# PROOF VERSION ONLY

**LAW REFORM COMMITTEE**

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

Melbourne – 22 February 2002

Members

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**Necessary corrections to be notified to executive officer of committee**

**The CHAIRMAN — On behalf of the committee I welcome you to this morning's hearing in relation to our reference on the powers of entry, search, seizure and questioning.**

You will have the opportunity of perusing the transcript and should there be any changes you wish to make, points to amplify upon, or additional information to forward to the committee as a result of questions this morning, feel free to do so.

I understand you have some general remarks that you would like to make at the outset, following which we will run a number of questions by you. It will be an interactive process.

**Mr SHIRREFS** — I am a member of the Criminal Bar Association and represent the committee of that association. The association represents some 320 practising barristers at the Victorian bar, specialising predominantly in the criminal law. Clearly the area of criminal law is an area in which search, seizure and the powers of questioning and arrest are fairly paramount in the evidence-gathering process. I note from the discussion paper that the terms of reference do not specifically relate to a review of police powers, but look generally across the board at a large variety of legislative schemes that provide for search and seizure and the powers of questioning and the like, and whilst the committee of the Criminal Bar Association would have as its main focus areas to do with the criminal law, we are in a position to assist and make comments and recommendations in relation to search and seizure generally.

The comments I want to make from the outset are to do with some basic philosophical concepts in relation to search and seizure as it has developed over the last 100 years or so. Historically, as you are probably aware from the contents of the detailed discussion paper, insofar as the rights of individual citizens, the common law protected those rights and protected those rights quite vehemently through writs of trespass and other common-law schemes to protect the individual from simply having their rights, privacy and property the subject of a trespass.

With the development of modern policing, with interests in upholding community values in the detection of crime, governments have developed legislative schemes, statutory provisions, which abrogate those common-law rights and have permitted the power of search, the power of seizure and under statutory regimes, the power of arrest. In the area of criminal law, certainly in Victoria, it is embodied in section 465 of the state Crimes Act. At the commonwealth level it is in part 1AAA of the commonwealth Crimes Act.

As far as the interpretation of those provisions are concerned, the High Court has been adamant to insist on strict compliance with those regimes as simply representing the balancing exercise between the community's interest in seeing that wrongdoers are arrested, and also protecting those common-law rights. That is particularly in the area of criminal law. So when one looks at, say, the ordinary citizen, or the unregulated entity or organisation, that balance needs to be struck between the community permitting a person to be subject to search, seizure and ultimately arrest, against on the other side the protection of common-law rights and protections that we for centuries have held dear to ourselves to protect our person and our property.

At least two other areas that we have in legislation are included in the discussion paper: industries that are regulated for which licences are held and the consideration of the concepts that perhaps need to be balanced there, where the community gives to an individual or to an organisation the right to carry out and practise in a certain area of industry and whether or not as a result of being a license-holder or in a regulated industry, different considerations apply. Where do you draw the line? Clearly that seems to me to be an issue that is fairly well focused in the forefront of your minds as you look at the schemes that operate throughout the state.

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 that contained in 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. What can be contained in warrants, what can be seized, what cannot be seized, what is to happen thereafter — a very complete piece of legislative drafting. One criticism that emerges from the discussion paper and also from the Senate committee that that scheme does not have is that when items are seized, you come back before the issuing officer, be that a justice of the peace or in most instances, a magistrate. That operates in Victoria under the Crimes Act and also under the Magistrates Court Act, which is a very important independent, arms-length filtering process to ensure that there is not a disregard for the conditions that govern the exercise of search and seizure and that what is ultimately taken can be taken and therefore used according to the lawful constraints or obligations that are imposed by the legislation.

To the extent that magistrates in Victoria fulfil that function, the committee regard that as a very important function to exist and to be utilised in relation in search and seizure generally. The committee also regards insofar as

any appropriate model is concerned that the commonwealth model represents probably the greatest control that exists legislatively by setting out rights and obligations of most legislative schemes in Australia, certainly far greater than exist in Victoria.

To that extent perhaps although you are not looking at police powers in these terms of reference, generally section 465 of the Crimes Act perhaps needs to be examined in comparison to that which exists in the commonwealth Crimes Act where there is far greater regulation with the rights of those who seek to search and setting out the rights of those whose property is being searched. Under the commonwealth regime three conditions need to be satisfied before items can be taken. They are specified in the warrant. They are that you are searching for specified items that are listed on the warrant. The second condition is that the items that are being searched for and seized relate to nominated persons and they relate to nominated offences.

These are clearly warrants where there is a suspicion of criminal wrongdoing and for which items, if they are seized, may well become evidence at some later process. But the specification in those three conditions of items that fall within categories to be seized, be they accounts, particular types of documents, for example, phone records, is that they also relate to nominated persons and specific provisions. It gives a measure of regulation and control as much as one can, to govern the exercise of search and seizure, and provides another measure of protection to the occupier or the person whose premises are being searched through and seized.

In relation to other areas outside the immediate criminal jurisdiction, we look at a variety of acts set out in the discussion paper, being pieces of legislation 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 persons are being protected and the way in which 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 no body or no overseeing of that prior to its taking place, nor in the course of the search taking place. Some acts that fall into that category would be the pharmaceutical situation, the fisheries and there are others where there is no requirement for there to be a warrant. The committee would suggest that perhaps as far as balancing rights of individuals against the industry's or the community's right to protect its industry, that warrants should ordinarily be required — as primary rule warrants are required — before a search is permitted, be that a suspicion warrant of the type that are referred to, whether it is a suspicion of wrongdoing. Bear in mind that some of these acts carry penal sanctions. For instance, the Fisheries Act carries penalties of up to six months in prison for a person who fails to comply with the condition of the licence. Those conditions are set out as core conditions in the regulations to the act. So a person could find themselves not only having a conviction which goes onto their licence and will potentially diminish the value of their licence — and there is a lot of money tied up in licences under the Fisheries Act — to potentially finding themselves subject to penal sanction in circumstances where there is no warrant condition.

**Mr LANGUILLER** — May I just interrupt you there. How practical would it be, for example, for a health and safety officer who drives around the regions and drops into places — building sites or other areas — to continually and on an ongoing basis, to obtain warrants?

**Mr SHIRREFS** — How often do they do it as a matter of practice? I do not know that there are any statistics on that. Whether they are delivered every day of the week, going around to building sites and just walking on I do not know. I understand the difficulties that exist in that area. 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.

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. That perhaps is the area where there is the biggest problem in that the inspector would come along who does not require a warrant. The person whose premises are

being inspected does not really know what his obligations are and it may well be that powers are exercised beyond those that the legislation permits the inspector to in fact engage in. At least with a monitoring warrant, there is a document in the possession of the inspector that can be provided to the occupier which specifies rights and obligations for both sides. It is a very important piece of paper because it would show to the occupier that it is a lawful search, that it is sanctioned by somebody other than the inspector himself, and it sets out what the inspector can do and what he should do.

If items are then seized, in accordance with the general practice in Victoria they would be brought back before some independent person so they can be dealt with according to law.

**Mr LANGUILLER** — For the purpose of keeping a register to follow up activities — —

**Mr SHIRREFS -** Yes. Maybe it is a monitoring warrant. Something to go on and to see whether or not this particular premises is complying with their obligations under the Health Act or some other regulation or act which controls what they are doing. If in the course of conducting the search, exercising that monitoring, it becomes apparent that something is being done in contravention of the act which constitutes an offence, clearly the officer conducting the search would be entitled, if it fell within the terms of the warrant, to seize items as evidentiary material that they came across in the course of their monitoring of the premises. That would then be taken back before the person who issued the warrant or before a magistrate, if that was the issuing officer.

I think the arming of inspectors with warrants, with documents, is a very important step in ensuring that there is compliance with the regime that enables him to engage in the search and potential seizure of items. It also informs the occupier, the owner, the licensed person, what is taking place, so that they know that the parameters of rights are in fact not being crossed.

**Mr STENSHOLT** — There are some examples in legislation whereby inspectors have the right to enter, search and seize but they also have the facility to obtain a warrant to do exactly the same thing. We were advised by one person, for example, that they have never actually obtained a warrant because they find it very useful to say when they do their inspections, 'Otherwise we will go and get a warrant'. They find the fact that they can get a warrant, a useful means of obtaining compliance without the warrant.

**Mr SHIRREFS** — So it becomes a lever that they can use to go ahead and do what they want to do without questions being asked. That is a problem. The committee would suggest in the circumstances of which I am presently speaking, of where you have inspectors going on to premises that are regulated by act or subordinate legislation for which there may also be licences, that prima facie in the ordinary situation a warrant should be obtained and that only in exceptional circumstances should an inspector be permitted to enter and search and seize. An inclusive definition of those exceptional circumstances could be contained within the act, so it is not exclusive. But exceptional means exceptional. In other words, it may well be that they have just received information of a most compelling nature that there is something going on in a particular dwelling, shop or factory, so that if they do not go in right away there would be evidentiary material of something serious that is going to take place that they otherwise could not stop, or there would be the potential to lose material or evidence if they are required to go away and get a warrant in the meantime. That would be an unusual situation.

**Mr STENSHOLT** — There are examples of legislation and the right of entry, search and questioning relating to a premises when it comes down to a private dwelling, where they have to go and get a warrant. There are several cases in legislation which make that distinction between premises where a business is conducted and a private dwelling. You would obviously prefer a more comprehensive one, rather than the exception.

**Mr SHIRREFS** — I cannot understand any argument which would say that we should not have warrants at all. I can understand the difference between suspicion warrants and monitoring warrants — monitoring in the case of industry, albeit the pharmaceutical industry or the like. But the importance of the warrant is the document itself which specifies that which can be done so that at least, as I said earlier, the person whose premises are being searched and monitored knows from the document that is being provided to him or her that which can be done.

**Mr LANGUILLER** — One of the typical arguments is that it is impractical. Would you envisage that, for example, this monitoring warrant may be obtained on the phone or electronically given the nature of new technologies? I would imagine that by and large — and this is my assumption — that there would not be strong objection to working under a monitoring warrant, if that is what we call them, but the practicality of it is one which appears to be used as an argument against having to obtain one each and every time.

**Mr SHIRREFS** — I can understand why they would argue against it because they are the people who

exercise the powers they have without anything that would stand in their way. But from the point of view of the police in Victoria, they are able to obtain a warrant at any time during the day or night via the fax machine and the telephone. They can make an application to a magistrate over the phone. They prepare the warrant and the affidavit or statutory declaration in support of it. They fax it through. It is faxed back and they have got it in a matter of minutes. I think the practicality is an argument of convenience. There seems to be no valid reason why a monitoring warrant could not be obtained on the previous day, nominating the premises that are to be monitored in the course of that day.

**Mr LANGUILLER** — Would you care to comment on electronic obtaining of warrants? Do you have a view on that?

**Mr SHIRREFS** — That can be done easily. It can be done via email.

**Mr BOWDEN** — Justices of the peace used to be able to hear and issue warrants up until the last 15 years. I issued many before that right was taken away from justices.

**Mr SHIRREFS** — Maybe they should be reconsidered.

**Mr BOWDEN** — Maybe they should be re-allowed to hear, and that way there would be a formal hearing under evidentiary standards with an authorised person to give some credence. I have some quiet reservations about the obtaining of a warrant without a need to go before a judicial officer, but that is a personal view.

**Mr SHIRREFS** — I do not argue against that. Maybe they should be reconsidered so justices of the peace are again able to provide that independent and judicial mind to the task at hand.

**Mr KATSAMBANIS** — Warrants tend to have special significance in our legal system. What we are really talking about — —

**Mr SHIRREFS** — It is an authority.

**Mr KATSAMBANIS** — Yes. What we are really talking about is some sort of formal documentation that sets out the limit of a particular monitoring search and outlines rights and obligations of the inspector and of the premises and the occupiers of the premises that are being inspected. In our investigations that is something that tends to be a void at the moment. It is something that tends to operate in theory but not in practice, and whether we call it a monitoring warrant or an authority — —

**Mr SHIRREFS** — Don't call it a warrant!

**Mr KATSAMBANIS** — It at least evidences the fact that the search has taken place and the rights and obligations of the respective parties.

**Mr SHIRREFS** — An authorisation under the act to enter and search.

**Mr KATSAMBANIS** — I would see it as a work flow matter, from a management point of view anyway.

**Mr SHIRREFS** — Insofar as who provides that authority, that comes back to the same question. Who authorises the inspector to do that which he seeks to do, and following on from what Mr Bowden said, that justices of the peace up until 15 years ago were regularly signing off on these documents. I see a lot of value, indeed importance, in having it done through an independent person.

**Mr STENSHOLT** — It would also cover several other aspects. There are some variances in terms of provision of authority, like name, address and where you come from, and also provision of information, making it clear under what circumstances and the purpose of entry. There is some variance in the legislation as to what explanations have to be given.

**Mr SHIRREFS** — If you have a model document, you can set out in that document a reflection of what is said to be the balancing exercise between the rights of the community, the rights of the industry and the rights of the individual, bearing in mind that licence-holders in licensed industries pay money for their licence. With that comes the privilege to operate in the industry, but that does not mean they should be exposed carte blanche to inspectors to at will inspect everything that they do without protection. But they pay money to obtain their licence and with that comes some privileges to protect them as well.

**Ms McCALL** — I think that is probably the issue that I have a particular interest in and where you and I may come from a different perspective. There is an issue of what the community expects an inspector to do and the protection of them as members of the general community. So there is the issue of whether someone is conducting a business that is illegal or doing things in an improper manner, and the rights of the person who is conducting a legitimate business. That is where there is the conflict because I would hate to suddenly discover that we had become so regulated that you cannot actually knock on the door and say, 'Hello, I am from wherever it is and by the way, because I have got a warrant, I can come in', that you are eliminating the rights of a person to do a spot check. The conflict that the committee is up against is: do you regulate it so that nobody can do anything without a piece of paper which tells you exactly what they can do? The community may turn around and say that that is going to slow down the process or it is going to pre-warn them or it will do a number of other things to the extent that you may indirectly protect the illegal operator of the business in the interim. Do you follow what I am saying? It is a two-pronged argument and it is the civil liberties argument trying to protect the community against the frivolous employer. Do you protect all the employers including the villains by doing these other things? Do you understand what I am trying to get to?

**Mr SHIRREFS** — It is a hard balance.

**Ms McCALL** — I am the one who says that I do not like warrants except in certain cases, and I like the idea of inspectors having some power to enter unannounced.

**Mr SHIRREFS** — But in some acts inspectors have absolute power.

**Ms McCALL** — They certainly do!

**Mr SHIRREFS** — And who regulates the inspectors when they are on the property?

**Ms HADDEN** — No-one.

**Ms McCALL** — And that is what we are trying to come to.

**Mr SHIRREFS** — That is the problem.

**Ms McCALL** — You understand the conflict?

**Mr SHIRREFS** — I understand the conflict, but the balance can be struck. I do not see difficulties for inspectors. They will probably have an idea at the beginning of the day about where they are going to be going, which premises are going to be looked at on that particular day. That is something that they know, and perhaps a justice of the peace can be informed of it, somebody independent in authority can be informed of it, so at the beginning of the day they have their authorities obtained and they set about doing what they want to do, which they would ordinarily be doing without such a document anyway. I see no difficulty in that as a practical measure.

**The CHAIRMAN** — Thank you. Are there some broader opening remarks that you would like to make at this juncture, or would it be appropriate — —

**Mr SHIRREFS** — I think we have probably engaged in that exercise. I have not touched on issues of self-incrimination, nor have I spoken about legal professional privilege. I notice in some of the acts, for instance, self-incrimination is abrogated to the extent that a person is required to answer, but there are protections.

**The CHAIRMAN** — I have those questions allocated among my colleagues.

**Mr SHIRREFS** — Perhaps we can just go into the questioning session. It might be for the best, rather than any further remarks from me.

**Ms McCALL** — What is the association's view on the abrogation of the privilege against self-incrimination which exists in some legislation?

**Mr SHIRREFS** — We are fundamentally against it because the right to silence 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. Fundamentally our position is that the right to silence is paramount, and indeed persons should be informed of that

right.

**Ms McCALL** — Like, for example, the former CEO of Enron refusing to appear in the United States of America?

**Mr SHIRREFS** — He has his constitutional right.

**Ms McCALL** — Yes, indeed. Would you see any time when abrogation of that self-incrimination could be justified at all?

**Mr SHIRREFS** — No.

**Ms McCALL** — So, no exceptions?

**Mr SHIRREFS** — No.

**Ms McCALL** — Okay.

**Mr KATSAMBANIS** — In a lot of our acts there is a clear distinction between verbal self-incrimination, if you like, and the production of documents, so there is a protection in some acts from having to say anything — the right to silence is protected — but there is no analogous right to keep documents away from investigators. Do you see that distinction as being legitimate?

**Mr SHIRREFS** — Yes, I do. 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 justice system that has developed over centuries, it is an adversarial system where the presumption of innocence is paramount. It is the golden rule, if you listen to Rumpole.

**Mr KATSAMBANIS** — But do you think there is a difference between words out of their mouth and documents that they pass up?

**Mr SHIRREFS** — That is a different issue. 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. You have to go to the core reason of why we have the right to silence. It is because of the nature of our system of justice. The state brings the accusation, the state has the obligation to prove it to the requisite standard, which is ordinarily beyond reasonable doubt, depending on the regime, and the presumption of innocence is paramount. Once you start to remove rights to silence and force people to answer questions, it really does undermine the whole nature of the way in which our system of justice operates.

**Mr STENSHOLT** — Is that absolute? Several acts have requirements to provide name and address with penalties for providing false ones.

**Mr SHIRREFS** — The police can stop you in the street. They can ask your name and it is an offence not to answer. It did not used to be, but it is now.

**Mr STENSHOLT** — And age?

**Mr SHIRREFS** — Yes.

**Mr STENSHOLT** — So they would have to answer those questions, but beyond that?

**Mr SHIRREFS** — I have difficulties with that also, but I have not discussed that with the committee. It is my own philosophical belief that you should not necessarily have to say who you are. The law has changed in relation to that. It depends on what we are doing. If we are talking about regulated, licensed industries, that is a different consideration. Are we talking about citizens in the street?

**Mr STENSHOLT** — The big example at the moment is the blitz on the trains and the trams. At the last one 12 000 people were picked up, 500 were detained and 43 ended up being arrested. This was over

providing their name and address and for further questioning. If the 12 000 decided not to give their name and address, then there would be 12 000 detained.

**Mr SHIRREFS** — Because it is an offence not to do it.

**Mr STENSHOLT** — Correct.

**Mr SHIRREFS** — You arrest a person because you believe on reasonable grounds that they have committed an offence under the act. You then take them into custody and question them. If they do not say who they are, ultimately you find out. In the case of the gentleman charged with murder recently whose identity was completely unknown, it was a lengthy process, but ultimately they found out who he was. I would think that is the exception. Having done criminal law for 20 years, I have found people invariably give their names; it hardly ever happens that they do not. It is usually the case that they have some form of identification on them anyway, so you can find out quite easily, but that is when you have taken them into custody for questioning in relation to the suspected commission of an offence. But that takes us away from the question you were asking.

**Mr LANGUILLER** — Since 11 September it has been suggested that authorities around the world need to step up their law and order and tighten up issues of security and consequently identity and so on. Surely you would take that into account? The public is almost demanding that of us.

**Mr SHIRREFS** — As to who these people are? What is your name? It comes back to balance. It is a difficult one to deal with philosophically. The fact is that there have obviously been serious crimes committed over many years. The 11th of September is the most recent example, and it has been a horrific situation for everyone, but whether you necessarily go and change fundamental beliefs or principles as a result of it is much harder to resolve. I certainly would not see that as a basis for changing the way in which our criminal justice system operates, not in this country.

**Mr KATSAMBANIS** — Do you see any distinction in the preservation of the right to silence generally as opposed to the right to silence of those individuals or corporations running regulated, licensed businesses.

**Mr SHIRREFS** — That is the point I was coming to. In circumstances where people have a licence 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. Those obligations being when asked questions in relation to aspects of their work to answer those questions. Some of those are reflected in the legislation, where they are required to answer certain questions, but those answers cannot be used in any criminal proceedings against them. Those protections are there, but it depends very much upon what it is that is being questioned. If they are being questioned in relation to matters that could lead to penal sanction because of offence provisions in the act, then they should not be put in the position of incriminating themselves from their own mouth in relation to the commission of offences.

**Mr KATSAMBANIS** — But generally you do not think that an individual who is licensed to run a business is complying with that licensing regime?

**Mr SHIRREFS** — Sorry?

**Mr KATSAMBANIS** — It seems to me that you are suggesting that this presumption of innocence can be essentially abrogated because somebody is licensed to do something.

**Mr SHIRREFS** — No, I am not saying that. The presumption of innocence must surely still be there. I am simply saying that there needs to be a balance struck between the situation where you have a licence-holder, who is running an industry and is required to comply — —

**Mr KATSAMBANIS** — I am sorry. Apart from keeping the records and documentation that is required under the licensing regime — —

**Mr SHIRREFS** — Why should it be any different?

**Mr KATSAMBANIS** — Why should it not be any different?

**Mr SHIRREFS** — Well, it probably should not be, particularly if they are being asked questions that could reveal that they have committed an offence. The position is that they are required to comply and provide documents. There is an obligation to enable inspectors to come and inspect. Beyond that they should not be

required to go any further.

**Mr KATSAMBANIS** — I guess we can move on to the somewhat associated issue of legal professional privilege.

**Mr SHIRREFS** — The development of the most recent cases in the High Court have really strengthened that as a fundamental principle of law, that privilege against self-incrimination. It is not a rule of evidence, it is not a rule of practice, it is a principle — and it is a principle that has been held to be paramount in our system of justice and the administration of justice, be it criminal or otherwise. I would steadfastly adhere to that, and our association adheres to that principle being attained — and it is in Victoria, generally speaking, and it is in the commonwealth regime, generally speaking.

In Victoria where as a result of the seizure of documents you come back before the magistrate, there is that filtering process and the situation exists to be able to raise questions of legal privilege with the magistrate so that it can be determined. That does not exist in the same way with the commonwealth situation. There are practices in place. For instance, there is a policy that exists between the federal police and the commonwealth Director of Public Prosecutions — I think it is with the Australian law council — that if items are seized or in the course of a search items are found, and it is suggested by the person who is the occupier that these items may well be subject to legal professional privilege, they are quarantined into a particular bin, or they are labelled as such, and are put to one side.

A process exists whereby if the point is still being pressed that the Director of Public Prosecutions or the federal police appoint an independent lawyer on one side, and somebody appears on behalf of the occupier who is making the claim, and between them they try to resolve the issue. Usually an inspection of the documents makes it quite clear whether they fall within the ambit of the privilege or they fall outside the ambit of the privilege. It is not an issue that really causes much difficulty. If the principle is to be adhered to, and our position is that it should still be adhered to, there are really no practical problems in ensuring that that privilege is upheld and maintained. It is directed to communications between lawyer and client provided they are not in the furtherance of any criminal activity. There have been many instances in recent years where there have been conversations between lawyers — in some instances barristers and in some instances solicitors — where the conversations have come from their chambers or their office which have been tape-recorded by way of listening devices, for which claims of legal professional privilege have been made, but have been rejected on the basis that those conversations were for the purposes of some criminal activity. So the privilege is lost. But it is important that organisations and individuals are able to consult with respect to the law, consult with respect to their position and have the confidentiality of those discussions protected. Going back to the philosophical basis of our adversary system and the privilege of self-incrimination. It is a by-product of that.

**Mr BOWDEN** — I would like to spend a little time on the issue of informed consent. Many of the Victorian acts really give authorised officers the ability to request, require and insist on access. Often they seek consent from the people who are occupying premises, and often they do not have a search warrant so there is a difficulty there. Does your organisation have a view as to what might be a good practical way of ensuring that that consent is recorded in a balanced and fair way? Maybe there is a document that the occupier or the person in charge of the premises could sign that informs that person and records that consent was given on an informed basis.

**Mr SHIRREFS** — As an alternative to a warrant/authority to enter that we were speaking about previously?

**Mr BOWDEN** — Yes.

**Mr SHIRREFS** — In situations like Mr Stensholt spoke of where you can have informed consent to enter. You also have situations where they can go get a warrant if that consent is not given, and they use that as leverage to get in. You could have a document that sets out the rights and obligations on both sides that is required to be read to the person.

**Mr BOWDEN** — On that first occasion?

**Mr SHIRREFS** — On that first occasion that they understand it. One of the difficulties you may have is a language difficulty — for example, a proprietor may be running a hamburger shop in Sunshine and the health inspectors want to come and see whether or not the fat is too many days old or whatever, or how many flies there are in the kitchen, and the proprietor does not speak very good English.

**Mr LANGUILLER** — They are great cooks though!

**Mr SHIRREFS** — They may be wonderful cooks. They are the best hamburgers you get on a Friday night — exactly! But who protects them? If an inspector comes in wearing the uniform or carrying the badge of authority and the proprietor does not know what is going on, but understand enough to say that the inspector can come in but they do not really know much other than that, who protects their interests?

**Mr STENSHOLT** — The act actually says that any signs in those shops that are not in English have to be translated by the proprietor for the inspector into English.

**Mr SHIRREFS** — The onus is on the proprietor to speak English? You are kidding!

**Mr STENSHOLT** — I am not.

**Mr SHIRREFS** — In this state we cannot have shop proprietors who do not speak English, so it seems.

**Mr KATSAMBANIS** — From that point of view as well, a lot of people who may not necessarily have a good command of English come from cultures where there is a more pressing need to comply with any form of higher authority.

**Mr SHIRREFS** — There is a fear of higher authority because of where they have come from. So I come back to the question: who protects them?

Coming back to the notion of informed consent being a documented thing, where there is a requirement that the information be properly conveyed to them as to what can happen to them if they consent to it, and what can take place during the course of a search if they consent to the entry, and that if you do not consent the law permits a warrant to be obtained, it puts it into the realm of the unknown to this extent: it takes out of the equation the independent issuing officer in the case of a warrant/authority to enter, be it the justice of the peace or a magistrate and puts it as between the inspector and the proprietor who have to sort it out between themselves. But there would clearly be circumstances where the proprietor does not really have the mechanisms to deal with that situation particularly well, either through lack of language, lack of sophistication, problems as a result of their background and where they came from, et cetera. It still leaves it in the realms of the unknown to that extent. You may say that there are requirements in the act that it has to be translated into English. But who is to do that? You would have to get a translator there, somebody who is authorised to do it, who is independent, who is properly trained, who carries a level 3 certification in that particular language. It becomes fairly cumbersome.

I suppose those same problems exist anyway in terms of talking about warrants and authorities to enter where the person upon whom it is being served does not speak the language. Our position would be that it is only proper and fair that the person whose property is being searched know precisely what it is that the law permits the inspector to do, and the law permits them to do, either by not giving consent following proper information or in the case of a warrant to enter, making sure that the person conducting the search properly adheres to that which the warrant permits.

**Mr LANGUILLER** — But the suggestion is, if I may interrupt you, that those individuals would be obtaining licences for the purpose of carrying out a business and implied in the obtaining of that licence is that they understand they might be the subject of an entry for search by an inspector. What is the difference between the two?

**Mr SHIRREFS** - They understand that by obtaining the licence 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.

**Mr LANGUILLER** — I have a question in relation to the cooperation and relationship between the various agencies and the supplying of information from one agency to the other. I will give you one example that we have frequently come across. I am a health and safety inspector. I walk into a site and in the corner I do not think I see flour, but I think I see something else — heroin. What are the protocols for me to provide that information to other relevant authorities, including my own, and the cooperation between the agencies? In my personal view, this committee has received inconsistent reports in relation to the internal procedures and protocols

for the purpose of registering that information and for the purposes of passing that information on to other authorities. In addition, on our recent trips to New York, London and a couple of other cities — I am not sure whether on or off the record — I heard anecdotal examples such as, 'I am a cop. I do not have sufficient evidence to enter a particular premise. I call on my Telstra or equivalent officer and I ask him to do a certain job for me until such time as I can do the job, obtain a warrant and come into the place.' In Australia in my judgment, I am not yet satisfied that the agencies have standard, consistent protocols and morals which are used for the purpose of registering that information, keeping records of that information and passing it on to other authorities and equally assuring the public that when and if that information were required, that we could obtain it and know exactly what happened from A to Z.

**Mr SHIRREFS** - The example you just spoke of where off the record in New York it was suggested there was an improper purpose and the Telecom person was going in pretending to conduct a check on the telephone, but really going there as an agent of the police officer who did not have the warrant of the basis to enter himself. Clearly that is an improper purpose. I would have thought that it is hard to prevent that happening if you have a situation, as we have in this state, where inspectors can go onto premises without the requirement for a warrant or other authority.

As far as the dissemination of information between agencies is concerned, I would imagine that the community would say that if information is obtained that is relevant to another area of law and there is evidence of wrongdoing in that area of law, there should be some requirement to pass it across or an ability to be able to do so. But you have to put in place mechanisms to ensure that it is properly noted in various information reports and documented in some accountable document, that is traceable from one agency to the next, and noted when it was received and what the information was. I do not see that the committee would have a view that there should not be dissemination between agencies because that would be artificial and I think probably not in anybody's interests. But there needs to be mechanisms put in place to ensure that when it does happen, proper, accountable records are kept.

Accountability is the important thing, all the way through. There must be accountability so that if a health inspector goes into a shop and sees something, not relevant so much to his aspect of inquiry but clearly relevant he believes to perhaps a police officer's area of inquiry, he should make contemporaneous notes, he should refer perhaps to somebody higher up within the health division that he is in and then go through the proper channels to whichever police department is the appropriate department to report it to. So long as it is properly documented. He may then become somebody who is relevant to the basis for obtaining a warrant as a result of the passing on of information. After documenting contemporaneously, an application is made to a magistrate to get a warrant to enter on the reasonable suspicion that there is contained within the premises drugs contrary to the Drugs, Poisons and Controlled Substances Act.

**Mr LANGUILLER** — Thank you.

**Ms GILES** — Can I just ask you a final question. It is really a point of clarification. In your written submission you say that the association favours the development of principles and the development of consistent statutory provisions.

We have received evidence from a couple of organisations, including the Law Institute of Victoria that such consistency could be achieved, for example, by reference to a standard enshrined in an act of Parliament. I wondered whether you had any views on the form it should take. Whether they should be formalised in an act of Parliament, or simply guidelines, or whatever else.

**Mr SHIRREFS** - I think they should be formalised in an act because that is a reflection of the wishes of the community through the Parliament of this state. The act of Parliament would set out what is required for the purpose of the issue of a warrant, if a warrant is involved, and the purpose of search and seizure, so that if challenge is ultimately made to the steps undertaken because it was beyond law or items were taken contrary to the provisions which governed the search, those provisions in my view, and our view, would be in an act of Parliament. That specifies what the law is.

**The CHAIRMAN** — Mr Shirrefs, in the absence of any further questions we thank you for your time this morning and for giving us a detailed insight into the view of the Criminal Bar Association on our terms of reference.

**Committee adjourned.**