only seek to exercise it under warrant from a court.¹⁷

In a supplementary submission to the Committee EPA elaborated on this proposed power, noting that:

One means of rectifying this apparent deficiency in the current legislation is to include a provision in the Act to enable search warrants to be obtained with respect to residential premises where the Authority believes on reasonable grounds that an indictable offence against the Act has been committed. This power would be similar to that of authorised officers in Queensland, where a search warrant can be obtained to enter a residential premises where there are reasonable grounds for suspecting that there is a particular thing or activity that may provide evidence of the commission of an offence against the *Environment Protection Act (1994) (QLD)* and the evidence is, or may be within the next 7 days, at the place.¹⁸

Inspection and testing powers

In a written submission to the Committee, EPA noted that its inability to direct vehicles to stop for inspection or to move to a suitable location for testing:

[...] limits our capacity to investigate and prevent the unsafe transportation of hazardous material, investigate marine incidents or to undertake roadside testing of vehicles.¹⁹

¹⁷ Dr B. Robinson, *Minutes of Evidence*, 12 December 2001, p. 59.

¹⁸ Environment Protection Authority, submission no. 18S, p. 5.

¹⁹ *Ibid*, p. 3.

In relation to ships EPA explained its reason for calling for the introduction of this new power as follows:

Another power is to enter and inspect ships. The difficulty with ships is that their turnaround time is critical to the viability of the shipping activity and demurrage charges are very high. There is a need to quickly ascertain whether there has been an offence or to collect evidence where evidence of the offence has already been collected.²⁰

EPA noted further that, while EPA authorised officers currently have a power under section 55A to require ships by notice in writing to be made available for inspection:

The minimum statutory time frame for the notice (not less than 14 days) is often not practicable for ships that are sailing in and out of port.²¹

EPA noted that a number of interstate EPAs, including South Australia, Queensland and New South Wales have broad powers to stop and enter vehicles, including trains, ships and aircraft.

Amendments sought by Consumer & Business Affairs Victoria

Consumer & Business Affairs Victoria (CBAV) has criticised the 1999 re-organisation of the inspectors' powers provisions in the Acts it administers into licensing and non-licensing Acts. Following the reforms, under the non-licensing Acts, and in contrast to the licensing Acts, inspectors can no longer enter and inspect premises without a warrant for monitoring purposes. Rather, inspectors can only exercise the powers with a search warrant if they hold a reasonable belief that an offence has been committed. CBAV submitted that its inability to pro-actively enforce the non-licensing Acts, hinders the effectiveness of its law enforcement function.²²

Our submission to the Committee is that in respect of our non-licensing acts, since 1999 we have been severely prejudiced in terms of the proactive enforcement of those acts. Mr Devlin will give the Committee examples of how that has occurred in practice, but we come under pressure from various sectors to be proactive about enforcement of our legislation and to have us not just wait around until somebody

²⁰ Dr B. Robinson, *Minutes of Evidence*, 12 December 2001, p. 59.

²¹ Environment Protection Authority, submission no. 18S, p. 4.

²² According to the written submission of Consumer & Business Affairs Victoria, the Acts which contain the new non-licensing powers are: *Fair Trading Act 1999*; *Disposal of Uncollected Goods Act 1984*; *Domestic Building Contracts Act 1995*; *Funerals (Pre-paid Money) Act 1993*; and *Residential Tenancies Act 1997*: Consumer & Business Affairs Victoria, submission no. 32, Attachment A.

commits a breach. However, since 1999 we have found in relation to our non-licensing Acts that that has not been possible.

[...]

Proactive enforcement is encapsulated in the phrase on which our licensing powers are predicated – that is, to monitor compliance. If we want to do a sweep, for instance, to see what is happening out there and whether people are complying with the Act, we can have spot checks and say, ‘Lets look at your books and see how you are going. Do you have the relevant material out front and notices posted on the wall’” and so on. Because the non-licensing Act powers have to be exercised only where there is a reasonable belief that there has been a breach, obviously that is a reactive power. We would be reacting to evidence of a breach. Then we cannot do sweeps and spot checks.²³

In its written submission, CBAV also formulates a number of arguments as to why the distinction in powers based on whether the Act is licensing or non-licensing, is faulty. The Committee notes that it has already referred to the common distinction drawn between licensing and non-licensing Acts in the previous Chapter of this Report. It also notes that the arguments for and against this distinction will be further canvassed in Chapter 8 of this Report which considers consistency in the light of different legislative models. In this Chapter, the Committee merely highlights CBAV’s dissatisfaction with its lack of monitoring powers in the licencing Acts and its stated belief that it is hampering its ability to enforce these Acts effectively.

Amendments sought by the Municipal Association of Victoria²⁴

Mr John O’Donoghue, who appeared on behalf of the Municipal Association of Victoria sought the following amendments for reasons extracted below.

Arrest powers in section 224 of the Local Government Act 1989

The broadest power for local laws officers is contained in section 224 of the *Local Government Act*, and it is the most commonly used power. It appears to be substantially adequate for their purposes. One possible exception is the lack of reference to arrest powers, which, generally speaking, are not important but can be important if a person refuses to provide evidence of their identity or to answer questions about their identity in circumstances in which an offence has been observed.²⁵

²³ P. L’Estrange, *Minutes of Evidence*, 12 December 2001, p. 24.

²⁴ This section does not refer to a further amendment sought by the Municipal Association in relation to section 74(2) of the *Domestic (Feral and Nuisance) Animals Act 1994* because it appears that the amendment sought has already been incorporated into the legislation.

²⁵ J. O’Donoghue, *Minutes of Evidence*, 13 December 2001, p. 99.

Definition of seizure and privilege against self-incrimination in the Domestic (Feral and Nuisance Animals) Act 1994

Mr O'Donoghue also sought amendments to *the Domestic (Feral and Nuisance Animals) Act 1994*. In relation to section 77 of the Act which relates to the seizure of cats and dogs he noted:

Frequently people ring up a council wanting it to seize a cat that is on a particular premises. It might be a semi-wild cat. The question is whether the power of seizure extends to the council trapping that animal, which is frequently the only way to collect them.²⁶

The Municipal Association also submitted that the reasonable excuse provision in section 76(2) of the *Domestic (Feral and Nuisance Animals) Act 1994*, which entitles persons to refuse to answer questions where the answers would tend to incriminate the person, should be amended so that they cannot be relied on in cases where an authorised officer asks for a person's name and address. As Mr O'Donoghue put it:

The person in charge of that animal [which is not wearing an identity tag – an offence under the Act] is deemed by the legislation to be the owner of the animal and this response of refusing to give an answer frequently comes up on the basis that that would incriminate them. We would say it does not incriminate them; it only identifies them.²⁷

A note on the State Revenue Office

The Committee notes that the State Revenue Office also advocated one amendment to the *Taxation Administration Act 1997*. However, the proposed amendment, which related to positive mandatory injunctions, appears to go beyond the scope of this Inquiry.²⁸

²⁶ Ibid.

²⁷ Ibid, p. 100.

²⁸ The SRO stated that sections 1323 and 1324 of the *Corporations (Victoria) Act* would be an appropriate model for the introduction of positive mandatory provisions. According to the SRO, the *Taxation Administration Act 1997* currently “has insufficient powers within it to freeze assets that are subject to a claim by the Commissioner.” P. Hiland, *Minutes of Evidence*, 12 December 2001, p. 64.

Amendments proposed by Alex Serrurier, Chief Environmental Officer, Ballarat City Council

Mr Serrurier told the Committee that it would be useful for Environmental Health Officers to have the same powers of enforcement that the Environment Protection Authority (EPA) inspectors have on the basis that the EPA is not always willing or able to deal with the more minor pollution issues:

[...] [W]hen we have a problem with a chlorine spill from our swimming pool, for instance, or a contaminated land site, they make some judgment about whether or not they will attend; and they rely on local government environmental health officers to be their eyes and ears. Unfortunately, we don't have their powers. We have certain powers under the *Environment Protection Act* in relation to waste water, but not in terms of pollution. If they don't become involved in a pollution investigation, we are left trying to deal with it as either a nuisance under the *Health Act* or as an offence under the *Litter Act*, and it is not terribly satisfactory.²⁹

Amendment mentioned by the Victorian Casino and Gaming Authority

Mr Brian Forrest, representing the Victorian Casino and Gaming Authority commented that the Authority is currently:

in the process of considering some amendments to the *Gaming No. 2 Act* to reflect the fact that there needs to be a distinction drawn between professionally organised and promoted charities on the one hand, as opposed to what might be termed the church or local charity or sporting club raffle on the other.³⁰

Recommendation 3

That the Department of Justice, with the relevant government departments, provide a response to the following proposals obtained in evidence:³¹

(a) The Environment Protection Act 1970

- ***enhanced information gathering powers;***
- ***the power to enter residential premises under warrant;***
- ***inspection and testing powers; and***

²⁹ A. Serrurier, *Minutes of Evidence*, 21 February 2002, p. 176.

³⁰ B. Forrest, *Minutes of Evidence*, 22 February 2002, p. 248.

³¹ In the light of the appropriate safeguards recommended in the section on the fairness of inspectors' powers (Chapter 5) in this Report and taking into account the general principles in Chapter 2.

- *the granting of expanded powers to Environmental Health Officers under the Environment Protection Act 1970.*
- (b) *Re-consideration of the distinction between licensing and non-licensing Acts in the Fair Trading area and, in particular, consideration of the introduction of pro-active monitoring powers into the non-licensing Acts.*
- (c) *Local Government Act 1989*
- *introduction of arrest powers*
- (d) *Domestic (Feral and Nuisance Animals) Act 1994*
- *clarification of the definition of seizure in section 77 and the reasonable excuse provision in section 76(2).*
- (e) *Taxation Administration Act 1997*
- *introduction of positive mandatory injunctions.*
- (f) *Gaming No. 2 Act 1997*
- *amendment to reflect the distinction between professionally organised or promoted charities and church or local charities*

Amendments sought by the Royal Society for the Prevention of Cruelty to Animals (RSPCA)

The RSPCA identified a number of amendments and additional powers it needs to improve its enforcement of the *Prevention of Cruelty to Animals Act 1986*. The Society stated that the new powers were necessary on the basis that:

Existing limitations on the right of entry or seizure have ensured that those people who are inflicting pain and suffering and are breaching the laws are indeed the very ones who are protected. The RSPCA seeks fair access to animals believed to be in jeopardy and to be permitted to remove animals requiring care and treatment under certain circumstances. The Society also seeks the right to issue legally enforceable (reasonable) instructions for the care and maintenance of animals.³²

³² RSPCA, preliminary submission no.10, p. 1.

The RSPCA described and in some cases justified the further powers sought as outlined below. The Committee notes, however, that there were certain amendments to the *Prevention of Cruelty to Animals Act 1986* in December 2001 which seem to have implemented some of these suggestions.³³

Power of entry to commercial or farm properties where animals are held to enable inspection of conditions under which they are kept

With commercial premises we believe there is a need for an ability to carry out routine inspections simply to see that things are being done appropriately. A series of codes of practice govern the operation of those facilities, and we believe there should be the procedures for inspection to see that those codes are complied with.³⁴

Power of entry with warrant to dwellings where there is a reasonable basis for believing that animals are suffering or in danger

The need for this power was illustrated by way of a disturbing case study recounted to the Committee during oral submissions at the public hearings:

Even where we have reasonable grounds to believe an animal is either suffering starvation or has untreated injuries there is limited access to open property. To give an example, we dealt with a case in Prahran three or four years ago where the report to us was that inside a flat a man was torturing a dog using a screwdriver. We cast about for two days trying to find ways of getting access to the flat. The person would not let us or anyone else in. At the end of the two days we still had not resolved the issue, but the dog died and was thrown out the window. There was no difficulty prosecuting and convicting him. The difficulty was resolving the problem two days earlier when the report came in.³⁵

However the Committee notes that this proposed amendment appears to have been implemented with the introduction of a new section 21A of the Act which provides as follows:

- (1) An inspector may apply to a magistrate for the issue of a search warrant in relation to a person's dwelling, if the inspector believes on reasonable grounds that there is in the dwelling –

³³ In particular section 21A in relation to search warrants for dwellings inserted by Act no. 83 of 2001.

³⁴ R. Hunter, *Minutes of Evidence*, 13 December 2001, p. 138.

³⁵ *Ibid*, p. 139.

- (a) an abandoned, diseased, distressed or disabled animal; or
- (b) an animal, in respect of which a contravention of section 9 [which relates to cruelty] is occurring or has occurred.

This new power would cover cases where there are reasonable grounds for believing that an animal is suffering or in danger.

Power of entry without warrant to vehicles where animals are suffering or at risk

With motor vehicles we are talking about immediate problems, particularly during the summer period, with dogs in hot cars, which is the most common problem. Frankly we have gained access in the past simply by breaking the car window when we cannot find the owner. There is no legal sanction for that. We believe there should be a mechanism for gaining access in emergency situations. I am not sure what the law says regarding children locked in cars. There should be an ability to take immediate action, with the person taking the action protected by the law.³⁶

Power of seizure with warrant of animals where they are suffering or at risk and power to move them to specified places for treatment, feeding and safekeeping

The RSPCA has the legislative power to allow its officers to enter a paddock to provide feed to animals that have not been fed over a period or to provide veterinarian treatment. Often that is impractical. The animals may be standing in a paddock where there is no feed, and the only answer is to truck in large amounts of feed [...] If the law already allows us to feed animals, there should be a warrant system to allow us to remove them from the paddock for a specified period and place them in a paddock where there is feed. If there is a dog in a backyard with a broken leg the law says we can take a veterinarian onto the property to treat the dog, but that is often not practical. What is practical is to take the dog to the veterinarian. There should be a warrant, subject to a magistrate's approval, to allow us to remove the dog to a particular place for a particular period.³⁷

The Committee notes that this proposed reform does not appear to have been introduced by the new section 21A in the Act.

Other powers identified (but not elaborated on) in written or oral submissions before the Committee were:

³⁶ Ibid.

³⁷ Ibid, pp. 139-140.

- Power to obtain information required to provide care for animals, subject to the privilege against self-incrimination;
- Power to issue binding instructions to people responsible for animals to ensure the wellbeing of those animals; and
- Power to search for animals believed to be suffering or used for illegal purposes and implements used in illegal acts such as cockfighting.

Recommendation 4

That the Department of Natural Resources and Environment provide a response to the proposals suggested by the RSPCA in evidence before the Committee.

Criticisms of RSPCA inspectors' powers

The Committee received two submissions which were critical of the powers of RSPCA inspectors. Some aspects of the criticism may be said to go beyond the current terms of reference. However, they are generally related to issues relevant to this Inquiry and are therefore referred to here.

One organisation which was critical of RSPCA inspectors who exercise powers under the *Prevention of Cruelty to Animals Act 1986* was the Shooting Sports Council of Victoria.

The Council described the RSPCA as a “private lobby group” not dissimilar to itself. As such, the Council alleged:

It has a particular philosophy and political objectives which it endeavors to implement by whatever influences it can bring to bear. [...] What has changed dramatically in recent years is the definition of cruelty. This definition, under the influence of RSPCA and its present leadership has contrived successfully to bring that definition closer to an animal rights view of the concept.³⁸

The Council also submitted that only sworn officers of the State should have enforcement powers:

³⁸ Shooting Sports Council of Victoria Inc, submission no. 39, p. 4.

[O]nly sworn officers of the State should have any enforcement powers. This is for the same reason that the doctrine of the separation of powers is such an important part of the Westminster system of Government. The enforcers of the law should do so without prejudice or favour as is required of the police. Politically, we cannot see that the appointment of paid employees of a private lobby such as the RSPCA can ever be seen as in accordance with that fundamental doctrine however well individual officers may perform their duties. There will always be the problem if not the inference of influence.³⁹

A member of the public who made a submission to the Committee was similarly critical of the RSPCA. Mr Eric Meren, who recounted a personal experience with RSPCA officers, referred to the lack of “any democratic checks and balances” and the fact that:

Being a private organisation it [the RSPCA] is not subject to ministerial oversight or scrutiny by the Ombudsman.⁴⁰

Mr Meren also commented that, in his view, the RSPCA inspectors he had encountered were poorly equipped to deal with the difficult and sensitive situations they encounter:

I have found the RSPCA Inspectors poorly equipped to deal with difficult and sensitive situations when they come between people and the pets they love. This is an emotionally charged and potentially volatile mix which has to be handled with sensitivity. They will not always encounter mature peaceful people. In such cases things can quickly get out of hand and result in tragedy. We have already had an Inspector killed. Giving the RSPCA such powers, with its culture, attitude and lack of training can only result in more tragedies.⁴¹

Analysis of the *Prevention of Cruelty to Animals Act 1986* and of internal procedures relating to RSPCA inspectors

Because of the criticisms the Committee received and the fact that inspectors employed by the RSPCA are one of only two groups of inspectors which are not government employees (the other one being authorised officers employed by the public transport companies), the Committee considered it necessary to analyse the powers of RSPCA inspectors under the *Prevention of Cruelty to Animals Act 1986* in greater detail and to examine the evidence received on the internal procedures of the RSPCA.

In this section the Committee analyses the Act according to various indicators of fairness discussed elsewhere in this Report, namely:

³⁹ Ibid, p. 5.

⁴⁰ E. Meren, submission no. 42, p. 1.

⁴¹ Ibid, p. 2.

- authorisation and identification;
- powers exercisable with and without a warrant; and
- the protection of the privilege against self-incrimination.

While the Committee has selected these areas for special analysis it notes that all recommendations of this Report should be applied to the *Prevention of Cruelty to Animals Act 1986* and the RSPCA.

Authorisation and Identification

The Act sets out the process of the authorisation of inspectors in section 18(1). That section defines inspectors as:

- (a) any member of the police force; and
- (b) any person who is -
 - (i) an inspector of livestock appointed under the *Livestock Disease Control Act 1994*; or
 - (ii) a full-time officer of the Royal Society for the Prevention of Cruelty to Animals –
and who is approved as an inspector by the Minister in writing; and
- (c) Any person who is an authorised officer under section 72 of the *Domestic (Feral and Nuisance) Animals Act 1994* and who is approved as an inspector by the Minister in writing, but only in respect of an alleged offence committed or a circumstance occurring in the municipal district for which that person is an authorised officer.

Section 18(2) provides that the authorisation remain in force for a period specified in the approval and for not more than three years and section 18(3) allows the Minister to cancel authorisation as an inspector.⁴² In addition, section 18A sets out the authorisation process for specialist inspectors.

It is notable that a number of different inspectors have parallel powers under the *Prevention of Cruelty to Animals Act 1986*. These are inspectors employed by the DNRE, local Councils and the RSPCA.⁴³

⁴² The DNRE told the Committee that “the Minister may cancel the approval of an inspector. There are no specific grounds listed in the POCTA for doing this and any reason may be acceptable:” email from Stephen Tate, Director, Bureau of Animal Welfare, Agriculture Quality Assurance, DNRE, 26 April 2002.

⁴³ In addition, the police are deemed to be inspectors pursuant to section 18(1)(a).

Section 19 contains an identification provision which is reasonably typical in the Acts the Committee encountered. Namely, it provides for the issue of an identification certificate (section 19(1)) which must be produced on demand (s.19(2)).

The authorisation provisions in the Act appear to be broadly adequate. However, the identification provision is not. In accordance with Recommendation 19 the Committee considers that inspectors should be required to produce their identification automatically rather than on demand. In addition, in line with Recommendation 20, the Committee considers that the Act should be amended to require inspectors automatically to produce a card setting out their name or identifying number, title, the agency employing them (for instance, the RSPCA or the particular council) and information on the relevant complaints mechanism. Finally, in accordance with Recommendation 21, the Act should be amended to provide that persons should not be found guilty of obstructing an inspector unless, as soon as practicable under the circumstances, the inspector has:

- clearly identified him or herself;
- informed the person of his or her rights; and
- warned the person that a failure or refusal to comply with a request could constitute an offence.

The Committee notes that some aspects of appointment and identification are contained in a Memorandum of Understanding recently signed between the RSPCA and the DNRE and referred to in more detail below. However, in the Committee's view internal appointment and identification procedures do not remove the need for clear legislative provisions on these issues.

Powers exercisable with and without a search warrant

The *Prevention of Cruelty to Animals Act 1986* contains both powers which are exercisable with a warrant and powers which can be exercised without a warrant. Section 21 sets out the powers exercisable without a warrant. This provision allows inspectors to enter "any premises other than a person's dwelling." Some of the subsections of section 21 appear to be directed to investigation purposes. For instance, section 21(1)(a)(i) allows inspectors to enter premises:

if the inspector suspects on reasonable grounds that baiting, trap-shooting or the use of an animal as a lure is occurring in or on the premises.

Other powers are more clearly directed towards emergencies. For instance, section 21(1)(ba) provides as follows:

Power to enter any premises other than a person's dwelling with such assistance as is necessary –

- (i) to free an animal from an entanglement, tether or bog (without removing it from its housing or the premises on which it is located) if the animal is showing signs of pain or suffering from the entanglement, tether or bog; or
- (ii) to inspect an animal showing signs of pain or suffering as a result of injury or disease in order to determine whether the animal requires treatment by a veterinary practitioner.

Section 21A, which was inserted into the Act in December 2001, allows inspectors to apply to a magistrate for a search warrant for entry into dwelling houses if the inspector believes on reasonable grounds that there is in the dwelling:

- (a) an abandoned, diseased, distressed or disabled animal; or
- (b) an animal, in respect of which a contravention of section 9 is occurring or has occurred. [Section 9 is the cruelty provision].

The Committee considers that section 21 of the *Prevention of Cruelty to Animals Act 1986* inappropriately conflates the powers exercisable in emergencies and those exercisable where an offence is suspected. The Act should be amended to more clearly differentiate between these powers. In accordance with recommendation 70, the Committee also considers that inspectors with powers under the *Prevention of Cruelty to Animals Act 1986* should be required to obtain a warrant for the investigation of suspected offences except in clearly defined emergencies. Thus, the new section 21A should also apply to cases where inspectors have reasonable grounds to suspect that an offence under the Act has been committed.

On a positive note, the Act contains all the protections such as announcement before entry and that a copy of the warrant be given to the occupier outlined in Recommendations 43 and 44.

The privilege against self-incrimination

The *Prevention of Cruelty to Animals Act 1986* contains no reference to the privilege against self-incrimination and section 23(d) makes it an offence where a person:

contravenes or fails to comply with any direction or requirement of an inspector or specialist inspector who is acting in the discharge of that inspector's powers [...].

There is no reference to "reasonable excuse." On the basis of the Committee's research outlined in Chapter 5 of this Report, it is likely that the privilege is thus abrogated by "necessary implication."

In accordance with Recommendation 34, the Committee believes that the privilege against self-incrimination is an important right which, in the light of confusion in the common law, should be specifically preserved in Statutes at least in relation to questioning. Accordingly, the Committee considers that the *Prevention of Cruelty to Animals Act 1986* should be amended to preserve the privilege against self-incrimination in relation to inspectors' questioning powers.

Other protections

The Committee also notes the following deficiencies with the Act:

- there is no reference to an internal complaints mechanism; and
- the Act contains no reporting requirements.

The Committee reiterates that the Act should be reviewed to take account of all the recommendations in this Report. In addition, the Committee considers that the RSPCA must review its internal procedures to ensure that it complies with those principles and recommendations outlined in this Report which are directed towards such procedures.

Recommendation 5

That the Prevention of Cruelty to Animals Act 1986 be amended to:

- ***require inspectors to produce their identification automatically rather than merely on demand.***
- ***require inspectors automatically to produce a card setting out their name or identifying number, title, the organisation employing them and information on the relevant complaints mechanism.***

- *provide that persons should not be found guilty of obstructing an inspector unless, as soon as practicable under the circumstances, the inspector has:*
 - *clearly identified him or herself;*
 - *informed the person of his or her rights; and*
 - *warned the person that a failure or refusal to comply with a request could constitute an offence.*
- *differentiate more clearly between powers granted for the purpose of acting in emergencies and those which inspectors can exercise where they reasonably suspect that an offence under the Act has been committed.*
- *require inspectors to obtain a warrant for the investigation of suspected offences except in clearly defined emergencies.*
- *specifically preserve the privilege against self-incrimination in relation to questioning by inspectors.*
- *make provision for an internal complaints mechanism and reporting requirements in accordance with recommendations 28 and 31-33.*

Recommendation 6

That the Prevention of Cruelty to Animals Act 1986 and the internal practices of the RSPCA be further reviewed in the light of all general principles and relevant recommendations in this Report.

Non-legislative elements of RSPCA inspectors' powers

The Committee has concluded elsewhere in this Report that internal procedures can be just as important as legislative provisions in determining the fairness, effectiveness and consistency of inspectors' powers. Accordingly, the internal procedures of the RSPCA and DNRE are considered here and, in particular:

- the prosecution powers of the RSPCA and the RSPCA's enforcement philosophy;
- the jurisdiction of the RSPCA;

- the complaints registration system and systems for documenting, and reporting on, the use of powers; and
- the training of RSPCA inspectors.

In examining the non-legislative aspects of the powers of RSPCA inspectors, the Committee has been assisted not only by the evidence received from witnesses but also by a Memorandum of Understanding recently signed between the DNRE and the RSPCA.⁴⁴ The Memorandum clarifies the relationship between the DNRE and the RSPCA. Pursuant to the Memorandum the RSPCA accepts certain reporting requirements, complaints procedures and obligations in relation to the administration of its officers authorised as inspectors.

Prosecution powers and enforcement philosophy

The Memorandum of Understanding contains one line in relation to “Prosecution Policy,” namely:

Each agency will conduct and fund its own prosecutions.⁴⁵

The Committee considers that it is problematic that a non-government organisation such as the RSPCA is granted not only considerable inspection powers but also the power to prosecute offenders. The Committee is concerned in the light of evidence which suggests that the RSPCA has a strict enforcement philosophy which emphasises prosecution over co-operation and education.⁴⁶ The issue of enforcement philosophy is considered in the next section of this Chapter.

The Committee welcomes the statement in the Memorandum of Understanding that:

the RSPCA will clearly separate its enforcement role and enforcement policies from such other policies so that the proper enforcement of the Act by either agency is not compromised or brought into disrepute.⁴⁷

⁴⁴ Memorandum of Understanding between the Royal Society for the Prevention of Cruelty to Animals (Victoria) Incorporated and the Victorian Department of Natural Resources and Environment, May 2002.

⁴⁵ Ibid, p. 5.

⁴⁶ The submission of Eric Meren, submission no. 42, referred to above suggests that this is the case.

⁴⁷ Memorandum of Understanding, above note 44, p. 6.

However, the Committee considers that there is still a risk and a public perception that prosecutions run by non-government agencies may be motivated by policies which are not necessarily in accordance with government policy. Significantly, the only other non-government organisations with inspectors' powers being considered in this Inquiry, namely the public transport companies, are not responsible for the prosecution of offences under the *Transport Act 1983*. Prosecutions for such offences are handled by the Department of Infrastructure.⁴⁸

The issue of prosecution goes beyond the terms of reference of this Inquiry. For this reason, the Committee is reluctant to make detailed recommendations. There are issues to be examined in more detail including whether it is more appropriate that all prosecutions be undertaken by government officers rather than non-government instrumentalities. The Committee also acknowledges that transferring the responsibility for prosecutions to the DNRE is not a cost neutral solution. However, the Committee feels that this issue must be considered further by the government and the DNRE.

Recommendation 7

That the Government review the policy and process for the prosecution of offences under the Prevention of Cruelty to Animals Act 1986.

The jurisdiction of the RSPCA and the DNRE

The Memorandum of Understanding also clarifies the respective areas of jurisdiction of the RSPCA and the DNRE. The Memorandum states that, in general, DNRE will refer companion animal cases to the RSPCA. In relation to other cases, the Memorandum states:

Local agency inspectors should contact each other with regard to involvement in cases not affecting companion animals, to avoid duplication of activity and conflicting advice. The organisation undertaking initial investigation of a case will complete it unless exceptional circumstances occur which require collaboration or transfer to the other agency.⁴⁹

The Memorandum also refers to the specific responsibilities of the parties in emergency situations in Article 9. However, Article 9.6 provides that inspectors will

⁴⁸ This was confirmed in the evidence of Yarra Trams before the Committee: P. McKeon, *Minutes of Evidence*, p. 204.

⁴⁹ Memorandum of Understanding, above note 44, p. 4.

be expected to deal with animal welfare incidents outside their primary areas of responsibility:

if the welfare of the animal is severely compromised and there is an immediate need to alleviate pain and suffering, or if directed by their organisation.⁵⁰

The Committee welcomes any attempt to clarify the jurisdiction of the RSPCA and the DNRE and to encourage communication and co-operation between the two inspectorates. However, because the parties to the memorandum are the DNRE and the RSPCA, the Memorandum does not adequately address co-operation between the DNRE and local councils whose officers also have powers under the *Prevention of Cruelty to Animals Act 1986*. In addition, the Committee is concerned that the RSPCA, a non-government agency, has primary responsibility for investigating and prosecuting companion animal cases. Consideration should be given to providing appropriate training to those DNRE and council officers who are authorised under the *Prevention of Cruelty to Animals Act 1986* and to encouraging these officers to use their powers under the Act.

Recommendation 8

That DNRE and council officers be trained in relation to companion animal issues so that such officers can effectively use the powers under the Prevention of Cruelty to Animals Act 1986.

Complaints / Reporting Requirements

There is no reference to a complaints system in the *Prevention of Cruelty to Animals Act 1986* but the RSPCA executive officer, Mr Richard Hunter, told the Committee that they had a complaints registration system and systems for documenting the use of powers:

We have a complaints registration system. All of our activities are documented. Inspectors are required to log their activities throughout the day. When using unusual powers, such as access to the motor vehicle registry and telephone system to get addresses and so on, we have a tight set of protocols on how they are used. Those are subject to audit each year, and we provide an audit certificate to the various authorities that grant us access [...].⁵¹

⁵⁰ Ibid, p. 4.

⁵¹ R. Hunter, *Minutes of Evidence*, 13 December 2001, p. 138.

Mr Hunter told the Committee that the RSPCA has volunteered to place itself under the supervision of the Ombudsman and that complaints could also be made to the Minister for Agriculture:

We have for a long period volunteered to place ourselves under the supervision of the Ombudsman, because we believe that is the proper way to do it. There is a further sanction that they can go to the Minister for Agriculture, because he has the ability to remove approval from any of our people at any time.⁵²

The Victorian Ombudsman's office told the Committee that there was no formal arrangement in place with the RSPCA but that it was fair to say that the RSPCA had shown itself to be willing to co-operate with complaints and thus to be subject to the scrutiny of the Ombudsman.⁵³

The Memorandum of Understanding also refers to a complaints mechanism and to reporting requirements. Article 4.3 states that the RSPCA will have procedures to deal with complaints against inspector and that:

The RSPCA will immediately advise the Minister of any complaints of a serious nature against RSPCA inspectors in their enforcement of the Act.⁵⁴

The Memorandum goes on to describe the reporting of complaints in more detail.

Article 6 of the Memorandum covers reporting requirements, stating that:

- 6.1 The RSPCA will furnish the Minister with an annual report [...] which provides information on:
 - (a) Number of complaints received and the number investigated by the species;
 - (b) Number of prosecutions, including the number of successful prosecutions; and
 - (c) Any other significant issues thought appropriate by the RSPCA.⁵⁵
- 6.2 The Minister may request at any time other information for the proper and accountable administration of the Act, including information about the performance of an Inspector or concerning the exercise of an Inspector's powers.

The Memorandum also contains provision in relation to RSPCA / DNRE liaison and in relation to the establishment of:

⁵² Ibid.

⁵³ This information was obtained in a telephone conversation with Mr Bob Seamer of the Victorian Ombudsman on 16 April 2002.

⁵⁴ Memorandum of Understanding, above note 44, p. 2.

⁵⁵ Ibid, p. 3.

clear operational and procedural guidelines and an accountability framework for the appropriate and effective administration and enforcement of the Act by all Inspectors.⁵⁶

The Committee considers that, where persons who are not officers of the state have coercive powers under legislation, particular care should be taken to ensure that there are adequate safeguards in relation to the use of the powers, including statutory complaints mechanisms and reporting requirements. In particular, it is vital that non-government agencies with inspection powers remain accountable to the relevant department and the Minister.

The Committee commends attempts to improve the reporting of complaints and the accountability of the RSPCA. However, the Committee considers that the Memorandum of Understanding should be even more detailed on these issues. In addition, as stated in the earlier analysis of the Act, and in accordance with Recommendations 28 and 31-33 the Committee believes that any internal complaints mechanism and reporting requirements should be enshrined in legislation.

The evidence the Committee has received suggests that, although complaints and reporting procedures are to some extent already in place, they appear to be little known. All organisations employing inspectors have an obligation to educate the public about their powers and the complaints procedures available. The Committee believes that the RSPCA needs to do more in this area.

The Committee is pleased to note that the RSPCA is prepared to co-operate with inquiries conducted by the Victorian Ombudsman but considers that this should be a statutory requirement. The Committee notes that there are precedents for non-public bodies to be formally subject to the jurisdiction of the Ombudsman.⁵⁷

Recommendation 9

That the Ombudsman Act 1974 be amended to ensure that the inspectorate function of the RSPCA is formally subjected to the oversight of the Ombudsman.

⁵⁶ Ibid.

⁵⁷ For example, State Trustees, which was set up as a private company rather than as a public body set up by an Act, did not come within the jurisdiction of the Ombudsman until section 13(2A) was inserted in 1998. This section provides that “the Ombudsman may, subject to this Act, enquire into or investigate any administrative action taken by State Trustees.”

Recommendation 10

That the RSPCA publicise its complaints, reporting procedures and enforcement philosophy in line with recommendations 15 and 20.

Training of RSPCA inspectors

The Committee was told that RSPCA inspectors usually have tertiary qualifications in animal-related fields and then undergo 6 months of training in inspection duties. The Committee was also told that inspectors attend the Detective Training Course run by Victoria Police.⁵⁸

The Memorandum of Understanding provides that:

No person will be appointed as an Inspector under the Act until an approved training program has been undertaken and the requirements for approval have been met.⁵⁹

There is no further reference to training in the Memorandum of Understanding. The Committee understands that there are currently plans underway to require RSPCA inspectors to undergo accredited training through the Australian National Training Authority to ensure that certain minimum standards of training are being given.⁶⁰

Later in this Chapter, the Committee expresses the view that the training of authorised officers affects the effectiveness, consistency and fairness of the use of inspectors' powers. The Committee commends the provision in the Memorandum of Understanding that no person can be authorised until an approved training program has been completed and notes that this accords with Recommendation 24. However, this requirement should be enshrined in the *Prevention of Cruelty to Animals Act 1986* as should the requirement that the retention of authorisation be contingent upon an approved program of in-service and ongoing training in accordance with Recommendation 25.

The Committee also considers that the Memorandum of Understanding should address the issue of training and ensure that there is ministerial and departmental oversight of the training of RSPCA inspectors.

⁵⁸ R. Hunter, *Minutes of Evidence*, 13 December 2001, p. 136.

⁵⁹ Memorandum of Understanding, above note 44, article 4.1.

⁶⁰ Telephone conversation with Stephen Tate, Director, Bureau of Animal Welfare, Agriculture Quality Assurance, DNRE, 2 May 2002.

Recommendation 11

That the Prevention of Cruelty to Animals Act 1986 be amended to specify that inspectors cannot be authorised until they have completed approved training and that the retention of authorisation be contingent upon an approved program of in-service and ongoing training.

Recommendation 12

That the Memorandum of Understanding between DNRE and the RSPCA be amended to specifically address the issue of training and to ensure ministerial and departmental oversight of the training of RSPCA inspectors.

Use of powers and enforcement strategy

A further indication of the effectiveness of the powers of entry, search, seizure, questioning and to require the production of documents is whether and the extent to which such powers are used in practice.⁶¹ Non-use of powers may be an indication that the powers are not necessary to achieve the purpose of the legislation and therefore not effective. Conversely high usage may indicate that there is a need for the powers.

However, many agencies made it clear to the Committee *that powers which are not regularly used are not necessarily ineffective or unnecessary*. In fact, it may be possible to draw the opposite conclusion: non- or under-use of powers is often part of a deliberate internal law enforcement strategy aimed at achieving greater compliance with the legislation. The Committee received evidence from many agencies that they adopted a strategy based on education and co-operation because this resulted in higher compliance and therefore greater effectiveness. Such agencies also stressed, however, that the powers were still important as a deterrent to potential offenders and as a “last resort” where less coercive methods have failed to achieve compliance.

⁶¹ For instance, use of the powers is cited as an indicator of effectiveness in the Senate Report, above Chapter 1, note 1, p. 129.

Alex Serrurier's response to the question as to how he would describe an environmental health officer's approach to law enforcement is typical of the new co-operative approach of agencies and authorised officers:

If you had asked me that question 20 years ago, the answer would have been that there was a significant philosophy of enforcement. Today enforcement is very much a last resort in terms of legal enforcement. The emphasis these days is very much on education, about talking to people about where we feel their practices aren't appropriate; but it is not to say that we wouldn't take immediate action, for instance, in a food sampling situation where there was contamination of food with a cigarette butt [...] If we were satisfied that the case was such that the fault lay with the proprietor, then we would proceed to prosecution immediately. I don't think that would be uncommon across the state.⁶²

The Committee's findings in this area appear to be supported by the academic research on enforcement strategies which is briefly referred to below.

Academic Literature / Empirical Studies of Enforcement Philosophies

Introduction

Rules are inherently vague or indeterminate, and inherently over- or under-inclusive. [...] ⁶³ A rule [...] is only as good as its interpretation.⁶⁴

Legal rules may appear to require, allow or proscribe certain activities. But the invocation of enforcement of the rules may reshape them into a form that bears little resemblance to the "law in books."⁶⁵

It is not always clear what the law means, and hence what compliance might look like and entail. Regulatory law is often vague, involving broad legal standards and the exercise of discretion by officials. A socio-legal perspective of compliance reveals it to be a complicated process of adaptation, flexibility, reflection and, above all, interpretation.⁶⁶

All legal rules are open to interpretation but regulatory laws are open to greater interpretation by inspectors at field level than most other legislation.⁶⁷ As the passages extracted above indicate, inspectors regularly exercise their discretion to interpret and enforce legal rules. An important aspect of this discretion is the decision

⁶² A Serrurier, *Minutes of Evidence*, 21 February 2002, p. 174.

⁶³ Julia Black, *Rules and Regulators* (1997), p. 1.

⁶⁴ *Ibid.*, p. 13.

⁶⁵ Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds), *Thinking About Law: Perspectives on the history, philosophy and sociology of law* (1995), p. 158.

⁶⁶ Bridget M Hutter, *Compliance: Regulation and Environment* (1997), p. 3.

⁶⁷ *Ibid.*

about whether and to what extent to use coercive powers in particular situations. In this way, the question of how inspectors' discretion is used can be a more important indicator of the effectiveness of the statutory rules than the rules themselves.

An examination of the factors which guide the use of inspectors' discretion, including (and most importantly) the particular enforcement strategy or philosophy adopted by their agencies, is the subject of a growing body of academic literature. In this section of the Report the Committee examines this literature, focusing in particular on the main types of enforcement strategies identified and the reasons for the adoption of a particular enforcement strategy over another.

Empirical research rather than legal research

Empirical analysis is the research method adopted by most academic researchers in this area. The starting point for traditional legal research is an examination of the statutory and common law rules. In contrast, socio-legal empirical studies are generally based on *direct observation*. As the term "direct observation" implies, many empirical researchers studying regulation and compliance actually accompany inspectors for a period of time and observe their enforcement techniques. For instance, one author states that she employed a variety of methods for her empirical analysis of three regulatory inspectorates in Great Britain, including:

Three months in each department accompanying inspectors in the course of their working day, a documentary survey, and interviews in each department.⁶⁸

Another author who adopted the method of "participant observation" explained the benefits of this method as follows:

Observation provides the raw material which permits the activities of enforcement agents and their discretionary behaviour to be understood in the context of their routine work.⁶⁹

This researcher chose not to study any of the relevant legislation before conducting his field work, so that he could "learn the law as the field officers knew it" and avoid:

the distortion [...] which thorough prior knowledge of the formal structure of rules may have conferred [...]⁷⁰

⁶⁸ Bridget M. Hutter, "Variations in Regulatory Enforcement Styles," *Law & Policy*, Vol. 11, No. 2, April 1989, pp. 153-174.

⁶⁹ Keith Hawkins, *Environment and enforcement: regulation and the social definition of pollution*, (1984), p. 229, as referred to in Hunter et al, above note 65, p. 162.

The main types of enforcement philosophy

Researchers have identified two main approaches to enforcement, namely the “accommodative” or “compliance” strategy and the “deterrence” or “sanctioning” strategy.⁷¹ Compliance rather than punishment is the main objective of the accommodative approach.⁷² Agencies which follow this approach may rarely use their formal legal powers. As Bridget Hutter notes:

The use of formal legal methods, especially prosecution, is regarded as a last resort, something to be avoided unless all else fails to secure compliance.⁷³

Such agencies may, however, refer to or threaten the use of their powers as a means of obtaining co-operation. “The importance of legal methods,” notes Hutter, “lies in the mystique surrounding their threatened or possible use rather than their actual use.”⁷⁴ The Committee heard evidence from a number of Victorian agencies that they relied on the direct or indirect threat of their powers to secure compliance. This evidence is examined in the next section of this Chapter.

Within the broad compliance approach, Hutter has identified two contrasting strategies, namely the “persuasive” and the “insistent” strategy. Both approaches aim to secure compliance rather than to exact retribution but differ in their strictness. The persuasive approach favours an informal range of tactics:

Officials educate, persuade, coax and cajole offenders into complying with the law. They explain what the law demands and the reasons for legislative requirements. They discuss how improvements can best be attained. Patience and understanding underpin the whole strategy, which is regarded as an open-ended and long-term venture.⁷⁵

In contrast, the insistent strategy is:

less benevolent and less flexible than the persuasive approach. There are fairly clearly defined limits to the tolerance of officials adhering to this strategy. They are not prepared to spend a long time patiently cajoling offenders into compliance and they expect a fairly prompt response to their requests. When this is not forthcoming, these officials will automatically increase the pressure to comply. They will readily

⁷⁰ Ibid.

⁷¹ Note that the terminology differs somewhat among researchers. These are the terms used by Bridget Hutter and referred to in Hunter et al, above note 65, p. 164.

⁷² Hutter, “Variations in Regulatory Enforcement Styles”, above note 68, p. 153.

⁷³ Ibid, p. 154.

⁷⁴ Ibid. Later, Hutter comments that agencies favouring accommodative techniques tend to adopt the view that “anyone who needs to resort to formal enforcement matters has failed in his job.” p. 162.

⁷⁵ Ibid, p. 155.

initiate legal action to effect their objectives should they encounter resistance to their requests.⁷⁶

The compliance approach is often contrasted with the “deterrence” or “sanctioning” enforcement model. In this model, inspectors routinely use their coercive powers to enforce the legislation. Prosecution has an important role and may even be regarded as a sign of success.⁷⁷

Use of the enforcement strategies and advantages and disadvantages

Researchers have found that the accommodative or compliance approach is the enforcement model most often favoured by inspectors.⁷⁸ This is borne out by the comments by Victorian agencies reviewed in the next section of this Chapter. However, and again in line with the evidence considered in the next section, in practice agencies use both approaches when necessary.⁷⁹

Why do many agencies favour the accommodative approach over the deterrence model? What are the benefits and drawbacks of the two approaches? The Committee considers attempts by researchers to answer these questions below.

A number of authors have highlighted the disadvantages of the deterrence enforcement model. In their comparative study of the regulatory systems which multinational corporations encounter in different jurisdictions, Robert Kagan and Lee Axelrad found that the strict enforcement style of many American regulatory authorities, and which they refer to as “adversarial legalism,” was more expensive and ultimately less effective than the more conciliatory style typical of agencies in other developed countries:

With some exceptions, the research indicates that adversarial legalism imposes much higher costs and delays on the American operations of multi-national corporations. More tentatively, and again with some exceptions, these case studies suggest that American adversarial legalism, despite its more threatening character, often does not generate higher levels of protection for the public than do the less legalistic regulatory

⁷⁶ Ibid, p. 156.

⁷⁷ Ibid, p. 154.

⁷⁸ Ibid, p. 153.

⁷⁹ Bridget Hutter notes that all enforcement officials use both accommodative and sanctioning techniques: “Persuasion and prosecution are both needed; indeed it is important to recognise that persuasion is more possible in some situations than in others. Moreover, persuasion does not necessarily mean failure. Enforcement is a complex and complicated matter.” Hutter, *Compliance: Regulation and Environment*, above note 66, p. 245.

regimes of other developed countries – at least in the sector of the economy occupied by large corporations.⁸⁰

In her book entitled “Rules and Regulators”⁸¹ Julia Black refers to the vague and indeterminate nature of rules and the way in which the varying interpretation of rules by inspectors can lead to the “over-inclusion” of behaviour which may not have been intended to fall within the scope of the rule or, alternatively, the “under-inclusion” of conduct which should have been covered by the rule. In her view, a compliance strategy can help to counteract this phenomenon “by the waiver of the rule in that particular circumstance, or the negotiation of the application of the rule to new and unforeseen circumstances.”⁸² A deterrence strategy, on the other hand, exacerbates the problem:

Under a deterrence strategy [...] the problems of over- and under-inclusiveness of rules are not mitigated by the enforcement process: every occasion in which there has been a breach of the rule is sanctioned.⁸³

On the other hand, there is a body of opinion which regards the compliance approach as a “soft option” which evinces a failure to regulate effectively and which can lead to the “capture” of the regulator by the regulated.⁸⁴

Another problem identified with the compliance strategy is the difficulty of monitoring the behaviour of inspectors and ensuring that they are accountable for their actions. As Julia Black comments:

It is difficult for other regulated firms or individuals and those outside the system to observe and monitor. The conversation, particularly when it occurs at the level of enforcement officers, is likely to be a dialogue between regulator and regulated, rather than a discussion embracing a wider community.⁸⁵

⁸⁰ Robert A. Kagan and Lee Axelrad, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (2000), p. 1.

⁸¹ Black, above note 63.

⁸² *Ibid.*, p. 41.

⁸³ *Ibid.*

⁸⁴ Hutter, *Compliance: Regulation and Environment*, above note 66, p. 244.

⁸⁵ *Ibid.*, p. 43. In their article “The Political Economy of Legislative Change: Making Sense of Victoria’s New Occupational Health and Safety Legislation,” *The Law in Context* (1988) 6(2), pp. 1-19, Kit Carson and Cathy Henenburg note that, following the introduction of the *Occupational Health and Safety Act 1985*, inspectors were actively encouraged to think of themselves as “advisers.” The authors stated that it was “hard to see” how such operational changes “could have any effect other than to heighten the ambiguity of the position of the Department and its staff,” p.14.

In addition, as the discussion in the next section of this Chapter highlights, a strategy of compliance or accommodation may not be possible or appropriate in all circumstances.

Factors influencing enforcement style

Researchers have identified a number of factors which influence the enforcement style of particular agencies. These include the agency's resources, the "relational distance" between inspectors and those they regulate and the frequency of their interaction, and political factors such as the degree of public awareness and concern about particular regulatory matters.

It has been pointed out, for instance, that organisational or economic factors such as an agency's budget and staff numbers can influence the enforcement style they adopt. Bridget Hutter found that those agencies which adhered to the persuasive strategy generally had greater resources than those who favoured the insistent approach; insistent strategists pointed out that, after a certain point, it is more cost effective to prosecute uncooperative offenders than to conduct repeat visits.⁸⁶

The Committee acknowledges this view but notes that it does not accord with the practical experience of some of its members. While it may in some instances be more cost-effective to dispense with persuasion tactics and to utilise more formal enforcement methods, it seems equally clear that a lack of resources can lead regulatory bodies to adopt a more persuasive enforcement approach. An example of this would be the setting up of voluntary standards in cases where there are insufficient resources to enforce more formal rules. This could lead to a situation where standards are lowered in order that they can be more easily and cheaply complied with. The Committee notes that to avoid such a situation agreed standards need to be set before moving to a voluntary regime. While the cost of a regulatory regime is a relevant consideration it must not become the only or dominant factor in determining the extent of regulation.

A more important determinant of the enforcement approach⁸⁷ is the relational distance between inspectors and the regulated and the frequency of their interaction. After

⁸⁶ Hutter, "Variations in Regulatory Enforcement Styles," above note 68, p. 165. Julia Black also comments that the "conversational style" (similar to the persuasive strategy) "may be reliant on considerable regulatory resources in terms of time and personnel." Black, above note 63, p. 42.

⁸⁷ Hutter refers to the social context of enforcement as an "especially important influence, for it may affect perceptions of the severity of offences, attitudes to offenders, and the accompanying presence

outlining the benefits of a strategy of compliance, Julia Black acknowledges that this approach may be easier to operate where there are relatively few “regulatees:”

If regulation is via licence or franchise of individual operators [...] or simply one in which there are relatively few operators then there may be greater potential for the regulator and regulated effectively to conduct a conversation as to the application of the rules [...] It may also be easier to use vague rules in these circumstances.⁸⁸

Bridget Hutter also pointed out that agencies were more likely to adopt a persuasive enforcement style in small, close-knit communities. Where the “relational distance” between parties was greater, agencies were more likely to use their formal enforcement powers:

Conversely, those working in large conurbations adopt a more suspicious attitude. They are less likely to be acquainted with those they regulate, do not fear to the same extent the negative consequences of legal action, and are likely to adopt a cynical and less charitable view of the regulated.⁸⁹

Thus, where those subject to inspection are “dispersed and unknown” and violations of the law are unpredictable and therefore not easily preventable, the deterrence enforcement strategy is more likely to be used.⁹⁰

Conclusion

Which enforcement strategy is the most effective? The empirical analyses of enforcement strategies reveal that there is no clear answer to this question. The appropriateness and effectiveness of the enforcement strategy adopted by an agency will depend on a variety of economic, political and social factors. What is clear, however, is that the enforcement strategy or philosophy of agencies and their inspectors has an important impact on the effectiveness of the legislative regime they enforce. Accordingly, any analysis of the statutory rules and case law would be incomplete without considering how these rules are used and interpreted in practice. As one commentator notes:

or absence of public concern about offences.” Hutter, “Variations in Regulatory Enforcement Styles,” above note 68, p. 171.

⁸⁸ Black, above note 63, p. 42.

⁸⁹ Hutter, *Variations in Regulatory Enforcement Styles*, above note 68, p. 169.

⁹⁰ Hutter, *Compliance: Regulation and Environment*, above note 66, p. 239: Compliance systems are also prevalent where there is a possibility of continuing harm (especially where the process of detecting violations and sanctioning violence is complex or costly), where the long-term consequences are more serious than the short-term harms and where the penalties for non-compliance can be passed on to others (and therefore no deterrent effect): p. 239.

The actions and responses of law enforcement officials and of those subject to legal controls cannot be deduced from the text of statutes and high court opinions.⁹¹

For this reason the Committee examines the agencies' evidence in relation to their enforcement strategies in the next section of this Chapter.

Experiences of the relevant agencies

Agencies which pursue a co-operative enforcement strategy and the impact on effectiveness

The Committee heard evidence from a number of agencies that the powers of entry, search, seizure and questioning available to their authorised officers are rarely used. Instead such agencies pursue non-coercive measures to promote compliance with the Act. Agencies stated that the adoption of a more co-operative enforcement approach was more cost-effective and more likely to achieve compliance with the legislation.

The Environment Protection Authority (EPA) is one agency which adopts a co-operative approach to enforcement. It has found that non-regulatory enforcement measures are effective on a number of levels. EPA describes the emphasis on such measures in its published Enforcement Policy:

EPA is of the view that non-regulatory measures taken to promote compliance with the Act and regulations are often cost effective and will reduce the need for enforcement.

These measures include education and the provision of information, technical advice on licence compliance and waste minimisation, industry codes of practice, promotion of environmental audits, and encouragement of environment improvement plans.

EPA is also of the view that industry, including industry bodies, should promote best practice environmental management within its ranks.

An open relationship with local communities is also encouraged as a means of achieving good environmental performance.⁹²

The policy goes on to describe in some detail the education and information programs and technical advice offered as well as the promotion of industry codes of practice and voluntary environmental audits.

⁹¹ Kagan and Axelrad, above note 80, p. 5.

⁹² Environment Protection Authority, *Enforcement Policy*, July 1993, p. 9.

However, this is not to say that coercive powers are not used or penalties are never imposed. In its description of its enforcement policy EPA's written submission emphasises the importance of selecting "the most appropriate enforcement tool to obtain the desired outcomes."⁹³ The Enforcement Policy outlines the factors to be considered when making an assessment of the most appropriate enforcement measure. In some cases this might be prosecution. As EPA Chairman, Dr Robinson commented:

The whole nature of the environment protection regime can only be built by the cooperation of the bulk of people. So you have to exercise a culture which is more attuned to cooperation, but you also need to have the powers there when you need to exercise them, when people are carrying out deliberate criminal Acts for profit.⁹⁴

In general, however, the Enforcement Policy emphasises co-operation before coercion, a point which was confirmed in the public hearings when Dr Robinson told the Committee:

We have 30 years of experience now, and as I said in my introduction, most of our entry needs are met co-operatively. Therefore the occasions on which we have to use more forceful powers are few, but when we have needed them I do not think we have been overly constrained.⁹⁵

The State Revenue Office (SRO) also gave evidence that it favours an approach based on co-operation and voluntary compliance:

The compliance strategy favoured by the SRO involves encouraging voluntary compliance. The preferred strategy is that of self-regulation because it involves the least burden on both the SRO and the taxpayers.

The first stage of this compliance strategy is by education, customer focused service delivery and "light handed" regulation. This stage is self-regulation [...]⁹⁶

SRO uses its coercive powers only where attempts at co-operation and education have failed. It refers to this aspect of its enforcement strategy as the "principle of escalation:"

As a matter of policy, the SRO compliance strategy operates on a principle of escalation. Initially requests for information are made by request and seeking the cooperation of the taxpayer. It is only if such requests are refused or not fully complied with that matters would proceed on a more formal basis.⁹⁷

⁹³ Environment Protection Authority, submission no. 18, p. 5.

⁹⁴ Dr. B Robinson, *Minutes of Evidence*, 12 December 2001, p. 61.

⁹⁵ *Ibid.*

⁹⁶ State Revenue Office, submission no. 23, p. 3.

⁹⁷ *Ibid.*, pp. 4-5.

As foreshadowed in the previous chapter of the Report, despite the extensive powers available to its officers under such Public Health legislation as the *Food Act 1994* and the *Health Act 1958*, the Department of Human Services also adopts a co-operative approach to enforcement. In its written submission to the Committee, the DHS described this approach as follows:

Whilst public health powers need to be extensive, use of the powers is likely to be rare as the powers are exercised, as far as possible, on a co-operative model.

It is important to appreciate that the primary regulatory strategy of public health protection is to obtain the consent, co-operation and assistance of the affected business or individuals [...]

Prosecutions are a last resort as a means of improving management of public health risk. Similarly, when investigations of outbreaks occur the first concern is identifying the source of the outbreak and any common link between cases rather than laying blame.

Powers of entry are seldom exercised, as entry is generally consensual and often welcomed. Whilst there are no formal safeguards to ensure that consent is genuine and informed it is in the interests of authorised officers to provide sufficient explanation to obtain co-operation and assistance [...]⁹⁸

Importance of continued existence of powers: effective as a deterrent

Although agencies which adopt a co-operative approach to enforcement tend to use their powers rarely and only as a “last resort,” they nevertheless argued strongly for the continued existence of the powers because they are a deterrent to those individuals or organisations who would otherwise not comply with the legislation.

Trade Measurement Victoria is one such agency. Its Director, Mr Phillip Hatton, told the Committee:

I would have to say that the warrant provisions, which are in the Administration Act have never been used within Trade Measurement Victoria. However, we certainly find them a very powerful deterrent in assisting us in our investigations. In other words, [while] we haven't had to use those warrants, we more particularly have had a number of times to refer to them and by referring to them we certainly have been able to achieve the sort of work and investigation that we have needed to undertake, but certainly without having to go and actually obtain that warrant.⁹⁹

⁹⁸ Department of Human Services, submission no. 33, p. 37.

⁹⁹ P. Hatton, *Minutes of Evidence*, 21 February 2002, p. 225.

Similarly, the Office of the Chief Electrical Inspector (OCEI), which also focuses on education and co-operation to achieve compliance provided evidence that the mere existence of the powers encouraged compliance:

While the OCEI has not needed to use these powers as yet, it is essential that these powers exist and continue to exist, as it has encouraged the industry and the public to co-operate with the OCEI in its aim to achieve safety outcomes and to have safety standards maintained. This cooperation has meant that the OCEI has not had to exercise these enforcement powers to achieve results.¹⁰⁰

On the other hand, the OCEI does not actively publicise the powers for fear of appearing too adversarial:

It is the aim of the OCEI to exercise functions through cooperation with the electrical industry and [with] the public. For this reason, our enforcement powers are not publicised and we are keen to avoid an approach that may be perceived as initially adversarial. We promote general awareness of electricity safety and through this awareness campaign achieve results based on education and cooperation.¹⁰¹

The SRO also emphasises the deterrent function the powers have and implies that, without them, the SRO would not have the leverage to encourage compliance:

While the compliance strategy is predicated upon a commitment to do all that is necessary by way of use of compulsory powers, penalties and prosecutions to encourage self-regulation the compulsory powers of the SRO are used only rarely. The existence of these compulsory powers is recognised and acknowledged by taxpayers and these powers facilitate contacts with taxpayers that might not occur in their absence. Certainly the view is held within the SRO that co-operation from taxpayers arises to a significant degree because of their awareness of the consequences of a failure to co-operate.¹⁰²

The Committee also refers to the evidence of the Department of Human Services and the Environment Protection Authority cited in the previous chapter of this Report relating to the importance these agencies place on their power of immediate entry to respond to emergencies.

¹⁰⁰ Office of the Chief Electrical Inspector, submission no. 31, p. 2.

¹⁰¹ Ibid, p. 3.

¹⁰² State Revenue Office, submission no. 23, p. 4.

Agencies which emphasise formal legal enforcement and the impact on effectiveness

From the evidence received the only organisations which seem to adopt a deterrence approach to enforcement are Yarra Trams and the RSPCA. As noted in the Introduction to this Report, due to the number of submissions received in relation to the powers of revenue protection officers, the Committee will consider them in a separate section of this Report.

The Committee also notes that many agencies, including ones such as the Department of Natural Resources and Environment which state that they adopt a co-operative approach, gave evidence that they rely on the support of Victoria Police when they execute search warrants.¹⁰³ This underlines the point made by some agencies referred to in this section that they are quite prepared to adopt a less conciliatory approach where necessary. The issue of police assistance is considered more fully in Chapter 6.

Conclusion

The submissions reviewed above reveal that the enforcement philosophy of a particular agency can be just as important as the legislative powers available to their authorised officers. The Committee notes that many agencies felt that a co-operative regulatory style is more effective than one which emphasises strict legal compliance at all times. However, the Committee recognises that the effectiveness of this regulatory approach will depend on many factors such as the risk and gravity of the offences involved and whether the compliance regime is directed towards a relatively small number of persons in a particular sector or to the public in general.

Because of the impact which enforcement philosophy can have on the use and effectiveness of the powers, the Committee considers that the enforcement philosophy or strategy of an agency should be as transparent and well-publicised as possible. The Committee refers to the published Enforcement Policy of the Environment Protection Authority referred to earlier in this Chapter as an example of best practice in this area and encourages other agencies to produce similar publications.

¹⁰³ See discussion in Chapter 6.

Recommendation 13

That agencies that have not already done so develop an enforcement philosophy as a written document.

Recommendation 14

Evidence of compliance with recommendation 13 should be contained in the 2003/2004 annual report of agencies.

Recommendation 15

That agencies ensure that their enforcement philosophies or strategies are as transparent and well-publicised as possible, preferably by means of publication and distribution among those affected by the legislation.

**Other factors affecting effectiveness: case study –
authorisation, identification and training of authorised officers**

In this section the Committee considers selection and training procedures adopted by the agencies. As with the issue of enforcement philosophy, these procedures are largely a matter of internal procedure. However, two key areas relevant to selection and training are often governed, at least in part, by legislative provisions. These relate to:

- the authorisation of inspectors; and
- the requirement to show identification.

The Committee considers examples of each type of provision in turn below before considering the non-legislative aspects of selection and training procedures.

Provisions governing the authorisation of inspectors

Once again, there is a considerable degree of inconsistency in the legislation on this issue. In general, statutes make some reference to authorisation, usually by specifying the classes of employees which may be appointed. However, a small number of statutes refer to other issues such as the reputation and integrity of the applicant and

appropriate training and experience. Other statutes are silent on the issue of authorisation or refer only to the fact that persons may be appointed as authorised officers but give no further guidance on the issue.

Statutes which are silent on authorisation procedures

A number of Statutes the Committee examined contain no reference to authorisation procedures. For instance, section 240A of the *Accident Compensation Act 1985* simply refers to persons “authorised by the Authority” but gives no guidance on the persons who may be so authorised. Similarly, section 224(1) of the *Local Government Act 1989* simply provides that “a council may appoint any person other than a Councillor to be an authorised officer.”

While the *Food Act 1984* referred to below refers to the classes of persons who can be appointed as authorised officers, the *Health Act 1958* which contains similar powers and is administered by the same government department appears to be silent on the issue of authorisation of authorised persons. Section 399A requires that identity cards must be held by “any person authorised by the Secretary for the purposes of this Act” yet the Act does not set out an authorisation procedure and nor is the authorisation specifically referred to in section 6 on the powers of the Secretary.¹⁰⁴ Finally, the important “template” Act for the licensing Acts in the Fair Trading area, namely the *Motor Car Traders Act 1986*, appears to be silent on the issue of authorisation and it is not specified in either the *Motor Car Traders Act 1986* or the *Fair Trading Act 1999* whether inspectors are appointed pursuant to section 114 of the *Fair Trading Act 1999*.

The Committee notes that some Acts which appear to be silent on the issue of authorisation are in fact governed by the authorisation provisions of another Act. For instance, the *Wildlife Act 1975* defines an authorised officer in section 3 as a person appointed under the *Conservation, Forests and Lands Act 1987*. Similarly, section 104 of the *Gaming and Betting Act 1994* also governs the appointment of inspectors under the *Gaming Machine Control Act 1991*, the *Club Keno Act 1993*, *Interactive Gaming (Player Protection) Act 1999* and the *Gaming No. 2 Act 1997*.

¹⁰⁴ Section 8A refers to “delegation by Secretary” and allows the Secretary to delegate “any power or function of the Secretary under this or any other act or under the regulations under this or any other Act, other than this power of delegation.” Yet authorisation of authorised officers is not specifically listed as a function of the Secretary.

Statutes which specify who can be authorised: the typical provision

Typically, statutes provide some guidance on who can be appointed as an authorised person. For instance, section 38 of the *Occupational Health and Safety Act 1985* provides as follows:

- (1) The Authority may appoint any officer or employee of the Authority to be an inspector for the purposes of this Act.

- (1A) The Authority may appoint any person who is employed in the Department of Natural Resources and Environment under the Public Sector Management and Employment Act 1989 to be an inspector for the purposes of this Act in respect of activities carried out under the Petroleum Act 1998, the Extractive Industries Development Act 1995 or the Mineral Resources Development Act 1990.

Section 20 of the *Food Act 1984* allows the Secretary to authorise officers in writing. Section 20(1)(a) allows the Secretary to appoint “*specific people* who are officers or employees of the public service or of a public statutory body” but can also appoint officers in a more general way by appointing:

- (b) a class of employees in the public service
- (c) a class of officers or employees of a public statutory body
- (d) people (either specifically or as a class) who are appointed to be inspectors or authorised officers or people having similar functions under any other Act – to be authorised officers for the purposes of this Act.

Importantly, section 20(2) allows the Secretary to place various limits on the grant of power to authorised officers.

Some Acts allow the appointment of agents to undertake inspection functions. Section 9 of the *Trade Measurement (Administration) Act 1995* (which pursuant to section 4 “must be read and construed as one with the *Trade Measurement Act 1995*”) is an example which allows the Director to appoint agents (rather than direct employees of the agency or other government agencies). The Committee notes that sub-section (a) also requires the Director to obtain the “approval of the Minister.”

Statutes containing specific authorisation provisions relevant to the particular industry involved

The Committee also came across examples of industry specific authorisation provisions. For instance, section 104 of the *Gaming and Betting Act 1994* (which also governs most of the other Gaming Control Acts with the exception of the *Casino Control Act 1991* as stated above) provides as follows:

Section 104

- (2) The Director must not appoint or employ a person under sub-section (1) unless the Director is satisfied after due inquiry that the person is of good reputation, having regard to character, honesty and integrity.
- (3) The Director may require a person the Director is inquiring into in relation to the person's suitability to be appointed or employed an inspector to consent to having his or her photograph, finger prints and palm prints taken.
- (4) The Director must refer a copy of any photograph, finger prints and palm prints and any supporting documentation to the Chief Commissioner of Police.
- (5) The Chief Commissioner of Police must inquire into and report to the Director on any matter that the Director requests.
- (6) Unless the Director otherwise approves, a person is not eligible to be appointed or employed an inspector if, at any time during the preceding 4 years, the person has been employed by or significantly associated with the licensee, or a former licensee, or a permit holder, or a venue operator or gaming operator or a casino operator or has been entitled to 2% or more of the voting shares in the licensee or former licensee.
- (7) Inspectors are appointed or employed under Part 3 of the Public Sector Management and Employment Act 1998.

This Act with its focus on honesty and good character and provisions for finger printing is clearly directed to the particular industry being controlled. The Committee notes that such provisions which may not be generally acceptable can be and are justified in limited circumstances.

Witnesses' views

Few witnesses commented on the authorisation provisions. However, one aspect of authorisation which attracted criticism was the authorisation of non-government employees. Few agencies are able to appoint such employees. However, two which can are the transport companies whose revenue protection officers have powers under the *Transport Act 1983* and the RSPCA whose inspectors are authorised under the *Prevention of Cruelty to Animals Act 1986*. Because the criticism of the powers of

these authorised officers goes beyond the issue of authorisation, they are considered in separate sections of this Report.¹⁰⁵

Conclusion

The Committee considers that many of the current authorisation provisions are inadequate. It is of the view that Acts should always refer to the authorisation of inspectors or cross-reference to the Act which does. To enhance the transparency of the authorisation process the Committee considers that authorisation provisions should be as specific as possible. The Committee is also of the view that authorisation requirements must be particularly stringent where non-government employees such as inspectors employed by the transport companies or the RSPCA are involved.

Recommendation 16

That Acts clearly set out the process of authorisation of inspectors or cross-reference to the Act which does.

Recommendation 17

That authorisation provisions be as specific as possible. In particular that:

- ***legislation not confer inspectors' powers on a recipient categorised merely as a member of a particular Department or organisation.***
- ***inspectors' powers not be conferred on a particular recipient simply because it is the most economically or administratively advantageous option.***
- ***agencies have clear and appropriate qualification requirements and educational and training standards for their inspectors.***¹⁰⁶

Recommendation 18

That, where non-government employees are authorised as inspectors, strong safeguards relating to monitoring and reporting on inspectors' activities and access

¹⁰⁵ The discussion of RSPCA inspectors is contained in Chapter 4. Discussion of revenue protection officers is noted in Chapter 8.

¹⁰⁶ This recommendation should be considered in conjunction with Recommendation 23.

to complaints mechanisms must be included.

Identification provisions

Closely related to authorisation provisions are sections relating to the identification of authorised persons. These fall into the following broad categories:

- Acts which are silent on identification;
- Acts which require the officer to carry identification and show it on demand;
- Hybrid Acts which require the officer to show identification automatically “if practicable” and on demand; and
- Acts which require the authorised officer to carry identification and show it automatically.

Of these, the second category of provisions appears to be the most common. However, the Committee notes that, once again, there is very little consistency among the provisions on the identification of authorised officers.

The issue of identification is also related to the public perception of the legitimacy of the authorised person. The public’s awareness of inspectors is important to the issue of effectiveness: if members of the public do not accept the legitimacy of authorised persons they are less likely to co-operate with inspectors.

As with the previous section on authorisation, the focus of this section is whether the identification of authorised officers is actually contained in the legislation. The Committee is aware that inspectors who are not actually required by legislation to carry identification may nevertheless be required to do so as a matter of internal practice.

Acts which are silent on identification

Acts which make no reference to the identification of authorised officers include the *Liquor Control Reform Act 1998*. However, this omission may not be relevant in practice because the Committee heard evidence that the inspectorate functions in the Act were entirely carried out by police officers.¹⁰⁷ The *Accident Compensation Act*

¹⁰⁷ B. Kearney, *Minutes of Evidence*, 21 February 2002, p. 231.

1989 and the *Pharmacists Act 1974* are also silent on the issue of identification and appear to contain no cross-reference to identification in other Acts.

Acts which require identification to be shown on demand

The *Health Act 1958* is an example of a provision which requires the officer to show an identification card on demand and one which specifies the features the identification card must have. Section 339A(1) requires the Secretary to issue identity cards to authorised persons and sub-section (2) requires councils to do the same. Sub-section (3) sets out precisely what the identity card must contain – a photograph, the person’s signature and the signature of the secretary. Sub-section (4)(a) requires the authorised person to carry the identity card and sub-section 4(b) requires the officer to show the card “upon being requested to do so.”

The *Food Act 1984* also requires identification which is referred to as a “certificate of authorisation” to be shown on demand. Pursuant to section 20(3):

every authorised officer shall be furnished by the Secretary or the council (as the case requires) with a certificate of his authorization bearing on it a photograph of the authorized officer.

Sub-section (4) requires authorised officers to carry the certificate with them while discharging their duties to “produce that certificate to any person on demand.”

The succinct section 67 of the *Trade Measurement Act 1995* contains the requirement that:

an inspector exercising or proposing to exercise a function under this Act shall, on request, produce the inspector’s certificate of authority issued under the Administration Act.

Hybrid Provisions

The *Occupational Health and Safety Act 1985* is an example of a “hybrid” provision which requires that inspectors show their identification cards before exercising their powers and also on demand. Unlike many of the other Acts, however, the provision does not specify the form which the identification is to have:

s.38(4) The Authority must furnish every inspector with an identification card which an inspector must produce –

- (a) if practicable, on each occasion before he or she proceeds to act pursuant to this Act; and
- (b) on demand.¹⁰⁸

The Act also provides that the certificate of appointment is conclusive proof of appointment (s. 38(3)) and makes it an offence to counterfeit or forge the identity card of an inspector (s. 38 (5)). Section 13 of the *Dangerous Goods Act 1985* contains identical provisions. Section 12 of that Act also contains an additional safeguard, namely that the appointment of inspectors' can be subject to certain conditions:

The appointment of any inspector may be made subject to conditions, limitations or restrictions as to –

- (a) the powers exercisable by that person; and
- (b) when, where and in which circumstances that person may exercise those powers.

Identification provisions confined to only one part of the provisions conferring inspectors' powers

Some provisions are problematic because they appear to relate to only one set of inspectors' powers. For instance the *Wildlife Act 1975* at section 59E(a) requires inspectors entering with a warrant to identify themselves to the occupier "by producing evidence of his or her identity for inspection by that person." However, section 59E(a) is within the Part on warrants, and there is no parallel provision in the general entry section. Hence there is no statutory requirement to produce identification when entering without a warrant.

Acts requiring automatic identification

Provisions which require inspectors to identify themselves automatically are less common. Section 104(1) *Casino Control Act 1991* is one such Act. This provision stipulates that, unless the inspector produces an identity card, he or she is not authorised to exercise his or her functions under the Act:

s.104(1)

An inspector is not authorised to exercise the functions of an inspector unless he or she is in possession of an identification card issued by the Director.

¹⁰⁸ Section 82 of the *Motor Car Traders Act 1986* contains a similar provision.

- (3) If a person proposing to exercise the functions of an inspector fails to produce on demand his or her identification card, the person is not authorised to exercise those functions in relation to the person making the demand.

Section 105(2)

An inspector who enters a casino under sub-section (1) is not authorised to remain in the casino if, on the request of the casino operator or a casino employee, the inspector does not show his or her identity card to the operator or employee.

Section 88(2) of *Taxation Administration Act 1997* goes even further in protecting the rights of individuals subject to inspectors' coercive powers by providing that a person is not guilty of the offence of obstruction or failure to comply with a requirement if the authorised officer has not shown identification and warned the person that refusal to comply with a requirement may be an offence:

A person is not guilty of an offence under this section arising from the entry of an authorised officer onto premises unless the court hearing the charge is satisfied that, at the material time, the authorised officer –

- (a) identified himself or herself as an authorised officer; and
- (b) warned the person that a failure or refusal to comply with the requirement may constitute an offence.

Witnesses comments on identification

The witnesses who commented specifically on the issue of identification generally agreed on its importance.¹⁰⁹

The Victorian Abalone Divers Association commented that:

Officers must be appropriately equipped and identifiable. An official identification is essential. Officers should be identifiable according to their respective functions within the agency, particularly where there are authorised officers with differing roles employed within one agency.¹¹⁰

Representatives from Yarra Trams told the Committee that their authorised officers sometimes had problems establishing legitimacy because their identification badges were not uniform across the different transport companies:

[...] Sometimes people have actual problems in identifying who they [the authorised officers] are, and we have suggested [that there be] a common badge that could be

¹⁰⁹ However, few witnesses commented.

¹¹⁰ Victorian Abalone Divers Association, submission no. 20, p. 4.

carried by all the carriers which could be used to identify themselves and perhaps try to raise public awareness in relation to that particular badge, which indicates who that person is and what powers they have which go along with their authorisation. So that is something that the franchisers have looked at and have requested and we have consulted the government in relation to that.¹¹¹

Victoria Legal Aid argued that inspectors should identify themselves without being asked because many people would be unaware of their right to demand identification. While VLA's comments were in the context of the reciprocal right of the individual to ask for identification in statutes which allow authorised officers to request a name and address, they are equally relevant to other inspectors' powers provisions:

Police officers and authorised persons should give their name, rank and work address as a matter of course in all cases. Currently the onus is on the person to request this information (e.g. *Transport Act 1983* s.218B(5)). Many people would not be aware of this right. It is also too onerous for some people, particularly young people or persons with intellectual disabilities or who are mentally impaired, all of whom may be intimidated in such a situation.

In recognition of the reality that many people will not exercise their reciprocal right, police or the authorised officer should be required to hand over their card with their name, rank and place of duty. The card should have information identifying a complaints mechanism/body, such as the Police Ombudsman.¹¹²

Conclusion

The Committee is of the view that identification procedures can contribute to both the effectiveness and the fairness of inspectors' powers provisions. They assist inspectors to establish their legitimacy and hence encourage the co-operation of individuals subject to the inspectors' powers. As with other provisions such as those which require inspectors executing search warrants to announce their presence prior to entry, they are also part of the set of "safeguard" provisions in the Acts which ensure that individuals are aware of the inspectors' identity and powers.

As the analysis in this section testifies there is currently little consistency in the legislation and many of the provisions are deficient in a number of respects. The Committee agrees with the reasoning of Victoria Legal Aid that inspectors should be required to identify themselves automatically rather than upon request. It also agrees with the idea that authorised officers should, in addition to an identity card, have a card setting out their name, title and the agency employing them as well as

¹¹¹ B. Power, *Minutes of Evidence*, 21 February 2002, p. 211.

¹¹² Victoria Legal Aid, submission no. 19, p. 10.

information as to how to make complaints. Where the personal safety, security or identity of authorised officers could be at risk, the Committee inspectors could provide an identifying number rather than their own name.

Finally, the Committee also supports the rationale behind section 88(2) of the *Taxation Administration Act 1997*. The Committee recognises that people should only be expected to co-operate with inspectors who clearly identify themselves. Accordingly, it considers that no person should be found guilty of obstructing or hindering an inspector unless, as soon as practicable, the inspector has clearly identified him or herself and warned the person that a failure or refusal to comply could constitute an offence.

Recommendation 19

That all Acts conferring relevant powers on inspectors require inspectors to produce identification automatically.

Recommendation 20

That all Acts conferring relevant powers on inspectors require inspectors automatically to produce a card setting out their name or identifying number, title, the agency employing them as well as information on the relevant complaints mechanism.

Recommendation 21

That all Acts conferring relevant powers on inspectors provide that persons should not be found guilty of obstructing an inspector unless, as soon as practicable under the circumstances the inspector has:

- ***clearly identified him or herself;***
- ***advised the person of the inspector's powers under the legislation as well as of the person's rights;***
- ***warned the person that a failure or refusal to comply with a request could constitute an offence.***

Training of authorised officers

Departments and organisations are very much governed by their financial resources. Consequently, all too often the powers under discussion are conferred on people who are too young, untrained and inexperienced. Common sense tells us that this must affect the quality and success of entry and search activities. (*Written submission of Victoria Legal Aid*)¹¹³

While Victoria Legal Aid's view that many authorised officers are poorly trained was not shared (or only to a very limited degree) by the agencies administering the legislation, it does highlight the impact that the selection and training of authorised persons can have on the *effectiveness* of entry, search, seizure and questioning powers. Selection and training of authorised officers also has important implications for the *fairness* and *consistency* of the powers they use as foreshadowed in the introduction to this Chapter. Again, as the Committee commented earlier in this Chapter, apart from the area of authorisation and identification, training is a matter of internal procedure. For this reason this section draws heavily on the evidence received from the agencies and other witnesses.

Evidence of witnesses on training of authorised officers

Most agencies which appeared before the Committee described the training of their authorised officers in some detail and were generally of the view that the training offered was appropriate.

Several agencies emphasised that, as well as offering their authorised officers appropriate training, they ensured that they recruited persons with appropriate professional training.

The Department of Human Services told the Committee that in the infectious diseases investigations area the investigative teams were "usually composed of doctors, nurses and environmental health officers. The composition of a team is dependent on the nature of the investigation at the time."¹¹⁴ Once such professionals are recruited, they go through:

[...] what might be regarded as an apprentice sort of program, where they are provided with ongoing, on-the-job training by more experienced staff. They are also

¹¹³ Ibid, p. 5.

¹¹⁴ Dr Carnie, *Minutes of Evidence*, 12 December 2001, p. 3.

sent to courses and so on to update their skills and knowledge all the time. It is ongoing training, but the basic training they get is in the process of getting their professional qualifications.¹¹⁵

In terms of specific training on investigations and evidence, Ms Foy noted that the Department was “currently working on an improved pilot” which would probably last a week.¹¹⁶

The Department of Natural Resources and Environment (DNRE) also emphasised the training as an important aspect of quality assurance of the legislative powers granted to authorised officers and commented on the training manuals provided to its officers:

Obviously the framework provided by Parliament has been further supported by a number of guidelines to be read by authorised officers in conjunction with the legislative framework. These guidelines form the basis on which officers perform the function in the field and are listed as the legal systems training manual; compliance guidelines *Fisheries Act* and regulations; compliance guidelines *Wildlife Act* and regulations; information management guidelines [...]¹¹⁷

The DNRE also drew the important link between training of authorised officers and consistency in the exercise of powers:

Since 1987 the department has ensured consistency of standards through vigorous training of staff in both the technical and enforcement areas. All authorised department staff performing enforcement activities are required to undertake and complete designated training courses.

In 1987 the departments introduced two subjects, Legal Systems 1 and Legal Systems 2, which were adopted by the TAFE colleges as part of the Associate Diploma of Resource Management. Those subjects were designed to prepare authorised officers in the knowledge of the legislation, powers of authorised officers, the gathering of evidence, the questioning of suspects, statement taking, the preparation of briefs of evidence and courtroom practices and procedures. Implicit in the exercise of powers was the specific training in relation to search, seizure and arrest.¹¹⁸

As well as training on the legislative powers and legal areas such as evidence gathering, a number of agencies provide training in areas such as conflict management and negotiating skills. The Office for the Director of Public Transport told the Committee that the transport companies trained their inspectors in a number of such areas:

¹¹⁵ Ibid.

¹¹⁶ D. Foy, *Minutes of Evidence*, 12 December 2001, p. 4.

¹¹⁷ R. Warren, *Minutes of Evidence*, 12 December 2001, p. 48.

¹¹⁸ Ibid, p. 49.

They do training in customer service, verbal and physical conflict management, company induction, public transport background, business knowledge, ticketing – how the machines work and all of that, so they understand what they are enforcing – safety and first aid, dealing with difficult people, occupational health and safety and equal opportunity – dealing with people with disabilities, such as the blind or those with other physical disabilities. [...]¹¹⁹

The Public Advocate also told the Committee about the importance of training in a variety of areas, in particular in dealing with difficult and sometimes aggressive people:

[T]he staff who are involved in this work have a variety of disciplines, which may include social work or law or they might have a health services background, and the training that they have had included dispute resolution. One of the things that we are working on at the moment is a whole new and probably fairly expensive course of training on dispute resolution, not in the sense of formal mediation but in dealing with situations. There are regrettably a number of incidents a year in which my staff are assaulted.¹²⁰

Criticisms of Training

While most of the evidence the Committee received on training was positive, some agencies acknowledged that there were aspects of their training which could be improved. In addition, weaknesses in training were identified by organisations such as the Consumer Law Centre and Victoria Legal Aid.

The evidence the Committee received indicated that problems seem to emerge when training is de-centralised and offered by a number of different organisations. For instance, the representative from the Office of the Director of Public Transport acknowledged that there had, until recently, been no attempt to ensure consistency of training offered by the different transport companies:

We have been concerned to ensure consistency, and we have been working towards that. I recently appointed somebody to manage the process more closely.¹²¹

¹¹⁹ G. Sharman, *Minutes of Evidence*, 13 December 2001, p. 110. In Yarra Trams's submission, the company states that: "All officers initially undertake a training program that is modelled on the Department of Public Transport Report of Offence Course. Training includes a number of subjects including dispute resolution, statutory powers of authorised officers, safety, use of discretion. Ongoing training and development are also provided." Yarra Trams, submission no. 14, pp. 4-5.

¹²⁰ J. Gardner, *Minutes of Evidence*, 13 December 2001, p. 144.

¹²¹ G. Sharman, *Minutes of Evidence*, 13 December 2001, p. 96.

The Consumer Law Centre told the Committee that the training of transport inspectors appeared to be inadequate due to what were described as systemic and constant breaches of the legislation and the inconsistencies in enforcement philosophy:

To get to your point about training: I am not deeply or intimately familiar with the sort of training that these sorts of officers have. All I can say is that the results of the training don't seem to be adequate to me, so what I see at the moment is the systemic lack of following in the actual legislation itself. I see a lack of preparedness to act in a way that diffuses the situation as opposed to exacerbates it [...] ¹²²
[...]

One other point in relation to the training that is important to make is that either because the training is not being understood or because it is being given in an inconsistent way or perhaps the messages that are being sent are inconsistent, the behaviour of the authorised officers is inconsistent. ¹²³

The Committee comments on the powers of authorised officers under the *Transport Act 1983* in Chapter 7.

Just as each transport company offers its own training programs (albeit with the prospect of increasing monitoring and direction offered by the Office of Public Transport) each council provides its own training programs to local laws officers.

While the Committee was impressed with the level of training and professionalism of Environmental Health Officers employed by Councils, ¹²⁴ and who are largely trained during their four year tertiary qualification, the Committee received other evidence which suggests that other officers may be less well trained which may lead them to exceed their authority in certain cases. Whether this is because of the lack of a centralised training regime for council officers is, however, unclear.

Mr J O'Donoghue of the Municipal Association told the Committee that:

[There] is sometimes a situation where the individual is not as experienced, so he can exceed his authority. What happens so often is that a new officer will go out under the supervision of an experienced officer and will be given on-the-job training in that type of circumstance. But what can happen, and what I was suggesting happened in this case, is that two people who were not as experienced went out together, did not expect to encounter the situation they did and exceeded their authority. ¹²⁵

¹²² C. Field, *Minutes of Evidence*, 21 February 2002, p. 220.

¹²³ C. Lowe, *Minutes of Evidence*, 21 February 2002, p. 220.

¹²⁴ See, for instance, the evidence of A. Serrurier, *Minutes of Evidence*, 21 February 2002, p. 16 and of Mr Mark Diepstraten, Environmental Health Officer, Hume City Council: "There is an accredited four-year degree course at Swinburne University, a major component of which is law. They study the rules of gathering evidence and they deal with mock cases throughout their period of training. Then there is experience in the field, which is gathered over time:" *Minutes of Evidence*, 13 December 2001, p. 104.

¹²⁵ J. O'Donoghue, *Minutes of Evidence*, 13 December 2001, p. 102.

While he generally emphasised the quality of the Victorian Workcover Authority's inspectors, Mr Mountford, Chief Executive of the Authority, also identified a weakness in an area related to training, namely the "front-line management" of inspectors. The Committee was told that ineffective front-line management could affect how consistently inspectors exercise their powers. Mr Mountford explained this point to the Committee as follows:

One of the other things we are doing is seeking to improve the frontline management. I would say one of the problems with inspectors in the past is that there really hasn't been enough effective management of them, so you could think of them really as a field force, they could be a sales force or a service force for an organisation. What you really need to have is good front line management that is actually mentoring them, performance managing them. We frankly have not had that in place. We still have not got that adequately in place, but one of the other things we are doing is moving towards creating a front line management position, and with that a clear expectation of them and their job is to manage these people and ensure we get greater consistency in the way they operate.¹²⁶

Submission of Victoria Police

The Committee was told that the "training of investigating officials is of particular interest to Victoria Police."¹²⁷ One of the reasons for this is that Victoria Police receives frequent requests to assist inspectors to carry out their functions (particularly the execution of search warrants). The Committee considers the issue of police assistance of authorised officers in Chapter 6 of this Report.

Victoria Police was critical of the current level of knowledge among inspectors on certain aspects of their powers, stating that:

It is regularly found that civil investigators or inspectors lack an awareness of custody, investigation and confessional evidence requirements. This area of the law relates to Section 464 of the *Crimes Act 1958* [...] A lack of understanding of the provisions of section 464 will not only be detrimental to the likely success of any prosecution but may result in a serious infringement of the suspected person's rights.¹²⁸

The Police submission stressed the need for a more consistent national approach to training and for ongoing (rather than merely initial) training of authorised persons.¹²⁹

¹²⁶ B. Mountford, *Minutes of Evidence*, 21 February 2002, p. 241.

¹²⁷ Victoria Police, submission no. 21, p. 4.

¹²⁸ *Ibid*, p. 5.

¹²⁹ *Ibid*, p. 4.

The submission goes on to formulate a number of questions relating to training. These are:

1. What training is provided to government and private regulatory bodies given powers of entry, search, seizure and questioning?
2. If provided, does training accord with other jurisdictions?
3. What accreditation does the training carry?
4. What follow up (re-accreditation) processes are in place?
5. Does the training address the legislative authority granted?
6. Does the training provided accord with National Competency Standards?
7. Does the training equate to the legislative powers granted if tested from a litigation perspective.¹³⁰

The Police submission also highlighted the link between effective and consistent training and *the consistent exercise of inspectors' powers*.

The development of recognised accredited training addressing powers of entry, search, seizure and questioning by authorised persons would eradicate inconsistencies which are currently experienced in the application of current legislative powers.¹³¹

Civil Investigators Courses at the Victoria Police Detective Training School

The Committee was interested to learn of the existence of the Civil Investigators courses conducted by the Detective Training School of Victoria Police. According to the Police submission:

Participants of the course are drawn from both Government and non-Government investigation agencies. These courses are of two weeks duration and cover, among other issues:-

- the laws of evidence.
- forensic science
- interviewing skills
- arrest, search and seizure
- custody, investigation and confessional evidence.¹³²

In oral submissions before the Committee, Victoria Police confirmed that the course was “highly sought after”¹³³ by agencies. However, police representatives also made it clear that Victoria Police has limited resources and does not advocate that it should take over all training of inspectors. As Commander Hornbuckle told the Committee:

¹³⁰ Ibid, p. 5.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Inspector Leane, *Minutes of Evidence*, 13 December 2001, p. 83.

We are happy to assist as we have done in the training of these people, but while I say that I am not advocating, as was mentioned in our submission, that we would take over all training.¹³⁴

Victoria Legal Aid's proposal of an independent monitoring and accredited training body

Victoria Legal Aid stressed the importance of training throughout its submission:

[...] (I)t is imperative that persons authorised to carry out such entries, searches and seizures, are persons who have received initial and ongoing accredited training.¹³⁵

In order to ensure that agencies offer the appropriate level of training, VLA proposed the establishment of an independent body to oversee authorised officers. The body would undertake a monitoring and auditing function and would also receive complaints made about authorised officers. VLA expands on its proposal in its written submission to the Committee as follows:

VLA is of the view that there ought to be a body, independent of all the various agencies and government entities, set up to oversee all persons given such powers. This body would also deal with complaints made by members of the public. In particular a person on whom a warrant has been executed should be informed at the time, that the body exists and that they have the right to address any complaint they may have to this body.

Whilst it may not be appropriate to directly undertake the role of educating and training all authorised persons, this body could well be responsible for auditing training programs and ensuring that minimum standards are being met by the agencies. Accredited training programs that can be adapted to the particular needs of specific agencies do need to be developed. Legislative consistency needs to be matched with consistency in implementation.¹³⁶

Conclusion

The Committee is of the view that the selection and training of authorised officers is a vital component of the effectiveness, consistency and fairness of the use of those powers. Accordingly, the Committee believes that Acts should provide that persons should not be authorised under the legislation until they have received appropriate training. In addition, to ensure that agencies provide ongoing training to their

¹³⁴ Commander Hornbuckle, *Minutes of Evidence*, 13 December 2001, pp. 87-88.

¹³⁵ Victoria Legal Aid, submission no. 19, p. 2.

¹³⁶ *Ibid*, p. 5.

inspectors, the retention of authorisation as an inspector should be contingent upon approved programs of in-service and other ongoing training.

While the Committee received valuable evidence from the agencies and other organisations on training issues, it is concerned that there is currently no objective way of evaluating training programs to ensure that they meet certain minimum standards. The Committee is also aware that the issue of training cannot be appropriately dealt with in legislation.

Accordingly, the Committee believes a body which could evaluate current programs and set minimum standards for inspector training and other matters outlined elsewhere in this Report would be a valuable component of any law reform strategy in the area of inspectors' powers.

Recommendation 22

That agencies have appropriately tailored training in place for their authorised officers.

Recommendation 23

That a standards unit be established within Government to ensure that training offered by agencies meets agreed minimum standards .

Recommendation 24

That all Acts conferring relevant powers on inspectors provide that inspectors should not be formally authorised until they have completed appropriate and monitored training.

Recommendation 25

That all Acts conferring relevant powers on inspectors provide that the retention of authorisation be contingent upon approved programs of in-service and ongoing training.

CHAPTER FIVE - THE FAIRNESS OF INSPECTORS' POWERS

Introduction to fairness

Another important question in relation to inspectors' powers is how to balance the need for such powers with the rights and interests of those who are subject to the inspections. It is an obvious aspect of the activity of inspection that it can be intrusive; a person's privacy and, indeed, their dignity can be significantly interfered with when they are the subject of such inspection. (Such interference is not, of course, a goal of such inspections, at least, not when carried out in good faith.) Nonetheless, though the intrusion upon privacy and dignity is not in itself welcomed, some measure of interference can be an acceptable "cost" of the inspections.

At this point some fundamental issues arise: When is that cost acceptable? How can this cost of interference be minimised without unduly diminishing the effectiveness of inspections? The goal, of course, is to balance the values of privacy and regulatory inspections so that the costs to each are acceptable. The acceptability of the intrusion may depend on the benefits derived from the effectiveness of enforcement. Identifying just when privacy, on the one hand, or inspection, on the other, is acceptably compromised, is by no means a straightforward task and no simple formula or rigid decision procedure is to be expected. [...]

In balancing these matters, it needs to be recognised, on the one hand, that respect for privacy and dignity serves as a legitimate side-constraint upon the exercise of inspection powers, and, on the other hand, that if no compromise of privacy and dignity were ever allowed then the side-constraint becomes simply an obstacle thwarting the pursuit of a legitimate goal. How much may the side-constraint be breached before it is too much? Again, these questions, as important as they are, cannot be usefully answered in the abstract and can only be figured out in the detail of particular cases.

(Written submission of the Legal Policy Unit of the Department of Justice)¹

This extract from the written submission of the Legal Policy Unit of the Department of Justice highlights important issues at the heart of one of the central goals of this Inquiry – namely, the achievement of an appropriate balance between the public interest in effective law enforcement and the individual's rights to privacy, the

¹ Legal Policy, Department of Justice, submission no. 26, pp. 4-5.

integrity of his or her person and the possession of his or her property.² While relevant to all Chapters of this Report, this difficult balancing exercise is perhaps most relevant to the subject matter of this Chapter: an evaluation of the *fairness* of powers of entry, search, seizure and questioning by authorised persons. In the Committee's view, inspectors' powers provisions which best achieve the balance between these competing interests can be viewed as "fair."

The Senate Report adopted a similar definition of fairness and also referred to a recurring theme in the current Inquiry, namely that the practice of enforcement (how the provisions are exercised) can be just as important as the theory (what is in the legislation):

The fairness or otherwise of right of entry provisions may be a matter of the terms of those provisions – whether they adequately balance competing interests and whether they are consistent with generally acceptable principles. [...]

However, fairness is more often a matter of how entry provisions are exercised. A provision may be fair in its terms, but administered in an unfair manner. Or a provision may be 'unfair' in its terms, but administered by the relevant agency in a way that renders it 'fair.'³

The Committee reiterates its view that non-legislative factors such as the training of authorised officers and the enforcement philosophy of the agencies not only impacts on the effectiveness of the powers but also on their consistency and fairness, and continues to draw on examples of the "practice" of enforcement where relevant.

In this Chapter, however, the Committee primarily focuses on statutory and common law protections which accompany the powers.⁴ These protections are an important attribute of inspectors' powers identified in Chapter 1 of this Report. Here, the Committee looks not at whether a particular power of entry, search or seizure is necessary or effective but rather at how the current powers are "balanced" by provisions aimed at protecting the rights of those subject to the powers. This Chapter also explores how the current legislative and common law protections could be improved while ensuring that the power remains workable.

Many of the legislative protections which the Committee examines in this Chapter are based on the principles adopted by the Senate Report. Since most of these principles

² See above discussion and Discussion Paper, p. 42.

³ Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 2000 (6 April 2000), p. 107.

⁴ These protections are an important attribute of inspectors' powers identified in Chapter 1 of this Report.

are aimed at achieving fairness (in the sense of the balance between private and public interests referred to above), an analysis of Victorian legislation based on these principles provides a useful insight into the current level of fairness in the Victorian Acts. However, the principles only provide a starting point for analysis; the aspects of fairness considered in this Chapter do not purport to address all the principles and in some cases go beyond these principles as do the recommendations.

The Committee has selected the following statutory and common law indicators of fairness for further analysis in this Chapter:

- location of powers (primary or subordinate legislation);
- complaints mechanisms and evidence of complaints data;
- reporting mechanisms;
- privilege against self-incrimination;
- legal professional privilege;
- protection of privacy;
- warnings / cautions; and
- search warrants (as a mechanism of protection).

Location of powers: primary / subordinate legislation

According to the Senate Report:

When granting powers to enter and search, Parliament should do so expressly, and through primary, not subordinate legislation.⁵

The Department of Justice comments on why this principle is so important to the notion of fairness:

Here it is made clear that Parliament is the only proper body that may create inspection powers. As such powers involve a fundamental interference with the privacy and liberty of citizens, it is appropriate in a democracy that only the citizens themselves, via their elected representatives, may create such powers. In effect, it is the people themselves limiting their own freedom, such that the autonomy democracy is intended to embody is preserved. The creation of such powers should, therefore, not be delegated to any other body by way of subordinate legislation.⁶

⁵ Senate Report, above note 3, p. 49.

⁶ Department of Justice, Legal Policy, submission no. 26, p. 11.

An examination of Victorian legislation reveals that most Acts already comply with this principle: entry, search, seizure and questioning powers are generally contained in the primary Act.

Some Acts allow regulations to be made on matters ancillary to entry, search and seizure powers. For instance, the *Accident Compensation Regulations 2001* contain the prescribed forms for search warrants under the Act.⁷ *The Trade Measurement Act 1995* allows regulations to be made in relation to:

the positioning of, and access to, measuring instruments in order to facilitate their use for trade, their examination by an inspector or licensee and their verification, re-verification or certification.

However, the Committee notes that sub-sections (i) and (j) of section 80 also appear to allow the Governor in Council to make regulations relating to more substantive matters, namely:

- (i) the provision or taking of samples of measuring instruments and the testing of the samples;
- (j) conditionally or unconditionally conferring specified functions of an inspector on a person who has similar functions under a corresponding law.

The most notable exception to the general rule that coercive powers are contained in the primary Act is the *Health (Infectious Diseases) Regulations 2001*. According to the written submission of the Department of Human Services:

Powers to deal with public health outbreaks have been granted expressly through subordinate legislation. [...]

Regulation 15 of the Regulations gives the Secretary the power to enter premises search for and seize goods without a warrant, if the Secretary to the Department of Human Services believes that an outbreak of infectious disease may occur or has occurred. [...]⁸

The Department of Human Services acknowledged that the powers contained in the *Health (Infectious Diseases) Regulations 2001* should be contained in the *Health Act 1958*:

It is recognised that powers of entry should generally be contained in the principal Act and this issue could be addressed in a review of the Act.⁹

⁷ Regulations 7 and 8 of the *Accident Compensation Regulations 2001*.

⁸ Department of Human Services, submission no. 33, p. 42.

⁹ *Ibid*, p. 41.

Regulation 15 of the *Health (Infectious Diseases) Regulations 2001* may be the most prominent example of powers being contained in subordinate legislation but other health regulations contain relevant provisions too. For instance, *the Health (Pest Control Operators) Regulations 1992* require pest controllers to maintain records which they must produce upon request from the Department.¹⁰

Scrutiny of Regulations and Bills by the Scrutiny of Acts and Regulations Committee (SARC)

The Committee notes that all Victorian regulations are subjected to the scrutiny of the Regulation Review Subcommittee of the Scrutiny of Acts and Regulations Committee. According to the SARC's scrutiny handbook:

The Subcommittee carefully checks regulations against the heads of review contained in section 21 of the *Subordinate Legislation Act 1994* to ensure that they do not unduly trespass on the rights and freedoms of citizens.¹¹

Section 21 of the *Subordinate Legislation Act 1994* allows SARC to report to Parliament if it considers that a statutory rule falls within one of the categories enumerated in that section. These includes statutory rules which:

- (e) contains any matter or embodies any principles which should properly be dealt with by an Act and not by subordinate legislation;
- (f) unduly trespasses on rights and liberties of the person previously established by law;
- (ga) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
- (h) is inconsistent with principles of justice and fairness.

It is worth noting that SARC also considers Bills. Pursuant to section 4D of the *Parliamentary Committees Act 1968*, it is SARC's function to report to Parliament as to whether the Bill:

- (i) trespasses unduly upon rights or freedoms; or
- (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers; or
- (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions; or

¹⁰ Ibid, p. 40.

¹¹ Scrutiny of Acts and Regulations Committee, *Scrutiny Handbook*, 2002, p. 45.

- (iiia) unduly requires or authorise acts or practices that may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000; or
- (iv) inappropriately delegates legislative power; or
- (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny; [...]

The Act also contains other functions which are less relevant to this inquiry and therefore are not set out here.

Conclusion

The Committee acknowledges the important role which SARC plays in ensuring that statutory rules do not unduly infringe the rights of citizens and in making sure that regulations do not contain principles which should properly be dealt with by an Act. However, the Committee considers that it is important that Acts which confer coercive powers on inspectors be subjected to an even greater level of scrutiny, namely to the scrutiny of the Parliament. Regulations are not subjected to the same level of scrutiny as are Acts. As the Scrutiny Handbook produced by SARC notes:

Acts of Parliament are subject to debate by Members of Parliament and require formal approval by both Houses of Parliament before becoming law. Regulations are not subject to any such debate, nor is there any need for the Executive to obtain the approval of Parliament prior to making regulations.¹²

It is therefore important that all primary powers of entry, search, seizure and questioning be contained in the principal Acts rather than in statutory rules. Because of the importance the Committee places on this fundamental principle it recommends that situations where coercive powers are contained in subordinate legislation be identified and that appropriate amendments be made to legislation.

Recommendation 26

That powers of entry, search, seizure, questioning and to require the production of documents only be contained in primary, not subordinate legislation.¹³

¹² Ibid, p. 44.

¹³ This is similar to a Senate Committee principle: Senate Report, see above note 3, p. 49.

Recommendation 27

That the Government examine existing Acts and regulations to identify which provisions granting powers of entry, search, seizure, questioning and to require the production of documents are currently in subordinate legislation, with a view to moving such provisions to the principal Act.

Complaints mechanisms and complaints data

Whether persons affected by the powers of authorised officers have an opportunity to complain about any perceived misuse of those powers is an important element of fairness. Along with reporting requirements which the Committee discusses in the next section of this Chapter, complaints mechanisms help to ensure that agencies and their inspectors are kept accountable to the Community. They are also one of the best means of monitoring the Community perception of the powers and the behaviour of inspectors.

In this section the Committee considers both whether agencies have in place an adequate complaints mechanism (and whether it is required by the legislation) and the evidence on the number and type of complaints received. As required by the terms of reference of this inquiry, the Committee also considers the complaints data of Victoria Police and the Victorian Ombudsman.

Legislative provisions on complaints mechanisms

While many agencies have internal procedures for dealing with complaints, very few are required by legislation to set up such a mechanism.

An exception to the general rule is section 139 of the *Fair Trading Act 1999* which provides:

- (1) Any person may complain to the Director about the exercise of a power by an inspector under this Part.
- (2) The Director must –
 - (a) investigate any complaint made to the Director; and

- (b) provide a written report to the complainant on the results of the investigation.

Consumer & Business Affairs Victoria informed the Committee that there have been no complaints to date pursuant to this section.¹⁴

Complaints data held by the Ombudsman and Victoria Police

The terms of reference require the Committee to consider:

Complaints data relating to the use of such powers (for instance, data held by the Ombudsman, Victoria Police or other government agencies.)

The Committee received evidence that neither the Ombudsman nor Victoria Police maintains separate records in relation to complaints about inspectors and that they receive few complaints about inspectors.

In response to the question as to what complaints data the Ombudsman holds in relation to complaints about the use of inspectors' powers, the Ombudsman, Dr Perry, answered:

Very little. Some of the bodies that have inspection powers are excluded from the jurisdiction of the Ombudsman – for example, the Auditor General, and quite correctly, I submit. So very few bodies that have those powers are subject to the jurisdiction of the Ombudsman. My office receives very few complaints about bodies within jurisdiction using coercive powers. The most common would be complaints about the Department of Natural Resources and Environment and the powers of seizure of its fisheries section, for example, and those types of things. Some of the agricultural bodies have powers of seizure, but again, complaints are very rare. Off the top of my head I would say that the Department of Natural Resources and Environment is probably the one about which most complaints are made.¹⁵

Surprisingly, given the controversy surrounding inspectors' powers in the public transport area, the Ombudsman receives very few complaints in relation to transport issues:

That is initially a matter for the Director of Public Transport; it is his province. If people remain dissatisfied then they may complain to my office, but I get very few complaints in that area.¹⁶

¹⁴ Director of Consumer & Business Affairs Victoria, submission no. 32, p. 1.

¹⁵ Dr Perry, *Minutes of Evidence*, 12 December 2001, pp. 20-21.

¹⁶ *Ibid*, p. 21. (In a later conversation with the Office of the Victorian Ombudsman, the Committee staff was told that only one complaint which related to the alleged misconduct of inspectors or misuse of their powers had been received in the last two years. However, there had been a small number of

Similarly Victoria Police holds no data specifically relating to the powers of inspectors and commented that they receive few complaints. Commander Hornbuckle commented:

At the end of the day the complaints that are made about the behaviour of inspectors would be likely to end up with the Ombudsman. I would expect that that office would maintain records of complaints.¹⁷

Accordingly, Victoria Police does not have any complaints data in relation to inspectors:

If a complaint is made alleging a crime, for example an Inspector has assaulted a person, police will investigate that criminal allegation. Unfortunately the Force is not able to provide statistics to the Committee in regard to the number of these investigations that are conducted. Matters, such as these are reported in an ad hoc fashion usually by the complainant or occasionally by the Government Department the Inspector works for. Anecdotal advice indicates that the frequency of such complaints is not high.¹⁸

Agencies' complaints mechanisms and complaints data held by agencies

Although rarely required to do so by legislation, most agencies who gave evidence on this issue have an internal complaints mechanism for investigating complaints about the conduct of their inspectors. However, most agencies stated that they received few complaints on this issue. While this is pleasing, the Committee has concerns about how well publicised and transparent these internal mechanisms are to the individuals who are subject to coercive powers. This concern was often not addressed by the agencies.

However, one agency – the Office of the Chief Electrical Inspector (*OCEI*) – which appeared to have one of the more extensive complaints mechanisms, acknowledged that its agency was unsure as to how well known the complaints mechanism is.

In its written submission the OCEI commented:

complaints indirectly involving inspectors (such as nuisance complaints where authorised officers had inspected the alleged source of nuisance): telephone conversation with Bob Seamer, 4 March 2002.

¹⁷ Commander Hornbuckle, *Minutes of Evidence*, 13 December 2001, p. 94.

¹⁸ Victoria Police, submission no. 21, p. 3.

Any person can complain in writing, telephone, facsimile or email. The available complaints procedure is in place and all complaints are logged through the OCEI's service centre and Communications Register Computer system. [...]

The OCEI's complaint procedure is advertised on the OCEI's website, however, there is currently no measure in place to determine whether the public and industry understands the process or how well known it is. This will be included in future customer surveys.¹⁹

Just as a little known complaints mechanism can lead to a small number of complaints, the Department of Human Services also acknowledged that an inadequate complaints system can affect the number of complaints.²⁰ However, the DHS believes that its own system is adequate, noting that there were a number of options open to members of the public who wished to complain about the conduct of an inspector under one of the Health Acts. Such persons could take their complaints to the Ombudsman, the Secretary of the Department or to the Manager of the inspector. Some Acts also allow for judicial review in VCAT.²¹

In relation to the number of complaints received, Ms Foy told the Committee:

Generally we do not get many complaints either because we do not have sufficient complaints mechanisms, which I do not think is the case, or receive many complaints. Investigations result in prosecutions, but I cannot recall a prosecution in three years where we have been admonished by a court, or any reference has been made to improper use of our powers.²²

The Department of Natural Resources and Environment also appeared satisfied with its internal complaint mechanisms when its representatives gave evidence before the Committee:

The complaint will either come into the Minister's office or the Secretary's office. Generally in the animals area I would look at the basis of the complaint and give advice to senior management on what were the issues, what was the basis for the complaint, what needs to be done or does not need to be done to address the problems; and if it went to the Ombudsman, he would write to the secretary and I would have to provide advice up to the Secretary on what had happened in that particular instance.²³

In a follow-up response to the Committee about whether the Department has a complaints data system the DNRE stated:

¹⁹ Office of the Chief Electrical Inspector, submission no. 31, p. 7.

²⁰ D. Foy, *Minutes of Evidence*, 12 December 2001, p. 7.

²¹ *Ibid*, p. 6.

²² *Ibid*, p. 7.

²³ Dr Galvin, *Minutes of Evidence*, 12 December 2001, p. 55.

NRE does not have a single data system for complaints about inspectors' powers. Complaints and other comments about the exercise of inspectors' powers are dealt with administratively and in a variety of ways depending on the nature of the complaint.²⁴

The submission goes on to describe four ways of making a complaint, namely:

- telephone calls and emails (by means of the Department's internet web site);
- letters;
- complaints to the Ombudsman;
- other contexts (e.g. Freedom of Information requests).²⁵

The State Revenue Office commented both on its complaints mechanism and on the number of complaints it received:

We are required to record and deal with all complaints against officers from an internal operating perspective in terms of our ISO certification. We have a compliment and complaint register where a balance of not only complaints but compliments of the activities of our staff are recorded. The suggestion of impropriety by a member of staff is immediately investigated by a senior officer, if not at an executive level or close to the executive level.

We do not receive many complaints and, fortunately, I can say that in the two and a half years that I have been responsible for the division none has been substantiated, but there will be general complaints, particularly where officers are involved in the use of coercive power in situations where a great deal of money is involved. There is no love lost in some of the exchanges, but that is part of the normal cut and thrust of investigation activity.²⁶

The Public Advocate told the Committee that:

We have a published complaints process, which is a leaflet we give to people to tell them how to complain; and internally we keep what we call a complaints register. For every complaint that comes in we have a one-page, quick summary, which I keep primarily so we can look at it to see if there are any lessons to be learnt for quality improvement.²⁷

One agency which recognised that its internal complaints mechanism might be deficient was the Victorian Workcover Authority:

I am not saying the Authority has always been perfect, so some of the things we have done: we have, as I was explaining in another place today, begun the development of

²⁴ Department of Natural Resources and Environment, submission no. 22S, p. 3.

²⁵ Ibid.

²⁶ P. Hiland, *Minutes of Evidence*, 12 December 2001, p. 71.

²⁷ J. Gardner, *Minutes of Evidence*, 13 December 2001, p. 147.

a centralised complaint management system. We have not had that centralised complaint management system in the organisation and that is something we are putting in place.²⁸
[...]

[In terms of] a formal complaints mechanism, as I said to you, we do get complaints: they come through me, Ministers and Members of Parliament, and we take them seriously. What we don't do enough of is actually make sure that we are monitoring them and really understanding what is driving them so we can actually fix them at the source. [...] I would say to you that certainly something that is on our agenda this year as an organisation is really making sure that, as part of moving towards being more customer-oriented, we actually start off by knowing what are the things that are bugging customers [...] now.²⁹

Conclusion

In general, the evidence the Committee received suggested that agencies are aware of the importance of a complaints mechanism and have internal procedures in place to deal with complaints and, in some cases, to monitor the progress of complaints directed to outside agencies such as the Ombudsman. However, there appeared to be little consistency between the various procedures and the Committee is not satisfied that such mechanisms are sufficiently clear and well-known by members of the public and organisations subject to the coercive powers.

While the Committee commends the efforts by most agencies and other organisations with inspectors' powers to set up internal complaints mechanisms even where this is not required by the legislation, it considers that, for the sake of transparency and consistency, the requirement for such mechanisms should be enshrined in the legislation rather than be left as a matter of "internal procedure."

To ensure that certain minimum standards are being set and that there is a greater level of consistency in the training programs currently offered by government agencies and other organisations with inspectors' powers, the Committee considers that the Government standards unit referred to in Recommendation 23 could formulate standards for internal complaints mechanisms.

The Committee also recognises the advantages of an effective outside body, independent of the agencies, which can investigate complaints about inspectors. To some extent such bodies already exist in the form of the Ombudsman and, to a lesser

²⁸ B. Mountford, *Minutes of Evidence*, 21 February 2002, p. 236.

²⁹ *Ibid*, pp. 237-238.

extent, Victoria Police. However, the Committee is not convinced that those subject to inspectors' powers are sufficiently aware of their right to complain. It also notes that neither of these bodies maintain separate data in relation to such complaints. The Committee believes that the transparency and reporting mechanisms of these external complaints options should be improved.

One way of doing this would be to establish and fund a special unit within the Office of the Victorian Ombudsman for investigating complaints about inspectors. Alternatively, improvements could be made within the current structure of the Ombudsman. Such improvements could include:

- maintaining separate data in relation to complaints received about inspectors;
- reporting specifically on complaints;
- conducting a public awareness campaign of the right to complain about the misuse of inspectors' powers.

The Committee believes that this issue needs to be considered further.

Recommendation 28

That the requirement for internal complaints mechanisms relating to inspectors' powers be enshrined in legislation.

Recommendation 29

That the standards unit within Government set minimum standards for internal complaints mechanisms.³⁰

Recommendation 30

That the Government give consideration to improving the transparency and effectiveness of the Victorian Ombudsman for complaints about inspectors.

³⁰ See recommendation 23.

Related issue: reporting mechanisms

A related matter relevant to the fairness and transparency of the powers of authorised persons is whether there is any requirement to maintain records of and report regularly on the use of the powers. This issue is reflected in the Senate principle which reads as follows:

Each agency which exercises entry and search powers should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.³¹

Legislative Provisions on the maintenance of records and reporting mechanisms

Just as few Victorian Acts specifically provide for complaints mechanisms for complaints about inspectors' powers, few Acts require agencies to report on the use of the powers. Exceptions to this general rule are the *Electricity Safety Act 1998* and the *Fair Trading Act 1999*. The relevant provisions of these Acts are extracted below.

Section 128 of the *Electricity Safety Act 1998*:

- (1) If an enforcement officer exercises a power of entry under this Division, the enforcement officer must report the exercise of the power to the Electrical Appeals Board in accordance with the regulations.
- (2) The Electrical Appeals Board must keep a register containing the prescribed particulars of all matters reported to it under this section.

Sections 137 and 138 of the *Fair Trading Act 1999*

Section 137 Entry to be reported to the Director

- (1) If an inspector exercises a power of entry under this Part, the inspector must report the exercise of the power to the Director within 7 days after the entry.
- (2) The report must include all relevant details of the entry including particulars of—
 - (a) the time and place of the entry; and
 - (b) the purpose of the entry; and
 - (c) the things done while on the premises, including details of things seized, samples taken, copies made and extracts taken; and
 - (d) the time of departure from the premises.

³¹ Senate Report, above note 3, p. 54.

Section 138 Register of exercise of powers of entry

The Director must keep a register containing the particulars of all matters reported to the Director under section 137.

Agencies' views on the requirement to maintain a register of and report on the powers

Few agencies or other witnesses specifically addressed this issue. Those that did were divided about whether agencies should be required to maintain a register of and report on inspectors' powers.

The Department of Human Services expressed misgivings about introducing any requirement to report on the use of the powers. In fact, the DHS was quite open in its rejection of Principle 10.1 (as it was numbered in the Discussion Paper) and outlined its reasons as follows:

DHS does not support Principle 10.1. It is impractical given that search and entry powers are exercised by local council authorised officers as well as DHS authorised officers. It is also impractical given the number of times the search and entry powers are relied on for routine inspections. To comply with this Principle would involve a significant commitment of resources for DHS.³²

It is possible that a number of agencies with monitoring powers which are used on a regular basis would concur with the DHS on this issue.

For instance, the Victorian Casino and Gaming Authority also queried the necessity of reporting to Parliament and pointed out that any logging process of the use of powers would have to take account of the fact that these powers were used on a daily basis:

The next [...] point was the issue of public reporting to Parliament on the use of inspectors' powers. It needs to be kept in mind in the exercise of the powers and the functions of inspectors that their role is not simply responding to a complaint. In effect it is a daily monitoring of the industry. The inspectors are in the field [...]³³

Other objections raised included that current internal reporting procedures are adequate and that more formal, legislative reporting processes would be superfluous and that agencies may already report on the number of inspections undertaken in their

³² Department of Human Services, submission no. 33, p. 8.

³³ B. Forrest, *Minutes of Evidence*, 22 February 2002, p. 251.

annual reports to Parliament. The Victorian Workcover Authority raised these misgivings, stating that:

Given the processes and procedures that the VWA has and is putting in place to register, co-ordinate and monitor complaints, investigations and outcomes, we do not see the added value of creating a new and separate process of specifically reporting to Parliament on the exercise of inspectors' and investigators' powers.³⁴

The Authority also pointed out that:

Through its Annual Report, the VWA already reports to Parliament the number of Worksafe inspections undertaken, the numbers of improvement or prohibition notices issued and the number and outcome of prosecutions brought by the VWA.³⁵

A concern of a different nature was raised by the Victorian Privacy Commissioner. On the one hand, the Commissioner supports the “administrative clarity and accountability” implicit in Senate principle 10.1, stating that:

Reports to Parliament are especially valuable. Tabling of reports should be compulsory and not a matter of ministerial discretion.

However, Privacy Victoria's written submission urges the Committee to consider how detailed the records should be. The level of detail involves a balancing exercise between the degree of openness required for proper accountability against the need to protect individual privacy.³⁶ The submission goes on to recommend the techniques of de-identification of statistics and case studies:

Where the raw, identifiable data is retained, it should not be aggregated. Keeping it in separate databases and even separate agencies can assist security. Where identifiable data is aggregated, security should be tight and access strictly controlled. For example, intrusions that resulted in the seizure of documents and property may be distinguished from those intrusions that resulted in nothing warranting further action.

One way to establish accountability without aggregating all the data may be to establish procedures for an independent audit of the information collected about use of the intrusion powers and procedures.³⁷

In contrast, other witnesses had no objection to maintaining registers and reporting on the powers. Pursuant to section 128 of the *Electricity Safety Act 1998* cited above, the Office of the Chief Electrical Inspector (*OCEI*) is required to provide a report to the Electrical Appeals Board each time the power of entry for the purpose of monitoring

³⁴ Victorian Workcover Authority, submission no. 41, p. 2.

³⁵ *Ibid*, p. 3.

³⁶ Victorian Privacy Commissioner, submission no. 38, p. 18.

³⁷ *Ibid*.

compliance is exercised. In its written submission the OCEI states that it has no objection to the recording and reporting of such powers with the caveat that:

(R)eporting of the use of powers in a public arena (annual report or other means) should not occur until any action (prosecution, finalisation of an infringement notice or a Committee of Inquiry) is finalised and no further action is possible or required.³⁸

Similarly, the Victorian Abalone Divers Association supported the idea of maintaining centralised records of the use of inspectors' powers:

VADA agrees that each agency should keep centralised records of numbers and types of warrants sought, the success of the application, and number of warrants executed. Apart from being available for accountability purposes, such information will be valuable for the agency to guide its officer training by focussing the training on specific areas.³⁹

In its written submission VADA expressed doubt about the introduction of any requirement that agencies report to Parliament. However, when asked to elaborate on their opposition to reporting to Parliament in the public hearing, VADA's representatives indicated that they would have no objection.⁴⁰

Conclusion

The Committee notes the comments of agencies whose inspectors monitor compliance on a daily basis that reporting on every entry could be onerous. However, the Committee considers that the collection of gross statistics and reporting of overall figures of usage rather than the details of every case, should not be an impossible or overly costly task. Accordingly, the Committee agrees with the relevant Senate principle that every agency should maintain a centralised record of every occasion on which those powers are exercised.

Similarly, the Committee considers that agencies should report annually to Parliament on the exercise of those powers, including comments and data on, among other things, the use of the powers and any complaints received. In so doing, the agencies should ensure that any statistics used are de-identified and that identifiable data is not

³⁸ Office of the Chief Electrical Inspector, submission no. 31, p. 13.

³⁹ Victorian Abalone Divers Association, submission no. 20, p. 7.

⁴⁰ D. Fitzpatrick, *Minutes of Evidence*, 21 February 2002, p. 184. Mr Fitzpatrick's exact words were: "I have no objection to that sort of process, I don't think. I am quite neutral about it, really. It is not something that we have strong views about."

aggregated, or if it is, the agency should ensure that the appropriate security arrangements are in place.

The burden on agencies in producing such a report could be reduced if a Chapter on specified aspects of inspectors' powers were required to be incorporated into the annual reports most agencies already provide to Parliament. The Committee notes that some agencies do this already, although they may not report on all relevant aspects of inspectors' powers.

Recommendation 31

That agencies be required to collect and maintain records of figures of usage of the inspectors' powers they administer.

Recommendation 32

That agencies be required to report to Parliament annually, preferably as part of their Annual Report, in relation to the use of inspectors' powers and complaints received.

Recommendation 33

That the government consider what information should be contained in the report and issue guidelines to agencies on this matter. The Committee recommends that the report on this issue include information and, as far as practicable, statistics on the following matters:

- ***the incidence of the use of inspectors' powers;***
- ***number of complaints against inspectors received and whether they were resolved, are still pending etc;***
- ***information on the type of complaints received (by use of case studies); and***
- ***statistics on penalty infringement notices and or prosecutions launched by the agency.***

Privilege against self-incrimination

When asked about the Criminal Bar Association's view of the abrogation of the privilege against self-incrimination in some statutes, Stephen Shirrefs replied:

We are fundamentally against it because the right to silence⁴¹ is, in the view of the committee, a fundamental right that we all have, although it is clear in recent years in various pieces of legislation, both state and commonwealth, that that privilege has been abrogated, not entirely but in part. It is an area of concern to us, but I can understand perhaps why in certain areas of investigation, and perhaps also in certain areas of industry, why the move is heading in that direction. It is a question of what protection to put in place.⁴²

As the above quotation indicates, the protection of the privilege against self-incrimination, which seeks to ensure that a person cannot be compelled to testify or produce documents or other evidence which tends to incriminate that person,⁴³ is regarded as an important indication of fairness in inspectors' powers provisions. It is also an aspect of fairness which is specifically referred to in the terms of reference for this inquiry which require the Committee to have regard to:

the power to question any person or to require a person to provide any documents (and the extent to which that person may rely upon the privilege against self-incrimination).

In this section the Committee considers the main categories of statutory provisions concerning the privilege against self-incrimination. Once again, the Committee's analysis of Victorian Acts reveals very little consistency or clarity. Part of the reason for the lack of clarity is that the privilege against self-incrimination is a common law principle and, accordingly, statutes are often silent or incomplete in relation to the privilege. The Committee will consider the judicial interpretation of common statutory provisions later in this section.

⁴¹ The right to remain silent and the privilege against self-incrimination are related rights and are sometimes used interchangeably – including by witnesses in this Inquiry. Case law has established that, in the absence of specific statutory questioning powers, there is no obligation to answer questions or to produce documents requested by an executive agency (ie there is a right to remain silent at common law). A statute which gives an agency questioning powers effectively abrogates the right to silence – or at least in relation to areas of inquiry specified in the Act – but an individual may still be able to rely on the privilege against self-incrimination – see *Pyneboard Pty Ltd v Trade Practices Commission (1983)* 152 CLR 328 at 351, cited below at note 47. The approach of Courts to this issue is explored in this section.

⁴² S. Shirrefs, *Minutes of Evidence*, 22 February 2002, pp. 262-263.

⁴³ See Leaver A, *The Laws of Australia, Investigation by Independent Agencies* (looseleaf), 1996, p. 49.

Statutory provisions

As mentioned in the Committee's Discussion Paper for this inquiry, there are at least five broad approaches in the legislation to the privilege against self-incrimination, namely:

- statutes which preserve the privilege in relation to both the power to question and to require the production of documents;
- statutes which preserve the privilege in relation to questions but abrogate it in relation to the production of documents (but may provide that documents cannot subsequently be used in criminal proceedings if the privilege is raised – this is known as a “use immunity” provision);
- statutes which abrogate the privilege for both questioning and documents (but may contain a use immunity provision.);
- statutes which do not refer to the privilege; failure to comply will attract a penalty unless there is a “reasonable excuse;”
- statutes which do not refer to the privilege; failure to comply will attract a penalty (and there is no mention of “reasonable excuse”);

Each of these categories will be considered in turn below.

Privilege specifically preserved in relation to both powers

A few of the Acts examined specifically preserve the privilege in relation to both the power to question and to seize or require the production of documents.

For instance section 137 of the *Electricity Safety Act 1998* provides:

A natural person may refuse or fail to give information, produce a document or do any other thing that the person is required to do by or under this Part if the giving of the information, the production of the document or the doing of that other thing would tend to incriminate the person.

The content of section 83A of the *Marine Act 1998* is similar although the wording of the provision is quite different:

- (1) A person must not-
 - (a) without reasonable excuse, refuse or fail to comply with a request or requirement made by an inspector in the course of conducting an investigation under section 82; or
 - (b) give information under section 83 that the person knows to be false or misleading in a material particular.

Penalty: 10 penalty units.

- (2) It is a reasonable excuse for a natural person to refuse or fail to give information, produce a document or do any other thing that the person is required to do by or under section 83 if the giving of the information, the production of the document or the doing of that other thing would tend to incriminate the person.

Section 84 of the *Catchment and Land Protection Act 1994* is another example of a provision which specifically preserves the privilege in relation to both powers:

- (2) Despite anything to the contrary in sub-section (1) a person may refuse to answer an authorised officer's question or to produce a document to the authorised officer if the person believes that the answer or information in the document would tend to incriminate the person.

Privilege retained for questions but abrogated for documents

Like section 83A of the *Marine Act 1998*, section 133(1) ("Protection against self-incrimination") of the *Fair Trading Act 1999* draws a link between reasonable excuse and the privilege against self-incrimination. However, unlike the *Marine Act 1998*, section 133 abrogates the privilege in relation to the production of documents by providing that a refusal to produce such documents on the grounds of the privilege will not be a "reasonable excuse."

Section 133 provides:

- (1) It is a reasonable excuse for a natural person to refuse or fail to give information or do any other thing that the person is required to do by or under this Part, if the giving of the information or the doing of that other thing would tend to incriminate the person.
- (2) Despite sub-section (1), it is not a reasonable excuse for a natural person to refuse or fail to produce a document that the person is required to produce by

or under this Part, if the production of the document would tend to incriminate the person.

The wording of section 108(1)(a) of the *Casino Control Act 1991* is quite different but it has the same effect: the privilege is preserved for questioning but would appear to be abrogated in relation to the requirement to produce documents. The provision allows inspectors to:

require any person in possession of, or having control of, any gaming or betting equipment or records to produce the equipment or records for inspection and to answer questions or provide information relating to equipment and records.

However, section 109(5) preserves the privilege only in relation to the questioning power:

A person is not required by this section to answer a question which might incriminate the person.

The conclusion that the Act preserves the privilege in relation to the questioning power only is supported by the offences provision (section 110). Section 110(1)(b) makes it an offence to fail to produce for inspection any gaming or betting equipment or records in the possession, or under the control, of the person when required to do so. This requirement does not appear to be modified in any way.

In contrast, section 110(c) makes it an offence to fail without reasonable excuse to attend before an inspector and answer questions or supply information. While the judicial interpretation of reasonable excuse is uncertain, section 109(5) confirms that the privilege applies to questioning.

Privilege is abrogated for both questions and the production of documents

There are some Acts which specifically abrogate the privilege in relation to both the power to question and to require the production of documents.

Section 55(3E) *Environment Protection Act 1970* is a case in point. That section provides:

A person upon whom a notice is served under sub-section (3D) shall not be entitled to object to *furnishing any information or making any statement* as required by that notice on the ground of self-incrimination.

Moreover, section 55(5) makes it an offence to obstruct or fail to comply with any requirement made by an authorised officer. The section makes no reference to “reasonable excuse” and the penalty is substantial: 240 penalty units or 6 months’ imprisonment or both.

While worded differently, section 66 of the *Trade Measurement Act 1995* also abrogates the privilege against self-incrimination in relation to both powers. However, this Act as well as the *Motor Car Traders Act 1986* cited below ameliorate any adverse impact on individuals by inserting a “use immunity” provision which is quite common in Acts which abrogate the privilege. “Use immunity” provisions provide that answers given or documents provided cannot be used in any subsequent criminal proceedings against the individual who was forced to comply with the requirements in abrogation of the privilege against self-incrimination.

Trade Measurement Act 1995, section 66:

- (1) A person is not excused from answering any question or producing any record, if required to do so under this Part, on the ground that the answer or record might tend to incriminate the person or make the person liable to a penalty.
- (2) An answer given or document produced by a person in compliance with a requirement of this Part is not admissible against the person in any criminal proceedings other than proceedings for an offence under section 73.

Section 82AS of the *Motor Car Traders Act 1986*

- (1) A person is not excused from answering a question or producing a document under this Division on the ground that the answer or document might tend to incriminate the person.
- (2) If the person claims, before answering a question, that the evidence might tend to incriminate them, the answer is not admissible in evidence in any criminal proceedings, other than in proceedings in respect of the falsity of the answer.

There is no reference to privilege. Failure to comply will attract a penalty unless there is a “reasonable excuse.”

Section 76(2) of the *Domestic (Feral and Nuisance Animals) Act 1994* is an example where “reasonable excuse” is defined and appears to incorporate the privilege against self-incrimination (although the Committee notes that this is not clear because the wording of the provision does not specifically refer to the privilege against self-incrimination.) Section 76(2) provides as follows:

It is a reasonable excuse for a person to refuse or fail to answer an authorised officer's question or to give information, produce a document or do any other thing that the person is required to do under this Act when the requirement is made by an authorised officer or any other person in authority for the purpose of determining whether the person who has refused or failed to answer has committed an offence.

More typical of "reasonable excuse" provisions is section 111 of the *Fisheries Act 1995* which refers to reasonable excuse as a defence for not complying with section 102 (requirement to produce documents upon request) and to section 103 (requirement to give assistance to authorised officers.) "Reasonable excuse" is not defined in this Act.

Another Act with a broadly similar provision is section 241(b) of the *Accident Compensation Act 1985* which provides:

A person shall not –

- (b) without reasonable excuse, refuse or fail to comply with a requirement made by a person exercising powers under section 239 [power to obtain information and evidence] and section 240 [powers of inspection].

There is no reference to the privilege or to "reasonable excuse." Failure to comply may attract a penalty

A number of Acts contain neither a reference to the privilege against self-incrimination nor to "reasonable excuse." Where such Acts make it an offence to fail to comply, it can be assumed that the privilege is abrogated.

For instance, there is no reference to the privilege against self-incrimination or "reasonable excuse" in the *Occupational Health and Safety Act 1985*. Pursuant to section 42(1)(c) failure to produce any document requested under the Act or the regulations is an offence. Failure to answer questions is not specifically mentioned in the "Offences in relation to inspections" provisions in section 42, although section 39(1)(d) allows inspectors to make "such examination and inquiry as may be necessary to ascertain whether or not this Act or the regulations have been complied with."

Similarly, the *Food Act 1984* refers neither to the privilege nor to a "reasonable excuse." Section 29(e) makes it an offence to contravene or fail to comply with any

lawful direction or order of an authorised officer (and section 29(h) makes it an offence to fail to state a name and address or to state a false name or address). It would seem that a “lawful direction” can include questioning and the requirement to produce documents; for example section 21(1)(a)(I) allows inspectors to “make such investigation and enquiry as are necessary to ascertain whether the provisions of this Act are being complied with.”

Other provisions which make no reference to the privilege or reasonable excuse include the *Health Act 1958*⁴⁴ and the *Liquor Control Reform Act 1998*.⁴⁵

Given the Committee’s conclusions about the need for inspectors’ powers provisions to be contained in the principal Act, the Committee is concerned to note that the privilege against self-incrimination is abrogated in the *Health (Infectious Diseases) Regulations 2001*. Regulation 15(1)(b) authorises the Secretary to direct certain persons to give information; regulation 15(2) provides that there is a penalty for failure to comply with any written direction. As the written submission of the Department of Human Services notes, “to this extent, the privilege against self-incrimination is modified by the regulations.”⁴⁶

The common law

At common law, there is no obligation to answer questions asked by an executive agency or to produce documents requested by an executive agency [this is commonly known as the right to silence]. But if the legislature chooses to arm the Executive with a power of compulsory interrogation – and the frequency with which the Executive is armed with such powers appears to be increasing – it is the function of the courts to ascertain the extent of the power and to determine, by construing the

⁴⁴ However, section 406(3) makes it an offence to refuse to comply with the provisions of that section (which refers to the production of books only). In relation to the *Health Act 1958* the Department of Human Services writes: “There is no general power to require the production of documents in the Health Act. However, section 406(1)(b) allows the Secretary to make or cause to be made copies or extracts from books relating to the store records or the reception possession or delivery of prohibited drugs. A person who fails to comply is guilty of an offence (section 406(s)). To this extent the Act impliedly modifies the privilege against self-incrimination in relation to the production of documents.” Department of Human Services, submission no. 33, p. 40.

⁴⁵ Section 133 contains a penalty for, inter alia, failing to comply with a request under sub-section (1)(d) which refers to the power to require the production of documents and to answer questions with respect to such documents or the supply and purchase or storage of liquor. Neither the privilege against self-incrimination nor “reasonable excuse” are mentioned.

⁴⁶ Department of Human Services, submission no. 33, p. 42. The following comment in the submission may be seen as a justification for the power (and impliedly the abrogation of the privilege): “This power is used to carry out the very important work of Public Health in tracing contacts of persons with certain infectious diseases (e.g. sexually transmissible infectious diseases). These powers have contributed to the success of limiting the transmission of HIV/AIDS in Victoria.”

language which the legislature has used, whether the power is qualified by a privilege against self-incrimination.

*(Pyneboard Pty. Ltd v Trade Practices Commission, per Brennan J)*⁴⁷

As the analysis of Acts and the above citation taken from the leading case of *Pyneboard*⁴⁸ indicates, the privilege against self-incrimination is not absolute and can be modified by the legislature. However, as we have seen, legislative provisions on inspectors' powers are often silent or unclear on the operation of the privilege. In order to determine the extent to which individuals can rely on the privilege, therefore, it is necessary to examine the common law on the privilege against self-incrimination in the inspectors' powers context. The section does not purport to give an exhaustive analysis of every aspect of the privilege but rather focuses on the following questions:

- introduction to the privilege as a common law right, rather than as a mere rule of evidence which can be relied on in court.
- When will the privilege be held to be abrogated?
- Does “reasonable excuse” include the privilege against self-incrimination?

Common law right not rule of evidence

Historically, the privilege against self-incrimination was limited to an evidentiary role, applicable only to witnesses testifying at trial. In this context it was viewed as a fundamental concept of the adversarial system, representing an “unequivocal rejection of an inquisitorial approach.”⁴⁹ The privilege is still most commonly claimed in judicial proceedings.⁵⁰ However, as the investigative role of agencies has increased, the privilege has extended to most forms of compulsory examination including executive inquiries and quasi-judicial proceedings.⁵¹ In one of the most recent High Court decisions on the issue it was held that:

The rule of the common law *nemo tenetur seipsum accusare* is seen as too fundamental a bulwark of liberty to be categorized simply as a rule of evidence applicable to judicial and quasi-judicial proceedings.⁵²

⁴⁷ *Pyneboard Pty. Ltd. v Trade Practices Commission* (1983) 152 CLR 328, p. 351.

⁴⁸ *Ibid.*

⁴⁹ Deane, Dawson & Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, p. 532.

⁵⁰ Thus, it is often referred to as an evidentiary rule such as in Legal Policy, Department of Justice, submission no. 26, p. 27.

⁵¹ *Caltex*, above note 49, p. 527.

⁵² *Pyneboard Pty Ltd v Trade Practices Commission*, above note 47, p. 340 (per Mason, Wilson and Dawson JJ). This was confirmed in *Sorby v the Commonwealth* (1983) 152 CLR 281, in which

The High Court has also categorised the privilege as part of the common law of human rights⁵³ as the relevant article of the International Covenant on Civil and Political Rights has been adopted by the *Human Rights and Equal Opportunity Act (1986) (Cwth)*.

The privilege against self-incrimination is thus a “deeply ingrained” common law right, rather than merely a rule of evidence.⁵⁴

Subject to statutory modifications it is generally accepted that the privilege can apply to administrative inquiries for natural persons⁵⁵ (but, notably, not for corporations.)⁵⁶

Abrogation of the privilege against self-incrimination

As the above analysis of the Acts revealed, many Acts do not specifically refer to the privilege or use vague concepts such as “without reasonable excuse.” In order to determine whether the privilege applies in such cases or whether it is abrogated, regard must be had to the common law. Accordingly, in this section the Committee examines the judicial interpretation of the privilege in the inspectors’ powers context.

In *Sorby v The Commonwealth*⁵⁷ Brennan J cited with approval the quotation by Younger J in *Re Jordison; Raine v Jordison*.⁵⁸

Courts are bound to presume that Parliament intended to give effect to a fundamental principle of law which the statute does not exclude and which would otherwise apply to the subject matter, though the strength of the presumption depends upon the subject-matter of the statute.⁵⁹

Mason, Wilson and Dawson JJ held: “We reject the submission that the privilege is merely a rule of evidence applicable in judicial proceedings and that it cannot be claimed in an executive inquiry. We adhere to the conclusion we expressed in *Pyneboard* [...] that the privilege against self-incrimination is inherently capable of applying in non-judicial proceedings”: p. 309.

⁵³ Per Murphy J in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, p. 394 and per all judges in *EPA v Caltex Refining Co Pty Ltd*, above note 49.

⁵⁴ *Sorby*, above note 52, p. 309.

⁵⁵ *Sorby*, above note 52; *Donovan v CMRR of Taxation* (1992) 34 FCR 355; Leaver, above note 43, p. 49.

⁵⁶ *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, *Sorby*, above note 52. See also *Evidence Act 1995 (Cwth)*, section 187.

⁵⁷ *Sorby*, above note 52.

⁵⁸ *Re Jordison; Raine v Jordison* (1922) 1 Ch 440.

⁵⁹ *Ibid*, p. 465.

It is thus clear that the privilege against self-incrimination exists at common law unless it is specifically abrogated by the statute. The authority suggests that generally the privilege must be abrogated in express terms or in “unmistakable language.”⁶⁰

It could be argued that statutes which are silent as to privilege or which refer to “reasonable excuse” do not abrogate the privilege in “unmistakable language.” Yet Courts have held that, where statutes are silent, the privilege may nevertheless be *implicitly abrogated*. In other words, express words of exclusion may not be necessary.⁶¹ In such cases it will be necessary to refer to the purpose of the legislation or to whether there is any other section which “necessarily implies” that the legislature intended to exclude the privilege. The Committee briefly examines each of these possibilities of abrogation in turn below.

Abrogation by reference to the purpose of the legislation

Kitto J articulated the policy grounds for the abrogation of the privilege even where there are no specific words of exclusion, when he commented that to allow the privilege in some circumstances could “render the provision relatively valueless in the very cases which call most loudly for investigation.”⁶²

The *Commissioner of Taxation v De Vonk* is an illustration of a case where the privilege would “totally stultify” the purpose of a statute and was thus deemed to be abrogated. In that case, the Commissioner's power to interrogate a taxpayer about sources of income was designed to discover whether the taxpayer had complied with tax return obligations. The Court held that allowing the privilege to operate in such circumstances would frustrate the basis of the legislation.⁶³

Abrogation by “necessary implication”

Even where the purpose of a particular provision is not clear, the privilege may be abrogated by “necessary implication” when the section is read in context with the rest of the Act.⁶⁴ There is a considerable amount of case law on the meaning of “necessary

⁶⁰ See, for instance, *Sorby*, above note 52, per Murphy J, p. 311.

⁶¹ See Gibbs CJ in *Sorby*, above note 52, p. 289.

⁶² *Mortimer v Brown* (1970) 122 CLR 493, p. 496.

⁶³ *Commissioner of Taxation v DeVonk* (1995) 61 FCR 564.

⁶⁴ *Sorby*, above note 52, per Gibbs CJ; *The King v Associated Northern Collieries* (1910) 11 CLR 738 per Mason, Wilson and Dawson JJ.

implication.” Two examples which commonly appear in the inspectors’ powers provisions include:

- Use immunity provisions

In the leading High Court case of *Sorby v The Commonwealth*, Mason, Wilson and Dawson JJ found that “use immunity” provisions (described earlier in this section) could have no purpose other than to protect the witness from the consequences of the abrogation of the privilege.⁶⁵

- Where the statute has offences for obstructing an authorised officer.

In *Environment Protection Authority v Caltex Refining Co Pty Ltd*⁶⁶ such a provision was interpreted as an adequate abrogation of the privilege.

Other examples where Courts have held that the privilege may be impliedly excluded by “necessary implication” include:

- where the:

obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification;⁶⁷

and, more controversially:

- where a witness’s claim of privilege would necessarily have to be determined by a legally unqualified person. As the majority judgement in the *Pyneboard* case states:

That the privilege is impliedly excluded in such circumstances is a conclusion which, as we have noted, may be more readily drawn where the obligation to answer questions or provide information does not form part of an

⁶⁵ *Sorby*, above note 52, but note that Gibbs CJ and Murphy J dissented on this point.

⁶⁶ *EPA v Caltex Refining Co Pty Ltd*, above note 49.

⁶⁷ *Pyneboard*, above note 47, p. 342. The majority judgment goes on to note: “This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of person who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation.”

examination on oath. The obligation to give an answer not on oath at an executive inquiry provides an illustration.⁶⁸

It is clear from the above that the circumstances in which the privilege can be held to be abrogated by implication are many and varied, a situation which does not provide a great deal of certainty to either agencies or those subject to inspectors' powers. The judicial interpretation of "reasonable excuse" is similarly inconsistent.

Reasonable excuse – a preservation of the privilege?

As the Committee has noted in the first part of this section, the term "reasonable excuse" is often referred to in Victorian legislation.

The term is sometimes defined but it has varying meanings. A few Acts specifically provide that the defence of "reasonable excuse" includes the privilege against self-incrimination (section 133 of the *Fair Trading Act 1999* cited above is an example). Other Acts contain quite different definitions of reasonable excuse. For example, section 397 of the *Co-operatives Act 1966* provides that a reasonable excuse for refusing to give information is where a person is not aware that the information was false or misleading. Section 82G of the *Magistrates' Court Act 1989* provides that it is a "reasonable excuse" for non-compliance if the sheriff did not inform the person at the time that it is an offence to fail to answer questions.

Where the Act does not define reasonable excuse, the common law principles will apply. On the one hand, there is authority to suggest that "reasonable excuse" incorporates the privilege against self-incrimination. On the other hand, there are indications that this will not be a foregone conclusion. The Committee examines the alternative interpretations of the term below.

The case of *R v Tawill* indicates that the phrase "without reasonable excuse" has a wide meaning. In that case the Court held that the phrase included (but was not limited to) legal justifications and criminal justice principles such as absence of mens rea (the requisite mental element or intention to commit an offence), mistake, insanity or *privilege*.⁶⁹ Similarly, in *Sorby v The Commonwealth* Brennan J held that reasonable excuse incorporates the privilege against self-incrimination. However, in that case "reasonable excuse" was defined whereas in many of the Victorian Acts containing inspectors' powers it is not:

⁶⁸ *Ibid*, p. 343.

⁶⁹ *R v Tawill* (1973) 22 FLR 284.

There is no express reference to a privilege against self-incrimination, but it is embraced by the reference to “reasonable excuse” in s. 10(4). [...] “Reasonable excuse” in this context is defined to mean “an excuse which would excuse an act or omission of a similar nature by a witness or a person summoned to attend before a court of law as a witness.” As the privilege entitles a witness before a court of law to refuse to answer a question when the answer may tend to incriminate him, s. 10(4) imports that privilege as a defence to an allegation of contempt of the Commission.⁷⁰

While not directly relevant to the privilege against self-incrimination the Committee notes that it has been argued that reasonable excuses are not necessarily legal excuses. In a recent article, Anthony Dickey QC argues that if that were the limitation, the legislature would have used the term “without lawful excuse” rather than “without reasonable excuse” because both are terms which are used commonly.⁷¹

On the other hand, there are indications that “reasonable excuse” will not necessarily always incorporate the privilege against self-incrimination. For instance, there are statutes which refer to “reasonable excuse” but which also expressly abrogate the privilege. The *Transport Act 1983* is a case in point. Section 129(U)(2) provides:

A person must not refuse or fail, *without reasonable excuse* to comply with a requirement made under sub-section (1) [which allows the Minister to require the Secretary or any other person or body to “inquire into, and to report to the Minister on any railway accident or incident that may affect the safe operation, construction, maintenance, repair or alteration of any rail infrastructure or rolling stock.”.]

Yet section 129S specifically abrogates the privilege in relation to questioning and documents (although sub-section (2) provides that such evidence cannot be used against the person in subsequent proceedings whether criminal or civil).

In addition, the Committee notes the judicial interpretation of “reasonable excuse” in the cases on legal professional privilege which are discussed in the next section of this Chapter. In *Corporate Affairs Commission v Yuill*,⁷² for instance, a majority of the High Court held that the legislature did not intend that legal professional privilege should be a “reasonable excuse,” stating that the term referred “more to physical or practical difficulties in complying” rather than an ability to claim the privilege. While this case did not relate to the privilege against self-incrimination, it may nevertheless

⁷⁰ *Sorby*, see above note 52, p. 323.

⁷¹ Anthony Dickey QC, “Without reasonable excuse in s112AD(1),” May 1998, Volume 72, *The Australian Law Journal*, pp. 342-343, at p. 343; see also *The Nominal Defendant (Qld) (No2)* [1964] Qd R 374, p. 378 that a reasonable excuse is that which is consistent with a reasonable standard of conduct.

⁷² *Yuill v Corporate Affairs Commission (NSW)* (1990) 20 NSWLR 386.

prove to be a persuasive interpretation of “reasonable excuse” in the context of the privilege against self-incrimination, particularly as the High Court decided *Yuill*⁷³ after *R v Tawill*⁷⁴ and *Sorby*⁷⁵ referred to above.

Suffice it to say that the term “reasonable excuse” by no means clearly incorporates the privilege against self-incrimination, a point which the Committee emphasises in the section on conclusions and recommendations.

Witnesses’ views

The comments by witnesses related to:

- the validity of the distinction between documents and questioning (whereby the privilege is abrogated for documents but retained for questioning);
- the problems which can arise where the statute is silent as to the privilege; and
- a model for reform and the importance of “use immunity” provisions.

Distinction between questioning and documents

A number of witnesses commented on the validity of the distinction between questioning and documents which, as the Committee has noted, is made in several Acts. Danny Holding, representing the Law Institute Victoria commented:

I think there is a distinction. The common law power to seize evidence has always been there, and I think there is a distinction between seizing evidence and questioning somebody and obtaining information against them. But I have not thought through particularly what documents might be relevant there. It could be that they are self-generated or that they are material that might in some circumstances have some sort of privilege attached to them. But I think there probably is a valid distinction.⁷⁶

Stephen Shirrefs, representing the Criminal Bar Association agreed that the distinction is a legitimate one:

I see the distinction as legitimate because they should not be forced to incriminate themselves through their own words. That is the fundamental philosophy behind it, that they in fact incriminate themselves. If you go back to the basis of our criminal

⁷³ Ibid.

⁷⁴ *R v Tawill*, above note 69.

⁷⁵ *Sorby*, above note 52.

⁷⁶ D. Holding, *Minutes of Evidence*, 13 December 2001, p. 157.

justice system that has developed over centuries, it is an adversarial system where the presumption of innocence is paramount.

[...]

It is a philosophically different situation. In an adversarial system where there is a presumption of innocence and the person is presumed innocent until proven guilty, they should not be required through their own mouth, their own words, to incriminate themselves. That does not mean that their premises cannot be searched in the course of which documents might be found. Those documents could therefore form the basis of evidence that goes towards establishing the commission of some wrongdoing. That is a different issue altogether, and I see a fundamental distinction between the two.⁷⁷

The Victorian Abalone Divers Association, while not directly referring to the distinction, agreed that the privilege should not hinder the seizure of documents. Elaborating on VADA's written submission, Andrew Garden told the Committee:

[...] VADA believes documents should be able to be seized in the ordinary course of the execution of search powers, and that any issues in relation to privilege should be determined judicially prior to the use of those documents, if privilege is an issue for those documents.

Just on the reading of it: there appeared to be some issue that the claim of privilege against self-incrimination in relation to documents meant that most documents theoretically would be unseizable; that is, that documents that show, for example, transactions relating to the purchase or sale or processing of abalone, if something in relation to an offence was occurring, that those documents may describe that or disclose that offence. Arguably, you could claim that those documents are going to incriminate you and therefore ought not be available to enforcement officers. So I guess the point there was that we felt documents should be seizable completely, and issues about self-incrimination should then be determined by the judicial process, should they be required for further investigative or prosecution purposes.⁷⁸

The Department of Justice, Legal Policy also agrees that there should be some distinction drawn, although it submits that the privilege should still apply to documents. However, it argues that the privilege should apply only where:

the production that is sought would require the person to identify, locate, reveal the whereabouts of, or explain the contents of, the document or item.⁷⁹

The rationale behind this principle was explained as follows:

The privilege against self-incrimination is primarily directed towards excluding incriminating evidence "wrung out of the mouth of the offender."⁸⁰ Where the

⁷⁷ S. Shirrefs, *Minutes of Evidence*, 22 February 2002, p. 263.

⁷⁸ A. Garden, *Minutes of Evidence*, 21 February 2002, pp. 183-184.

⁷⁹ Legal Policy, Department of Justice, submission no. 26, p. 28.

⁸⁰ *EPA v Caltex Refining Co. Pty Ltd*, above note 49.

effective production of a document or thing requires some sort of “testimonial disclosure” by the person, such production is said to attract the application of the privilege against self-incrimination. This is because the capacity for the document or item to be used as evidence against the person is dependent upon the person’s own disclosure. This is in contrast to those situations where the document or item can be obtained and proved by some independent means, such as a search warrant.⁸¹

Problems which can arise from lack of clarity in the legislation

Yarra Trams referred to the problems which could arise if the Statute is unclear about whether the privilege applies or not. In response to the proposal in its written submission that the privilege be specifically abrogated, Boyd Power told the Committee:

The privilege could even be extended to the production of a ticket. If somebody is asked to provide their ticket to a revenue protection officer, they could in effect refuse to do so on the basis of that privilege. So the Act or the provisions of the Act which relate to revenue protection officers in general would be unworkable, so that clearly wasn’t the intent of the Act. The provisions are there and at the time obviously the privilege against self-incrimination wasn’t taken into account. [...] It is a difficult area, but to clear the problem up, remove the privilege or exclude it.⁸²

Model for reform and importance of “use immunity” provisions

Victoria Legal Aid highlighted the importance of the privilege in its written submission to the Committee. It acknowledged that it may be appropriate that the privilege be abrogated in some cases. However, VLA submitted that, in such cases, legislation should contain a “use immunity” provision. VLA also argues that the relevant provisions the *Victorian Evidence Act 1958* which were set out in the Discussion Paper⁸³ would be appropriate “model provisions” for Acts containing inspectors’ powers.

The privilege against self-incrimination as a basic common law right should be retained at all costs. It is fundamental to our justice system.

VLA recognises that this common law right can be modified or excluded by legislation and that this is often done to facilitate criminal investigations. The Senate Committee Report has proposed that as a general principle [...] provisions in Commonwealth criminal legislation in relation to powers of entry search and seizure should represent the upper limit of powers available. [...]

VLA would argue that the *Victorian Evidence Act* provides a very good model that could well be adopted in legislation governing other agencies. The *Children’s*

⁸¹ Ibid.

⁸² B. Power, *Minutes of Evidence*, 21 February 2002, p. 213.

⁸³ Discussion Paper, p. 29.

Services Act 1996 for example already has similar provisions. Section 464J of the *Crimes Act 1958* is also significant because it specifically provides for the situation where a person already in custody retains the privilege.

Whilst VLA is unable to provide informed comment on the powers of authorised officers in other specific legislation, VLA would contend that in legislation that specifically excludes the privilege, the legislation should always (rather than usually) provide that where a claim of privilege is made prior to answering questions or producing documents, evidence obtained is not admissible in evidence in subsequent criminal proceedings.⁸⁴

Conclusion

The Committee finds that the statutory provisions in relation to the privilege against self-incrimination are inconsistent and ambiguous. The situation is not helped by the similarly inconsistent judicial interpretation of statutes which are silent on the issue of the privilege or which merely refer to the defence of “reasonable excuse.” Given such statutory and judicial ambiguity, the Committee is concerned that:

- it is not clear whether the privilege against self-incrimination applies in many cases; and that
- individuals may not be aware of their ability to claim the privilege against self-incrimination;

The Committee believes that the privilege is an important common law right and element of fairness in the context of inspectors' powers. Accordingly, it should only be abrogated in exceptional circumstances.

However, the Committee recognises that there is a distinction between questioning and documents and that, in relation to documents, it may be more appropriate that the privilege be abrogated. For example, the privilege should not allow natural persons to refuse or fail to produce documents which the person is required to keep pursuant to the legislation.⁸⁵ In addition, the Committee believes that the privilege in relation to questioning should not be used as a reason to avoid giving a name and address where the legislation gives an inspector the power to ask for these details.⁸⁶

⁸⁴ Victoria Legal Aid, submission no. 19, p. 9.

⁸⁵ An example of this is section 133(2) of the *Fair Trading Act 1999* which provides that it is not a reasonable excuse for a natural person to refuse or fail to produce a document that the person is required to keep.

⁸⁶ This incorporates the power of public transport inspectors to ask to see a valid ticket and, if one is not produced, to ask for a name and address.

Recommendation 34

That the following principles in relation to the privilege against self-incrimination be reflected in all legislation containing inspectors' powers:⁸⁷

(a) Information as to rights

- *persons who are to be questioned by an inspector should, prior to such questioning, have their rights and obligations explained to them, including their right to rely on the privilege against self-incrimination.*⁸⁸

(b) The privilege in relation to questioning

- *as a general principle, all legislation should specifically preserve the privilege against self-incrimination in relation to questioning.*
- *without limiting the generality of the above, individuals should not be able to rely on the privilege to avoid giving a name and address where the legislation gives the inspector the power to ask for these details.*

(c) The privilege in relation to documents

- *as a general principle, a person who has been asked by an inspector to produce a document or other item should not be able to rely on the privilege against self incrimination unless the production of the document would “require the person to identify, locate, reveal the whereabouts of, or explain the contents of, the document or item.”*⁸⁹
- *in particular, the privilege should not allow natural persons to refuse or fail to produce documents which the person is required to keep pursuant to legislation.*

⁸⁷ These principles draw heavily on the submission of the Legal Policy, Department of Justice, submission no. 26.

⁸⁸ Legal Policy, Department of Justice, submission no. 26, p. 27.

⁸⁹ Ibid.

- *persons who have exercised their right to rely on the privilege should not have that fact used in evidence against them in any subsequent criminal proceeding.*⁹⁰
- *documents in relation to which privilege is claimed should be carried before a justice to be dealt with according to law and the privilege may be argued before that justice.*⁹¹

(d) Abrogation of the privilege

The privilege may be abrogated only where:

- *it has been shown to be absolutely necessary for the adequate functioning of the relevant law; and*
- *any answers given or documents or items produced are not admissible in evidence in any subsequent criminal proceeding, except where false answers are given.*⁹²

The application of legal professional privilege

As with the privilege against self-incrimination the rationale for legal professional privilege is, in the words of one author, “based on balancing the powers of the state against individual human rights to freedom, dignity and privacy.”⁹³ As Deane J commented in *Baker v Campbell*:

I am persuaded that the general and substantive principle underlying legal professional privilege is of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law in that it is a precondition of full unreserved communication with his lawyer.⁹⁴

In this section, the Committee examines to what extent this fundamental principle can be relied on to refuse compliance with the demands of law enforcement agencies (and

⁹⁰ Ibid.

⁹¹ Ibid, p. 30.

⁹² Ibid.

⁹³ Ben Saul, “Legal professional privilege – balancing law enforcement against protecting the regulated,” *Law Institute Journal*, March 2002, pp. 68-72, p. 70.

⁹⁴ *Baker v Campbell* (1983) 153 CLR 52, as cited in Lachlan Menzies, “The Full Federal Court removes the protection of privilege in ACCC investigations,” (2001) 9(2) *TPLJ* 115-117, p. 117.

particularly with a request to produce documents or with attempts to inspect and or seize such documents). Recent case law on the difficult issue of abrogation of the privilege by implication is the focus of this section. First, however, the less contentious aspects of legal professional privilege are examined.

Non-contentious aspects of legal professional privilege

As noted in the Discussion Paper for this Inquiry, the principle of legal professional privilege establishes that certain communications between lawyers and their clients are privileged from disclosure.⁹⁵ In general, privileged communications are those confidential communications between solicitors and their clients for the purpose of obtaining or giving legal advice or for use in existing or anticipated litigation.⁹⁶ It is now settled law that the communications must be for the “dominant purpose” of a lawyer providing legal advice or legal services rather than for the “sole purpose.”⁹⁷

It is also now settled law that the doctrine is not limited to judicial and quasi-judicial proceedings but that it also applies to statutory administrative investigations and procedures.⁹⁸

The starting point for any consideration of the principle of legal professional privilege is that it is a fundamental and general principle of the common law and not simply a rule of evidence.⁹⁹ As such, the High Court has held that the privilege applies unless it is possible to discern a contrary statutory intention by express words or “necessary implication.”¹⁰⁰ According to one leading decision, the intention of Parliament to abrogate the privilege must be “unmistakably clear.”¹⁰¹

⁹⁵ G E Dal Pont, *Lawyers’ Professional Responsibility in Australia and New Zealand*, (2001), p. 275.

⁹⁶ *O’Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR at 22 (quoted in G E Dal Pont, above note 95, p. 275) and see Lo Surdo, “A quiet revolution has been happening in Legal Professional Privilege,” (2001) 39(6) *Law Institute Journal*, 50, p. 50.

⁹⁷ *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 74 ALJR 339. The *Esso* case over-ruled the High Court decision of *Grant v Downs* [1976] 135 CLR 674 which applied the sole purpose test.

⁹⁸ *Baker v Campbell*, above note 94, and *Australian Competition and Consumer Commission v Daniels Corp International Pty Ltd* [2001] FCA, Butterworths Unreported Judgments, 1, per Wilcox J at p. 11.

⁹⁹ *Ibid.*

¹⁰⁰ *Baker v Campbell*, above note 94, and see discussion in Saul, above note 93, at p. 70.

¹⁰¹ *Yuill v Corporate Affairs Commission* (NSW) (1990) 20 NSWLR 386 per Kirby J and see discussion in Saul, above note 93, at p. 70.

Abrogation of the privilege

The Committee's research reveals that, in most cases, and in contrast to the privilege against self-incrimination, statutes are silent on the question of legal professional privilege (with the possible exception of statutes which allow non-compliance for a "reasonable excuse" which is discussed below). On the basis of the principles discussed above, one would expect in such cases that the privilege would apply (because there are no express words which abrogate it). Yet, courts have held that statutes which are silent as to privilege may still abrogate the privilege by "necessary implication."

Abrogation by necessary implication

In examining the concept of abrogation of legal professional privilege where the statute is silent, it is useful to have regard to the general propositions set out by Wilcox J in the recent Federal Court case of *ACC v Daniels*.¹⁰²

The third proposition states:

Such is the importance of the common law rule about legal professional privilege, that it is not to be taken as abrogated in a particular case except by clear words.¹⁰³

However, the fourth and sixth propositions qualify this statement as follows:

- (iv) However, it is not necessary for the relevant statute expressly to refer to legal professional privilege. The intention to abrogate legal professional privilege will be sufficiently indicated if Parliament has used words that, in their natural meaning, are inconsistent with retention of the privilege in the particular case.
- (vi) In determining whether the words used by Parliament impliedly exclude legal professional privilege, in a particular case, it is necessary to have regard to the nature of the relevant statutory functions and powers and the extent (if any) to which legal professional privilege might impede the discharge of those functions or the exercise of those powers.¹⁰⁴

¹⁰² *ACC v Daniels*, above note 98.

¹⁰³ *Ibid*, p. 11.

¹⁰⁴ *Ibid*. The fifth principle states that it is "immaterial whether Parliament in fact had legal professional privilege in mind when enacting the words. Consequently, it does not matter that the statute may have been enacted at a time when it was generally understood that the doctrine of legal professional privilege had no application to administrative procedures; thus making it unlikely the drafter or the Parliament in fact had legal professional privilege in mind:" pp. 11-12.

To paraphrase these principles, the privilege may be abrogated by necessary implication (where the statute is silent) where the *natural meaning* of the words used by Parliament is *inconsistent* with the retention of the privilege. In determining this question, the Court must have regard to the nature of the statutory powers and *whether the privilege would impede their use*.

In addition to these principles, as one author notes:

Even where the privilege is not expressly or impliedly removed by statute, the courts have always retained the discretion to deny a claim of privilege in favour of a competing public policy interest such as the prevention of crime or fraud or broader cases of “fraud on justice.”¹⁰⁵

Examples of abrogation of the privilege

It was held in *Daniels*¹⁰⁶ that the natural meaning of the words in the statute which made it an offence “to refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it” were such as to exclude the doctrine of legal professional privilege. This is despite the fact that the privilege was not directly referred to anywhere in the statute. The Court reached this decision for a number of reasons, including the following:

- the High Court in the *Pyneboard* case had previously decided that these words abrogated the privilege against self-incrimination and that the words of the Court in that case suggested that legal professional privilege was also excluded.
- the word “capable” in the Statute refers to what a person is able to do rather than what he or she is entitled to do – thus a person is capable of producing a document which is subject to legal professional privilege even if he or she is entitled not to do so.¹⁰⁷
- the investigative purpose of the *Trade Practices Act* would be substantially frustrated if a person could claim the privilege (and thus avoid compliance).¹⁰⁸

¹⁰⁵ Saul, above note 93, p. 70 (original footnotes omitted).

¹⁰⁶ *ACC v Daniels*, above note 98.

¹⁰⁷ *Ibid*, p. 13.

¹⁰⁸ See Vince Brennan, “Federal Court makes inroads into legal professional privilege,” (2001) 21 (5) *Proctor* 28.

The Committee notes that on 15 February 2002 the High Court granted an application for special leave to appeal which has been set down for hearing in June 2002.

Another case where the privilege was held to be excluded was the case of *Corporate Affairs Commission v Yuill*.¹⁰⁹ The abrogation of the privilege in that case is particularly significant for this Report because it turned on an interpretation of the words “without reasonable excuse.” As the Committee noted in the previous section of this Chapter (on the privilege against self-incrimination), many Victorian Acts containing inspectors' powers contain these words.

The reasoning in *Yuill* is complicated because the judges were divided as to the meaning of “reasonable excuse.” In the end, a bare majority held that Parliament intended that the privilege did not constitute a “reasonable excuse” for failing or refusing to comply with the relevant investigative powers.¹¹⁰ Rather, Justices Dawson and Toohey held that reasonable excuse more aptly refers to any *physical or practical* difficulties a person may encounter in complying with the legislation.¹¹¹

In contrast, Gaudron J who dissented on this point, held that the words “reasonable excuse” (which were undefined in the legislation) were:

quite wide enough to cover any matter which the law acknowledges by way of answer, defence, justification or excuse [...] the expression has an ambulatory operation so that it refers to such answer, defence, justification or excuse acknowledged by the law [...]¹¹²

Conclusions on legal professional privilege

As with the privilege against self-incrimination, the Committee notes that the judicial interpretation of legal professional privilege in the inspectors' powers context is inconsistent and confusing. While the privilege is said to be a fundamental common law right, in many cases statutes which are silent on the privilege (the vast majority of the Acts under consideration in this Report) and those which refer to “reasonable excuse” are actually held to abrogate the privilege. Accordingly, the Committee considers that the application of legal professional privilege needs to be clarified in the statutes.

¹⁰⁹ *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

¹¹⁰ Saul, above note 93, p. 70.

¹¹¹ *Yuill*, above note 101, p. 845.

¹¹² *Ibid*, p. 857.

The Committee notes the views of commentator Ben Saul who suggests that, in the face of such inconsistency and uncertainty, a uniform legal professional privilege provision should be formulated:

One avenue of law reform may be to draft a uniform or omnibus provision on privilege [...] It could set out the circumstances in which all types of privilege and immunity apply in relation to provisions compelling the disclosure of information. Such a provision would clarify the rights and obligations of regulators and regulated, and end the present uncertainty.¹¹³

The Committee agrees that the application of the privilege should be clarified in legislation and that provisions should be as consistent as possible. However, in the Committee's view, legal professional privilege is a much more specific privilege than the privilege against self-incrimination and only applies in a relatively limited number of factual circumstances. In addition, the Committee is not convinced that it is always appropriate that the privilege should be preserved in legislation. For this reason, the Committee confines its recommendation to ensuring that the operation of the privilege is more transparent by reference to it in the legislation.

Recommendation 35

That, as a general principle, the application of legal professional privilege (whether it applies or is abrogated) be clarified in statutes containing inspectors' powers.

Practical issues relating to legal professional privilege

Few witnesses commented on the operation of legal professional privilege. Two who did were Liberty Victoria and the Law Institute Victoria. Both of these witnesses focussed on practical issues relating to the privilege.

Felicity Hampel, representing Liberty Victoria referred to the protocol agreed on by the Victorian Bar Council, the Law Institute and Victoria Police.¹¹⁴ According to this protocol:

Once police have a warrant and are searching and a claim for privilege is made in respect of documents the police then do not look at the documents. They do not get the knowledge of what is contained in them. The documents are placed in a sealed

¹¹³ Saul, above note 93, p. 72.

¹¹⁴ Ms Hampel noted that the Law Council of Australia has a similar arrangement with the Australian Federal Police: F. Hampel, *Minutes of Evidence*, 12 December 2001, p. 75.

envelope or box [...] and are delivered to the court [...] and the privilege is litigated.¹¹⁵

Ms Hampel noted that this protocol is “something that can as easily be adopted by other agencies seizing documents.”¹¹⁶

However, on behalf of the Criminal Law Section of the Law Institute Mr Danny Holding commented that the protocol did not always work according to the theory outlined by Ms Hampel:

There are procedures that are in force for particular warrants where documents are placed in sealed envelopes and they are taken before a court. But of course as a matter of practice there tends to be a viewing of the documents from a preliminary point of view in determination of whether they fall within the scope of the warrant to start off with. In a sense that is a breach of the privilege to begin with.¹¹⁷

As a solution, Mr Holding suggested that:

It might be worth considering whether or not there could be people who are independent from the enforcement authorities assisting those authorities by having a general understanding of what falls within the warrant and doing no more than cursorily looking at the documents to determine whether that is a possibility, placing them in a sealed envelope so that the authorities themselves have not seen the documents, and then bringing the matter before a court and arguing whether or not they should be released.¹¹⁸

Conclusion

The Committee received too little evidence to reach any conclusion on the current practice among agencies on this issue but considers that it is important that agencies have a system in place for dealing with documents in relation to which legal professional privilege is claimed. The Committee considers that the protocol adopted by Victoria Police, the Law Institute and the Bar Council could potentially be adopted by agencies and should be considered as a model. While the Committee acknowledges the concerns of Mr Holding, on the basis of the current evidence it is not convinced that the problem of inspectors viewing documents warrants the expense of engaging persons independent from the agencies to accompany inspectors for the purpose of determining whether there is a possibility of a privilege claim.

¹¹⁵ F. Hampel, *Minutes of Evidence*, 12 December 2001, p. 75.

¹¹⁶ *Ibid*, p. 76.

¹¹⁷ D. Holding, *Minutes of Evidence*, 13 December 2001, p. 154.

¹¹⁸ *Ibid*.

Recommendation 36

That agencies ensure that they have a protocol in place for the seizure of documents over which legal professional privilege is claimed.

Other aspects of fairness related to legal professional privilege

The Committee notes that there are other elements of fairness related to legal professional privilege. One of these is the duty of confidentiality owed by a professional to a client. This doctrine is particularly relevant to lawyers and is therefore related to legal professional privilege. However, it can also apply to documents held by other professionals such as doctors and bankers.¹¹⁹ In contrast to legal professional privilege, the duty of confidentiality is not an absolute duty. This means that it can be overridden by a statutory obligation to furnish information and / or to produce documents. The Discussion Paper for this Inquiry originally foreshadowed that further research would be undertaken on the scope of this duty. However, as no witnesses specifically commented on the issue and because the Committee believes the duty to be a less important aspect of fairness than others which it has considered, it has decided not to examine the issue further in this Report.

For similar reasons, the Committee has determined that the interpretation of “relevant documents” and the “possession” of documents¹²⁰ are not sufficiently relevant to the current inquiry to justify inclusion in this Report.

Privacy

Privacy is a slice of the larger concept of liberty. Privacy is essential to the exercise of other aspects of liberty, including freedom of thought and conscience, freedom of expression and freedom of association. But privacy is also essential to the development of the self, to autonomy and to the dignity of the individual.¹²¹

(Written submission of the Victorian Privacy Commissioner)

The Victorian Privacy Commissioner made it clear in his submission to the Committee that the *Information Privacy Act 2000* requires his office to “strike a

¹¹⁹ Brett Bolton, “Compelling Production of Documents to the ASC,” *Queensland Law Society Journal*, June 1995, 221-240, pp. 235-6.

¹²⁰ For instance, whether this includes documents which are not actually in a person’s possession but may nevertheless be said to be within his or her custody or power.

¹²¹ Victorian Privacy Commissioner, submission no. 38, p. 3.

balance between what is described as the public interest in the free flow of information and the public interest in privacy.” This balancing exercise can be seen as part of the wider balancing exercise between public and private interests which is the hallmark of fairness. For this reason, the Committee considers the issue of privacy in this section and, in particular, on the following elements of privacy:

- the different dimensions of privacy;
- law enforcement agencies and the *Information Privacy Act 2000*;
- examples relevant to the powers of authorised officers; and
- a privacy “checklist” for law enforcement agencies.

For the drafting of this section the Committee has relied on the submissions of the Victorian Privacy Commissioner.

The different dimensions of privacy

The Privacy Commissioner told the Committee that it was important to divide up the concept of privacy into its different dimensions.¹²² These are privacy of the body (relevant to arrest powers); privacy of the home; privacy of personal belongings; privacy from surveillance; privacy from eavesdropping and information privacy.¹²³ The Committee considers that, of these, privacy of the home, privacy of personal belongings and information privacy are the most relevant to the powers exercised by authorised persons. For instance, the Privacy Commissioner told the Committee that the powers of authorised officers override the principle that a person’s home is his or her sanctuary:

The home is special in privacy law. It is a sanctuary where we are free from the world’s scrutiny, where we can relax our public faces and “be ourselves.” It is a place of intimacy and security [...] Powers for authorised officers of the state to enter and search the home override all these values, and the law has long recognised the significance of the intrusion and the importance of limiting the purposes and the exercise of the powers.¹²⁴

The Privacy Commissioner also emphasised the importance of information privacy, stating that:

Control and consent are fundamental in information privacy. When the state takes that control away from the individual, compels disclosure by law without consent and

¹²² P. Chadwick, *Minutes of Evidence*, 21 February 2002, p. 190.

¹²³ See Victorian Privacy Commissioner, submission no. 38, pp. 3-5.

¹²⁴ *Ibid*, p. 4.

authorises collection and use for purposes determined by others, it overturns the presumption of liberty in a potentially far-reaching way.¹²⁵

The Committee notes that information privacy has taken on a particular significance following the enactment of the *Information Privacy Act 2000* and the *Health Records Act 2001*. The impact of the *Information Privacy Act 2000* is considered below.

Law enforcement agencies and the *Information Privacy Act 2000*

The *Information Privacy Act 2000* requires that the collection, use and disclosure of personal information obtained by authorised officers during the exercise of their entry, search, seizure and questioning powers should be consistent with the Information Privacy Principles outlined in that Act.¹²⁶ However, section 13 of the Act contains an exception for “law enforcement agencies.” The Privacy Commissioner told the Committee that many of the agencies affected by this inquiry will fall within this definition:

Many of the authorised officers will be employed by agencies that fit the broad definition of “law enforcement agency” in the Information Privacy Act. That definition includes organisations or individuals whose function or functions include law enforcement. Where an organisation exercises law enforcement functions, and even where those functions are but a small part of the organisation’s overall operations, it will be defined as a law enforcement agency for the purposes of the Information Privacy Act.¹²⁷

However, the Privacy Commissioner pointed out to the Committee that section 13 was not a blanket exception but rather merely a qualified one:

I lay stress on that partly because some agencies at the early stage of the life of the Information Privacy Act appear to misunderstand the Parliament’s intention with that exemption, and I think it is important that I try to clarify that early.¹²⁸

The exemption provides that it is not necessary for law enforcement agencies to comply with some (but not all) of the Information Privacy Principles where it believes on reasonable grounds that non-compliance is necessary for one of the following purposes:

¹²⁵ Ibid, p. 5.

¹²⁶ Ibid, p. 8.

¹²⁷ Ibid, p. 9.

¹²⁸ Paul Chadwick, *Minutes of Evidence*, 21 February 2002, p. 191.

- (a) for the purpose of one or more of its, or any other law enforcement agency's, law enforcement functions or activities; or
- (b) for the enforcement of laws relating to the confiscation of the proceeds of crime; or
- (c) in connection with the conduct of proceedings commenced, or about to be commenced, in any court or tribunal; or
- (d) in the case of the police force of Victoria, for the purposes of its community policing functions.

The Commissioner urged the Committee and agencies to “look to the information privacy principles as a consistent and common standard.” He discouraged the insertion of privacy exemptions into the Acts containing inspectors' powers:

Otherwise, we will distort the law of Victoria by building into the various statutes many exemptions from the overall privacy balancing tool that you've enacted in 2000, the Information Privacy Act.¹²⁹

Examples relevant to the powers of authorised officers

The Privacy Commissioner cited a number of areas relevant to the powers of authorised officers where privacy issues could arise. One of these was the public transport area. Due to the controversy surrounding the powers of public transport inspectors, the Committee considers this issue separately in Chapter 7. In addition, Privacy Victoria's submissions on the aggregation of data for the purposes of preparing centralised records of the use of the powers and reporting to Parliament are contained in the section on “reporting mechanisms” earlier in this Chapter.

Video or audio taping of entry and search

Another area of concern to the Privacy Commissioner is the video or audiotaping of entry and search. The Commissioner submitted that any proposal empowering or requiring authorised officers to record entry and search of premises should be considered carefully. He pointed out that “comparatively benign intrusion powers take on new privacy invasive dimensions if video recorded.”¹³⁰

Consider the potential reactions of a farming household if a person accompanies inspectors who arrive to investigate a potential disease threat with a video camera in

¹²⁹ Ibid.

¹³⁰ Victorian Privacy Commissioner, submission no. 38, p. 17.

operation. Such inspections can have serious implications for a farm, and for neighbouring properties.

While video or audio taping of certain entry and search procedures may be useful in assessing any subsequent allegations against those conducting such entry and search procedures, the recording may not be necessary. The presence of an appropriately senior and independent witness may be sufficient and will be less privacy invasive.¹³¹

In light of the potentially serious incursions on privacy, the Privacy Commissioner recommends that the following questions should be used to develop “precise procedures, with accountability for adherence.”¹³²

- How long will the video or audio recording run and how much detail of the entry and search will be gathered? For example, will there be limits placed on tracking and zooming?
- What part of the entry and search procedure will be recorded?
- How intrusive will the recordings be?
- How long will the recording be retained?
- Who will have access to the recordings? Will the individual have access?
- What safeguards will prevent the tape being doctored, copied, altered and distributed or otherwise misused?

Privacy Checklist

As an appendix to the written submission Privacy Victoria provided the Committee with a privacy checklist. The checklist contains a series of questions which should form part of the assessment for any existing or proposed power to enter, search, seize or question. Some of the principles are directed primarily to the Parliament for consideration when enacting new or “renovating” old inspectors’ powers provisions and some are mainly directed to the agencies administering the powers.

State Intrusion Powers and Privacy Checklist

1. How does the power affect privacy, in any of its several dimensions:
 - Privacy of the body
 - Privacy of the home
 - Privacy of personal belongings
 - Privacy from surveillance

¹³¹ Ibid.

¹³² Ibid.

- Privacy from eavesdropping
 - Information privacy
2. What is the public interest to be served by empowering authorised officers to use the power and is that public interest sufficient to override an individual's right to privacy in every circumstance? If not, how should the power be qualified to ensure privacy rights can prevail in certain circumstances?
 3. Is the power precisely limited to that which is necessary in the circumstances to achieve the stated public purpose?
 4. Will the procedures for the use of the power be proportionate and any intrusion into the individual's affairs kept to a minimum, especially for uninvolved third parties?
 5. Have all the less privacy-invasive procedures been adequately considered and found wanting?
 6. Is there a need for independent authorisation to use the power so that those who want to use it are separated from the judgement that it is necessary to use it? (Like, for example, telephone intercepts are required to be authorised by warrant.)
 7. Are the persons exercising the power accountable expressly for unauthorised privacy breaches as well as any other breaches of proper procedures?
 8. Has Parliament considered what happens after the power has been used so that the impact on the privacy of the individual concerned and on any third parties is minimised? For example, who will have access to the information collected? How will the information be stored? In what circumstances can the information be used or copied or retained? Who will determine when it is appropriate to destroy personal information or return property after the public purpose has been fulfilled?
 9. Is the process as transparent as the circumstances permit? For example, at a minimum, is there provision for independent audit and for public disclosure, in de-identified form, of statistics about the frequency of the use of the power?

Conclusion

The Committee considers that privacy and, in the light of the *Information Privacy Act 2000* particularly information privacy, is an important right which must be balanced against the community interest in effective law enforcement. The Committee recommends that agencies develop internal systems for compliance with the Act and other dimensions of privacy where relevant.

The Committee endorses the checklist developed by the Privacy Commissioner and believes that these principles should be considered when enacting new or amending old legislation and, where relevant, by the agencies in their development of internal

procedures for compliance with the *Information Privacy Act 2000* and for respecting other dimensions of privacy.

Warnings / Cautions

As the Committee noted in the section on the training of authorised officers in an earlier chapter of this Report, Victoria Police has found that inspectors “lack an awareness of custody, investigation and confessional evidence requirements” contained in section 464 of the *Crimes Act 1958*.¹³³ For this reason, and because many of the requirements of section 464 are directed towards protecting the rights of persons suspected of having committed an offence and are thus important elements of the concept of fairness, the Committee considers those requirements briefly here.

Section 464 governs the detention and questioning of persons suspected of a crime and codifies the rights of persons subject to questioning by an “Investigating Official.”¹³⁴ This term is defined in section 565(2) as:

A member of the police force or a person appointed by or under an Act (other than a member or person who is engaged in covert investigations under the order of a superior) whose functions or duties include functions or duties in respect of the prevention or investigation of offences.

This definition makes it clear that the provisions of section 464 extend to inspectors and that, as Victoria Police notes, “the custody, investigation and confessional evidence provisions extend to the investigation of all offences, not merely indictable offences.”¹³⁵

Section 464 comes into operation when a person suspected of committing an offence is “in custody.” The term “in custody” is defined broadly in the Act and extends beyond the situation where the person is under arrest. Section 464(1)(c) provides that a person is “in custody” if he or she is –

- (c) in the company of an investigating official and is –
 - (i) being questioned; or
 - (ii) to be questioned; or
 - (iii) otherwise being investigated –

¹³³ Victoria Police, submission no. 21, p. 5.

¹³⁴ Ibid.

¹³⁵ Ibid.

to determine his or her involvement (if any) in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence.

In relation to this definition, Victoria Police submitted to the Committee:

It can be seen then that where an inspector has a power of arrest and the circumstances conform to the definition of 'in custody,' certain rights have to be provided to the suspect. These rights include:-

- Limits on periods of detention (s.464A)
- Right to communicate with a friend, relative and legal practitioner (s. 464C)
- Right to an interpreter (s. 464D)
- Extra protections if under the age of 17 years (s. 464E)
- Right of foreign national to communicate with consular office (s. 464F).

Do investigating officials have to have the power of arrest before they are required to comply with section 464?

It is clear that section 464 applies to investigators who have arrest powers (even if the person does not have to be actually "under arrest" to be "in custody.") But what is the situation with authorised officers who have no arrest power in their legislation, which is the general rule in the Acts which fall within the ambit of this inquiry? Is it necessary for the requirements of section 464 to operate "that the investigating official in whose company the suspect is have the power of arrest?"¹³⁶ There is little case law on this issue.

One case which did address the issue was the unreported Victorian Supreme Court decision of *McCormack v Silberman*.¹³⁷ In that case, the appellant, a senior drugs and poisons officer (the *Drugs Officer*) employed by the Department of Health and Community Services in its Drugs and Poisons section interviewed the respondent, a medical practitioner. The Court noted that, although the DMAS Officer had "the power to investigate possible breaches of the *Drugs, Poisons and Controlled Substances Act 1981* [...]" and the power to lay charges:

he had no power of arrest other than that conferred by section 458 of the *Crimes Act 1958* (the Act) [the citizen's arrest provision], which power may be ignored for the present purposes.¹³⁸

¹³⁶ *McCormack v. Silberman*, (Unreported, Supreme Court of Victoria, Ashley J, December 1993.)

¹³⁷ *Ibid*, p. 1.

¹³⁸ *Ibid*.

The interview was recorded and the doctor was given a warning at the start of the interview. However, the Magistrate who heard the case at first instance excluded the record of interview on the basis that the Drugs Officer had not given the Doctor the information of the kind referred to in a sub-section of section 464.¹³⁹

On appeal the Supreme Court held that:

There is nothing in s.464(1)(c) that plainly says the investigating official must also have a power to make the arrest there contemplated. Moreover, the definition of “investigating official” contains no such requirement.¹⁴⁰

The Court went on to consider the arguments for and against the application of section 464 to officials who have no arrest power and concluded that the application of section 464 was not limited to investigating officials with the power of arrest:

In circumstances where certain safeguards provided by subdivision 30A extend to the conduct of persons other than the police, only some of those persons having a power of arrest, it seems to me that it would be wrong to limit the operation of the safeguards to situations where the particular investigating official has a power of arrest. [...] It must, I think, be enough that, objectively viewed, arrest would be justified. The potential for arrest is not the less real because, in a particular case, arrest could not be effected by the particular questioner.

Further, the range of “investigating officials” is wide; some having power of arrest, some not. Whilst assuming that persons should be treated as knowing the law, it does not offend common sense that legislation should provide safeguards in a way that recognises the practical unreality of the assumption in a particular context.¹⁴¹

This decision indicates that investigating officials need to be aware of and comply with the provisions of section 464 not only where they have the power of arrest but also in cases where “an arrest would be justified.”¹⁴² One commentator on the

¹³⁹ Namely section 464C(1) requiring the investigating official to inform the person in custody that he or she may communicate with a friend or relative or communicate with a legal practitioner (with certain exceptions).

¹⁴⁰ *McCormack v Silberman*, above note 136, p. 3.

¹⁴¹ *Ibid*, p. 7. Tim Sharard notes that “the verbiage of s 464(1)(c) strongly suggests that the question to be resolved is whether the sum knowledge in the possession of an investigating official at a particular time, viewed objectively, is sufficient to justify an arrest. This is also consistent with the Coldrey Committee Report which was the origin of s. 464(1)(c). There is nothing in either s. 464(1)(c) or in the definition of investigating official in s. 464(2) that plainly says that the investigating official must have a power of arrest.” Tim Sharard, “Case and Comment: McCormack v Silberman,” *Criminal Law Journal*, Volume 18, October 1994, 288-290, p. 288.

¹⁴² Paul Connor refers to an unreported decision in the Magistrates’ Court (*Wyndhan City Council v Skrinnikoff Jones*, Unreported, Magistrates’ Court of Victoria, 1 August 1996) in which parts of an interview were held to be inadmissible because no caution was given: “a caution should have been given as soon as preliminary questions or discussions revealed that the interviewee was a suspect or putative defendant: Paul Connor, *Authorised Officers and Investigations – a cautionary tale*,” *Local Government Law Journal*, November 1996, 69-71, p. 69.

decision notes that section 464(2) would seem to include “health inspectors, wildlife inspectors and probably child protection workers”¹⁴³ and goes on to observe:

As a result of this decision, at the point in an interview where there is sufficient information to justify someone arresting the person being interviewed in respect of the offence being investigated, that official must meet not only the requirements of ss 464A and 464C, but also ss 464D, 464E and, where the offence is an indictable one, s. 464G. Such officials will either need to know the law of arrest or comply with all of these provisions as a matter of routine. If they do not do so, then there is a strong argument for discretionary exclusion on the basis of unfairness.¹⁴⁴

Conclusion

The Committee considers that the current formulation of section 464(1)(c) of the Crimes Act 1958 and the case law on the section does not provide adequate guidance to agencies and investigators. The Committee refers to the comments of Victoria Police in Chapter 4 of this report that “it is regularly found that civil investigators or inspectors lack an awareness of custody, investigation and confessional evidence requirements.”¹⁴⁵ In the Committee’s view, the question as to whether and when section 464 of the *Crimes Act 1958* applies to inspectors as “investigating officials” under that Act needs to be clarified. The Committee also reiterates the importance of comprehensive training for inspectors in relation to the requirements of section 464.

Recommendation 37

That the Government immediately clarify the operation of section 464 of the Crimes Act 1958 in relation to whether and when inspectors without any power to arrest must nevertheless comply with the section.

Recommendation 38

That, where relevant, the obligation of inspectors to comply with section 464 be enshrined in legislation.

¹⁴³ Sharard, above note 141, p. 290.

¹⁴⁴ Ibid. Connor puts the argument even more clearly. After citing section 464 he notes: “It is clear that the caution needs to be given by authorised officers who are questioning persons about their involvement in an offence. The caution must be given even if the offence carries a light penalty.” Connor, above note 142, p. 69.

¹⁴⁵ Victoria Police, submission no. 21, p. 4 and see discussion in Chapter 5.

Recommendation 39

That agencies ensure that education on the requirements of section 464 of the Crimes Act 1958 is part of their training programs for relevant authorised officers.

Recommendation 40

That the standards unit referred to in Recommendation 23 ensure that agencies are providing certain minimum standards of training to their inspectors on compliance with section 464.

Review of Search Warrant Provisions

The requirement of a warrant is a practical safeguard which both common law and statute provide against arbitrary interference with the personal liberty and property of the individual. The state official wishing to seize a person or his or her property must swear on oath before an independent judicial officer as to the need for that interference. The law will scrutinise warrants carefully, both as to the validity of their issue and the power they confer.¹⁴⁶

The Committee noted in Chapter 1 of this Report that the dichotomy between powers which can only be exercised under a search warrant and those which do not require a warrant is an important initial level of power which must be determined. The key question which arises is: exactly when should a search warrant be required? The Committee heard evidence from a number of witnesses in relation to this issue. Several witnesses told the Committee that requiring inspectors to obtain a search warrant before exercising coercive powers is an important safeguard against the abuse of those powers. These witnesses argued that authorised persons should be required to obtain search warrants in all but exceptional cases.¹⁴⁷ On the other hand, a number of agencies told the Committee that requiring their inspectors to obtain a warrant would hamper their ability to monitor compliance with their legislation or to act quickly in emergency situations.

The issue as to when a search warrant should be required is integral to the question of consistency across Acts and, for this reason, the Committee considers this issue in more detail in Chapter 8 of this Report.

¹⁴⁶ *Challenge Plastics Pty Ltd v The Collector of Customs for the State of Victoria* (1993) 42 FCR 397, p. 405.

¹⁴⁷ For example Liberty Victoria and the Criminal Bar Association.

In this section the Committee will focus instead on the content of the search warrant provisions and, in particular:

- the relevant provisions of the Magistrates' Court Act 1989;
- the operation of section 57 requiring a register of search warrants to be kept.
- reference to the Magistrates' Court Act 1989 in the legislation and consideration of reform proposals;
- the types of search warrant provisions in the Acts, particularly:
 - when a search warrant must be obtained;
 - safeguards in the provisions such as provision for announcement before entry, that details of the warrant be given to the occupier and so on.
- the law in relation to the seizure of items not mentioned in the warrant.

Relevant Provisions of the *Magistrates' Court Act 1989*

The *Magistrates' Court Act 1989* provides for the issue of a number of different types of warrant. The most relevant type of warrant in the context of this Inquiry is the power to issue a search warrant.¹⁴⁸

General Requirements

General requirements for warrants, including search warrants, include the following:

- the warrant must name or otherwise describe the person or property against whom or which it is issued: s.57(3).
- a search warrant may only be issued by a magistrate: s.57(5).
- a warrant must be executed by the use of a copy of the warrant, known as the execution copy, or by the use of a copy of the execution copy, including a copy transmitted by fax: s.58(8).
- an execution copy of a warrant must be returned, when executed, to the Court.

¹⁴⁸ Other warrants which can be issued pursuant to section 57 are warrants to arrest, remand, seize property, imprison, detain in a youth training centre and penalty enforcement warrants. The warrant to seize property may also be relevant but appears to be largely directed to the Sheriff. In addition, the search warrant provisions allow persons to search for any thing and bring the article before the Court so the matter can be dealt with according to law. This would appear to cover most cases of seizure in the context of investigations by authorised officers.

This last provision was singled out for praise in the Senate Report which contained the recommendation:

The Committee recommends that the procedure that is applicable in Victoria and in some other jurisdictions be followed where, after execution, a warrant is returned to the court which issued it.¹⁴⁹

Requirements in relation to search warrants

The *Magistrates' Court Act 1989* provides that applications for search warrants must be supported by evidence on oath or by affidavit and that the affidavit may be transmitted by fax: s.75(2) and (3). Courts have held that there is a duty of full disclosure of all material facts by the person seeking a search warrant.¹⁵⁰

Section 78 prescribes the authority conferred by a search warrant. Importantly, where things are seized, the person to whom the warrant is directed must “bring the article, thing or material before the Court so that the matter may be dealt with according to law.”¹⁵¹ This rule is relevant to the issues of legal professional privilege and the privilege against self-incrimination which were discussed earlier in this Chapter.

Section 79(6) of the *Magistrates' Court Act 1989* provides for the return of seized goods:

The Court may direct that any article, thing or material seized under a search warrant be returned to its owner, subject to any condition that the Court thinks fit, if in the opinion of the Court, it can be returned consistently with the interests of justice.

The Committee notes that a number of statutes also contain their own provisions in relation to the itemisation and return of seized goods.¹⁵²

¹⁴⁹ Senate Report, above note 3, p. 113.

¹⁵⁰ Henry Aizen, Rod Saunders, “Search Warrants A practical guide,” *Law Institute Journal*, October 1998, pp. 48-53, p. 50: the authors comment that “material facts” does not necessarily mean all facts and refers to the cases of *Karina Fisheries Pty Ltd v Mitson* (1990) 26 FCR 473 and *Leggo Australia v Paraggio* (1994) 44 FCR 151.

¹⁵¹ Similarly, if a person is arrested pursuant to section 78 that person must be brought before a bail justice or the Court within a reasonable time of being arrested to be dealt with according to law: section 78(2)(a).

¹⁵² The Committee notes that these provisions are not always part of search warrant sections. For instance, s. 26 of the *Food Act 1984* and s. 408 of the *Health Act 1958* contain provisions for the return of seized items. Section 93A of the *Medical Practice Act 1994* requires the itemisation of seized items on request. Section 75(1) of the *Domestic (Feral & Nuisance) Animals Act 1994* requires the issue of a receipt in the prescribed form.

Power of arrest

Given the concern over the arrest powers of inspectors under Acts such as the *Transport Act 1983*, it seemed notable that no witness initially commented on section 78(1)(b) of the *Magistrates' Court Act 1989* which allows the person to whom the search warrant is directed:

To arrest any person apparently having possession, custody or control of the article, thing or material.

However, when asked to provide a comment, Victoria Legal Aid indicated that, in its experience, authorised officers did not use this little-known power when executing search warrants. This accords with the evidence the Committee received that authorised officers usually obtain the assistance of Victoria Police to execute search warrants.¹⁵³ In VLA's view the arrest power is superfluous in any event because authorised officers can rely on the citizen's arrest provision in the *Crimes Act 1958*.¹⁵⁴

Whilst it is generally accepted that Police have an inherent power to arrest persons, it is less well known that authorised officers have such power. It is the experience of VLA, however, that authorised officers do not, and will not, carry out arrests when executing a search warrant. A likelihood that a person would need to be detained will usually result in the authorised officer seeking assistance of Police in executing the warrant.

However, it should be noted that section 78(1)(a)(ii) and 1(b)(iii), are somewhat superfluous. Police are entitled to arrest a person at any time where they form a belief that such person has committed, or is about to commit, a criminal offence. Similarly, there is a provision under the *Crimes Act 1958 (Vic)* for carrying out a "citizen's arrest." Presumably, even if an authorised officer did not have the statutory authority to carry out arrests, he/she could rely upon s.458 of the *Crimes Act 1958 (Vic)* and carry out an arrest where he/she finds a person committing any offence. [...]

VLA reiterates, however, that it is not the experience of VLA that authorised officers engage in carrying out arrests of persons believed to be committing criminal offences on a regular basis. The fact, however, that they do have this specific statutory power conferred upon them lends weight to the argument that such persons should be persons properly trained and highly skilled in the execution of warrants.¹⁵⁵

¹⁵³ See discussion in Chapter 6.

¹⁵⁴ Section 458 *Crimes Act 1958 (Vic)*.

¹⁵⁵ Victoria Legal Aid, submission no. 19S, p. 1.

The Committee agrees that it is important that authorised officers are properly trained on the execution of warrants and refers to the recommendations it made on the training of inspectors in Chapter 4.

Register pursuant to section 57 of the *Magistrates' Court Act 1989*

Section 57 of the *Magistrates' Court Act 1989* requires that the person issuing a warrant must cause the “prescribed particulars” of the warrant to be entered in the register.

The Magistrates' Court told the Committee that the register is not divided into warrants issued under particular Acts but that it is possible to establish how many warrants have been issued under a particular Act over a given period.¹⁵⁶ Each Senior Registrar is required to provide a monthly return of warrant numbers issued but the return is limited to the more common warrants with the uncommon warrants (including warrants issued pursuant to many of the Acts being considered in this Inquiry) grouped under the heading “Other warrants – State; Commonwealth Act / Agency.”¹⁵⁷

The Register contains the following information:

- date of issue;
- register number;
- address for execution;
- section authorising issue; and
- name of issuing Magistrate.¹⁵⁸

In relation to whether the register contains details of unexecuted warrants, the Court stated:

The Register does NOT state whether the warrant was executed. However, the Register is kept as a reference for our files and the details of the results of the search are then attached to the file [...] If the warrant is NOT executed at all, no record is kept of this aside from the fact that the ‘result of search’ is not attached to the file.¹⁵⁹

¹⁵⁶ Magistrates' Court Victoria, submission no. 43, p. 2.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

Conclusion

The Committee has already noted the importance of agencies maintaining records of and reporting on the operation of inspectors' powers. It therefore considers that the register kept by the Magistrates' Court could function as an important independent record of the exercise of inspectors' powers under warrant. Currently, however, data in relation to the issue of warrants under most of the Acts being considered in this Inquiry is not readily identifiable. The Committee considers that it would be helpful if the register listed how many warrants are issued under each Act.

Recommendation 41

That the Magistrates' Court review the Register required to be kept pursuant to section 57 of the Magistrates' Court Act 1989 to allow warrants issued under particular Acts to be more readily identifiable.

After Hours Service of the Magistrates' Court

It is important to consider whether there is sufficient opportunity to obtain search warrants. The Committee consulted the Magistrates' Court about the operation of the after hours service. The Court told the Committee that the After Hours Service operates between 5.00pm and 9.00am on weekdays and continuously on the weekend and on public holidays.¹⁶⁰ The Service makes a magistrate available for all urgent matters including urgent search warrant applications.

The Magistrates' Court confirmed to the Committee that response times to applications are rapid:

It is expected that the Registrar will respond to the pager as soon as physically possible, usually within 5 minutes and certainly within 20 minutes [...] Should the application be for consideration of a Magistrate the documentation is checked (for administrative correctness), recorded in a register and faxed to the Magistrate. The Magistrate is expected to attend to the application within 20 minutes. Should there be further evidentiary requirements the Magistrate will contact the Registrar who will make further enquiries [of] the applicant, then receive and transmit any further affidavit material to the Magistrate.¹⁶¹

¹⁶⁰ Ibid, p. 3.

¹⁶¹ Ibid.

In short, according to the Court:

Generally any application made to a magistrate or registrar is completed within 30 minutes of the time the pager message is received – this is when there is no further supporting material required, no further “administration” (action to correct affidavits not properly sworn etc.) Equipment failures occur at times but are rare.¹⁶²

On the basis of the information received, the Committee considers that the After Hours Service provides agencies with adequate opportunity to obtain a search warrant outside of business hours.

Reference to the *Magistrates’ Court Act 1989* in the legislation

Many of the Acts considered in this Inquiry make reference to *the Magistrates’ Court Act 1989*. For instance section 93A(5) of the *Medical Practice Act 1994* provides:

The rules to be observed with respect to search warrants mentioned in the Magistrates’ Court Act 1989 extend and apply to warrants under this section.

Section 109(2) of the *Casino Control Act 1991* is worded differently but has the same effect:

in accordance with the *Magistrates’ Court Act 1989* a search warrant in the prescribed form [...].¹⁶³

The Committee notes that these Acts also often contain reasonably extensive search warrant provisions which add to the provisions of the *Magistrates’ Court Act 1989*. Some of these provisions are discussed later in this Chapter.

Once again, however, the Committee could not identify any general rule in the legislation. Several Acts do not make any reference to the rules of the *Magistrates’ Court Act 1989* despite containing extensive warrant provisions: examples include the *Accident Compensation Act 1985* and the *Fisheries Act 1995*.

A small number of Acts refer to the requirement to obtain a warrant but contain no warrant provisions and make no reference to the *Magistrates Court Act 1989*. Section 60(2)(b) *Trade Measurement Act 1995* is a case in point. It provides that entry onto residential premises requires either the consent of the occupier or a search warrant yet

¹⁶² Ibid.

¹⁶³ See also section 77A(4) of the *Domestic (Feral & Nuisance) Animals Act 1994*.

is silent on the issue of what the search warrant must contain and other points which are common in other Acts.

Conclusion

The lack of reference to the *Magistrates' Court Act 1989* is more a failing of transparency and consistency than of substance because the Committee has not identified any provisions which specifically abrogate or contradict the provisions of the *Magistrates' Court Act 1989*. In addition, because the issue of warrants in Victoria is governed by the *Magistrates' Court Act 1989*, it seems clear that that Act applies even to those Acts which do not specifically refer to it.¹⁶⁴

However, matters of clarity and transparency are issues which are at the heart of this Inquiry and the Committee considers that the link between the *Magistrates' Court Act 1989* and the search warrant provisions in the various Acts should always be explicit. The Committee also considers that it would be useful to have a consolidated and regularly updated list of Acts containing search warrant provisions.

One option for improving transparency could be to list all the Acts with search warrant provisions in a schedule to the *Magistrates' Court Act 1989* or in stand-alone legislation. One model for stand-alone legislation is the *Search Warrants Act 1985 (NSW)*. Section 10 of that Act defines search warrant as “a search warrant issued under any of the following provisions” and goes on to list a large number of Acts which incorporate the provisions of the *Search Warrants Act 1985 (NSW)*.

One drawback of this method is that, as existing Acts are amended or new legislation is enacted, the list in the Search Warrants Act 1985 becomes out of date. This is to some extent addressed by the “catch all” line at the end of the definition of search warrant in section 10 which provides:

any other provision of, or made under, an Act, being a provision which provides that this Part applies to a search warrant issued under that provision.

However, the Committee notes that this would appear not to catch provisions which do not specifically provide that the *Search Warrants Act 1985 (NSW)* applies.

¹⁶⁴ Section 57(7) of the *Magistrates' Court Act 1989* provides that a judge of the Supreme Court or Judge of the County Court may exercise any power conferred by a magistrate by or under this Act with respect to the issue, recall or cancellation of a warrant or duplicate copy of a warrant.

Recommendation 42

That the Department of Justice consider the possibilities for enhancing the clarity and transparency of search warrant provisions in Victorian legislation conferring powers on authorised persons by listing them in the Magistrates' Court Act 1989 or in new stand-alone legislation, giving particular consideration to the model of the Search Warrants Act 1985 (NSW).

A review of search warrant provisions in Acts conferring powers on authorised persons

When is a search warrant required?

The purpose of an entry and search will often dictate whether a search warrant is required, as noted in Chapter 3 of this report. The Committee's research reveals that search warrants are often required where the power to enter and search is for the purpose of investigating a suspected offence or where the property concerned is a residential premises. On the other hand, many Acts do not require authorised persons to obtain a warrant where the entry is for the purpose of monitoring compliance with the legislation. This issue will be considered further in Chapter 8.

Reasonable Grounds: belief / suspicion

Most Victorian Acts specify that magistrates can issue warrants if they have reasonable grounds for believing or suspecting that an offence has been committed.¹⁶⁵

For instance, section 103(2) of the *Fisheries Act 1975* provides that:

A magistrate may only issue the warrant if he or she is satisfied by information on oath that there are reasonable grounds for suspecting –

- (a) that an offence against this Act, a regulation or a fisheries notice has occurred or is occurring or is about to occur at the dwelling house; or
- (b) that evidence of an offence against this Act, a regulation or a fisheries notice is present at the dwelling house.

¹⁶⁵ Examples include *Accident Compensation Act 1985*, s. 70; s. 82 *Drugs, Poisons and Controlled Substances Act 1981*; s. 103 *Fisheries Act 1995* and numerous others.

Section 122(1) of the *Fair Trading Act 1999* provides that:

An inspector, with the written approval of the Director, may apply to a magistrate for the issue of a search warrant in relation to particular premises, if the inspector believes on reasonable grounds that there is on the premises evidence that a person or persons may have contravened this Act or the regulations.

The requirement of reasonable grounds for suspecting or believing that an offence has been committed is one of the safeguards against unwarranted entries and searches. These terms are not defined in the legislation but there is a considerable amount of case law on the meaning of the terms “suspicion,” “belief” and “reasonable grounds,” particularly in the context of police powers. There is also a large body of case law in relation to other aspects of search warrants.

For instance, the principles outlined in *Tillett's case*¹⁶⁶ concerning the duty of judicial officers and what the warrant must contain provide an important protection against the misuse of warrants. The Senate Committee included these principles as part of its set of principles with which entry and search provisions must comply and the Committee also adopts these principles which are set out in the second Chapter of this Report.

With one exception,¹⁶⁷ however, the Committee does not discuss the case law on search warrants in this Report because it extends beyond the current terms of reference and has already been discussed in detail by other authors.¹⁶⁸ The exception relates to the seizure of items not specified under a search warrant and is discussed in Chapter 6 because it relates to the issue of co-operation between agencies and the police and other agencies.

Common protections: announcement before entry, details to be given to occupier etc

Warrant provisions in the Acts considered by the Committee typically contain a number of added protections which are not referred to in the *Magistrates' Court Act 1989*. These include provisions for:

- announcement before entry; and

¹⁶⁶ *R v Tillet; Ex parte Newton* (1969) 14 FLR 101.

¹⁶⁷ In relation to the seizure of items not specified under warrant.

¹⁶⁸ For instance, Tronc, Crawford and Smith, *Search and Seizure in Australia and New Zealand* (1996), Chapter 5.

- that details of the warrant be given to the occupier.

Other provisions which typically appear in warrant sections are a sunset clause (the time after which the warrant will no longer be valid), procedures for dealing with disputed seizures and time limits for the return of material seized.¹⁶⁹ The latter two safeguards are not necessarily limited to the warrants' sections of Acts. Finally, there are protections which appear only rarely in the legislation. One example is the Acts which require authorised officers to first obtain the authorisation of another point of authority within the agency.¹⁷⁰

In this section the Committee considers the “announcement before entry” and the “details of the warrant to be given to the occupier” provisions as a brief case study of the existence of protections in general.

Acts which contain the usual added protections

Sections 93B and 93C of the *Medical Practice Act 1994* are typical of the provisions contained in other Acts:

Section 93B Announcement before entry

- (1) Immediately before executing a search warrant, a person named in the warrant must announce that he or she is authorised by the warrant to enter the premises.
- (2) The person need not comply with sub-section (1) if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure the safety of any person or that the effective execution of the search warrant is not exercised.

Section 93 C Copy of warrant to be given to occupier

If the occupier or another person who apparently represents the occupier is present at premises when a search warrant is being executed, the person or persons named in the warrant must –

- (a) identify themselves to that person by producing their identification card for inspection by that person; and
- (b) give to that person a copy of the execution copy of the warrant.

Many other Acts contain similar provisions.¹⁷¹

¹⁶⁹ In particular, procedures are needed for the return of computer hard discs.

¹⁷⁰ For instance, this is required by section 122(1) of the *Fair Trading Act 1999* which provides that an inspector may apply for a warrant “with the prior written approval of the Director.”

¹⁷¹ Other Acts which include similar protections include sections 16(6) and 16(8) of the *Trade Measurement (Administration) Act 1995*; section 77B of the *Domestic (Feral and Nuisance)*

Acts which do not contain the usual protections

The Committee notes that a small number of Acts do not contain these protections. For instance, section 109 of the *Casino Control Act 1991* and section 240A of *Accident Compensation Act 1985* allow inspectors to obtain a warrant but do not specifically require announcement before entry or that the details of the warrant be given to the occupier. The *Liquor Control Reform Act 1998* is similarly silent on both requirements.

Conclusion

The Committee considers that the protections should be included in legislation unless there are compelling reasons for their exclusion. No such reasons were provided to the Committee and hence the Committee concludes that legislative change is required.

Recommendation 43

That search warrant provisions contain protections including, but not limited to:

- *announcement before entry; and*
- *that a copy of the warrant is to be given to the occupier.*

Recommendation 44

That Statutes conferring coercive powers on authorised officers contain other common protections, including:

- *exactly what matter the search warrant must cover;*
- *a sun-set clause on warrant validity;*
- *procedures for dealing with disputed seizures;*
- *time limits for the return of material seized.*

Animals Act 1994; section 82AJ and 82AK of the Motor Car Traders Act 1986; sections 59D and 59E of the Wildlife Act 1975 and so on.

CHAPTER SIX – OBSTRUCTION OF AUTHORISED OFFICERS AND POLICE ASSISTANCE

The related issues of the obstruction of authorised officers and police assistance are relevant to both the effectiveness and fairness of inspectors' powers provisions. For this reason, the Committee has decided to deal with them in a separate Chapter of the Report.

This Chapter begins with an examination of provisions which make it an offence to obstruct inspectors, as well as related provisions such as sections which make it an offence to impersonate an inspector. In the next part of the Chapter the Committee considers the various different types of police assistance provisions before examining the views of the agencies, Victoria Police and other witnesses on police assistance.

Finally, the Committee briefly considers the issue of formal and informal co-operation between the police and agencies and, in particular, the issue of how inspectors react when they come across evidence of other illegal activity.

Obstruction Provisions

The Committee's research revealed that most Acts contain provisions which make it an offence to obstruct inspectors and frequently also make it an offence to impersonate inspectors. Some Acts also contain further related provisions.

Some Acts make no reference to the obstruction of authorised officers but may make it an offence not to assist. Provisions which make it an offence not to assist (with or without reasonable excuse) were discussed in Chapter 5 of this Report in relation to the privilege against self-incrimination and will not be referred to further in this section.

Section 110(1) of the *Casino Control Act 1991* is an example of a provision which makes it an offence to obstruct an inspector and which elaborates on the types of behaviour which can lead to a breach of this section:

A person must not –

- (a) assault, obstruct, hinder, threaten, abuse, insult or intimidate an inspector, or a police officer acting in aid of an inspector, when the inspector is exercising, or attempting to exercise his or her functions as an inspector;

Section 135 of the *Fair Trading Act 1999* is a reasonably typical provision which makes it an offence to obstruct or impersonate inspectors:

Section 135 Offence to hinder or obstruct inspector

A person must not without reasonable excuse, hinder or obstruct an inspector who is exercising a power under this Part.

Penalty: 60 units

Section 136 Offence to impersonate inspector

A person who is not an inspector must not, in any way, hold himself or herself out to be an inspector.

Section 65 of the *Trade Measurement Act 1995* contains particularly detailed obstruction provisions, including:

A person is guilty of an offence if the person –

- (a) hinders or obstructs an inspector when the inspector is exercising any function of an inspector under this Act; [...]
- (e) assaults or directly or indirectly threatens an inspector while the inspector is exercising the functions of an inspector;
- (f) impersonates an inspector or otherwise falsely pretends to be engaged in or associated with the administration of this Act.

In contrast, the *Motor Car Traders Act 1986* contains no such provisions, although section 82AQ does contain a requirement to assist. The health professional Acts, such as the *Medical Practice Act 1994* are similarly silent on these issues.

Examples of Obstruction

Although, or perhaps because, the Committee received considerable evidence from agencies that they rely on police assistance when exercising coercive powers in

situations where resistance is likely (particularly when executing search warrants) it received relatively little evidence of obstruction of authorised officers.

When asked about examples of obstruction of Environmental Health Officers, Alex Serrurier, Chief Environmental Health Officer of the Ballarat City Council told the Committee:

In my time at the City of Ballarat, which is now about 12 and a half years, we have had two cases where we have been refused admission. I can recall one Department of Human Services Environmental Health Officer being locked in a freezer by a proprietor of a meat place that she went to visit, and being assaulted as part of the experience.

When I first came to Ballarat, I knew of a couple of instances [where EPOs were] threatened by proprietors with meat cleavers, and knives as well as the threats of, “You’ll end up in Port Phillip Bay with concrete boots.” They are not common but they are there. Usually discretion is the better part of valour. We are not armed, and we don’t undertake self-defence training. Not yet!¹

The Environment Protection Authority also commented on the issue of obstruction, stating:

[...]While our staff are sometimes threatened – and they are now well trained to deal with that by withdrawing – that is not the majority of cases.²

Conclusion

The Committee considers that it is important that authorised officers be allowed to carry out their lawful powers under the legislation without the risk of obstruction. It agrees with the principle developed by the Senate Committee that:

Where people enter and search premises under a power that accords with the principles set out in this Report, and exercise that power appropriately and in accordance with due process, they are entitled to do so without being subject to violence, harassment or ridicule, and are entitled to the protection of the law and to respect as persons carrying out their duty on behalf of the community.³

¹ A. Serrurier, *Minutes of Evidence*, 21 February 2002, p. 174.

² Dr Robinson, *Minutes of Evidence*, 12 December 2001, p. 61.

³ Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 2000 (6 April 2000), p. 53.

Recommendation 45

That, as a matter of general principle, all Acts should contain provisions which make it an offence to obstruct or impersonate authorised officers.

Acts which confer powers on police directly

Before examining specific provisions which allow or require police assistance, the Committee notes that several Acts, particularly the older Acts directly confer inspectors' powers on the police. Such Acts may deem the police to be inspectors or provide that the police also have particular powers on a section by section basis.

An example of a provision which deems the police to be inspectors is section 18 of the *Prevention of Cruelty to Animals Act 1986* which provides:

- (1) The following persons are inspectors –
 - (a) any member of the police force; [...]

The *Fisheries Act 1995* is an instance of a provision which confers particular powers on police on a section by section basis. This is the more typical provision. Various sections which confer coercive powers specify that they can be exercised by “an authorised officer or member of the police force.”⁴

However, in general, as Victoria Police correctly points out:

While, historically, it has been the case that Inspectors' Powers were conferred on police as a matter of course, the trend in recent times has been to exclude police. The Committee's attention is drawn, for example, to the *Motor Car Traders Act 1986* and the *Second Hand Dealers and Pawnbrokers Act 1989*. This has coincided with the increase in the number of Inspectors throughout Government Departments.⁵

Victoria Police goes on to state:

However, as the role of Inspectors and the use of their powers have increased, increased calls have been made on the Force to provide support in the execution of these powers.⁶

⁴ For example, sections 102, 104, 105 etc.

⁵ Victoria Police, submission no. 21, pp. 1-2.

⁶ Ibid, p. 2.

Victoria Police's arguments in relation to the increased calls for their assistance will be examined later in this Chapter.

The Committee notes that many of the Acts which do not specifically confer powers on the police (jointly with inspectors) nevertheless contain provisions allowing authorised officers to request police assistance and in some cases even compel the police to assist inspectors. The Committee considers these provisions below.

Police Assistance Provisions

Acts which do not refer to police assistance or assistance generally

There are some Acts which make no reference to police assistance or assistance in more general terms. The Committee could identify no rationale behind such an omission as this group of Acts represents a reasonably broad spectrum of the different types of inspectors' powers. These Acts include the *Fair Trading Act 1999*, the *Trade Measurement Act 1995*, the *Medical Practice Act 1994* and the *Local Government Act 1989*.⁷

Acts which refer to "assistance" but do not specify police assistance

Some Acts refer to assistance more obliquely and do not refer specifically to the assistance of the police.

For instance, section 74(2)(a) of the *Domestic Feral and Nuisance Animals Act 1994* allows authorised officers to enter a building "with any assistance which the officer requires."

In contrast to the *Food Act 1984*⁸ there is no requirement in the *Health Act 1958* that police assist upon request but rather only to the authorised officer obtaining "such assistants as he thinks necessary." (section 401(1)).

The *Prevention of Cruelty to Animals Act 1986* is another Act which makes frequent reference to inspectors being able to acquire "such assistance as is necessary" in

⁷ Although the Council can appoint police officers to be authorised officers pursuant to section 224(1).

⁸ See discussion below.

exercising their powers under section 21 of the Act. However, as stated above, this Act also confers powers on the police directly.

Acts which allow inspectors to request the presence of police

Acts in the next category allow inspectors to obtain the assistance of police but do not compel the police to assist. While the substance of these provisions may be essentially the same, the Committee notes that the wording of the provisions differs markedly between Acts.

Section 82 AH (1) of the *Motor Car Traders Act 1986* is a case in point:

For the purpose of monitoring compliance with this Act or the regulations, an inspector may (with the assistance, if necessary, of another inspector or a member of the police force), do any or all of the following [...]

Similarly, section 108(h) of the *Casino Control Act 1991*, allows an inspector to:

Call to his or her aid a police officer if he or she is obstructed, or believes on reasonable grounds that he or she will be obstructed, in the exercise of his or her functions.

Worded differently again is section 19 of the *Dangerous Goods Act 1985*:

Any member of the police force or officer or member of a fire authority may, where requested to do so by an inspector, assist the inspector in the execution of any of the inspector's powers or functions.

Provisions which require the police to attend

The last group of provisions can be seen as the high watermark of police assistance provisions because they actually compel police to attend. Some Acts require a police presence for the execution of search warrants and others require the police to attend upon the request of the inspector, whether for the execution of a search warrant or otherwise.

Requirement to attend for the execution of a search warrant

Section 240A of the *Accident Compensation Act 1985* provides that warrants must be executed by a member of the police force “together with any other person named in the warrant,” which presumably would include inspectors.

Similarly, section 130 of the *Liquor Control Reform Act 1998* requires police to be present for the execution of the search warrant because it allows magistrates to issue a warrant authorising “a member of the police force, together with any other person named in the warrant.”

Requirement to attend on request (whether search warrant or entry without warrant)

Section 21(1)(d) of the *Food Act 1984* is an example of a provision which requires the police to attend. Notably, however, the inspector must have come across obstruction or must believe on reasonable grounds that he or she may be obstructed before invoking the provision. The inspector may:

in a case where he is obstructed or believes on reasonable grounds that he may be obstructed in the exercise of the powers or authorities or the discharge of the functions or duties conferred or imposed upon him by or under this Act, call to his aid a member of the police force, whereupon it shall be the duty of a member of the police force so called to assist him as required and a member so assisting shall have the same powers and authorities as are conferred upon authorized officers by this Act.

Section 85 of the *Conservation, Forest and Lands Act 1987* is more direct and does not require the authorised officer to have formed a reasonable belief that he or she may be obstructed:

Members of the police force must assist an authorised officer at the request of that officer in the execution of his or her functions.

Another example of a provision which compels police assistance is section 132 of the *Liquor Control Reform Act 1998*. However, it is limited to assistance to licencees to eject persons from licenced premises:

All members of the police force are required, on the request of the licensee or permittee or their employee or agent, to expel or assist in expelling any person whose presence on the licensed premises or any authorised premises would subject the

licensee or permittee to a penalty under this Act and whom the licensee or permittee has asked to leave the licensed premises or authorised premises.

Conclusion

The Committee is of the view that oblique references to “reasonable assistance” or similar terms are not sufficiently clear and considers that the police ought to be specifically named and that, where practicable, any other assistance inspectors may require be defined.

The Committee’s conclusion on mandatory police assistance provisions follows the discussion below of Victoria Police’s objections to these provisions.

Views of agencies on police assistance

Many agencies indicated that they regularly and, in some cases, always seek the assistance of police, particularly when executing warrants. The main reason given for requesting police assistance was to ensure that authorised officers are adequately protected.

The Department of Natural Resources and Environment told the Committee that, although most officers in the fisheries agency have been trained to police standard, police assistance is still regularly sought:

Most of the staff within the fisheries agency have been trained to police standard. They have attended detective training schools and they have attended analyst courses run by Victoria Police so as to become familiar with the standards of Victoria Police. We have a reliance on the support of Victoria Police because of officer safety, particularly when we are involved in major operations with identified organised crime.⁹

In a supplementary submission to the Committee, the Department of Natural Resources and Environment clarified the situation with regard to warrants executed pursuant to the *Fisheries Act 1995*:

No such warrant is executed without the assistance and presence of the Victoria Police. NRE requires that appropriate advice be given to officers and pre-execution

⁹ D. Donaldson, *Minutes of Evidence*, 12 December 2001, p. 50.

briefings to all NRE and Victoria Police operatives prior to taking action under a warrant.¹⁰

The agricultural section of the Department of Natural Resources and Environment also frequently requires police assistance, both in emergency situations and in planned operations:

If there is an immediacy aspect and an offence is underway, perhaps with multiple offenders and there may be a need for back-up assistance from the police to detain the people, there would be a local request from field staff to the police to get that immediate backup. Also [...] with our major planned operations we would prepare an operational plan consistent with the police operational plan. [...] There would be a conjoint operation managed from the early stage of the investigation right through to its completion.¹¹

The Committee notes that several agencies which emphasised that they try to take a co-operative approach to law enforcement made it clear that they also seek police assistance where necessary.

For instance, the Environment Protection Authority seeks police assistance where entry is resisted:

We are not in the business of engaging in what might become a somewhat physical encounter. Our staff are not trained for that. I see that as an occupational health and safety issue, whereas the police are trained to act in the circumstances. Therefore, we prefer the police to effect entry on our behalf.¹²

Similarly there is evidence to suggest that, like search warrant provisions, the mere possibility of obtaining police assistance can encourage cooperation. The Department of Human Services noted in its written submission that:

In practice, officers advise a proprietor of a food premises that they wish to enter and that if entry is refused, the proprietor is advised that the assistance of the police may be obtained.¹³

Even though, as the Committee noted in an earlier section of this report, the DHS seldom exercises its coercive powers in the public health area “because entry is generally consensual and often welcomed,”¹⁴ in rare cases its officers do have to call for police assistance:

¹⁰ Department of Natural Resources and Environment, submission no. 22S, p. 2.

¹¹ R. Warren, *Minutes of Evidence*, 12 December 2001, p. 56.

¹² Dr Robinson, *Minutes of Evidence*, 12 December 2001, p. 58.

¹³ Department of Human Services, submission no. 33, p. 5.

¹⁴ *Ibid*, p. 37.

If entry is required and it is being refused or withdrawn in the course of entry, police assistance would be obtained where the investigation is urgent. [...] Where the exercise of power involves force or physical interference it is carried out with the assistance of the police. It should be pointed out that this [...] would only occur in extreme and rare circumstances.¹⁵

Alex Serrurier, Chief Environmental Officer of the Ballarat City Council whose officers enforce the public health Acts (among others) agreed with this when he told the Committee:

[I]f necessary we can bring the police in to assist us to gain access. I have always told my staff that if they are refused entry, and they go through the process of explaining to people that they are entitled to enter the premises and undertake their investigations, and if they are still refused entry, that they should withdraw and either try to make an appointment with the person to see them at a time that is more convenient, or to come back and we can debate whether or not we need to get the police, or if I go down with them, that's usually enough.¹⁶

In what seems to be the high-water mark of police assistance, Liquor Licensing Victoria told the Committee that it relied totally on the police to enforce the Act:

In terms of the liquor enforcement laws in Victoria, Liquor Licensing Victoria, which is the administrative unit controlling it, has not appointed any inspectors or authorised officers to give effect to the powers that the director has under the Act. There is total reliance on the Victorian Police to enforce the various provisions of the Act.¹⁷

Criticism of Police assistance

Some witnesses who appeared before the Committee were critical of the agencies' heavy reliance on police assistance. Foremost among these was Victoria Police itself. Before turning to the submissions of the police, however, we outline the objections raised by Victoria Legal Aid (VLA).

VLA criticised the practice whereby agencies automatically obtain police assistance. VLA's objection was based on the fact that people are often stigmatised by a visit from uniformed police. In its written submission, VLA explains its objection as follows:

Where the exercise of power involves force or physical interference with people or property, police assistance should always be sought and obtained. Members of departments or agencies should never use force unless there is a need to protect

¹⁵ Ibid.

¹⁶ A. Serrurier, *Minutes of Evidence*, 21 February 2002, p. 175.

¹⁷ B. Kearney, *Minutes of Evidence*, 21 February 2002, p. 231.

oneself from risk of injury. However, VLA does not wish to see assistance of police being sought and obtained as a matter of course, or in circumstances where it is not warranted. VLA recognises that the majority of citizens are reluctant to have police (particularly in uniform) knocking on their doors. Some stigma attaches to residents who may be seen to be “criminals” simply because a number of uniformed police officers attend and enter their homes.¹⁸

When asked how it is possible to predict in advance that a situation will involve force or physical interference and to comment on the fact that many agencies automatically bring the police along when executing a warrant, Carmen Randazzo, Senior Public Defender in the Criminal Law Division of VLA, elaborated on VLA’s view:

It is a very delicate balance that has to be addressed, and the two aspects have already been brought up. VLA recognises that most people do not want police in uniform knocking on their door due to fear of being labelled a criminal or because of the stigma that might be attached to that. However, VLA does say that if there is any real prospect of physical injury to the person executing the warrant [...] then by all means they should be accompanied by a police officer for their protection. But what VLA does not want to see is a situation where it is simply done as a matter of course; it is simply done as, “today I have to go out and execute these two warrants. I am going to call up the police and tell them to accompany me.” That’s the situation. There must be a real threat, or there must be imminent danger to the person to justify having the assistance of the police. So it is a balance.¹⁹

Victoria Police’s objections to assisting inspectors were quite different from the objections raised by VLA. Police representatives pointed out that, as the powers of inspectors has increased, so too has their enforcement activity and therefore also their reliance on police assistance. Inspector Leane from Victoria Police described the process whereby powers shifted from police to inspectors but then (due to the practice of obtaining police assistance) back to the police again, as a “circular progression:”

At the end of the day from a policing perspective, as that direction shifts we offset, shift offshore or outsource activities which used to be core activities – for example, gaming. Those activities move off to other agencies which take control of them and build up their role in those industries. As they build up their role, they often build up their powers in what they do, and as they build up their powers they get to the situation where more and more they need police assistance in performing their functions. It is a circular progression in each of these agencies as they develop: as they move ahead we come back to the point where police are involved nearly as much as we were in the first place.²⁰

Victoria Police is particularly concerned about the drain on police resources that their assistance to inspectors involves:

¹⁸ Victoria Legal Aid, submission no. 19, p. 6.

¹⁹ C. Randazzo, *Minutes of Evidence*, 21 February 2002, p. 163.

²⁰ Inspector S. Leane, *Minutes of Evidence*, 13 December 2001, p. 84.

An action by an inspector to conduct a search and seize property or individual exhibits exposes the inspector to the possibility of confrontation. The execution of a search warrant is an action where an inspector may be particularly vulnerable to confrontation. It is in these situations that the police are often called on to assist. With the increase of these types of powers an obvious increased call is made on police resources to assist in areas that are now not core responsibilities of the force. This has inevitable budget and resource impacts on the force.²¹

On the question of whether re-arming fisheries officers would result in a reduction of calls on the police, Victoria Police commented that this was “difficult to determine.”²²

An armed Fisheries officer on general patrol will obviously have a reduced need to call on police assistance to conduct higher risk functions, however, the execution of search warrants is a different situation. The Force has done considerable work in skilling up its members to conduct forced building entry searches. The execution of search warrant has been identified as a high-risk enterprise and should not be taken on lightly. Merely arming Fisheries Officers would not provide them with sufficient skills, in the view of the Force, to undertake this function. Certainly, arming Fisheries officers will reduce the call on police resources. The actual level of reduction will be difficult to measure.²³

The Committee notes that this issue is being considered by the Environment and Natural Resources Committee in two of its current inquiries.²⁴ Accordingly, it does not propose to comment on it further in this Report.

Another point of particular concern to Victoria Police is the existence of mandatory police assistance provisions, such as section 85 of the *Conservation, Forest and Lands Act* (referred to above), which require the police force to assist authorised officers:

It is no longer appropriate for a mandatory requirement to be placed on the Force to assist Inspectors in the exercise of their roles unless appropriate budget transfers are made to meet the expenses incurred.²⁵

Conclusion

The Committee considers that, where entry and search is likely to involve force or physical interference with people and their property, it is desirable that inspectors obtain the assistance of Victoria Police. On the basis of the evidence it received, the

²¹ Commander P. Hornbuckle, *Minutes of Evidence*, 13 December 2001, p. 83.

²² *Ibid.*

²³ Victoria Police, submission no. 21S, pp. 1-2.

²⁴ Namely, the Inquiry into Fisheries Management across Victoria and the Inquiry into the Sustainable Management of the Victorian Abalone and rock lobster fisheries.

²⁵ Victoria Police, submission no. 21, p. 4.

Committee notes that the use of force is most likely to arise during the execution of search warrants but is not limited to these situations. Even where inspectors are trained using police standards, the fact remains that inspectors are currently unarmed and may therefore require the protection of the Police in some cases.

However, the Committee agrees with Victoria Legal Aid that assistance should not be obtained as a matter of course where there are no reasonable grounds to suspect that the inspection will involve the use of force.

The Committee also acknowledges the concerns of Victoria Police that their role in assisting inspectors is a drain on police resources. The Committee sees this as an issue of identifying and making an allocation for this cost in budget preparations whether they be the budgets of Victoria Police or the relevant enforcement agency.

The Committee is also of the view that mandatory police assistance provisions are generally inappropriate. The Committee believes that Victoria Police should be able to prioritise requests for assistance and that mandatory police assistance provisions prevent them from doing so.

Recommendation 46

That, where it is envisaged that the assistance of the police may be necessary, the Act specifically name the police rather than merely make a general reference to “such other assistance as is necessary” or similar words.

Recommendation 47

That Acts specify that inspectors may seek assistance from police if they are obstructed or believe on reasonable grounds that they will be obstructed in the exercise of their functions.²⁶

Recommendation 48

That, as a matter of general principle, mandatory police assistance provisions are inappropriate.

²⁶ See, for instance, section 108H of the *Casino Control Act 1991*.

Issue of lack of training of police in the details of the legislation

Another criticism of the substantial and increasing involvement of Victoria Police in the exercise of the powers of authorised officers is that police officers are not always familiar with the plethora of inspectors' powers provisions. The principal reason why Victoria Police supports greater consistency between Acts is so that its officers can more easily understand inspectors' powers and not have to rely on advice from the agencies. The written submission states:

With such a disparity and lack of formulae in the provision of Inspectors' Powers, members of police often have to rely heavily on the advice from Inspectors when attempting to settle disputes or prevent breaches of the peace. As can be seen from the vast list of Acts which contain Inspectors' Powers it is not possible to know and understand the extent of the powers provided under each.²⁷

The Victorian Abalone Divers Association (VADA) also commented on the fact that the levels of knowledge and experience of police officers in the enforcement powers of the *Fisheries Act 1995* differed markedly:

[...] I think it depends on where the police come from [...]. Some of them are going to be uniformed officers from the local station, and some of those clearly may not have any experience in enforcement. I think officers who come from the Tactical Response Group – which is where most of the police are drawn for preorganised operations – are going to have more experience in that type of work because they are more regularly working with fisheries officers, for example.²⁸

The Committee notes that the police's general knowledge of the powers available to inspectors would be assisted if there were a greater level of consistency in Victorian Acts containing inspectors' powers. The Committee refers to the submissions of the Police and of other witnesses in relation to consistency in Chapter 8 of this Report.

In the Committee's view it is important that Police officers receive training in relation to the inspectors' powers which they hold directly or in relation to which their assistance is sought.

²⁷ Victoria Police, submission no. 21, p. 3.

²⁸ A Garden, *Minutes of Evidence*, 21 February 2002, p. 186.

Co-operation with police / other agencies

The issue of co-operation between agencies and the police and or other agencies has two main aspects. First, there is the question as to what authorised persons should do when they come across evidence of criminal activity which extends beyond the ambit of the Act they are enforcing. One more specific aspect of this which the Committee examines is the extent to which authorised officers can seize items which go beyond the scope of the warrant they are executing. Secondly, there is the issue as to whether and how police request authorised officers to assist them in the exercise of police investigations.

Where inspectors encounter evidence of other crimes

The approach taken by inspectors in this situation appears to vary considerably. The evidence of two witnesses suggested that agencies may have insufficient protocols for dealing with evidence of criminal activity which falls outside the ambit of the relevant agency's enforcement powers and that any co-operation with the police or other agencies occurs on an ad hoc basis and is left up to the discretion of the individual inspector.

When asked how Environmental Health Officers would react if they came across evidence of other crimes, Alex Serrurier, the Chief Environmental Health Officer of the Ballarat City Council, answered:

I guess it is very much an individual view on that one. People would make up their own mind on what they want to do with that. If they walked into a place and somebody had what was obviously some marijuana or heroin, or something like that, then it would be up to the individual to decide whether or not they needed to report that. We also have issues around visiting premises and there being instances of child abuse. We are not mandatory reporters, which perhaps is a little strange, but environmental health officers are not mandatory reporters. However, my staff in the past have come back and said, 'I am unhappy with what is going on there,' and we would, in most cases, make a report as a result of that.

I think most of my people would also – I certainly would if we saw something there – talk to the police about it. If we saw an obvious marijuana crop, we would probably talk to the police about it [...]²⁹

²⁹ A Serrurier, *Minutes of Evidence*, 21 February 2002, p. 175.

Similarly, when asked whether inspectors come across prohibited goods and, if so, what the protocols are for liaising with other agencies, Mr David Lear, Contracts Manager, Trade Measurement Victoria responded:

Generally, I don't know whether our inspectors would necessarily know what prohibited goods were. They are very conversant in their own Acts but they are not extremely conversant with a lot of other Acts.³⁰

However later he observed:

[T]hey are very observant and there has certainly been a number of cases where they have seen an occupational health and safety issue which is not right and will forward it on to the appropriate department to follow it up.³¹

In contrast, the Victorian Casino and Gaming Authority indicated that their inspectors are specifically trained to report any evidence of criminal activity to the police immediately and that there are formal liaison systems in place to assist this process:

Inspectors are trained to note and immediately report to police any criminal offences detected. This can include obtaining video surveillance film, securing any available documentary or other evidence and providing same to police. If these offences are detected at the casino, Inspectors have direct contact with the Victoria Police Casino Crime Squad who occupy an adjoining office. Offences detected in respect of gaming venues are reported to the liaison officer at the Victoria Police Organised Criminal Squad.³²

On a related issue, the Victorian Workcover Authority provided evidence to the Committee that it has a formalised system of co-operation with some other agencies. In its written submission to the Committee the Authority told the Committee:

The VWA has developed Memoranda of Understanding (MOU) with a number of other agencies. The MOUs are published on the VWA website. Current MOUs are listed below:

- Australian Maritime Safety Authority
- Country Fire Authority and Metropolitan Fire and Emergency Services Board
- Department of Natural Resources and Environment
- Environment Protection Authority
- Marine Board
- Office of the Chief Electrical Inspector
- Office of Gas Safety

In the development and implementation of any new legislation, regulations, codes of practice or guidance notes, the VWA identifies other agencies who may have

³⁰ D. Lear, *Minutes of Evidence*, 21 February 2002, p. 229.

³¹ *Ibid.*

³² Victorian Casino and Gaming Authority, submission no. 35S, p. 1.

overlapping jurisdiction, and will liaise and develop MOUs with these agencies where appropriate.

[...]

Where VWA Inspectors or Investigators become aware of evidence of other crimes or breaches of legislation, that information is forwarded to the relevant authorities.³³

VWA also referred to cooperation with the police but in the context of its membership of DISPLAN, the standing disaster plan for the State, which involves a number of the Emergency Services and which is co-ordinated by the police.

Conclusion

The Committee considers that it is inappropriate that the reporting of offences not related to the inspectors' particular duties be left up to the discretion of individual inspectors. It is important that agencies have formalised systems in place, whether in the form of Memoranda of Understanding with other agencies with overlapping responsibilities or in the form of a procedure which authorised officers must follow when they come across evidence or activity which falls within the jurisdiction of another agency or of the police.³⁴ The Committee notes that systems should be formalised not only with Victoria Police and other Victorian agencies but also with the Federal Police and Federal agencies. The Committee believes a whole of government approach would be appropriate in this regard.

Recommendation 49

That the Government develop a protocol for agencies dealing with suspected offences not related to the legislation covering their operations.

Seizure of items not specified under warrant

In what situations, if at all, can investigators seize items or undertake investigation activities which are not specified in the warrant or which do not fall within the scope of the search warrant provisions in the relevant legislation? This is a more specific aspect of the issue as to what authorised officers can and should do when they encounter evidence of other offences.

³³ Victorian Workcover Authority, submission no. 41, p. 5.

³⁴ Stephen Shirrefs, representing the Victorian Criminal Bar Association, supports the ability to share information so long as there are appropriate accountability mechanisms in place: *Minutes of Evidence*, 22 February 2002, p. 268.

The statutes offer little, if any guidance, and the state of the common law on this issue is uncertain. Danny Holding representing the Law Institute Victoria told the Committee:

This is an area of the law that causes a lot of confusion, when the police are, for example, executing a search warrant relating to drugs and they come across stolen property; or fisheries officers who might be looking for abalone who come across stolen property.

The law has taken different views about the legitimacy of seizing that property or conducting a further search in relation to that type of property.³⁵

Seizures of evidence which does not clearly fall within the scope of the warrant or the legislation can lead to the evidence being excluded during later criminal proceedings.

The question as to whether authorised persons can seize property or undertake other investigation activity which is not directly covered by the warrant³⁶ goes to the heart of the question as to just how much protection warrant provisions really offer. If items can be seized which do not fall within the scope of the relevant warrant, how can warrants be said to be “a practical safeguard which both common law and statute provide against arbitrary interference with the personal liberty and property of the individual”?³⁷

Legislative provisions

The Committee identified a small number of Statutes containing a provision allowing inspectors to seize things not described in the warrant. However, the scope of these provisions is very limited.

For instance, section 24G of the *Prevention of Cruelty to Animals Act 1986* allows inspectors to seize animals not described in the warrant if the inspector believes the welfare of that animal is at immediate risk:

In addition to the seizure of any animal described in a warrant issued under section 24E or any animal of a class described in the warrant, the warrant authorises an inspector executing it to seize an animal that is not described in the warrant or that is not of a class described in the warrant, if the inspector believes, on reasonable grounds that the welfare of the animal is at immediate risk.

³⁵ D. Holding, *Minutes of Evidence*, 13 December 2001, pp. 154-155.

³⁶ The scope of which is, in turn, defined by the legislation.

³⁷ *Challenge Plastics Pty Ltd v The Collector of Customs for the State of Victoria* (1993) 42 FCR 397, p. 405 (cited in the section entitled “The review of Search Warrant Provisions” in Chapter 5.)

Similarly, section 125 of the *Fair Trading Act 1999* allows inspectors to seize or take a sample of anything not described in the warrant if the inspector believes on reasonable grounds that the thing is of a kind which could have been included in a search warrant or will afford evidence about the contravention of any Consumer Act:

Pursuant to section 125(b), the inspector must believe on reasonable grounds that:

it is necessary to seize that thing in order to prevent its concealment, loss or destruction or its use in the contravention of this Act or any other Consumer Act.

Section 82AL of the *Motor Car Traders Act 1986* is a similar provision.

The scope of these provisions is clearly limited because they only allow inspectors to seize objects which relate to other Consumer Acts. Thus, they do not authorise seizure of illicit drugs or evidence of other serious crimes.

Other provisions the Committee identified are even more limited in scope because they refer only to seizure of evidence of an offence against the relevant Act. Section 103 of the *Fisheries Act 1995* and section 59C of the *Wildlife Act 1975* provide that, if authorised officers find a thing which they believe on reasonable grounds to be connected with the offence or another offence against the Act concerned and believes it is necessary to seize that thing, they can do so.

The common law - a brief overview

The common law provides little guidance on the extent to which inspectors may seize items or undertake other inspection activities which are not within the scope of the search warrant. In addition, once again, the cases concern searches by the police rather than by authorised persons. This section briefly sets out the current state of uncertainty in the law on this issue; it does not purport to provide an exhaustive analysis of the case law which, in the context of police powers at least, has been undertaken more extensively by others.³⁸

Traditionally, people's homes were regarded as their castles and their possessions were jealously protected by the common law.³⁹ Searches could only be undertaken

³⁸ For example, Tronc, Crawford & Smith, *Search and Seizure in Australia and New Zealand* (1996), Chapter 1.

³⁹ *Entick v Carrington* (1765) 95 ER 807.

under the authority of a warrant and the entry onto property and seizure of items not specified in the warrant were viewed as a trespass ab initio and thus regarded as an abuse of powers.⁴⁰

Following a number of cases which eroded the original common law principle that seizures outside the scope of a warrant were an abuse of power,⁴¹ the landmark Federal Court case of *Challenge Plastics v Collector of Customs for the State of Victoria*⁴² marked a return to an emphasis on the rights of the occupier. In that case, Heerey J implicitly adopted the reasoning in an earlier Victorian case which held that, with the exception of cases involving the arrest of a suspect, the only way the seizure of items could be justified was “under a search warrant lawfully issued.”⁴³

However, more recent authority suggests that seizure outside of a warrant may be justified in limited circumstances. For example the Federal Court in the case of *Dunesky v Commonwealth of Australia*⁴⁴ reiterated the comments made in an earlier decision that the Court must take a practical approach to the seizure of items which go beyond the scope of a warrant:

It is simply impossible for a police officer executing a warrant to make an instant judgment on the admissibility, probative value or privileged status of the documents which he may encounter in his search. Generally speaking, it is in the course of the subsequent investigation following seizure of the documents that informed consideration can be given to the documents and an assessment made of their worth or significance.⁴⁵

In that case, the Court had regard to the “circumstances of this large-scale and difficult search relating to complex issues” and concluded that the search and seizure had not been improperly undertaken.⁴⁶

⁴⁰ *Six Carpenters’ Case* (1610) 8 CoRep 146a.

⁴¹ *Ghani v Jones* [1970] 1 QB 693 and *Chic Fashions* [1968] 2 QB 229.

⁴² *Challenge Plastics v Collector of Customs for the State of Victoria* 115 ALR (1993) 149.

⁴³ *Levine v O’Keefe* (1930) VLR 70, p. 72.

⁴⁴ *Dunesky v Commonwealth of Australia* (1996) 89 A Crim R 372.

⁴⁵ *Ibid*, p. 386.

⁴⁶ The case of *R v McNamara* also appears to retreat to some extent from the strict approach in *Challenge Plastics*. In that case the Supreme Court said of the judgments in *Challenge Plastics* “we do not see any dicta [...] which are of assistance in the present case.” In that case the police, who had permission to install a listening device pursuant to a warrant, also installed a video camera. It was held that the evidence thus obtained was not improperly obtained, noting “[...] it seems to us to be absurd if the law in effect required the police to ignore contents of the shed which were there before their eyes. The suspicion that drugs were being manufactured gave rise to the application for a warrant, and upon entry they observed a laboratory which even to the inexperienced eye would appear to be designed to carry out a chemical process. In our view the police were entitled to make observations and to record them on camera; the question whether their activities when further than was lawful is not easy to decide.” *R v McNamara* [1995] 1 V.R. 263, p. 269.

The ability of authorised officers to seize items or undertake investigation activities which are not specified in the warrant also depends on the terms of the provision pursuant to which the warrant is granted. Where the statute specifically states what can be seized, the scope for seizure of other items will be limited. This was the case in the *Challenge Plastics* case where the relevant provision conferred only the power to remove and impound “any of those books and documents which are found” “relating to the goods.” As Heerey J held, this section “would be meaningless if once on the premises the officers could remove and impound other documents.”⁴⁷

In summary, the present state of the law in relation to the seizure of items beyond the scope of a warrant is unclear. However, on the basis of more recent cases it seems that authorised officers have only limited scope to seize material which is not mentioned in the search warrant or which does not strictly fall within the scope of items or documents specified in the statute.

In contrast, the United Kingdom and the United States appear to allow police and authorised officers greater scope to seize items which are not specified in the warrant and which are evidence of another crime.

Overseas models

The United Kingdom and the United States have related doctrines known as the *Chance Discovery Principle* and the *Inadvertent Discovery Principle* respectively. These doctrines apply in situations where an investigating official is lawfully on premises under a statutory right, consent or warrant and inadvertently discovers property. The US doctrine has three main components, namely:

- lawful intrusion;
- inadvertent discovery;
- the seized property must be “immediately apparent” as evidence of an offence.⁴⁸

The UK doctrine encapsulates the principles of the case of *Ghani v Jones*,⁴⁹ a case which, prior to the *Challenge Plastics* case, had been applied in a number of

⁴⁷ *Challenge Plastics*, above note 42.

⁴⁸ *Coolidge v New Hampshire* (1971) 91 S Ct 2022.

⁴⁹ *Ghani v Jones* [1970] 1 QB 693 which affirmed the principles outlined in *Chic Fashions (West Wales) Ltd v Jones* [1968] 1 All ER 229.

Australian decisions.⁵⁰ In essence, the doctrine provides that, when officials are lawfully in any place and an item is suspected on reasonable grounds to be evidence of an offence, that item may be seized for evidentiary purposes. As one author points out:

The fundamental proposition underlying *Ghani v Jones* is that it would be unrealistic and unreasonable to require police officers who have found property unexpectedly, while in the course of lawful activity, and where that property is likely to provide evidence of an offence, to first obtain a search warrant before seizing it.⁵¹

Options for reform

The Committee considers that the law in relation to the seizure of items which are not mentioned in the warrant or the statute should be clarified. In recommending any new statutory provision on this issue the Committee is as always mindful of the need to balance the community's interest in law enforcement against the individual's right to privacy. Allowing authorised officers to seize material unrelated to their search warrant would arguably be too great an intrusion on the rights of the individual. On the other hand, not allowing authorised officers to take any action would hinder effective law enforcement.

One way such a balance could be reached would be to introduce a right to preserve the scene and to notify the appropriate authorities by way of an approved and monitored procedure. Danny Holding, representing the Criminal Law Committee of the Law Institute Victoria presented this idea to the Committee at a public hearing:

We would say that the position should be that there should be a right to preserve the scene and to obtain appropriate authority in relation to the new material. Often that is desirable because people who might be executing the power do not have the necessary expertise to determine whether the material is material that properly warrants suspicion or further investigation.

There would have to be some sort of arbitrary kind of line, but we would hope it would not extend beyond something like a day – 24 hours – for different authorities to be notified, preservation of the scene to occur, and a new power or new warrant obtained specifically to that new material.⁵²

⁵⁰ See discussion in Chapter 1 of Tronc, Crawford and Smith in *Search and Seizure in Australia and New Zealand* (1996) and cases *GH Photography Pty Ltd v McCarrigle* [1974] 2 NSWLR 635, *See v Milner* (1980) 2 A Crim R 210, *Parker v Churchill* (1985) 9 FCR 316.

⁵¹ Tronc et al, above note 38, p. 20.

⁵² D. Holding, *Minutes of Evidence*, 13 December 2001, p. 155.

On a more general level, the Committee reiterates its view that agencies should have formalised reporting systems for dealing with evidence of criminal activity which does not fall within the ambit of their powers, whether or not they encounter such evidence in executing a search warrant or in exercising powers without a warrant.

Recommendation 50

That consideration be given to conferring on inspectors a limited power to preserve a scene for a set period of time if they encounter clear evidence of crimes which are not within the scope of their own powers.

Requests for authorised officer assistance with police inquiries

In the course of the meetings which the Committee conducted with agencies overseas, the Committee heard evidence that some overseas police forces request authorised officers to use their coercive powers to assist the police with criminal investigations. It is important to differentiate here between legitimate requests for information by the police and requests to ask inspectors to enter and search premises for the purposes of a police inquiry unrelated to the subject matter of the relevant Act.

The Committee is of the view that the second type of request would be clear abuse of inspectors' powers provisions.⁵³ The Committee received no evidence of such requests or any other improper co-operation between police and inspectors from Victorian witnesses.⁵⁴ Specific questions directed at witnesses elicited no evidence of such activity.

⁵³ Stephen Shirrefs representing the Victorian Criminal Bar Association agreed: "Clearly that is an improper purpose." S. Shirrefs, *Minutes of Evidence*, 22 February 2002, p. 267.

⁵⁴ VLA did, however, refer to the practice of the police requesting assistance from agencies: "In relation to criminal cases, it is the experience of VLA that Police do seek assistance from agencies when investigating criminal matters. Agencies such as Telstra, the Health Department, WorkCover are just a few. [...] More often than not it is Police requesting information from, or assistance with their own criminal investigation."⁵⁴ Victoria Legal Aid, submission no. 19S, p. 1.

CHAPTER SEVEN - POWERS OF PUBLIC TRANSPORT INSPECTORS

Introduction

The powers of public transport inspectors¹ to request a name and address and detain and arrest under the *Transport Act 1983* are without a doubt the most controversial inspectors' powers the Committee encountered during this inquiry.

In line with the public and media interest in the issue, which was particularly high during the December 2001 and February 2002 ticketing "blitzes," the powers of public transport inspectors attracted more submissions to this Inquiry than any other single issue: eight witnesses who appeared before the Committee made submissions in relation to the powers and the issue was the dominant or sole focus for half (highlighted below with an asterix).²

- Office of the Director of Public Transport*;
- Yarra Trams*;
- Public Transport Users Association*;
- Consumer Law Centre*;
- Law Institute Victoria (Criminal Law Section);
- The Victorian Privacy Commissioner;
- Liberty Victoria; and
- Criminal Bar Association

Due to the high level of interest in these contentious powers, the Committee has decided to deal with them in a separate Chapter of this Report. However, the conclusions reached and general principles developed elsewhere in this Report,

¹ To avoid unnecessary repetition, the terms public transport inspectors, authorised officers, ticket inspectors and revenue protection officers are used interchangeably in this Chapter.

² A late submission was also received from the RMIT Union Legal Service.

particularly in relation to questions of authorisation, identification and training, are also relevant to this area.

The Committee notes that, in relation to some issues, such as the distinction between detention and arrest, there is case law which has arisen almost exclusively in the context of police powers. Given that the case law does not specifically relate to the powers under the *Transport Act 1983* and given this Inquiry's focus on the transparency and clarity of *legislative* powers, it is of marginal relevance. Accordingly, the Committee does not consider it in this Chapter.

In this Chapter, the term "Transport Companies" is used to denote the private operators of public transport in Victoria which employ authorised persons with relevant powers under the *Transport Act 1983*.

Introduction to current powers

The *Transport Act 1983* contains a number of powers relevant to this Inquiry, including rail safety accreditation provisions and taxi-cab and tow truck compliance provisions.³ This Chapter, however, focuses only on the powers relevant to public transport inspectors.⁴

The powers of public transport inspectors include the powers to:

- require names and addresses (section 218B);
- arrest suspected offenders (section 219);
- detain suspected offenders (section 219AA); and
- remove offenders (section 220).

The offences to which these powers apply, include:

- travelling without a valid ticket (section 221); and
- further offences (Division 4AB) (including smoking in carriages, leaving a moving vehicle; feet on seats; trespass and graffiti offences etc).⁵

³ These powers are set out in the submission of the Department of Infrastructure, Public Transport Division, submission no. 34, pp. 6-7.

⁴ Significantly, Yarra Trams refers to such inspectors as "revenue protection officers."

⁵ These provisions are set out in the submission of the Department of Infrastructure, Public Transport Division, submission no. 34, p. 3.

Other relevant provisions include:

- identification of authorised persons (contained in section 218B and section 221I);
- authorisation of authorised persons (section 221C);
- inquiries into the conduct of authorised persons (section 221J).

The main focus of submissions to the Committee was on:

- aspects of enforcement philosophy, particularly the targeting of certain groups;
- the detention and arrest powers of authorised officers; and
- information privacy issues arising out of requests for names and addresses and verifying details.

Accordingly, the Committee considers each of these issues in turn in this Chapter. First, however, the Committee outlines how the powers are used currently. The current practices section below focuses on the questions which can be asked and the powers which can be exercised where passengers are found without a valid ticket because offences under section 221 (travelling without a valid ticket) were the main focus of submissions to the Inquiry. Problem areas which are discussed in the subsequent sections of this Chapter are also flagged here.

Current practices for ticket offences

Step One: “Can I see your ticket?”

- If the passenger has a valid ticket, no further questions can be asked.
- If the passenger has no valid ticket:
 - Inspectors should consider any claim that the passenger took “reasonable steps” or had “no reasonable opportunity” to purchase a ticket (e.g. ticket machine not functioning) pursuant to section 221(1B)(2):
 - If yes, no further powers can be exercised.
 - If no, inspector can ask for a name and address (see below).

One issue highlighted by the Privacy Commissioner was that sometimes inspectors ask for a name and address even where there was evidence to suggest that a passenger had taken reasonable steps to purchase a ticket.

Step Two: “What is your name and address?”

Section 218B(2) allows the authorised officer or member of the police force to ask for a name and address “if the officer or member believes on reasonable grounds that the person has committed or is about to commit an offence against this Act or the regulations.” In this case the offence is pursuant to section 221 which relates to offences for travelling without a valid ticket.

Step Three: “Can you verify your name and address?”

There is no actual power in the *Transport Act 1983* to require verification of a passenger’s name and address. However, the evidence the Committee received suggested that, in practice, authorised officers request verification details and treat a failure to verify identity as a reason to detain or arrest on the basis that the person is therefore a suspected offender.

The issue as to whether the *Transport Act 1983* should be amended to allow authorised officers to demand a name and address is considered later in this Chapter. In addition, the privacy issues relating to the collation of verification information are canvassed.⁶

Step Four: “You are under arrest”

If a person refuses to give a name and address an authorised person can exercise his or her powers of detention and arrest (sections 219AA and 219 respectively).

The blurred distinction between detention and arrest was an issue for discussion here. However, more significant was the discussion in relation to whether detention and arrest powers are proportional to the harm they are designed to combat.

These issues and others which arose in the course of public hearings are discussed in the following sections of this Chapter.

⁶ The *Transport (Further Miscellaneous Amendments) Bill 2002* which has recently been introduced into Parliament, deals in part with this issue. The postscript at the end of this Chapter gives more details of the Bill.

Enforcement philosophy

As discussed in Chapter 4 of this Report non-legislative aspects of statutory powers can be as important as the Statutes themselves. In that Chapter, the Committee commented on the evidence received from a number of witnesses that they found a co-operative approach worked better than a strict “black letter” (or deterrence) approach to enforcement.

In contrast to this approach, there is evidence to suggest that the Transport Companies adopt a strict approach to enforcement. When asked about their enforcement philosophy, Yarra Trams told the Committee:

[...] We have a very straightforward strategy with respect to fare evasion. Any offences committed under the Transport Act are reported. The staff has very minimal discretion, and that is with respect to a clear aspect with offences that are committed. If there is no clear evidential reason for reporting them, then they will use their discretion there; but if there is a clear fact that offences have been committed they will report them.⁷

The focus on strict enforcement was also clear from the answer Yarra Trams gave to the question as to whether it was concerned about the appeal of infringement notices:

No, not at all. I have pushed with my staff right from the very start that the penalty is not a problem for us. It is the enforcement of the *Transport Act*, and whatever penalty or appeal or withdrawal comes after that is not our worry. It is the enforcement at the start that is our concern.⁸

With the exception of the use of discretion,⁹ the Public Transport Users Association and other witnesses such as the Consumer Law Centre appeared to agree that transport inspectors generally adopted a strict, pro-enforcement strategy. The Public Transport Users Association criticised the culture of enforcement given the problems with the ticketing system:

We would argue that as an initial step the government and the private operators need to move away from the culture of enforcement and forget about it until they have a ticketing system that works properly. The present approach that everybody, regardless of reason, should be fined \$100 for not having a ticket is really only going to drive people away from public transport.¹⁰

⁷ P. McKeon, *Minutes of Evidence*, 21 February 2002, p. 203.

⁸ *Ibid*, p. 202.

⁹ Discussed below.

¹⁰ V. Williams, *Minutes of Evidence*, 12 December 2001, p. 36.

In the earlier section on “enforcement philosophy” the Committee noted that many agencies adopt a co-operative approach to enforcement because they found that this was ultimately more effective from the point of view of compliance and cost.

Danny Holding, on behalf of the Law Institute Victoria, expressed his view that there had been more situations of conflict since the enforcement strategy of the public transport system had changed:

It is true that one has to consider perhaps sometimes taking a step back and looking at whether the need really is justified. Perhaps I could give one example. Since conductors have been taken off the trams there are more situations of conflict. [...] ¹¹

After acknowledging that the current powers were designed to ensure the integrity of the whole enforcement system and that, in the current system, if there were no arrest power then effective enforcement would be difficult, Mr Holding went on to question the enforcement philosophy behind this system:

But one has to consider whether the cost involved from the beginning is really worth it, because if you had a tram conductor there giving the people a ticket you would not be creating the situation in the first place where you need the coercive power to ask somebody for their name and address and they’re thinking, “Well, do you really have the power to ask my name and address?” or saying, “Look, mate, I thought I had change but I didn’t have change,” and the situation escalating; and then you need the power of arrest.

Sometimes you really have to look at what sort of society you want to start off with. While you might have cost-cutting in one area – I do not know whether it is saving you money in terms of public transport, but I imagine it is – then you have to pay out in other areas. You have to pay out also in the public perception of the authorities whether or not these coercive powers are respectful of them, whether that leads in turn to disrespect for the government authorities, delinquent behavior and these types of problems. ¹²

Conclusion

The Committee considers that the co-operative approach is arguably easier to adopt where there is a small and discrete group of persons affected by the legislation than where there is a large group affected as is the case in the public transport area. ¹³

Further, as a general rule, the stricter the enforcement strategy, the greater the reliance on coercive powers. The coercive powers of public transport inspectors are some of

¹¹ D. Holding, *Minutes of Evidence*, 13 December 2001, p. 153.

¹² *Ibid.*

¹³ This accords with the conclusions reached in empirical studies referred to in Chapter 4.

the most intrusive available to authorised persons which has undoubtedly been a factor in the controversy surrounding the powers.

The use of discretion – the targeting and treatment of particular groups

One aspect of enforcement philosophy about which the Committee received conflicting evidence was the use of discretion by inspectors and the targeting of particular groups. As the Committee noted above, Yarra Trams indicated that their revenue protection officers have “minimal discretion.” However, the Public Transport Users Association disagreed, stating instead that inspectors often exercised their discretion inconsistently and unfairly targeted certain people:

They [the powers] are very broad and very discretionary in terms of what inspectors can do. We have been concerned that they are applied in a fairly arbitrary and arguably discriminatory way. [...] There is a lot of anecdotal evidence that they tend to give young people in particular a very hard time. I have seen it myself on a tram, where there will be two people in precisely the same situation of having the wrong ticket, an unvalidated ticket or no ticket at all and a group of inspectors gets on and treats them completely differently. One person will be bailed up, screamed at and have their details taken and the other person will simply be invited to buy or validate a ticket – and that is with the same inspector on the same day at the same time. We think in response to that the powers should be codified very clearly, possibly made a little less discretionary and rolled back to a significant extent.¹⁴

Targeting Young People

The Committee notes that its members have received complaints from constituents which relate to the targeting or inappropriate treatment of young people on public transport.

In response to the suggestion that their revenue protection officers target young people, Yarra Trams referred to the statistics in relation to the age-groups of the persons the Company had reported over the last 12 months. The figures were said to reflect the breakdown of the passengers’ age groups.¹⁵ That is, they showed no over-representation of any age group. Later, Mr Power told the Committee:

¹⁴ V. Williams, *Minutes of Evidence*, 12 December 2001, p. 36.

¹⁵ K. De Clercq, *Minutes of Evidence*, 21 February 2002, p. 205.

There is no policy to target school children or children in general for that matter. That hasn't been the case.¹⁶

Yarra Trams also pointed out that their complaints mechanism “doesn't indicate that there is a disproportionate number of children who are being penalised.”¹⁷

Mr McKeon speculated that the targeting of children may be one of perception rather than reality:

I think the problem is the perception there. If an adult is being spoken to by revenue protection officers, then they have been spoken to. But there is an automatic protection for children and young people and people take more notice of what is happening when young people are being spoken to.¹⁸

Treatment of Particular Groups

Related to the issue of discretion and targeting is the officers' handling of particular groups, although this issue is arguably more relevant to training than to enforcement philosophy. The Consumer Law Centre commented on the treatment of young people in particular and stated that it was important that inspectors be trained to deal with young people as well as other vulnerable sections of the community such as those from non-English speaking backgrounds:

We have had particular complaints as have other complaints agencies and other youth advocacy organisations about the treatment of young people. [...] Once again, the police have been trained to deal with segments of the community in a sensitive way and transport officers need that sort of training. Where it goes wrong there must be the opportunity for appropriate scrutiny, there must be the opportunity for those mistakes to be corrected and appropriate measures brought to bear.¹⁹

The Committee agrees that in relation to young people the issue should be dealt with by improved training of inspectors.

The Committee identified a number of other groups which it felt may warrant special consideration by transport inspectors. These include public transport users who:

- speak English as a second language,
- have an intellectual disability, or

¹⁶ P. McKeon, *Minutes of Evidence*, 21 February 2002, p. 205.

¹⁷ B Power, *Minutes of Evidence*, 21 February 2002, p. 206.

¹⁸ P. McKeon, *Minutes of Evidence*, 21 February, p. 205.

¹⁹ C. Field, *Minutes of Evidence*, 21 February, p. 222.

- rarely use the public transport system, such as tourists and country people.

These groups of people may all have difficulty understanding how the system works and consequently fail to comply with ticketing requirements through ignorance of their obligations. The Committee believes that these situations require a different approach by transport inspectors. The Committee would expect, for example, that inspectors are aware of the telephone interpreter service which they may be able to access from their mobile phones when dealing with a person whose English is poor. Stressful situations often make communication in a second language even more difficult.

In relation to intellectually disabled people, inspectors would need to be aware of their possible difficulties in understanding and responding to questions. This group too is likely to find answering questions particularly difficult in stressful situations.

Lastly with infrequent users of the transport system the Committee would expect that inspectors give consideration to genuine ignorance of the ticketing system in much the same way as was the case when the new ticketing systems were first introduced.²⁰ At this time the emphasis of the inspectors' duties was more on education than on enforcement in recognition of the fact that an unfamiliar system often leaves people unintentionally in breach of their obligations.

Conclusion

The Committee condemns any practice of selective discretion whereby authorised officers single out particular groups of the public for particular scrutiny. The Committee accepts Yarra Trams's clear statement that they do not have a policy of targeting young people. However, given the reality of their own experience and the evidence of other witnesses that young people are often both unfairly targeted and treated inappropriately, the Committee considers that the matter needs to be addressed. While there is no company policy to target particular groups, inspectors may well be targeting young people based on their own beliefs and prejudices about who offenders are likely to be.

²⁰ A further example of problems associated with infrequent use, in this case for metropolitan users, was provided by a Committee member. This involved a group of 20 people travelling together to a sporting event. Arriving shortly before their train was to depart, not all members of the group had time to purchase a ticket from the one available machine. The train users were unaware that only one machine would be available and that purchasing tickets would have to be done individually.

The Committee believes transport companies should actively address this issue by making sure their officers are trained not to target certain groups. Further, the Committee believes the companies should monitor the work of their officers to ensure targeting is not occurring. The Committee also considers that this issue could usefully be examined by a Public Transport unit of the Victorian Ombudsman which is referred to later in this Chapter.

In relation to the particular groups identified above the Committee believes that proper training of inspectors is the key to all public transport users being treated fairly. It is the Committee's view that training must be provided to transport inspectors which gives them the skills to deal appropriately with groups with different needs.²¹

Recommendation 51

That Transport Companies ensure that they maintain a consistent and even-handed approach to the enforcement of the Transport Act 1983, in particular by training transport inspectors not to target particular groups of the Community.

Recommendation 52

That Transport Companies ensure that transport inspectors receive training in how to deal appropriately with people who do not speak English as a first language, people with an intellectual disability, and those who rarely use the public transport system.

Fare Evasion and Infringement Notices

According to the written submission of Yarra Trams, fare evasion has been a longstanding problem with Melbourne's public transport system:

Melbourne's public transport operators have estimated lost revenue caused by fare evasion at being between \$30 and \$50 million dollars per annum. Recent surveys indicate that the number of persons evading fares on Yarra Trams services lies between 15 and 20% of total passenger numbers.²²

²¹ The Committee notes that evidence was received from the Office of the Director of Public Transport that existing training covers issues of dealing with people with disabilities, although only physical disability is mentioned. See G. Sharman, *Minutes of Evidence*, 13 December, p. 110.

²² Yarra Trams, submission no. 14, p. 1.

Yarra Trams believes that its revenue protection officers “have had a significant impact on reducing fare evasion” from approximately 25% to around 15% of total passenger numbers.²³

The Department of Infrastructure (the Office of the Director of Public Transport) provided the Committee with information on the number of infringement notices issued. The total number of trips made on public transport in the financial year to 30 June 2001 was 352 million. The Office indicated that the number of infringement notices issued was in fact a very small proportion of total trips made, namely approximately one infringement notice per 5,950 metropolitan trips.²⁴

Yarra Trams provided the Committee with a breakdown of the types of offences committed. The overwhelming majority (some 10,911 of the total of 13,889) of the infringement notices issued between 1 January 2001 and 1 February 2002 were in relation to persons who were unable to produce a valid ticket while making a journey.

According to the Offenders by Age Group Report provided to the Committee the most common group of offenders were males between the ages of 20 and 24 followed by females in the same age group and then followed by males and females (in that order) aged 15-19. However these figures reflected the numbers of tram users in these age groups and is not an over-representation of younger tram users as offenders.²⁵

The Committee was presented with limited evidence of the level of fare evasion on public transport. Yarra Tram estimates a 15-20% fare evasion rate. ODPT reports a rate of actual infringements at one in every 5,950 trips. While not directly comparable they do suggest a difference in the level of fare evasion.

The Committee would like to see more work done on establishing the extent of the problem posed by fare evasion. Later in this Chapter the Committee notes that Yarra Trams uses its estimates of the extent of the problem of fare evasion to justify the need for their inspectors’ existing powers and proposals for the extension of those powers. The Committee believes that more evidence is required before such an argument can be reasonably supported.²⁶

²³ Ibid, p. 2.

²⁴ The Committee notes, however, that these statistics pre-date the recent public transport blitzes.

²⁵ K. DeClerq, *Minutes of Evidence*, 21 February 2002, p. 205.

²⁶ The Committee notes that Chris Field, Executive Director of the Consumer Law Centre, also had concerns about this issue. He stated: “[T]here is no substantive evidence that has ever been presented that I have seen about the actual number of fare evaders [...]. The recent blitz reported most prominently in the Age last year indicated 1 per cent of the travelling public had their names and

Despite these reservations, the Committee accepts that fare evasion is a legitimate issue of concern for private operators of public transport.

Recommendation 53

That the Office of the Director of Public Transport commission independent research to establish the extent of fare evasion.

Detention and Arrest Powers

Before setting out the conflicting views on these powers, the Committee briefly considers the relevant provisions of the *Transport Act 1983*.

The power of arrest is set out in section 219 and provides that an authorised officer (or others specified including police officers):

may without warrant arrest the person if the member, officer, agent or relevant employee believes on reasonable grounds that the arrest is necessary for any one or more of the following reasons –

- (a) to ensure the appearance of the person before a court of competent jurisdiction; or
- (b) to preserve public order; or
- (c) to prevent the continuation or repetition of the offence or the commission of a further offence; or
- (d) for the safety or welfare of members of the public or of the person.

Sub-section (5) of the same provision provides that if the person responsible for the arrest is not a member of the police force or an officer “to convey people arrested under this section to a bail justice or the Magistrates’ Court” (authorised under section 219(7)):

The person must give the alleged offender into the charge of a member of the police force or an officer authorised under sub-section (7) as soon as is practicable after arresting the alleged offender (unless sub-section (4) applies.)

Sub-section (4) in turn provides that if an alleged offender is arrested in respect of a summary offence:

addresses taken in relation to fare evasion. That is a far cry from the 20 per cent that the companies suggest and indeed the department suggests is the reason why these blitzes of arrest and detention need to occur. I think we need to be clear and questions ought to be asked about what evidence, what numbers there are about real fare evasion? Let’s not just quote figures without support and back up for that”: *Minutes of Evidence*, 21 February 2002, p. 218.

He or she may only be detained for so long as the reason for the arrest under subsection (2) continues. The person detaining the alleged offender must release the alleged offender as soon as the reason ceases to exist, regardless of whether or not the alleged offender has been charged with the offence.

Section 219AA deals with the power of authorised persons to “detain” suspected offenders. The differences between detention and arrest appear to be minor and the sections are very similar. For instance, the power to detain can be used in the same situations as the power of arrest: the sub-sections of section 219AA regarding the grounds on which the power may be used, the limitation on detention in relation to summary offences and so on are identical.

The scope of application of section 219AA is somewhat different from section 219²⁷ and the equivalents of sections 219AA(7)(a) and (b) are not contained in section 219.²⁸ However, the main difference appears to be the persons who can exercise the power. The power of arrest can be exercised by a “member, officer, agent or relevant employee” whereas the power of detention can only be exercised by an “authorised person.”

“Authorised person” is defined in section 219AA as:

a person who is employed or engaged by a passenger transport company or bus company and who is authorised in writing by the Secretary either generally or in a particular case for the purposes of this section.

Section 219 defines “relevant employee” as follows:

“relevant employee,” in relation to the Department, means an employee in the Department employed under Part 3 of the Public Sector Management and Employment Act 1998 who –

- (a) immediately before their employment under that Part, was an officer of the Public Transport Corporation; or
- (b) is authorised in writing by the Secretary either generally or in a particular case for the purposes of this section.

²⁷ For instance, section 219AA(2) which refers to specific parts of the Act whereas section 219(1) applies to the whole Act. However Part 7 (Prosecutions, Enforcement and Penalties) includes transport and ticket infringements. In the public transport context, therefore, the distinction is immaterial.

²⁸ These sections provide that authorised persons:
(a) may only exercise powers under this section in relation to offences or suspected offences relating to a passenger transport company or bus company committed or that the authorised persons believes were committed on or in relation to public transport property of that passenger transport company or bus company (as the case requires); and (b) in exercising powers under this section may not use any more force than is reasonable in the circumstances.

The terms “member,” “officer” and “agent” who also hold the power of arrest pursuant to section 219(2) are not formally defined in this section although presumably one of them applies to members of the police force who are mentioned in various sub-sections.

They also appear to apply to employees of Transport Companies who have been authorised in writing by the Secretary because it is clear that such persons also exercise arrest powers. Yarra Trams confirms in its written submission to the Committee that the power to arrest a person (section 219) is one of the powers exercised by their revenue protection officers.²⁹

Hence, the reasons for drawing a distinction between the persons allowed to exercise detention and arrest powers are not sufficiently clear in the legislation. Given the provisions are essentially identical (in particular, the “triggers” for the powers are the same), it is also not clear in the *Transport Act 1983* when the powers can be exercised.

That the distinction gives rise to confusion is clear from the submissions the Committee received. The Consumer Law Centre reported the following case study to the Committee:

A client of the Consumer Law Centre boarded a crowded tram at approximately 5.30pm. She was waiting in a queue to purchase a ticket from a machine when a public transport officer asked her to produce a ticket. She replied, “Can’t you see that I am in the queue? I’m just about to buy one.” The officer then demanded her name and address. She repeated that she was just about to buy a ticket. The officer grabbed our client’s shoulder bag and started wrestling her for possession of it. Presumably, the officer believed that details of our client’s name and address would be found in the bag. The client kept holding onto the bag. Five colleagues joined the officer and assisted him to drag our client off the tram. A lawyer, who was also travelling on the tram, came to our client’s assistance. The officers did not arrest our client but detained her for over two hours while waiting for the police. No infringement notices were issued. Our client has reported this incident to the police.³⁰

The Centre continues:

It appears from the above case study that some officers misunderstand the distinction between the power to arrest and the power under the Transport Act to detain a person and the circumstances in which the power may be exercised.³¹

²⁹ Yarra Trams, submission no. 14, p. 1.

³⁰ Consumer Law Centre, submission no. 17, p. 1.

³¹ Ibid.

Yarra Trams also acknowledged that there is confusion about the issue:

It is hard to decipher between arrest and detention. If we detain someone to verify those details, technically they are under arrest. We may detain of that 1200 effectively 500 of those people, but it is purely by saying we need verification of these details, “would you mind staying with us until we get that verification?” By that time they are happy doing that, but technically it is a detention but it doesn’t seem that way at the time.

When people are arrested specifically it is when they have resisted, when they have tried to run off from us and they have been physically detained. They are automatically told they are under arrest for refusing to give us an address or for whatever reason and the detention then takes place from there. Normally the people who are charged with resisting are the ones who continue to struggle after they have been told they are arrested, and it has been made clear to them what the situation is.³²

Views of Legal Policy, Department of Justice

Legal Policy, Department of Justice told the Committee that a person should only be detained by an inspector for the purpose of asking his or her name and address:

Once the person provides such information, he or she should be released from detention. If the person refuses to answer such questioning, then he or she should be released from detention unless such refusal is an offence, in which case the person should only be further detained if arrested for having committed that offence. Further, if the inspector reasonably suspects that false information has been given in answer to such questioning and if providing such false information is an offence, then the person may be arrested; otherwise he or she should be released.³³

Legal Policy explains this principle further as follows:

This principle seeks to tightly delimit the circumstances in which a person may be detained without arrest by an inspector. Because simple detention, unlike arrest, does not entail bring(ing) the person before a court, it is essential that any power to detain be very strictly limited, with immediate release being the presumed goal.³⁴

Conclusion

The Committee considers that it is important that the distinction between detention and arrest be made clearer in the *Transport Act 1983*. In particular, the persons who have these powers should be more clearly defined in the Act than is currently the case. In addition, the Committee considers it to be problematic and confusing that, as the Act currently reads, the powers appear to be exercisable in identical circumstances.

³² P. McKeon, *Minutes of Evidence*, 21 February 2002, p. 208.

³³ Legal Policy, Department of Justice, submission no. 26, p. 37.

³⁴ *Ibid.*

The Committee agrees with the principle formulated by Legal Policy that inspectors should only be able to detain persons for the purpose of asking for their names and addresses.

Where an inspector believes that false information has been given (which is an offence under section 218B(4) of the Act), then the person must be arrested if he or she is to be held “in custody.” This term is defined in more detail in Chapter 5 but would cover a situation where a person is being questioned in relation to verification of identification details. In such a situation section 464 of the *Crimes Act 1958* would apply. The implications of this are also set out in Chapter 5.

Before making recommendations in relation to this issue, the issue of whether powers of detention and arrest should be retained will be considered.

Arguments for and against detention and arrest powers: views on proportionality

The Committee notes that the distinction between the detention and arrest powers has little practical effect on the arguments for and against the powers; witnesses generally argued either for both powers or against both powers. A key theme running through the arguments for and against detention and arrest powers was that of “proportionality” – namely the argument that coercive powers should be proportionate to the harm they are designed to combat. The views of witnesses in relation to this issue depended very much on how they defined “harm.” Some witnesses took a narrow or individual view of harm, namely that the powers are designed to combat a minor offence - the non-payment of a tram or train fare. Needless to say, such witnesses argued that detention and arrest powers are disproportionate to this harm.

However, other witnesses pointed out that the harm was not the non-payment of an individual fare but rather the integrity of the whole public transport system. If there were no ability to detain and arrest, so the argument went, no one would comply with the system and fare evasion, already rife according to the statistics of the Office of the Director of Public Transport and Yarra Trams, would become even more endemic.

The Consumer Law Centre was in the former category of witnesses, taking the view that current powers were disproportionate to the harm (the cost of a tram or train fare) they are designed to combat. The Centre agreed with the Committee’s statement in the Discussion Paper that detention and arrest powers “represent a greater degree of

abrogation of individual rights³⁵ than other inspectors' powers. The Centre recommended that the *Transport Act 1983* be amended to confer the detention and arrest powers on the police only.³⁶

Chris Field, Executive Director of the Centre told the Committee:

I must say I think there ought to be some sort of consideration in society as to whether people ought to be detained, arrested, physically pushed to the ground, assaulted as we have seen in some of the evidence that has been well publicised and has been brought to my centre for theft of \$1 or \$2. There is a disproportionality in terms of some of the responses we see for this problem, and that must be considered as well.³⁷

The Public Transport Users Association also expressed the view that it was inappropriate that people can be arrested over a tram fare. The Association further stated that detention and arrest powers should be exercisable by the police only:

There are two specific powers ticket inspectors have which we are concerned about. One is arrest. We think it is not appropriate for people to be arrested over a \$2.60 tram fare. The first response to a person without a ticket should be an invitation to buy one. If the passenger continues to be unco-operative, the next step should be to ask them to leave the vehicle. Arrest should be a last resort, and we would say that it should be carried out by the police rather than employees of private companies.³⁸

Like the Consumer Law Centre, Liberty Victoria implied that the powers of transport inspectors were disproportionate to the "minor" harm in this case:

It is usually relatively minor harm, something like putting feet on a seat, not paying a fare or drinking on a train. It is not armed robbery. It may be unpleasant and difficult and people do have an obligation to pay fares on public transport, but they do not necessarily justify arbitrary powers of arrest, or of demanding the name and address.³⁹

Later Ms Hampel commented more generally on the importance of proportionality (although her comments were still made in the context of the powers of public transport inspectors), stating that the less serious the matter, the less intrusive the power should be:

[T]he severity of the matter being investigated should have a direct relationship to the extent of the power of intrusion required. So to come back to the point that I think Peter [Katsambanis] was making about some of the agencies that said earlier that looking at minor matters justified having great powers and no accountability, seems to be upside down. The more serious the matter the greater the need for an intrusive

³⁵ Consumer Law Centre, submission no. 17, p. 2.

³⁶ Ibid, p. 1.

³⁷ C. Field, *Minutes of Evidence*, 21 February 2002, p. 218.

³⁸ V. Williams, *Minutes of Evidence*, 12 December 2001, pp. 36-37.

³⁹ F. Hampel, *Minutes of Evidence*, 12 December 2001, p. 77.

power, and once there is an intrusive power the greater the need for scrutiny and accountability.⁴⁰

The Office of the Director of Public Transport and Yarra Trams, however, told the Committee that the powers were necessary to maintain the effectiveness of the whole enforcement system. In their submissions they implied that the “harm” to which the powers were directed was not individual fares but rather the whole culture of fare evasion which, it was argued, would increase if the powers were removed.

On behalf of the Office of the Director of Public Transport Geraldine Sharman told the Committee that if the powers were removed there would be no means to enforce the Act:

I think the power of arrest needs to be retained by authorised officers. If you are going to have revenue enforcement and you have the power to ask for a name and address and somebody refuses, the power of arrest is the only way you can make sure you get a truthful name and address in the end. Of course, many people tell the truth. But if an authorised officer is unable to say, “I have further powers if you do not provide you name and address,” I think that many people who do not buy tickets will just say, “My name is Mickey Mouse,” and there is nothing you can do about it. The matter would never be able to be taken further. [...] I think the whole ability to enforce the ticket requirement would disappear if they were not able to exercise the power of arrest [...]⁴¹

Yarra Trams was critical of the view that fare evasion is a trivial offence:

Fare evasion is perceived by some as a relatively trivial offence. Fare evasion, however, needs to be viewed in totality and has a serious financial impact on the community in general. Melbourne’s public transport operators have estimated lost revenue caused by fare evasion at being between \$30 and \$50 million dollars per annum. Recent surveys indicate that the number of persons evading fares on Yarra Trams services lies between 15 and 20% of total passenger numbers.⁴²

The Company also agreed with the argument that the powers function as a deterrent and that fare evasion would increase if they were removed:

However, what the fear is, is people will soon realise that the officers won’t have the power to actually arrest them in the event that they don’t give their name and address and the flow-on from that is that fare evasion will increase.⁴³

⁴⁰ Ibid, p. 80.

⁴¹ G. Sharman, *Minutes of Evidence*, 13 December 2001, p. 118.

⁴² Yarra Trams, submission no. 14, p. 1.

⁴³ B. Power, *Minutes of Evidence*, 21 February 2002, p. 206.

Danny Holding of the Law Institute Victoria also pointed out that the detention and arrest powers are not directed to the payment of a particular fare but rather to the integrity of the whole enforcement system:

[W]hen you are talking about somebody who is on the train without a ticket and it is demanded that they give their name and address, you are not really enforcing the getting of the name and address because it is so important that particular person pay their fare. The problem is what you do if you do not have that power – because you cannot enforce the payment of fares.⁴⁴

Availability of the police

One important aspect of the debate about whether the police alone should be able to exercise powers of detention and arrest is the availability of police officers. For the Office of the Director of Public Transport the lack of availability of police officers was a reason for retaining the detention and arrest powers for inspectors.

Geraldine Sharman told the Committee:

Part of the difficulty with the Victoria Police is that they are mostly not available. In the city they are often nearby and do attend [...]⁴⁵

The Consumer Law Centre disputed this argument: Mr Field pointed out that police are often “on hand” when detention and arrest powers are exercised as part of a “blitz” action,⁴⁶ a comment confirmed by Senior Policy Officer, Catriona Lowe:

[T]here are certainly a number of cases that we have in a case work capacity at our centre where the police both as part of an organised blitz and in individual circumstances have been called and have attended with the matter.⁴⁷

While there was some dispute about the extent to which the police are available, all witnesses appeared to agree that there would be some cases at least where the police are not available. As Chris Field commented:

I think [in] the one-off cases it is unlikely that the police would be there just as sometimes the police are not there when you want them to be in your own circumstance. As you know, they can't of course be everywhere, they are not sufficiently resourced to be so.⁴⁸

⁴⁴ D. Holding, *Minutes of Evidence*, 13 December 2001, p. 153.

⁴⁵ G. Sharman, *Minutes of Evidence*, 13 December 2001, p. 111.

⁴⁶ C. Field, *Minutes of Evidence*, 21 February 2002, p. 216.

⁴⁷ C. Lowe, *Minutes of Evidence*, 21 February 2002, p. 217.

⁴⁸ C. Field, *Minutes of Evidence*, 21 February 2002, p. 216.

In response to the question as to whether he was suggesting that there should be no power of arrest in “one off” or emergency situations where the police are not available Mr Field replied:

No. What we are saying is that the power of arrest and detention is a fundamentally important power for officers, public officers, to hold. It is all the more important I think when we look at the transport officers being effectively privatised public officers. I have referred to them previously as a privatised police force, but whichever way you look at it they are a privatised formerly public position. If you were to hold detention arrest powers – and there are no more important powers for officers to hold in the community, they are an absolutely fundamental incursion upon what we consider to be our civil liberties – if people are to hold those sorts of powers this must be properly monitored and [...] subject to scrutiny and complaint mechanisms.⁴⁹

The Committee notes that this comment appears to be a modification of the proposal that only police be allowed to exercise detention and arrest powers. However, it is clear from other comments and from the Centre’s written submission, referred to earlier in this section, that the Centre advocates the removal of the power of arrest from ticket inspectors.

The Public Transport Users Association also acknowledged that the police would not always be available to deal with emergency situations but submitted that in such cases inspectors could rely on the citizen’s arrest provisions under the *Crimes Act*:

In an emergency situation where somebody is violent or it is not practical to wait for the police, inspectors could rely on the citizen’s arrest provisions under the *Crimes Act* and not have to have their own independent powers under the *Transport Act*.⁵⁰

Conclusion

The Committee is of the view that the individual or narrow view of harm taken by several witnesses fails to take account of the wider picture of enforcement of the *Transport Act 1983*. The seriousness of a particular offence is one relevant and important consideration in determining the extent of coercive powers. However, it is not the only factor. Regard must also be had to whether the powers are necessary to combat a greater harm – in this case the problem of fare evasion.

It is also important to consider particular problems which arise in the public transport area. For instance, the process of identifying offenders is more difficult in the public

⁴⁹ Ibid.

⁵⁰ V. Williams, *Minutes of Evidence*, 12 December 2001, p. 37.

transport area where large numbers of the general public use the system, than it is in most other areas the Committee considered. The unavailability of the police to assist can also be a particular problem. Without detention and arrest powers and in the absence of Victoria Police, ticket inspectors would have no way of identifying passengers who refuse to identify themselves or who give a name and address which is clearly false.

Accordingly, the Committee considers that the obligation to pay fares on public transport would be difficult to enforce without the powers of detention and arrest and concludes that they should be retained. However, the Committee is cognisant of the intrusiveness of these powers and of the evidence received that they may be used inappropriately at times.

The Committee believes that, because of the intrusiveness of the powers, it is essential that the extent of the powers, in what situations they apply and who can exercise them are all clearly defined in the *Transport Act 1983*. As noted earlier this is not currently the case and the Committee therefore recommends that the Act be amended urgently to rectify this situation. In addition the Committee has recommended that detention be allowed only for the purpose of asking the initial questions of a person's name and address and for verifying information. If a person is to be further detained it must be made clear to them that they are then formally under arrest. At this time the person should be made aware of their rights which are codified in section 464 of the *Crimes Act 1958*.

As the Committee noted in Chapter 5, section 464 of the *Crimes Act 1958* comes into operation when a person suspected of an offence is "in custody." The Committee has recommended that the application of the section to inspectors be clarified.⁵¹ The Committee is aware that the provisions of section 464 may come into operation at an earlier stage during the detention of the person. The Committee is here recommending that at least at the stage where a person is formally under arrest, that person should be made aware of his or her rights.

In addition the Committee considers that it is vital that inspectors are appropriately trained to use the powers responsibly. One particular aspect that this training should cover is the need for inspectors to ensure that the verification process does not unduly interfere with an individual's employment or personal circumstances.⁵² In addition, it

⁵¹ In recommendation 37.

⁵² The Committee holds the view that this is imperative.

is important that inspectors receive mandatory training prior to their accreditation on the use of detention and arrest powers, including the application of section 464 of the *Crimes Act 1958* to arrest situations and that they receive ongoing training as a condition for retaining accreditation.

Recommendation 54

That the distinction between detention and arrest in the Transport Act 1983 be clarified to differentiate the circumstances under which the powers can be exercised and to more clearly define the persons who can exercise these powers.

Recommendation 55

That, the Transport Act 1983 be amended to allow inspectors to detain persons only for the purpose of asking for their names and addresses where the inspector suspects on reasonable grounds that an offence against the Act has been or will be committed, and for obtaining verifying information.

Recommendation 56

That, the Transport Act 1983 be amended to require that inspectors use the power of arrest rather than detention, on the grounds that the person has committed an offence under the Act, where a person refuses to give a name and address or where the inspector suspects on reasonable grounds that the information given is false and it is not subsequently verified.⁵³

Recommendation 57

That Transport Company inspectors receive mandatory training prior to accreditation on the use of detention and arrest powers, including the application of section 464 of the Crimes Act 1958 to arrest situations, and that they receive ongoing training as a condition for retaining accreditation.

⁵³ Section 218B(4) provides “a person must not, in response to a request made by an authorised officer or member of the police force in accordance with this section – (a) refuse or fail to comply with the request; or (b) state a name that is false in a material particular; or (c) state an address other than the full and correct address of his or her ordinary place of residence or business. Penalty applying to this sub-section: 5 penalty units.

Privacy Issues

While the main debate among the witnesses concerned detention and arrest powers, many witnesses also highlighted the potential breaches of privacy which use or rather misuse of the powers could give rise to.

As stated in the section on privacy in Chapter 5 of this Report, the protection of privacy can be seen as a sub-set of fairness and, like fairness, must be subject to a “balancing exercise” between the public interest in law enforcement and the protection of individual privacy. Privacy issues in the public transport area primarily arise in relation to:

- the appropriateness and legality of obtaining a name and address (particularly where it could be said that “reasonable steps” have been taken to buy a ticket or there was “no reasonable opportunity” to do so);
- the obtaining of personal information which goes beyond the powers available in the *Transport Act 1983* (such as the practice of requiring passengers to verify their name and address); and
- how such information is stored and used.

The Committee examines each of these issues in turn below.

Where obtaining a name and address is improper: the defence of “reasonable steps” and “no reasonable opportunity”

Pursuant to section 218B(2):

An authorised officer or a member of the police force may request a person to state his or her name and address if the officer or member believes on reasonable grounds that the person has committed or is about to commit an offence against this Act or the regulations.

Section 218B(4) makes it clear that it is an offence to refuse to comply with the request or to state a name and address which is false.

However, it is important to note that the *Transport Act 1983* effectively provides commuters with a defence to the offence of travelling without a valid ticket (the key offence referred to by witnesses). Section 221(1B)(2) provides that:

A person may make a journey in a carriage, or be on land or premises for entry to which a ticket is required, without a ticket if –

- (a) prior to commencing the journey or entering that land or those premises he takes all reasonable steps to purchase a ticket; and
- (b) while making the journey or being on that land or those premises he has no reasonable opportunity to purchase a ticket; and
- (c) on completion of the journey or on leaving that land or those premises he takes all reasonable steps to purchase a ticket.

Thus, if persons have taken “all reasonable steps” to purchase a ticket or have had “no reasonable opportunity” to purchase a ticket they cannot be guilty of an offence under the Act. Yet, during the highly controversial and well-publicised ticketing “blitzes” inspectors took names and addresses from everyone found without a valid ticket, including those who claimed that they had not bought a ticket because the ticket machine had not been working and thus claimed that they had not had a “reasonable opportunity” to buy a ticket.

The Victorian Privacy Commissioner questioned the practice of obtaining a name and address from all persons found without a valid ticket without having regard to whether the person had in fact taken reasonable steps to buy one.

In a Media Release issued in December 2001 the Office of the Victorian Privacy Commissioner refers to the defence and goes on to state:

It is for others to determine what are the reasonable steps that a person should take if a station has no ticket seller, a tram has no conductor and ticket machines are not working. It is for others to determine what constitutes a reasonable opportunity to buy a ticket during the journey.

The privacy issues start when the passenger is asked by a properly authorised person to produce his or her ticket during the journey or at a station. An explanation that a ticket machine was not working is not, by itself, reasonable grounds for the ticket inspector to believe the offence of fare evasion has or will be committed.⁵⁴

As the Privacy Commissioner points out, there is no automatic power under the *Transport Act 1983* to obtain names and addresses. Further, any attempt to do so without the requisite “reasonable belief” that an offence has been committed, will be a misuse of inspectors’ powers and a breach of privacy.

⁵⁴ Media Release from the Office of the Victorian Privacy Commissioner, 4 December 2001.

Conclusion

The Committee considers that the practice of taking names and addresses from every passenger found without a valid ticket regardless of the explanation, as occurred during the recent blitzes, does not take adequate account of whether a passenger took reasonable steps to purchase a ticket. One important aspect of this is the responsibility of the Transport Companies to make verification of a claim that a machine is not functioning available as often as possible. For example, inspectors could access a central office which could provide details of out of order machines.⁵⁵

Only where reasonable efforts have been made by the Company to verify the passengers' claim and the claim is unable to be verified, should a name and address be taken.

While the Committee is aware that inspectors currently have access to lists of out of order machines, it is concerned that these lists are not always up-to-date. One member of the Committee was present at a train station at which the ticket machine was clearly not working. Yet, at the other end of the journey inspectors, when notified of this fact, stated that according to their records there was no problem with the machine and hence ticket infringement notices were issued to passengers who had boarded the train at the station concerned.

The Committee recommends that existing transport network communications systems, including the red button security arrangements in operation throughout the metropolitan train network could be used by members of the public to report malfunctioning ticket machines. Further consideration could be given to utilising the same system to record the names of people who endeavoured to purchase a ticket but were unable to do so.

Recommendation 58

That Transport Companies develop or improve transport system design and procedures to assist people to comply with their obligation to buy a ticket under the Transport Act 1983.

⁵⁵ The Committee understands that this is already happening to some extent.

Recommendation 59

That Transport Companies develop or improve procedures which provide inspectors access to frequently updated lists of out of order ticket machines.

Recommendation 60

That only where reasonable attempts have been made to verify a passenger's claim that a machine is not functioning should inspectors ask for a name and address.

Recommendation 61

That existing transport network communications systems, including the red button security arrangements in operation throughout the metropolitan train network, be adapted for use by members of the public to report malfunctioning ticket machines and that consideration be given to utilising the same system to record the names of people who endeavoured to purchase a ticket but were unable to do so.

**Seeking information which goes beyond the *Transport Act 1983*:
Verification**

[...] Just noting the commentary I heard earlier from Yarra Trams, that they appear to be seeking an extension of the Act especially to deal with matters such as date of birth, verification and so forth. We can certainly assure you that those things are being requested now, and that is an unlawful exercise of power in our view.⁵⁶

(Catriona Lowe, Senior Policy Officer, Consumer Law Centre)

Another area where privacy issues arise is where inspectors request additional information to that which they can lawfully demand under the *Transport Act 1983*. The prime example of this is where inspectors ask passengers to verify their name and address usually by asking them to produce a drivers' licence. Other common requests reported to the Committee which go beyond the current powers of the *Transport Act 1983* include requests for a passenger's date of birth and for the name and telephone number of a third party who can verify the name and address of the passenger.

Several witnesses referred to the issue of identification. The main objection to the practice of requiring verification was that it is an intrusion of privacy. However,

⁵⁶ C. Lowe, *Minutes of Evidence*, 21 February 2002, p. 217.

objections on other bases were also made. For instance, the Public Transport Users Association argued that inspectors put undue emphasis on seeing a drivers' licence to verify identification. Vaughan Williams submitted that many users of public transport do not have a drivers' licence:

There is an issue of verification. Many public transport users use public transport because they do not drive. However, the drivers licence is the primary form of identification, and that is what inspectors want to see, so there can be problems there. We have had reports of ticket inspectors being somewhat fundamental about it and insisting that unless the passenger could produce a drivers licence they would have to either ring up a friend to verify who they were or be arrested.⁵⁷

Most witnesses, however, referred to privacy issues. Felicity Hampel of Liberty Victoria told the Committee that inspectors should not be able to ask for identity at all on the basis that:

we do not require people to carry identity cards or proof of identity in this country. It is one of the great freedoms we enjoy here.⁵⁸

The corollary of this freedom is that people "should not be subject to questioning or arrest because they do not carry identification."⁵⁹

The Privacy Commissioner also referred to the privacy implications of obtaining verification of identification. Apart from the point that it may be inappropriate for inspectors to demand a name and address in cases where there is evidence that a person tried to buy a ticket (referred to above) or to obtain verification where there is no power in the Act to do so, the Commissioner was also concerned about how such information is recorded:

It is common practice, I am advised, that when someone gives a name and address the inspector would ask, "Can I have a look at your driver's licence, have you got a gas bill on you, bank statement, something that will tell us that you really are the person you've said you are? There is a distinction between sighting that document and copying or recording the details of it, because for privacy purposes you ask yourself whether that is necessary for the function. In any event, my staff and I can find nowhere in the Transport Act that authorises the person to seek the verifying details."⁶⁰

The Public Transport Users Association was also concerned about the recording of the information collected:

We think there are issues of privacy, particularly where private companies have an interest in this day and age in building up marketing databases and so on. We are

⁵⁷ V. Williams, *Minutes of Evidence*, 12 December 2001, p. 37.

⁵⁸ F. Hampel, *Minutes of Evidence*, 12 December 2001, p. 80.

⁵⁹ *Ibid.*

⁶⁰ P. Chadwick, *Minutes of Evidence*, 21 February 2001, p. 193.

dubious about having private companies having names and addresses, particularly if they add dates of birth, telephone numbers and so on.⁶¹

The Public Transport Users Association also referred to the fact that inspectors commonly try to obtain a date of birth which may explain why they often wish to see a drivers' licence and the names and addresses of third parties such as family members. The Association again referred to the lack of proportionality between the powers and the harm (described as a \$2.60 tram fare) and the fact that the current enforcement tactics of inspectors would only drive people away:

We have also had reports of inspectors asking for more information than they are entitled to. They are very insistent on getting a date of birth, which could well be why they want to see a licence because if the passenger will not give their date of birth it can be transcribed off the licence, which is in violation of the *Transport Act* as there is no requirement to give a date of birth. They often ask for phone numbers and names and addresses of family members. We are concerned that conducting that sort of Spanish Inquisition over a \$2.60 tram fare is not appropriate from a civil liberties point of view. As a matter of good public transport policy and customer service it will only drive people away.⁶²

Yarra Trams confirmed that their revenue protection officers request more information than the *Transport Act 1983* allows them to demand. The Company confirmed that its authorised officers required verification of identification and that, if they did not obtain verification, they would call the police (and presumably exercise powers of detention and or arrest in the meantime):

We are telling them we have their name and address and to assist us we need verification of those details. They are not obliged to supply those details but if they are unable to verify those details then we have to call the police in to assist us in the verification.⁶³

In addition, Yarra Trams told the Committee that their officers ask for a date of birth in order to be able to prove the identity of the person in any subsequent court proceedings:

We ask every passenger for a date of birth, but if they refuse to give it to us, we have no power to take it any further, so we have to go by our own judgment and assess how old they are and hope we don't get into trouble with it.⁶⁴

Yarra Trams also confirmed that their officers often obtain the date of birth from drivers' licences:

⁶¹ V. Williams, *Minutes of Evidence*, 12 December 2001, p. 42.

⁶² *Ibid*, p. 37.

⁶³ P. McKeon, *Minutes of Evidence*, 21 February 2002, p. 207.

⁶⁴ *Ibid*, p. 209.

We do ask [for a date of birth] as a matter of courtesy but if they refuse we are unable to take the matter any further. Another way of getting that [date of birth] is obviously the production of a driver's licence which had the date of birth on there.⁶⁵

As far as the recording of verification information is concerned, Yarra Trams indicated that they no longer insist upon details of third parties or that licence numbers be recorded:

With respect to verifications, if we ask someone for a family member or friend to verify who they are, we will contact that person. We now have in place directions with respect to permission: "Can we have you name and address, or can we have your name to verify this person," and if they say, "No, I don't want the name taken," we take it no further. Their verification is on the person doing the phone call. If they are satisfied with the information they have received then it needs to go no further. It is similar to licence numbers. We used to detail licence numbers that were produced to us; we no longer do that. The fact that we have sighted that correct licence is enough.⁶⁶

In response to a question as to whether the law needs to be clarified in this area, Mr McKeon, the Revenue Protection Officer Manager answered:

I very much believe so. We need a specific power to have people prove who they are.⁶⁷

Earlier, Mr McKeon explained the importance of such a power to the Committee:

If we had clear guidelines under the *Transport Act* to say that you must supply a name and address and must verify those details by way of production of identification, we would have a lot less of a problem because it is clear cut in that respect.⁶⁸

The Consumer Law Centre opposed any introduction of the powers to ask for verification and a date of birth unless appropriate safeguards were put in place:

It would be unthinkable to extend the powers at this stage [that] the transport officers hold unless there were appropriate safeguards put in place. There is far too great a chance that those powers will be abused – indeed the current powers are being abused. There is no doubt that is the case. I would not be confident and I don't believe the public could be confident that the powers would not be abused unless indeed there was appropriate scrutiny and safeguards in place, like for example improved training mechanisms or an Ombudsman's system.⁶⁹

⁶⁵ Ibid, p. 210.

⁶⁶ Ibid, p. 212.

⁶⁷ Ibid, p. 209.

⁶⁸ Ibid, p. 207.

⁶⁹ C. Field, *Minutes of Evidence*, 21 February 2002, p. 217.

Conclusion

The Committee considers the current practice of requesting verification of a passenger's name and address without any power to do so under the *Transport Act 1983* is problematic. The Committee understands that the power to obtain a name and address would not be effective if inspectors have no way of verifying that name and address. On the other hand, the Committee is concerned about the privacy issues which arise when inspectors take this information.

While conscious of the points raised by Liberty Victoria in relation to our freedom not to carry identification, the Committee believes that the appropriate balance between the need to verify identification details with the need to protect individual privacy would allow authorised officers to verify a passenger's name and address. The question is how this verification should be obtained.

In addition the Committee believes that the only records which should be kept by authorised officers is the name and address of the passenger. This means there should be no recording of licence numbers, contact details of third parties, date of birth or any other further information.

On the issue of how verification can be obtained the Committee believes that the current procedure where a person is asked for verification and if they refuse they are detained until the police arrive, is not a desirable one.

The Committee considered whether extending the powers of the *Transport Act* to allow an inspector to demand verification would improve the current situation, as suggested by Yarra Trams.

The Committee concluded that such an extension of powers would be appropriate. However, the Committee would restrict the power to demand identification to situations in which it would be legitimate to demand a person's name and address. In addition, the Committee only supported such an extension on the basis that it would be a requirement for Transport Companies to give prior notice to users of public transport that they may be required to produce identification in certain circumstances. The Committee likens this situation to shops placing notices which identify the right to search bags as a condition of entry.

The Committee envisages that an important part of this requirement to give prior notice would be the prominent display at train stations and tram stops of notices which advise that:

- a person may be required to produce a valid ticket; and
- where a person has no valid ticket and cannot show that they have made reasonable attempts to purchase one, that person will be required to provide his or her name and address and verifying information.

Recommendation 62

That the Transport Act 1983 be amended to allow authorised officers to demand verification of names and addresses of passengers where they believe on reasonable grounds that the passenger has given a false name and / or address.

Recommendation 63

That, subsequent to the Act being amended as per Recommendation 62, signs be placed at stations, trams and bus stops informing passengers of their obligation to verify their name and address if they are found without a valid ticket on public transport.

Recommendation 64

That any verification information establishing true identity be sighted only and not recorded.

Recommendation 65

That the public transport ticketing system be improved urgently in order to enhance ticket availability and reduce fare evasion opportunities.

Postscript: Transport (Further and Miscellaneous Amendments) Bill

On Thursday 9 May 2002, less than two weeks before this Report was due to be printed, the *Transport (Further and Miscellaneous Amendments) Bill* was read a

second time in the House of Assembly. Because the Bill was introduced so late in the adoption process of this Report and given that it has not yet been passed by either House of Parliament the Committee has not altered its conclusions and recommendations in this Chapter.

According to a letter dated 9 May 2002⁷⁰ to the Chairman of the Committee from the Minister for Transport, Hon. Peter Batchelor, MP the relevant section of the Bill clarifies the power of authorised officers to request information verifying a suspected offender's name and address when there is a reasonable suspicion that the name and address provided may be false, and makes it an offence to fail to comply with such a request.⁷¹ The letter further states:

This amendment clarifies an existing practice of authorised officers that is considered necessary to the enforcement process. It also confirms the view of the Magistrates' Court, which has upheld this practice for many years as being legitimate for enforcement purposes.⁷²

The letter highlights that the Bill addresses privacy issues, as does the Second Reading Speech in which the Minister stated:

[...] In view of the requirements of privacy laws, the Bill includes a number of measures to clarify the power of authorised officers to request verification information and to record the information. The Bill also introduces a substantial penalty for the misuse of the verification information, and only permits the information to be used for enforcement purposes. To ensure the protection of privacy, guidelines governing the collection, use and disposal of personal information gathered in the process of detecting and enforcing public transport related offences are currently being developed.⁷³

The Minister also stated in his letter to the Committee that further limitations on the verification power in the Bill include the following:

- verification can only be requested if the authorised officer has reasonable grounds for suspecting that a name and address already given by a person may be false.
- a person can commit an offence for failing to comply with a request for verifying information only if an authorised officer has first advised the person that this is an offence.

⁷⁰ Letter from the Minister for Transport, the Hon. Peter Batchelor MP, dated 9 May 2002.

⁷¹ If passed, the amendments would become sections 218B (6A) – (6D) of the *Transport Act 1983*.

⁷² Letter from Minister for Transport, above note 70.

⁷³ Ibid.

- a person may fail to provide an authorised officer with verifying information if that person has a reasonable excuse.⁷⁴

In accordance with the recommendations in this Chapter, the Committee welcomes any new legislative provisions which clarify the ability of inspectors to require verification of names and addresses of passengers on public transport. The Committee also approves of the various safeguards to individual privacy in the Bill.

However, the Committee reiterates its view that the introduction of a formal power to require verification details should be accompanied by measures to inform the public of this new requirement, including the prominent display of signs at train stations, tram and bus stops. In addition, due to the confusion in the common law as to the meaning of “reasonable excuse” noted in earlier sections of this Report,⁷⁵ the Committee considers that this term may need to be defined in legislation.

Impact of the Current Transport System on the Use of Inspectors’ Powers

The Committee considers that the solution to the fare evasion issues is not simply a matter of granting or taking away coercive powers from inspectors but rather involves a re-evaluation of the whole public transport policy and the enforcement philosophy adopted by the Transport Companies. The debate about the appropriateness of the enforcement philosophy of the Transport Companies and the Office of the Director of Public Transport raises important and contentious issues such as the current ticketing system and the impact of the privatisation of the public transport system. The need for coercive powers is not necessarily “innate” but rather to some extent rendered necessary by the nature of the system as a whole. For instance, before the introduction of the current ticketing system and the removal of conductors from trams, there was much less controversy about the arrest power in the *Transport Act 1983* and it appeared to be rarely used – or only in more serious cases.

The Committee is gravely concerned at the extent of fare evasion and at the figures provided to it in evidence. Clearly the continuance of fare evasion in the order of twenty per cent affects the viability of the public transport system. Despite

⁷⁴ Ibid.

⁷⁵ On the privilege against self-incrimination and legal professional privilege (Chapter 5).

privatisation, Victorian taxpayers bear the ultimate cost of such extensive fare evasion.

Importantly, the Committee is most concerned at the increasing and extensive use by ticket inspectors of intrusive powers of detention and arrest, with ticketing “blitzes” becoming common practice. The Committee believes that the Victorian public supports the integrity of a ticketing system and the appropriate payment of fares but it does not believe that the community wishes the use of the powers of detention and arrest by private, non-government inspectors to be common practice.

The Committee keenly debated the causes of the rise in the use of the powers of detention and arrest by inspectors. The Committee, with the exception of one member, agreed that the main cause of the rise is the current ticketing system. It is clearly unsatisfactory in many respects, bordering on the unworkable given that in a short period of time it has led to a significant increase in the non-payment of fares. The Committee believes that the ticketing system needs to be reformed as soon as possible.

The current ticketing arrangements are certainly flawed and contribute directly to people travelling without tickets and, by extension, to the incidence of detention and arrest. The ticketing system should operate in such a way as to make the use of the powers of detention and arrest a rarity rather than a multiple daily occurrence.

Some members believed that the privatisation of the public transport system under the previous government had severely exacerbated the problems with fare evasion. Those members believed that public resentment to such a change was proving deep and abiding, particularly as enforcement was transferred from the public to the private sector. Other members considered that the problems with the present ticketing system predated the privatisation of the system. Other issues canvassed included the long-term contracts and the difficulty of changing these in the short-term to provide improvements to the system.

The Committee considers that the Transport Companies should strongly focus on improving the integrity and operability of the ticketing system. Transport Companies should urgently review current ticketing arrangements and education programs with a view to introducing short-term measures. These could include introducing appropriate incentives, better information on ticket availability, additional ticket distribution points and positive education campaigns to increase conformity with the

ticketing laws and hence reduce the incidence of arrests for what are essentially minor offences.

For the medium and long-term the transport companies and the Department of Infrastructure need to develop and implement a vastly improved ticketing system.

Further Reforms suggested

The establishment of an Ombudsman

One reform idea outlined in some detail by the Consumer Law Centre and supported by the Public Transport Users Association was the establishment of a Public Transport Ombudsman.

The Consumer Law Centre presented a number of arguments in support of this proposal including the fact that:

- it is “widely accepted, including by government, that the current system for public transport complaints is inadequate.”⁷⁶ The Centre referred to a recommendation by Department of Treasury and Finance, “Essential Services Ombudsman Consultation Paper, May 2000” which recommended that:

existing arrangements do not meet the Government’s policy commitments for comprehensive and effective mechanisms for dispute resolution for customers and operators of all utility businesses.⁷⁷

- the Victorian Public Transport Customer Charter (1997) developed in consultation with a diverse range of community groups had recommended that a Public Transport Ombudsman be established.

The Centre also argued that:

establishing an Ombudsman would enable a “one-stop shop” for public transport complaints. It would receive and attempt to resolve all complaints concerning the public transport system, including complaints concerning the actions of “authorised officers.” We believe the Ombudsman should be established in a similar fashion to other private industry dispute resolution bodies, including the Australian Banking Industry Ombudsman, Telecommunications Industry Ombudsman and the Energy and Water Ombudsman Victoria.⁷⁸

⁷⁶ Consumer Law Centre, submission no. 17, p. 2.

⁷⁷ Ibid.

⁷⁸ Ibid, pp. 2-3.

The Public Transport Users Association also supported the establishment of an Ombudsman:

We would also argue that there should be a Public Transport Ombudsman to supervise the exercise of those powers as well as provide comment on systemic issues such as the dysfunctional ticketing system. In every other essential public service that has been privatised such as banking, telecommunications, electricity and gas, in every one I can think of an Ombudsman has been set up to regulate the system. As far as we know public transport is the only essential service where that has not been done. We would argue that the government should rectify the situation there.⁷⁹

When asked to comment on the proposal, Yarra Trams replied that they did not object to it:

We don't have a problem with an industry Ombudsman being appointed. I know that it has been prefaced before, but we haven't had any real discussions with the government, so we are not opposed to the idea of that occurring.⁸⁰

When asked the same question, Ms Sharman representing the Office of the Director of Public Transport indicated that she was not able to give a conclusive answer but that she "presumed it was being looked at":

I personally do not have an opinion on it, because I think you need to look at the models that are available, and I am not sure whether it would be suitable or not. I have not actually looked at it myself. But I understand there have been reports in the newspaper that the government or the minister has been looking at whether or not there should be a Transport Ombudsman, so I presume it is being looked at.⁸¹

Conclusion

The Committee recognises the difficult and in many ways unique enforcement problems facing the public transport sector. The Committee also notes the evidence that, with the exception of the Office of the Director of Public Transport which expressed no concluded view, witnesses from both sides of the public transport debate supported the establishment of an Ombudsman or at least had no objection to this proposal.

However, the Committee is reluctant to recommend the establishment of a costly new arm of public sector bureaucracy in the form of a Public Transport Ombudsman. As an alternative, the Committee considers that the complaints investigation function of the current Victorian Ombudsman could be extended to ensure that the inspectorate function of the Transport Companies is formally subjected to the oversight of the

⁷⁹ V. Williams, *Minutes of Evidence*, 12 December 2001, p. 36.

⁸⁰ B. Power, *Minutes of Evidence*, 21 February 2002, p. 206.

⁸¹ G. Sharman, *Minutes of Evidence*, 13 December 2001, p. 119.

Victorian Ombudsman.⁸² In addition, given the controversial nature of inspectors' powers in this area, the Committee recommends that a separate public transport unit should be set up within the organisational structure of the Victorian Ombudsman.

Recommendation 66

That the Ombudsman Act 1974 be amended to ensure that the inspectorate function of the Transport Companies is formally subjected to the oversight of the Victorian Ombudsman.

Recommendation 67

That a separate public transport unit be set up within the Office of the Victorian Ombudsman to consider complaints concerning the public transport system, including complaints relating to the actions of authorised officers employed by Transport Companies.

Better identification for authorised officers

Yarra Trams told the Committee that it was consulting with the Government in relation to a common badge for authorised officers which would help them to identify themselves and raise public awareness and acceptance of their powers:

Sometimes people have actual problems in identifying who they [the authorised officers] are, and we have suggested that we would like it if there was a common badge that could be carried by all the carriers which could be used to identify themselves and perhaps try to raise public awareness in relation to that particular badge, which indicates who that person is and what powers they have which go along with their authorisation, so that is something that the franchisers have looked at and have requested and we have consulted the government in relation to that.⁸³

Conclusion

In accordance with its previous conclusions in relation to the authorisation and identification of authorised officers,⁸⁴ the Committee supports any proposal which

⁸² Currently, as private companies, the Transport Companies are not subject to the jurisdiction of the Ombudsman. However, the Department of Infrastructure is and, for this reason, the Ombudsman can receive complaints in relation to infringement notices which are issued from that Department.

⁸³ B. Power, *Minutes of Evidence*, 21 February 2002, p. 211.

⁸⁴ In Chapter 4.

would improve the identification of authorised officers and raise public awareness of their powers.

Recommendation 68

That the Government give consideration to introducing a common identification badge for authorised officers employed by the Transport Companies.

Removal of the privilege against self-incrimination

Yarra Trams also made a submission in relation to the privilege against self-incrimination. The Company argued that the privilege was already excluded from the *Transport Act 1983*, which is silent on the question, by necessary implication on the basis of the High Court decision in *Pyneboard Pty Ltd v Trade Practices Commission*.⁸⁵ However, Yarra Trams argued that the privilege should be specifically excluded from the *Transport Act 1983*:

In any event, we believe that a person's right to claim the privilege against self-incrimination if requested to produce documents or answer questions should be specifically excluded from the Transport Act on the grounds that the rights of the community at large would best be served by such an exclusion.⁸⁶

The Age Newspaper on 13 March reported that consumer and motoring groups and the Police Association did not support Yarra Trams's proposal for greater powers.

The Executive Director of the Consumer Law Centre, Mr Chris Field, was reported as saying:

These proposals, if implemented, are unreasonable (and draconian) in their nature. Passengers under no circumstances should be compelled to answer questions which might incriminate them, save for answering truthfully the question: "What is your name and address?"⁸⁷

⁸⁵ *Pyneboard v Trade Practices Commission* (1983) 152 CLR 329, on the basis that "the statutory provisions pursuant to which the demands were made would be rendered useless if the privilege could be invoked" - see Yarra Trams, submission no. 14, p. 5. The case law on the privilege against self-incrimination is discussed in Chapter 5 of this Report.

⁸⁶ Yarra Trams, submission no. 14, p. 5.

⁸⁷ Andrew Heasley, "Red Light for boosting tram inspectors' powers," *The Age*, 13 March, 2002, p. 13.

Conclusion

In accordance with the Committee's recommendations on the privilege against self-incrimination in Chapter 5, the Committee believes that passengers should not be compelled to answer questions which may incriminate them. However, persons should not be able to rely on the privilege against self-incrimination as a justification for the refusal to give a name and address and verifying information. To clarify this issue the *Transport Act 1983* should be amended to this effect.

Recommendation 69

That the Transport Act 1983 be amended to preserve specifically the privilege against self-incrimination with the exception of the requirement to give a correct name and address and verifying information.

Additional power to issue infringement notices to motorists

Another extension of powers sought by Yarra Trams is the power to book motorists who disregard rules 76 and 155 of the *Road Rules – Victoria 1999* which were designed to exclude motor vehicles from dedicated tram tracks. Yarra Trams told the Committee:

With respect to passenger safety, we submit that the powers of authorised officers should be extended to enable them to issue infringement notices against motorists who disregard rules 76 and 155 of the *Road Rules – Victoria 1999*. These rules were designed to exclude motor vehicles from dedicated tram tracks. The vast majority of injuries received by our passengers are caused when a motor vehicle cuts in front of our tram and the tram driver is forced to apply the tram's emergency brakes in order to avoid a collision with the vehicle. Unfortunately, such incidents are a daily occurrence and falls by passengers, particularly those who are standing become inevitable. Negligent motorists who cause such incidents should be held accountable for their actions.⁸⁸

The same newspaper article referred to above reported Vaughan Williams representing the Public Transport Users Association as having stated that:

It's not appropriate for these inspectors to have police-like powers," he said. But it was "a good idea" for inspectors and tram drivers to report offending cars to police.⁸⁹

⁸⁸ Yarra Trams, submission no. 14, p. 3.

⁸⁹ Heasley, above note 87, p. 13.

According to the article the RACV and the Police Association were also critical of the suggested additional power to book motorists:

The RACV and the Police Association said enforcing road rules should be left to police. RACV public police manager Professor Ken Ogden had reservations about the inspectors' training and suitability for doing what has been the domain of police and bylaws officers.⁹⁰

Conclusion

The Committee believes that it is important that Melbourne has an efficient public transport system and that, in particular, trams are not blocked by traffic. It is concerned about evidence received that, on a daily basis, the transit of trams is delayed as a consequence of the illegal obstruction of tram tracks by motorists.

However, the Committee considers that the power to issue infringement notices to motorists requires further consideration and appears to be beyond the scope of this Inquiry. Accordingly, the Committee is not in a position to make a recommendation on this issue. However, it urges the Department of Infrastructure and the Transport Companies to consider the issue.

⁹⁰ Ibid.

CHAPTER EIGHT: CONSISTENCY OF INSPECTORS' POWERS

Introduction

The next point I wanted to make [...] was the fact that at the State level, as at the commonwealth level, there is an enormous disparity in the powers that currently exist. I adhere to what I said on behalf of Liberty Victoria to the Senate Committee about that, that is it is more a matter of historical accident than a conscious conferring of different powers on different agencies for particular reasons.¹
[...]

Again, when I was speaking to the Senate Committee we discussed [...] the Tax Act and the extraordinarily broad powers existing under that Act compared with other Acts [...] Some of those powers were conferred as early as 1910 and it is clear that the consciousness about people's rights and liberties was very different from the awareness now. So part of the historical accident is a different awareness of people's rights at a time when earlier Acts were passed rather than the conscious acceptance of the need to give a greater power then or now.²

(Felicity Hampel on behalf of Liberty Victoria)

The Committee's analysis of Victorian legislation confirms Ms Hampel's view that there is an "enormous disparity" in inspectors' powers provisions. In this Chapter of the Report the Committee explores the important question as to whether, and to what extent, there should be greater consistency in the future development of the powers of authorised persons.

In particular, the Committee considers:

- how much consistency there is among the Acts currently;
- the level of consistency among Acts with similar subject matter and with other Australian jurisdictions;

¹ F. Hampel, *Minutes of Evidence*, 12 December 2001, p. 74.

² *Ibid.*

- the extent to which there should be greater consistency in Victorian legislation, presenting arguments for and against;
- consistency according to the legislative model:
 - different powers for monitoring versus investigation purposes;
 - criminal laws of general application versus licensing provisions;
 - whether consent provisions are a useful and adequate alternative to obtaining a search warrant;
 - the gravity of harm towards which the powers is directed as an alternative justification for a different extent of power;
 - whether the Commonwealth or Victorian Crimes Act is the appropriate high-water mark for Victorian inspectors' powers; and
- the means by which consistency should be achieved and whether current powers which go beyond the statutory powers should be reformed.

Current Levels of Consistency among the Acts

The preceding analysis of the purpose, effectiveness and fairness of Victorian legislation revealed a high degree of inconsistency among Acts containing inspectors' powers. This inconsistency is apparent on a number of levels, including the content of the provisions, their *form* (in other words, how they are worded) and in terms of non-legislative, internal mechanisms supporting the powers which are an important part of the enforcement process.

The Committee has sought to highlight and give examples of such inconsistencies throughout this Report. For this reason, it does not propose to repeat those findings in this section. Rather, in this section the Committee focuses on two aspects of consistency which have not yet been covered in the Report, namely consistency among Acts which deal with similar subject matter and consistency between Victorian Acts and similar Acts in other jurisdictions.

Consistency between Victorian Acts and interstate jurisdictions

A number of witnesses told the Committee that their legislation was broadly similar (or, in some cases identical) to interstate Acts containing similar powers. In fact, the Committee received evidence that several Victorian Acts are the result of national agreements. For instance the State Revenue Office (*SRO*) pointed out that the *Tax Administration Act 1997* was the outcome of a national process designed to improve consistent administration and enforcement provisions among Australian jurisdictions. In its written submission, the SRO described this process as follows:

The existence of the powers in their current form is of relatively recent origin, and Victoria's provisions are largely uniform with those applying in other state jurisdictions. The TAA was an outcome of an inter-jurisdictional policy process which sought to ensure that uniform and consistent administration and enforcement provisions applied not just across taxation laws applying in each state, but also as between the states themselves.³

Similarly the Department of Natural Resources and Environment told the Committee that:

Similar powers are contained in agricultural legislation in other States and Territories; and in many cases, the powers have been agreed nationally through Ministerial Councils.⁴

Mr Warren elaborated on this point in oral submissions before the Committee:

Overarching all of this is the Commonwealth and state government strategic framework. There is a recognition at the Commonwealth, State and local government levels of the significance of biodiversity and the establishment of a framework on which state legislation is established and evolved to ensure the objectives are met. There are numerous examples of Commonwealth and State agreements for which the department is responsible for the delivery on a statewide basis. The legislation may be different in different areas of operation, but often the legislation is consistent with those of other states as it reflects [...] these common objectives.⁵

The powers in the *Trade Measurement Act 1995* are the result of Victoria's commitment to the national uniform trade measurement legislation (UTML) the genesis of which the Department of State and Regional Development (as it then was) described in its written submission to the Committee:

³ State Revenue Office, submission no. 23, p. 1.

⁴ Department of Natural Resources and Environment, submission no. 22, p. 2.

⁵ R. Warren, *Minutes of Evidence*, 12 December 2001, p. 45.

In 1990 the Commonwealth and the majority of State and Territory Ministers responsible for trade measurement signed the agreement on Uniform Trade Measurement Legislation. To give effect to its obligations under the national agreement, the Victorian Government enacted a package of legislation which adopts the model uniform trade measurement legislation and provides specific provisions for the administration of uniform trade measurement legislation in Victoria. Uniform trade measurement legislation under the terms of the 1990 Agreement was also enacted in New South Wales, Queensland, South Australia, Australian Capital Territory and the Northern Territory.⁶

The Department of State and Regional Development (as it then was) also stated that consistency should not be imposed when the Act is part of a national regime. The rationale behind this view is that consistency on a national level should be favoured over conformity with other State legislation:

The Committee's Discussion Paper discloses (at page 9) that its inquiry "is concerned with consistency within the Victorian jurisdiction where very little consistency between agencies appears to exist." In the event that absolute rules of consistency are recommended by the Committee, and accepted by the Government, undesirable consequences may arise where trade measurement legislation would not be able to conform with the rules of consistency without Victoria's breaching its commitment to the UTML [Uniform Trade Measurement Legislation].

In the circumstances it is important for the Committee to distinguish the special considerations applying to trade measurement legislation compared to other enactments. Having regard to Victoria's commitment to the UTML, it is inappropriate to consider the trade measurement provisions within a broader context of consistency across Victorian laws dealing with powers of authorised persons.⁷

Before considering the validity of that argument, the Committee notes that it is clear that the powers of authorised officers in some other Victorian Acts are inconsistent with their interstate counterparts.

Consumer & Business Affairs Victoria (CBA) gave evidence that the re-organisation of powers had the effect of putting the Victorian non-licensing Acts out of line with most interstate jurisdictions. As CBAV notes in its written submission:

[A]ll states except Tasmania and Western Australia have inspectors' powers in the consumer affairs context that are similar to the powers that applied in Victoria before 1999.⁸

Mr Devlin, Manager Legal Services, commented further that "in relation to other States, we are limited" and that:

⁶ Department of State and Regional Development, submission no. 27, p. 3.

⁷ Ibid, p. 5.

⁸ Consumer & Business Affairs Victoria, submission no. 32, p. 5.

It is interesting to note that New South Wales and Queensland both have the power to enter without warrant, and there is a limit on [the privilege against self-] incrimination. South Australia has the power to enter without a warrant, albeit the privilege of self-incrimination is retained, and this is in relation to consumer matters.⁹

In submissions to the Committee CBAV expressed its dissatisfaction with the 1999 division in the Acts it administers between licensing and non-licensing Acts.¹⁰ In that re-organisation of powers, inspectors lost their monitoring powers in non-licensing Acts, of which the *Fair Trading Act 1999* is the primary example. CBAV's criticism of the 1999 reforms will be discussed in a later section of this Chapter in relation to the distinction between licensing and non-licensing Acts.

The Environment Protection Authority also notes that the *Environment Protection Act 1970* is inconsistent with counterpart statutes in other states in a number of respects. For instance, EPA told the Committee that, unlike itself:

A number of interstate EPAs, including South Australia, Queensland and New South Wales, have broad powers to stop and enter vehicles including trains, ships and aircraft.¹¹

The Committee referred to the specific extensions to powers sought by the various agencies including CBAV and EPA in Chapter 4.

Consistency with national competition policy

Finally, the Committee notes that the National Competition Policy is an overriding national agreement which impacts on all Victorian legislation, including the Acts under consideration in this Inquiry. As the Office of Regulation Reform notes:

In April 1995, the Commonwealth, States and Territories agreed to the implementation of the National Competition Policy (NCP). As part of the agreement all Australian governments have agreed to adopt the Guiding Legislative Principle that:

Legislation should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and

⁹ S. Devlin, *Minutes of Evidence*, 12 December 2001, p. 27.

¹⁰ See generally, Consumer & Business Affairs Victoria, submission no. 32.

¹¹ Environment Protection Authority, submission no. 18S, p. 3.

- (b) the objectives of the legislation can only be achieved by restricting competition. [...]

As a consequence, the National Competition Policy will have a significant impact on all existing and future legislation and regulation.¹²

An example of the impact of national competition policy on inspectors' powers was given by the DHS in their written submission to the Committee. Noting that the current *Pharmacists' Act 1974* did not conform to the model provisions, the DHS told the Committee:

A National NCP review recommended that pharmacy legislation be "wound back" to focus on ensuring that 'pharmacy services are practised by professionals safely and competently, and that these professionals act always in the best interests of their patients and clients without undue, inappropriate or unethical interference from any third party.' While a final COAG response to this recommendation is yet to be made public, it is expected that the recommendation will be supported [...].¹³

At a meeting in Sydney, the New South Wales Health Department told the Committee that national competition policy was the key impetus for the reform of the Health Practitioner legislation in that state which included a review of the inspectors' powers provisions.¹⁴

Conclusion on national co-operation as a reason for failure to comply with principles

The Committee agrees with the conclusion in the Senate Report that "it is highly desirable that high and common standards of civil life and liberty apply throughout Australia."¹⁵ It therefore commends attempts to ensure consistency with other Australian jurisdictions. On the other hand, the Committee does not consider that national co-operation should provide a complete or automatic excuse for not complying with the recommendations of this Report or the general principles set out in Chapter 2.

Even in the case of the most formal arrangements, where national uniform legislation applies, some amendments at an individual State level may be possible. For instance,

¹² Office of Regulation Reform, *Principles of Good Regulation*, p. 22.

¹³ Department of Human Services, submission no. 33, p. 63.

¹⁴ However, the evidence received suggested that the powers were reviewed at the same time other amendments were made rather than because of National Competition Policy: Meeting on 15 November 2001 with Iain Martin, New South Wales Department of Health.

¹⁵ Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 2000 (6 April 2000), p. 92.

when asked whether internal practices such as a complaints mechanism and reporting requirements should be inserted into legislation, Mr Phillip Hatton, Director of Trade Measurement Victoria acknowledged that:

That would not be as hard as it first appears because that would probably be in the Administration Act. The Administration Act is separate from the Uniform Model Act, and it is only the Uniform Model Act which in fact we can't change without unanimous agreement.¹⁶

As amendment is possible to some aspects of uniform national legislation at a State level, amendment should also be possible in cases of less formal national co-operation. The Committee believes that any appeal to national co-operation as a reason for the agency's inability to comply with state consistency principles should be scrutinised to ensure the stated reason is a legitimate one.

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That reference to a system of national co-operation, whether formal or informal, should not operate as a complete or automatic justification for failure to comply with the principles set out in Chapter 2.

Examples of model provisions (consistency within different Acts in Victoria)

Another aspect of consistency is the extent to which Acts dealing with similar subject matter and administered by the same government agency are consistent. While the Committee did not undertake an exhaustive comparative analysis of all Acts administered by the various agencies, it is clear that few attempts had been made to "standardise" inspectors' powers dealing with similar powers and subject matter.

That differences between similar Acts are more the result of historical accidents than of policy decisions was confirmed by the comments of Mr Brian Forrest, the Chairman of the Victorian Casino and Gaming Authority. Commenting on differences between the various Acts in the gaming area, Mr Forrest told the Committee:

There are some differences in the different legislation. This is not an exercise in speculation, although it is in some sense; it may be attributable to prevailing views at the time and a recognition of the various Acts and the degree of seriousness in respect

¹⁶ P. Hatton, *Minutes of Evidence*, 21 February 2002, p. 228.

of various offences. As I understand it, the Club Keno Act, for example, to which reference has been made, is a product of the former Gaming Commission which was subsumed in 1994, whereas the Gaming and Betting Act is a product of Treasury.¹⁷

However, the Committee did encounter two examples of inspectors' powers provisions which are uniform across similar Acts. These are the Health practitioner registration Acts administered by the various medical Boards¹⁸ and the licensing and non-licensing Acts under the administration of Consumer & Business Affairs Victoria. A primary impetus for the amendments in both cases was to establish consistent powers across similar legislation.

Health Practitioner Registration Acts

In relation to the reform of ten of the eleven Health Practitioner Registration Acts,¹⁹ the Department of Human Services (DHS) reported:

A 'model' Act for health practitioner registration has been developed to establish common provisions across all Acts in relation to registration, establishment of registration Boards, definitions of unprofessional conduct and powers of investigation, search and entry.²⁰
[...]

Health practitioner registration Acts serve a common purpose, which was the grounds for establishing consistent powers across all Acts.²¹

The only Act which does not yet contain the model provisions is the *Pharmacists Act 1974* which, in contrast to the new Acts, still allows inspectors to enter pharmacies without a warrant for the purpose of monitoring compliance with the Act.²² This Act is currently under review. Both the Pharmacy Board and the Pharmacy Guild, from which the Committee heard evidence argue that these powers should remain. While the review is not yet complete, there is some indication that the Department of Human

¹⁷ B. Forrest, *Minutes of Evidence*, 22 February 2002, p. 248.

¹⁸ In its written submission, the DHS states that "it is important to note that these are independent, self-funding statutory authorities, and unlike many of the other Acts considered in the VLRC's current review, these authorities (rather than the Department of Human Services) exercise the powers contained within the Act. The Department does, however, maintain regular contact with the Boards, researches emerging issues in the field of health practitioner regulation and provides police advice on potential legislative reforms." Department of Human Services, submission no. 33, p. 62.

¹⁹ The reform is now complete with the exception of the *Pharmacists Act 1974* which is currently being reviewed: see Department of Human Services, submission no. 33, p. 63.

²⁰ Department of Human Services, submission no. 33, p. 62.

²¹ *Ibid*, p. 64.

²² See also earlier discussion in Chapter 3 of this Report.

Services is sympathetic to their arguments. DHS states in its submission to the Committee:

The issues raised [by the Pharmacy Board] do indeed have validity, and the role of the pharmacist does significantly differ in these aspects from those of other health practitioners. Given the complementarity of pharmacy and drugs and poisons legislation, such issues require consideration within the context of how great the potential harm could be, and whether such powers are most appropriately vested in one or both pieces of legislation.²³

On the other hand, the submission notes that it is expected that a new Pharmacy Bill would be introduced into Parliament this year which “would bring the Board’s powers into line with those of the model provisions.”²⁴

The Committee does not wish to pre-empt the results of the pending review of the *Pharmacists Act 1974* but does flag it as a potential example of a case where the desirability of consistency among inspectors’ powers gives way to other considerations such as the need to protect against what can be serious threats to public health and safety. The need for different levels of consistency and the argument that consistency is not always appropriate will be considered in a later section of this Chapter.

Licensing and Non-licensing Acts under the administration of Consumer & Business Affairs Victoria

The Second Reading Speech by the then Minister for Police and Emergency Services on the *Fair Trading (Inspectors Powers and Other Amendments) Bill 1999* reveals that a key impetus behind the re-organisation of inspectors’ powers in the Fair Trading area was to introduce more consistency into what was described as a “confusing” array of inspectors’ powers:

The current situation in relation to those inspectors’ powers is confusing because of the various ways in which inspectors are appointed and empowered.

Some Acts have their inspectors’ powers in the Acts themselves. Some incorporate powers by reference to the *Consumer Affairs Act 1972*, while others have a mixture of their own powers and those under the Consumer Affairs Act. In some cases, the wide powers conferred by the *Consumer Affairs Act* are, in today’s context, no longer necessary. In addition, there is little consistency in the language of similar provisions

²³ Department of Human Services, submission no. 33, p. 63.

²⁴ Ibid.

that appear in the portfolio Acts. The procedures for appointing inspectors vary and are inconsistent.

The bill approaches the problem of rationalising the inspectors' powers by dividing the Acts into those which confer business licenses and those which generally regulate business conduct.²⁵

The Committee comments on the arguments for and against drawing a distinction between licensing and non-licensing Acts in a later section of this Chapter. In the next section, the Committee considers the issue of consistency in a more global sense, posing the question: to what extent is consistency desirable?

Is consistency desirable?

[...] It is important that entry and search provisions should be as consistent as practicable across all agencies which exercise those powers. Greater consistency means that both officials and members of the public have some consistent expectation of what might happen during an entry and search. [...]

While consistency is a guiding principle, it should not be seen as an absolute. There will obviously be occasions when a particular entry provision need not conform with the standard approach in every respect.²⁶

The conclusions reached in the Senate Report typify the responses received from many Victorian witnesses most of whom agreed that consistency is important but who also acknowledged that there should be some flexibility. For instance, some of the witnesses who were most outspoken in their support for consistency conceded that some sort of distinction could be drawn between inspections under licensing Acts and inspections under non-licensing Acts. The Committee examines witnesses' views on different legislative models in the next section of this Chapter.

Global arguments for consistency

Several witnesses emphasised the importance of improving consistency. For instance, Danny Holding representing the Criminal Law section of the Law Institute Victoria stressed the benefits of "clear and easily understandable guidelines" for inspectors and members of the public alike:

²⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 April 1999, 357 (Mr W.D. McGrath, Minister for Police and Emergency Services).

²⁶ Senate Standing Committee for the Scrutiny of Bills, *Entry, Search and Seizure Provisions in Commonwealth Legislation*, Fourth Report of 2000 (6 April 2000), pp. 92-93.

There are a number of reasons why consistency is important. This is a complex area of the law. Even well-meaning law enforcement officers, including the police and the variety of investigating officials, are often faced with very difficult tasks in the execution of warrants. It is in their interests that they have clear, easily understandable guidelines to follow. On the other hand, there are no doubt maverick investigators – that is, people who use their powers improperly. It is clearly in the interests of the public that they have readily accessible information as to their rights that can be clearly explained.²⁷

Stephen Shirrefs representing the Criminal Bar Association also highlighted the advantages of greater consistency, referring to the fact that inconsistent legislative provisions lead to “inconsistent results.” In this extract taken from his oral submissions to the Committee during the public hearings, Mr Shirrefs also pointed to a common inconsistency in the Acts – namely the fact that some Acts require authorised persons to obtain a warrant prior to conducting a search whereas others do not:

In relation to other areas outside the immediate criminal jurisdiction, we look at a variety of Acts set out in the discussion paper, [...] that operate in this state. There is inconsistency which is quite apparent and which you are probably quite aware of. There are different schemes that operate in different ways. One of the main problems with that is that with inconsistency you get inconsistent results.

You get inconsistency with the way in which people are being protected and the way searches are being conducted and in relation to that, as I said at the outset, where there is a licensed situation or regulated industry, perhaps one of the fundamental considerations is: what is the philosophical basis enabling searches to take place? Where do you draw the line in balancing community interests against individual rights?

Some of those schemes provide for the obtaining of warrants permitting search and seizure; some of them do not. Some of them put complete control and power into the hands of inspectors in circumstances where there is really nobody or no overseeing of that prior to its taking place, nor in the course of the search taking place. (...) ²⁸

Victoria Police submitted to the Committee that greater consistency would help the Community to understand inspectors' powers. Moreover, Victoria Police stated that a consistent set of powers would assist the police to enforce the many Acts which confer powers on the police as well as on inspectors, and to assist inspectors in using their coercive powers when requested to do so:

There is a broad understanding of police roles, responsibilities and obligations in the community. That is not necessarily so about inspectors' powers. That is where there is inconsistency in the legislation. At the end of the day, so far as police are concerned, for operational members to deal with disputes between inspectors and members of the public or to assist inspectors in the execution of their duties, if

²⁷ Ibid, p. 130.

²⁸ S. Shirrefs, *Minutes of Evidence*, 22 February 2002, p. 258.

inspectors had consistent powers across all their Acts, whether regulatory or not, and to a particular level, it would be simpler for police enforcement, police assistance and the general community at large.²⁹

However, Victoria Police recognised that a single inspectors' powers regime may not be appropriate and canvassed the idea of various levels of inspectors' powers. In response to the question as to whether the range of areas inspectors cover is capable of being reduced to the one regime, Inspector Leane answered:

Maybe not the one regime, but there would need to be levels and triggers. It has been discussed in the Discussion Paper and in some of the questions posed. You ask whether there is a need for the mandatory answering of questions. What is the justification for and policy reasons behind that? How is that used? Is it limited to an industry? If it is limited to an industry they are some of the trigger questions that could be answered, but there may be stages of powers that are provided to investigators, and for want of a better word there may be four or five categories, with the highest category providing the ability of an investigator to demand that questions be answered. Then the community becomes aware that there is at least some consistency across those areas. For example, the Legal Practice Act mentioned may be the bottom level because they deal with legal practitioners and the powers are limited compared to the powers in the gaming acts. It would have to be staged rather than a flat level, but consistency could be achieved by staging it in that way.³⁰

The Legal Policy unit of the Department of Justice generally supported the notion that a greater degree of consistency is desirable:

It is undesirable for there to be an ad hoc array of inspectors' powers. This is primarily because people should be able to know their rights and responsibilities when they are subject to inspection. If each type of inspection is distinct, then persons subject to inspection will have little capacity for knowing the details of what they may and must do. Inspectors, in contrast, will know the law in relation to their own area and so it will have less impact on them than other inspectors may do things differently.³¹

However, like Victoria Police, Legal Policy submitted that some differentiation may be justified on the basis that persons within certain industries are more aware of the inspection regime that applies to their industry than inspection regimes which apply more generally:

It could be said, however, that persons within certain industries will generally be aware of the inspection regime that applies to their industry, and that variations in other inspection regimes are not as great a problem as they are in cases where persons subject to inspection are not engaging in a specified industry as their full-time occupation. If so, it may be appropriate to draw a distinction between inspections that

²⁹ Inspector Leane, *Minutes of Evidence*, 13 December 2001, p. 88.

³⁰ *Ibid*, p. 89.

³¹ Legal Policy, Department of Justice, submission no. 26, p. 8.

are specific to certain industries or specialised activities (for example, abalone harvesting) and inspections that apply more generally, such that potentially any person could be subject to inspection (for example, ticket inspection on public transport.) Generally speaking, it will be more important that the inspection regimes in relation to the latter cases should be as uniform as possible.³²

Legal Policy went on to state that inconsistency was a problem “when the variations do not simply reflect some particular need within the specific practical context but rather involve some variation at the level of general principles” and clarified its view as to the type of consistency which should be our goal:

The extent to which privacy is to be interfered with (in contrast with the practical variations relating to how it is to be interfered with) should be consistent across industries or activities regardless of the extent to which individuals can adapt.

There is a middle ground, then, between an array of entirely particular and ad hoc inspectors' powers and a single rigid regime which specifies all the details of inspectors' powers and to which all types of inspection must adhere. The principles under consideration represent, in Legal Policy's view, the right sort of balance here by serving as a template or default regulatory regime that can be adapted to a particular subject matter, such that variations in particular cases are to be justified by reference to the factual and practical particularities of the specific situation.³³

Another witness which stressed the importance of consistency was the Victorian Abalone Divers Association. Like Victoria Police, Legal Policy and the Law Institute, it submitted that the public's understanding of inspectors' powers would improve if there were a greater level of consistency across the Acts. VADA also submitted that there may be some instances where broader powers are justified:

Consistency is very desirable. A person can understand the powers of authorised persons more easily where the person will have similar “rights” for any authorised officer interaction. For example, if an authorised person can enter and search a commercial premises without a warrant, then the occupier will know that all authorised officers are able to do so without warrant. A consistent approach makes legislation simpler for a person to understand and apply unfamiliar legislation, thereby providing an additional safeguard for the rights of the individual.

Broader powers are justified where the nature of an offence requires increased powers for successful detection or enforcement. The particular offence or offences requiring additional powers should be identified before Parliament when legislation is being enacted.³⁴

³² Ibid.

³³ Ibid.

³⁴ Victorian Abalone Divers Association, submission no. 20, p. 2.

Arguments against consistency

Other witnesses, particularly agencies, did not support the idea of consistency across all Victorian legislation. For instance, the Department of Human Services (DHS) submitted that the health and safety focus of most of the legislation it administered justified the fewer “due process” style protections in its legislation. Again, this argument is relevant to the next section on different levels of consistency. The DHS made it clear that it opposed any standardisation of inspectors’ powers:

The Committee’s second term of reference concerns whether or not there is a need for greater consistency between powers. The Committee notes the importance of balancing the powers with the gravity and risk of injury.

The need for government agencies to act in a consistent manner when they use authorised powers is critical in maintaining public confidence in the governance of the state. However, a consistent use of authorised powers across the agencies is not the same as identical authorisation powers. Emphasis should be focused upon ensuring that the powers and requirements do not hamper the ability of the authorised officers to fulfil their responsibilities.

[...]

Furthermore, DHS does not support a principle which requires consistency of powers across all legislation within Victoria.

DHS recognises the importance of balancing the rights of the individual and the rights and interests of the community.

However, given the focus on the protection of health and safety within much of the legislation administered by DHS, DHS does not support a requirement that all elements of due process are required in every Act as suggested in Principle 1.3 [...] DHS does not believe that extensive provisions are necessary or desirable in legislation. Such provisions are inappropriate in DHS legislation, which has as its intention the protection of health and safety and/ or which requires consent to entry as a condition of licensing or registration.

The Department suggests that the preferable principle which should inform the grant of powers of authorised officer to search enter and seize in legislation is that the level of power should be directed to the risk and level of injury to health and safety which may result from a breach.³⁵

The Department of Natural Resources and Environment (DNRE) took a similar view to the DHS although it did not elaborate on it in such detail. It argued that the “contextually specific” nature of its legislation meant that it should not necessarily have to conform with other inspectors’ powers legislation:

³⁵ Department of Human Services, submission no. 33, p. 5.

The industry specific, generally non-urban context of the enforcement issues has led to the development of legislative provisions which are contextually specific and not generic. It would not be appropriate for the legislation or its administration to be simply assessed by reference to other legislation developed to address other needs.³⁶

Similarly, the Victorian Casino and Gaming Authority argued against the notion of “consistency for its own sake.” Like the DNRE, the Authority pointed to the fact that different industries have different characteristics which may require different powers:

While consistency may properly be seen as an ingredient of justice, it does not constitute the hallmark of it. Consistency for its own sake is not desirable. Guidelines that set parameters for questioning powers and that do not recognise the peculiarities of the regulated environment in which the powers are applied will not be useful. [...]

[After explaining the questioning powers of the Authority]:

Other regulated industries have other characteristics, and their regulators may need specialised powers that are of greater or lesser reach than those of the Authority. Questions of adequacy of these powers are best answered by the administering agency. Powers consistent across all agencies will be ineffective for most.³⁷

The arguments against any concept of blanket consistency referred to above in many ways pre-empt the discussion in the next section of this Chapter: namely, the concept of consistency according to the legislative model. For instance, the comments of the DHS and the DNRE imply that the significant harm against which many of the Acts which they administer are directed (protection of public health and the environment respectively) warrant substantial powers which are not necessarily justified in other areas. In the oral submissions to the Committee, Ms Debra Foy representing the Department of Human Services stated:

Most of our legislation is designed to protect the most vulnerable and disadvantaged members of our community, such as aged people in supported residential services, children attending children’s services during the day, people in hospitals, people who are mentally ill and children who are at risk of harm. We would suggest that in certain circumstances those powers are perhaps unique.³⁸

Consistency according to the legislative model

In the first Chapter of this Report the Committee introduced the three principal attributes of powers: the warrant / consent provisions, the protections of civil liberties and the specific entry, search, seizure and questioning powers available. In that

³⁶ Department of Natural Resources and Environment, submission no. 22, p. 2.

³⁷ Victorian Casino and Gaming Authority, submission no. 35, p. 3.

³⁸ D. Foy, *Minutes of Evidence*, 12 December 2001, p. 2.

Chapter the Committee noted that it is important to identify attributes of powers in order to reach conclusions about the extent to which (or, in relation to which attributes) legislative provisions should be consistent. The Committee notes that it has already discussed the provisions designed to protect the civil liberties of those subject to the powers. In this Chapter, the Committee focuses on the factors governing the choice of warrant / consent provisions.

Readers will recall that warrant / consent provisions relate to the initial hurdle requirement which must be met (if any) before powers can be exercised. For instance, when should Acts require that inspectors obtain a search warrant or the consent of the occupier or person subject to the powers before exercising their powers? In the first Chapter of this Report, the Committee outlined three key considerations in determining questions about the choice of legislative provisions: namely the purpose of the powers, the gravity of the harm towards which the power is directed and whether or not there has been implied consent to inspection. The Committee also foreshadowed its view that whether or not a search warrant or consent should be required before the powers can be exercised should mainly depend on the purpose for which the powers are exercised.

In this Chapter, the Committee explores the witnesses' views on this issue and elaborates on its conclusions. It starts by examining the arguments for and against the proposition that whether or not inspectors should have to obtain a search warrant depends on whether the powers are exercised for an investigatory or a monitoring purpose. The Chapter then considers an issue which is in many ways related, namely whether the warrant / consent provisions should vary according to the legislative model of the Act and, in particular, whether the Act sets up a licensing regime (a licensing Act) or contains provisions of general application (a non-licensing Act). Finally, the Committee considers the witness evidence on consent provisions and whether they can be said to be a valid alternative to search warrants where powers are exercised for investigation purposes.

Rationale for different powers depending on whether for monitoring or investigation purpose

Several witnesses from whom the Committee heard evidence in public hearings agreed with the argument that powers for monitoring purposes should not require

inspectors to obtain a search warrant. However, witnesses appeared to have different reasons for their position.

Non-agency witnesses

Witnesses who emphasised the importance of protecting the rights of those subject to the coercive powers of inspectors appeared to support the proposition that no warrants should be required for monitoring purposes on the basis that occupiers subject to monitoring powers have generally received notice of the regulatory powers. However, such witnesses stressed that safeguards to protect individual rights were still necessary in such cases.

For example, Liberty Victoria commented that inspectors' powers exercised for emergency or monitoring purposes could be a valid exception to the proposed general rule that inspectors always obtain a warrant:

If it is in a monitoring category rather than that of suspicion of commission of an offence there are circumstances where it is appropriate that an officer or investigator of an agency should be able to enter without a warrant. But we would say these conditions should then apply: it has to be in normal business hours – they cannot come early in the morning or late at night and demand access to the books; and it has to be in circumstances where the person who has the identification that is part of the code advises the person of their rights.³⁹

The reference to a code and the importance of advising persons of their rights is closely linked to the argument that inspectors should not have to obtain a warrant before entering premises of occupiers subject to licensing conditions. In many cases where legislation allows inspectors to exercise powers for monitoring purposes without a warrant, the occupiers subject to the powers have previously entered into a licensing arrangement with the relevant agency.⁴⁰ Licensees, it is argued, have voluntarily subjected themselves to the licensing regimes and thereby “consented” to inspections monitoring compliance with those regimes and the Acts they operate

³⁹ F. Hampel, Liberty Victoria, *Minutes of Evidence*, 12 December 2001, p. 78. Note that Ms Hampel went on to note that: “But we would say these conditions should then apply: it has to be in normal business hours – they cannot come early in the morning or late at night and demand access to the books; and it has to be in circumstances where the person who has the identification that is part of the code advises the person of their rights.” Note that Ms Hampel made a similar submission before the Senate Committee quoted in that Report: Senate Report, above note 26, p. 86.

⁴⁰ E.g. the *Motor Car Traders Act 1986* and other licensing Acts administered by CBAV; the *Food Act 1984*.

under.⁴¹ Submissions which highlighted this distinction are considered in the next section of this Chapter.

Views of agencies

In contrast to the rationale based on “implied consent” supported by groups such as Liberty Victoria, agencies (and groups generally supportive of agencies such as VADA) which considered this issue highlighted different reasons for their support of the distinction between powers exercised for monitoring purposes and those exercised for investigation purposes.

For instance, the Victorian Abalone Divers Association (VADA) indicated that, without general monitoring powers, inspectors may be impeded in exercising their investigation powers. In VADA’s view inspectors may only develop reasonable grounds for believing or suspecting that an offence has been committed, which is the usual requirement to obtain a warrant, if they have been able to undertake monitoring beforehand:

A warrant should not be required for monitoring purposes, except for a dwelling house. The power to enter and search for monitoring purposes should be provided for in legislation, not by warrant. It will often not be possible to determine whether an offence is occurring, or to have reasonable grounds to suspect an offence, without having undertaken some monitoring at a premises.⁴²

Other agencies emphasised the importance of the element of surprise in making routine unannounced visits under general powers of entry for monitoring purposes. For instance, the Pharmacy Board stated in its written submission that:

to conduct these inspections by invitation or under a warrant would defeat the intention of the Act in that the Board needs to see what is happening at a point in time rather than seeing circumstances that are dressed up for the occasion. There is also the impracticality of scheduling visits on an appointment basis (with or without a warrant) because the officer does not know how long a visit will take and common sense and efficiency dictates that a particular area is dealt with at a time.⁴³

⁴¹ See, for instance, the Second Reading Speech in relation to *the Fair Trading (Inspectors Powers and Other Amendments) Bill 1999*, Victoria, Parliamentary Debates, Legislative Assembly, 15 April 1999, 357 (Mr W.D McGrath, Minister for Police and Emergency Services): “The applicants for such licenses exercise a choice to accept the regime under the relevant Acts [...] the non-licensing Acts do not warrant such wide powers.”

⁴² Victorian Abalone Divers Association (VADA), submission no. 20, p. 3.

⁴³ Pharmacy Board of Victoria, submission no. 7, p. 2.

Alex Serrurier, Chief Environmental Officer of the Ballarat City Council, also argued that any requirement to obtain a search warrant would hamper the work of environmental health officers:

Today it is perhaps not as dramatic as it was when we had outbreaks of typhoid, cholera and the plague in goldrush Melbourne, but it is no less just as important that environmental health officers have the ability to do their job without the need to go to a magistrate or a justice of some description in order to obtain search warrants, which often takes a fair amount of time.⁴⁴

View that no distinction between powers according to purpose is appropriate

Finally the Committee also received evidence expressing the view that a warrant, or at least some form of authorisation, should be required in all cases, even where inspectors merely wish to monitor compliance with legislation. This view, which can be described as the high-water mark of the civil libertarian approach, was put by Stephen Shirrefs representing the Criminal Bar Association. Mr Shirrefs outlined his idea for a monitoring warrant to the Committee as follows:

That is dealing more in terms of a monitoring warrant. They are given a warrant that enables them to carry out inspections of nominated places. It may be that they can do that without the requirement to obtain it from a magistrate but perhaps if it can be obtained from somebody high up in the organisation or some independent tribunal – that they are given a warrant for a particular day to monitor activities at a nominated premises. The fact that they have a warrant would not be notified to the occupier of the premises but they are permitted to turn up and inspect.⁴⁵

Mr Shirrefs told the Committee that the value of a monitoring warrant was the fact that it sets out information about the rights and obligations of occupiers:

The value in having the monitoring warrant would be that the document itself would set out on its face that which is permitted to be done by the inspector who is armed with it. That would be required to be served on the occupier of the premises so that they are then informed of their obligations.⁴⁶

Conclusion

The Committee agrees with the view taken by the majority of witnesses that a valid distinction can be drawn between powers exercised for monitoring and powers

⁴⁴ A. Serrurier, *Minutes of Evidence*, 21 February 2002, p. 173.

⁴⁵ S. Shirrefs, *Minutes of Evidence*, 22 February 2002, p. 259.

⁴⁶ *Ibid.*

exercised for investigation purposes. The Committee recognises that where inspectors exercise their powers based on a suspicion that an offence has been committed the potential consequences (in some cases a conviction for an indictable offence) are more serious than cases in which inspectors exercise their powers to monitor compliance with legislation. Similarly, the incursion of civil liberties is clearly greater when an inspector enters a residential premises (the “sanctuary” of the home, to use the words of the Victorian Privacy Commissioner), than when he or she enters a business premises. In the Committee’s view a search warrant provides a greater level of protection than safeguards which are merely contained in a statute. Hence, the Committee considers that the correct balance between public and private interests would require a search warrant to be obtained before coercive powers can be exercised in these two instances.

In contrast, the Committee is of the view that the potential consequences and the incursions on civil liberties are generally not as serious where inspectors use their powers to monitor compliance with legislation. Accordingly, the Committee considers that a warrant should not be required for powers exercised purely for monitoring purposes.

In addition, the Committee considers that where there is a serious threat to human life or serious environmental or similar harm, the balance between the public and private interests tips in favour of the public interest. Accordingly, the Committee considers that inspectors should not be required to obtain search warrants in clear and defined emergencies. On this note, the Committee reiterates its recommendations in Chapter 4 of this Report that there must be a clear distinction drawn between emergency, monitoring and investigation powers.

The Committee also considers that what constitutes monitoring and when monitoring activity may become, in reality, the investigation of an offence needs to be clarified. For example, if on a regular monitoring visit an inspector has some concerns and decides to visit more frequently than usual, is this still monitoring or has it become an investigation? At what point would increased “monitoring” visits go beyond what could be justified without a warrant? While no agencies specifically addressed this issue the Committee notes that there may need to be an agreed limit to what is allowed as monitoring. The most obvious limit would be on the number of visits allowed over a specified period of time.

In the few cases where monitoring is not part of a licensing regime, particularly where the Act affects members of the general public rather than merely a particular industry or class of people, it is vital that agencies make attempts to publicise the inspection powers and the rights and duties of the persons affected. In such cases it is also even more important that inspectors be required to explain people's rights and obligations to them, both orally and in writing. Any request to deviate from the principles set out in Chapter 2 should be subjected to particular scrutiny.

Recommendation 71

That as a matter of general principle, warrants be required for the investigation of suspected offences and for entry into residential premises.

Recommendation 72

That, as a matter of general principle, warrants not be required for the monitoring of compliance with primary legislation or in responding to genuine and clearly defined emergencies.⁴⁷

Criminal laws of general application versus licensing Acts

A related debate concerned whether different rules should apply for licensing and non-licensing Acts. Many Acts which fall within the ambit of this Inquiry require persons who wish to engage in the activity which the Act regulates, to obtain a license.⁴⁸ In Chapter 1 of this Report the Committee noted that the consent to inspection regimes implicit in the act of entering into a licence agreement can be a justification for giving inspectors greater powers (and, in particular, for not requiring inspectors to obtain a warrant or consent before exercising their powers.)

Most witnesses acknowledged that there was an element of "implied consent" to monitoring in the licensing Acts which justified a broad level of power which allowed inspectors entry without a warrant or consent. Some, most notably Consumer & Business Affairs Victoria, argued against this distinction.

⁴⁷ Provided that the safeguards recommended in this report are followed.

⁴⁸ E.g. *Fisheries Act 1995*, *Motor Car Traders Act 1986*.

Arguments for the licensing / non-licensing distinction

The Criminal Law Section of the Law Institute Victoria expressed the view that drawing a distinction between licensing and non-licensing Acts was justified on the basis that persons who have entered into a licensing regime could be said to have given “informed consent” to monitoring by inspectors:

I think there is a difference between people who embark on an exercise or commercial enterprise where they have been informed at the time of obtaining their licence that their premises will be subject to routine inspection, perhaps at short notice, and people who are having coercive powers exercised on them. I am trying to think of different examples: perhaps if it is outside normal business hours, if it is not necessarily a commercial premises that is easily accessible and things of that nature.⁴⁹

It is clear that the Victorian Government agreed with this rationale in its re-organisation of the Acts administered by Consumer & Business Affairs Victoria. As already noted, that re-organisation resulted in inspectors being given the power to monitor compliance without a warrant under the licensing Acts but not under the non-licensing Acts where authorised officers are required to obtain a search warrant or consent before exercising their powers. Consumer and Business Affairs explains the change to the Committee in its written submission:

The most significant change from the pre-1999 position is that in relation to persons other than licensees and those in possession of documents relating to licensed businesses, the only power available to CBAV is to apply to the Magistrates’ Court for a search warrant.⁵⁰

The relevant section of the Second Reading Speech for the *Fair Trading (Inspectors Powers and Other Amendments) Bill 1999* extracted below suggests that such a distinction was justified on the basis that licensees exercise a choice to accept the regime under the relevant Acts:

The Bill approaches the problem of rationalising the inspectors’ powers by dividing the Acts into those which confer business licences and those which generally regulate business conduct. The business licensing Acts confer rights to operate businesses in industries that, for various reasons, require close supervision. They currently contain powers for inspectors to require production of relevant documents, the answering of relevant questions and the entry to licensed premises, without a court order. The applicants for such licenses exercise a choice to accept the regime under the relevant Acts. The Bill maintains that system but standardises the inspectors’ powers in the various licensing Acts. The non-licensing Acts do not warrant such wide powers.

⁴⁹ D. Holding, *Minutes of Evidence*, 13 December 2001, p. 154.

⁵⁰ Consumer & Business Affairs Victoria, submission no. 32, p. 8.

Therefore, the Bill provides that all powers to enter or to require production of documents or answers to questions are exercisable only under court order.⁵¹

Legal Policy, Department of Justice also took the view that:

Generally, it would seem that warrants are not appropriate to mere monitoring exercises, and it is envisaged that monitoring will usually proceed other than by way of warrant (most often through some statutory provision specifying that persons engaged in a particular industry and who have received a licence or were registered shall be taken to have consented to being subject to certain kinds of monitoring under known conditions.) [...] ⁵²

Arguments against the licensing / non-licensing Act dichotomy

Consumer & Business Affairs Victoria (*CBAV*) argued against the distinction drawn between licensing and non-licensing Acts. It submitted that the existence or otherwise of “constructive consent” is not a logical justification for the distinction. In *CBAV*’s submission the question as to whether or not legislation should be proactively (monitoring compliance) or reactively (entering with a search warrant on suspicion of an offence) enforced is a policy question, not a question of consent:

The existence or not of “constructive consent” is not a logical basis for saying that it is appropriate for *CBAV* not to be required to apply to the courts in relation to licensed traders but appropriate for it to have to do so for other traders. The question of who should supervise the exercise of inspectors’ powers is a policy question, namely who can best do the job in the context of the evil at which the legislation is aimed, and the need for resource efficiency and timeliness.

Nor is “constructive consent” a logical basis for saying that some legislation should be proactively enforced and other legislation should only be re-actively enforced. Whether a particular Act should be pro-actively or re-actively enforced is a policy question based on whether the aim is to prevent breaches or to punish offenders.

While the licensed industries are more problematic than unlicensed industries (which is why licensing was set up in the first place) all *CBAV*’s legislation is for the purpose of consumer protection. Consumers exploited by ordinary traders are just as aggrieved as those exploited by a licensed trader; and so the level of enforcement should not depend on whether the trader is licensed or not.⁵³

Later in the submission *CBAV* questioned the rationale behind the added time and resources involved in obtaining search warrants under the non-licensing Acts and pointed out there was no evidence that the pre-1999 powers had been misused:

⁵¹ Victoria, Parliamentary Debates, Legislative Assembly, 15 April 1999, above note 41, p. 357.

⁵² Legal Policy, Department of Justice, submission no. 26, p. 33.

⁵³ Consumer & Business Affairs Victoria, submission no. 32, p. 7.

Again, the existence or not of “constructive consent” is not a logical basis for saying that it is appropriate for CBAV not to be required to apply to the courts in relation to licensed traders but appropriate for it to have to do so for unlicensed traders. Nor is it clear what is practically gained by requiring CBAV to expend time and resources in applying to the courts to enforce the legislation regarding unlicensed traders.

Further, there was nothing to suggest that the more flexible pre-1999 powers, as they applied to unlicensed traders, were being used inappropriately, such as to warrant a change from the pre-1999 position.⁵⁴

Stephen Shirrefs representing the Criminal Bar Association questioned the rationale for the licensing/ non-licensing distinction on another basis. Shirrefs acknowledged that:

in circumstances where people have a license and are regulated under an Act and given the privilege to operate an industry, there may be obligations that they carry which go beyond that of the ordinary citizen.⁵⁵

However, he queried how much licensees really were informed about inspectors’ powers:

They understand that by obtaining the license the inspector may from time to time come to inspect. That is fine to the extent that they know that it might happen. But it does not really govern the situation when it does happen and what their rights are in the course of that search. What can in fact happen? What can the inspector do so that they know what his powers are, what his rights are and what their obligations are? That is the area of concern. Rights and obligations are paramount in all of this so we know exactly what the parameters are. But when those parameters are not clearly defined and not understood by both parties, you have problems.⁵⁶

The Committee received little evidence in relation to how much licensees are informed about the powers of authorised persons at the time they enter into the licence. Two witnesses who did address the issue, albeit only in passing, were the Department of Human Services (DHS) and the Victorian Casino and Gaming Authority.

The DHS submitted that Acts which required consent to entry as a condition of obtaining a license or registration should not have to contain extensive legislative protections:

It is the Department’s view that these are requirements of natural justice and must be observed. However, DHS does not believe that extensive provisions are necessary or desirable in legislation. Such provisions are inappropriate in DHS legislation, which

⁵⁴ Ibid, p. 8.

⁵⁵ S. Shirrefs, *Minutes of Evidence*, 22 February 2002, p. 264.

⁵⁶ Ibid, p. 267.

has as its intention the protection of health and safety *and/or which requires consent to entry as a condition of licensing or registration.*⁵⁷

The Victorian Casino and Gaming Authority stated that licensees are given a “clear statement of their rights and responsibilities” at the time of entering into the license:

[...] When licensed employees and venues are given their licenses there is a clear statement of their rights and responsibilities. Special employees are given information about what they are required to report in relation to the conditions of the licence, their responsibilities in the event of any offences being committed and their obligation to keep informed about the particular changes the legislation requires.⁵⁸

Conclusion

The Committee agrees that licensees can generally be expected to have a greater knowledge of the inspection regimes of the Acts governing their industries than those operating in unlicensed industries. The Committee believes that the responsibility for ensuring a level of knowledge by licensees rests largely with the licensing body.

Hence, the Committee considers that it is important that agreement to submit to the monitoring regime form part of the licensing agreement and that potential licensees' attention is drawn to this fact. This should include handing licensees a document setting out these matters upon entry to ensure that licensees clearly understand their rights and obligations at the time of the inspection.

In relation to non-licensing Acts it is the Committee's view that there may be situations in which monitoring powers without a warrant may still be appropriate. These situations will, however, be limited. The Committee agrees with the view of CBAV that a decision to monitor compliance is essentially a policy decision for the government rather than simply a matter of whether the Act contains a licensing regime or not.⁵⁹ The Committee notes there are cases where such a distinction would be absurd; for instance, persons who travel on public transport do not have a license to do so and yet few would argue that there should be no monitoring of compliance with the system (although there is considerable debate about the form that such monitoring should take, as the Committee discussed in Chapter 7 of the Report).

⁵⁷ Department of Human Services, submission no. 33, p. 5, emphasis added. At page 5 of the submission the DHS also states: “The Food Act contains a registration regime which includes inspection by local Environmental Health Officers (“EHO”), employed by Councils. It is a condition of registration that an EHO be able to enter premises:” DHS, submission no. 33, p. 5.

⁵⁸ B Forrest, *Minutes of Evidence*, 22 February 2002, p. 255.

⁵⁹ See previous discussion in this Chapter on the fact that a decision to make an industry licensed is essentially a reflection of a policy decision.

Because the resolution of this issue involves important policy issues which may have previously been debated in the context of legislative review and which extend beyond the scope of this Inquiry, the Committee does not reach a concluded view about whether monitoring powers without a warrant for non-licensed industries administered by Consumer & Business Affairs Victoria are appropriate. It merely states that the absence of a licence should not automatically exclude any possibility for monitoring compliance. The Committee reiterates the comments it made in the previous section of this Chapter in relation to the importance of safeguards where agencies have monitoring provisions in non-licensing regimes.

Finally, the Committee reiterates its view that the key distinction is between monitoring compliance and investigating suspected offences. If an inspector has reasonable grounds to believe that an offence has been committed – whether pursuant to a licensing or a non-licensing Act - the Committee considers that a warrant should be obtained, unless immediate entry is necessary to respond to a genuine and clearly defined emergency.

Recommendation 73

That the absence of a licence not automatically exclude any possibility for monitoring compliance with legislation.

Consent Provisions - an alternative protection to search warrants?

Another issue relevant to the appropriate extent of powers across Acts is whether formal consent to entry provisions is a valid alternative to search warrant provisions.

This issue must be distinguished from the practice of obtaining consent where there is no formal requirement to obtain a search warrant. Readers will recall that in Chapter 4 of the Report the Committee noted that several agencies which have the power to inspect without consent or warrant nevertheless often obtain the consent of occupiers as a matter of internal practice (or “enforcement philosophy”).

Relatively few Acts specifically refer to the possibility of inspectors’ obtaining consent to entry and fewer still contain safeguards to ensure that the consent is

genuine and informed. One Act which does is the *Fair Trading Act 1999*.⁶⁰ In general, and as previously noted in this Report, the *Fair Trading Act 1999* allows inspectors to exercise their powers for the purpose of investigating a suspected offence under a valid search warrant. However, section 119 outlines various powers which can be exercised with the consent of the occupier (instead of under a warrant) and goes on to specify exactly what information the inspector must give the occupier. Section 119(3) requires inspectors to ask the occupier to sign an acknowledgment of consent in the prescribed form. In other words, in the *Fair Trading Act 1999* and others which are based on this Act, obtaining the consent of the occupier or person subject to the powers is an alternative to obtaining a search warrant. In this section the Committee asks: is this a valid alternative?

Views of witnesses

The importance of ensuring that consent is informed

Few witnesses specifically addressed the issue of informed consent perhaps because relatively few of the Acts contain “entry with consent” provisions.

One organisation that did comment was Victoria Legal Aid. VLA indicated to the Committee that it had “grave concerns” about inspectors obtaining consent as an alternative to obtaining a warrant. VLA referred in particular to the “subjective nature” of the process of obtaining informed consent and the necessity of safeguards to ensure that consent is informed. VLA’s submission on this point raises many important points and is worth quoting at some length:

The question of consent to enter and search without a warrant is of grave concern to VLA and is discussed throughout the following sections.

Whilst it is recognised that the practice of carrying out searches and seizures with the consent of the person should be retained, VLA is concerned that any such consent is actually “informed consent.” Problems arise because of the subjective nature of the process.

There are many questions that need satisfactory answers. What is “informed consent”? Who decides a person has actually provided “informed consent”? What

⁶⁰ The *Fair Trading Act 1999* contains a number of provisions to ensure that consent is genuine and informed. Section 82AG of the *Motor Car Traders Act 1986* contains similar safeguards. Section 122 of the *Electricity Safety Act 1998* also contains detailed safeguards for entry by consent although it is worded quite differently. Acts which contain consent provisions but which do not contain safeguards for informed consent include section 60(2) of the *Trade Measurement Act 1995* and section 108(1)(d) of the *Casino Control Act 1991*.

information should be given to a person? Should it be given in writing? Should a person be entitled to seek legal advice before consenting? What if the person from whom you are seeking consent turns out to be mentally ill or intellectually disabled?

What amounts to “informed consent” by one authorised person may not reach that standard for another. [...]

If consent is withdrawn during the course of the entry and search, it is imperative that the authorised person immediately withdraws. Indeed, if it becomes apparent to the authorised person during the course of the entry and search that a person is unable to consent or suspected of being unable to consent, then there ought to be immediate withdrawal.⁶¹

The submission goes on to question the need for a penalty or disadvantage to be imposed on a person who fails to consent or co-operate in a search. In particular, VLA stresses that:

Under no circumstances should a penalty be imposed where consent is initially given, but later withdrawn. If a person withdraws consent (or was unable to give consent in the first place) then it is assumed that they are not “co-operating” in the search. In those circumstances, the authorised person should immediately withdraw and if wishing to continue the entry and search, should apply for a warrant in the normal way. In these circumstances, anything seized prior to the withdrawal should be surrendered.⁶²

The Committee notes that the Senate Report also emphasised the importance of informed consent in the following principle:

Where legislation provides for entry and search with consent (or alternatively under a warrant), it should make clear that the consent must be genuine and ongoing consent, and it should impose no penalty or disadvantage if an occupier fails to co-operate in the search, or subsequently withdraws consent – requiring an occupier to co-operate is inconsistent with the idea of consent.⁶³

Some agencies supported this principle. For instance, the Department of Human Services indicates its support for this principle but does not comment further.⁶⁴ The Office of the Chief Electrical Inspector (the OCEI) demonstrates its support of the principle by implication; its submission outlines the provisions for gaining access by consent in the *Electricity Safety Act 1998* and notes that these are backed up by internal procedures and safeguards. For instance, the OCEI notes that:

⁶¹ Victoria Legal Aid, submission no. 19, pp. 3-4. See also comments by Stephen Shirrefs, *Minutes of Evidence*, 22 February 2002, pp. 266-267.

⁶² *Ibid*, p. 4.

⁶³ Senate Report, above note 26, p. 50.

⁶⁴ Department of Human Services, submission no. 33, p. 6.

Procedure for obtaining consent from an occupier is set out in the Office's Enforcement Manual. Accordingly, the enforcement officer is required to explain to an occupier the reason for the need to enter the residence or land on which there is a residence. The enforcement officer then goes on to explain the need for their consent to enter the property. The consent form sets out the occupier's name and address, and gives the enforcement officer permission to enter at a specified time on a specified day. The form also acknowledges that they were given 24 hours notice. A copy is given to the occupier immediately.⁶⁵

The OCEI also confirmed that if consent is withdrawn during the course of the entry and search, the authorised officers withdraw in recognition that the legal basis of their presence has been removed.⁶⁶

View that consent is of little practical value

One witness which expressed a different reservation about consent provisions was the Victorian Abalone Divers Association (VADA). VADA pointed out to the Committee that consent provisions were of "little practical value" because where entry can be effected only with a warrant or consent, inspectors usually obtain a search warrant before conducting a search due to the fact that consent can be refused or withdrawn during the search (in which case a search warrant would have to be obtained anyway):

VADA believes that entry with informed consent is considered of little practical value by enforcement officers. Where entry and search is considered necessary to facilitate an investigation or to secure evidence, a search warrant is almost always obtained, since it will be necessary to obtain a warrant should the occupier decline to give informed consent, or withdraw consent during the search. The circumstance where informed consent is helpful is where the occupier is the complainant about the alleged offence, usually involving some third party. In that circumstance though, authorised persons are usually invited onto the premises and informed consent is probably only a formal version of an invitation.⁶⁷

On the other hand, VADA supports many of the safeguards recommended by VLA where entry with consent is possible under the legislation:

Sufficient safeguards include [...] the consent being in writing acknowledging that the person can decline to consent to entry and search without punishment, the purpose of search and the possible consequence of the search, i.e. the person may be charged.

⁶⁵ Office of the Chief Electrical Inspector, submission no. 31, pp. 4-5.

⁶⁶ Ibid.

⁶⁷ Victorian Abalone Divers Association, submission no. 20, pp. 2-3.

Where consent is withdrawn, the authorised person must leave the place for which consent was given to enter and search. However, all things done while consent was given must be considered lawful, so items found or observations made whilst on the premises, or whilst leaving, should be admissible evidence.⁶⁸

Representatives from Consumer & Business Affairs Victoria confirmed that the consent provisions in the *Fair Trading Act 1999* were rarely used in practice for similar reasons as those outlined by VADA. Mr Devlin, the Manager Legal Services of CBAV, also told the Committee that where consent was refused, the evidence sought in entry and search could often “disappear” in the time it took to come back with a search warrant:

The consent provisions have rarely been used or have not been used in relation to a true suspect, to the extent that, if you have enough information and the conduct you are concerned about is serious enough to be seeking to go onto somebody’s premises, you do not want to risk knocking on the door saying, ‘Look, we are here, we have got a concern, we want to come in and we want to grab documents,’ because that is where – and we have had experience of this – people will say, “Well I’m not going to consent.” Then you have to go back and get your warrant, and that will cost you at least half a day, if not a day. When you go back the next day probably the documents that you were seeking are not there. So we are not going to use consent – and again this might be a criticism of me, but I would never advise an investigator to use consent in those circumstances, because it really defeats the purpose of the raid.⁶⁹

On the other hand, CBAV noted that the consent provisions can be of some use in limited circumstances – such as to protect persons who could be described as witnesses rather than suspects to a suspected breach of the legislation. Mr Devlin noted that the provisions had been used:

To protect a person who is more of a witness than a suspect, who may be involved in an allegation – an employee, if I can use that [example] – and where that person has been a bit reluctant and said, ‘I do not want to simply hand over a document because I might be sued.’ They are looking for some comfort in saying, ‘Well, I handed over a document,’ or ‘I gave some information, but it was because of a search conducted by Fair Trading,’ albeit a consent search.⁷⁰

Conclusion

The Committee agrees that consent provisions which are an alternative to obtaining a search warrant will often be of little practical value to inspectors. The Committee notes that the comment by witnesses that search warrants are often obtained prior to a

⁶⁸ Ibid, p. 3.

⁶⁹ S. Devlin, *Minutes of Evidence*, 12 December 2001, p. 30.

⁷⁰ Ibid, p. 27.

search because of the risk that consent will be refused or withdrawn. Similarly, consent provisions arguably do not give the person being asked for consent any added protection against inspectors using their coercive powers for the same reason: if consent is refused or withdrawn, inspectors can simply apply for a search warrant under the Act.

The Committee also considers that consent provisions do not contain the same level of protection as search warrant provisions due to the often subjective process of obtaining informed consent. However, the Committee notes that provisions such as section 119 of the *Fair Trading Act 1999* go some way to ensuring that consent is genuine and informed.

For these reasons, the Committee does not advocate the insertion of consent provisions as an alternative to obtaining a search warrant. However, it does not go so far as to conclude that current consent provisions should be removed from legislation or that they are never appropriate in new legislation. It recognises that in certain circumstances, such as the situation of witnesses co-operating in investigations described by CBAV, consent provisions may be of some value.

Accordingly, where there are currently entry with consent provisions it is important that there are statutory safeguards which help to ensure that the consent is genuine and informed. The Committee considers that section 119 of the *Fair Trading Act 1999* is a good model “informed consent” provision.

The Committee is aware that a provision which requires, inter alia, that the occupier sign a consent form, does not adequately ensure that consent is informed when the occupier has poor English language skills or has an intellectual disability. The Committee accepts that in such cases legislative prescriptions are a less adequate safeguard against misuse of the provisions than factors such as the training and experience of inspectors.

Recommendation 74

That all provisions which allow inspectors to exercise their powers with the consent of the occupier contain the legislative safeguards contained in section 119(2) of the Fair Trading Act 1999.

Recommendation 75

That, where entry is gained with consent pursuant to an Act, that Act should not impose any penalty or disadvantage:

- ***if an occupier fails to co-operate in the search***
- ***where an occupier subsequently withdraws consent.***

Gravity of harm towards which the power is directed: an alternative justification for a different extent of power?

In the first Chapter of this Report the Committee considered the gravity of harm towards which the powers are directed as another factor affecting the extent of inspectors' powers. The Committee's observations in this section should therefore be read in conjunction with the relevant section of Chapter 1.

The comments of some of the agencies cited in the section considering arguments against consistency make it clear that they believe that the risk and gravity of the harm their powers are designed to combat means that greater powers are warranted than in other Acts. The Department of Human Services (DHS) and the Department of Natural Resources and Environment (DNRE) are two examples. Similarly, as previously noted, CBAV is of the view that the level of harm is a more appropriate rationale for determining the broad level of power than consent.

The Committee notes that this issue was not the subject of as much debate as the monitoring / investigation and licensing / non-licensing Acts issue and therefore receives less examination in this section.

It is not the role of the Committee to comment on the relative importance to public policy of particular areas of regulation. However, it considers that, where inspectors are acting in emergency situations such as an outbreak of food poisoning or an environmental disaster, greater powers may be warranted. For instance, and as already noted, it agrees that in such circumstances time is of the essence and there may be no time to obtain a search warrant.⁷¹

⁷¹ The Committee advocates that search warrants should generally be required for the exercise of investigatory powers. Currently, as noted in Chapter 3 of this Report, Acts such as the *Health Act 1958*, the *Food Act 1984* and the *Environment Protection Act 1970*, do not adequately differentiate between purposes and contain no requirement to obtain a search warrant.

The ability to act quickly in emergencies appeared to be the principal reason why agencies considered they may need greater powers: the Committee refers here to the comments of the DHS and the EPA cited in Chapter 3 of this Report.⁷²

Where inspectors act in more standard situations, however, such as where they are simply monitoring compliance with legislation, the Committee sees no justification routinely to reduce the usual protections of civil liberties for those agencies whose work covers areas of considerable risk.

The Committee considers that agencies should be required to justify their claim for any deviation from the general principles for powers which are not specifically, or only, exercised in emergency situations. In so doing, they should ensure that they differentiate between powers to act in true emergency situations and more standard powers such as the power to monitor compliance. Agencies should not obtain greater powers across the board merely because inspectors need to be able to act immediately in some situations, namely emergencies.

Finally, the Committee reiterates its comments in Chapter 3 of this Report that powers which are used for emergency purposes should be clearly identified and defined.

Police powers as a standard?

The Senate Report recommended that:

The extent of a power to enter and search will vary with the circumstances applicable, but the powers of entry and search given to the Australian Federal Police (AFP) under the Crimes Act 1914 should be seen as a “high-water mark.” Officials in other organisations might be given lesser powers, but greater powers should be conferred only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising the powers are subject to proper scrutiny.⁷³

Three witnesses who addressed this issue agreed that police powers should be the high water mark for inspectors' powers.

Stephen Shirrefs representing the Criminal Bar Association told the Committee:

It was seen from the point of view of the Criminal Bar Association Committee that the high-water mark as far as a legislative model is concerned, is perhaps contained in

⁷² See section entitled “Powers exercised for the purpose of responding to emergency situations.”

⁷³ Senate Report, above note 26, p. 51.

the Commonwealth Crimes Act in part 1AAA, section 3C through to 3Z that sets out in clear and complete terms the conditions governing the issue of warrants.⁷⁴

Liberty Victoria also advocated that police powers should be the benchmark for inspectors' powers:

We agree that the benchmark should be the benchmark available to the police. The Senate Committee recommended the powers conferred on the Australian Federal Police under the Commonwealth Crimes Act, which in many ways follows the Victorian Crimes Act. [...]

There is merit in that as there is already operational knowledge and procedure about the Victoria Police powers of entry and search. There is an enormous amount of learning and expertise and the greatest amount of judicial scrutiny of the exercise of those powers that is formed, not just the statutes, but judicial interpretation.⁷⁵

The Legal Policy Unit of the Department of Justice also advocated that the powers of Victoria Police be the high-water mark for inspectors' powers:

The rationale behind the idea of police powers setting the high-water mark accords with the general proposition that the less serious the offending conduct, the less intrusive the powers of investigation ought to be.

In contrast, Consumer & Business Affairs Victoria pointed out that police powers are not the appropriate benchmark for all inspectors' powers because they are exercised in a very different context:

Some of the licensing Act powers are exercisable without recourse to the courts, and CBAV seeks these powers also for its non-licensing Acts. These would be considered to be in excess of police powers.

However, CBAV inspectors exercise these 'non-court' powers in an entirely different context to the powers exercised by police.

Firstly, these powers are required in order effectively to meet expectations of a pro-active approach to the enforcement of CBAV's consumer protection legislation.

Secondly, police powers are often or usually exercised in the context of serious criminal offences where gaol may be the result. Further, police are armed, uniformed, have the power of arrest, and operate to a great extent free of Executive control.⁷⁶

The Committee agrees that police powers are not analogous to monitoring powers and that they are not an appropriate high-water mark for such powers.

⁷⁴ S. Shirrefs, *Minutes of Evidence*, 22 February 2002, p. 257.

⁷⁵ F. Hampel, *Minutes of Evidence*, 12 December 2001, pp. 74-75.

⁷⁶ Consumer & Business Affairs Victoria, submission no. 32, p. 15.

Conclusion

The Committee considers that Commonwealth or preferably the *Victorian Crimes Act 1958* could be an appropriate high-water mark for legislative provisions which relate to investigatory matters. However, it is not convinced that the police powers would be an appropriate high-water mark for inspectors' monitoring powers.⁷⁷

Recommendation 76

That, as a general principle, where the powers of inspectors are comparable to the powers of police such as when they are investigating a suspected offence, their powers be no greater than the police powers contained in the Victorian Crimes Act 1958.

The means by which consistency should be achieved

Those witnesses who argued most strongly for greater consistency across Victorian Acts submitted that the powers and or general principles should be codified in an Act of Parliament. However, these witnesses acknowledged that such legislation should allow some exceptions to the principles and / or that there may need to be different powers for different classes of offences or types of Acts, for example licensing/ non-licensing Acts.

Danny Holding was one witness who strongly supported the codification of inspectors' powers in legislation:

On that first and basic issue of consistency, I commend the Committee's review of these types of provisions and strongly recommend that consideration be given to codifying in one Act the search and seizure powers that are represented through the variety of legislation in this appendix [to the Discussion Paper]. I have only had limited time to consider the mechanism by which that would be done, but your Discussion Paper correctly outlines that there are different levels of incursions and powers that are required depending upon the seriousness of the menace that is trying to be combated. It may be that what one would have to encompass in a general Act is the codification of different powers for different classes of offences.⁷⁸

⁷⁷ This accords with the conclusion the Committee previously reached that a warrant should not be necessary in monitoring situations.

⁷⁸ D. Holding, *Minutes of Evidence*, 13 December 2001, p. 150.

Mr Holding goes on to point out that similar exercises have been carried out in other areas:

It is my respectful submission that [a codification of powers] has been done in other cases. The one that comes to mind is the confiscation powers under the commonwealth where effectively property can be forfeited when a person is charged with serious offences. The burdens of proof and what has to be shown in order to get the property back or to retain it is dependent on the classes of offences with which the person is being charged.⁷⁹

Liberty Victoria told the Committee that consistency should be achieved “by reference to a standard enshrined in an Act of Parliament.”⁸⁰ Felicity Hampel supported this proposal largely on the basis that the powers would then become better known, leading to greater public acceptance of and confidence in such powers:

Our primary position is that powers of search, entry, seizure and questioning should be consistent across the whole range of authorities and agencies having the power to exercise those powers. The consistency should be by reference to a standard enshrined in an Act of Parliament so that the principles governing the grant of powers to search, entry, seizure and questioning are available and are known to everybody.

In our view, it makes it not only much better for successive parliaments to see the principles that have been adhered to by the previous parliaments, but it is something of enormous importance to the agencies that are given the responsibility of exercising those powers and also to the citizens – those whose rights are likely to be affected by a proper exercise of the power.⁸¹ [...]

Having those principles enshrined in an Act of Parliament is essential to achieving those ends so everybody knows what they can and cannot do. There is a greater confidence in the organs of the state so that there is not a resentment or fear about arbitrary or capricious use of power or unreasonable expectations in the citizenry as to what they can or cannot do. These ends are served by having the powers contained in the statute, and that statement of powers should be the benchmark for the way the powers of search, entry, seizure or questioning are exercised.⁸²

Ms Hampel acknowledged that there may be cases where greater powers (or fewer protections) may be justified. In such cases, she submitted, agencies should be under an obligation to justify the powers needed. Such a system would ensure that agencies did not obtain unnecessary powers and would draw the public’s attention to the fact that Parliament is conferring powers greater than the statutory charter:

If any agency [...] is given power, the starting point is it must be no greater than the powers contained in the statutory charter. If Parliament wishes to confer on an agency

⁷⁹ Ibid.

⁸⁰ F. Hampel, *Minutes of Evidence*, 12 December 2001, p. 73.

⁸¹ Ibid.

⁸² Ibid, p. 73-74.

powers greater than those in the statutory charter, there should be a clear statement of the need to do so, the reasoning behind it to justify the conferring of a greater power and a conscious Act of Parliament agreeing to confer those powers greater than the charter on that agency for those circumstances and the reasons for so doing. That is insurance that agencies are not bidding unnecessarily for greater powers; that parliamentarians are aware of the benchmarks; and that votes on these powers, when they are sought to be greater, are done consciously so parliamentarians and the public know they are conferring greater powers than the statutory power. That seems to me to provide an appropriate balance between the need to give them greater powers than the standard in particular circumstances, while not allowing the sort of incremental slip-back of increasing powers without proper scrutiny or questioning.⁸³

The Committee consulted the Office of the Chief Parliamentary Counsel (OCPC) as to the practical effect of options for the inclusion of basic principles in legislation. The Committee was advised that since 1994 the OCPC has had internally-developed standard provisions on inspectors powers and powers of entry.

The OCPC noted, however, that:

[...] drafting instructions may depart from the model provisions. This leaves drafters as the gatekeepers in trying to ensure some degree of uniformity in powers given to authorised persons.⁸⁴

The OCPC reported that internal guidelines have not been successful in achieving consistency. Their experience has been that:

Once “special case” provisions are legislated, they quickly erode any attempted uniformity across the statute book.⁸⁵

The OCPC concluded that guidelines needed to be placed in legislation if they were to be effective.

In my view, guidelines need to be contained in legislation in order to be effectual and to enforce accountability. They could be legislated by Parliament in a similar fashion to section 21 of the *Subordinate Legislation Act 1994* giving a Parliamentary Committee power to report to the Parliament as to whether a Bill or a statutory rule contained provisions which breached the guidelines.⁸⁶

Conclusion

The Committee agrees with the view stated by OCPC and witnesses that to be effective guidelines need to be enshrined in legislation. The Committee is aware,

⁸³ Ibid, p. 67.

⁸⁴ Office of the Chief Parliamentary Counsel, submission no. 44, p. 2.

⁸⁵ Ibid.

⁸⁶ Ibid.

however, that not all of the principles developed in this Report would be suitable to be included in such legislation. Some are more appropriate as principles to guide the policy and procedure of agencies. Hence the Committee recommends that only those principles which are relevant to determining the content of legislation should be included in legislation.

Recommendation 77

That authorised persons' powers of entry, search, seizure, questioning and the power to require the production of documents conform with the set of principles set out in Chapter 2.

Recommendation 78

That those principles relevant to determining the content of legislation be contained in stand-alone legislation.

Recommendation 79

That those principles relevant to the policy and procedure of agencies be developed into a set of procedural guidelines by each agency and that these guidelines be assessed by the standards unit to ensure consistency across agencies wherever possible.

Should current powers which go beyond the statutory powers be repealed?

Only one witness of those who advocated the idea of a codification of the principles in an Act of Parliament considered the issue as to whether current powers which go beyond the statutory powers should be repealed. Liberty Victoria acknowledged that the process of amendment of older powers may be “unrealistic:”

While it may be unrealistic to consider that all previous powers greater than that [the statutory code] should be repealed and brought back into line, there should be some process, if a statutory code is introduced, of measuring existing powers against that and evaluating whether there is a need for the existing power for good reason. It seems to be a way of balancing the cultures that already exist, but with a statement of

principle that we should be starting from now and should not be afraid of escaping from them because things have grown up in a piecemeal way.⁸⁷

The Committee agrees that, given the large number of Acts involved, it would be an onerous task to undertake the consideration and amendment of them all. At the same time, given the importance of coercive powers, the Committee considers that it is inappropriate for the principles only to apply to new legislation. A middle ground approach is suggested where the consideration and reform of inspectors' powers provisions is undertaken on the next occasion that any sections of a particular Act or suite of Acts is reviewed.

Recommendation 80

That all new Acts conferring coercive powers on authorised persons adhere to the principles, unless there is a compelling reason for departure from the principles.

Recommendation 81

That whenever Acts containing inspectors' powers are reviewed or amended in the future, the inspectors' powers provisions are specifically reviewed with reference to the principles.

⁸⁷ Ibid, p. 74.

CHAPTER NINE - PERSPECTIVES FROM INTERNATIONAL JURISDICTIONS

Introduction

The Committee undertook investigations in several international jurisdictions to enable a comparative analysis of the legal and practical approaches taken to inspectors' powers elsewhere in the world. While the Committee concentrated on comparisons with common law countries it also included a meeting in Brussels to give an added perspective from a non-common law jurisdiction.

The Committee found a number of common themes in the approaches to inspectors' powers across jurisdictions. These are detailed below. In addition the Committee noted a number of practices which warrant particular discussion.

Common Themes

Research

In common with the Committee's experience in Victoria and in Australia generally, the Committee found that publications and research did not deal specifically with the issues related to this reference. Published work in relation to search and seizure dealt almost exclusively with police powers. Information was thus gleaned from meetings with a number of different agencies, with an emphasis on gaining an understanding of the practical issues involved in the delivery of services by inspectors and by asking agencies to identify both best practice and possible weaknesses in their enforcement regimes.

Consistency

Lack of consistency between inspectors' powers from different agencies was a recurring theme in the Committee's overseas investigations. Again this was a feature of the Committee's finding in Victoria. In general the Committee found that the UK was currently doing most to overcome lack of consistency issues. Some of these activities are highlighted below. The UK approach has included promoting both consistency of approach or philosophy for all government enforcement activities, as well as greater practical consistency within particular areas of enforcement such as food safety and social care.

Enforcement Philosophy

It has been noted earlier in this Report that the enforcement philosophy of an agency can be at least as important as its legislative provisions in determining its practices and its effectiveness. The Committee found that, almost without exception in its meetings with overseas agencies, the notion of encouraging compliance through co-operative strategies was regularly practiced. Many agencies reported that they rarely, if ever, needed to use their coercive powers such as entry and search with a warrant. However, in common with many Victorian agencies it was noted that the presence of coercive powers acted as leverage to encourage compliance and that the powers themselves were necessary for this reason and as a last resort in cases of persistent refusal to comply.

Particular Issues

UK Foot & Mouth Disease Emergency

A significant test of the efficacy of inspectors' powers was provided in the UK by the Foot and Mouth disease emergency which that country experienced during 2001. The Committee heard evidence from the Department for Environment, Food and Rural Affairs (DEFRA) that legislation proved to be inadequate in some cases to cope with the crisis effectively. Many of these problems were addressed at the time by using statutory instruments. The Committee heard evidence that more than 450 statutory instruments had been used over the 12 months to January 2002, to deal with

the crisis.¹ Under provisions in the *Animal Health Act 1981 (UK)* orders can be made by the Minister and these do not require Parliamentary scrutiny.

The UK evidence shows how useful a residual power to use statutory instruments such as Ministerial orders can be in an emergency situation. The Committee notes, however, that the *Animal Health Act 1981 (UK)* will shortly be amended to address the problems identified during the crisis. In particular the amendments will strengthen enforcement powers.

The Committee notes its conclusions elsewhere in this report that as a general principle the powers of entry, search, seizure and questioning should be contained in primary rather than secondary legislation. The Committee believes that this is an appropriate safeguard. Provisions aimed at dealing with emergency situations can also be included in primary legislation. This does not preclude the possibility of statutory instruments being utilised in emergency situations.

Civil Enforcement Initiative- Multi-Agency Response to Community Hotspots (MARCH), New York

An example of a mutually beneficial police and agency co-operative strategy was provided to the Committee by the New York Police Department (NYPD). In 1991 the NYPD commenced a pilot project called the Civil Enforcement Initiative. The initiative was described as follows:

By adding civil remedies to the traditional arsenal of criminal law enforcement, the Police Department will develop strategies that are more effective at abating long term illegal conduct. Civil enforcement results are more visible to the public and improve the quality of life of city residents.²

Prior to the initiative the police had very little role in civil enforcement. The police retained the services of a number of attorneys (lawyers) to assist in identifying and prosecuting civil enforcement matters. The project involved attorneys working with the police commanding officers of various precincts. The attorneys undertook a survey of precinct problems including interviews with police, departmental officers and members of the community. Issues were then prioritised and solutions considered which may require co-ordinated police and departmental action. A number of

¹ Meeting with DEFRA 28 January 2002.

² Bloomberg, M et al, *The Cutting Edge of Policing: Civil Enforcement for the 21st Century*, New York Police Department, p. 1.

strategies have been used to address the problems identified. One which the Committee notes in particular is detailed below.

Multi-Agency Response to Community Hotspots (MARCH) addresses the problem of local businesses whose consistent and repeated disregard for health and safety regulations endangers the surrounding community. Civil Enforcement attorneys work with police commanders to identify these businesses. The attorneys then enlist other city and State enforcement agencies, such as Fire, Sanitation and Building departments, to co-operatively and simultaneously enforce various laws, rules and regulations. The methodology centers on co-ordinated summons issuance, with all appropriate summonses returnable (on) the same day. Affected neighbors and members of the community are informed of the return date and are invited to voice their concerns to the administrative law judge.³

The Committee sees this as an example of sensible co-operation between agencies. Such co-operation goes beyond the occasional opportunistic sharing of information which already happens in some cases when inspectors from one agency may report matters witnessed during the course of their activities which could be relevant to another agency in particular the police.

The Committee has recommended earlier in this report that agencies develop protocols for dealing with situations where information is shared between agencies. The Committee believes that in developing such protocols agencies should also consider how they might engage in co-operative activities such as the example given above.

Police pretext searches

This matter was first raised with the Committee in San Francisco⁴. A pretext search refers to a situation where police may use a legitimate power granted for a non criminal purpose, such as a power to stop a vehicle or enter premises, as a pretext to make a search in relation to suspected criminal activity. Pretext searches relate to inspectors' powers when the power used to legitimate the search is an administrative power exercised by the police, or where police accompany an inspector on an administrative entry.

The example given was that of a telephone company inspector who may have the right to enter premises to make inspections of telephone equipment. The Inspector

³ Ibid, p. 5.

⁴ Professor Rory Little, Hasting College of the Law, University of California.

would have the discretion to take a police officer with her or him in certain circumstances. In the event of the pretext search the purpose of the police presence is for the police to gain access to premises which they would not otherwise be able to access. This may occur where there is insufficient evidence for a warrant to be sought directly.

This situation was identified as one for concern by the academic who raised the issue and his suggestion was that in instances where police will accompany an inspector to enter premises without a warrant, judicial authority should be required. The effect of this would be to discourage pretext searches, given that the judicial officer would need to be convinced that there was a need related to the inspectors' duties which required a police presence.

The Committee questioned a number of agencies during the course of its subsequent meetings as to whether this practice was used. A number of agencies reported that they had various arrangements with police to assist inspectors in particular situations. In New York, as detailed below, the Committee heard about a formal program of agency co-operation. No agencies reported that their inspectors engaged in pretext searches with police officers, although this is hardly surprising given that such activities would have at least an element of illegality about them.

The Committee noted earlier in this Report that no evidence of such activity was found in Victoria.

Moves Towards More Consistency and Greater Co-ordination

In the United Kingdom and in Brussels the Committee encountered a number of recently established bodies whose aim is to achieve greater co-ordination of enforcement activities. This was particularly evident in the food safety area, no doubt given impetus by the recent Bovine Spongiform Encephalopathy (BSE) and Foot and Mouth emergencies in the UK and Europe. Three of these agencies are discussed briefly below.

UK Regulatory Impact Unit - Enforcement Concordat

The UK Regulatory Impact Unit (RIU) is part of the UK Cabinet Office. Its role is described as:

to work with other Government departments, agencies and regulators to ensure that regulations are fair and effective. Regulations are needed to protect people at work, consumers and the environment, but it is important to strike the right balance so that they do not impose unnecessary burdens on business or stifle growth.⁵

Victoria has an agency with some similar functions in its Office of Regulation Reform (ORR), which is part of the Department of Innovation, Industry and Regional Development. The Office describes itself as:

[...]critical to the efforts to improve the quality of Victoria's regulatory environment and make Victoria a better place to do business. The Government has systematically introduced reform proposals concentrating on removing unnecessary regulation and ensuring that new regulatory proposals are best practice.⁶

The two agencies however differs in that the RIU is a larger, better resourced organisation with a much broader scope. The ORR focuses on statutory Regulations rather than regulation in its broader sense. Enforcement activities are not matters generally within their area of interest. The placement of the RIU in the Cabinet Office reflects its across-government focus and its status within the Government. The stated role of the RIU not only refers to its function in assisting business by reducing regulation but also acknowledges the necessity of regulations for the community's protection. A number of related entities and developed principles are of interest to the Committee in its current inquiry.

In March 1988 the RIU released its Enforcement Concordat. This document sets out the Principles of Good Enforcement.⁷

The Concordat was developed as a national standard that would be promoted for adoption by central and local government agencies engaged in enforcement activities. Acceptance of the Concordat is voluntary and each agency decides whether it will formally commit to the Concordat. The principles are at a very general level but include the requirement that agencies develop their own clear standards and levels of

⁵ www.cabinet-office.gov.uk/regulation/Role/index.htm

⁶ www.dsrd.vic.gov.au/regreform

⁷ The Concordat is reproduced at Appendix 3.

performance and report against these on an annual basis. In particular the Concordat includes the requirement that complaints procedures are provided which are well publicised, effective, timely and easily accessible.

The Committee heard that as of January 2002, 96% of local authorities had signed up, as had most of the central government agencies.⁸

The Concordat also calls for consistency, proportionality and openness of enforcement activities. The Committee considers a major benefit of such a document is in promoting better practices by considering and then articulating in a standard form the aims of enforcement activity.

The Better Regulation Taskforce was established in 1997 by the RUI. It is an independent body which advises Government on action to ensure that regulation and its enforcement accord with the five principles of good regulation.⁹

In April 1999 the Taskforce released its review of enforcement. In the Foreword it was noted that:

Good enforcement practice is a key element to better regulation. But our experience is that far too often it tends to be treated as the poor relation of policy making. We chose to undertake a review of enforcement arrangements because we wanted to address the concerns about consistent and efficient enforcement that have been raised repeatedly in the context of Task Force review work.¹⁰

These initiatives have developed from an analysis of enforcement regimes in their entirety. By contrast the task before the Committee has been to investigate specific delineated powers. As such the Committee believes that its comments on these schemes need to be viewed as comments relevant to the inquiry in a limited but still important way. They point to the importance of factors such as consistency, transparency and proportionality in the context of the exercise of powers rather than restricting consideration of these issues to how they relate to the underlying legislative provisions. For example, a recommendation of practical implication from the Review was that government offices enforcing the same legislation should undertake peer review assessment.¹¹ The offices would conduct exercises and reviews to establish

⁸ Meeting with Mr Phillip Rushbrook, Head of Public Sector Team, Regulatory Impact Unit, London, 28 January 2002.

⁹ These being transparency, accountability, proportionality, consistency and targeting, see www.cabinet-office.gov.uk/regulation/taskforce/index.htm

¹⁰ Better Regulation Taskforce, *Review Enforcement*, April 1999, p.2.

¹¹ *Ibid*, p. 5.

whether similar situations led to the different offices reaching the same conclusions. This recommendation is designed to promote consistency of practice among inspectors.

Earlier in the Report the Committee has recommended that agencies develop an enforcement philosophy as a written document. The Committee does not specifically address the issue of the level at which the agencies' philosophies, strategies and practices should be identified. In the UK example, the Enforcement Concordat, while aspirational in many respects, ties these basic statements of principle into practical requirements such as the production of written standards and rules, the provision of a complaints mechanism and specific consultation requirements. The Committee heard evidence as noted above of the high adoption rate of the Concordat by government agencies.

The Committee believes that the Concordat has been a useful document and reproduces it at Appendix 3. While the Committee does not go as far as to recommend a similar document be developed for Victoria, the Committee does feel that agencies should consider the Concordat when developing enforcement philosophies. The Committee believes it represents the product of considerable work in its development and heard evidence of its very broad acceptance by agencies. The Committee considers it to be a valuable document relevant to the Victorian situation.

Recommendation 82

That in developing their enforcement philosophies agencies give consideration to matters addressed in the UK Enforcement Concordat.

UK Local Authorities Coordinating Body on Food and Trading Standards (LACOTS)

The Enforcement Concordat states under the heading of Consistency:

We will carry out our duties in a fair, equitable and consistent manner. While inspectors are expected to exercise judgement in individual cases, we will have arrangements in place to promote consistency, including effective arrangements for liaison with other authorities and enforcement bodies through schemes such as those operated by LACOTS [...]

LACOTS represents 467 local authorities in the United Kingdom. Its role is to assist those agencies to improve the quality of trading standards and food enforcement by promoting coordination, consistency and good regulation. Some of its stated terms of reference are to:¹²

- Promote quality regulations, co-ordinate enforcement and assist in the development and dissemination of good practice
- develop information resources to assist enforcement practitioners
- liaise with industry, trade and consumer organisations on enforcement issues

LACOTS is a company limited by guarantee which is responsible to the local authority Associations in England, Wales, Scotland and Northern Ireland. A Management Committee of 12 Councillors appointed by the local authorities determines policy and priorities of LACOTS on major issues to do with trading standards, consumer protection and food safety. It also approves matters of enforcement policy.

LACOTS was established to fill a perceived gap in co-ordination of regulation efforts by local authorities as follows:

Government places a wide range of control responsibilities on local authorities but sometimes fails to set out expectations. Government guidance, when given, can conflict between ministries and even from the same ministry at different times. To assist in addressing these issues local government has created its own national co-ordinating body..

Belgian Federal Agency for Safety of the Food Chain

In Brussels the Committee met with representatives of the Belgian Ministry of Consumer Protection and the Environment. The Committee heard that until the year 2000, there were five agencies dealing with matters involved in the food chain from farm to table. The Belgian approach has been to establish a Federal Agency for Safety of the Food Chain, which is presently established on paper but has yet to begin operation. The main purpose of the Agency will be to ensure co-ordination of the process.

¹² www.lacots.com/pages/trade/about.asp

National Care Standards Commission UK

The National Care Standards Commission (NCSC) was established from 1 April 2002 as a non-departmental public body to take on the regulation of social care and private and voluntary health care in England. Inspectors will transfer from Health Authorities and local authorities to the NCSC.

The Commission will regulate and inspect services against national minimum standards and investigate complaints against registered services. The Commission also has a reporting role to the Secretary of State on the range and quality of regulated services. It may advise the Government on any changes it thinks should be made to the national minimum standards. In addition the Commission will be responsible for providing the public with better and more accessible information about available services.

The Committee was interested in the evidence provided as to the training of inspectors. While there has previously been no national standard of accreditation for inspectors, the Committee was advised that a course for inspectors leading to a post-graduate certificate qualification will be introduced under new legislation.

Conclusion

In general terms the Committee's international investigations confirmed its view that the current Review is timely. Insights can be gained by examining overseas examples of efforts to increase co-ordination and consistency of regulatory enforcement powers and practices. The Committee found significant evidence of this task being approached at a whole of government level in the United Kingdom and in Brussels. By comparison the US appeared to be doing little to encourage consistency across the country but did provide some examples of interagency co-operation.

Adopted by Committee

20 MAY 2002

Subject Areas

- Environmental Protection / Natural Resources (31 Acts)
- Fair Trading / Consumer Protection (17 Acts)
- Human Services / Health (15 Acts)
- Health Practitioner Regulation (11 Acts)
- Regulation of Utilities / Public Services (10 Acts)
- Casino / Gaming Control (9 Acts)
- Minerals and Petroleum Legislation (6 Acts)
- Occupational Health & Safety / Accident Compensation (6 Acts)
- Trade Measurement / Liquor Control (3 Acts)
- Audit / Tax Control (3 Acts)
- Miscellaneous (18 Acts)

Total: 129 Acts.

1. Environmental / Natural Resources¹

Aboriginal Lands Act 1972

Agricultural Industry Development Act 1990

Agricultural and Veterinary Chemicals (Control of Use) Act 1992

¹ These Acts are administered principally by the Department of Natural Resources and Environment.

Archaeological and Aboriginal Relics Preservation Act 1972

Catchment and Land Protection Act 1994

Coastal Management Act 1995

Conservation Forests and Lands Act 1987

Crown Land (Reserves) Act 1978

Dairy Act 2000

Domestic (Feral and Nuisance) Animals Act 1994

Environment Protection Act 1970

Fisheries Act 1995

Flora and Fauna Guarantee Act 1988

Forests Act 1958²

Fuel Emergency Act 1977

Heritage Act 1995

Heritage Rivers Act 1992

Impounding of Livestock Act 1994

Livestock Disease Control Act 1994

Marine Act 1988

Meat Industry Act 1993

Murray-Darling Basin Act 1993

National Parks Act 1975

Planning and Environment Act 1987

Plant Health and Plant Products Act 1995

Prevention of Cruelty to Animals Act 1986

Stock (Seller Liability & Declarations) Act 1993

² And Forests (Diseases of Trees) Regulations 1992.

Valuation of Land Act 1960

Veterinary Practice Act 1997

Wildlife Act 1975

Zoological Parks & Gardens Act 1995.

2. Fair Trading / Consumer Protection³

Associations Incorporation Act 1981

Business Names Act 1962

Co-operatives Act 1996

Credit (Administration) Act 1984

Disposal of Uncollected Goods Act 1984

Domestic Building Contracts Act 1995

Estate Agents Act 1980

Fair Trading Act 1999

Fundraising Appeals Act 1998

Funerals (Pre-paid Money) Act 1993

Introduction Agents Act 1997

Motor Car Traders Act 1986

Petroleum Products (Terminal Gate Pricing) Act 2000

Prostitution Control Act 1994

Residential Tenancies Act 1997

Second-hand Dealers and Pawnbrokers Act 1989

Travel Agents Act 1986.

³ These Acts are administered by Consumer & Business Affairs Victoria (Department of Justice).

3. Human Services / Health⁴

Building Act 1993

Children's Services Act 1996

Disabled Persons Services Act 1986

Drugs, Poisons and Controlled Substances Act 1981

Food Act 1984

Health Act 1958⁵

Health Services Act 1988

Human Tissue Act 1982

Infertility Treatment Act 1995

Intellectually Disabled Persons' Services Act 1986

Liquor Control Reform Act 1998

Mental Health Act 1986

Tobacco Act 1987

Road Safety Act 1986

Therapeutic Goods (Victoria) Act 1994.

4. Health Practitioner Regulation

Chiropractors Registration Act 1996

Chinese Medicine Registration Act 2000

Dental Practice Act 1999

Medical Practice Act 1994

Nurses Act 1993

Optometrists Registration Act 1996

⁴ The Acts in this category are administered principally by the Department of Human Services.

⁵ See also *Health (Infectious Diseases) Regulations 2001*.

Osteopaths Registration Act 1996

Pharmacists Act 1974

Physiotherapists Registration Act 1998

Podiatrists Registration Act 1997

Psychologists Registration Act 2000.

5. Regulation of Utilities / Public Services

Country Fire Authority Act 1958

Electricity Industry Act 1993

Electricity Safety Act 2000

Electricity Safety Act 1998

Essential Services (Year 2000) Act 1999

Gas Industry Act 1994

Gas Safety Act 1997

Metropolitan Fire Brigades Act 1958

Transport Act 1983

Water Industry Act 1994.

6. Casino / Gaming control

Casino Control Act 1991

Club Keno Act 1993

Gaming and Betting Act 1994

Gaming Machine Control Act 1991

Gaming No. 2 Act 1997

Interactive Gaming (Player Protection) Act 1999

Lotteries Gaming and Betting Act 1966

Public Lotteries Act 2000

TT-Line Gambling Act 1993.

7. Minerals and Petroleum Legislation

Extractive Industries Development Act 1995

Mines Act 1958

Mineral Resources Development Act 1990

Petroleum Act 1998 (see also environmental legislation)

Petroleum (Submerged Lands) Act 1982

Pipelines Act 1967.

8. Occupational Health and Safety / Accident Compensation etc⁶

Occupational Health & Safety Act 1985

Accident Compensation Act 1985

Accident Compensation (Workcover Insurance) Act 1993

Dangerous Goods Act 1985

Equipment (Public Safety) Act 1994

Mines Act 1958.

9. Trade Measurement / Liquor Control⁷

Trade Measurement Act 1995

Trade Measurement (Administration) Act 1995

Liquor Control Reform Act 1998.

⁶ Acts administered by the Victorian Workcover Authority.

⁷ Acts administered by the Department of State and Regional Development.

10. Audit / Tax control

Audit Act 1994

Taxation Administration Act 1997

Taxation (Reciprocal Powers) Act 1987.

11. Miscellaneous

Alcoholics and Drug Dependent Persons Act 1968

Business Franchise (Petroleum Products) Act 1979

Business Franchise (Tobacco) Act 1974

Cemeteries Act 1958

Classification (Publications, Films and Computer Games Enforcement) Act 1995

Community Services Act 1970

Corporations (Victoria) Act 1990

Education Act 1958

First Home Owner Grant Act 2000

Legal Practice Act 1996

Local Government Act 1989

Magistrates' Court Act 1989

Melbourne and Metropolitan Board of Works Act 1958

Murray Valley Citrus Marketing Act 1989

Police Regulation Act 1958

Seamen's Act 1986

Surveillance Devices Act 1999⁸

⁸ This Act has little application to authorised officers. Section 15 provides that a law enforcement officer, with the approval of a senior law enforcement officer may apply for a warrant. The definition

Vocational Education & Training Act 1990.

of law enforcement officer and senior law enforcement officer includes authorised officers appointed under the *Conservation, Forests and Lands Act 1987*.

- Accident Compensation Act 1985
- Casino Control Act 1991
- Catchment and Land Protection Act 1994
- Domestic (Feral and Nuisance Animals) Act 1994
- Environment Protection Act 1970
- Electricity Safety Act 1998
- Fair Trading Act 1999¹ (plus 5 Acts containing identical inspectors' powers)
- Fisheries Act 1995
- Food Act 1984
- Gaming Machine Control Act 1991²
- Health Act 1958
- Liquor Control Reform Act 1998
- Local Government Act 1989
- Medical Practice Act 1994³ (plus 9 Acts containing identical inspectors' powers)

¹ The following Acts contain identical inspectors' powers: *Disposal of Uncollected Goods Act 1984*, *Domestic Building Contracts Act 1995*, *Funerals (Pre-paid Money) Act 1993*, *Residential Tenancies Act 1997* and *Petroleum Products (Terminal Gate Pricing) Act 2000*. Yet to be amended are *the Business Names Act 1962* and *the Associations Incorporation Act 1981*: Consumer & Business Affairs Victoria, submission no. 32, Attachment A.

² The inspectors' powers provisions of the *Gaming and Betting Act 1994* are very similar.

³ The following Acts contain identical inspectors' powers: *Chiropractors Registration Act 1996*, *Chinese Medicine Registration Act 2000*, *Dental Practice Act 1999*, *Nurses Act 1993*, *Optometrists Registration Act 1996*, *Osteopaths Registration Act 1996*, *Physiotherapists Registration Act 1998*, *Podiatrists Registration Act 1997*, *Psychologists Registration Act 2000*. *The Pharmacists Act 1974* is currently being reviewed.

- Motor Car Traders Act 1986⁴ (plus 3 Acts containing identical inspectors' powers)
- Occupational Health & Safety Act 1985
- Pharmacists Act 1974
- Prevention of Cruelty to Animals Act 1986
- Taxation Administration Act 1997
- Trade Measurement Act 1995
- Transport Act 1983
- Trade Measurement (Administration) Act 1995
- Wildlife Act 1975

Total (including identical provisions in other Acts): 40 Acts.

⁴ The following Acts contain identical inspectors' powers: *Credit (Administration) Act 1984*, *Travel Agents Act 1996*, *Secondhand Dealers and Pawnbrokers Act 1989*. Yet to be amended are *the Estate Agents Act 1980*, *Introduction Agents Act 1997* and the *Fundraising Appeals Act 1998*: Consumer & Business Affairs Victoria, submission no. 32, Attachment A.

Principles of Good Enforcement:***Policy******Standards***

In consultation with business and other relevant interested parties, including technical experts where appropriate, we will draw up clear standards setting out the level of service and performance the public and business people can expect to receive. We will publish these standards and our annual performance against them. The standards will be made available to businesses and others who are regulated.

Openness

We will provide information and advice in plain language on the rules that we apply and will disseminate this as widely as possible. We will be open about how we set about our work, including any charges that we set, consulting business, voluntary organisations, charities, consumers and workforce representatives. We will discuss general issues, specific compliance failures or problems with anyone experiencing difficulties.

Helpfulness

We believe that prevention is better than cure and that our role therefore involves actively working with business, especially small and medium sized businesses, to advise on and assist with compliance. We will provide a courteous and efficient service and our staff will identify themselves by name. We will provide a contact point and telephone number for further dealings with us and we will encourage business to seek advice/information from us. Applications for approval of

establishments, licenses, registrations etc, will be dealt with efficiently and promptly. We will ensure that, wherever practicable, our enforcement services are effectively co-ordinated to minimise unnecessary overlaps and time delays.

Complaints About Service

We will provide well publicised, effective and timely complaints procedures easily accessible to business, the public, employees and consumer groups. In cases where disputes cannot be resolved, any right of complaint or appeal will be explained, with details of the process and the likely time-scales involved.

Proportionality

We will minimise the costs of compliance for business by ensuring that any action we require is proportionate to the risks. As far as the law allows, we will take account of the circumstances of the case and the attitude of the operator when considering action.

We will take particular care to work with small businesses and voluntary and community organisations so that they can meet their legal obligations without unnecessary expense, where practicable.

Consistency

We will carry out our duties in a fair, equitable and consistent manner. While inspectors are expected to exercise judgement in individual cases, we will have arrangements in place to promote consistency, including effective arrangements for liaison with other authorities and enforcement bodies through schemes such as those operated by the Local authorities Co-Ordinating Body on Food and Trading Standards (LACOTS) and the Local Authority National Type Approval Confederation (LANTAC).

Principles of Good Enforcement:***Procedures***

Advice from an officer will be put clearly and simply and will be confirmed in writing, on request, explaining why any remedial work is necessary and over what time-scale, and making sure that legal requirements are clearly distinguished from best practice advice.

Before formal enforcement action is taken, officers will provide an opportunity to discuss the circumstances of the case and, if possible, resolve points of difference, unless immediate action is required (for example, in the interests of health and safety or environmental protection or to prevent evidence being destroyed).

Where immediate action is considered necessary, an explanation of why such action was required will be given at the time and confirmed in writing in most cases within 5 working days and, in all cases, within 10 working days.

Where there are rights of appeal against formal action, advice on the appeal mechanism will be clearly set out in writing at the time the action is taken (whenever possible this advice will be issued with the enforcement notice).

Principles of Good Enforcement:***Policy and Procedures***

This document sets out what business and others being regulated can expect from enforcement officers. It commits us to good enforcement policies and procedures. It may be supplemented by additional statements of enforcement policy.

The primary function of central and local government enforcement work is to protect the public, the environment and groups such as consumers and workers. At the same time, carrying out enforcement functions in an equitable, practical and consistent manner helps to promote a thriving national and local economy. We are committed to these aims and to maintaining a fair and safe trading environment.

The effectiveness of legislation in protecting consumers or sectors in society depends crucially on the compliance of those regulated. We recognise that most businesses want to comply with the law. We will, therefore, take care to help business and others meet their legal obligations without unnecessary expense, while taking firm action, including prosecution where appropriate, against those who flout the law or act irresponsibly. All citizens will reap the benefits of this policy through better information, choice and safety.

We have therefore adopted the central and local government Concordat on Good Enforcement. Included in the term 'enforcement' and advisory visits and assisting with compliance as well as licensing and formal enforcement action. By adopting the Concordat we commit ourselves to the following policies and procedures, which contribute to best value, and will provide information to show that we are observing them.

March 1988

Regulatory Impact Unit

Public Sector Team

Cabinet Office

35 Great Smith Street

London SW1P 3BQ

1. Acts referred to in text

Associations Incorporation Act 1981 (Vic)

Accident Compensation Act 1985 (Vic)

Casino Control Act 1991(Vic)

Catchment and Land Protection Act 1994 (Vic)

Children and Young Person's Act 1989 (Vic)

Community Services Act 1970 (Vic)

Co-operatives Act 1966 (Vic)

Crimes Act 1958 (Vic)

Dangerous Goods Act 1985 (Vic)

Domestic (Feral and Nuisance Animals) Act 1994 (Vic)

Environment Protection Act 1970 (Vic)

Environment Protection Act (1994) (Qld)

Electricity Safety Act 1998 (Vic)

Fair Trading Act 1999 (Vic)

Fisheries Act 1995 (Vic)

Food Act 1984 (Vic)

Gaming Machine Control Act 1991(Vic)

Health Act 1958 (Vic)

Health Records Act 2001 (Vic)

Human Rights and Equal Opportunity Act (1986) (Cwth)

Information Privacy Act 2000 (Vic)

Liquor Control Reform Act 1998 (Vic)

Local Government Act 1989 (Vic)

Magistrates' Court Act 1989 (Vic)

Marine Act 1988 (Vic)

Medical Practice Act 1994 (Vic)

Mental Health Act 1986 (Vic)

Motor Car Traders Act 1986 (Vic)

Occupational Health & Safety Act 1985 (Vic)

Parliamentary Committees Act 1968 (Vic)

Pharmacists Act 1974 (Vic)

Prevention of Cruelty to Animals Act 1986 (Vic)

Protection of the Environment Operations Act 1997 (NSW)

Ombudsman Act 1973 (Vic)

Search Warrants Act 1985 (NSW)

Subordinate Legislation Act 1994 (Vic)

Taxation Administration Act 1997 (Vic)

Trade Measurement (Administration) Act 1995 (Vic)

Transport (Further Miscellaneous Amendments) Bill 2002 (Vic)

Wildlife Act 1975 (Vic)

2. Cases

Baker v Campbell (1983) 153 CLR 52.

Cleland v The Queen (1982) 151 CLR 1.

Challenge Plastics v Collector of Customs for the State of Victoria 115 ALR (1993).

Chic Fashions (West Wales) Ltd v Jones [1968] 2 QB 299.

Commissioner of Taxation v DeVonk (1995) 61 FCR 564.

Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs (1985) 156 CLR 385.

Coolidge v New Hampshire (1971) 91 S Ct 2022.

Dunesky v Commonwealth of Australia (1996) 89 Crim R 372.

Entick v Carrington (1765) 95 ER 807.

Ghani v Jones [1970] 1 QB 693.

Grant v Downs [1976] 135 CLR 674.

GH Photography Pty Ltd v McCarrigle [1974] 2 NSWLR 635.

Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477.

Esso Australia Resources Ltd v Commissioner of Taxation (1999) 74 ALJR 339.

Karina Fisheries Pty Ltd v Milson (1990) 26 FCR 473.

Leggo Australia v Paraggio (1994) 44 FCR 151.

Levine v O'Keefe (1930) VLR.

The King v Associated Northern Collieries (1910) 11 CLR 738.

McCormack v Silberman, (Unreported, Supreme Court of Victoria, Ashley J, December 1993).

Meates v A-G [1981] 2 NZLR 335.

Mortimer v Brown (1970) 122 CLR 493.

The Nominal Defendant (Qld) (no. 2) [1964] Qd R 374.

O'Reilly v Commissioners of State Bank of Victoria (1983) 153 CLR.

Parker v Churchill (1985) 9 FCR 316.

Pyneboard Pty. Ltd. v Trade Practices Commission (1983) 152 CLR 328.

R v McNamara [1995] 1 VR 263.

See v Milner (1980) 2 A Crim R 210.

Six Carpenters' Cast (1610) 8 CoRep 146a.

Sorby v The Commonwealth (1983) 152 CLR 281.

R v Tillett, Ex Parte Newton (1969) 14 FLR 101.

Yuill v Corporate Affairs Commission (NSW) (1990) 20 NSWLR 386.

3. Books / Articles

Aizen, Henry and Saunders, Rod, "Search Warrants: A practical Guide," *Law Institute Journal*, October 1998, 48-53.

Black, Julia, *Rules and Regulators* (1997).

Bolton, Brett, "Compelling Production of Documents to the ASC," *Queensland Law Society*, June 1995, 235-6.

Brennan Vince, "Federal Court makes inroads into legal professional privilege," (2001) 21 (5) *Proctor* 28.

Carson, Kit; Henenburg, Cathy, "The Political Economy of Legislative Change: Making Sense of Victoria's New Occupational Health and Safety Legislation," *The Law in Context* (1988) 6(2), 1-19.

Connor, Paul, "Authorised Officers and Investigations: A cautionary tale," *Local Government Law Journal*, November 1996. 69-71.

Dal Pont GE, *Lawyers' Professional Responsibility in Australia and New Zealand*, (2001).

Dickey, Anthony QC, "Without reasonable excuse in s.112AD(1)," May 1998, Volume 72, *The Australian Law Journal*, 342-343.

Hunter, Rosemary; Ingleby Richard and Johnstone, Richard (eds), *Thinking About Law: Perspectives on the history, philosophy and sociology of law* (1995).

Hawkins, Keith *Environment and enforcement: regulation and the social definition of pollution* (1984).

Hutter, Bridget M, *Compliance: Regulation and Environment* (1997).

Hutter, Bridget M, "Variations in Regulatory Enforcement Styles," *Law & Policy*, Vol. 11, No. 2, April 1989, 153-174.

Kagan, Robert A; Lee Axelrad, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (2000).

Leaver A, The Laws of Australia, *Investigation by Independent Agencies* (looseleaf) (1996).

Leaver Alan, *Investigating Crime: A Guide to the Powers of Agencies Involved in the Investigation of Crime* (1997).

Lo Surdo, "A Quiet Revolution has been happening in Legal Professional Privilege," (2001) 39(6) *Law Institute Journal* 50.

Menzies, Lachlan, "The Full Federal Court removes the protection of privilege in ACCC investigations," (2001) 9(2) *TPLJ* 115.

Saul, Ben, "Legal professional privilege – balancing law enforcement against protecting the regulated," *Law Institute Journal*, March 2002, 68-72.

Sharard, Tim, "Case and Comment: McCormack v Silberman," *Criminal Law Journal* Volume 18, October 1994, 288-290.

Tronc, K; Crawford, C and Smith, D, *Search and Seizure in Australia and New Zealand*, (1996).

Williams, David John Parry, *Investigations by Administrative Agencies* (1987).

4. Other Documents

Better Regulation Taskforce (United Kingdom), Review Enforcement, April 1999.

Bloomberg, M et al, *The Cutting Edge of Policing: Civil Enforcement for the 21st Century*, New York Police Department.

Heasley, Andrew, "Red Light for Boosting Tram Inspectors' Powers," *The Age*, 13 March 2002, p. 13.

Environment Protection Authority, *Enforcement Policy*, July 1993.

Media Release, *Victorian Privacy Commissioner*, 4 December 2001.

Memorandum of Understanding Between the Royal Society for the Prevention of Cruelty to Animals (Victoria) Incorporated and the Victorian Department of Natural Resources and Environment (May, 2002).

Office of Regulation Reform, Principles of Good Regulation.

Regulatory Impact Unit (United Kingdom), Enforcement Concordat, 1988.

Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 2000 (6 April 2000).

Scrutiny of Acts and Regulations Committee, *Scrutiny Handbook*, 2002.

Victoria, Parliamentary Debates, Legislative Assembly, 15 April 1999, 357 (Mr W.D. McGrath, Minister for Police and Emergency Services.)

www.cabinet-office.gov.uk/regulation/role/index.htm

www.dsrd.vic.gov.au/regreform

www.lacots.com/pages/trade/about.asp

PRELIMINARY SUBMISSIONS

<i>No.</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
1	31-Aug-01	Mr Mike Ebdon	Manager, Safety Systems <i>The Office of Gas Safety</i>
2	03-Sep-01	Mr John Phillips, A.C.	Chief Justice <i>Supreme Court</i>
3	04-Sep-01	Hon. Glenn Waldron, AO	Chief Judge <i>County Court</i>
4	05-Sep-01	Mr Russell Cheffers	Acting Chief Executive Officer <i>CFA</i>
5	06-Sep-01	Mr Nicholls	Executive Services <i>Victoria Police</i>
6	07-Sep-01	Ms Anita Rynhart	Enforcement Officer <i>Heritage Victoria</i>
7	07-Sep-01	Mr Peter Akers	Chief Executive Officer <i>Metropolitan Fire Brigade</i>
8	10-Sep-01	Mr Robinson	Chief Executive Officer <i>Legal Practice Board</i>
9	10-Sep-01	Ms Helen Szoke	Chief Executive Officer <i>Infertility Treatment Authority</i>
10	11-Sep-01	Mr Peter Barber	State Director <i>RSPCA</i>
11	12-Sep-01	Ms Marilyn Small	Admin Co-ordinator <i>Rhed</i>
12	12-Sep-01	Senior Sergeant Tony O'Conner	Senior Sergeant <i>Victoria Police</i>
13	13-Sep-01	Mr John Lord AM	Chief Executive Officer <i>Marine Board of Victoria</i>
14	14-Sep-01	Mr Julian Gardner	Public Advocate <i>The Office of the Public Advocate</i>

<i>No.</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
15	14-Sep-01	Mr David Pollard	Commissioner of State Revenue <i>Commissioner of State Revenue</i>
16	15-Sep-01	Mr Pat Armstrong	Chief Executive Officer <i>Magistrates' Court of Victoria</i>
17	16-Sep-01	Mr Clay Manners	General Manager Policy <i>Victorian Farmers Federation</i>
18	17-Sep-01	Mr Rob Spence	Chief Executive Officer <i>Municipal Association of Victoria</i>
19	18-Sep-01	Mr Ian Cuthbertson	Chief Financial Officer/Corporate Secretary <i>VENCORP</i>
20	19-Sep-01	Dr Barry Perry	Ombudsman <i>Ombudsman of Victoria</i>
21	19-Sep-01	Mr Gary Sullivan	Supervising Solicitor <i>West Heidelberg Community Legal Service</i>
22	19-Sep-01	Hon John Thwaites MP	<i>Minister for Planning</i>
23	20-Sep-01	Mr Ian Graham	Chief Electrical Inspector <i>Office of the Chief Electrical Inspector</i>
24	21-Sep-01	Hon John Thwaites, MP	<i>Minister for Health</i>
25	26-Sep-01	Ms Jenny Morris	Solicitor <i>Legal Services Branch, Dept of Human Services</i>
26	02-Oct-01	Mr John Merritt	Executive Director <i>WorkSafe Victoria</i>
27	03-Oct-01	Mr Patrick L'Estrange	Legal Officer Legislation Branch <i>Consumer & Business Affairs Victoria</i>
28	03-Oct-01	Mr C Beamish	Registrar <i>Optometrists Registration Board</i>
29	03-Oct-01	Ms Chloe Munro	Secretary <i>Dept of Natural Resources and Environment</i>
30	12-Oct-01	Mr Stephen Marty	Registrar <i>Pharmacy Board of Victoria</i>

<i>No.</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
31	14-Oct-01	Ms Janet Atkinson	Solicitor to the Board <i>Medical Practitioners Board</i>
32	16-Oct-01	Mr Hubert Guyot	Chief Executive Officer <i>Yarra Trams</i>
33	13-Nov-01	Mr Regis Hennion	Managing Director <i>Melbourne Transport Enterprises Pty Ltd</i>

FINAL SUBMISSIONS

* Please note that where the Submission number follows with an S, this indicates that a Supplementary Submission was also received.

1	04-Nov-01	Mr Shawn Delaney	Private Individual
2	05-Nov-01	Mr Duncan Mac Donald B.M	Private Individual
3	15-Nov-01	Ms Kate Hammond	<i>Legal Ombudsman</i>
4	18-Nov-01	Mr Julian Knight	Private Individual
5	23-Nov-01	Ms Lisa Hannan	Supervising Magistrate, Criminal Jurisdiction <i>Magistrates' Court of Victoria</i>
6	26-Nov-01	Mr Patrick Washington OAM	Chairman <i>VR Fish</i>
7	27-Nov-01	Mr Stephen Marty	Registrar <i>Pharmacy Board of Victoria</i>
7S	18-Dec-01	Mr Stephen Marty	Registrar <i>Pharmacy Board of Victoria</i>
8	27-Nov-01	Mr Paul Vose	Private Individual
9	27-Nov-01	Mr Andrew Lang	Director Corporate Services <i>Office of the Regulator-General, Victoria</i>
10	28-Nov-01	Mr Bill Robinson	Chief Executive Officer <i>Legal Practice Board</i>
11	28-Nov-01	Mr Ross Hodge	Executive Director – SIV

<i>No.</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
			<i>Seafood Industry Vic.</i>
12	28-Nov-01	Mr Edward J Lorkin	Secretary <i>Criminal Bar Association</i>
13	28-Oct-01	Mr Patrick Garry	Environmental Health Officer
14	29-Oct-01	Mr Hubert Guyot	CEO <i>Yarra Trams</i>
15	30-Nov-01	Mr Philip La Roche	Private Individual
16	30-Nov-01	Mr Ken Gardner	Director of Gas Safety <i>Office of Gas Safety</i>
17	30-Nov-01	Mr Chris Field	Executive Director <i>Consumer Law Centre Victoria</i>
18	03-Dec-01	Mr Robert Joy	Executive Director <i>EPA Victoria</i>
19	04-Dec-01	Mr Tony Parsons	Managing Director <i>Victoria Legal Aid</i>
20	06-Dec-01	Mr Don Buckmaster	President <i>VADA – Victorian Abalone Divers Association</i>
21	06-Dec-01	Mr P. B Nancarrow	Deputy Commissioner (Policy and Standards) <i>Victoria Police</i>
21S	22-Jan-02	Ms Christine Nixon	Chief Commissioner <i>Victoria Police</i>
22	11-Dec-01	Ms Chloe Munro	Secretary <i>Department of Natural Resources and Environment</i>
22S	26-Feb-02	Mr Shaun Green	Acting Manager Cabinet and Legislation Services <i>Dept of Natural Resources and Environment</i>
23	11-Dec-01	Mr Peter Hiland	Executive Director, Compliance and Policy <i>State Revenue Office</i>
23S	13-Jan-02	Mr Peter Hiland	Executive Director, Compliance and Policy <i>State Revenue Office</i>
24	20-Dec-01	Mr Alex Serrurier	Chief Environmental Health Officer

<i>No.</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
			<i>City of Ballarat</i>
25	06-Nov-01	Mr Kerrin Bower	Private Individual Department of Justice
26	02-Jan-02	Mr Denis Hall	Director, Legal Policy <i>Department of Justice</i>
27	02-Jan-02	Mr Neil Edwards	Secretary <i>Department of State and Regional Development</i>
27S	03-Apr-02	Mr Philip Hatton	Director - Trade Measurement Victoria <i>Dept. of State and Regional Development</i>
28	15-Jan-02	Mr Mike McIntyre	Assistant Director (Operations) <i>Heritage Victoria</i>
29	14-Dec-01	Mr John Donoghue	Legal Consultant <i>Municipal Association of Victoria</i>
30	16-Jan-02	Mr Danny Holding	Solicitor Criminal Law Section <i>Law Institute Victoria</i>
31	04-Feb-02	Mr Allan Driver	General Manager Use Safety <i>Office of the Chief Electrical Inspector</i>
32	31-Jan-02	Mr F N Lovass	Acting Director, Consumer and Business Affairs Vic <i>Department of Justice</i>
33	07-Feb-02	Mr Paul Falkner	Secretary <i>Department of Human Services</i>
34	13-Dec-01	Ms Geraldine Sharman	Manager, Legal Services Public Transport Division <i>Dept of Infrastructure</i>
35	15-Feb-02	Mr Brian Forrest	Chairman <i>Victorian Casino and Gaming Authority</i>
35S	22-Mar-02	Mr Brian Forrest	Chairman <i>Victorian Casino & Gaming Authority</i>
36	21-Feb-02	Mr Maurice Sheehan	Director <i>The Pharmacy Guild of Australia</i>

			<i>Victorian Branch</i>
37	02-Apr-02	Ms Maria Pizzi LLB	Solicitor <i>RMIT Union Legal Service</i>
38	27-Feb-02	Mr Paul Chadwick	Privacy Commissioner <i>Office of the Victorian Privacy Commissioner</i>
39	28-Feb-02	Mr Phil Brown	President <i>Shooting Sports Council of Victoria</i>
40	22-Mar-02	Mr John Kendall	Principal Advisor Property & Legal <i>Goulburn-Murray Water</i>
41	22-Mar-02	Mr Eric Windholz	General Counsel <i>Victorian Workcover Authority</i>
42	20-Mar-02	Mr Eric Meren	Private Individual
43	16-Apr-02	Ms Lisa Hannan	Supervising Magistrate, Criminal Jurisdiction <i>Melbourne Magistrates' Court</i>

APPENDIX 6

LIST OF WITNESSES

No.	Date of Hearing	Witness	Affiliation
1	12 December 2001 MELBOURNE	Dr K. Lamb,	Director, Family and Community Support Branch, Community Care Division;
2		Dr J. Carnie,	Director, Disease Control and Research;
3		Ms J. Bowman,	Manager, Environmental Health Unit;
4		Ms D. Foy,	Acting Assistant Director, Legal Services;
5		Ms L. Akenson,	Acting Senior Legal Officer, Legal Services;
6		Ms W. Tabor,	Legal Officer, Legal Services, <i>Department of Human Services.</i>
7		Dr B. Perry	<i>The Victorian Ombudsman</i>
8		Mr P. L'Estrange	Legal Officer, Legislation Branch
9		Mr S. Devlin	Manager Legal Services Consumer & Business Affairs Victoria, <i>Department of Justice</i>
10		Ms A. Morton	Vice-President
11		Mr V. Williams	Secretary <i>Public Transport Users Association.</i>
12		Mr R. Warren,	Chief Prosecutor, Offence Management Unit;
13		Mr R. Waters,	Manager, Flora and Fauna Compliance and Utilisation;
14		Mr M. Donaldson,	Chief Investigator, Fisheries Victoria;
15		Ms K. Regan,	Manager, Pest Plant and Animal Program
16		Mr R. Walters,	Senior Catchment Management Officer, <i>Department of Natural Resources and Environment.</i>
17		Dr J. Galvin,	Manager, Animal Health Operations, <i>Department of Natural Resources and Environment.</i>
18		Dr B. Robinson,	Chairman;
19		Mr M. Payton,	Solicitor;
20		Ms K. Leishman,	Senior Adviser, Strategic Coordination;
21		Ms A. Dawe,	Environment Protection Officer; and

No.	Date of Hearing	Witness	Affiliation
22		Ms G. Wettenhall,	Environment Protection Officer; Environment Protection Authority
23		Mr P. Hiland,	Executive Director, Compliance and Policy, State Revenue Office.
24		Ms F. Hampel	Immediate Past President Liberty Victoria
25 26	13 December 2001 MELBOURNE	Commander P. Hornbuckle, Inspector S. Leane,	Corporate Policy and Executive Support Manager, Legislative Review and Proposals Unit Victoria Police.
27		Mr J. O'Donoghue	Legal Consultant Municipal Association of Victoria.
28		Mr M. Diepstraten,	Environmental Health Officer Hume City Council.
29		Ms G. Sharman,	Manager, Legal Services Department of Infrastructure
30 31 32		Mr A. Driver, Mr A. Padanyi Ms C. Wait	General Manager, User Safety Legal Officer Legal Assistant Office of the Chief Electrical Inspector
33 34		Mr S. Marty Mr D. Newgreen,	Registrar Project Pharmacist Pharmacy Board of Victoria.
35		Mr R. Hunter	Executive Officer Royal Society for the Prevention of Cruelty to Animals
36 37 38		Mr J. Gardner, Ms L. Glanville, Mr D. Petherick,	Public Advocate Legal Officer to the Public Advocate Manager, Community Visitors Program, Office of the Public Advocate
39		Ms M. Troup,	Disability Services Department of Human Services.
40		Mr D. Holding,	Barrister and Solicitor Law Institute Victoria
41	21 February 2002 MELBOURNE	Ms C. Randazzo,	Senior Public Defender, Criminal Law Division, Legal Aid Victoria.
42 43		Mr M. Sheehan, Mr D. Nolte,	Director National Pharmacy Guild.
44		Mr A. Serrurier,	Chief Environmental Health Officer

No.	Date of Hearing	Witness	Affiliation
45 46 47		Mr A. Garden, Mr D. Fitzpatrick Mr D. Tomkin	Ballarat City Council. Secretary Solicitor Executive Officer; Victorian Abalone Processors Association.
48 49 50 51 52 53 54 55 56 57 58 59 60 61		Mr P. Chadwick, Mr B. Power, Mr P. McKee Ms K. De Clercq Mr C. Field, Ms C. Lowe, Mr P. Phillip Hatton Mr R. Lear, Mr B. Kearney, and Mr P. Eager, Mr B. Mountford Mr E. Windholz Ms D. Preston Ms S. Lagos	Privacy Commissioner. Insurance and Legal Counsel Revenue Protection Officer Manager Public Relations Spokesperson; Yarra Trams Executive Director Senior Policy Officer, Consumer Law Centre Director Contracts Manager Trade Measurement Victoria Director Liquor Licensing Victoria Senior Sergeant, Victoria Police Chief Executive General Counsel Compliance Branch Manager Director of Legal Services and Investigations Victorian Workcover Authority
62 63	22 February 2002 MELBOURNE	Mr B. Forrest Mr S. Shirrefs,	Chairman Victorian Casino and Gaming Authority Barrister Criminal Bar Association

APPENDIX 7

LIST OF MEETINGS

<i>No.</i>	<i>Date of Meeting</i>	<i>Representative</i>	<i>Affiliation</i>
1	15 November 2001 NSW	Mr Mark Marien Kate Thompson	Director Policy Officer Criminal Law Review Division NSW Attorney General's Department
2		Mr David Catt Mr Chris Hanlon Mr Kit Pacey Ms Mary-Louise Battilana Mr Nefley Hethrington	Director Legal Division Director Compliance and Standards Manager Prosecutors and General Litigation Legal Division Principal Policy Officer Legislation Branch Policy Division Senior Policy Officer Legislation Branch NSW Department of Health
3		Iain Martin	Legal Officer Legal Branch NSW Department of Health
4		Mr Cameron Murphy Ms Pauline Wright	President Vice President NSW Council for Civil Liberties
5		Mr Mark Kelly	Acting Director Litigation NSW Environment Protection Authority (EPA)
6	22 January 2002 SAN FRANCISCO	Mr David Frieders Ms Amy Kiernan	Director Public Relations Co ordinator Department of Consumer Assurance Agriculture/Weights and Measures
7		Professor Rory Little	Hastings College of the Law University of California
8		Mr Harry Dorfman	Assistant District Attorney Attorney-General's Office California Department of Justice
9		Ms Sue Cone Mr Kenneth Sato	Program Manager Hazardous Materials Program Principal Environmental Health

<i>No.</i>	<i>Date of Meeting</i>	<i>Representative</i>	<i>Affiliation</i>
		Mr William Chang	Inspector Legal Office Office of the City Attorney Department of Public Health, Bureau of Environmental Health Management
10	24 January 2002 WASHINGTON	Mr Alan Christian Ms Theresa Lorenzo Mr Tim Fordahl	Director Investigations and Enforcement Specialist Investigations and Enforcement Department of Agriculture, Animal and Plant Health Inspection Service (APHIS)
11		Mr Arthur Libertucci Mr Malcolm Brady Mr Robert Tobiassen Ms Mary Ryan Ms Anita Ko	Assistant Director Alcohol and Tobacco Deputy Assistant Director, Field Operations Associate Chief Counsel, Alcohol and Tobacco Deputy Associate Chief Counsel, Alcohol and Tobacco Senior Attorney Bureau of Alcohol and Tobacco and Firearms (ATF)
12	24 January 2002 NEW YORK	Mr Robert Messner Sergeant Martin Gleeson Mr Peter Ostapenko Mr Thomas Prasso Assistant Commissioner Thomas Doepfner Deputy Commissioner George Grasso Detective Edward Wallace	Assistant Commissioner Legal Bureau – Civil Enforcement Unit Managing Attorney Associate Staff Analyst Office of Management Analysis and Planning Director License Division Assistant Commissioner Legal Bureau Deputy Commissioner Legal Matters Senior Crime Scene Analyst Forensic Investigation Division New York City Police Department
13		Mr Hector Serrano Mr J.G. Kennelly Ms Carol de Fritsch Mr John Radziejewski Mr Max Verga	Director of Enforcement Deputy Director of Enforcement Special Counsel Press Secretary Director New York City Department of Consumer Affairs
14		Mr Philip Heckler	Director Environmental Affairs

<i>No.</i>	<i>Date of Meeting</i>	<i>Representative</i>	<i>Affiliation</i>
		Ms Gerri Kelpin	Bureau of Wastewater Treatment Director Air and Noise Permitting, Bureau of Environmental Compliance NYC Department of Environmental Protection
15	25 January 2002 NEW YORK	Ms Debra Cohn	Deputy Attorney General for Policy Office of the New York State Attorney-General
16	28 January 2002 LONDON	Mr Phillip Rushbrook	Head of Public Sector Team Regulatory Impact Unit
17		Mr Peter Johnson	Policy Division Health and Safety Executive (HSE)
18		Ms Alison Reeves Mr Iain Bailey Ms Mayur Patel Mr Nicholas Robson	Head of Vaccination Team AHD Enforcement Liaison Officer Animal Welfare Head of Civil Litigator Legal Officer Foot and Mouth Disease Control Department of Environment Food and Rural Affairs (DEFRA)
19	29 January 2002 LONDON	Mr Les Bailey	Policy Officer Local Authorities Co-ordinating Body on Food and Trading Standards (LACOTS)
20		Mr Christopher Harrison	Barrister Legal Department Department of Environment Food and Rural Affairs (DEFRA)
		Mr David Morgan	Children's Rights Director National Care Standards Commission
21	32 January 2002 BRUSSELS	Mr John Verhaeghe Mr Frank Swartenbroux	Legal Department Federal Agency for Safety of the Food Chain International Relations Federal Agency for Safety of the Food Chain Belgian Ministry of Public Health