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LAW REFORM COMMITTEE

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

Melbourne — 21 February 2002

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Necessary corrections to be notified to executive officer of committee

The CHAIRMAN — Good morning, Carmen. On behalf of the Law Reform Committee of the Victorian Parliament I welcome you to today's hearing. Our time is reasonably finite today, and we have a solid submission from Victorian Legal Aid which we are grateful for. I would like to start with a couple of questions, just to make sure we have the relevant information for our further review work. I have allocated questions to my colleagues. We will work along with you, but if there are any questions about which you feel it may be helpful to provide some further information on, feel free to do so. We will then be happy to take comments from you in relation to the material. I would like to make sure that you have a chance to present to us your personal views if you have any additional remarks you would like to make outside the submission we have already received.

Mr BOWDEN — I have read the submission. Thank you very much. My question is along these lines, and maybe I could present a preliminary point before you answer it. On page 2 of your submission: the need to exercise the powers should be tempered and balanced with the need to ensure that intrusion on a person's rights is kept to a minimum; this means that the limits must be imposed on a person to whom the power is conferred. These limits could well be expressed in the form of safety requirements or protocols to be followed. Could the VLA please elaborate on that view and what form should the safety requirements and protocols take?

Ms RANDAZZO — We envisage a situation where there are checks and balances put in place. It refers to another portion of the submission that relates to the setting up of a monitoring body that would oversee all of the authorities, agencies and so forth to ensure they are not exceeding their powers. It relates then back, of course, to the other suggestion made by VLA: That there must be in place proper training and appropriate skills provided to the persons who exercise these powers. Certain standards, therefore, must be set for those persons, and those standards must be met. VLA envisages a situation where if there were a body that oversaw these persons who do have these powers, who are conferred these powers to enter and search, that they oversee the training programs, and audit the training programs, for example; that they are a body to which complaints made as a result of searches and seizures are made, and that they essentially would be a body that oversees all aspects, not only the training and complaints, but also ensures that standards are being met.

That, of course, means that the standards have to be set in the first place, and a specially designed or set up body to do that would, we believe, be a means of ensuring that any standards are met, therefore checks and balances, safety requirements, if you like — and I use that term very loosely — are set and met by those bodies. That portion of VLA's submission is probably a little out of context, but it refers to ensuring that there is something in place beforehand, before the conferring of powers, and that that power is conferred to the appropriate people.

You may have also noted that such things as supervision on the job training were suggested, things such as ensuring that these people are accredited and that their accreditation is maintained, so there may be a need for ongoing training.

Mr BOWDEN — Do you perhaps feel that the State Ombudsman's Office is not adequate for this purpose, or this is a separate suggestion, and a separate body that you are suggesting?

Ms RANDAZZO — VLA envisages a separate body that deals specifically and only with these areas. It is not to suggest that the State Ombudsman's Office could not deal with complaints, for example, that might be made. It is because the power to enter and search is such a significant power that is conferred upon individuals, and is significant because, of course, it interferes with a person's or individual's rights. One of the things discussed was that we have a system in place whereby warrants can be obtained and executed, and people will use their commonsense when they go out to enter and search. The difficulty with that is that it is all a bit too ad hoc as far as VLA is concerned. Personally I come across situations day in and day out in the courts where items seized in searches and entries are questioned, are challenged; the very entry and search itself is challenged. So when VLA says that this is important, it is important because it is seen as an intrusion on individual's rights; it is seen as an interference with individual's basic rights to privacy, and especially so in people's own homes.

So it is worthy of an independent body that would oversee and be responsible for ensuring that safety requirements, or protocols and standards are met independent of the State Ombudsman.

Mr BOWDEN — Thank you very much.

Ms McCALL — I think you are touching on it a little bit, if I can suggest, Carmen. I refer you to page 3 of the submission: Too many warrants are granted by some judicial officers as a matter of course without due consideration being given to the merits of each application. Can you give us some examples of what sorts of complaints you have received specifically, without betraying any confidentiality?

Ms RANDAZZO — I act as a Senior Public Defender, and I appear as a barrister. Complaints are not necessarily received by VLA, but VLA's experience is that we often attend court, appear in a trial in which there has been a large number of items seized, particularly, for example, in Commonwealth prosecutions such as for drug importation or something of that nature. One questions the validity of the warrant, and sees that an application for a warrant has been usually faxed in to a court; it will list a number of items that are sought, but all that will occur is as a cursory practice, it is signed and faxed back to the applicant. That, unfortunately, is seen all too often. It happens also in matters that are prosecuted by the State rather than the Commonwealth.

Ms McCALL — If I can jump in. Say things like under the Confiscation of Goods Act; that is what you are talking about? It is a bit carte blanche?

Ms RANDAZZO — It is not to say it happens all the time, and in fact it does not happen usually in the more serious cases that involve large amounts of drugs or a very well-planned and well-executed undercover operation, for example; but it happens more in those cases where you have a suspicion there might be drugs on the premises, or there might be items that need to be seized. A form, if you like, is filled in and faxed, or given to a magistrate or a judge — and unfortunately it can happen and does happen — that may not even be looked at. The form may be given a cursory glance and signed. And they are just so common, the application for warrants, in these circumstances.

Recently I was faced with the situation where a lot of material that was seized as a result of warrants — and this was in a very large undercover operation in respect of drugs, a Commonwealth prosecution — and even video recordings, video surveillance, that was taken and challenged by the defence and excluded from evidence.

The CHAIRMAN — Why was it excluded from evidence?

Ms RANDAZZO — For two reasons. The manner in which the warrants had been obtained; in other words, the requirements that are currently in place were not met by the applicant, so that the warrant to video tape, for example, was not obtained properly. The other reason was that the video material was excluded also because it disclosed potential offending that had nothing to do with the warrant itself. In other words, it disclosed other matters that would not have been admissible in that particular trial. That was why they were excluded, and in that case there were also some listening devices that had been installed, and evidence obtained as a result of that exercise was also excluded for similar reasons.

Mr LANGUILLER — Installed by whom?

Ms RANDAZZO — The Australian Federal Police in this particular case, because it was a Commonwealth prosecution. At present our current system is such that in order to install a listening device, or in order to video tape as part of a surveillance operation, it is necessary to obtain a warrant under the various acts — the Telecommunications Act, or whichever act is applicable. The practice with the listening devices, or bugging, is that it is so common in undercover operations that warrants can be issued very much as a matter of course.

One of the other reasons, I recall now, in that particular case, was that material was excluded because there was videotaping of items that were seized, and the items that were seized were not items that were listed on the warrant as being items that were sought. There is a need — and I touch on this in the submission by VLA — to ensure that judicial officers, when looking at issuing warrants and allowing warrants to be issued, must be very careful to ensure that the items that are sought, for example, are listed clearly and that it is not merely a broad description of items sought so that in some respects it could be seen to be nothing more than a fishing expedition. So there are repercussions if warrants are not sought, issued and executed properly. There are financial repercussions as well. That's why the VLA says that there is a need for properly trained, qualified, mature people to undertake searches and entries.

Ms HADDEN — Carmen, in your submission you express concern about the subjective nature of informed consent, and you state that there are many questions that need satisfactory answers: What amounts to informed consent by one authorised person may not reach that standing for another. You then go on to say that this is part of the reason only specifically trained persons should be granted the power to carry out searches and seizures. What is VLA's view on the requirement enshrined in some acts — for example, section 19 of the Fair Trading Act — that authorised officers inform occupiers of their rights, including their right for refusing consent?

Ms GILES — Can I clarify that? The question is really about so-called consent forms that authorised officers are sometimes required to give to occupiers to make them sign, et cetera. For example, the requirement under the Fair Trading Act. Do you think that that requirement should be contained in all legislation, and what

would your solution be, for example, to non-English speaking people or people with intellectual disabilities? Obviously what they are signing may not reflect their understanding.

Ms RANDAZZO — Yes. This was another area that VLA felt very strongly about, and we accept and we say that there should be minimal intervention in people's rights to their privacy, and so forth, but we recognise the need to sometimes have to intrude on that.

VLA is of the view that if one can obtain consent from a person to enter, search and seize items, then that consent should be sought and obtained before carrying out any entry and search. As a general principle, it is much better to have someone's consent to that rather than having to use force or having to go through the legal process of obtaining a warrant.

However, it is a subjective test as to what amounts to informed consent, and if as part of that informed consent — I am not certain what happens under other legislation — but I do know that in the Crimes Act, and certainly in Children and Young Persons Act, there is provision made to safeguard the person's rights in as much as they should have explained to them what it is that is occurring; they should have explained to them what their rights are. VLA sees that all legislation should contain that, and that it should go even further to provide a mechanism whereby the recipient of the warrant, or the person giving the consent, is actually told there are certain consequences or things that that person can do if they are not happy with, for example, the way the entry and search has been carried out.

Ms GILES — A complaint mechanism.

Ms RANDAZZO — Yes. They should be given the name. The situation that is very hotly discussed at the moment is the question of inspectors on trams and trains. At the moment they wear the appropriate uniform to indicate they are employees of the public transport system, but they are not required to give their name or any details as to where or how they can be either contacted or to which body, for example, a complaint about them can be made. They are not given any of that information. People are just stopped and asked for their names and addresses, but it is not reciprocal. Those are the sorts of things VLA envisages should be part of all legislation.

Mr LANGUILLER — Should that be the case, for example in terms of health and safety officers? Do you suggest the health and safety officer who is told there are serious breaches of the act in relation to safety which may well affect the lives and wellbeing of workers, gives the company plenty of notice so they come on site, because your suggestion of having harmony and consistency across the legislation potentially has implications? Do you have any views?

Ms RANDAZZO — I do. The situation you are referring to is where an emergency may have arisen, for example. VLA does recognise the need to carry out these sorts of entries and searches in emergency circumstances, and also that is there is a need at times to do so without notice being given because of the danger of potentially damaging evidence being destroyed, or because of the nature of the investigation itself. That is a very separate situation you are referring to. Yes, without a doubt, there will be times when entries and searches will need to be carried out without notice so that the element of surprise is not lost, and at unreasonable hours, if you like, or hours outside of the norm so that potentially damaging evidence is not destroyed.

Mr LANGUILLER — Just to be clear: consequently you are not suggesting there should be consistency across all acts?

Ms RANDAZZO — I am suggesting there should be some consistency. In a situation, for example, where a warrant is able to be sought and executed so that there is, I suppose, in that respect plenty of time; you've got the time to go before a court and seek a warrant. In that situation, where a warrant is executed, where there is a warrant in existence and it is executed, and in the situation where you believe you have informed consent — and there is no need, of course, to use force — in those situations it should be the case that details are made available at the time of executing the warrant; the person's name, location, where they are from, and if they have a registration number. It may be inappropriate in some circumstances to actually provide a name, but there must be some form of identifying that person. In those circumstances, the non-emergency circumstances, the non-urgent circumstances, there should be consistency in approach across the legislation.

Ms GILES — Can I just follow up on that. You would be aware, Carmen, that there are a number of acts, such as in the fair trading area, where licensees, inspectors, are able to enter without consent for monitoring purposes, and obviously Legal Aid has not actually mentioned those sort of acts; but would you agree that different standards might apply to that sort of legislation? Or is it your view that there need to be the safe civil liberty

protections for those sorts of acts, as for all the others?

Ms RANDAZZO — VLA has not specifically addressed those particular agencies because they do not have any experience with those agencies. However, yes, your question is a very good one. I haven't discussed this with anyone else in VLA, but I would envisage that clearly there would have to be a mechanism whereby for general monitoring purposes a health inspector is entitled to enter and search without notice. That is again different to the situation that I was discussing just a moment ago, where a crisis or emergency may have arisen, and in those circumstances, of course, it is quite appropriate to enter without giving notice and without even seeking a warrant.

The question of informed consent, in VLA's submission, really is limiting itself to the situation where if you went to premises and sought the consent of a person, for example, to search those premises and that person gives you consent, at what point does the person with the power to enter and search say, 'Yes, I am satisfied that this person understands everything; understands who I am, where I am from, what it is I am here to do' and that they do know about this body, for example, that is set up to whom they can make a complaint if necessary? To what extent is that person satisfied of those things? The search should only be proceeded with in the circumstances where that person is satisfied of those things.

It gets back to the previous point I was making, that you need mature, properly trained, highly qualified and accredited people carrying out these searches.

The CHAIRMAN — Carmen, we have allocated just half an hour for each hearing time today. You've spoken very eloquently and eruditely this morning. Perhaps we could follow up with some further questions. You've already responded to one question that has been farmed out, but I will allocate just one minute worth of closing remarks in relation to questions Peter may pose to you.

Mr KATSAMBANIS — You say where the exercise of power involves force or physical interference with people or property police assistance should be sought, but then you also say that you don't wish to see assistance of police being sought and obtained as a matter of course or in circumstances where it isn't warranted. My question is really in two parts. First of all, how can you predict in advance that a situation will involve force or physical interference? And secondly, we have had a fair amount of evidence from some agencies that the way they go about enforcing regulation and legislation nowadays, if they have to execute a warrant, it has got to a stage where they invariably automatically almost bring police along with them. How do you respond to those two issues?

Ms RANDAZZO — 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 the 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, for example, or if there is a risk of personal injury to that person, 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 police. So it is a balance.

I hear what you say about the situation where a lot of agencies, when they get to the stage where there is a warrant that needs to be executed, will probably have to have that executed in the company of a police officer. There would have been some history I would imagine that would have given them, if you like, that belief. If there is history, then without a doubt no-one is suggesting, certainly not VLA, that they should carry out that entry and search without police assistance.

Mr LANGUILLER — I referred to the relationship between agencies, and in particular to the relationship between police officers and other authorised officers, and to the ad hoc and informal relationship between the agencies. I put the following hypothetical to you: Have you ever heard of cases, for instance, where police officers who may well be undertaking an investigation find themselves in a position where they haven't got sufficient evidence for the purpose of seeking a warrant, and on that basis then informally seeking the cooperation — let's say hypothetically, of a Telstra inspector — to go into a place and help informally, and on an ad hoc basis police officers obtain certain levels of evidence which subsequently may lead on to seeking that warrant?

Ms RANDAZZO — Yes, it does occur. I don't believe the relationship is actually all that ad hoc, though, because, for example, there is a means for Victoria Police, to go to Telstra and obtain records of telephone calls and numbers. Obtaining that information from Telstra, or from a Telstra officer, is quite permissible — or whoever is the service provider, and that then is the basis for obtaining the warrant. It is the information that is placed

on the application for a warrant and becomes the basis for obtaining the warrant — say, for example, to put in a listening device or bug the telephone, that sort of thing.

I have certainly come across a situation where that has happened, and in my experience it is not an ad hoc relationship that exists. There is the power to obtain these records by Victoria Police from these agencies, and that can and usually does form the basis for then taking the next step, which is to obtain a warrant to either install a listening device or undertake video surveillance, or whatever.

The CHAIRMAN — Carmen, on behalf of the committee, I thank you very much for your most well-informed evidence here today.

Ms RANDAZZO — Thank you very much.

The witness withdrew.