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LAW REFORM COMMITTEE

Inquiry into powers of entry, search, seizure and questioning by authorised officers

Melbourne — 13 December 2001

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Necessary corrections to be notified to executive officer of committee

The CHAIRMAN — On behalf of the Victorian parliamentary Law Reform Committee I welcome you here today and thank you for giving of your time to come along to speak to us in relation to our reference on the powers of entry, search and seizure and related matters.

Mr HOLDING — I thank you for the invitation.

The CHAIRMAN — The dialogue this afternoon will be recorded by Hansard and you will receive a transcript of it. Should you wish to make any amendments to it, please do so and return it to our staff.

I invite you to commence by outlining what you see as being some of the relevant issues, following which we will be very pleased to ask a number of questions.

Mr HOLDING — I apologise for being less organised than I would have liked to have been. It was only last Tuesday afternoon when I was invited here.

The CHAIRMAN — And we appreciate your taking a brief at short notice! We look forward to your comments.

Mr HOLDING — When I thought about the reluctance of other members of the criminal law section to come along it brought to mind one of the issues that has been raised in your discussion paper — that is, the difficulties of people being knowledgeable across the board in terms of the powers that are under consideration. I notice in your discussion paper that one of the primary issues you are addressing is the inconsistency or, more properly put, the desirability of consistency in this area of law.

I have been practising exclusively in criminal law for more than 15 years. I was gratified to receive the appendix attached to your discussion paper and see that somebody has taken the effort to list all the different acts that have search and seizure powers. 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 on their rights and responsibilities under many of the acts. Their first port of call would be to try to read the legislation. 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.

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. 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.

In my respectful submission, that 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.

In this category when you look through the powers in the various acts there is clearly a division in the types of powers that are attached to each act. At the highest end you have the commonwealth customs and crimes acts with extremely invasive powers extending to body cavity searches and various powers for customs officers that you have probably marked as the high benchmark.

The CHAIRMAN — The customs legislation is a federal act.

Mr HOLDING — Yes, it is; it and the commonwealth crimes legislation also has provisions for search and seizure. We have the same kinds of provisions in our own Crimes Act and Magistrates' Court Act as well as in the Drugs, Poisons and Controlled Substances Act, and various other acts that might go to more criminal offences in the strict sense of penalties being attached to those offences and, in some cases, many years imprisonment.

Clearly, the needs and powers that will be conferred on law enforcement officers sometimes have to be at the higher level rather than the other acts listed there, such as the legislation covering podiatrists and veterinarians, and various legislation that I have not have had the chance to go through but which, I imagine, would not have the same extensive powers of coercion.

There are a number of reasons why consistency is important. This is a complex area of law. Even well-meaning law enforcement officers, including 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.

From the position of lawyers advising people it is important that they be able to provide people with sound advice. As it stands generally you look for a specialist barrister who has a particular knowledge of search warrants in what is a very problematic area of the law at the moment.

The CHAIRMAN — On that point, are you aware of any members of the bar who specialise in that area?

Mr HOLDING — Yes, I had a brief meeting with Brian Walters, recently appointed as Queen's Counsel, who is a specialist in the area of search warrants.

The CHAIRMAN — A very good counsel.

Mr HOLDING — Yes. In discussion and trying to summarise perhaps the points I could make to you on what we regard as a desirable outcome — that is, the codification of these powers — there are a number of points that we would say are important from the point of view of protecting the rights of people who will be subjected to these powers.

The first point would be that there be access to justice by the people who are subject to those coercive powers and that there should be an obligation on the investigating officials to provide the people with information as to how to contact a lawyer and review or get advice about the powers that are being exerted on them at the time. There should be a simple mechanism by which the people who are being affected by the powers can bring the matter before a court to review the legitimacy of the powers that are being executed.

If I could take a step back, the most frequently examined issues that come before the courts in relation to disputes about search warrants include the questions: is there the power to have granted the warrant in the first place; what is the scope of that power; is the search being conducted in accordance with that power; and are the privileges that might attach to material that is sought to be seized being observed? That is the starting point.

If I could diverge for a moment, when I first started practising criminal law the police, in the investigation of offences, had the power to question people after they had arrested them and charged them with an offence. That would happen by way of them essentially typing out the questions and the answers that they said were given in response to the questioning of the suspect. The suspect was then asked to sign a document, which was the police record of interview and was used as evidence in a court proceeding. That caused a lot of angst in the courts because these matters were often disputed.

There were major changes to the law in the tape-recording of questioning of suspects. The changes made things more accountable from everybody's points of view: it was harder for a defendant to deny the answers were being given because the answers were on tape; and it was harder for the police to be coercive in their questioning because it was on tape. One of the more fundamental shifts from my point of view was what had been the case in common law — namely, that illegality in these types of procedures as a matter that was discretionary before the court — so that if it were shown that perhaps a confession had been obtained illegally it was still admissible in court proceedings depending on the discretion of the trial judge, but within the provisions that changed that act was a provision that not only did the questioning have to be tape-recorded but failure to caution a person properly and to tape-record that cautioning, and failure to record the answers, led to a prima facie inadmissibility. The burden changed.

Previously, had it been illegal it generally got in unless you persuaded a judge it should go out. It changed to a position that if it was illegal the prosecution had to establish exceptional circumstances as to why it should become evidence in a case. In terms of the powers your committee is examining, it is often the consideration where a warrant may have been improperly executed or not properly obtained that, from a lawyer's point of view, it might

be after the event. It may be too late for the person's rights to be observed. Perhaps I am getting to a different point as I am leaving aside the access to justice point for a moment, although access to justice does not mean a lot if the person does not know how to access that justice.

To get down to the nuts and bolts, when a person executes a warrant on somebody we say that as part of that process they should be obliged to provide people with their rights in terms of review of that warrant. That may simply mean a right to contact a lawyer, as there is under most criminal law offences. When police now execute a warrant under most Crimes Act provisions, and they want to question somebody, they have to read to that person the fact they do not have to answer questions — the privilege against self-incrimination — and inform the person they have a right to contact a lawyer. Further, they have to ask the person whether they want to exercise those rights. That cautioning process, if not tape-recorded at the scene, must be tape-recorded subsequently in the sense of, 'Didn't I tell you this? Didn't you see this?'. There are consequences that flow from not doing that.

The CHAIRMAN — Is that an existing system?

Mr HOLDING — That is an existing system under section 464 of the Crimes Act in relation to the questioning of people about suspected offences. The taping provision relates to indictable offences — the more serious offences. That means that there has been a tremendous cost saving in terms of these matters not being litigated in the way that they were because what the person has said is on the record. It does not mean there are not circumstances where there are still fights about what happened before the tape recorder went on and about the questioning that takes place.

But I notice in your discussion paper there is a reference to the technology and the benefits that might have in terms of these types of powers. We ask the committee to consider strongly the use of technology in terms of the tape recording of rights that we say should be given to people when these types of coercive powers are being exercised. What we are really talking about is saying, 'You have the right to contact a lawyer. We will provide you with a phone to do so', and recording the administration of those rights to the people when those warrants are being executed.

Mr LANGUILLER — What if the person was unable to understand English, which is always possible given the nature of our community; how would you overcome that?

Mr HOLDING — In legislation such as the Crimes Act, for example, the police have general powers and are given reasonable time to exercise those powers. 'Reasonable time' is defined under the act in terms of, for example, the ability to provide a person with an interpreter and to obtain those services. Of course, there will always be a variety of circumstances that are difficult to cover. My understanding is that often the practical difficulty with, for example, the videorecording of the execution of warrants is that one enters the premises and everybody shoots off in different directions, and the question then arises of where you point the camera. It is not easy. Of course there is a cost involved, in that virtually you have an extra person with a video camera. It is not easy, but it is certainly desirable. It certainly assists in people being accountable. As I have mentioned before, that assists both sides — the executors of the warrant do not have to worry so much about being accused of things they did not do and, from the other perspective, it is harder for them to do things that they should not do.

Ms McCALL — You are talking about some of the negative aspects of warrant issuing. I understand that, but can you put a positive slant on it? Do you think it is appropriate that authorised officers in certain instances do have the power of entry and seizure; and can you explain perhaps from a legal perspective whether those ones are exercised properly?

Mr HOLDING — I think it is unavoidable in this society that you not have these powers because there are so many matters in which the public deserve protection. There is no doubt about it that investigation of crime or health and safety consequences requires accountability and investigation. There is a public interest in bringing to account people who are not meeting their obligations.

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. I think the discussion paper talks about the general public perhaps being more readily able to understand a police officer's investigatory powers than people they do not normally see as having those types of powers. So one has to consider — I think the paper properly points out — that when 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.

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 their 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 government authorities, delinquent behaviour and those types of problems.

I could not say there are not positives. Clearly, from my experience, in executing search warrants people discover serious crimes. There is no doubt about that, and that has to be a positive. But on the other hand there is a need for a bit of the balance about whether the power is really justified for the ultimate aim you are trying to achieve. I do not know whether that answers your question.

Ms McCALL — It certainly does. Thank you.

Mr HOLDING — I repeat that access to justice was the main consideration. The second is ensuring that privileges are properly preserved. There are some difficulties here. One of them, for example, is legal professional privilege. We would like to say that where legal professional privilege attaches, documents should not be read. 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.

So I understand the request that the documents not be read is perhaps not easy to enforce. I have not thought this through, but 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. We say there should be accountability in the sense that breaches of these powers should result in prima facie inadmissibility. That goes back to the point I mentioned before, similar to the provisions in the Crimes Act in relation to questioning.

In terms of who should have the power to issue warrants, we would say that should always be independent judicial officers. It was my understanding that sergeants of police could issue warrants, for example, in relation to certain circumstances. I think that might have been changed recently in the Crimes Act to be a magistrate, but I did not get time to properly look at that. I understand there are senior departmental officers and all sorts of different people who might have the power to allow the inspection of certain premises.

That may be appropriate in terms of some of the health regulations, but one always has to think about these things. This is where I would encourage the committee to draw divisions between the classes of offences. I think there could be perhaps three different types or stages of warrants and inspections: the lower level, middle level and more serious level. Certainly at the more serious level it should be independent judicial officers, but at least the status of a magistrate, and for more serious offences a Supreme Court or Federal Court judge.

Mr LANGUILLER — Did you say that in terms of what you might describe as low level types of offences it nevertheless would require warrants, or could you live without them?

Mr HOLDING — 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. I am not sure whether you would call it a warrant or an implied licence from an agreement that somebody has entered into, but I think it depends again on the rights that are being impinged upon by the execution of the process.

There is an important point that should be looked at by the committee in terms of what occurs — I forget what the Americans call it — when police or investigating officials come across material that is not the subject of their warrant but which causes concern. 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. 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 in relation to that new material.

The CHAIRMAN — Are there any other issues on which you would like to comment specifically?

Mr HOLDING — No. I just commend the committee on trying to tackle this area. I know, for example, that there are obscure legal decisions that bear upon the powers of investigating officials. I was involved in one. Let me just give you the citation: *McCormick v. Silberman*, an unreported decision of Justice Ashley on 17 December 1993. That related to the power, I think, of a health official questioning a doctor about prescriptions that perhaps should not have been issued. The question arose in that proceeding about whether the health official was obliged to give a caution similar to the caution that is given under the Crimes Act about a person's right to contact a lawyer. There were issues there about whether the investigating official had a power of arrest. Justice Ashley found that that was not necessary, but the caution should be given in circumstances where there might be power of arrest if a police officer was present.

But I am certain it would be practically unknown to the investigating officials that these types of requirements were present. It really just emphasises the complexity and ad hoc nature of having so many different acts of Parliament that provide for so many different types of common powers of search and seizure. We commend the idea of trying to codify these powers in a simple act.

I think the main points are access to justice, preservation of privilege, breach of power leading to consequences — inadmissibility of evidence — independence of judicial officers and preservation of the scene when those accidental discoveries outside the warrant are made.

The CHAIRMAN — What is the issue in relation to preserving the scene?

Mr HOLDING — Often you have situations where people executing warrants are trying to keep within that power but they have legitimate concerns about finding something else. They may not have the expertise to know whether or not those matters should be seized, for example. At the moment the law is unclear about their powers and it causes a lot of angst among both people trying to execute the warrants and lawyers trying to give advice. We would say there should be a procedure where others who might have more expertise can apply for a warrant where they feel it is desirable or to give advice in that situation.

The CHAIRMAN — What would you suggest would be the proper procedure there — a telephone call from the scene to a magistrate?

Mr HOLDING — Not necessarily to a magistrate. The warrant itself may have a provision that if it is reasonably suspected by the person executing the warrant that evidence of a different offence or regulatory breach has been committed, they give the person notice that the scene is not to be interfered with, or they make some practical inquiries to find out how long it would be before somebody else could come to the scene and give advice concerning it, and get signed consent for it to be taken for 24 hours and things of that nature. I have not thought through the details, but basically it would not simply be a case of thinking, 'That infringes such-and-such an act; we might not be from the fisheries division' — for example — 'but we are pretty sure it does. We will take it, we'll show it to them and we'll see what the outcome is'.

The CHAIRMAN — That is an interesting point. Thank you.

Ms HADDEN — One of the groups that have made submissions to the committee said section 464 did not

apply to them. I was absolutely staggered.

Mr HOLDING — Do you know which group?

Ms HADDEN — I cannot remember now — I would have to go back through my notes. The comment was that section 464 applies only to indictable offences.

Mr HOLDING — It gets a little bit complicated. It is actually not right. Parts of section 464 do not just apply to indictable offences — for example, the cautioning part relates to any offence. The taping provision relates to indictable offences in terms of confessions. Then it gets down to a power of arrest, and a power of arrest can be different depending on whether it is an indictable offence. If it is a summary offence, if there is the belief that it could be a continuing offence, there is a power of arrest. So there are circumstances in which section 464 does apply to investigating officials. This is what I mean: I am sure they would not know that, and I am sure it often would not be litigated and it would never cause anybody any fuss. But it may be that if a lawyer was aware of that particular unreported decision and was able to assist somebody there might be a legal basis for challenging the execution of the warrant or, perhaps more relevantly, the questioning of the person at the time on the scene.

Ms HADDEN — That was one point raised by another group yesterday. Today I raised the questioning of children in relation to section 219 of the Transport Act and section 464E of the Crimes Act. You have to define at what point they are under arrest; you have those procedures. You might like to comment on this. The police have very stringent requirements, and properly so, under the Crimes Act. Therefore why should an authorised officer not be subject to the same stringent requirements?

Mr HOLDING — Yes, I think that is right. The common law always tends to draw a distinction between the investigation of an offence, where people are being questioned to determine what might have happened at a very preliminary level, and questioning for the purposes of gathering evidence so that you can use it against the person. That second part was regarded as unfair, in that people should be told that they do not have to answer questions. You often find with investigating officials that there is not a requirement to record the questions and answers, so they will simply write down the notes of the conversation that is had. I am not sure whether they caution people as a normal procedure at the moment. I would imagine that most of them do, but I might be wrong.

Ms HADDEN — That was not part of the evidence.

Mr HOLDING — Yes, well that is a concern. I do not see why people should not be, at the stage where they are hoping to get, essentially, evidence against the person to be used in their prosecution, cautioned about their rights. I do not see why in this day and age it would be that difficult to have a little hand-held tape recorder and to tape record the giving of those rights to people. I just do not see that it is practically that difficult. It tends to be that the less serious the matter, the less effort there is to make people accountable.

Sometimes these things have pretty drastic consequences for people. I have had some dealings in relation to cruelty to animals and Royal Society for the Prevention of Cruelty to Animals investigators, and things like that, where there have been statements of what has allegedly been said but people have denied it. It seems to me it would be to everybody's benefit to have had a tape recording of the questioning and the people being cautioned.

The CHAIRMAN — Danny, we will not have a full quorum at 5 o'clock, which will be the formal finish time for our deliberations, so I will take you quickly through some other points. Dianne, do you have any other questions?

Ms HADDEN — No.

The CHAIRMAN — We have a number of issues that may be within your field of expertise to respond to, although some of them might relate more to the Law Institute. I will run through them briefly. If you have any succinct comments, I will be happy to take them on board now. We may liaise with the institute later on, if it is appropriate.

One matter relates to: what issues has the Law Institute come across in relation to the privilege against self-incrimination in the context of investigations by government agencies? Do you have any comments on that? I can move to the next one.

Ms HADDEN — Put it on notice.

The CHAIRMAN — It can perhaps be on notice. If when you get the Hansard transcript you would like to briefly put down any thought, that may be helpful. If not, don't worry.

The next one is: is the distinction which is often drawn between questioning and the production of documents where the privilege is retained for questioning but abrogated for the production of documents appropriate? The next one is in relation to questions relating to further limits on the power to require the production of documents. The final matter in our note is: have any other issues arisen in relation to the requirement to produce or seize documents from solicitors' offices?

Mr HOLDING — Yes, the final one relates to the bit I said before about the privilege. The earlier one I think is difficult, the distinction between documents. 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. I do not know whether there are any other matters there.

The CHAIRMAN — No, that is all. Thank you.

Mr LANGUILLER — I raise an issue in relation to the cooperation of the various authorities and officers and the cliché that following 11 September the world has changed forever. My view is that governments of all persuasions inevitably will have to move towards the area of security, and potentially that always tends to undermine some areas of civil rights. Do you have any comments about procedures as to how officers and/or authorities may or may not exchange information, and if so under what circumstances? Do you have any anecdotal evidence that may be of concern to you?

Mr HOLDING — I think it gets back a little bit to the fundamental principles of whether you are talking about people who might be subject to obligations because they have attracted a power. For example, the most common is when you obtain a licence to drive you necessarily have obligations that might deprive you of what might be the normal liberty — that is, you have to automatically provide your name and address to people. I think that, as a principle, when people are involving themselves in particular activities it needs to be made clear to them, in terms of advice, how the information will be used. I think there is a new privacy act now that deals with some of those issues, but I do not feel I could make a sensible comment about those provisions.

The CHAIRMAN — Thank you very much for coming along and giving your time on short notice and for taking on a working brief on the matter. Thank you very much.

Mr HOLDING — Thank you.

Committee adjourned.