



LAW REFORM COMMITTEE

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**Warrant Powers and Procedures**

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**Parliament of Victoria**

**Law Reform Committee**

Warrant Powers and Procedures

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## FOREWORD

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While warrants are one of the most basic and frequently used tools of the justice system, most members of the community will have no experience of them. For the majority of people, it is not until they come into contact with a warrant that they become aware of their pervasive nature and the significant intrusions into private property and civil liberties which they authorise. Warrants can authorise a search of your home, seizure of your property, the interception of your phone calls, your arrest and a number of other acts which would be illegal without a warrant's authority.

The Committee has sought to balance the legitimate need for warrant powers for criminal law enforcement and some civil enforcement purposes, against our individual and human rights which the community expects will be protected unless there is good reason for overriding these rights in the public interest.

In considering the appropriate balance between these competing interests the Committee focused on the fairness of warrant powers and procedures and also on the related issue of creating greater consistency between numerous pieces of legislation which authorise various types of warrants. The Committee has made recommendations which will make both the source of the law which authorises a warrant and the steps involved in enforcing that warrant, more logically located in legislation, and hence more readily accessible and understandable to both legal practitioners and other members of the community.

The Committee has undertaken this task in a climate of heightened awareness of the need for adequate law enforcement powers to respond to perceived increased security risks associated with terrorist activity. The Committee has been particularly conscious of the need to appropriately balance the protection of civil liberties whilst ensuring that the police can properly undertake their law enforcement role in an environment of rapid developments and potentially high stakes.

The Committee has sought to establish the fundamentals of a fair and consistent legislative regime for the use of warrant powers, which should apply in all circumstances unless sufficient justification can be provided to depart from these fundamentals. The Committee believes that this approach will go some way to preventing the incremental expansion of powers which can occur, and in some instances identified by the Committee has occurred, when each decision to expand existing powers is based primarily on the particular practical necessity of the situation considered in isolation from other comparable powers. By emphasising the need for a consideration of fundamental principles on each occasion that powers are extended, the Committee believes that both law enforcement needs and civil liberties will be appropriately considered and protected.

During the course of this inquiry the Committee has been fortunate to receive substantial submissions and to hear important evidence in public hearings, from a large number of stakeholders. This material has informed the direction and final recommendations of this inquiry and I record here our gratitude to all those who had input into the inquiry. I would also like to thank the members of the Committee for the considerable time and effort they invested in the careful consideration of this report and in formulating law reform in this area.

The original research and writing of this report was undertaken by Jon Cina whose detailed exposition of the issues was of great assistance to the Committee in determining the key directions of this report. A report of this magnitude also requires a team effort. Both Michelle McDonnell and Nathan Bunt have assisted with drafting sections of the final report and Merrin Mason has brought her considerable experience and expertise to the key reform issues confronting the Committee. Jaime Cook has provided considerable administrative support to the team throughout this inquiry. The report could not have been produced without the effective work of the staff team.

The Committee hopes that this Report will result in reform of warrant powers which will produce greater fairness, consistency and efficiency.

I commend the report to the Parliament.

**Rob Hudson MP**  
**Chairman**

## FUNCTIONS OF THE COMMITTEE

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### *Parliamentary Committees Act 2003*

#### 12. Law Reform Committee

(1) The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with—

- (a) legal, constitutional or parliamentary reform;
- (b) the administration of justice;
- (c) law reform.

## TERMS OF REFERENCE

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Referred by the Governor in Council on 3 June 2003.

The Governor in Council, under section 12 of the Parliamentary Committees Act 2003, requests that the Law Reform Committee of Parliament inquire into, consider and report to Parliament on:

1. Victoria's existing warrant powers and procedures, including arrest warrants, warrants to seize property and search warrants; and
2. whether the existing laws should be amended, and in what way, having particular regard to the need to promote fairness, consistency and efficiency.



# RECOMMENDATIONS

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**Recommendation 1. .... 63**

That legislation be amended to ensure that application procedures for search warrants are consistently specific, using section 80 of the *Confiscation Act 1997* as a model.

**Recommendation 2. .... 68**

That the Government develops standard search warrant application forms in consultation with the Magistrates' Court of Victoria, Victoria Police and other interested stakeholders.

**Recommendation 3. .... 71**

That legislation containing warrant provisions be amended so that applications for search warrants brought by police must, as a minimum standard, be brought by a police officer of or above the rank of senior sergeant.

**Recommendation 4. .... 71**

That the Government considers an appropriate rank requirement in cases where the effect of Recommendation 3 is to undermine the purpose of the powers exercisable under a search warrant.

**Recommendation 5. .... 75**

That legislation be amended to provide that individuals subject to a search warrant are able to apply to the Magistrates' Court to view the Magistrates' Court's copy of application documents.

**Recommendation 6. .... 75**

That the Government and Magistrates' Court, in consultation with other relevant stakeholders, establish a system to facilitate the implementation of Recommendation 5, with appropriate safeguards in place and having regard to section 13 of the *Search Warrants Act 1985* (NSW) and associated regulations.

**Recommendation 7. .... 79**

That Victoria Police amends section 7 of the Victoria Police Manual by inserting provisions that emphasise the purpose of warrants, the necessity for accuracy of affidavits, and that they should be supported by records of observations or other information.

**Recommendation 8. ....83**

That the Office of Police Integrity uses its own motion powers to investigate the prevalence of the use of false or misleading evidence in support of applications for search warrants and of unjustified night time executions, and make appropriate findings and recommendations.

**Recommendation 9. ....83**

That the Department of Justice resources a project in which, for a period of at least 12 months, Victoria Legal Aid record information about allegations of the use of false or misleading evidence in support of applications for search warrants and that an analytical report on the data be prepared and published. That the Victorian Aboriginal Legal Service and community legal centres consider joining the recording and reporting study.

**Recommendation 10. ....86**

That legislation be amended to make it a criminal offence to knowingly use false or misleading information in an application for any type of warrant, and that the penalty for such an offence be a maximum of two years imprisonment.

**Recommendation 11. ....91**

That the *Magistrates' Court Act 1989* search warrant provisions be amended to include a general power to apply for search warrants by telephone, fax or other similar means if the applicant believes it is necessary because of urgency and there is no practicable alternative.

**Recommendation 12. ....104**

That section 92(2) of the *Crimes Act 1958* be repealed.

**Recommendation 13. ....113**

That legislation (except that referred to in Recommendation 14) be amended to provide that the burden of proof required for the issue of a warrant be that the issuing officer is satisfied that the applicant believes on reasonable grounds that there is, or will be within 72 hours of the issuing of the warrant, evidential material on the premises to be searched.

**Recommendation 14. ....113**

That legislation retain or incorporate a different burden of proof only where this departure from the standard recommended above can be justified as necessary to support the purpose of the warrant.

**Recommendation 15. ....119**

That the Office of Police Integrity uses its own motion powers to investigate the prevalence of the inappropriate issue of search warrants and make appropriate findings and recommendations.

**Recommendation 16.** ..... **119**

That the Department of Justice resources a project in which, for a period of at least 12 months, Victoria Legal Aid record information in cases where it appears that search warrants were issued inappropriately, and that an analytical report on the data be prepared and published. That the Victorian Aboriginal Legal Service and community legal centres consider joining the recording and reporting study.

**Recommendation 17.** ..... **120**

That relevant Victorian Courts include the provisions of s12A(2)(a) of the *Search Warrants Act 1985* (NSW) in their Practice Directions on warrant procedures.

**Recommendation 18.** ..... **127**

That primary legislation be amended to require each agency with warrant powers to create and maintain a search warrants register and record the following information in it:

- (a) number and dates of ordinary and telephone applications made, withdrawn, granted, rejected, including reapplications;
- (b) details of the legislative provision authorising each warrant application;
- (c) basis for the reasonable belief justifying each application;
- (d) details of any offences relevant to each warrant;
- (e) date of issue and name of issuing officer;
- (f) date, time and duration of the execution of each warrant and name of executing officials
- (g) name(s), if known, of any person(s) present on the premises and any arrests;
- (h) details of any use of force;
- (i) results of the search, including description and details of any disposal of seized items;
- (j) statistics on proceedings initiated as a result of the use of warrant powers;
- (k) number of complaints received and how resolved;

and that the Government consider what other information should be recorded.

**Recommendation 19.** ..... **127**

To facilitate effective comparative analysis of agencies' practices, that the Government work with agencies to develop a standard template on which to base search warrant registers maintained pursuant to Recommendation 18

**Recommendation 20.** ..... **127**

That agencies prepare a de-identified version of the data contained in search warrant registers and publish it annually on their websites and report it to Parliament, preferably as part of their annual reports.

**Recommendation 21. .... 128**

That the Ombudsman and the Office of Police Integrity review the data periodically and make appropriate recommendations.

**Recommendation 22. .... 128**

Without prejudice to any proceedings relating to the warrant, that individuals subject to a search recorded in a search warrant register have a right of access to the recorded information, suitably edited to remove information that would identify agencies' personnel or compromise agencies' operations.

**Recommendation 23. .... 130**

That the Magistrates' Court's search warrants Register be amended to record:

- (a) whether a warrant application is returned to the applicant for further evidence to be provided;
- (b) the date of decisions to grant, reject or return applications for further evidence to be provided;
- (c) the number and dates of in person, fax and telephone applications made, withdrawn, granted and rejected, including reapplications.

**Recommendation 24. .... 130**

That a statistical summary of the Magistrates' Court's search warrants Register be included in the Court's annual reports.

**Recommendation 25. .... 130**

That the Ombudsman and the Office of Police Integrity review the Magistrates' Court's search warrants Register periodically and make appropriate recommendations.

**Recommendation 26. .... 131**

Without prejudice to any proceedings relating to the warrant, individuals subject to a search recorded in the Magistrates' Court's search warrants Register have a right of access to the recorded information, suitably edited to remove information that would inappropriately identify any person.

**Recommendation 27. .... 131**

That the obligations and rights in Recommendation 23 to Recommendation 26, including the contents of the Magistrates' Court's search warrants Register be prescribed by primary legislation, rather than by Regulation or Magistrates' Court Practice Direction.

**Recommendation 28. .... 131**

That, the Magistrates' Court considers amending the search warrants Register to record:

- (a) the basis for the reasonable belief justifying each application;
- (b) details of any offences relevant to each warrant;

- (c) name(s) of any person(s) present on the premises and any arrests;
- (d) details of any use of force;
- (e) results of the search, including description and details of any disposal of seized items

**Recommendation 29. .... 133**

That the *Magistrates' Court Act 1989* be amended to require the retention by the issuing officer of all documents pertaining to ordinary and telephone applications for search warrants, copies of the information provided to the occupier/s of the target premises and the results of search report.

**Recommendation 30. .... 134**

That the Government ensures that, as a matter of urgency, Magistrates' Court venues' computer systems are able to share and compile records and statistics pertaining to the issue and use of warrants. In particular, the Court's multiple search warrant registers should be computerised, centralised and networked

**Recommendation 31. .... 134**

That the Magistrates' Court ensures that all data pertaining to the issue and use of warrants generated by each venue is stored in a manner that facilitates the sharing of information in real time across different venues, while incorporating appropriate data security and redundancy protections.

**Recommendation 32. .... 135**

That Recommendation 23 to Recommendation 31 apply to search warrants issued by judges of the Supreme and Country Courts under section 57(7) of the *Magistrates' Court Act 1989*

**Recommendation 33. .... 137**

That the replacement for the Law Enforcement Assistance Program database includes the capability to record data about the application and execution of all warrants (excluding covert warrants) by Victoria Police.

**Recommendation 34. .... 138**

That all Victorian warrants that are not covert warrants be recorded in a central warrants database that is accessible by individuals named in the warrant, or their legal representatives. That as part of its plans to improve the capacity of Victorian courts to collate and collect data, the Government considers how to develop such a database from existing warrants data recorded by the Supreme, County and Magistrates' Courts

**Recommendation 35. .... 139**

That the database contain sufficient information to enable the identification and location of warrants relating to a particular individual, such as the names of individual/s subject to the warrant, applicant and issuing officer; the type and date of issue of warrant; and the legislative basis for the warrant

**Recommendation 36. .... 145**

That legislation be amended, to apply an expiry period of seven days, with the possibility of an extension to a maximum of 30 days where this can be justified, to all warrants issued.

**Recommendation 37. .... 145**

That Acts which currently contain warrant provisions without an expiry period be amended as a matter of urgency

**Recommendation 38. .... 145**

That all such legislative amendment include a requirement that the expiry period is clearly marked on the warrant.

**Recommendation 39. .... 146**

That legislation be amended to impose a limit on telephone warrant validity until the end of a maximum of 24 hours from the time of issue, or the time of execution, or withdrawal, or cancellation, whichever event occurs first

**Recommendation 40. .... 152**

That legislation be amended to require the execution of search warrants during day time hours unless the applicant can demonstrate reasonable grounds justifying night time execution.

**Recommendation 41. .... 152**

That the Government consider defining reasonable grounds to include circumstances such as those listed in section 19A(1) of the *Search Warrants Act 1985* (NSW) and section 194(9) of the *Crimes Act 1900* (ACT).

**Recommendation 42. .... 154**

That legislation be amended to provide for the extension of the period during which the execution of search warrants is authorised, where an issuing officer is satisfied that reasonable grounds exist for doing so. That the Government considers defining reasonable grounds to include circumstances such as those listed in section 19A(1) of the *Search Warrants Act 1985* (NSW) and section 194(9) of the *Crimes Act 1900* (ACT)

**Recommendation 43. .... 154**

That legislation allow executing agencies to request extensions by telephone or other appropriate means of communication.

**Recommendation 44. .... 154**

That legislation require that written reasons for the request for an extension of the authorised period be included in the report to the court on the execution, and that those reasons and the issuing officer's decision to grant or refuse the request be included in the record of warrant proceedings retained by the court.

**Recommendation 45. .... 157**

That legislation be amended to allow multiple entries on the same warrant only where re-entry is within a short period of time and so closely associated with the original entry that it can reasonably be regarded as part of the execution of the original warrant.

**Recommendation 46. .... 157**

That officials executing search warrants keep records pertaining to all re-entries, including reasons for re-entry, any agreement or opposition from occupiers of the premises and logs of departure, entry and other relevant times. That such records be included in the report to the court on the execution, and, together with the issuing officer decision to grant or refuse a request for a fresh warrant, be included in the record of warrant proceedings retained by the court

**Recommendation 47. .... 168**

That legislation be amended to require agencies to provide information about search warrants to persons in the place to be searched, and that such information must include, in plain English and other appropriate languages the following:

- (a) why the warrant has been issued;
- (b) who issued the warrant, where and when;
- (c) who will execute the warrant;
- (d) when the warrant may be executed and when it will cease to be valid;
- (e) what is permitted under the warrant;
- (f) what persons in the place subject to the warrant must do and the consequences for not doing so;
- (g) the rights of persons in the place subject to the warrant;
- (h) what persons in the place subject to the warrant may do if they are dissatisfied with any aspect of the warrant or its execution.

**Recommendation 48. .... 168**

That agencies ensure that their officials who execute warrants are trained to assist persons at the place to be searched who do not understand the written information provided pursuant to Recommendation 47.

**Recommendation 49. .... 168**

That, if there is no one present during the execution of a search warrant who appears to be in control of the place being searched, the information pursuant to Recommendation 47 be provided to any person in the place.

**Recommendation 50. .... 168**

That legislation be amended to require officials executing search warrants to serve an occupier's notice in accordance with Recommendation 47 at the time of entry or as soon as practicable thereafter, unless there are compelling reasons not to do so, and to show on request a copy of the warrant.

**Recommendation 51. .... 169**

That legislation require officials executing search warrants to produce identification at the time of entry, or as soon as practicable thereafter, unless there are compelling reasons not to do so.

**Recommendation 52. .... 171**

That Victorian warrant provisions be amended to include a procedure that mirrors or is modelled on section 86X of the *Police Regulation Act 1958*.

**Recommendation 53. .... 175**

That agencies whose personnel are involved in the execution of search warrants require their personnel to comply with or exceed applicable provisions of the Victoria Police Manual on the use of force during searches of property.

**Recommendation 54. .... 182**

That the Office of Police Integrity uses its own motion powers to investigate the incidence of improperly executed search warrants and the use of unnecessary or disproportionate force during the execution of search warrants, and make appropriate findings and recommendations.

**Recommendation 55. .... 182**

That the Department of Justice resources a project in which for a period of at least 12 months, Victoria Legal Aid records information about allegations of abuse of force during the execution of search warrants and that an analytical report on the data be prepared and published. That the Victorian Aboriginal Legal Service and community legal centres consider joining the recording and reporting study.

**Recommendation 56. .... 193**

That legislation be amended to require the videorecording of the execution of all search warrants relating to drug offences.

**Recommendation 57. .... 193**

That the Government considers requiring the videorecording of the execution of search warrants relating to other offences.

**Recommendation 58. .... 194**

That agencies with search warrant powers develop standard operating procedures for the videorecording of searches. In doing so, agencies should work with the Office of the Victorian Privacy Commissioner to address privacy concerns arising from videorecording.

**Recommendation 59. .... 194**

That the Office of Police Integrity reviews the results of Victoria Police's pilot videorecording projects and makes appropriate recommendations.

**Recommendation 60. .... 197**

That the Government considers the suitability of including in search warrant provisions a requirement that an independent observer be present during the execution of search warrants. In doing so, the Government should consider the experiences of New South Wales and other jurisdictions as appropriate, and consult with the Office of Police Integrity, Victoria Police, Victoria Legal Aid, the Criminal Bar Association, the Victorian Aboriginal Legal Service, the Office of the Victorian Privacy Commissioner and other relevant stakeholders.

**Recommendation 61. .... 205**

That legislation be amended to authorise police members who are lawfully executing a search warrant to seize things that are not specified in the warrant, if they believe on reasonable grounds that such things constitute evidential material

**Recommendation 62. .... 210**

That legislation be amended to include receipt provisions that meet the following requirements:

- (a) officials executing search warrants, other than covert search warrants, must give as soon as practicable to the occupier of the place being searched, or other appropriate person, a receipt for all things seized;
- (b) receipts must include sufficient detail to enable identification of seized items;
- (c) receipts must include clear information about what could happen to seized items and the rights of individuals with an interest in the seized items, including how to challenge any seizure;.....
- (d) receipts must be signed by the senior official executing the search and, where possible, by the occupier of the place being searched or other appropriate person;
- (e) where no such person is present during the search, receipts must be left in a prominent place or served at a later date;
- (f) receipt forms should be available in appropriate languages and agencies should ensure that their officials who execute warrants are trained to assist individuals at the place to be searched who do not understand the forms.

**Recommendation 63. .... 218**

That the Victorian protocol on legal professional privilege be amended to formalise the existing ad hoc practice of using an independent arbitrator to hear and determine claims of privilege in the first instance.

**Recommendation 64. .... 220**

That the legal professional privilege procedures of the *Major Crime (Investigative Powers) Act 2004* be amended to provide for agreed independent arbitration of privilege claims without resort to court, as proposed in Recommendation 63 above.

**Recommendation 65. ....222**

That legislation be amended to include procedures for dealing with claims of legal professional privilege in all Victorian search warrant provisions, using as a model, section 86VE of the *Police Regulation Act 1958* and section 61BE of the *Whistleblowers Protection Act 2001* as amended in accordance with Recommendation 63 and Recommendation 64 above.

**Recommendation 66. ....231**

That legislation be amended to require property that is seized that is not specified in a search warrant, to be taken before the Magistrates' Court.

**Recommendation 67. ....232**

That the Government consults with stakeholders about how the use of photographic evidence to comply with the requirement to take seized property before the Court could be expanded.

**Recommendation 68. ....234**

That the Government considers whether and how to recognise a right of occupiers and other affected persons to raise issues relevant to seized items during the court's directions hearing pursuant to sections 78(b)(ii) of the *Magistrates' Court Act 1989* and 465 of the *Crimes Act 1958*.

**Recommendation 69. ....239**

That the Magistrates' Court clarifies the Result of Search Form and procedures and guidance provided to magistrates to implement them, in particular the scope of directions for the use of seized items in police investigations and the use of digital photographs.

**Recommendation 70. ....248**

That legislation be amended to require the return to the court of unexecuted warrants as soon as practicable after their expiry.

**Recommendation 71. ....248**

That legislation be amended to require a report on the outcome of all search warrants, containing the following information:

- (a) whether the warrant was executed;
- (b) reasons for non-execution;
- (c) the date, time and place of execution;
- (d) names of individuals who executed the warrant and individuals who were present at the premises;
- (e) whether an occupier's notice was served;
- (f) a list of seized property;
- (g) confirmation countersigned by the occupier or other appropriate individual that receipts were issued for seized property;

- (h) a description countersigned by the occupier or other appropriate individual of any damage that occurred during the search;
- (i) confirmation countersigned by the occupier or other appropriate individual that they were informed of their rights to challenge the warrant;
- (j) additional information as prescribed by specific legislation;
- (k) a section on directions to be given by magistrates pursuant to section 78(5) of the *Magistrates' Court Act 1989*.

**Recommendation 72. .... 248**

That legislation permit individuals affected by the warrant to apply to the issuing court for access to relevant reports on the outcome of search warrants.

**Recommendation 73. .... 258**

That Victorian legislation includes a provision consistent with section 138 of the uniform Evidence Act

**Recommendation 74. .... 281**

That Section 13 of the *Terrorism (Community Protection) Act 2003*, be amended to require the submission of annual reports under that section as soon as practicable, but within three months of the end of the financial year that forms the reporting period.

**Recommendation 75. .... 282**

That, if Recommendation 74 is not implemented, section 13 of the *Terrorism (Community Protection) Act 2003* be amended to provide that where the Parliamentary tabling date for reports on the use of covert search warrant powers falls outside Parliamentary sitting periods, such reports be publicly disseminated, using the regime in section 102K of the *Police Regulation Act 1958* as a model.

**Recommendation 76. : ..... 292**

That legislation be amended to

- (a) allow covert searches of property only with express authority clearly stated in a warrant;
- (b) require that the warrant must specify in what circumstances the execution may be carried out covertly;
- (c) restrict the availability and use of covert search warrants to exceptional circumstances in the most serious offences and to a narrow class of permissible applicants;
- (d) set rigorous safeguards including requiring: (i) a Supreme Court judge to determine applications; (ii) applicants to demonstrate why, and issuing judges to be satisfied that, covert search is necessary and justified; (iii) a report within a specified period on execution or non-execution; (iv) a rebuttable presumption that the target of the search shall be notified of its occurrence as soon as practicable; and (v) prompt and public annual reporting and trend analysis on the use of the powers.

**Recommendation 77. ....293**

That any resulting covert search warrants regime be subject to a review within three years.

**Recommendation 78. ....294**

That legislation be amended to provide police with clear powers to establish and control crime scenes.

**Recommendation 79. ....296**

That legislation be amended to include vehicles within the definition of premises subject to a search warrant.

**Recommendation 80. ....298**

That legislation be amended to enable officials executing search warrants to make copies of hard drives at the premises being searched, to retain these copies rather than the original hard drive and to leave the original hard drive with the owner where appropriate.

**Recommendation 81. ....301**

That legislation be amended to provide for the issue of production notices instead of search warrants in appropriate circumstances, and that the Government determine such circumstances and the appropriate issuing authority for such notices.

**Recommendation 82. ....313**

That the Government undertakes consolidation of Victorian search warrant powers and procedures, modelled on the *Search Warrants Act 1985* (NSW) and including the following elements:

- (a) the creation of a new Act which consolidates standard search warrant provisions in line with the Committee's recommendations in Chapters Three to Seven;
- (b) the retention of existing Acts conferring search warrant powers, which will continue to authorise relevant officials to use search warrants;
- (c) the presumption that all other aspects of search warrant powers conferred by existing Acts will be governed by the standard procedures in the new Act; and
- (d) the provision in existing Acts conferring search warrant powers of such special conditions and exemptions from the standard procedures as are justified, consistent as far as possible with the purpose and effect of the standard procedures in the new Act.

**Recommendation 83. ....314**

That the Government considers asking the Standing Committee of Attorneys-General to develop a set of nationally consistent guidelines for search warrant powers and procedures.

**Recommendation 84. .... 337**

That the *Surveillance Devices Act 1999* be amended to include digital records in the definition of ‘record’

**Recommendation 85. .... 345**

That the *Surveillance Devices Act 1999* be amended to provide that a warrant may only be granted for the use of a surveillance device in relation to a relevant offence which is defined as:

- (a) an offence punishable by a maximum term of imprisonment of three years or more, or for life; or
- (b) an offence that is prescribed by the regulations

**Recommendation 86. .... 352**

That the *Surveillance Devices Act 1999* section 17(1) be amended by adding the following provision:

*“(d) in the case of an application for a warrant relating to an offence other than a serious indictable offence - that exceptional circumstances exist.” ..... 352*

**Recommendation 87. .... 359**

That the Government continues to review the use of the provision in the *Surveillance Devices Act 1999* which allows an application for an emergency authorisation in relation to serious drug offences, to establish whether there is sufficient justification for the continuing inclusion of the provision.

**Recommendation 88. .... 365**

That the *Surveillance Devices Act 1999* be amended to specifically make inadmissible evidence illegally collected by a surveillance device without a properly authorised warrant.

**Recommendation 89. .... 405**

That all agencies that issue infringement notices develop procedures to ensure that:

- (a) when an individual commits infringing behaviour, if an issuing officer is aware of special circumstances that are consistent with those applied by the Enforcement Review Program to their special circumstances list, the officer will in the first instance issue the individual with a warning, caution or referral to appropriate social services in place of an infringement notice; and
- (b) if the infringing behaviour is repeated, an infringement notice will be issued.

**Recommendation 90. .... 405**

That all issuing officers receive training to sensitise them to the issues associated with particular groups, to enable them to recognise genuine cases of special circumstances and to refer them appropriately. The Government, issuing agencies, social and legal services and community groups work together to develop appropriate training programs and referral guidelines, and to ensure that referral services are adequately resourced.

**Recommendation 91. ....405**

That the Government supports and expands initiatives such as those being developed by the Public Transport Enforcement Forum and other stakeholders, with the aim of encouraging earlier intervention to focus on underlying behaviours as a way of reducing the volume of people who come into contact with the infringement system.

**Recommendation 92. ....409**

That issuing agencies adopt consistent policies on the review, withdrawal and variation of infringement penalties and costs.

**Recommendation 93. ....410**

That issuing agencies withdraw penalties and costs at the earliest possible opportunity where evidence is provided of special circumstances excluding financial hardship as a sole special circumstance, and where the individual has not previously been issued with a warning or caution in accordance with Recommendation 89.

**Recommendation 94. ....410**

That issuing agencies consider imposing minor remedial conditions on the withdrawal of penalties

**Recommendation 95. ....412**

That clause 7 of Schedule 7 of the *Magistrates' Court Act 1989* be amended to permit applications to the PERIN Court for the conversion of penalties and costs to community work.

**Recommendation 96. ....418**

That legislation be amended to require issuing agencies or, if an enforcement order has been issued, the PERIN Court, to reduce penalty infringement amounts on application by individuals experiencing financial hardship at or after the time that an infringement penalty was incurred, supported by documentation verifying their eligibility for a Centrelink Health Care Card.

**Recommendation 97. ....418**

That issuing agencies work with financially disadvantaged people and legal, financial and other social service providers to develop a lower penalty rate and guidelines for application procedures and acceptable documentation.

**Recommendation 98. ....421**

That issuing agencies develop policies to accept payment of penalties, including penalties reduced in accordance with Recommendation 96, and costs in instalments or grant extensions of time to pay in cases where individuals can demonstrate financial hardship.

**Recommendation 99. .... 421**

That issuing agencies consult with financially disadvantaged people, relevant advocates and support services to determine appropriate guidelines and procedures for the establishment and management of instalment and extension plans, in particular methods for assessing and varying amounts payable and the types of evidence that could establish financial hardship

**Recommendation 100. .... 423**

That the PERIN Court collaborates with financial counsellors and other relevant stakeholders to ensure the fairness and efficiency of its systems for establishing and managing instalment payment plans under clause 7 of Schedule 7 of the *Magistrates' Court Act 1989*, and amends its policies as appropriate.

**Recommendation 101. .... 425**

That all issuing agencies be required to offer individuals who receive infringement notices the opportunity at the time of receipt of the notice to elect in writing to divert the matter from the infringement system to open court for hearing and determination.

**Recommendation 102. .... 426**

That clause 10(4) of Schedule 7 of the *Magistrates' Court Act 1989* be amended to specify that enforcement orders may be revoked to enable the individual subject to them to plead guilty to the offence in open court and be sentenced in accordance with the Sentencing Act 1991.

**Recommendation 103. .... 432**

That the Enforcement Review Program/Special Circumstances List be expanded in scope and presence. The PERIN Registrar should, in consultation with medical, legal and other social service providers develop, adopt and publish a policy to govern the consideration of a limited range of factors in determining whether a matter may be more appropriately dealt with by the Court.

**Recommendation 104. .... 432**

That the Government provides secure funding for the Enforcement Review Program.

**Recommendation 105. .... 432**

That the Government provides funding to enable the Special Circumstances List to sit for a trial period outside Melbourne.

**Recommendation 106. .... 432**

That the PERIN Court amends its procedures, in consultation with stakeholders, to accept an agreed range of materials in support of applications for revocation of enforcement orders under clause 10A of Schedule 7 of the *Magistrates' Court Act 1989* .

**Recommendation 107. ....436**

That infringement system forms be amended to ensure that they inform recipients, in plain language, of their rights to seek:

- (a) a review of the penalty;
- (b) a lower penalty if eligible;
- (c) an instalment agreement or extension of time to pay;
- (d) transfer of the matter to open Court; and
- (e) that the forms include information about how to make such applications, what supporting material is required and the possible consequences of successful and unsuccessful applications.

**Recommendation 108. ....437**

That infringement system forms include the following:

- (a) more detailed information on the enforcement stages and options after the expiry of the period provided for in each form, including revocation under Clauses 10 and 10A of Schedule 7 of the *Magistrates' Court Act 1989*;
- (b) information about the availability of community based orders and community custodial permits; and
- (c) a statement advising recipients to seek independent advice and listing contact details for Victoria Legal Aid and peak organisations for financial counsellors and other appropriate services.

**Recommendation 109. ....437**

That infringement system forms include as much of the above information as practicable in appropriate languages other than English.

**Recommendation 110. ....437**

That where the format of notices makes it difficult to include additional information, it be included on a separate form developed by issuing agencies and that authorised officers can carry and serve with the part of the infringement notice that they print.

**Recommendation 111. ....437**

That the title of courtesy letters be changed to "reminder notice".

**Recommendation 112. ....440**

That the Victorian Infringement Management System be modified to enable the automatic identification of individuals incurring multiple infringement notices and that procedures be developed to enable the referral of such cases to open court or the Enforcement Review Program as appropriate.

**Recommendation 113. .... 440**

That the Government explores ways of consolidating all data generated from the time that infringement notices are issued by agencies other than Victoria Police.

**Recommendation 114. .... 440**

That the Government consults with stakeholders about approaches in addition to improved data collection to deal with cases of individuals with multiple infringement notices.

**Recommendation 115. .... 442**

That the *Magistrates' Court Act 1989* be amended to:

- (a) suspend the running of the seven day period under clause 8 of schedule 7, upon receipt by the PERIN Court of an application for an extension of time to pay, or an instalment payment plan or revocation of an enforcement order, and
- (b) provide seven days from the date of receiving such a notice for an application to be made, and
- (c) if no application is received within that time, to allow a further seven days before attempts are made to execute the warrant.

**Recommendation 116. .... 443**

That Forms 4 and 5 of *Magistrates' Court (General Regulations) 2000* be amended to include information about:

- (a) supporting material required for extension and instalment plan applications;
- (b) the potential reasons that recipients may wish to apply for revocation, such as that they did not commit the alleged offence;
- (c) the possibility and purpose of an application for revocation and referral under clause 10A of Schedule 7;
- (d) the consequences of successful and unsuccessful applications, including the right under clause 10(6) of Schedule 7 to object to a refusal to grant revocation;
- (e) the consequences of non-payment, in more detail, including the possibility of and eligibility for CCP and the options available to the Court if the recipient is arrested and sent for sentencing under Part 4 of Schedule 7; and
- (f) additional sources of advice, such as peak organisations for financial counsellors and other appropriate services.

**Recommendation 117. .... 444**

That the *Magistrates' Court (General Regulations) 2000* be amended to require the service of a debtor's notice of rights and obligations to render the execution of a penalty enforcement warrant valid. The notice should be consistent with relevant parts of Recommendation 47 to Recommendation 50.

**Recommendation 118. ....445**

That Form 8 of the *Magistrates' Court General Regulations 2000* be amended to:

- (a) be consistent with Recommendation 116;
- (b) include advice that an individual should seek legal advice if they do not understand the form; and
- (c) provide contact details for Victoria Legal Aid.

**Recommendation 119. ....449**

That Part 4 of Schedule 7 of the *Magistrates' Court Act 1989* be amended to the effect that, where an individual is taken before the Court following the execution of a penalty enforcement warrant:

- (a) a person is sentenced under the *Sentencing Act 1991*; or
- (b) the matter is heard and determined in open court and that, on a finding of guilt, the person is sentenced under the *Sentencing Act 1991*.

**Recommendation 120. ....449**

That the title of Part 4 of Schedule 7 of the *Magistrates' Court Act 1989* be modified to more accurately reflect the contents of its provisions.

**Recommendation 121. ....452**

That the PERIN Court be responsible for coordinating the administration of all aspects of an infringement matter once it is registered under clause 4 of schedule 7 of the *Magistrates' Court Act 1989*, including staying the execution of orders following applications for revocation or extensions of time to pay or instalment payments.

**Recommendation 122. : .....454**

That a body be established with an advisory board that includes issuing agencies, the PERIN Court, Sheriff's Office, Department of Justice, peak social and legal service organisations and the Ombudsman to ensure that the infringement system is fair, efficient and consistent, in particular by

- (a) developing consistent policies and guidelines with respect to:
  - (i) education;
  - (ii) outreach;
  - (iii) agency discretion;
  - (iv) withdrawal of penalties, instalment payment plans, payment extensions, conversion of penalties into community work and other non-monetary sanctions;
  - (v) design and content of infringement documentation;
  - (vi) special circumstances categories and applications;
  - (vii) training and sensitisation of authorised officers, other issuing agency staff and Sheriff's Office personnel;

and further by:

- (b) addressing ongoing systemic issues;
- (c) collecting and analysing empirical data from the community, in particular from infringement system agencies, individuals who receive infringement notices and their representatives, prosecutors, the PERIN Court, the Sheriff's Office, the Ombudsman and other relevant entities; and
- (d) monitoring and applying best practices and innovations from other jurisdictions.

**Recommendation 123.** :..... **456**

That the Government introduces legislation that includes provisions addressing the following matters

- (a) agencies' eligibility to use the infringement system;
- (b) training standards for issuing agencies and Sheriff's office personnel;
- (c) offences, levels of penalties and costs;
- (d) form and content of infringement notices, courtesy reminder letters and PERIN Court documents;
- (e) special circumstances categories and applications;
- (f) principles and procedures for the development and implementation of standards for record keeping and data management, waiving and varying penalties, converting penalties into community work and other non-monetary sanctions, granting instalment agreements and extensions of time to pay, revoking enforcement orders, diverting matters to court;
- (g) execution of penalty enforcement warrants, seizure of goods, arrest and subsequent court hearings; and
- (h) oversight of the infringement system.

**Recommendation 124.** ..... **470**

That the Government institute a regime to consolidate Victorian arrest warrant powers and procedures by:

- (a) the removal of existing arrest warrant procedures from the various authorising Acts and from the *Magistrates' Court Act 1989* into the same consolidated Warrants Act as has been recommended for search warrants;
- (b) the retention of existing Acts conferring arrest warrant powers, which will continue to authorise relevant officials to use arrest warrants;
- (c) the presumption that all other aspects of arrest warrant powers conferred by existing Acts will be governed by the standard procedures in the new Act;
- (d) the provision in existing Acts conferring arrest warrant powers of such special conditions and exemptions from the standard procedures as are justified and consistent as far as possible with the purpose and effect of the standard procedures in the new Act.

**Recommendation 125.** ..... **476**

That Victoria Police work with VALS to formalise an agreement for the notification of VALS of any outstanding arrest warrants for indigenous people, in cases where it is practicable and reasonable to do so.

**Recommendation 126. ....477**

That the agreement be subject to similar performance monitoring by Victoria Police as the agreement with VALS regarding arrest notification and take account of the recommendations of Victoria Police’s forthcoming report into the timeliness of arrest notification.

**Recommendation 127. ....478**

That Victoria Police ensure the collection of arrest warrant statistics, as part of the new database that replaces LEAP, at all stages of its involvement in arrest warrant processing. The statistics should record the date and time of day of execution and whether the arrestee is an indigenous person.

**Recommendation 128. ....480**

That the terms of Recommendation 18 to Recommendation 22 be adopted in relation to the creation of an arrest warrants register by each agency with arrest warrant powers, with the additional requirement that the register record whether the subject of the warrant is an indigenous person, wherever such information is available or can be practicably obtained.

**Recommendation 129. ....481**

That the terms of Recommendation 23 to Recommendation 32 be adopted in relation to the establishment, reporting and monitoring of arrest warrants registers for the Magistrates’, County and Supreme Courts, with the additional requirement that the register record whether the subject of the warrant is an indigenous person, wherever such information is available or can be practicably obtained.

**Recommendation 130. ....481**

That in implementing Recommendation 34 and Recommendation 35, the Government require the inclusion of information, wherever it is available or can be practicably obtained, as to whether the subject of an arrest warrant is an indigenous person.

**Recommendation 131. ....493**

That the Government introduces uniform civil procedures legislation, to provide for a single warrant to seize property under a single Act, regardless of the issuing court.

**Recommendation 132. ....493**

That the Government introduces legislation, whether as part of the introduction of uniform civil procedure rules or otherwise, which locates the authority to issue a warrant to seize property within primary legislation.

**Recommendation 133. ....506**

That there be a legislative requirement that civil debt recovery actions against persons residing in Victoria be commenced in Victoria and in a court which is closest to the usual residence of the debtor. A warrant to seize property should also only issue from the same court, that is, the court closest to the usual residence of the judgement debtor.

**Recommendation 134. .... 508**

That any new legislation to introduce a power of forced entry require that:

- (a) the exercise of the power be preceded by an examination of the judgement debtor's assets and financial circumstances;
- (b) such examination be a three-fold process:
  - (i) assessment of the judgement debtor's financial circumstances (focusing on income and expenditure);
  - (ii) identification of the judgement debtor's assets;
  - (iii) determination of the most appropriate means of enforcing the judgement debt;
- (c) a warrant to seize property only be issued where examination has established the existence of assets, other than "protected assets" under the *Bankruptcy Act 1966* (Cth);
- (d) a court may issue a warrant to seize property where:
  - (i) it determines that such examination is not practicable; or
  - (ii) the judgement debtor fails to participate in the examination process; or
  - (iii) it is satisfied on the balance of the available evidence that, despite having participated in the examination process, the judgement debtor has failed to reveal the existence of non-exempt assets; and
  - (iv) it has considered alternative means of enforcement.

The Government should consider the introduction of a monetary threshold below which recovery of a judgement debt should be by means other than a warrant to seize property. 509

**Recommendation 135. .... 512**

That in any new legislation to introduce a power of forced entry an examination process be a compulsory first stage in the enforcement process for claims below a certain dollar value, for example \$10,000.

**Recommendation 136. .... 512**

That any new legislation to introduce a power of forced entry:

- (a) contain a requirement that the Sheriff seek the owner or occupier's consent to entry at the time of execution;
- (b) in cases where the owner or occupier does not give their consent, permit the Sheriff to proceed only where consent has been unreasonably withheld or where s/he has been unable to contact the owner or occupier after making reasonable attempts;
- (c) include as minimum safeguards the restrictions on the power of forced entry contained in section 75 of the *Civil Judgements Enforcement Act 2004* (WA), including restrictions on the times when entry may occur, the distinction between a person's home and other premises and a belief on "reasonable grounds" as to the existence of seizable assets.

**Recommendation 137. ....513**

That any new legislation to introduce a power of forced entry under a warrant to seize property address the question of Sheriffs' training.

**Recommendation 138. ....514**

That any new legislation to introduce a power of forced entry contain a requirement that all exercises of force by the Sheriff comply with applicable provisions of the Victoria Police Manual.

**Recommendation 139. ....514**

That any new legislation to introduce a power of forced entry permit the Sheriff's Officer(s) responsible for effecting seizure to retain a discretion not to force entry if, in their judgement of the particular circumstances, it would be unsafe or unreasonable to do so. In such cases, the Sheriff should request police assistance.

**Recommendation 140. ....516**

That a power of forced entry in any new legislation only be introduced as part of a legislative scheme which rationalises the system of civil judgement enforcement by locating all existing court orders for enforcement in a single Act.

**Recommendation 141. ....516**

That the mechanism for the examination of judgement debtors in Recommendation 134 above also be located in the same Act.

**Recommendation 142. ....516**

That the Government consider introducing such a scheme as part of uniform civil procedures legislation, as adopted in Queensland and New South Wales.

**Recommendation 143. ....517**

That such a scheme include:

- (a) legislative provision for the increased use of existing enforcement alternatives to warrants to seize property: instalment orders, instalment agreements, attachment of earnings orders and attachment of debts orders;
- (b) legislative provision for the promotion of arbitration and mediation wherever possible and appropriate; and,
- (c) a legislative prohibition against judgement creditors being able to unreasonably seek multiple warrants in relation to the same debt.

**Recommendation 144. ....517**

That, where a warrant to seize property is returned unexecuted because the judgement creditor has been unable to determine the most recent address of the judgement debtor, the judgement creditor be empowered to request that the Sheriff reapply to the Court on their

behalf if the Sheriff has a more recent address. Such a procedure should include provision for preserving the privacy of the judgement debtor's current address from the judgement creditor.

**Recommendation 145. .... 557**

That section 27 of the *Guardianship and Administration Act 1986* be amended to require an applicant for a visitation order to establish that they have a reasonable belief that a person has a disability and is being unlawfully detained against his or her will or is likely to suffer serious damage to health or well-being.

**Recommendation 146. .... 558**

That the Office of the Public Advocate consult with the Victorian Civil and Administrative Tribunal, Department of Human Services, Victoria Police and ambulance services to ensure that effective and appropriate procedures exist for the transmission of written orders under section 27 of the *Guardianship and Administration Act 1986*.

**Recommendation 147. .... 559**

That the Office of the Public Advocate consult with the Department of Human Services, Victoria Police and ambulance services to ensure that relevant personnel in all agencies are aware of the existence and purpose of section 27 orders, and relevant obligations in respect of enforcing them.



## EXECUTIVE SUMMARY

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In this inquiry, the Committee was asked to consider Victoria's existing warrant powers and procedures, including arrest warrants, warrants to seize property and search warrants, and to report whether and in what way existing laws should be amended, with a particular focus on the need to promote fairness, efficiency and consistency.

Warrant powers permit the application for and issue of a warrant that authorises acts that would otherwise be illegal, such as entering a place, using force if necessary, and seizing certain things found there. They touch many areas of society, from the investigation and prevention of crime to the protection of young people and the assessment of individuals believed to have a mental illness. They are therefore among the most frequently used tools in the legal system. More than 20 000 search warrants and arrest warrants and more than 600 000 penalty enforcement warrants were issued between July 2003 and June 2004.

Actions authorised under warrants include: entry; search for and seizure of evidence of an offence or of things that may be sold to satisfy a debt or penalty; arrest; surveillance; interception of telecommunications; and transfer to another jurisdiction. They are issued by courts and the powers in them are exercised by members of Victoria Police, Sheriff's officers and other public officials who are authorised to do so under a broad range of legislation governing law enforcement, the regulation of industries and professions and the protection of certain groups in the community.

Given the diverse range of warrant provisions, the Committee sought to identify those most appropriate to focus on during the inquiry. Stakeholders were therefore asked to identify warrant powers and procedures that they had experience of and that could be usefully reviewed, and to indicate why review would be appropriate. Their responses assisted the Committee to develop a framework focused on warrants that authorise search and seizure, surveillance, the enforcement of infringement notices, apprehension and the protection of vulnerable groups. This approach was reflected in the discussion paper that the Committee issued in July 2004.

Many of the officials who use warrant powers also have common-law and statutory powers that can be exercised without a warrant. Throughout the report, the Committee refers to these as warrant-like powers. As the effect of their exercise is often substantially similar to warrant powers, the Committee considered whether they should be included in the inquiry. Many warrant-like powers were examined in the Report of the Inquiry into the Powers of Entry, Search, Seizure and Questioning by Authorised Officers, issued by the Law Reform Committee of the 54<sup>th</sup> Parliament in 2002 (Inspectors' Powers Report). The Committee decided not to revisit issues

considered in that inquiry unless particular concerns had emerged since its conclusion.

The Inspectors' Powers Report excluded powers exercised solely by the police (police are authorised to use many of the warrant-like powers available to other authorised persons) and those relating to the protection of vulnerable groups. Given the range of warrant-like powers available to the police and the limited scope of this inquiry, the Committee decided to exclude those powers, unless stakeholders raised particular concerns. One such issue that was brought to the Committee's attention concerned the authority to search for stolen goods under section 92(2) of the *Crimes Act 1958*. This is discussed in the summary of search warrants below. Also in response to stakeholder concerns, the Committee considered guardianship visitation and assessment orders and some mental health entry and assessment powers.

While the Committee conducted this inquiry, a number of related reviews began or were in progress. These included an examination of the *Crimes Act 1958*, which contains the most commonly used Victorian warrant power (search warrants issued under section 465), and of the state's infringement notice system. These projects were some of the first steps in the comprehensive law reform agenda outlined in the Attorney-General's Justice Statement. The Department of Justice was also exploring legislation to consolidate the powers and procedures of Sheriffs' officers, who execute many warrants. During the inquiry, the Department informed the Committee that consideration of the legislation had been suspended pending the Committee's report.

The Committee held hearings in Victoria, New South Wales and Western Australia, taking evidence from 56 witnesses, and received 42 written submissions.

## 1. Warrants for search and seizure

Over 80 Victorian Acts currently authorise the issuing of search warrants, although many are rarely, if ever, used. Notable among the less frequently used Victorian warrant powers are those that authorise searches for skins of cattle, goods from wrecks, gunpowder and for evidence relating to forestry offences. The most commonly used warrant is that provided for by section 465 of the *Crimes Act 1958*, which authorises a magistrate to issue a warrant to search for evidence of an indictable offence. The scope of that warrant is sufficiently wide to encompass many specific warrant provisions. Other common provisions are section 92(1) of the *Crimes Act 1958*, authorising search for stolen goods, and section 81 of the *Drugs, Poisons and Controlled Substances Act 1981*. These three provisions together accounted for almost 80% of the search warrants issued in Victoria in 2003 - 2004.

The *Magistrates' Court Act 1989* contains rules applicable to all Victorian search warrants. These govern in general terms the form of a search warrant application, who warrants may be addressed to, what they authorise and what is required after

execution. Other key provisions of the Act are the requirement to record warrants in the court register and to take seized property before a court.

The Committee's research and findings covered four themes: strengthening the integrity of existing laws; improving consistency; covert searches; and consolidation.

## **Strengthening existing search warrants law**

The exercise of powers under a search warrant creates an unequal relationship between officials executing the powers and those subject to them. The *ex parte* nature of the application process requires that the issuing officer acts both as the contradictor to the applicant and as the judge of the existence of the reasonable belief or suspicion that justifies the granting of an application. Moreover, many individuals in target premises are not sufficiently aware of their rights to effectively advocate them during a search. Evidence that the Committee received indicated that the vast majority of warrants are executed with due regard for the rights of occupants of searched premises. It is nevertheless imperative that the legal system provides opportunities to redress any concerns that arise in relation to applications for or executions of warrants.

Many safeguards already exist. There is, however, some inconsistency in the application of legislative protections as some are located in the *Magistrates' Court Act 1989*, while others are found in specific-purpose legislation. Other safeguards are provided by agencies training practices and internal procedures for authorising officials to apply for and execute warrants, and for approving warrant applications.

Some stakeholders argued that safeguards were not effective and alleged that warrant powers are misused, specifically through illegitimate applications for warrants, insufficient scrutiny of applications and unnecessary use of force. None of these claims were substantiated and the Magistrates' Court and other agencies strongly rejected them.

The Committee was concerned, however, by the lack of any detailed data about the use of search warrant powers that would enable it to test some of the allegations, some of which were made by stakeholders with extensive and long-standing experience of warrant powers. The Committee received evidence from and about the work of the police jurisdiction of the Ombudsman and has examined its reports and those of the Royal Commissions in Queensland, New South Wales and Western Australia. As a result, the Committee believes that there is a strong case for strengthening the accountability framework of Victorian search warrants powers and has recommended five mechanisms:

- it should be an offence to make a false application for a search warrant;

- the presumption in favour of the admissibility of unlawfully obtained evidence should be reversed and made consistent with section 138 of the uniform *Evidence Act 1995*;
- all searches under warrant related to drug offences should be recorded on video, and the Government should consider extending this requirement to other offences;
- the Department of Justice should conduct a trial project to collect and analyse data from Victoria Legal Aid and community legal centres as appropriate concerning allegations of misuse of powers to apply for, issue and execute search warrants; and
- courts and agencies with warrant powers should enhance their record keeping about warrants and include more comprehensive information in their annual reports.

The Committee has also recommended that the Office of Police Integrity, which has taken over the police jurisdiction of the Ombudsman, investigates various aspects of warrant powers, such as the existence and extent of any misuse of the powers, the records maintained by courts and agencies, agencies' practices relating to the issuing of receipts and the results of Victoria Police's trial of videorecording of search warrant executions.

## **Improving consistency**

Victorian Acts contain inconsistent terms on matters that include: who may apply for a warrant; the state of mind required to justify application for and issue of a warrant; how long a warrant remains valid; when it may be executed; the seizure of evidence not mentioned in the warrant; the issuing of receipts for seized items; the provision of information to occupiers of searched premises; the application of legal professional privilege and handling of claims; and reporting on the execution of the warrant.

In relation to some of these issues, recent Victorian legislation contains relatively detailed provisions and procedures, for example the *Police Regulation Act 1958* as amended by 2004 legislation establishing and empowering the Office of Police Integrity, and the *Confiscation Act 1997*. Further recent reform is evident in relation to the search warrant powers of authorised persons. Health practitioner and other legislation has been amended with model terms that include requirements relating to announcement before entry, the provision of certain information to occupiers and seizure of items not mentioned in the warrant.

The Committee believes that inconsistency can create confusion and make the law less transparent, less accessible and therefore less fair. It can also reduce the efficiency of agencies that are bound by the law because of the need for additional training and procedures to deal with different powers. However, inconsistencies may be justified in particular circumstances, typically related to operational necessities that

arise from the use of a particular type of warrant. For example, it may be necessary to conduct a search related to drug offences covertly to obtain information about a future importation of drugs without alerting potential offenders to law enforcement officials' knowledge of the importation.

The Committee has examined the range of Victorian search warrant legislation and, where possible, the policy basis for any inconsistencies. The Committee has also identified and analysed common law governing these issues, and relevant law from other states, territories and the Commonwealth. As a result, the Committee recommends a series of legislative amendments, the most significant of which are:

- police applicants for warrants must possess a minimum rank of senior sergeant;
- warrants to remain valid for up to seven days, or 24 hours if issued by telephone;
- warrants must be executed in daylight hours unless the applicant can demonstrate reasonable grounds for night-time execution;
- the continuation beyond daylight hours of searches that begin in daylight hours must be authorised by an issuing officer, possibly by telephone, and written records for the continuation must be kept and provided to the issuing officer;
- multiple entries on a single warrant should be permitted in certain circumstances and relevant written records must be kept and provided to the court;
- things not mentioned in the warrant may be seized if they are believed on reasonable grounds to constitute evidential material;
- individuals at the searched premises must be given a notice explaining in clear and accessible language why the warrant has been issued, the rights and obligations of people involved in the search and how to challenge the warrant or its execution;
- an occupier or other appropriate person must be given a receipt for all things seized, which contains clear and accessible information about rights and obligations in relation to seized items;
- officials executing warrants must provide a report on the execution or non-execution of the warrant, which could be achieved by developing the existing Result of Search Form used by the Magistrates' Court; and
- the codification of procedures for dealing with claims of legal professional privilege and the creation of a process to resolve claims by agreement by independent arbitration prior to any determination by a court.

The Committee recognises that there may be merit in adopting different standards in situations where the implementation of these recommendations could undermine the purpose of the warrant power or be unreasonably onerous. The Committee therefore

suggests that the Government considers appropriate cases that could be exempt from its recommendations and urges that any departure from the standards it proposes be restricted to the minimum extent necessary.

## Covert searches

Currently only one piece of Victorian legislation (the *Terrorism (Community Protection) Act 2003*) explicitly permits searches under warrant without the knowledge of the occupier of the target premises. The Committee received some evidence about this and about covert searches in general.

The Committee was urged to consider the regulation of covert searches not covered by the *Terrorism (Community Protection) Act 2003*. The Committee's research confirmed that there does not appear to be any other explicit Victorian authorisation for covert search or seizures under warrant. In particular, neither the three most commonly used search warrant provisions (sections 92 and 465 of the *Crimes Act 1958* and section 81 of the *Drugs, Poisons and Controlled Substances Act 1981*), nor the relevant general provisions of the *Magistrates' Court Act 1989* that are imported by reference into many warrant provisions, explicitly require an occupier to be present during the search.

The Committee heard evidence that such searches do occur, and the Victoria Police Manual contemplates them, although as an exceptional practice. The Committee examined the experiences of other jurisdictions, in particular Queensland, where the regulation of covert searches under warrant was ambiguous until the passage of the *Police Powers and Responsibilities Act 1997* containing provisions authorising covert search warrants.

The Committee believes that covert searches can and do make a significant contribution to effective law enforcement. On the other hand, such searches result in increased infringement of individual rights because occupiers of searched premises have no knowledge of the search. The Committee believes that in the current law enforcement climate of heightened awareness of both the need for enforcement agencies to have the tools to carry out their work, and fears and anxieties about the possible misuse of powers, it is in all participants' interests that the extent of any covert search warrant power is clear and that there are clear mechanisms to regulate and scrutinise the use of such a power.

The Committee therefore concluded that covert searches should be regulated by legislation. Covert searches should only be performed under the authority of a warrant and all warrant provisions should stipulate whether the powers that they contain may or may not be exercised covertly and in what circumstances. The availability of covert search warrants should be restricted to the most serious offences and subject to a range of safeguards, including a review of the powers three years after their enactment. The Committee recommends that the Government consults with

stakeholders about appropriate additional powers and protections that should be part of a covert warrants regime for investigations not related to terrorism and should consider the safeguards in other jurisdictions' covert search warrants legislation.

## Consolidation

The combined effect of the Committee's recommendations for improving consistency is in effect to create a consolidated code of search warrant procedures. The Committee believes that such an outcome will provide greater certainty, consistency and efficiency than the current fragmented scheme. A standard code will also be easier to amend than many different Acts containing varying degrees of procedural requirements. The Committee therefore recommends that search warrant procedures be moved from individual legislation into a central Act, and that only the powers authorising the application for and use of search warrants be retained in individual subject-specific legislation.

Such a reform could be implemented through reform of the *Magistrates' Court Act 1989*. The Committee believes, however, that the Act is not the most appropriate location for such a code. While most warrants are issued by magistrates, other judges also do so. The Committee considered that the Act should deal with the constitution and functions of the Court and that search warrants are an independent aspect of the legal system. For these reasons, the Committee recommends the enactment of a consolidated search warrants act, analogous to the New South Wales *Search Warrants Act 1985*.

## 2. Warrants for surveillance and interception

Another area where warrants are used is to obtain information about individuals' activities and communications. Surveillance devices warrants permit the use of listening devices, optical surveillance devices, tracking devices and data surveillance devices. Telecommunication interception warrants authorise the recording of conversations passing through telecommunication services. While surveillance devices are covered by state legislation (the *Surveillance Devices Act 1999*), because telecommunication services are a federal responsibility under the Constitution, the power of interception can only be granted through Commonwealth legislation (*Telecommunications (Interception) Act 1979* (Cth)). The Committee makes no recommendations in relation to telecommunication interception as it is generally outside of its jurisdiction.

## Surveillance

Some stakeholders argued that surveillance devices warrant powers were particularly open to misuse because of the difficulty of reviewing the voluminous amount of data produced as a result of the surveillance and the limited ability for individuals affected by the use of the powers to challenge them. Victoria Police, the main user of surveillance powers, believed that Victorian legislation was comprehensive and contained a high level of accountability.

The use of surveillance devices throughout Australia has recently been subject to comprehensive review by the Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers (JWG). The JWG was established to develop model laws for cross-border investigations, including the mutual recognition of surveillance warrants, following agreement by the Prime Minister and state and territory leaders on the subject in 2002. The *Surveillance Devices (Amendment) Act 2004* gives effect in Victoria to the mutual recognition principle and certain other JWG recommendations. The Committee reviewed state surveillance warrant powers in the context of the new Act, which has not yet come into force, and the JWG's work.

The Committee concluded that the current legislation does not sufficiently reflect the principle that covert warrants should only be available for and issued in exceptional circumstances. A major difference between Victorian legislation and the JWG's Model Bill is that the latter provides that an application can be made in relation to a "relevant offence", while the Act applies to any offence. However, the *Surveillance Devices (Amendment) Act 2004* provisions which allow warrants to authorise installation or use of surveillance devices outside the Victorian jurisdiction also preclude the issue of such a warrant if the offence in relation to which the warrant is sought is not a relevant offence. In effect, different standards operate in Victoria depending on whether the warrant will have extra-jurisdictional effect.

The Committee concluded that there was no justification for this inconsistency and therefore recommends that the *Surveillance Devices (Amendment) Act 2004* be amended to restrict the use of surveillance warrants to relevant offences. To ensure consistency with the JWG Model Bill and to ensure that such a qualification would not exclude important offences, the Committee proposes that relevant offences be defined as offences punishable by a maximum term of imprisonment of three years or more, or those prescribed by regulations.

The legislation also provides that emergency authorisations may be issued to use surveillance devices. This does not initially require a warrant. However, the court must subsequently approve the emergency authorisation, at which time the judge may issue a warrant for the continued operation of the device.

The Committee believes that the emergency authorisation is an extreme measure which allows significant invasions of privacy without the oversight of a judicial officer in the first instance. This is reflected in the JWG Model Bill provisions which restrict

the use of such instruments to situations where there is an imminent threat of serious violence to a person or substantial damage to property. The use of the device must be so urgent that a remote application cannot be made.

Victorian legislation also permits emergency authorisations in relation to serious drug offences. The Committee was concerned that such cases require no imminent threat to persons or property but instead rely on the nature of the offence. The Committee considered that the general provisions provide the appropriate level of emergency and that a drug related offence should qualify for an emergency authorisation only when the general thresholds can be met. The Committee recommends that this issue be the subject of ongoing review to establish whether there is sufficient justification for the continuing inclusion of the provision which relates solely to drug offences.

Another issue that the Committee examined was the admissibility of unlawfully obtained evidence. While the *Telecommunications (Interception) Act 1979* (Cth) renders such evidence inadmissible, prohibition under the JWG Model Bill and Victorian legislation do not appear to extend to information gathered outside the terms of the warrant. The Committee considered that the logic which excludes any illegally obtained evidence obtained by telecommunication interception applies equally to evidence obtained through a surveillance device: agencies which exercise the powers to covertly obtain evidence must be subject to strict compliance regimes if the public is to retain its confidence in those agencies' ability to protect the public's interest. The Committee was concerned that, given the lack of opportunity for public scrutiny, any situation which retrospectively legitimises the inappropriate use of covert powers is likely to undermine such public confidence.

The Committee therefore recommends that the *Surveillance Devices Act 1999* be amended to specifically make inadmissible evidence illegally collected by a surveillance device without a properly authorised warrant.

The Committee also considered the appropriateness of a Public Interest Monitor to assist judges hearing applications for warrants. As with covert search warrants under the *Terrorism (Community Protection) Act 2003*, the Committee was not satisfied that such a mechanism is presently necessary but suggests that the issue be kept under review.

### **3. Penalty enforcement warrants**

Instead of prosecuting cases in open court, many agencies deal with offences through the infringement notice system. This is an automated process that commences with the issue of an infringement notice containing a fixed penalty as a sanction for certain offences, such as speeding, littering and travelling on public transport without a ticket. More than three million notices are issued every year, under more than 60 pieces of legislation administered by dozens of issuing agencies. Infringement notices provide offenders with a simple and certain way of expiating offences they have committed.

Payment generally does not result in a conviction being recorded. For agencies, the system saves time and expense that would otherwise be required to pursue court cases. The system is governed by Schedule 7 of the *Magistrates' Court Act 1989* and by various other provisions of that Act and other legislation that establishes the offences.

Failure to pay the penalty in an infringement notice triggers the next stage in the process, whereby agencies issue a reminder letter to offenders. Non-payment results in the penalty being lodged with the Penalty Enforcement by Registration of Infringement Notices Court (PERIN Court), part of the Magistrates' Court of Victoria. The PERIN Court provides offenders with a further opportunity to pay before issuing a penalty enforcement warrant. Each of these stages incurs enforcement costs, payable by the offender in addition to the original penalty.

Between 530 000 and 715 000 penalty enforcement warrants were issued in each of the financial years from 2001 until 2004. The warrants authorise entry and seizure and sale of items to satisfy the penalty. They are executed by Sheriff's Office personnel. Prior to execution, various safeguards must be complied with, including the provision of certain information to offenders about their options. Options include applying to the PERIN Court for revocation of the penalty and costs, or for an extension of time to pay or for an instalment plan. Offenders may also elect to have the matter dealt with in open court, where they have access to a broader range of sentencing options that is available under the PERIN system. If the execution of a warrant does not yield sufficient assets to satisfy the penalty and enforcement costs, an offender is assessed for a Community Custodial Permit. If a CCP is not appropriate, the offender is taken before the Magistrates' Court. Under Schedule 7, if certain medical conditions are not present and exceptional circumstances do not exist, the Court must impose a sentence of imprisonment based on the outstanding amount owing (the nominal sentence may be reduced by up to two thirds). These sentencing options are considerably more limited than those available in other matters, which are governed by the *Sentencing Act 1991*.

The PERIN system functions efficiently and effectively in approximately 85-90% of cases. However, particular groups of people are affected by the PERIN system more than others. Individuals with mental or physical illness, disability or intellectual impairment have a limited capacity to understand the nature and consequences of infringing behaviour. Such individuals may be eligible for the PERIN Court's Special Circumstances List, which can discharge penalties and costs and impose good behaviour bonds in certain circumstances. Another affected group is people who experience financial hardship and consequently have a limited ability to pay penalties and costs. There is a consensus among Government, agencies and advocacy groups that these cases should be dealt with through more individualised approaches than the PERIN system currently provides.

While warrants are an integral aspect of the PERIN system, the Committee was particularly concerned by the evidence it heard about the effect of the automated nature of the system as a whole on individuals with the sorts of special circumstances

described above. Many stakeholders made extensive submissions on this subject. The Committee therefore decided to consider how to reduce the number of warrants that are issued, reforms to process that follow the issue of the warrants and more general questions of improving coordination and consistency in the system.

## **Reducing the number of PERIN warrants issued**

The Committee proposes a number of modifications to the PERIN system to facilitate outcomes in appropriate cases that are fairer to the individuals concerned, because legitimate exculpating or mitigating circumstances are taken into account, and ultimately more efficient for agencies and the justice system, because of the likely savings from not pursuing inappropriate cases through the various stages of the system. The Committee's findings have taken into account the need to balance fairness with the importance of retaining the operational and conceptual integrity of the system, which must retain a large degree of automation and must continue to promote deterrence.

The Committee's principal recommendations call for:

- diversion of certain cases at the point of contact with an authorised officer following the commission of an infringement offence;
- mandatory agency review of infringement notices;
- permitting applications to the PERIN Court to convert penalties and costs into unpaid community work, in the same way that applications for revocation, extension or instalment payment plans are currently permitted;
- additional means to pay penalties and costs, including the variation of penalties on application by Centrelink Health Care Card holders and a requirement that agencies offer extensions of time to pay and instalment payment plans;
- improved options for diverting infringement matters to open court, including a requirement that all agencies explicitly offer and explain diversion in their infringement notices and reminder letters, and legislative amendment to oblige the PERIN Court to revoke infringement proceedings for the purposes of diverting the matter to open court to plead guilty;
- the expansion of the jurisdiction and funding of the Enforcement Review Program and associated Special Circumstances List;
- the provision of additional and clearer information in infringement notices, reminder letters and other PERIN system forms; and

- modifications to the Victorian Infringements Management System database to improve the PERIN system's capacity to proactively identify cases of potential concern, without the need for intervention by such individuals or their advocates.

## **Reforms to processes following the issue of a warrant**

The Committee reviewed penalty enforcement warrant and associated processes, including sentencing hearings.

The Committee concluded that the options under Part 4 of Schedule 7 of the *Magistrates' Court Act 1989* can be improved to increase magistrates' discretion and ensure fairer outcomes. The Committee recommends that it be possible for a magistrate to hold an open hearing and to determine a sentence consistent with the *Sentencing Act 1991* where an individual brought before the Court satisfies the Court that both, or either option, is appropriate in the circumstances. The Committee's proposals will not remove the option of a custodial sentence, which it recognises may be justified in some cases.

The Committee considered the seven day period between notification to an offender of the existence of a warrant and its execution and concluded that it should be extended in the event of an application for revocation, extension of time to pay or an instalment payment plan. The Committee believes that this is justified to provide sufficient time to offenders and their representatives to gather the material necessary to support such applications.

The Committee also analysed the content and accessibility of the information in penalty enforcement and related forms, as a result of which it recommends appropriate improvements to the material.

## **Overall coordination and consistency**

Finally, the Committee considered evidence about the lack of coordination or consistency in the system. To some degree, this is a consequence of the volume of cases and the range of agencies involved. The Committee endorsed the many previous proposals for system oversight and for overarching legislation. It recommends the establishment of a body with the following functions: the development of consistent policies for the operation of the infringement system; addressing ongoing systemic issues; collecting and analysing empirical data about the operation of the system; and monitoring and applying best practices and innovations from other jurisdictions. The Committee believes that the body should be advised by a standing board of stakeholders representing the various Government and community interests in the infringement system.

The Committee also recommends the enactment of consolidated infringement legislation to provide for matters including: agencies' eligibility to use the infringement system; training standards for issuing agency and Sheriff's office personnel; offences, levels of penalties and costs; form and content of infringement notices, reminder letters and PERIN Court documents; special circumstances categories and applications; principles and procedures for the development and implementation of standard policies; execution of penalty enforcement warrants, seizure of goods, arrest and subsequent court hearings; and oversight of the infringement system.

## **4. Warrants for the enforcement of civil debt**

Warrants are also used to enforce civil judgements in Victoria, such as for the payment of outstanding fees owed by the debtor for a service performed by the creditor. The Committee focused on warrants which authorise the seizure and sale of a person's property for the enforcement of a judgement debt. The Committee considered whether such warrants should authorise forced entry to the debtor's premises, and general aspects of relevant warrant procedures.

### **A power of forced entry**

One of the key issues raised by stakeholders at the beginning of the inquiry was whether it is desirable or possible for the Sheriff to have a power of forced entry when executing a warrant to seize property. At present, the Sheriff's powers under a warrant to seize property are significantly limited compared to the powers available under a criminal warrant. Notably, while the Sheriff can use force to enter a person's home when executing a penalty enforcement warrant, the Sheriff has no such power when enforcing a warrant to seize property.

The lack of a power of forced entry under a warrant to seize property has often meant that judgement creditors have been unable to collect sums owed to them. On the other hand, such a restriction can protect debtors from undue harassment. The existence of such a protection reflects the idea that civil disputes are more of a private matter, whereas the more coercive powers available in criminal matters are a result of the community's interest in preventing and detecting crime.

The Committee heard a range of opinions from stakeholders representing creditors and debtors. It also examined other jurisdictions in Australia and overseas where powers of forced entry exist. On balance, the Committee concluded that the adoption of such a power would have merit but recommends that it should only occur in conjunction with a range of safeguards. The Committee proposes three types of protections.

- Pre-warrant protections. A presumption that warrants to seize property should only be issued following an assessment of debtors' means and circumstances to establish the existence of assets not protected under the *Bankruptcy Act 1966* (Cth). The assessment must be conducted through a compulsory court examination for debts below a specific value and must include consideration of the most appropriate means of enforcing a judgement. Warrants may be issued where such an examination is not practicable or the debtor fails to participate or to reveal relevant assets.
- Enforcement protections. Sheriff's Office personnel authorised to execute warrants must seek the owner or occupier's consent to entry at the time of execution and may proceed where consent has been unreasonably withheld or where s/he has been unable to contact the owner or occupier after making reasonable attempts. Authorised personnel should be appropriately trained and subject to procedures consistent with those contained in the Victoria Police Manual relevant to forced entry to premises. Sheriff's Office personnel should retain a discretion not to force entry. Finally on this theme, the Committee recommends that restrictions contained in relevant Western Australia legislation, which deal with matters including time of entry, what qualifies as premises and the need for a belief on reasonable grounds about the existence of seizable assets, should be included in any Victorian legislation.
- Codification and consolidation. These safeguards should be enshrined in legislation, which should also promote alternative means of enforcement, including mediation and arbitration, and the greater legislative and administrative centralisation of civil judgement enforcement.

## **Civil warrant procedures**

The Committee's examination of relevant Victorian law revealed different procedures in each of the Magistrates', County and Supreme Courts.

The Committee concluded that the existence of separate provisions authorising the issue of warrants for the sale and seizure of property in the legislation of each of the courts is anachronistic and reflects the origin of the remedy within the common law rather than any policy basis. The Committee considered that consolidating these provisions could address various aspects of the current system that are inefficient and confusing to debtors and creditors. A number of other jurisdictions have legislated uniform civil procedures to standardise civil warrants. The Committee recommends the introduction of introducing uniform civil procedures legislation in Victoria to provide for a single warrant to seize property under a single Act, regardless of the issuing court.

## 5. Warrants of apprehension

Warrants providing for the apprehension of a person are generally governed by state law. In Victoria, sections 57-59 of the *Magistrates' Court Act 1989* apply to warrants generally and sections 61-67 apply to warrants to arrest specifically. A number of warrants which may be issued under the *Magistrates' Court Act 1989* provide for a person's apprehension: a warrant to arrest (this terminology has replaced warrants of apprehension and bench warrants); a remand warrant; a warrant to imprison and a warrant to detain in a youth training centre. In general, remand, imprisonment and detention warrants are issued in relation to people who have already been apprehended.

Evidence received by the Committee on this type of warrant focused on two specific issues relevant to arrest warrants: the codification of the requirements for lawful arrest; and the impact of warrants of arrest on indigenous Australians. The Committee's research also led it to consider the consolidation of arrest warrant provisions.

### Codification

The Committee received evidence arguing for the codification of the existing common law regulation of conditions that must be satisfied for a valid arrest. In contrast, Victoria Police felt that the courts have defined powers of arrest and entry that are appropriate and clear.

The Committee's research indicated that arrest pursuant to a warrant is now the exception rather than the rule in Victoria and throughout Australia. Given that, the Committee determined that an assessment of current law of arrest would be beyond the scope of this inquiry. The Committee's decision was influenced by the trend in other jurisdictions, such as Queensland and New South Wales, to consolidate and codify arrest powers as part of more general legislative reform. Moreover, the Committee did not receive any detailed arguments from stakeholders on this issue.

### Impact of warrants of arrest on indigenous people

The Committee received evidence alleging that members of Victoria Police use arrest warrants to "over-police" indigenous people. That claim raises complex and sensitive issues beyond the scope of this inquiry. While the Committee noted the over-representation of indigenous people in the justice system, the claim of "over-policing" by warrant was not substantiated by any evidence received or research that the Committee undertook. However, due to the limitations of current arrest warrant data, the Committee was unable to conclude with any certainty whether arrest warrants are used unfairly or in a discriminating way against indigenous people. For this reason,

the Committee recommends a range of improvements to record keeping practices by the Magistrates' Court, Victoria Police and other agencies with arrest warrant powers.

The Committee also heard allegations that specific procedures for the execution of arrest warrants against indigenous people were not implemented consistently. An agreement between Victoria Police and the Victorian Aboriginal Legal Service (VALS) requires the former to notify the latter of the arrest of an indigenous person. Both VALS and Victoria Police provided empirical evidence which supported VALS' claim that compliance with the agreement by Victoria Police has not been consistent. Victoria Police acknowledged the need to address and improve this situation and advised the Committee that it is drafting a report with recommendations for this purpose. The Committee concluded that any further consideration of reforms of this procedure should await the completion of the Victoria Police report.

The Committee was informed of another practice whereby some Victoria Police members inform VALS of the existence of outstanding arrest warrants. VALS argued that this practice should be regulated by agreement, a proposal that Victoria Police agreed to. The Committee recommends that such an agreement be concluded and be subject to the same monitoring and review as the agreement on notification of arrests.

VALS alleged that the execution of arrest warrants is sometimes delayed, resulting in the arrest of indigenous people overnight or over the weekend. This claim was not substantiated, in part because of a lack of data about arrest times and dates. The Committee considered that the possibility that it occurs is nevertheless a matter of serious concern and recommends improved data collection to establish whether this in fact occurs and to assist in determining any possible causes.

## **Consolidation of arrest warrant provisions**

The *Magistrates' Court Act 1989* contains detailed provisions dealing with the application, issue, execution and post-execution of arrest warrants, while a range of other Acts, such as the *Crimes Act 1958*, define the circumstances in which an arrest warrant may be issued.

The Committee found that there are three types of legislation which authorise the issue of a warrant to arrest or apprehend: legislation setting out the circumstances, without more, in which the issue of a warrant is authorised; legislation including provisions dealing with one or more aspects of the application, issue or execution of a warrant but not referring to the requirements contained in the *Magistrates' Court Act 1989*; and legislation including provisions dealing with one or more aspects of the application, issue or execution of a warrant and a reference to the *Magistrates' Court Act 1989*.

The Committee concluded that the legislation governing arrest and apprehension warrants is not fragmented to the same degree as that governing search warrants. However, it believes that the existence of three separate categories of authorising

provision demonstrates a similar need for consolidation. In particular, although the location of the law relevant to the first two types of legislation may be apparent to a legal practitioner (aspects of the application, issue, execution and post-execution of an arrest warrant that are not addressed in the authorising legislation are generally governed by the *Magistrates' Court Act 1989*), the Committee was concerned that this was not clear in the authorising legislation and concluded that making it explicit would significantly enhance the clarity, consistency and accessibility of the law. The Committee accordingly recommends that the Government considers the appropriateness of removing arrest warrant provisions to the consolidated warrants act that it recommended in Chapter Seven, with appropriate references to other authorising legislation.

## **6. Warrants for the protection of vulnerable groups**

The Committee received evidence about warrants and warrant-like orders issued under four pieces of legislation whose purpose is to protect the welfare of vulnerable members of the community: the *Mental Health Act 1986*; the *Children and Young Persons Act 1989*; the *Guardianship and Administration Act 1986*; and the *Alcoholics and Drug-dependent Persons Act 1968*.

### ***Mental Health Act 1986***

Stakeholders made comments about both general warrant powers that the Committee has reviewed throughout the report and about specific provisions in the *Mental Health Act 1986* that authorise entry by force and apprehension of eligible individuals. The Act contains one warrant power, which permits a magistrate to order a police officer and a medical practitioner to visit an individual and examine them in certain circumstances. Relevant warrant-like powers are those under sections 9B, 10 and 43. They respectively authorise the transport of individuals, the detention of individuals by police officers and the apprehension of individuals whose community treatment orders have been revoked.

The presence of Victoria Police in many situations involving individuals with mental illness is required by legislation or operational procedures (for example where there is a particular risk to mental health professionals or others). Stakeholders argued for reform of existing procedures to facilitate the attendance of mental health professionals, in particular Crisis Assessment and Treatment (CAT) Teams at incidents involving warrant and warrant-like powers. The Committee believes that in principle such professionals should attend incidents, because of their relatively greater expertise and experience in dealing with mental health issues. The Committee concluded, however, that such an outcome appears to be financially unrealistic and considered that a more detailed assessment of the context in which CAT teams operate and their capabilities was beyond the scope of this inquiry.

In response to other stakeholder concerns, the Committee also examined relevant training provided to Victoria Police, and the various concerns of the police and other voices in the community. The Committee concluded that consideration should be given to enhancing the training to focus more on understanding mental illness, its consequences and additional strategies for ensuring appropriate interaction between police and individuals with mental illness during the exercise of warrant and warrant-like powers. The Committee believes that improving general police skills in these areas can make an important contribution to better outcomes by increasing police knowledge and options available to members who attend such incidents. The Committee referred to existing local and international training programs as useful reform models.

### ***Children and Young Persons Act 1989***

Under the *Children and Young Persons Act 1989*, the Children's Court may issue safe custody warrants for the apprehension of a child in eleven circumstances. The Committee was advised of four concerns in relation to individuals subject to such warrants:

- the repeated issuing of warrants for children who constantly abscond from protective placements;
- an alleged lack of understanding among child protection workers concerning the scope and use of the warrants;
- the effectiveness of police procedures for the execution of these warrants; and
- the use of Victoria Police to transport children under the warrants where there is no other transport available.

Given the complexity and sensitivity of the issues that arise in relation to the child protection system, the Committee did not consider that it received sufficient evidence to make findings or recommendations in relation to any of those matters. Moreover, the Committee concluded that the ongoing reforms of the child protection system, in particular those relating to Children's Court orders, including safe custody warrants, provide a more appropriate forum for stakeholders to raise and address issues of concern that have been identified in the course of the present inquiry.

### ***Guardianship and Administration Act 1986***

The Committee considered warrant-like powers under sections 26 and 27 of the Act, which respectively authorise the Victorian Civil and Administrative Tribunal (VCAT) to make orders to enforce guardianship decisions and to visit and facilitate an assessment of a person with a disability who is at risk. The Office of the Public

Advocate (OPA) argued that the standard of proof necessary for a section 27 order (knowledge) was unduly onerous and that it should be modified to match the standard that was used in practice (belief on reasonable grounds). After examining OPA's evidence, which was supported in principle by the President of VCAT, submissions that opposed lowering the standard and the law and practice in other jurisdictions, the Committee concluded that a lower burden of proof in Victoria was justified and recommends that the Act be amended accordingly.

The Committee also heard evidence about the transmission and execution of orders, as a result of which it suggests improvements to procedures and to the information provided to relevant agencies and officials.

### ***Alcoholics and Drug-dependent Persons Act 1968***

Warrants may be issued under section 11 of the Act, which permits a court to order that a person who appears to be alcoholic or drug-dependent attends and be admitted to an assessment centre. Where the subject of such an order does not comply, section 11(3) authorises a court to issue a warrant "commanding" a member of the police force to convey them to an assessment centre named and deliver them to the officer in charge of the centre for the purposes of the examination.

The Act also provides authority for a warrantless apprehension of any person who escapes from detention in an assessment or treatment centre, or from the lawful custody or control of certain persons. Escapees may be apprehended by any member of the police force and returned to the place of detention, custody or control.

The Department of Human Services (DHS) referred to anecdotal evidence that these provisions were ineffective because individuals are not apprehended. It was suggested that this was the result of a lack of resources and training and a perceived low priority accorded to such cases. DHS felt that additional education and training may be required.

The Committee received no additional evidence on this legislation. For that reason it was unable to reach any conclusions but it re-iterated the importance of adequate training for all officials involved in the application, use and monitoring of warrants, in particular those relating to the protection of, and otherwise affecting, vulnerable groups.



## CHAPTER ONE – INTRODUCTION

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Warrants are one of the most basic and frequently - used tools of the justice system. They are instruments that authorise the police and other agencies to enforce laws. In the year from 1 July 2003 to 30 June 2004, the Magistrates' Court of Victoria issued 22 741 search warrants and warrants to arrest<sup>1</sup> and 615 575 penalty enforcement warrants against individuals.<sup>2</sup> In the same period, the Victorian Sheriff's Office processed 489 722 criminal and civil warrants.<sup>3</sup>

The range of purposes that warrants are used for is as broad as society is diverse.<sup>4</sup> As such, it is imperative that warrants further the goals of the justice system, and that the power and procedures that govern their use are regularly assessed to ensure that they are fulfilling their function.

This inquiry has been guided by these two objectives. The Victorian Parliament Law Reform Committee (the Committee) has investigated the role and purpose of various warrants used in Victoria and the ways in which their use is assessed. In doing so, the Committee heard evidence from many sections of Victorian society. All of the organisations and individuals who made submissions or gave evidence felt that warrant powers and procedures are in need of review and reform.

Among the concerns expressed is the view that warrant powers and procedures are scattered throughout many different pieces of legislation and the common law,<sup>5</sup> and consequently lack coherent guiding principles as to their creation, use and control. The ad hoc development of warrant powers makes it difficult to ensure that an appropriate balance between fairness and effectiveness is maintained, and that sufficient checks and balances exist to effectively safeguard the rights of those who are subjected to warrant powers and procedures.

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<sup>1</sup> The figure comprised 20 799 warrants issued during business hours and 1942 issued between 5pm and 8.45am: Magistrates' Court of Victoria, *Submission no. 29*.

<sup>2</sup> Email, Department of Justice Senior Legal and Policy Officer Andrew Crawshaw to Committee Research Officer, 28 September 2005.

<sup>3</sup> Enforcement Management Unit, Department of Justice, *Submission no. 38*, appendix.

<sup>4</sup> Compare for example, *International War Crimes Tribunals Act 1995* (Cth) s 10 authorising the issue of an arrest warrant against individuals accused of war crimes with the *Chinese Medicine Registration Act 2000* ss 88-91, which governs the use of search warrants to regulate the activities of Chinese medical or herbal practitioners, or the *Forests Act 1958* s 83.

<sup>5</sup> Common law is an unwritten body of law derived from cases decided by courts rather than from statutes passed by the legislature (Parliament).

The Committee therefore intends that this Report will explore the operation of warrant powers and procedures, identifying areas in need of improvement and proposing reform options.

## **Background to the inquiry**

The Committee received a reference on 3 June 2003 to inquire into, consider and report to Parliament on Victoria's existing warrant powers and procedures and whether existing laws should be amended, having regard to the need to promote fairness, consistency and efficiency.

This reference follows the Report of the Inquiry into the Powers of Entry, Search, Seizure and Questioning by Authorised Persons, published in 2002 by the Law Reform Committee of the 54th Parliament (Inspectors' Powers Report and Inspectors' Powers Inquiry).<sup>6</sup> That inquiry considered warrants used by a large number of agencies. Although it did not examine most police powers, the exception being where police were acting as authorised persons under particular legislation, or Sheriff's Office powers, the Report made a number of recommendations for reform of warrant powers.

The Committee was advised by the Attorney-General that "one of the key reasons the Inquiry into Warrant Powers and Procedures was referred to the Committee was to enable the issues relating to warrant powers and procedures that were identified in the Inspection Powers report to be considered in greater detail".<sup>7</sup>

## **The inquiry in context**

This inquiry is part of a larger program of review and reform of various aspects of the Victorian justice system.

### ***Inspectors' Powers Inquiry***

As noted, some warrant powers and procedures were reviewed as part of the Inspectors' Powers Inquiry. The Inspectors' Powers Report highlighted

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<sup>6</sup> Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons* (30 May 2002) (*Inspectors' Powers Report*), available on the Committee's website, at [www.parliament.vic.gov.au/lawreform](http://www.parliament.vic.gov.au/lawreform).

<sup>7</sup> Letter, Attorney-General to Committee Chairman, 1 November 2004 (*Attorney-General's Letter*). The issues identified by the Inspectors' Powers Report are detailed below in the methodology section of this chapter.

inconsistencies and a lack of transparency among the search, seizure and related powers conferred on authorised persons for the purposes of monitoring compliance with legislation/licensing regimes and investigating, and in some cases prosecuting, breaches thereof. The Report recommended a range of reforms to improve the clarity of inspectors' powers and the accountability of those who use them.

Clearly then, the Inspectors' Powers Report and this inquiry overlap. Indeed, the Committee has been greatly assisted by the work of the Inspectors' Powers Inquiry and anticipates, consistent with the Attorney-General's advice that the present report will influence the Government's consideration of the Inspectors' Powers Inquiry recommendations, that this report will play a part in the implementation of the results of both inquiries.

Relevant aspects of the reports and the Government Response are discussed below in the section on "How the Committee conducted the inquiry" and throughout this report.

## ***Department of Justice Reviews***

### **The Attorney-General's Justice Statement**

In May 2004, the Attorney-General released the Justice Statement, a ten year program to modernise the justice system and reinforce the protection of individual rights. Several of its proposals are relevant to this inquiry, most notably:

- the planned review and replacement of the *Crimes Act 1958* and the *Bail Act 1977*;
- the reviews of criminal procedure, evidence and of the effectiveness of the State's infringement notice system;
- improvements to Victorian courts' access to and use of information technology;
- the intention to undertake a consultation on how best to protect human rights and obligations in Victoria; and
- the commitment to "adopt a multi-disciplinary approach to [disadvantaged people]... who are caught up in a cycle of offending and punishment".<sup>8</sup>

Clearly, the implementation of this program will necessitate a review of the warrant powers and procedures relevant to each particular aspect of the justice system. The Committee therefore considered it particularly important to ensure communication between parties involved in the various reviews to encourage the most efficient use of

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<sup>8</sup> *Attorney-General's Justice Statement*, May 2004 (*Attorney-General's Justice Statement*), 52.

resources and to ensure that recommendations are consistent and able to be implemented. At the time this report was written, two projects were sufficiently advanced to enable such cooperation. The Committee's examination of the admissibility of improperly obtained evidence<sup>9</sup> was assisted by the ongoing review of the uniform Evidence Acts. The Committee's work on penalty enforcement warrants has also benefited from information obtained from Department of Justice's review of the infringement notice system.

### **Review of Infringement Notices**

During the inquiry, the Department of Justice commenced the review of the use of infringement notices. Such notices are used as an alternative to prosecution for a range of minor offences such as speeding, parking and public transport offences. Issues under review include the types of summary offences which are suitable for infringement notice offences, available penalties and alternative approaches to cases involving particular groups of people who attract a disproportionate number of notices and fines, such as the homeless, people with a mental, intellectual or physical disability or an addiction. The Committee is particularly concerned about the experiences of these and other disadvantaged groups in relation to warrant powers and procedures. During this inquiry, the Committee has maintained constructive contact with the Department of Justice agency that is conducting the review and has had the benefit of shared information and ideas.

The Committee discusses the penalty enforcement warrants and the infringement notice system in Chapter Nine of the report.

### **Review of Sheriff's Office Powers**

At the commencement of its inquiry, the Committee was advised that the Government proposed to review the law relating to the operations of the Sheriff in Victoria with a view to consolidating and standardising legislation and powers into a Sheriff's Act. According to the Department of Justice's 2002 - 2003 Annual Report, the proposed Act "should result in greater effectiveness and efficiencies in the enforcement of court orders and warrants".<sup>10</sup> The Committee was subsequently advised that the proposed legislation had been postponed to allow any relevant findings from this inquiry to be studied and incorporated as appropriate.<sup>11</sup> The Committee discusses Sheriff's powers in Chapters Nine and Eleven of the report.

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<sup>9</sup> The discussion begins at p 249 below.

<sup>10</sup> Department of Justice, *Annual Report 2002 - 2003*, 61.

<sup>11</sup> Email, Department of Justice Senior Policy Officer Andrew Crawshaw to Committee Research Officer, 6 July 2004.

## **Review of implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody**

Stakeholders made submissions alleging that aspects of warrant powers and procedures disproportionately affect members of Indigenous communities living in Victoria. These allegations are discussed in detail and evaluated in Chapter Ten of the report during the Committee's examination of warrants of apprehension. In summary, the stakeholders claimed that warrant powers and procedures are insufficiently flexible and sensitive to the particular needs and characteristics of indigenous communities and that mechanisms that have been developed to identify and assist indigenous people who come into contact with the justice system have not been properly implemented. Some of the complaints echo the findings of the 1991 report of the Royal Commission into Aboriginal Deaths in Custody (Deaths in Custody Report), in particular that, to quote one recent assessment of the Report, "criminal justice systems were culturally alien and insensitive to the needs of Indigenous persons and communities".<sup>12</sup>

As part of its commitment to implement the recommendations of the Deaths in Custody Report, in June 2000 the Victorian Government concluded the Victorian Justice Agreement with leaders of the Koori community. "The aim of the Agreement was to minimise Koori over-representation in the criminal justice system by improving accessibility, utilisation and effectiveness of justice related programs and services"<sup>13</sup> and to do so in partnership with Koori communities. The Aboriginal Justice Forum is responsible for overseeing the development, implementation and direction of the Justice Agreement. The Forum is comprised of senior representatives of indigenous community and Government groups and agencies and meets regularly to assess, review and report to the Government on "Aboriginal justice outcomes".<sup>14</sup>

The Forum established an Implementation Review in November 2003 to "rigorously assess" the Deaths in Custody Report recommendations and their implementation.<sup>15</sup> This was prompted by concerns at the "minimal change in the over-representation in the criminal justice system and the underlying issues that impact daily on indigenous communities" since the Deaths in Custody Report, and "scepticism in the Koori community about the accuracy of the four previous Victorian implementation reports", a critique that was "centred around the lack of community input and participation" in those implementation assessments.<sup>16</sup>

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<sup>12</sup> Aboriginal Justice Forum Implementation Review Steering Committee, *Victorian Implementation Review of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, Discussion Paper* (March 2004) (*Implementation Review Discussion Paper*), 1.

<sup>13</sup> *Ibid.*

<sup>14</sup> Victorian Department of Justice, *Victorian Aboriginal Justice Agreement* (2000), 32.

<sup>15</sup> *Implementation Review Discussion Paper*, 7.

<sup>16</sup> *Ibid.*

After the Warrants inquiry commenced, the Implementation Review published a discussion paper that raised a number of issues of relevance to this inquiry. In particular, the Review sought information from the Koori community and Government about relations between Indigenous people and the police, police training, complaints handling, court processes, data collection and monitoring, use of arrest, bail and cautioning and diversionary programs.

The Implementation Review had not reported by the time this report was completed.

### **Political environment**

The referral of this inquiry to the Committee is also timely given the recent intense focus on law and order issues, both locally and globally. Controversy in Victoria over police corruption and organised crime murders have resulted in extensive changes to the Ombudsman's police oversight role, in particular by the creation of the Office of Police Integrity and new warrant and other powers. This has in turn raised concerns about their appropriateness.<sup>17</sup> At the same time, countries throughout the world have increased the powers of law enforcement agencies, including those relating to warrants. In the wake of the legal and policy responses to terrorist attacks on and since 11 September 2001, concerns have been expressed about whether appropriate consideration and evaluation has preceded the adoption of such measures and whether there are sufficient checks and balances in place to prevent their misuse.<sup>18</sup> Others have argued that stronger powers are needed: legal practitioners and academics have advocated the creation of a new power to enable law enforcement agencies to apply to court for a warrant to torture suspects "to secure information that could prevent impending terrorist attacks",<sup>19</sup> and Australian Federal Police Commissioner Mick Keelty has called for legal reforms to increase opportunities to question suspects and have evidence from overseas law enforcement activities used as evidence in court proceedings.<sup>20</sup> Similarly, former ASIO director general Dennis

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<sup>17</sup> For example, Kirsty Simpson, Jason Dowling, *Police warned over Ombudsman's powers*, Sunday Age, 20 June 2004, 3; Ian Munro, *Rules have changed: Ombudsman*, The Age, 4 June 2004.

<sup>18</sup> Joo-Cheong Tham, *Casualties of the Domestic 'War on Terror': A Review of Recent Counter - Terrorism Laws*, 28 (2) MULR 512 (*Tham, Casualties of the Domestic War on Terror*), 513; Simon Bronitt, *Australia's Legal Response to Terrorism: Neither Novel nor Extraordinary*, Castan Centre for Human Rights Law Conference *Human Rights 2003: The Year in Review*, 4 December 2003, at [www.law.monash.edu.au/castancentre](http://www.law.monash.edu.au/castancentre).

<sup>19</sup> Alan Dershowitz, *A Choice Among Evils*, The Globe and Mail, 5 March 2003. Others advocate legalising the authorisation of torture: Julie Clarke and Mirko Bagaric, *Not Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable* (2005) 39 U.S.F.L. Rev. 581; Australian Broadcasting Corporation, The Law Report, *Torture*, Radio National, 15 February 2005, at [www.abc.net.au](http://www.abc.net.au).

<sup>20</sup> Australian Broadcasting Corporation, *AM: More law changes need to prevent terrorism: Keelty*, Radio National, 7 December 2004, at [www.abc.net.au](http://www.abc.net.au).

Richardson has reportedly argued that “properly considered, balanced tough laws are an essential component in the fight against terrorism”.<sup>21</sup>

While the present inquiry is not causally related to either of these broader phenomena, both are relevant to the Committee’s work. The debates on police corruption and terrorism underline the importance of appropriately considered and calibrated responses to complex and urgent issues of public policy. Moreover, underlying these debates and developments is the question of where the appropriate balance lies in responding to crime that is considered to threaten the fundamental security of a community. This challenge - to protect individual rights and freedoms while ensuring that law enforcement mechanisms are sufficiently effective to enable the enjoyment of those rights - has been central to the Committee’s consideration of warrant powers and procedures.

## **How the Committee carried out the inquiry**

In this section, the Committee outlines the stages of the inquiry and the methodology it used to conduct it in accordance with the terms of reference.

### ***Stages of the inquiry***

#### **Scoping questions**

The Committee’s chief aim during the consultation stages of the inquiry was to provide an opportunity for all members of the community who have experiences of warrant powers and procedures to have input into its deliberations, to ensure that the Committee was informed by the widest range of views as it considered its conclusions.

Preliminary research revealed a large and disparate range of subjects potentially within the terms of reference of the inquiry. As an aid to identifying the major topics of concern, the Committee decided to undertake preliminary consultations with a number of stakeholders selected because of their level of practical knowledge of warrant procedures. The Committee wrote to 39 stakeholders with the following scoping questions.

1. What warrant powers and procedures do you or your organisation encounter?
2. What issues arise in relation to them?

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<sup>21</sup> Patrick Walters, Greg Roberts, *Dozens’ with terror links*, The Australian, 24 March 2005, at [www.news.com.au](http://www.news.com.au).

3. Which warrant powers and procedures do you believe function fairly and efficiently and consistently?
4. Which warrant powers and procedures do you regard as not functioning fairly or efficiently or consistently?
5. Are there additional particular statutory or common law warrant powers or procedures that you wish to comment on? Please indicate briefly the statute or common law and your comments.
6. Although not the major focus of our review, because Commonwealth powers and procedures can be discharged in Victoria, some will be relevant to this inquiry. Are there particular Commonwealth warrant powers that should be included in the inquiry? Please indicate briefly which ones and why you believe that they should be included.
7. Is there any other information not already identified in response to the preceding questions that you consider important to the Committee's inquiry?

The Committee received substantive comments from 18 stakeholders, as well as informal comments from a number. Remarks identified four broad areas of concern:

- Normative: inconsistencies in legislation; standardisation and codification of certain warrant powers and procedures; existence of relevant principles.
- Operational: effectiveness of warrant powers and procedures in meeting legitimate needs of law enforcement agencies.
- Accountability for the use of warrant powers and procedures: inconsistent reporting requirements; gaps in data recording and reviewing; problems challenging the issue and execution of warrants.
- Impact of warrant powers and procedures on particular groups and sectors of the community: indigenous people, young people, homeless people, people with mental or intellectual impairments.

These responses assisted the Committee to develop an analytical framework for this inquiry.

### **Discussion paper**

The Committee also used the scoping question responses to prepare a discussion paper, which was published in July 2004 and distributed to 200 individuals and organisations in and beyond Victoria.<sup>22</sup> The discussion paper was written to assist

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<sup>22</sup> Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures, Discussion Paper* (July 2004) (*Warrant Powers and Procedures Discussion Paper*), at [www.parliament.vic.gov.au](http://www.parliament.vic.gov.au).

agencies and individuals who wished to have input into the inquiry. In it, the Committee provided background information on warrant powers and provisions, an overview of relevant laws and some thoughts on the principles of fairness, consistency and efficiency contained in the terms of reference. The discussion paper then posed a series of questions about the operation and regulation of current warrant provisions.

In response to the discussion paper, the Committee received 42 written submissions, listed in Appendix One of this report.

### **Public hearings**

The Committee held public hearings for witnesses in Melbourne in October and November 2004 and January 2005, and travelled to Perth and Sydney in August and September 2004. A list of witnesses and their affiliations appears in Appendix Two.

### **Other meetings and inputs**

The Committee also attended sittings of the Magistrates' Court of Victoria PERIN Court Special Circumstances list on 20 January and 3 February 2005 and convened a forum in April 2005 to facilitate exploration by PERIN agencies and client advocates of options for reform of current PERIN laws and practices. The observations and the Forum are considered in Chapter Nine of the report.

In July 2005, the Committee attended a search warrant execution training exercise at the Victoria Police Academy at Glen Waverley Victoria. The Committee's observations on the exercise appear in its examination of the execution of search warrants in Chapter Five of the report.

### **Report**

This report will be tabled in the Victorian Parliament. The Government is required to respond to the Committee's recommendations within six months of the tabling date.<sup>23</sup>

### ***Methodology***

The Committee's terms of reference request it to investigate warrants with only two limitations, namely that they should be Victoria's powers or procedures and that they should be current. The Committee interpreted the specification of "arrest warrants, warrants to seize property and search warrants" as including, but not limiting the inquiry to, those types of warrants. Therefore, the Committee has also considered

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<sup>23</sup> *Parliamentary Committees Act 2003* s 36.

other types of warrants. The Committee began by identifying and categorising warrant provisions.

### **Identifying warrant provisions**

There are many warrant powers in Victoria: the Committee's research identified more than 140 warrant provisions, contained in 93 Acts, that cover criminal and civil law, health, welfare and related issues and legislative regulation.

The Committee conducted an analogous exploration of Commonwealth statutes as many Commonwealth provisions are applicable in Victoria, either specifically in its courts or more generally on Victorian territory by Commonwealth agents. The Committee accordingly identified 441 provisions in 127 Commonwealth Acts.

It was beyond the resources of the Committee to examine in detail all of the provisions identified. Moreover, given the range of issues that arose during the inquiry, the Committee felt that Commonwealth laws would be more appropriately reviewed by Commonwealth bodies. The Committee therefore gave priority to the most significant Victorian warrant provisions and included Commonwealth provisions only in so far as they may be relevant for comparative purposes or as offering options for reform.

In assessing which powers and procedures are the most significant, the Committee considered:

- the frequency of use of a provision;
- concerns expressed about the application of a provision; and
- cases that do not meet these two criteria but which are nevertheless of particular concern, such as the use of warrants in relation to vulnerable groups.

Applying these criteria to stakeholder evidence and available statistics about warrant applications, executions and complaints, the Committee concluded that the most significant warrant provisions for the purposes of this inquiry are:

- Search and seizure warrants issued under sections 92 and 465 of the *Crimes Act 1958*, section 81 of the *Drugs, Poisons and Controlled Substances Act 1981* and part 2 of the *Terrorism (Community Protection) Act 2003*;
- Surveillance warrants issued under Part 4 of the *Surveillance Devices Act 1999*, and interception warrants issued under various parts of the *Telecommunications (Interception) Act 1979* (Cth);
- Penalty enforcement warrants used to secure payment of fines resulting from infringement notices issued for offences related to public transport, speeding and parking, issued under section 82 of the *Magistrates' Court Act 1989*;

- Warrants and warrant-like powers designed to protect vulnerable groups, issued under various sections of the *Mental Health Act 1986*, sections 26 and 27 of the *Guardianship and Public Administration Act 1986* and the various safe custody provisions of the *Children and Young Persons Act 1989*.<sup>24</sup>

A few stakeholders also raised issues about arrest warrants generally, without reference to particular legislative provisions,<sup>25</sup> and civil warrants executed by Sheriff's Officers.

## Warrant-like powers

In addition to reviewing warrant provisions, the Committee considered warrant-like powers. Although not technically warrant powers or procedures, these powers can have the same effect as warrants, such as authorising detention,<sup>26</sup> entry or search,<sup>27</sup> and are found in common law and legislation.<sup>28</sup> The Committee therefore considered that to exclude them absolutely from the inquiry would be to make an artificial distinction.

The Committee compiled a non-exhaustive list of 150 such provisions in Victorian legislation. In some cases these powers address situations where it is impractical to seek and obtain a warrant, such as emergencies or other relatively urgent circumstances, for example the availability of a power of arrest to police or citizens who witness an offence being committed, or to search for dangerous substances.<sup>29</sup> Other powers authorise entry, search, seizure, detention or questioning, or a combination of those activities, in ordinary circumstances.

In the discussion paper, the Committee proposed, again because of its limited resources, to examine warrant-like powers only in so far as they are relevant to its discussion of when it is appropriate to make the operation of a particular power subject to a requirement to obtain a warrant. No adverse comments were received

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<sup>24</sup> For a full list of these safe custody warrants, see Table 11 on p 542 below.

<sup>25</sup> Under section 457 of the *Crimes Act 1958*, any arrest not authorised by warrant or statute is unlawful.

<sup>26</sup> For example, *Victoria Racing Club Act 1871* s 22, which authorises, without warrant, the seizure and detention of a person committing an offence under the Act; *Crimes Act 1958* s 458 authorises the arrest without warrant of a person in certain circumstances, such as being found committing an offence, or escaping from legal custody.

<sup>27</sup> For example, the *Coroners Act 1985* ss 26, 41, which respectively authorise entry, search and seizure in connection with coronial investigations of deaths and fires; *Children's Services Act 1996* s 38, authorising entry and search on reasonable suspicion of the commission of an offence against the Act.

<sup>28</sup> For a general overview of common law and statutory powers, see Richard Fox, *Victorian Criminal Procedure 2005* (2005), 98-103, 106 (arrest), 126-135 (search and seizure) (Fox, *Victorian Criminal Procedure*); Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand* (1996) (Tronc *et al*, *Search and Seizure in Australia and New Zealand*), 1-38, 47-52.

<sup>29</sup> For example, *Drugs, Poisons and Controlled Substances Act 1981* s 82.

about this approach. The Committee has therefore included warrant-like powers in this inquiry only to the extent that they are illustrative of broader principles that it suggests should be applicable to all warrant powers and procedures.

### **Categorising warrant powers**

Having identified the most relevant warrant provisions, the Committee next considered how to categorise them for analysis. In its discussion paper, the Committee noted that there are a number of ways of doing so, such as considering warrants by what they authorise, or by whether they operate in a criminal or civil law jurisdiction, or by the underlying purpose that they serve. In the discussion paper, the Committee felt that the third approach was the most efficient and appropriate way to proceed. It concluded that the operation of warrants is, or should be, directly related to the purpose for which they are available, whereas an analysis based on the various different powers conferred by warrants would involve potentially confusing repetition, and the civil/criminal distinction was of limited analytical use. For that reason, the Committee grouped warrants into four categories: investigation and prosecution of crime; enforcement of proceedings; monitoring compliance with legislation and protection of vulnerable groups.

The evidence received during the inquiry, however, fell into two broad categories: concerns applicable to all warrants; and concerns about aspects of particular warrants - search, surveillance, PERIN, protective, arrest and civil enforcement warrants. The Committee felt that many of the issues raised were sufficiently distinct to justify some modification of the analytical approach that it proposed in the discussion paper. Thus rather than structuring its examination to look at the underlying purposes of warrants, the Committee considered the operation of each of the different types of warrants raised in evidence (search, surveillance, PERIN, arrest, protective). This approach is reflected in the structure of this report.

### **Structure of this report**

The terms of reference require the Committee to be guided by the need to promote fairness, consistency and efficiency in the operation of Victorian warrant powers and procedures. The Committee discusses these principles in Chapter Two, where examples of current practice highlight the tensions between the principles. For example, the automation of the PERIN fines system enables the efficient and consistent processing of fines incurred by most Victorians. As a result most offenders pay their fines before the matter progresses to the stage of issuing a warrant to search for and seize assets sufficient to pay the fine and related charges. However, the Committee has heard substantial evidence to suggest that the same standardisation of the fines enforcement process limits the fair treatment of offenders who are not a part of the majority who can and do pay fines that they incur. For some, the strict liability standard of many of the offences covered by PERIN ignores their lack of capacity to fully comprehend their actions in breaching the law; for others, the

lack of flexibility in the monetary value of particular penalties effectively means that the PERIN system imposes a greater penalty on them than on other members of the community who have committed the same offence. The Committee considers these problems and options for addressing them in Chapter Nine in its discussion of penalty enforcement warrants.

The Committee explores the operation of specific warrants in Chapters Three - Twelve, which cover search, surveillance, PERIN, apprehension, civil and protective warrants. In each, the Committee has summarised current law and practice, discussed issues raised in evidence and research materials and made recommendations for changes to relevant laws or procedures or for further research.

### **Inspectors Powers Inquiry**

Given the similarities in the objects (assessing the fairness, consistency, efficiency and effectiveness and proposing appropriate reforms) and the overlap in substance (search warrants and arrest warrants) between this inquiry and the Inspectors Powers Inquiry, the Committee studied the latter's report as an aid to devising its methodology for this inquiry.

The Committee noted that the Inspectors' Powers Inquiry was limited to particular types of warrants and warrant-like powers available to particular classes of individuals and agencies, and that the inquiry did not address in depth important issues relevant to warrant powers, such as the reasonable grounds requirement that must be satisfied before many warrants can be issued.

As observed, the Committee's process for identifying the most significant warrant provisions for the purposes of this inquiry did not exclude powers on the basis of who may exercise them. Accordingly, this inquiry included three areas that were explicitly excluded from the Inspectors' Powers Inquiry, namely powers available to: members of the police; the Sheriff's Office; and agencies as part of their mandate to protect children and other vulnerable persons.

Moreover, because of the thorough analysis of the subject in the Inspectors' Powers Report, the Committee decided to consider warrants available to authorised persons only where the Inspectors' Powers Report does not provide sufficient or appropriate guidance on a particular issue that they raise. No such issues have been brought to the Committee's attention.

The Inspectors' Powers Inquiry was also a valuable substantive research resource for the Committee. Apart from considering relevant discussions, submissions and other evidence from that inquiry, the Committee identified a number of recommendations as being of particular relevance. The Committee was subsequently informed by the Attorney-General that the warrants inquiry was motivated in key part by a desire to

consider in greater detail issues relating to warrant powers and procedures that were identified in the Inspectors' Powers Report.<sup>30</sup>

**Relevant recommendations from the Inspectors' Powers Inquiry**

As an aid to readers, the Committee reproduces below the recommendations from the Inspectors Powers Inquiry that it considered relevant to the Warrants inquiry, together with the government responses.

Recommendation		Government Response <sup>31</sup>
Requirement to have a warrant		
71	That, as a matter of general principle, warrants be required for the investigation of suspected offences and for entry into residential premises.	The Government will give further consideration to the question of when it is appropriate for warrants to be required for the exercise of inspection powers. It may also be appropriate to further consider the notion of "residential premises" so that there is a clearer distinction between a "dwelling house" and those parts of a residential property which are not used as a residence.
72	That, as a matter of general principle, warrants not be required for the monitoring of compliance with primary legislation or in responding to genuine and clearly defined emergencies.	The Government will give further consideration to the question of when it is appropriate for inspection powers to be exercised without a warrant and without consent. These issues will need to be considered in conjunction with the issues raised in Recommendation 71.
Search warrants		
41	That the Magistrates' Court review the Register required to be kept pursuant to section 57 of the <i>Magistrates' Court Act 1989</i> , to allow warrants issued under particular Acts to be more readily identifiable.	The Government will consult with the Magistrates' Court with regard to whether and how the practice in relation to the registering of search warrants may be improved.
42	That the Department of Justice consider the possibilities for enhancing clarity and transparency of search	The Government will give further consideration as to whether any legislative reforms might improve

<sup>30</sup> Attorney-General's Letter.

<sup>31</sup> Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee's Final Report on The Powers of Entry, Search, Seizure and Questioning by Authorised Persons, 11 June 2003.* (Victorian Government, *Inspectors' Powers Inquiry Response*).

	warrant provisions in Victorian legislation conferring powers on authorised persons by listing them in the <i>Magistrates' Court Act 1989</i> or in new stand-alone legislation, giving particular consideration to the model of the <i>Search Warrants Act 1985</i> (NSW).	the operation of search warrants.
43	That search warrant provisions contain protections including but not limited to announcement before entry and that a copy of the warrant is to be given to the occupier.	The Government supports in principle that persons executing search warrants make an announcement before entry and give a copy of the warrant to the occupier. The Government will give further consideration as to what matters need to be put in legislation or whether they are best left to the issuing magistrate to specify.
44	That statutes conferring coercive powers on authorised officers contain other common protection, including exactly what matters the search warrant must cover; a sun-set clause on warrant validity; procedures for dealing with disputed seizures; and time limits for the return of seized material.	The Government supports in principle that it be clear what matters a search warrant covers, when it expires and when seized materials must be returned. The Government will give further consideration as to what matters need to be put in legislation or whether they are best left to the issuing magistrate to specify.  Where a seizure under warrant is disputed, this can be argued before the court to which the seized material is returned. [...]
Standards		
77	That authorised persons' powers of entry, search, seizure and questioning and the power to require production of documents conform with the set of principles set out [in Chapter Two of the Report].	Subject to the Government's response to the Report's other recommendations, the Government supports in principle that the creation and exercise of authorised persons' powers of entry, search, seizure and questioning and the powers to require the production of documents be guided by the principles set out in Chapter Two of the Report, as they apply to the details of agencies' particular circumstances.
80	That all new Acts conferring coercive powers on authorised persons adhere to the principles, unless there is a compelling reason for departure from the principles.	Subject to the Government's response to the Report's other recommendations, the Government supports in principle that new legislation conferring inspection powers be guided by principles.

81	That whenever Acts containing inspectors' powers are reviewed or amended in the future, the inspectors' powers provisions are specifically reviewed with reference to the principles [set out in Chapter Two of the Report].	The Government supports in principle that whenever provisions in legislation relating to inspection powers are reviewed or amended in the future, those provisions should be specifically reviewed with reference to the principles (subject to the Government's response to the Report's other recommendations). Where other provisions in such legislation are reviewed or amended in future, this may also, where appropriate, provide an opportunity to review the provisions relating to inspection powers.
78	That those principles relevant to determining the content of legislation be contained in stand-alone legislation.	The Government will give further consideration to the recommendation that those principles relevant to determining the content of legislation be reflected in stand-alone legislation.
79	That those principles relevant to the policy and procedure of agencies be developed into a set of procedural guidelines by each agency and that these guidelines be assessed by the standards unit to ensure consistency across agencies whenever possible.	Subject to the Government's response to the Report's other recommendations, the Government supports in principle that, where appropriate, individual agencies develop procedural guidelines that reflect those principles relevant to their policies and procedures.
Training		
22	That agencies have appropriately tailored training in place for their authorised officers.	The Government supports in principle that each agency is to ensure that its authorised officers are appropriately trained.
23	That a standards unit be established within Government to ensure that training offered by agencies meets agreed minimum standards.	The Government supports in principle the importance of maintaining appropriate minimum standards of training for inspectors, but is of the view that, given the wide range of inspection powers and the circumstances in which they are exercised, the relevant Ministers are best placed to determine the minimum standards of training appropriate to the inspection agencies within their portfolios and to ensure that those standards are met.
29	That the standards unit within Government set minimum standards for internal complaints mechanisms.	The Government supports in principle the importance of maintaining appropriate minimum standards of training for inspectors, but is of the view that, given the wide range of inspection powers and the circumstances in which they are

		exercised, the relevant Ministers are best placed to determine the minimum standards of training appropriate to the inspection agencies within their portfolios
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**Table 1. Inspectors' Powers Report recommendations and Government response**

### ***Update on the Government response***

During the present inquiry, the Attorney-General wrote to the Committee to advise that:

1. the Department of Justice “encourages other Government Departments to develop new laws...in a manner that is consistent with the Government response” to recommendations 43, 44, 77, 80 and 81 of the Inspectors’ Powers Report;
2. the Government would give further consideration to recommendations 41, 42, 71, 72 and 78 after publication of the present report; and
3. as Recommendations 22, 23, 29 and 79 related to matters outside his portfolio, the Criminal Law Policy section of the Department of Justice was unable to comment on the implementation of those recommendations.

While the Committee welcomes the implementation of these recommendations as detailed in the Attorney-General’s letter, it notes that the Government originally responded to recommendations 43 and 44 by supporting them in principle and committing to give further consideration to how to implement them.<sup>32</sup>

The Committee considered that the status of some of the Inspectors’ Powers Report recommendations was thus somewhat ambiguous. Noting this, together with the overlap between the two inquiries and the Government’s stated interest in the considering aspects of the Inspectors’ Powers Report in light of the results of the Warrants inquiry, the Committee sought updated information from Inspectors’ Powers Inquiry stakeholders as appropriate. In preparing this report, the Committee has considered this information and reactions to relevant recommendations, particularly the extent to which the recommendations have been implemented.

The results of these enquiries are discussed throughout this report.

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<sup>32</sup> Victorian Government, *Inspectors’ Powers Inquiry Response*, 14.

## **Constraints on the conduct of the Inquiry**

### ***Breadth of reference***

The large number of warrant provisions and the broad scope of the terms of reference mean that throughout this inquiry, the Committee has been conscious of the need to ensure that its review of warrant powers and procedures is comprehensive without becoming unwieldy. Stakeholders have raised specific and broader issues that cover a wide range of public policy questions, ranging for example from whether legal professional privilege should be codified to what the appropriate levels of effectiveness and accountability are for law enforcement institutions, and from whether PERIN offenders can be provided with more transparent and accessible information about their rights and options to how agencies that issue infringement notices should most appropriately deal with individuals who offend due to undiagnosed mental illness.

Some of the broader policy questions that arise from the sorts of stakeholder submissions summarised above, for example mental health, homelessness and drug dependency, are either outside the remit of the Committee or are not suitable for consideration on a report into warrant powers and procedures. With the exception of the PERIN system, the Committee has therefore confined its inquiry to identifying warrant powers and procedures in need of reform and proposing options that could reduce the broader social impacts described by stakeholders.

The Committee has studied the PERIN system to identify options for reducing the number of penalty enforcement warrants that are issued and executed in cases where a non-coercive alternative seems, in the Committee's opinion, to be a much more appropriate and constructive approach to addressing the offending behaviour that led to the infringement notice being issued.

The Committee had the benefit of visits to New South Wales and Western Australia. As was the case in the Inspectors' Powers Inquiry, the Committee has been impressed by the operation of the New South Wales *Search Warrants Act 1985*, which is accordingly discussed in the report as a potential model for reform of Victorian legislation and codification of practice. However, much of the report necessarily focuses on Victorian law, because the large numbers of warrant provisions and issues for analysis have limited the Committee's ability to undertake in-depth comparative analysis of other jurisdictions in Australia and overseas.

As is clear from a number of recommendations in this report, the Committee considers that several areas that it has examined require further detailed research and consideration.

### ***Lack of relevant research and data***

A feature of this inquiry has been a lack of relevant research material and statistical data that the Committee could use to evaluate evidence received from stakeholders. As Darren Palmer, senior lecturer in criminology at Deakin University Faculty of Arts, told the Committee:

[T]here is a lack of detailed research in Victoria, in Australia and elsewhere on how procedures on warrants operate, the problems that might exist in relation to warrants and also the connection between the use or non-use of warrants and other pre-trial investigation practices. ...we really do need to have more detailed Victorian and Australian research into the use of warrants.<sup>33</sup>

Existing data collection systems do not collect certain types of information or do not enable identification of specific issues relating to warrants. Thus a complaint may be recorded as being about arrest but specific details such as whether the complaint concerns an arrest warrant, a search warrant, excessive use of force, damage to property etc may not be recorded. Both the Office of Police Integrity and the Office of the Victorian Privacy Commissioner advised the Committee that their complaints databases would be or were being improved to facilitate compilation of more detailed information about alleged misuse of warrants. The Magistrates' Court has also recently modified its search warrants register to include more detailed information about warrants that are issued by the Court. However, the Court advised the Committee that it does not record the result of every warrant because of differing legislative provisions about recording and that different court venues are not linked by computer.<sup>34</sup> This is discussed during the Committee's examination of warrant issuing powers and procedures, in Chapter Five of the report.

Another element of this gap in our knowledge as a community about how warrant powers and procedures operate involves other groups that receive or pursue complaints from or represent individuals affected by warrants. Such organisations are unable to systematically collect and analyse data due to resource constraints.<sup>35</sup>

As a number of its recommendations imply, the Committee hopes that its report will stimulate further research and continuing cooperation between stakeholders.

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<sup>33</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 323.

<sup>34</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 265-266.

<sup>35</sup> Victoria Legal Aid (VLA) and the Victorian Aboriginal Legal Service (VALS) made serious allegations about applications for, issuing of and execution of warrants. The claims were based on anecdotal evidence from VLA's and VALS' experience as large-scale legal practitioners. However, due to their limited capacities to collect and review relevant evidence from their case files, neither organisation was able to provide specific evidence to substantiate the claims to the Committee's satisfaction. The Committee discusses how it assessed these allegations and its findings in relation to them in Chapters Four, Five and Ten.

### ***Differing perceptions and Committee's role in reconciling them***

As noted above, one of the consequences of the lack of data and analytical research into the use of warrant powers is to limit the Committee's capacity to test allegations of abuse of powers and procedures. This is particularly the case where complainant individuals or organisations do not pursue allegations through available mechanisms, such as challenges to the admissibility of evidence, complaints to Victoria Police and/or the Ombudsman/Office of Police Integrity, or criminal or civil court proceedings. The Committee was advised that in some cases complainants do not have confidence that those institutions will provide a remedy to the alleged abuse. The institutions themselves rejected the most serious complaints made by some stakeholders, noting that they were not supported by any evidence that would facilitate an examination of the allegations. In this report, the Committee addresses the widely divergent perceptions of some stakeholders about the use of warrant powers and makes recommendations for attempting to narrow them.

### ***Limited information from some stakeholders***

The Committee reluctantly notes its disappointment with the overall level of cooperation it received from the Department of Justice. The Committee acknowledges and appreciates the assistance and information provided by individual members of the Department but was surprised at the repeated and protracted delays in obtaining the Department's submission and agreement for its witnesses to appear at public hearings. The Committee considers that the Department's role in bringing together "reform, administration and enforcement of the law in Victoria"<sup>36</sup> gives it a unique and highly valuable perspective on the legal, policy and financial implications of the operation of warrant powers and procedures, and of any proposed reforms. While other Government departments have identified shortcomings in current procedures and suggested reforms, for example to PERIN procedures, Department of Justice witnesses were unable to give the Committee the benefit of their experience-based opinions on some of the issues that the Committee has examined in this inquiry, such as consistency among search warrant provisions. In contrast, the Department's submission to the Inspectors' Powers Inquiry contained comprehensive principles, commentary and proposals for regulating powers exercised by authorised persons.

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<sup>36</sup> Department of Justice, *About the Department*, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

## Terminology and related issues

Warrants play a role in the operation of the justice system, the financial sector,<sup>37</sup> the system of military ranks<sup>38</sup> and certain administrative functions of the Executive.<sup>39</sup> The Committee has limited its inquiry to warrants as they operate in the justice system.

The Committee considers that all the warrants it has identified in its research to date serve a law enforcement function, in the broadest sense. For that reason, the Committee will use the term “justice system” to include individuals, agencies and entities that have involvement with warrant powers and procedures.

The Committee understands the phrase “powers and procedures” in the terms of reference to refer respectively to the substantive law governing warrants and to the practical operation of such law. Throughout this report, the Committee uses “powers” and “provisions” interchangeably with these terms.

Unless otherwise indicated, the report is based on the law as at 15 September 2005. In particular, the Committee has not considered the implications of the *Investigative, Enforcement and Police Powers Acts (Amendment) Bill*, introduced into Parliament on 18 October 2005. The Bill contains provisions relating to telecommunications interception powers and PERIN instalment payment plans, both areas that the Committee examines in this report.

Legislation referred to in the report is Victorian unless otherwise indicated by the addition of a three letter jurisdictional acronym in parenthesis immediately after the year the legislation was enacted, for example (NSW).

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<sup>37</sup> Australian Stock Exchange glossary, at [www.asxcom.au](http://www.asxcom.au).

<sup>38</sup> Australian War Memorial, *Military Organisation and Structure*, at [www.awm.gov.au](http://www.awm.gov.au).

<sup>39</sup> Encyclopaedia Britannica, *Warrants*, at [99.1911encyclopedia.org](http://99.1911encyclopedia.org).



## CHAPTER TWO – THE INQUIRY’S GUIDING PRINCIPLES

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The Committee is requested in paragraph two of the terms of reference to have “particular regard to the need to promote fairness, consistency and efficiency” when considering whether and how warrant provisions should be reformed. In this chapter, after setting out some basic background information on warrants, the Committee discusses these concepts and the related principle of accountability in general terms and as they apply to warrants.

### Background information on warrants

#### ***What are warrants?***

There is no mystery about the word ‘warrant’: it simply means a document issued by a person in authority under power conferred in that behalf authorising the doing of an act which would otherwise be illegal.<sup>40</sup>

A writ or order issued by some authority, empowering a police or other officer to make an arrest, search premises or carry out some other action relating to the administration of justice.<sup>41</sup>

The theme common to all warrants, whatever their application, is the concept of authorisation. Warrants are an instrument that permits the person or entity to whom they are issued to do something or act in a way that would be unlawful but for that permission. For this reason, the ability to issue a warrants is a “grave and extraordinary power”<sup>42</sup>

Among their many applications, warrants can be issued to arrest, remand, search, seize property, imprison, enforce penalty infringement notices,<sup>43</sup> conduct surveillance,<sup>44</sup> carry out forensic procedures,<sup>45</sup> enable protective measures for children

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<sup>40</sup> *IRC v Rossminster Ltd* [1980] AC 952, 1000, Lord Wilberforce.

<sup>41</sup> The New Shorter Oxford English Dictionary (1993), 3626.

<sup>42</sup> *R v Tillet* (1969) 14 FLR 101, 108, Fox J.

<sup>43</sup> *Magistrates' Court Act 1989* ss 57, 61, 68, 73, 75, 79, 82B.

<sup>44</sup> *Surveillance Devices Act 1999* s 13.

<sup>45</sup> *Crimes Act 1958* ss 464T(9), 464X, 464ZFA.

and young people,<sup>46</sup> examine mental health<sup>47</sup> and facilitate the operation of the guardianship system.<sup>48</sup>

### **Why are warrants necessary?**

The requirement of a warrant is a practical safeguard which both common law and statute provide against arbitrary interference with the personal liberty and property of the individual. The state official wishing to seize a person or his or her property must swear on oath before an independent judicial officer as to the need for that interference. The law will scrutinise warrants carefully, both as to the validity of their issue and the power they confer.<sup>49</sup>

Warrants therefore play a role in upholding fundamental principles of the rule of law: that citizen's rights should not be limited by the state, except where it is in the public interest to do so; and that such limitations should be transparent, imposed by an entity that is independent of the state and in circumstances that afford citizens the right to challenge such limitations. Put differently, the requirement to seek and possess a warrant illustrates:

the balance between two competing public interests. There is a public interest in the effective administration of justice and government. However, there is also a public interest in preserving people's dignity and protecting them from arbitrary invasions of their property and privacy... Neither of these interests can be insisted on to the exclusion of the other, and proper and fair laws which authorise the entering and searching of premises can only be made where the right balance is struck between these two interests.<sup>50</sup>

Although the Senate Standing Committee Report that the quote above is taken from limited its concern to entry, search and seizure powers, the principle of balancing competing public interests is central to the operation of the entire justice system, including those parts of it that deal with warrants.

The Standing Committee developed this theme further:

In principle, the community should prevent the taking of any untoward and arbitrary action, whether taken for a public or private purpose. This is a principle which ... rests on the belief that no individual or organisation should be allowed to take an arbitrary action which will adversely

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<sup>46</sup> *Children and Young Persons Act 1989* ss 69(1)(b), 70(3), 72(7), 79(5), 80(3)-(4), 80(5)-(6), 95(3)-(4), 98(4), 110(2A), 111(3)-(4) and 265(1). These warrants are discussed in Chapter Twelve of this report.

<sup>47</sup> *Mental Health Act 1986* s 11. These warrants are described in Chapter Twelve.

<sup>48</sup> *Guardianship and Administration Act 1986* ss 26-27. These warrants are also discussed in Chapter Seven.

<sup>49</sup> *Challenge Plastics Pty Ltd v The Collector of Customs for the State of Victoria* (1993) 42 FCR 397, 405.

<sup>50</sup> Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation, Fourth Report of 2000* (6 April 2000) (*Senate Report*) 67.

affect another – whether that person or group or organisation operates in a public or private capacity.

Laws which authorise entry and search [and other actions permissible under warrant] should preserve and foster civil life. They should ensure that the community is fair, free and secure. Their aim should be the wellbeing of, and equity for, each and every member of the community.<sup>51</sup>

The “wellbeing and equity” of the community has been protected by the courts, through the common law, in a long line of cases dating back to 1604.<sup>52</sup>

courts strive to balance the competing interests of the citizen to the inviolability of his home...and of the state to prevent the commission of crime and to obtain evidence in aid of the prosecution of offenders.<sup>53</sup>

In this inquiry, witnesses underlined the important role that warrants play in securing these objectives. Victoria Legal Aid told the Committee that:

The statutory regulatory scheme for warrants to enter, search, seize and arrest are critical to the maintenance of...the rights of Victorian citizens.<sup>54</sup>

From Victoria Police's perspective,

Warrant powers are crucial for effective law enforcement. Without these powers the ability of law enforcement agencies to properly investigate crime would be greatly diminished. The purpose of the powers is to permit the use of state power, when authorised and overseen by the judiciary.<sup>55</sup>

### ***Warrants in practice***

The power to issue warrants is now conferred by statute,<sup>56</sup> although common law still plays an important role in qualifying the powers conferred by warrants and the procedures for applying for and executing them.<sup>57</sup>

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<sup>51</sup> Ibid, 68.

<sup>52</sup> For a discussion of the original case, *Semayne v Gresham* (1604) 77 ER 194, and the subsequent gradual qualification of protections in respect of entry, search and seizure powers, see *Tronc et al, Search and Seizure in Australia and New Zealand*, 1-8.

<sup>53</sup> *Crowley v Murphy* (1981) 52 FLR 123, 141.

<sup>54</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 193.

<sup>55</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 213-214.

<sup>56</sup> *Magistrates' Court Act 1989* ss 57 - 59; *Crimes Act 1958* s 457.

<sup>57</sup> On search and seizure, see *Tronc et al, Search and Seizure in Australia and New Zealand*, 1-8; Greg Connellan, in Ian Freckleton, *Criminal Procedure* (2004) (Connellan; Freckleton, *Criminal Procedure*), 2-5537, 2-5544 -5545; see Richard Fox, *Victorian Criminal Procedure 2005* (2005) (Fox, *Victorian Criminal Procedure*), 98-107 for common law regulation of arrest and bail.

The person or entity who seeks to have the act done typically applies to a court or other authority empowered to issue the warrant, presenting evidence to satisfy the applicable standard for the issue of the warrant. To issue a valid warrant, the authority hearing the application must comply with one or more of several requirements, common ones being that s/he is reasonably satisfied that the evidence supporting the request justifies the warrant, and the inclusion of certain information on the warrant. Many warrants include additional obligations and restrictions on the individual or agency empowered to execute them, such as limits on how long the warrant remains valid<sup>58</sup> and a requirement to submit a report on the execution of the warrant to the issuing authority.<sup>59</sup>

## Fairness

By way of introduction, it is important to note that fairness, consistency and efficiency are of course fundamentally linked: consistency is an element of fairness; and levels of efficiency are generally directly proportional to levels of consistency and inversely proportional to the degree of fairness in a particular situation.

### Generally

#### Meanings of fairness

...fairness itself is rarely defined, and thus appears vague and elusive... While the concept is multi-layered and often contextually specific, it is arguable that it is one of the few values that provide a unifying force in a community.<sup>60</sup>

People have no difficulty in perceiving what is just once they have a particular context in which to assess fairness - 'once a set of facts is advanced, fairness or what is fair becomes much less elusive'.<sup>61</sup>

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<sup>58</sup> For example, *Surveillance Devices Act 1999* s 18(1)(b)(viii) (90 days or sooner if revoked); *Prostitution Control Act 1994* s 61L(3)(d) (28 days); *Firearms Act 1996* s 146(3)(f) (7 days).

<sup>59</sup> For example, *Confiscation Act 1997* s 89; *Drugs, Poisons and Controlled Substances Act 1981*, s81(4)(b).

<sup>60</sup> Richard Fox (Monash University) and the Department of Justice, *On the Spot Fines and Civic Compliance, Final Report Volume II* (2003) (Fox, *On the Spot Fines II*), 49. Administrative law and regulation theory contain extensive discussions of the concept of fairness. See, 48-60, and Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, Report 95 (1995), (ALRC *Principled Regulation*) chapters 14-15.

<sup>61</sup> E W. Thomas, *Fairness and certainty in adjudication: formalism v substantialism*, *Otago Law Review* 9(3), 459, quoted in Fox, *On the Spot Fines II*, 49.

The philosopher John Rawls offered this definition:

A practice will strike the parties as fair if none feels that, by participating in it, they or any of the others are taken advantage of, or forced to give in to claims which they do not regard as legitimate.<sup>62</sup>

Professor Richard Fox divides fairness into substantive and procedural dimensions:

1. the reasonableness of the actual law being enforced, that is, the degree to which laws satisfy the participant's expectations of justifiable distribution of costs and benefits (substantive fairness/distributive justice); and
2. the quality of the procedures applied in enforcing the law, that is, the extent to which the laws are made and applied in accordance with what the participants perceive as right process (procedural fairness/due process).<sup>63</sup>

The procedural aspect of fairness is more commonly described as due process and "involves the operation of proper and fair laws to control the actions of investigating and monitoring authorities",<sup>64</sup> or the:

retention of core safeguards such as specific accusations, a known process, an opportunity to be heard or make submissions in one's defence, proportionate penalties, and rights of appeal to correct obvious legal errors.<sup>65</sup>

In a recent discussion of procedural fairness, the Australian Law Reform Commission noted that:

Procedural fairness refers to a legal doctrine in administrative law more commonly referred to as natural justice, with which public authorities must comply in making decisions. In this context, the term 'procedural fairness' refers to specific legal doctrines that express fundamental principles about the fair treatment of persons and the procedures needed to ensure fair treatment.<sup>66</sup>

The above characterisations capture a number of elements of fairness that are relevant to the operation of legal systems:

- the terms or content of laws and procedures should be fair and perceived to be fair;
- the manner in which laws and procedures are enforced should be fair and perceived to be fair; and

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<sup>62</sup> John Rawls, *Justice as Fairness* (April 1958), 67 *The Philosophical Review* 164, quoted in Fox, *On the Spot Fines II*, 49.

<sup>63</sup> Fox, *On the Spot Fines II*, 49.

<sup>64</sup> *Senate Report*, 67.

<sup>65</sup> Fox, *On the Spot Fines II*, 49.

<sup>66</sup> *ALRC Principled Regulation*, paragraph 14.11.

- individuals subject to the legal system should be aware of their rights and able to avail themselves of them.

Laws and procedures should therefore curtail individual rights only so far as is necessary to achieve a legitimate public interest. Such laws and procedures must be developed and applied in a consistent manner. Their content and implementation should also be clear, transparent and subject to review that meets the same standards.

### **The legal protection of fairness**

These principles are reflected in the codification of minimum standards of fairness in international and domestic law.

#### ***International law***

The International Covenant on Civil and Political Rights, although not directly enforceable in Australia,<sup>67</sup> includes guarantees of equality before the law and to freedom from discrimination,<sup>68</sup> torture or cruel, inhumane or degrading treatment or punishment<sup>69</sup>, protection against arbitrary or unlawful arrest, detention,<sup>70</sup> interference with privacy, family or home,<sup>71</sup> rights to a fair trial,<sup>72</sup> to challenge detention,<sup>73</sup> to “an effective remedy” for violations of ICCPR rights,<sup>74</sup> including compensation<sup>75</sup> and a right of legal protection against such attacks.

Although the state of Victoria is not a party to the ICCPR or other international instruments, the “obligations undertaken by the Commonwealth are nonetheless applicable to Victoria”.<sup>76</sup> Article 50 of the ICCPR provides that the Covenant’s guarantees “extend to all parts of federal States without any limitations or

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<sup>67</sup> Except perhaps in the Australian Capital Territory, see *Human Rights Act 2004 (ACT)*.

<sup>68</sup> *International Covenant on Civil and Political Rights* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*ICCPR*) Article 26. Other international human rights instruments applicable in Europe, Africa and the Americas contain broadly similar protections but are not discussed here.

<sup>69</sup> ICCPR, Article 7.

<sup>70</sup> *Ibid*, Article 9(1).

<sup>71</sup> *Ibid*, Article 17.

<sup>72</sup> *Ibid*, Article 14.

<sup>73</sup> *Ibid*, Article 9(2) - (3).

<sup>74</sup> *Ibid*, Article 2(3)(a).

<sup>75</sup> *Ibid*, Article 9(5) provides an enforceable right to compensation for unlawful arrest or detention.

<sup>76</sup> Human Rights and Equal Opportunities Commission, *Submission no. 33*, 2.

exceptions".<sup>77</sup> Thus the Commonwealth is required to ensure that the laws of states and territory governments conform with the ICCPR.<sup>78</sup>

In its submission, the Human Rights and Equal Opportunities Commission (HREOC) stated that beyond what it called the "primary obligations" contained in the ICCPR, a series of agreed standards "provide a good guide as to the standard of conduct that is required by state parties under the ICCPR".<sup>79</sup> Notable among these is the *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*. Principle 2 states that arrest detention or imprisonment may only be carried out by people authorised for that purpose. Principle 9 of the same instrument provides that authorities that arrest or detain people or investigate their cases "may exercise only the powers granted to them under the law. The use of these powers must be subject to supervision by a judicial or other authority".<sup>80</sup>

With respect to the principle that laws and procedures should be subject to review, the ICCPR provides that people whose rights are breached shall have an effective remedy, to be determined by a competent judicial, administrative or legislative authority and enforceable, "notwithstanding that the violation has been committed by persons acting in an official capacity".<sup>81</sup>

### ***Domestic law***

In Australian law, common law and statutory safeguards form an "extensive matrix of rules, standards and presumptions that require fairness",<sup>82</sup> such as the fundamental requirement of a fair trial that is enshrined in the Constitution,<sup>83</sup> the requirement that charges be clearly defined, the right to an independent and impartial hearing before a tribunal established by law and to be represented by counsel.<sup>84</sup>

In *Dietrich v R*, Gaudron J discussed the role of the courts in upholding the fairness of the legal system:

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<sup>77</sup> ICCPR, Article 50.

<sup>78</sup> *Toonen v Australia* (488/92), 31 March 1994, 16.36, cited in Human Rights and Equal Opportunities Commission, *Submission no. 33*, 3.

<sup>79</sup> Human Rights and Equal Opportunities Commission, *Submission no. 33*, 5.

<sup>80</sup> *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988)*, Principle 9.

<sup>81</sup> ICCPR, Article 2(3)(a).

<sup>82</sup> *Fox, On the Spot Fines II*, 49.

<sup>83</sup> *Dietrich v R* (1992) 177 CLR 292 (Gaudron J).

<sup>84</sup> *Fox, On the Spot Fines II*, 51-57.

the requirement of fairness is not only independent, it is intrinsic and inherent...The power to prevent injustice in legal proceedings is necessary and, for that reason there inheres in the courts such powers as are necessary to ensure that justice is done in every case.<sup>85</sup>

These domestic legal protections are integral to the use of warrant powers and procedures and are explored throughout this report.

### ***Fairness in respect of warrants***

Warrants and their various internal and external components constitute a critical protective layer between citizen and state. The internal protections of a warrant are the requirements relating to application, issue, execution and review; examples of external components are training for agencies that use warrants and the availability of fora (Ombudsman, Office of the Victorian Privacy Commissioner (OVPC), courts) in which aspects of warrants can be challenged. Together, these layers of protection are intended to promote fairness. The Committee outlines them later in this chapter.

A number of stakeholders highlighted the protective nature of warrants by reference to their function as instruments of authorisation and the type of actions that they render lawful. OVPC pointed out that the range of activities that are authorised by warrants “are inherently intrusive.”

They can involve breaking into a person’s home, rifling through their papers and possessions, watching what they do and with whom they associate, listening in on their private conversations, and extracting blood or other tissue samples from their body and processing the samples to obtain further information of potentially greater power...the exercise of such intrusive powers can also interfere with other rights and freedoms - such as freedom of thought and belief, freedom of expression, freedom of association and freedom from discrimination.<sup>86</sup>

In other reflections on the meaning and requirements of privacy, OVPC suggested that:

Discussion of the state’s intrusions powers starts with acknowledging that in a free society there is a presumption against such powers. The good society begins with a presumption of liberty and qualifies it under law only as necessary.<sup>87</sup>

Logically then, an assessment of the fairness of warrant powers must consider “whether the existing safeguards that are attached to these powers provide adequate and effective guarantees against misuse or excessive intrusion”.<sup>88</sup>

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<sup>85</sup> *Dietrich v R* (1992) 177 CLR 292 (Gaudron J).

<sup>86</sup> Office of the Victorian Privacy Commissioner, *Submission no.17,1*.

<sup>87</sup> Office of the Victorian Privacy Commissioner, *Submission no. 38 to the Inspectors’ Powers Inquiry, 2*.

<sup>88</sup> Office of the Victorian Privacy Commissioner, *Submission no.17,1*.

Darren Palmer of Deakin University also linked the seriousness of the rights affected by warrants to the need for the warrant powers to be clear and controls on the powers accessible:

The general point about citizens' rights is that we are talking about the capacity to abridge a person's privacy in quite intrusive ways, by going into their home or other places, as well as businesses. When we are engaged in this kind of process I believe it is fundamental to the protection of rights [that] we have two things operating at the one time. One is clarity about what the powers are ... and what the authorities are allowed to do. ... Secondly, if a person believes that something has occurred which is inappropriate, there [must be] mechanisms to deal with substantive rights...not simply [the capacity] to make a complaint some time down the track, but actually being much more empowered ... in relation to challenging both the warrant itself and conditions in relation to the warrant...<sup>89</sup>

The emphasis in this evidence on the need for effective safeguards was mirrored by the Criminal Bar Association:

The law, through legislation, should be seeking to ensure ... that the person who is the subject of the warrant is not placed in such a position of vulnerability that their rights are ridden over, that they are able to express what they believe their rights to be.<sup>90</sup>

As will be seen in the rest of this report, the question of effective protection of civil liberties is at the heart of the Committee's inquiry. For present purposes, however, the stakeholder comments above illustrate the relevance in the context of warrants of the three elements of fairness identified earlier in this chapter. To recap, these are that laws and procedures should be fair and perceived to be fair in content; and implementation; and that individuals subject to those laws and procedures should be aware of their rights and able to access them.

Applying that approach to the evidence the Committee has received reveals a number of tensions between the fairness and efficiency of warrant powers and procedure. The Committee has already referred to the disproportionate impact of automated PERIN procedures on some individuals who receive infringement notices. Another situation where the balance between efficiency and fairness is problematic is in relation to covert search warrants, which are executed without the knowledge of the occupier of the premises being searched. There appears to be a lack of clear legal authority for covert warrants beyond that contained in the *Terrorism (Community Protection) Act 2003*.<sup>91</sup> A covert warrant improves the efficiency of law enforcement by providing an opportunity for law enforcement agencies to justify surveillance or other activity that would secure sufficient evidence to support a future prosecution.

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<sup>89</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 327.

<sup>90</sup> Stephen Shireffs, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 167.

<sup>91</sup> *Terrorism (Community Protection) Act 2003* s 6.

The use of covert warrants has potential advantages in terms of efficiency of *all* law enforcement work, particularly in relation to drug production where there may be evidence of preparations for criminal activity but insufficient evidence to pursue a prosecution. In such circumstances, an ordinary (i.e. non-covert) warrant would frustrate the law enforcement goals of identifying and halting criminal activity because suspects would be made aware of police interest in their activities and may consequently discontinue their conduct or carry it out elsewhere.<sup>92</sup> The Committee heard evidence of a police practice whereby officers in the course of executing an overt search warrant will wait outside the premises concerned until the occupier leaves and then enter the premises and conduct the search. While efficient, this practice has a cost in terms of fairness: because there is no-one independent of the police present at the search, the propriety of the search is solely reliant on the integrity of police procedures.

Conversely, “the requirements of fairness are in many respects an expensive, time-consuming, and often inefficient aspect of a [legal] system”.<sup>93</sup> One example the Committee learned of during the inquiry was the impact of the requirement under section 465 of the *Crimes Act 1958* to return property seized during the execution of search warrants to the issuing magistrate to be dealt with according to law. In its evidence, the Magistrates’ Court stated its view that property should not be returned for inspection because it felt that the Court resources required to inspect the property were disproportionate to the benefits of inspection:

It takes up an enormous amount of magisterial time, it takes up an enormous amount of registrars’ time and we have at various times questioned the value of it. If we are looking for a position to ensure that all the items that are seized are being produced it seems somewhat strange to rely upon the police being at a property and then coming to us some days or hours later as being a safeguard.

I suppose one of the other arguments is in relation to property being disposed of according to law in the sense that magistrates may seek to give different directions. ... Our primary position is that we do not want to continue to view the property.<sup>94</sup>

As the purpose of this chapter is to provide the background for warrant principles, the Committee will discuss issues concerning fairness, and those relating to consistency and efficiency, that were raised by stakeholders in more depth during its examination of specific warrant powers and procedures in other chapters of this report.

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<sup>92</sup> Stephen Shireffs, *Minutes of Evidence*, 19 October 2004, 171.

<sup>93</sup> *ALRC Principled Regulation*, paragraph 14.10.

<sup>94</sup> Magistrate Lisa Hannan, Magistrates’ Court of Victoria, *Minutes of Evidence*, 20 October 2004, 269.

### ***Determining the fairness of a law or action***

The existence of the rights derived from principles of fairness outlined earlier in this chapter constrains the exercise of power by the state and its agents. Yet their effect may be to “thwart the pursuit of legitimate [law enforcement] goal[s]”<sup>95</sup> if they are not interpreted in the context of the public interest in having effective mechanisms to address activities and events that harm the community.

In general, then, whether a particular provision or action can be viewed as fair depends on the extent to which it balances “the state’s interest in suppressing crime and prohibited conduct for ... the preservation of a peaceful and ordered community” with “the need to maintain respect for the dignity, privacy and human rights of individuals [that] protect citizens from arbitrary, irregular, illegal or excessive invasion of their liberties by police, prosecuting authorities, or judicial procedures.”<sup>96</sup>

The Committee will adopt the approach taken by its predecessor in the Inspectors’ Powers Inquiry:

[warrant] provisions which best achieve the balance between these competing interests can be viewed as “fair.”<sup>97</sup>

It follows from this that the determination of whether warrant powers and procedures strike that appropriate balance between the public interest and individual rights depends on whether they are proportional to the gravity of the need they are designed to address – whether the provisions fall short of, match, or exceed the “level of harm they are intended to combat”.<sup>98</sup>

## **Consistency**

“Consistency leads to predictability and stability”,<sup>99</sup> which promotes fairness:

general adherence to the principle of consistency demonstrates a commitment to equality in the treatment of individuals and groups and reduces the appearance of arbitrariness.<sup>100</sup>

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<sup>95</sup> Department of Justice Legal Policy Unit, *Submission no. 26 to the Inspectors’ Powers Inquiry*, 4-5.

<sup>96</sup> Fox, *On the Spot Fines II*, 49.

<sup>97</sup> *Inspectors’ Powers Report*, 109.

<sup>98</sup> *Ibid*, 20.

<sup>99</sup> K Yeung, *Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles* (Paper presented at *Penalties: Policy, Principles and Practice In Government Regulation*, Sydney, 8 June 2001), 16, quoted in *ALRC Principled Regulation*, paragraph 15.8.

<sup>100</sup> *ALRC Principled Regulation*, paragraph 15.10.

Consistency “refers to the effect and application of provisions, rather than merely consistency in their wording”.<sup>101</sup> Indeed, it is not the same as uniformity. The law should be sufficiently flexible to take account of the varying goals and needs of the state in regulating different areas of activity, although “caution needs to be exercised to ensure that a lowest common denominator is not fixed” for powers that require different levels of authorisation and execution procedure.<sup>102</sup> Therefore, a key factor affecting any evaluation of the degree of consistency is the purpose of particular provisions.

The public interest in promoting consistency across warrant powers and procedures flows from the expectation that “people should be able to know their rights and responsibilities”.<sup>103</sup> In other words, it should be reasonably easy for individuals and agencies who issue, execute and are subject to warrants to discover what they are entitled to and must do. Provisions that are inconsistent without good cause frustrate that expectation.

The need for consistency is, therefore, an issue for occupiers, who may otherwise find themselves subject to different procedures and obligations depending on the agency or the government which happens to be exercising its powers. It is similarly an issue for agencies exercising those powers as they may find themselves administering, and training staff in the administration of, quite different provisions.<sup>104</sup>

In normative terms, consistency is also relevant to harmonisation of national laws and standards. For example, the Victorian Privacy Commissioner urged the Committee to consider national consistency of warrant powers, including mutual recognition provisions. The Privacy Commissioner argued that inconsistencies could undermine relatively strong safeguards adopted in particular jurisdictions.<sup>105</sup> Inconsistent mutual recognition provisions would also affect the efficiency of the justice system by frustrating efforts to give force to warrants outside their originating jurisdiction. Dr. Steven Tudor, lecturer at La Trobe University School of Law, also argued that laws in state and Federal jurisdictions should be “as consistent as is reasonably possible”, noting that “it is highly desirable, for the sake of both fairness and efficiency”.<sup>106</sup>

The Privacy Commissioner also questioned inconsistencies among legislative provisions governing the disclosure of information for the purpose of investigating privacy breaches.<sup>107</sup> He argued that provisions governing the use of information

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<sup>101</sup> *Senate Report*, 92.

<sup>102</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 2.

<sup>103</sup> Department of Justice Legal Policy Unit, *Submission no. 26 to the Inspectors’ Powers Inquiry*, 8.

<sup>104</sup> *Senate Report*, 92.

<sup>105</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 3.

<sup>106</sup> Dr. Steven Tudor, *Submission no. 34*, 8.

<sup>107</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 3-4.

obtained under warrant should preserve the ability of regulators to effectively investigate and address alleged abuse of powers.

## Efficiency

An entity is efficient if it is able to achieve its objectives with the minimum amount of effort or resources.<sup>108</sup> In the context of the justice system, efficiency is relevant both to the broad public interest goals and to the individual rights that the justice system serves and upholds.

As indicated above in the discussion of fairness, the justice system is expected to effectively prevent and respond to harm within the community that it forms a part of. It performs these functions by monitoring the community's compliance with applicable laws, dealing with alleged breaches, conducting hearings, enforcing judgements and overseeing a framework of protective support for certain sections of the community. The measure of the system's efficiency is the extent to which it can carry out these roles in a timely way and according to law: it should be able to preserve the integrity of the community as a whole; and individual citizens who encounter the justice system should have a reasonable expectation that the system will respond to their needs expeditiously (if not necessarily favourably).

The justice system's ability to meet this expectation is, however, limited by the resources available to the community, which are finite and which the state must allocate to what are effectively infinite needs. As a result, whether the justice system operates efficiently depends on the circumstances of each case: the minimum amount of necessary effort or resources will vary across different situations.

Moreover, the efficiency of the justice system is subject to internal and external constraints that go beyond individual cases. Internal constraints, such as inadequate accountability and training practices, may limit the efficiency of its officers, and procedures, and consequently its institutions. External constraints tend to affect the perception and performance of the system as a whole. Examples include logistical restrictions, such as limited funding and availability of suitably qualified personnel.

Efficiency is also subject to what might be called "structural constraints", in the sense that a system that must continually balance the rights and interests of competing community interests is unlikely to be regarded by the whole community as efficiently addressing those claims. Thus, although "efficiency invariably serves as the quickest and most expedient way to get from here to there... in the protection of fundamental values, the race is not always to the swiftest or cheapest means".<sup>109</sup> Indeed, additional means are required to achieve the objectives of the justice system where it is

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<sup>108</sup> The New Shorter Oxford English Dictionary (1993), 787.

<sup>109</sup> *Opinion re: Doe v Ashcroft*, US District Court, Southern District of New York, 29 September 2004, 7.

perceived as being unfair because such perceptions create additional barriers to compliance with the law. For example, witnesses told the Committee that some individuals who allege that they have been subject to abuse of warrant powers and procedures are reluctant to report such allegations because previous unsatisfactory experiences with the justice system have corroded their confidence in the ability of the accountability mechanisms to address their allegations.

In the early 1990s, Darren Palmer examined files held by community legal centres in Victoria to assess peoples' perceptions of their experiences with police and the extent of allegations about abuse of powers. He commented that:

generally people are very reluctant to complain about mistreatment [by police].

Why is this so? On the one hand they believe there is the potential for some form of retribution. Whether this is right or wrong, it is the perceptions that actually count. Secondly, they do not believe that anything much will potentially come of it in terms of how they might have their case resolved. Thirdly, there is just a general concern about the inadequacy of actually dealing with complaints generally. The survey work we did cut across a number of grids. It was not limited to young people. It was just people who came into legal centres. This is a self-selecting sample, it is not a representative of the broader community but these sorts of concerns are fairly consistent in the literature internationally. There is also a concern about police investigating themselves.<sup>110</sup>

The Committee notes that all witnesses agreed that police practices and procedures have improved since this study was conducted and that the study was not necessarily representative of broader community views. The results of the study nevertheless indicate a lack of confidence in the justice system. The Victorian Aboriginal Legal Service (VALS) also raised concerns about accountability mechanisms for police in relation to warrant powers and procedures.<sup>111</sup> Although it could not substantiate them, Mr Palmer's conclusion bears emphasising: "whether this is right or wrong, it is the perceptions that actually count."<sup>112</sup>

The Committee discusses accountability mechanisms in the next section of this chapter.

All of these constraints are related. Training must be funded and suitably trained personnel can have a positive impact on attitudes toward the justice system. All affect warrant powers and procedures. Much of the evidence received by the Committee centred on the effect that these have on both the efficiency of the justice system and the perceptions of fairness among individuals that encounter it.

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<sup>110</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 324. Sam Biondo and Darren Palmer, *Report into Mistreatment by Police*, Federation of Community Legal Centres (May 1993).

<sup>111</sup> Greta Jubb, Victorian Aboriginal Legal Service, *Minutes of Evidence*, 19 October 2004, 152.

<sup>112</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 324.

The link between efficiency and fairness was highlighted by concerns expressed by a number of stakeholders about the degree of training provided to law enforcement officers and the effectiveness of accountability mechanisms in identifying and addressing abuses of warrant powers and procedures. For example, in its submissions and oral evidence, the VALS questioned the effectiveness of police training and procedures relevant to police interactions with indigenous people. Victoria Legal Aid (VLA) called for the training to be developed in consultation with the community.<sup>113</sup> Liberty Victoria, the Criminal Bar Association and Darren Palmer supported regular audits of warrant applications and their execution.<sup>114</sup> The Privacy Commissioner highlighted “a tendency in recent legislation to circumscribe or remove the court’s traditional role in authorising and overseeing powers of intrusion” such as the removal of a requirement to obtain a warrant to record a conversation where one party to the conversation consents to the recording and there is a reasonable belief that recording is necessary “for the protection of any person’s safety”.<sup>115</sup>

For these stakeholders, aspects of warrant provisions are therefore not efficient in the broader sense of promoting confidence in the justice system.<sup>116</sup>

On the other hand, Victoria Police and the Magistrates’ Court believe that existing accountability standards are generally sufficient to protect the rights of individuals affected by warrants.

OVPC succinctly explained the tension between efficiency and fairness as follows:

Some may argue that oversight and accountability obligations require resources and thereby undermine the efficiency in law enforcement investigations or divert resources away from core law enforcement functions to prevent and investigate crime. These resources may be calculated in terms of the time and staff required to compile affidavits to justify the need for a power of intrusion when applying for a warrant, to prepare and present reports back to court on the execution of the warrant, to keep records and make them available for audit by an oversight body during the course of the year, and to compile reports for Ministers and Parliament.

However, the cost of implementing accountability and oversight measures is a necessary price to be paid in a democratic society, where the community expects government to be accountable

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<sup>113</sup> Greta Jubb, Victorian Aboriginal Legal Service, *Minutes of Evidence, 19 October 2004*, 151; Victoria Legal Aid, *Submission no. 21*, 6.

<sup>114</sup> Currently, only limited audits are possible, via: court challenges to admissibility of evidence seized under warrant; investigations by the Ombudsman or the Privacy Commissioner of complaints about warrant provisions; and audits by the Ombudsman of surveillance device warrants.

<sup>115</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 4, referring to the *Surveillance Devices Act 2004* s 7(d) (not yet in force).

<sup>116</sup> For example, the comments of Victoria Police and the Police Association on, respectively, accountability and the electronic collection of evidence are the opposite of observations made by the Victorian Aboriginal Legal Service, Victoria Legal Aid and Brian Walters SC.

for the powers it exercises and where the public can be assured that the powers given to the state are not misused. While the desire for speed and efficiency is understandable, it is also understandable that disquiet should be expressed about giving the power to authorise the use of intrusive powers to the authorities that conduct the intrusive activities. Victoria has in recent times had cause to pay particular attention to issues of police accountability.<sup>117</sup>

## Accountability

It is a fundamental principle of the rule of law that individuals who exercise powers in the public interest should be required to justify the use of such powers by accounting to the community for their actions. “The underlying assumption is that all government powers are held on behalf of the community and therefore account must be made to it”.<sup>118</sup>

As the preceding discussion in this chapter suggests, accountability is an important concept in determining the fairness, efficiency and consistency of warrant powers and procedures. In particular, the availability of opportunities for people affected by their exercise to complain about any perceived misuse of the powers is an important aspect of fairness.

There are a number of mechanisms that control the use of powers and procedures in this area of the law. As these are critical to any examination of warrant provisions, the Committee outlines them in this section.

The Committee characterises these accountability mechanisms as either internal, being controls that are built into warrant processes, or external, being controls outside those processes.

### ***Internal mechanisms***

The various stages in the warrant cycle impose controls on the use and exercise of powers and procedures.

- The decision to apply for a warrant. This requires agencies to adopt procedures and train their personnel to make appropriate judgements about when an

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<sup>117</sup> Office of the Victorian Privacy Commissioner, *Submission no.17*, 5.

<sup>118</sup> D Galligan, *Procedural Fairness* in P Birks (ed), *The Frontiers of Liability* (1994) Oxford University Press, Oxford, 4, quoted in *ALRC, Principled Regulation*, Chapter 20, footnote 1.

application is justified and imposing sufficient internal controls to ensure these are effective.<sup>119</sup>

- The application, requiring the preparation of an application in accordance with legal requirements.
- The review of the application, requiring an issuing officer to evaluate the application to determine whether it meets legal requirements for the issue of a warrant.
- The issue of a warrant, conferring authority on qualified officials to the powers in the warrant and imposing applicable conditions.
- The execution of the warrant, requiring compliance with legal and procedural requirements, for example those relating to the use of force and legal professional privilege.
- The reporting stage, requiring a variety of actions to verify the validity of the execution of the warrant, such as taking seized property or an arrested individual before a court or submitting an execution report.

The Committee examines each of these topics in depth throughout this report.

### ***External accountability mechanisms***

Additional controls external to warrant processes enable individuals to challenge the outcomes of the use of warrant powers and procedures. The following types are particularly relevant:

- challenging the admissibility of evidence;
- agencies' complaints mechanisms;
- complaints bodies independent of the agencies, such as Ombudsman Victoria, Office of Police Integrity and OVPC;
- civil and criminal investigations and proceedings.

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<sup>119</sup> In the Inspectors' Powers Report, the Law Reform Committee of the 54<sup>th</sup> Parliament concluded that: "non-legislative internal practices of the agencies administering the powers can be just as important as the legislative provisions themselves. Factors such as the selection and training of authorised officers, complaints mechanisms and the 'enforcement philosophy' (such as whether authorised officers attempt to effect compliance through education and co-operation or by resorting to their coercive powers) can have a significant impact on questions of fairness, effectiveness and consistency of the powers": *Inspectors' Powers Report*, 16.

## Challenging the admissibility of evidence

Individuals who are subjected to prosecution as a result of the execution of a warrant may challenge the admissibility of evidence against them and courts may rule the evidence inadmissible if it was obtained in violation of the terms of the warrant.

The Committee considers the admissibility of evidence as it relates to warrants for search and seizure in Chapter Six. Therefore only a brief outline of the law is provided here.

Victoria is presently bound by the common law doctrine, under which such evidence may be excluded, based on the principle that “convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price”.<sup>120</sup> Exclusion is a matter to be decided by the judges hearing each case. Courts have identified a number of factors that judges should consider in exercising their discretion.<sup>121</sup>

An alternative doctrine is contained in the uniform *Evidence Act*, in force in the Commonwealth, New South Wales, Tasmania, the Australian Capital Territory and Norfolk Island. The Victorian Law Reform Commission is currently considering the desirability of the adoption of the uniform *Evidence Act* in Victoria.

Evidence may also be challenged in situations where the legality of an arrest is at issue. The failure of police to caution the accused properly following arrest, or to comply with relevant police instructions, does not automatically lead to the exclusion of any later admission or confession from evidence at any subsequent trial.<sup>122</sup> Section 464A(3) *Crimes Act 1958* and sections 23A-23W *Crimes Act 1914 (Cth)* require police to inform suspects whom they detain of their right to silence and their right to communicate with others. Material unlawfully obtained, such as answers to questions made after persistent and intimidating police questioning when the defendant has clearly indicated an intention not to answer, may be excluded from evidence.<sup>123</sup> However, the courts retain residual discretion to admit evidence obtained in violation of statutory requirements.<sup>124</sup>

## Agencies' complaints mechanisms

These are typically the first option for members of the community with a complaint about the actions of an agency or its staff.

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<sup>120</sup> *Bunning v Cross* (1978) 141 CLR 54, 75–78, referred to in Criminal Bar Association, *Submission no. 12*, 11.

<sup>121</sup> These factors are explained and discussed at p 250 below.

<sup>122</sup> *Van Der Meer* (1988) 62 ALJR 656, 659.

<sup>123</sup> *Jukow* (1994) 76 A Crim R 253.

<sup>124</sup> *Fox, Victorian Criminal Procedure*, 105.

One example is Victoria Police's complaints system, which has a number of components. A Customer Assistance Unit receives complaints and aims "to speedily and effectively resolve minor complaints and to investigate serious complaints." A second element is the Public Incidence Resolution mechanism, established by Victoria Police in 1997 to manage simple complaints that do not merit a time-consuming, resource-intensive comprehensive investigation by the Ethical Standards Department. The system uses local staff to liaise between complainant and staff and endeavours to resolve the incident within "a matter of days".<sup>125</sup> The Police Ethical Standards Unit deals with more serious complaints, in line with its primary objective of enhancing and promoting a high ethical culture in Victoria Police, "through effective prevention, deterrence and investigation of unethical behaviour, thereby ensuring the continued respect and confidence of the community".<sup>126</sup> Its Complaint Investigation Division is responsible for "all investigations of serious misconduct and criminality. The division actively manages and investigates specified operational incidents, including police use of firearms, pursuits, serious collisions, deaths in custody and other incidents likely to result in public concern".<sup>127</sup>

The complaints system operates in conjunction with detailed procedures for the investigation of allegations against and conduct of disciplinary action against members of the police force. These provisions, which include extensive powers for the Office of Police Integrity to oversee and/or conduct investigations, are contained in the *Police Regulation Act 1958* and the Victoria Police Manual.<sup>128</sup>

The Law Reform Committee of the 54<sup>th</sup> Parliament considered complaints mechanisms relevant to non-police agencies during the Inspectors' Powers Inquiry. Generally, these agencies also possess warrant powers and therefore the Committee's conclusions are relevant to the present inquiry.

In its report, Committee of the 54<sup>th</sup> Parliament noted inconsistencies in the availability of complaints mechanisms. Many had developed internal mechanisms. Others, few in number, were required by legislation to create a complaints process.<sup>129</sup> The Committee was concerned about how "well publicised and transparent" internal mechanisms were to the individuals who are subject to relevant powers and noted that its concern "was often not addressed by the agencies".<sup>130</sup> It concluded that there appeared to be "little consistency between the various procedures" and that it was not

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<sup>125</sup> Victoria Police, *Public Incidence Resolution*, at [www.police.vic.gov.au](http://www.police.vic.gov.au).

<sup>126</sup> Victoria Police, *Annual Report 2003 – 2004*, 18.

<sup>127</sup> Victoria Police, *Ethical Standards Unit*, at [www.police.vic.gov.au](http://www.police.vic.gov.au).

<sup>128</sup> *Police Regulation Act 1958* ss 68-102; Victoria Police Manual, VPM Instruction 210-1, *Discipline and complaints framework*, updated 5 July 2004; 210-4, VPM Instruction *Investigation of complaints and incidents*, 11 July 2003; VPM Instruction 210-2, *Public Incidence Resolution*, updated 8 June 2004; VPM Instruction 210-5, *Specialist internal investigations*, 11 July 2003.

<sup>129</sup> The Committee referred to the Fair Trading Act 1999 s 139: *Inspectors' Powers Report*, 115–116.

<sup>130</sup> *Inspectors' Powers Report*, 117.

satisfied that the mechanisms were “sufficiently clear and well-known by members of the public and organisations subject to the coercive powers”.<sup>131</sup>

The Committee made two recommendations:

- that, for the sake of transparency and consistency, the requirement for internal complaints processes “should be enshrined in the legislation rather than be left as a matter of ‘internal procedure’”;<sup>132</sup>
- that a Government standards unit should set minimum standards for internal complaints mechanisms.<sup>133</sup>

In its response, the Government supported in principle that internal complaints mechanisms should be available and stated that it would consider whether this was best realised through legislative regulation or at policy level. It also supported minimum standards for complaints mechanisms but felt that the range of powers and circumstances in which they may be used made relevant Ministers best placed to determine the most appropriate standards for their portfolio agencies.<sup>134</sup>

The current Committee asked stakeholders who received its discussion paper to comment on the implementation of its predecessor’s recommendations in the Inspectors’ Powers Inquiry. Two submissions specifically mentioned internal complaints mechanisms. The Chinese Medicine Registration Board of Victoria supported legislative provision for such processes<sup>135</sup> and the Royal Society for the Prevention of Cruelty to Animals indicated that it was in the process of establishing appropriate complaints and referral processes in consultation with the Ombudsman.<sup>136</sup>

Some agencies also operate under a statutory duty to pay compensation in certain circumstances, which provides some form of accountability for those agencies’ actions. For example, the Secretary of the Department of Infrastructure must pay compensation for any damage caused by an inspector or a person assisting an inspector exercising enforcement powers, including powers under search warrants.<sup>137</sup> Compensation is not payable if a thing that the inspection was directed towards

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<sup>131</sup> Ibid, 120.

<sup>132</sup> Ibid, 120-121.

<sup>133</sup> Ibid.

<sup>134</sup> Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee’s Final Report on The Powers of Entry, Search, Seizure and Questioning by Authorised Persons, 11 June 2003.* (Victorian Government, *Inspectors’ Powers Inquiry Response*), 10.

<sup>135</sup> Chinese Medicine Registration Board of Victoria, *Submission no. 16, 2.*

<sup>136</sup> Royal Society for the Prevention of Cruelty to Animals, *Submission no. 24*, covering letter.

<sup>137</sup> *Transport Act 1983* s 129O(1). Search warrants are authorised by s 129H.

finding was found and it provides evidence of a relevant offence, and the damage was “no more than was reasonably necessary in searching for the thing”.<sup>138</sup>

A search of Victorian law revealed two other relevant schemes, which require payment of compensation as a result of the exercise of warrantless powers.

Under the *Infertility Treatment Act 1995*, the owner of equipment or other facilities is entitled to compensation if those things are damaged as a result of them being operated by an inspector pursuant to monitoring powers under the Act and the damage was caused as a result of insufficient care being exercised by the inspector operating the things. In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises and the occupier's employees and agents, if they were available at the time, had provided any warning or guidance as to the operation of the equipment or other facilities that was appropriate in the circumstances.<sup>139</sup>

The *Environment Protection Act 1970* provides a right to apply for compensation to anyone who suffers “damages” as the result of the exercise of authorised officers’ power to enter land and drill bores for the purpose of assessing and monitoring the effect of waste discharges. Any such person may within 2 years of the exercise of that power apply to the Environment Protection Authority (EPA) for compensation for the damage. The Magistrates' Court is empowered to make a final determination of the amount of compensation payable where the claimant and the EPA are unable to agree on an amount.<sup>140</sup>

### **Complaints mechanisms independent of agencies**

Four types of independent complaints mechanisms exist: Ombudsman Victoria; the Office of Police Integrity; the Office of the Victorian Privacy Commissioner; and civil and criminal investigations and proceedings. The availability and effectiveness of each mechanism in remedying a misuse of power varies depending on the type of agency or power at issue.

#### ***Ombudsman***

Established in 1973, the Ombudsman is empowered to:

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<sup>138</sup> *Transport Act 1983* s 129O(2).

<sup>139</sup> *Infertility Treatment Act 1995* s 21Z.

<sup>140</sup> *Environment Protection Act 1970* s 55(1D)–55(1E).

- “enquire into or investigate any administrative action taken in any Government Department or Public Statutory Body to which this Act applies or by any member of staff of a municipal council”;<sup>141</sup>
- to monitor compliance with certain legislative provisions;<sup>142</sup>
- to audit Victoria Police records of intercepts of telephone conversations to ensure compliance with the *Telecommunication (Interceptions) (State Provisions) Act 1988*;<sup>143</sup>
- to inspect and report on the registers of surveillance devices warrants required to be maintained by Victoria Police, the Department of Primary Industries or the Department of Sustainability and Environment;<sup>144</sup> and
- to inspect records relevant to controlled operations.<sup>145</sup>

The Ombudsman has no jurisdiction over a range of institutions and individuals, including the legislature, the judiciary and municipal councils and councillors acting as such.<sup>146</sup>

In evidence to the Committee, Victoria Legal Aid argued that:

The role of the Ombudsman is essentially a reactive role with limited powers to enforce change. A formalised audit/compliance system would provide a more pro-active approach to preventing abuses of power.<sup>147</sup>

The Committee discusses such an auditing concept in Chapter Six of the report.<sup>148</sup>

Prior to the creation of the Office of Police Integrity, the Ombudsman also:

- reviewed the police investigation of all complaints to the police, where necessary investigating further or instructing the police to take further action;
- reviewed all internally generated police investigations of serious misconduct of police members

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<sup>141</sup> *Ombudsman Act 1973* s 13(1).

<sup>142</sup> *Ibid*, ss 13(2AAA), (2AA), (2AB), (2A).

<sup>143</sup> *Telecommunication (Interceptions) (State Provisions) Act 1988*, Part 3. The Committee discusses this legislation in Chapter Eight of this report.

<sup>144</sup> *Surveillance Devices Act 1999* ss 30P–30Q, as amended by *Surveillance Devices (Amendment) Act 2004* s 13.

<sup>145</sup> *Crimes (Controlled Operations) Act 2004* s 42.

<sup>146</sup> *Ombudsman Act 1973* s 13.

<sup>147</sup> Victoria Legal Aid, *Submission no. 21*, 6.

<sup>148</sup> The discussion begins at p 258 below.

- received complaints against police, investigating some and referring most to the police for inquiry or investigation.<sup>149</sup>

In June 2004, the Ombudsman's title in its police jurisdiction was changed to Police Ombudsman and the office was given power to initiate investigations into the conduct of members of the police or "the policies, practices or procedures of the force".<sup>150</sup>

### **Office of Police Integrity**

In November 2004, the Government established the Office of Police Integrity (OPI) "to ensure that the highest ethical and professional standards are maintained in the Victoria Police Force and to ensure that police corruption and serious misconduct is detected, investigated and prevented".<sup>151</sup>

OPI is headed by the Director Police Integrity (DPI), who replaces the Police Ombudsman.<sup>152</sup> Similar to the former police jurisdiction of the Ombudsman, DPI can receive and investigate police complaints and oversight police investigations of complaints. DPI also has the power to:

conduct an investigation ... on his or her own motion in respect of any matter that is relevant to the achievement of [DPI] object[ives], including but not limited to—

- (a) an investigation into the conduct of a member of the force; or
- (b) an investigation into police corruption or serious misconduct generally; or
- (c) an investigation into any of the policies, practices or procedures of the force or of a member of the force, or the failure of those policies, practices or procedures.<sup>153</sup>

DPI may conduct such an investigation:

- (a) whether or not any particular member of the force or other person has been implicated;
- (b) whether or not any serious misconduct or other misconduct is suspected;
- (c) whether or not any person under investigation who was a member of the force at any relevant time is still a member of the force at the time of the investigation.<sup>154</sup>

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<sup>149</sup> Victorian Ombudsman, *History and Functions of the Office of the Ombudsman*, at [www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au).

<sup>150</sup> *Police Regulation Act 1958* ss 6A, 86NA(1), as amended by *Ombudsman Legislation (Police Ombudsman) Act 2004* ss 4, 12; Ombudsman, *Annual Report 2003 – 2004*, 61.

<sup>151</sup> Office of Police Integrity, at [www.opi.vic.gov.au](http://www.opi.vic.gov.au); *Police Regulation Act 1958* s 102BA, amended by *Major Crime Legislation (Office of Police Integrity) Act 2004*.

<sup>152</sup> *Major Crime Legislation (Investigative Powers) Act 2004* s 100.

<sup>153</sup> *Police Regulation Act 1958* s 86NA(1).

DPI also has powers of arrest, entry and search, coercive questioning and covert investigation.<sup>155</sup>

These powers are particularly relevant to warrant powers and procedures given the Ombudsman's experience of abuses of search warrant powers by members of Victoria Police, which are discussed in Chapters Six and Seven of this report. Victoria Police argued that they are "extremely rigorous and effective oversight mechanisms, and any aspect of warrant practices and procedures is within the scope of the Director's investigative jurisdiction".<sup>156</sup>

### **Office of the Victorian Privacy Commissioner**

Warrant powers may interfere with individuals' privacy in a number of ways. In particular, search warrants may authorise entry into individuals' homes and surveillance and telecommunications interception warrants may permit agencies to listen to and analyse individuals' private communications. More generally, personal data may be recorded and transferred between agencies in the course of warrant procedures.

The Victorian Privacy Commissioner was established under the *Information Privacy Act 2000*.<sup>157</sup> The Act protects individuals' privacy<sup>158</sup> – of the body, home, belongings, from surveillance and eavesdropping and of information – and requires the state and private entities that contract with it to comply with Information Privacy Principles (IPP).<sup>159</sup> These standards govern the collection, use, disclosure, quality, security, accessibility, anonymity and transfer of personal information.

Broadly speaking, collection, use and disclosure of personal information obtained during the exercise of intrusion powers should be consistent with IPP [which] provide a mechanism for balancing the competing interests [of the community to live in safety and of individuals to privacy].<sup>160</sup>

The Act recognises that the protections it codifies may be incompatible with legitimate law enforcement activities and may thereby frustrate the latter. Accordingly, the Act

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<sup>154</sup> *Police Regulation Act 1958* s 86NA(1A).

<sup>155</sup> *Ibid*, Part IVA, Divisions 2–3.

<sup>156</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 215.

<sup>157</sup> *Information Privacy Act 2000* s 50.

<sup>158</sup> For information about the definition, background and implications of privacy and privacy law, see Kate Foord, Victorian Law Reform Commission, *Defining Privacy* (2002).

<sup>159</sup> *Information Privacy Act 2000* Schedule 1.

<sup>160</sup> Office of the Victorian Privacy Commissioner, *Submission no. 38 to the Inspectors' Powers Inquiry*, 8–9.

exempts “law enforcement agencies” from compliance with some of the Principles in certain circumstances.<sup>161</sup>

The Act establishes a Privacy Commissioner with various functions, including promoting the IPP, helping agencies implement the IPP and receiving and dealing with complaints.<sup>162</sup> The Act gives individuals the right to complain in certain circumstances to the Commissioner about a breach of their privacy.<sup>163</sup>

The Commissioner may investigate complaints and attempt to conciliate them. The Victorian Civil and Administrative Tribunal (VCAT) may hear complaints in various circumstances.<sup>164</sup>

The Act also provides that in certain circumstances the Privacy Commissioner may serve a compliance notice requiring the recipient to comply with the IPP or relevant code of practice.<sup>165</sup> An organisation served with a compliance notice that does not act to comply with it commits an indictable offence.<sup>166</sup> An individual or organisation affected by a decision to issue a compliance notice may apply to VCAT for a review of the decision.<sup>167</sup>

OVPC told the Committee that it receives enquiries from members of the public via telephone and email. Enquiry data revealed a number of concerns of potential relevance to this inquiry, relating to:

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<sup>161</sup> Exemption applies if an agency believes that on reasonable grounds that the non-compliance is necessary for the purposes of one or more of its, or any other law enforcement agency's, law enforcement functions or activities; or for the enforcement of laws relating to the confiscation of the proceeds of crime; or in connection with the conduct of proceedings commenced, or about to be commenced, in any court or tribunal; or in the case of the police force of Victoria, for the purposes of its community policing functions. *Information Privacy Act 2000* s 13. Law enforcement agencies are defined in the Act and include police, other agencies responsible for the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of law attracting sanctions and other agencies that execute warrants and other court or tribunal orders: *Information Privacy Act 2000* s 3. This definition would appear to include most if not all of the agencies who have warrant powers.

<sup>162</sup> *Information Privacy Act 2000* s 58.

<sup>163</sup> Complaints must relate to conduct that occurred after 1 September 2002 or is continuing from before that date. Complaints can only be made against state public sector organisations, local councils, statutory bodies, State Ministers and Parliamentary Secretaries and in some circumstances organisations providing services for the State. Complaints can only be made about a breach of one or more of the IPP. Office of the Victorian Privacy Commissioner, *Guidelines for Complainants under the Information Privacy Act 2000*, at [www.privacy.vic.gov.au](http://www.privacy.vic.gov.au).

<sup>164</sup> Circumstances include where a complaint is referred to VCAT by the relevant Minister and where a complainant directs the Privacy Commissioner to refer the complaint to VCAT after a determination by the Commissioner that the complaint is not suitable for investigation or conciliation, or conciliation has failed. *Information Privacy Act 2000* ss 29, 31, 32, 34, 37, 39.

<sup>165</sup> *Information Privacy Act 2000* s 44.

<sup>166</sup> *Information Privacy Act 2000* s 48.

<sup>167</sup> *Information Privacy Act 2000* s 49(1).

- the disclosure or use of information obtained under warrant or by consent;
- the manner of execution of warrants, for example the time of entry; and
- covert surveillance.<sup>168</sup>

OVPC noted that these concerns had not necessarily been investigated or had their veracity tested. Moreover, OVPC told the Committee that none of the statutory complaints received by OVPC to October 2004 dealt with an issue of relevance to the execution of a warrant or the handling of information derived from a warrant.<sup>169</sup>

OVPC also highlighted a concern about restrictions on its powers and on those of other regulators.<sup>170</sup> Although the issue the Commissioner referred to as an illustration of his concern does not strictly involve warrant powers, it is relevant to the Committee's consideration of accountability mechanisms pertaining to warrants, and more generally to the question of how to safeguard the rights of individuals affected by warrants. The Commissioner noted that section 464ZGK of the *Crimes Act 1958 (Vic)* does not expressly authorise the release of "information revealed by the carrying out of a forensic procedure"<sup>171</sup> that could be used to reveal the identify of "any person"<sup>172</sup> to any regulator investigating a complaint within its mandate.<sup>173</sup> While it appears to the Committee to be likely in practice that other provisions of s464ZGK (3) would permit the release of such data to regulators,<sup>174</sup> the Committee agrees with the principle underlying the Commissioner's concern:

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<sup>168</sup> Privacy Commissioner Paul Chadwick, Office of the Victorian Privacy Commissioner, *Minutes of Evidence, 19 October 2004*, 180-181.

<sup>169</sup> *Ibid*, 181.

<sup>170</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 3-4.

<sup>171</sup> *Crimes Act 1958* s 464ZGK(3).

<sup>172</sup> *Crimes Act 1958* s 464ZGK(4).

<sup>173</sup> Compare this to section 464ZGK(2) which authorises the disclosure of any data from the DNA database to the Privacy Commissioner, Health Services Commissioner and Ombudsman for purposes contained in each regulator's legislation. The distinction between subsections 2 and 3 appears to be due to the fact that Victorian legislation was based on the model forensic procedures bill developed by MCCOC.

<sup>174</sup> S 464ZGK(3): A person may only disclose information revealed by the carrying out of a forensic procedure as follows—

- (a) if the person is the suspect, offender or volunteer to whom the information relates;
- (b) if the information is already publicly available;
- (c) in accordance with any other provision of this Subdivision [presumably including s464ZGK(2) described in footnote 173 above];
- (d) in accordance with the Mutual Assistance in Criminal Matters Act 1987 of the Commonwealth or the Extradition Act 1988 of the Commonwealth;
- (e) for the purposes of the investigation of an offence or offences generally;

legislation that prescribes how information obtained as a result of a warrant or like power of intrusion should expressly preserve the ability of regulators (including the Privacy Commissioner and Ombudsman) to investigate [alleged] misconduct or non-compliance, handle complaints and refer matters to any relevant regulator (not limited to Victoria).<sup>175</sup>

## **Criminal and civil investigations and proceedings**

### ***Civil litigation***

Complainants may be able to sue the individuals, and/or their employers, who they allege are responsible for violating their rights as a result of an abuse of warrant powers although, where an individual acts beyond their power, the agency will deny responsibility for the act.<sup>176</sup>

Criminologists Dr Jude McCulloch and Darren Palmer recently studied civil litigation against Australian police between 1994 and 2002. They noted that;

[this form of] litigation is emerging as a major policing issue internationally and in Australia. There appears to be an emerging trend towards greater resort to civil litigation against police, combined with a definite trend to substantially larger judgements in favour of plaintiffs. Judicial benevolence towards questionable police practices has diminished and successful civil actions against the police are on the increase.<sup>177</sup>

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- (f) for the purpose of a decision whether to institute proceedings for an offence;
  - (g) for the purpose of proceedings for an offence;
  - (h) for the purpose of a coronial investigation or inquest;
  - (i) for the purpose of civil proceedings (including disciplinary proceedings) that relate to the way in which the procedure is carried out;
  - (j) for the purpose of the suspect's, offender's or volunteer's medical treatment
  - (k) for the purpose of the medical treatment of a person if necessary to prevent or lessen a serious threat to that person's life or health;
  - (l) if necessary to prevent or lessen a serious threat to public health;
  - (m) if the suspect, offender or volunteer consents in writing to the disclosure.

<sup>175</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 4.

<sup>176</sup> *State of Victoria v Horvath* [2002] VSCA 177.

<sup>177</sup> Dr Jude McCulloch and Darren Palmer, *Civil litigation by citizens against Australian police between 1994 and 2002, Report to the Criminology Research Council (McCulloch and Palmer, Civil litigation)*, at [www.aic.gov.au](http://www.aic.gov.au), 1. See also 118-124.

Victoria Police has also observed that “there has been a considerable increase in the number of civil writs issued against the Force and its members in recent times”.<sup>178</sup>

However, the impact of this form of litigation is not certain. Its contribution to preventing future abuses of warrant powers is unclear. In relation to police, Palmer and McCulloch note that “the literature is mixed in its appraisal of civil litigation as an effective police accountability mechanism”.<sup>179</sup> Legal practitioner and commentator Ian Freckleton studied this issue in 1996. He noted that:

civil actions seeking the award of damages for trespass to the person, false imprisonment or negligence constitute in principle a means of regulating police behaviour. [As such, they] could act as a catalyst for the accountability of police to the community for excesses committed in the execution of duty and for abuses of power.<sup>180</sup>

However, Freckleton contended that the level of damages awards was so low that it had a minimal impact on “police culture of inappropriateness to resort to force and to confront rather than to apprehend in less violence-prone circumstances”.<sup>181</sup>

He also argued that “the primary aim of [civil] proceedings is to resolve disputes between litigants, not to audit the performance of the institutions of state”.<sup>182</sup>

Similarly, the more limited goal of providing some form of redress for an abuse of warrant powers may not be met because of factors external to the litigation. A recent Victorian case illustrates the gaps in this system. Courts found that police officers had assaulted a number of individuals in the course of executing a warrant against them and awarded damages against some of the police officers concerned. One officer’s declaration of bankruptcy reportedly made the parts of the judgement relating to his victim unenforceable.<sup>183</sup> Moreover, the officers were reportedly not sanctioned by disciplinary proceedings, and were not subjected to a criminal investigation.<sup>184</sup>

### ***Criminal proceedings***

Another response to alleged abuses of warrant powers is to pursue a criminal investigation and prosecution of the individuals allegedly responsible. It follows that, in abusing their powers, the individuals involved must have also committed an offence and that evidence is thought to be available to make a prosecution viable. This option

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<sup>178</sup> Letter, Victoria Police Chief Commissioner Christine Nixon to Police Minister André Haermeyer, 2001, attached to Victoria Police, *Submission no. 21S to the Inspectors’ Powers Inquiry*.

<sup>179</sup> *McCulloch and Palmer, Civil litigation*, 84.

<sup>180</sup> Ian Freckleton, *Suing the Police, The Moral of the Disappointing Morsel*, (1996) 21(4) *AltLJ* 173.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> Fergus Shiel, *No money and no justice for woman bashed in raid on home*, *The Age*, 29 June 2004, 5.

<sup>184</sup> *Ibid.*

is expensive and time consuming. On the other hand, the effective functioning of the institutions of government depends on public confidence in them. This in turn requires that officials who exercise powers on behalf of the state are subject to particularly rigorous scrutiny and standards of accountability.

### **Stakeholders' views about accountability in general**

Stakeholders made some general comments about the effectiveness of the accountability mechanisms outlined above and throughout this report. Victoria Police told the Committee that in its experience:

in the main the current laws relating to warrants in Victoria work well. Police use of warrants is on the whole thorough, conscientious and we believe diligent. The warrant powers used by police are subject to intense scrutiny by the judicial system and, except for a small number of examples, we believe they are appropriately used.<sup>185</sup>

It was also felt that police have “a fairly high threshold of accountability” and that the powers of authorised officers “are much broader than the powers and the limitations that are placed on police”.<sup>186</sup>

Others argued that these various mechanisms are not effective as a whole. VLA considered that the principal problem with warrant powers and procedures:

is the lack of accountability in the transparency and supervision of agencies that exercise powers under warrants. We believe the focus of law reform efforts should be to increase and improve the protections afforded to Victorians who are the subject of investigation and enforcement processes. We believe it is vital that these protections be confirmed and improved upon and not reduced. Current events, whether they be security issues or related to police corruption or major organised crime, must not be allowed to cause a diminution in the rights of Victorian citizens. The statutory regulatory scheme for warrants to enter, search, seize and arrest are critical to the maintenance of those civil liberties.<sup>187</sup>

Darren Palmer argued that while the accountability mechanisms were effective within their own parameters, the range of issues affected by warrant powers and procedures and the limited availability of data about their use meant that:

you don't have the overall picture of what is actually happening in this area. Different players are performing different functions, such as police supervisory management of the exercise of warrants. They are providing some form of accountability. The judiciary is providing some form of accountability in terms of approving the use of warrants. ...

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<sup>185</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 213.

<sup>186</sup> *Ibid*, 215.

<sup>187</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 20 October 2004, 193.

I think the problem is that we have dispersed accountability and I think that [we need to have] some mechanism that brings ... together the different forms of accountability so we get a much better understanding of what is happening. We are talking about very fundamental rights to invade our privacy.<sup>188</sup>

He suggested that OPI may be the most appropriate mechanism to provide such comprehensive scrutiny of warrant powers. The Committee agrees that the OPI appears to have sufficient powers to enable it to provide such accountability in relation to use of warrants by Victoria Police.

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<sup>188</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 325.

## CHAPTER THREE - WARRANTS FOR SEARCH AND SEIZURE - OVERVIEW AND APPLICATION

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A search warrant ... authorises an invasion of premises without the consent of persons in lawful possession or occupation thereof. The validity of such a warrant is necessarily dependent upon the fulfilment of the conditions governing its issue. In prescribing conditions governing the issue of search warrants, the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property. Search warrants facilitate the gathering of evidence against, and the apprehension and conviction of, those who have broken the criminal law.<sup>189</sup>

The law relating to search warrant is, and has always been, a complicated area of civil rights and public policy...When searches do take place we take for granted that a good reason exists and that a serious offence is involved. We tend to forget that the freedom from arbitrary search was hard fought for in our constitutional history. This struggle became the battleground for establishing the role of law and the supremacy of the Parliament.<sup>190</sup>

Search warrants are an effective method of searching for and seizing items as potential evidence. But it is the very nature of this power and its exercise that represent significant risks to individual freedoms and which have led the courts to insist upon strict compliance [with the terms of the warrant provisions].<sup>191</sup>

[t]he important characteristics of the search warrant procedure are that its foundation is the making of an order by a judicial officer and that the warrant which issues by virtue of the order authorises the search and seizure of documents in the possession of another for use in the investigation and in any subsequent trial arising out of the investigation.<sup>192</sup>

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<sup>189</sup> *George v Rockett* (1990) 93 ALR 483, 486.

<sup>190</sup> Terrence Sheahan, Attorney-General, *Miscellaneous Acts (search warrants) Amendment Bill* [NSW], *Second Reading Speech*, 27 February 1985, 3859.

<sup>191</sup> Criminal Bar Association, *Submission no. 12*, 3.

<sup>192</sup> *Baker v Campbell* (1983) CLR 52, 82 (Mason J).

## History of search warrants

The full history of search warrants is lost in the mists of time.<sup>193</sup>

Search warrants have developed as a way of protecting individual rights, principally the right to enjoy one's property. The common law has traditionally valued this interest highly and has gone to great lengths to protect it.<sup>194</sup> The relevant law dates back at least 400 years, to a 1604 case that contains the "famous and now oft-quoted statement"<sup>195</sup> about the importance of individual freedom from intrusion:

the house of everyone is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose.<sup>196</sup>

In plain English:

Persons' homes were private domain. There they could do whatever they liked, without official interference. They were entitled to deny admission to whomever they pleased and the law upheld that right by providing for actions in trespass against anyone who entered private premises, if they were not an invitee, permittee or licensee.

In the history of the common law, the privacy, security and integrity of a citizen's home have been fundamental rights.<sup>197</sup>

Tronc, Crawford and Smith go on to trace the development of this common law philosophy of domestic inviolability and note that:

Exceptions to this stirring principle of private freedom were progressively made in the public interest. Although a person's home, property and possessions were generally inviolable, no home could be used as a hiding place for stolen goods, or as a refuge for thieves.<sup>198</sup>

The inviolability of the home was gradually eroded to the extent that a trespass could be defended if authorised by an express or implied statutory provision or common law.<sup>199</sup>

Thus in the 17<sup>th</sup> Century, justices of the peace began issuing search warrants to enable the detection and seizure of stolen goods. These early warrants authorised violations of individual's privacy if certain conditions were satisfied:

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<sup>193</sup> Keith Tronc, Cliff Crawford, Doug Smith, *Search and Seizure in Australia and New Zealand* (1996) (Tronc et al, *Search and Seizure in Australia and New Zealand*), 4.

<sup>194</sup> *George v Rockett* (1990) 93 ALR 483, 487.

<sup>195</sup> Tronc et al, *Search and Seizure in Australia and New Zealand*, 1.

<sup>196</sup> *Semayne v Gresham* (1604) 77 ER 194.

<sup>197</sup> Tronc et al, *Search and Seizure in Australia and New Zealand*, 1.

<sup>198</sup> *Ibid*, 54.

<sup>199</sup> *Ibid*, 3.

- the issuing justice had to be satisfied that reasonable grounds existed for the proposed search;
- the warrant described the goods that were to be searched for;
- the constable had to be “absolutely sure” that the seized goods were those described in the warrant.

As will become evident, three centuries on from these first pronouncements on warrants, the first two conditions are still at the heart of the law on search warrants.

In a case decided shortly after *Semayne v Gresham*, the same judge who pronounced the inviolability principle in that case held that “when entry, authority, or licence is given to anyone by the law, and he abuses it, he shall be a trespasser *ab initio*”.<sup>200</sup> Thus police officers who did not fulfil the third condition that applied to the early warrants were considered to have had no authority to enter the premises in the first place. The resulting trespass gave rise to a claim for damages by the person whose home and goods were subject to the search warrant.

These protections were undermined by the use of general warrants, which were not subject to judicial oversight and granted the sovereign’s agents a general discretion to “go anywhere at any time, in relation to any offence, search any place or person, and seize any thing”.<sup>201</sup>

Tronc, Crawford and Smith suggest that these warrants were issued by the Court of Star Chambers to attempt to “control and punish seditious libels by authors and printers”.<sup>202</sup> As such they were an early example of the state’s tendency to expand its powers and reduce the protections of individuals in response to actual and perceived new threats to the state.

A series of English cases led to a 1766 UK Parliamentary resolution outlawing general search warrants. Similar concerns about the impact of such warrants on the rights and freedoms of citizens in British colonies in America led to the Fourth Amendment to the US Constitution.<sup>203</sup> In what is one of the best known safeguards against undue invasions of privacy, this clause states that:

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<sup>200</sup> *Six Carpenters’ Case* (1610) 8 Co.Rep. 146a (Lord Coke), quoted in *Cinnamond and Others v British Airports Authority* (1980) 1 WLR 582 (Lord Denning).

<sup>201</sup> Australian Law Reform Commission, Report No. 2 (Interim Report) *Criminal Investigation* (1975), paragraph 189.

<sup>202</sup> *Tronc et al, Search and Seizure in Australia and New Zealand*, 55.

<sup>203</sup> The focus in America was on smuggling rather than sedition. British colonial authorities used writs of assistance, “which were general warrants authorising the bearer to enter any house or other place to search for and seize ‘prohibited and uncustomed goods’ and commanding all subjects to assist”. The writs remained in force until six months after the death of the sovereign in whose reign they were issued. FindLaw, *US Constitution*:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In Australia, general warrants have been authorised by legislator in a number of jurisdictions.<sup>204</sup> As the broad nature of the authority that they confer reduces the effectiveness of the warrant in protecting the privacy of those subject to it, such warrants are “widely regarded as an anachronism, with high potential for injustice” and are therefore frequently criticised.<sup>205</sup> In 1975, the Australian Law Reform Commission recommended their abolition because of their “great destructive potential so far as the right to privacy and civil liberties generally are concerned.”<sup>206</sup> For the same reason, general warrants are invalid in Victoria.<sup>207</sup>

## Search warrants today

As indicated above, the common law power to issue search warrants in respect of stolen goods has been progressively extended by statute. Bishop suggests three categories of statutory search warrants:

First, there are hundreds of statutory provisions which apply to particular types of offence. Second, there are provisions authorising the issue of search warrants in respect of any offence provided certain conditions are satisfied. Third, there is legislation that has made lawful what are really general warrants. The necessary consequence of these developments is that there is now a litany of statutory provisions authorising the issue of search warrants.<sup>208</sup>

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*Fourth Amendment: Annotations*, available at [caselaw.lp.findlaw.com/data/constitution/amendment04/#annotations](http://caselaw.lp.findlaw.com/data/constitution/amendment04/#annotations).

<sup>204</sup> *Summary Offences Act 1953* (SA) s 67; *Police Offences Act 1935* (Tas) s 60.

<sup>205</sup> *Tronc et al, Search and Seizure in Australia and New Zealand*, 54. For a discussion of the history of general warrants, see *Tronc et al, Search and Seizure in Australia and New Zealand*, 54-62; John Bishop, *Criminal Procedure*, 1998, 193-194.

<sup>206</sup> Australian Law Reform Commission, Report No. 2 (Interim Report) *Criminal Investigation*, paragraph 196: “The power to search and seize is undoubtedly a very necessary one for police to have. It has great destructive potential so far as the right to privacy and civil liberties generally are concerned. The power must therefore be capable of justification on every single occasion on which it is used. On this view, the continued existence of general search warrants cannot be countenanced. In the Commission's view such provisions should long ago have disappeared from the Commonwealth and Territorial statute books. We recommend that their demise be delayed no longer”.

<sup>207</sup> *Allit v Sullivan* [1988] VR 621, 632 (Murphy J), quoting with approval *Arno v Forsyth* (1986) 65 ALR 125, 139 (Lockhart J).

<sup>208</sup> John Bishop, *Criminal Procedure* (1998) (Bishop, *Criminal Procedure*), 189.

At the same time, Parliament has acknowledged and protected individuals' rights to privacy by making the lawful issue and execution of warrants contingent on the applicant and issuing authority satisfying a range of conditions.

Over 80 Victorian Acts now confer search warrant powers on a range of industry-specific agencies for use as part of the agencies' enforcement armoury.<sup>209</sup> The Committee heard, however, that many of these provisions are rarely if ever used.<sup>210</sup> In evidence to the Committee, the Magistrates' Court referred to the warrants in the following legislation as being those most frequently issued by the Court:<sup>211</sup> *Business Franchise (Tobacco) Act 1974; Children and Young Persons Act 1989; Confiscation Act 1997; Crimes Act 1958; Drugs, Poisons and Controlled Substances Act 1981; Firearms Act 1996; Fisheries Act 1995; Lotteries, Gaming and Betting Act 1966 (repealed and replaced on 1 July 2004 by the Gambling Regulation Act 2003) ; Police*

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<sup>209</sup> *Agricultural and Veterinary Chemicals (Control of Use) Act 1992; Agricultural Industry Development Act 1990; Associations Incorporation Act 1981; Building Act 1993; Catchment and Land Protection Act 1994; Children and Young Persons Act 1989; Children's Services Act 1996; Chinese Medicine Registration Act 2000; Chiropractors Registration Act 1996; Classification (Publications, Films and Computer Games) (Enforcement) Act 1995; Confiscation Act 1997; Control of Weapons Act 1990; Cooperatives Act 1996; Corporations (Victoria) Act 1990; Credit (Administration) Act 1984; Crimes Act 1958; Dental Practice Act 1999; Domestic (Feral and Nuisance) Animals Act 1994; Drugs, Poisons and Controlled Substances Act 1981; Electricity Industry Act 2000; Electricity Safety Act 1998; Estate Agents Act 1980; Fair Trading Act 1999; Federal Awards (Uniform System) Act 2003; Firearms Act 1996; First Home Owner Grant Act 2000; Fisheries Act 1995; Flora and Fauna Guarantee Act 1988; Forests Act 1958; Fundraising Appeals Act 1998; Gambling Regulation Act 2003; Gas Industry Act 1994; Gas Industry Act 2001; Gas Safety Act 1997; Geothermal Energy Resources Act 2005; Health Services Act 1988; Heritage Act 1995; Housing Act 1983; Infertility Treatment Act 1995; Introduction Agents Act 1997; Legal Practice Act 1996; Legal Profession Act 2004; Liquor Control Reform Act 1998; Livestock Disease Control Act 1994; Magistrates' Court Act 1989; Marine Act 1988; Medical Practice Act 1994; Motor Car Traders Act 1986; Nurses Act 1993; Occupational Health and Safety Act 2004; Optometrists Registration Act 1996; Osteopaths Registration Act 1996; Petroleum Act 1998; Pharmacy Practice Act 2004; Physiotherapists Registration Act 1998; Plant Health and Plant Products Act 1995; Podiatrists Registration Act 1997; Police Regulation Act 1958; Prevention of Cruelty to Animals Act 1986; Private Security Act 2004; Prostitution Control Act 1994; Psychologists Registration Act 2000; Racial and Religious Tolerance Act 2001; Road Safety Act 1986; Seafood Safety Act 2003; Second-Hand Dealers and Pawnbrokers Act 1989; Sports Event Ticketing (Fair Access) Act 2002; Summary Offences Act 1966; Surveillance Devices Act 1999; Taxation (Reciprocal Powers) Act 1987; Taxation Administration Act 1997; Terrorism (Community Protection) Act 2003; Tobacco Act 1987; Trade Measurement (Administration) Act 1995; Trade Measurement Act 1995; Transport Act 1983; Travel Agents Act 1986; Utility Meters (Metrological Controls) Act 2002; Veterinary Practice Act 1997; Water Efficiency Labelling and Standards Act 2005; Whistleblowers Protection Act 2001; Wildlife Act 1975.*

<sup>210</sup> Greg Davies, Police Association, *Minutes of Evidence 20 October 2004*, 257.

<sup>211</sup> In Victoria, search warrants can only be issued by a magistrate: *Magistrates' Court Act 1989* s 58(5).

*Regulation Act 1958; Prostitution Control Act 1994; Surveillance Devices Act 1999; and Wildlife Act 1975.*<sup>212</sup>

Notable among the less frequently used Victorian warrant powers are those that authorise searches for skins of cattle,<sup>213</sup> goods from wrecks,<sup>214</sup> gunpowder<sup>215</sup> and for evidence relating to forestry offences.<sup>216</sup>

In addition to these Acts, the *Magistrates' Court Act 1989* contains a number of general requirements for warrants, including search warrants:

- the warrant must name or otherwise describe the person or property against whom or which it is issued;<sup>217</sup>
- a search warrant may only be issued by a magistrate;<sup>218</sup>
- a warrant must be executed by the use of a copy of the warrant, known as the execution copy, or by the use of a copy of the execution copy (which must be in writing and signed or otherwise authenticated by the issuing officer)<sup>219</sup>, including a copy transmitted by fax;<sup>220</sup> and
- an execution copy of a warrant must be returned, when executed, to the Court.<sup>221</sup>

A number of the industry-specific Acts and other legislation containing search warrant provisions require compliance with the above provisions. However, as the Law Reform Committee of the 54<sup>th</sup> Parliament noted in its *Inspectors' Powers Report*, there does not appear to be any rule about which Acts should contain the link to the *Magistrates' Court Act 1989*.<sup>222</sup> The Committee revisits this issue later in this chapter in its discussion of consolidated search warrant legislation.

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<sup>212</sup> The Court also issues warrants under a range of Commonwealth legislation but the Committee has omitted these from this report as they are beyond its terms of reference.

<sup>213</sup> *Summary Offences Act 1966* s27.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Crimes Act 1958* s 466.

<sup>216</sup> *Forests Act 1958* s 83.

<sup>217</sup> *Magistrates' Court Act 1989* s 57(3).

<sup>218</sup> *Ibid.*, s 57(5).

<sup>219</sup> *Ibid.*, s 57(9).

<sup>220</sup> *Ibid.*, s 58(8).

<sup>221</sup> *Ibid.*, s 57(10).

<sup>222</sup> Law Reform Committee, *Inspectors' Powers Report*, 169, noting that various Acts, including the *Accident Compensation Act 1985*, *Fisheries Act 1995* and the *Trade Measurement Act 1995* contain no reference to the general rules in the *Magistrates' Court Act 1989*. The Committee considered that the link between the *Magistrates' Court Act* and other Acts containing search warrant provisions "should always be explicit".

## The use of search warrants in Victoria

The Magistrates' Court provided the Committee with the following data on search warrants issued in financial year 2003 - 2004:<sup>223</sup>

Type of search warrant	Number issued 2003 - 2004 (during business and after-hours) <sup>224</sup>
<i>Crimes Act 1958</i> s 92	1547 <sup>225</sup>
<i>Crimes Act 1958</i> s 465	4784 <sup>226</sup>
<i>Drugs, Poisons and Controlled Substances Act 1981</i> s 81	3531 <sup>227</sup>
<i>Firearms Act 1996</i> s 146	269 <sup>228</sup>
Other warrants ( <i>Children and Young Persons Act 1989</i> , state and Commonwealth agencies)	2303 <sup>229</sup>
<b>Total</b>	<b>12434</b>

**Table 2. Search warrants issued by the Magistrates' Court of Victoria: 2003 - 2004.**

Thus approximately 80% of Victorian search warrants used today are issued under just three legislative provisions: sections 92 and 465 of the *Crimes Act 1958* and section 81 of the *Drugs, Poisons and Controlled Substances Act 1981*.<sup>230</sup> Magistrate Bowles confirmed that these "are the most common forms of search warrants issued in the Magistrates' Court".<sup>231</sup>

Because of their prevalence, these three types of warrants are the focus of much of the evidence that the Committee received and considers in the remainder of this chapter. For ease of reference during the following discussion, the Committee

<sup>223</sup> Magistrates' Court of Victoria, *Submission no. 29*, 1.

<sup>224</sup> The after-hours service runs between 5pm and 8.45am.

<sup>225</sup> This figure comprises 1255 warrants issued during business hours (BH) and 292 issued after-hours (AH).

<sup>226</sup> BH: 4186. AH: 598.

<sup>227</sup> BH: 3073. AH: 458.

<sup>228</sup> BH: 208. AH: 61.

<sup>229</sup> BH: 1905. AH: 398.

<sup>230</sup> Evidence from Victoria Police and the Police Association about the most frequently used warrants supported this finding. Victoria Police, *Submission no. 25*, 2; Greg Davies, Police Association, *Minutes of Evidence*, 20 October 2004, 257.

<sup>231</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 272.

includes in Appendix Five the relevant text of these three warrant provisions, together with the general provisions of the *Magistrates' Court Act 1989*.<sup>232</sup>

The Committee will now turn to the evidence that it received concerning search warrants. The Committee has structured its discussion according to the chronological stages of a warrant, as follows:

- application for the warrant: standard of the application evidence; contents of the application; rank of the applicant; access to application evidence; allegations of illegitimate applications; telephone warrants;
- issue of the warrant: issuing officer; determination of the application - standard of review; record keeping; period of validity of a warrant;
- execution of the warrant: time of entry; multiple entries; information provided to persons at the target premises; use of force; videorecording; presence of an independent person; inadvertent discovery; receipts; legal professional privilege;
- post-execution issues: accountability to the court for the use of the warrant; admissibility of unlawfully seized evidence; auditing search warrant records; and
- other issues: covert search warrants; additional matters raised by Victoria Police.

In the final part of its discussion, the Committee proposes standard search warrant procedures as a way of consolidating Victorian search warrant provisions.<sup>233</sup>

## Application

In its evidence to the Committee the Magistrates' Court gave a general outline of the warrant application process.

Upon a member of the police force seeking to apply for a search warrant, the member must ensure that there is a basis upon which the warrant may be sought pursuant to the terms of the relevant Act. Depending on the type of warrant sought, an affidavit or evidence on oath must be given by a police officer who holds the appropriate rank to apply for the warrant.

In relation, for example, to section 465 Crimes Act warrants, which are sought in relation to the most serious offences — indictable offences — the officer must hold the rank of senior sergeant or above. The application is generally in the form of an affidavit rather than evidence on oath. The affidavit and search warrant are brought to the Court, faxed to the Court, or between the

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<sup>232</sup> The Committee has not reproduced recent amendments to section 465 of the *Crimes Act 1958* and section 81 of the *Drugs, Poisons and Controlled Substances Act 1981* relating to seized property affected by the *Confiscation Act 1997* as the Committee has not considered the powers conferred by these amendments.

<sup>233</sup> The Committee's discussion and recommendations begin at p301

hours of 5.00 p.m. and 9.00 a.m. and on weekends and public holidays faxed to the after-hours registrar for the after-hours magistrate to consider the application. There is a magistrate available 24 hours a day however many days there are in a year, so the Court is always able to respond to any applications sought by the police or another prosecuting agency.

Each application is entered into a search warrants register. A member of staff then provides the affidavit and search warrant to a magistrate for consideration.<sup>234</sup>

This basic requirement for application to be made to a court provides the first protection for an individual's right to privacy:

[T]he very fact that the police are required to set out in an information, to be put before an independent person, the basis for the issue of a warrant, is in itself a kind of guarantee that they themselves will consider with care whether they are in a position to justify proceeding as they propose, and that homes will not be invaded and possessions ransacked without cause, or to harass, or upon a "hunch".<sup>235</sup>

### **Standard of application evidence**

An application for a search warrant is not itself a trial, so the evidence that can be used does not have to meet the criteria of admissibility under the rules of evidence. Evidence can be collected and collated by a variety of sources, not necessarily by the informant, and hearsay may be used. This evidentiary flexibility recognises the often speculative nature of criminal investigations, but is not unlimited.<sup>236</sup>

The Magistrates' Court Act requires that applications for search warrants must be supported by evidence on oath or affidavit.<sup>237</sup> Other acts replicate this requirement, for example section 92(1) of the *Crimes Act 1958*; section 81(1) of the *Drugs, Poisons and Controlled Substances Act 1981*; section 146(2) *Firearms Act 1996*; section 93A(2) *Medical Practice Act 1994*; section 80(2)(c) *Confiscation Act 1997*. As Magistrate Bowles noted, applications are usually by affidavit. Victoria Legal Aid told the Committee:

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<sup>234</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 264-265.

<sup>235</sup> *Parker v Churchill*, 63 ALR 326, 334 (Burchett J) (references omitted). Although the case concerned a Commonwealth search warrant under the now repealed section 10 of the *Crimes Act 1914* (Cth), the principle is a sensible one.

<sup>236</sup> Matthew Groves, *Not so Tasty* (1995) 20(3) AltLJ 123, 125, referring to *George v Rockett* (1990) 170 CLR 105, 111-112, *Macleod* (1991) 61 A Crim R 465, 474.

<sup>237</sup> *Magistrates' Court Act 1989* s 75(2).

We believe minimum requirements for obtaining a warrant should be sworn affidavit evidence from an applicant about the need for a warrant, its objectives, the ambit of the search and seizure, and the identity of the officers involved.<sup>238</sup>

The importance of affidavits was also noted in the Deputy Ombudsman's report on the police raid on the Tasty Nightclub:

The affidavit should serve as a check to protect against unwarranted invasion of privacy by being a thorough exposition of evidence for the purpose of supporting the application and proving to a magistrate that the serious step of the granting of a warrant is justified.<sup>239</sup>

There appears to be some inconsistency in the various provisions. Some Acts incorporate the sworn evidence requirement by stating "If a magistrate is satisfied by evidence on oath or by affidavit...". Others use different constructions. For example, section 80 of the *Confiscation Act 1997* contains more detailed requirements for the application process but does not require that the application itself be sworn. Rather, applications must be in writing; must set out the grounds for the warrant being sought; the applicant must give the issuing officer any further information required about the grounds for the application; and the information in the application must be verified on oath or affirmation or by affidavit, which the issuing officer may administer.

The effect of both types of provisions is likely to be substantially the same, as both ultimately require the presentation of sworn information that supports the application to the issuing officer. Nevertheless, the Committee believes that legislative provisions should be consistent wherever possible and sufficiently detailed to ensure effective transparency of the criminal justice system. As the Committee is unaware of any reason for the presence of more specific procedures in some legislation but not in others, the Committee supports the codification of detailed provisions to govern application procedures for all search warrants.

The situation in New South Wales is instructive in this regard. The *Search Warrants Act 1985* (NSW) creates a single regime for the application, issue and execution of search warrants in that jurisdiction. Section 11 of that Act requires that all applications (excluding telephone warrants) for search warrants must be in writing in the form prescribed by the *Search Warrant Regulations 1999* (NSW); must be made by the applicant in person; and must not be issued unless the information given by the applicant in or in connection with the application is verified before the authorised justice on oath or affirmation or by affidavit, which may be administered by the issuing officer.

The requirements of section 80 of Victoria's *Confiscation Act 1997* are essentially the same as section 11 of the NSW legislation.

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<sup>238</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 194.

<sup>239</sup> Deputy Ombudsman (Police Complaints), *Commerce Club: Investigation of police raid on the Commerce Club (Tasty Night Club) on Sunday 7 August 1994*, November 1994, ('*Tasty Nightclub Report*') 57.

Recommendation 1. That legislation be amended to ensure that application procedures for search warrants are consistently specific, using section 80 of the *Confiscation Act 1997* as a model.

### ***The contents of the application***

Courts have held that there is a duty of full disclosure of all material facts by the informant seeking a search warrant.<sup>240</sup> Although “material facts” does not necessarily mean all facts, it does include the factual basis for any allegations or conclusions in the application.<sup>241</sup>

This duty reflects two features of search warrants: “the common law protection of the privacy of individuals against the arbitrary use of the power of entry and search”;<sup>242</sup> and the *ex parte* nature of the warrant application, where courts require the applicant for *ex parte* relief to bring to the court’s notice “all the material facts which the absent party would presumably have brought forward in his [her] defence to the application”.<sup>243</sup>

The power to put information before a magistrate “must be exercised...in good faith and for the purpose for which the power was conferred”.<sup>244</sup> The applicant must ensure that the “material before the magistrate or justice is not such as to mislead and that any omission of relevant material was inadvertent”.<sup>245</sup>

As already noted, Victoria Legal Aid suggested that the affidavit should at a minimum contain evidence “about the need for a warrant, its objectives, the ambit of the search and seizure, and the identity of the officers involved”.<sup>246</sup>

Current law, however, provides only limited guidance as to what should be included in a Victorian application for a search warrant. As already noted, section 75(2) of the *Magistrates’ Court Act 1989* prescribes in general terms the contents of the application (evidence on oath or by affidavit). Other legislation which authorises search warrants in specific situations implies what an application should contain by

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<sup>240</sup> Henry Aizen, Rod Saunders, *Search warrants: a practical guide*, Law Institute Journal, October 1998, 48-53, 50.

<sup>241</sup> Greg Connellan, in Ian Freckleton, *Criminal Procedure* (2004) (Connellan; Freckleton, *Criminal Procedure*), 2-5597.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*, referring to *Thomas A Edison Ltd v. Bullock* (1912) 15 CLR 679; *Karina Enterprises Pty Ltd v. Mitson* (1990) 26 FCR 473.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*, quoting *Leggo Australia v Paraggio* (1994) 44 FCR 151.

<sup>246</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence, 19 October 2004*, 194. See p 238 below.

referring to the conditions for the issue of a warrant. Typically, these require that the issuing magistrate is satisfied that there is a reasonable basis for believing that a warrant will facilitate the seizure of evidence of an offence against the Act in question. The Committee lists the following examples:

- section 465 of the *Crimes Act 1958* refers to the need to satisfy a magistrate that there is a reasonable ground for believing that there is or will be within 72 hours, evidence of an indictable offence and that the evidence will be at the place to be searched;
- section 92 of the same Act refers to the need to satisfy a magistrate that there is reasonable cause to believe that a person possesses or has custody of stolen goods;
- section 81 of the *Drugs, Poisons and Controlled Substance Act 1981* requires a magistrate to be satisfied that there is a reasonable ground for believing that there is or will be within 72 hours evidence of an offence under the Act (including a document relating to an actual or potential offence) and that the evidence will be at the place to be searched;
- section 147 of the *Health Services Act 1988* requires a magistrate to be satisfied that there are reasonable grounds for suspecting that a person is carrying on business at the premises to be searched as a health service establishment in contravention of section 111 of the Act; and
- provisions of the eleven health practitioner registration Acts<sup>247</sup> require an applicant to satisfy a magistrate that there is a reasonable belief that there has been or is contravention of the Acts or related regulations, or that entry is required to investigate a complaint under the Act, which if substantiated, may provide grounds for suspension or cancellation of the registration of a practitioner.<sup>248</sup>

At the operational level, the Victoria Police Manual contains an instruction on searches of property.<sup>249</sup> Section 7 concerns search warrants. To obtain a warrant, police members are instructed to complete the relevant search warrant form, using a generic police form (Form 710) if the legislation does not prescribe one, and to refer to Division 3 of the *Magistrates' Court Act 1989* and the specific provisions of other Acts that authorise the warrant. These specific provisions do not, however, provide

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<sup>247</sup> *Chinese Medicine Registration Act 2000, Chiropractors Registration Act 1996, Dental Practice Act 1999, Medical Practice Act 1994, Nurses Act 1993, Optometrists Registration Act 1996, Osteopaths Registration Act 1996, Physiotherapists Registration Act 1998, Podiatrists Registration Act 1997, Psychologists Registration Act 2000, Pharmacists Act 1974. The Medical Practice Act 1994 contains the model search warrant provisions for these Acts: Department of Human Services, Submission no. 19, 1.*

<sup>248</sup> Department of Human Services, Submission no. 19, 1.

<sup>249</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004.

any detailed guidance about what an application should contain additional to that of the provisions discussed above.

However, other parts of the Police Manual require the consideration of the contents of applications for search warrants. Police members must plan and document all property searches<sup>250</sup> and have them approved by a police officer,<sup>251</sup> who in so doing must consider a number of factors, including whether there are reasonable grounds for the search, whether the issue of a warrant is appropriate and that all relevant documentation is completed and checked.<sup>252</sup> This multi-stage consideration of all warrant applications contemplated by Victoria Police promotes consistency with respect to the contents of the applications. However, the process is internal to the Police and therefore not ordinarily transparent as far as the community is concerned.

### Other jurisdictions

Other jurisdictions provide guidance of varying specificity as to what information should be included in the application for a search warrant.

Section 3E of the Commonwealth *Crimes Act 1914* (Cth) requires the applicant to:

- provide information on oath to satisfy an issuing officer that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, evidential material (defined in section 3C as “a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form”) at the location to be searched;<sup>253</sup>
- to state in the application any suspicion that firearms will be required during the execution of the warrant and the grounds for the suspicion;<sup>254</sup>
- if a member of the Australian Federal Police (AFP), provide the particulars of any warrant application relating to the same person or premises as the current application.<sup>255</sup>

In Tasmania, the relevant provision of the *Search Warrants Act 1997* (Tas) is identical to section 3E(1) of *Crimes Act 1914* (Cth).

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<sup>250</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 5.1.

<sup>251</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 1.

Officer is defined as “a police member of the rank of Chief Commissioner, Deputy Commissioner, Assistant Commissioner, Commander, Chief Superintendent, Superintendent, Chief Inspector, or Inspector (including any member who is acting at that rank)”: Victoria Police Manual, *Dictionary*, 2.

<sup>252</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 6.4.

<sup>253</sup> *Crimes Act 1914* (Cth) s 3E(1).

<sup>254</sup> *Crimes Act 1914* (Cth) s 3E(3).

<sup>255</sup> *Crimes Act 1914* (Cth) s 3E(4).

In Queensland, search warrant applications must be sworn and state the grounds on which the warrant is sought. The issuing officer may refuse to consider the application until the applicant provides all the information that the issuing officer requires.<sup>256</sup> Further detail about application contents is provided in the *Police Powers and Responsibilities Regulations 2000* (Qld), which require applications to state:

- the applicant's name, rank, registered number and station;
- a description of the place to be searched;
- for an occupied place, the name of the occupier of the place, if known;
- the offence, suspected offence or confiscation related activity to which the application relates or, for a forfeiture proceeding, the Act under which the proceeding may be started;
- a description of the nature of the thing sought that is reasonably suspected of being evidence of the commission of the offence or confiscation related evidence in relation to the confiscation related activity;
- information or evidence being relied on to support a reasonable suspicion that evidence of the commission of an offence or the confiscation related evidence is at the place, or is likely to be taken to the place within the next 72 hours;
- in relation to each warrant granted in the previous year in relation to the place or a person suspected of being involved in the commission of the offence or suspected offence, or the confiscation related activity, to which the application relates: the place and date of issue; the type of offence or confiscation related activity to which such previous warrants related; and whether anything was seized under the warrant or a proceeding was started after a search;
- reasons why it is necessary to exercise any power sought to: search anyone found at the place for anything sought under the warrant that can be concealed on the person; search anyone or anything in on or about to board, or be put on, a transport vehicle; take a vehicle to, and search for evidence of the commission of an offence that may be concealed in a vehicle at a place with appropriate facilities for searching the vehicle; and
- reasons why it is necessary to execute the warrant at night if such authority is sought.<sup>257</sup>

Section 12A of the New South Wales *Search Warrants Act 1985* (NSW) contains relatively detailed requirements about the information that should be included in the search warrant application form. An authorised justice must not issue a search

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<sup>256</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 68(5).

<sup>257</sup> *Police Powers and Responsibilities Regulations 2000* (Qld) Schedule 10, clause 3.

warrant unless the application for the warrant includes the following information: the authority of the applicant to make the application for the search warrant; the grounds on which the warrant is being sought; the address or other description of the premises the subject of the application; if the warrant is required to search for a particular thing, a full description of that thing and, if known, its location; if a previous application for the same warrant was refused, details of the refusal and any additional information required by section 12C (which governs further applications for a warrant after refusal); and any other information required by the regulations. These requirements are reflected in the approved forms for New South Wales search warrant applications.

The *Search Warrant Regulations 1999* (NSW) prescribe one form for warrant applications for indictable, firearms, prohibited weapons, narcotics and stolen goods offences (“the offences form”), and a separate form for other search warrants (“the other warrants form”). The offences form requires the applicant to state their name, rank, place of work, date, the location and nature of the premises to be searched, what items are believed on reasonable grounds to be on the premises, or on them within 72 hours, what offence they are believed on reasonable grounds to be connected to, the grounds for that belief, and where appropriate, previous applications and what information justifies a new application. The other warrants form requires the applicant to state their name, authority to apply for a search warrant, what matters are believed on reasonable grounds to justify the application, what specific functions the warrant should authorise on entry, and where appropriate, previous applications and what information justifies a new application.

## Reform in Victoria

Commenting on the difference between the NSW prescribed forms and her experience of affidavits used in Victoria, Magistrate Bowles stated:

All affidavits will be unique in relation to their contents, but they are a consistent method of applying for a search warrant. In my view the concerns of the Committee in relation to ensuring consistency, fairness and transparency are not assisted by a prescribed form as is used in New South Wales. Generally affidavits flow in a chronological manner providing the basis for the application being made. The issuing magistrate would be in a better position, in my view, to understand why the warrant is being sought when an affidavit is provided than the manner in which the prescribed form is set out in the New South Wales legislation.<sup>258</sup>

The Committee considers, however, that Magistrate Bowles’ comments relate to the structure and content of the NSW prescribed forms, rather than the forms’ value as a consistent mechanism for submitting evidence in support of an application for a search warrant. The Committee believes that it is in the interests of certainty, consistency and transparency to have standard forms for search warrant applications

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<sup>258</sup> Magistrate Jennifer Bowles, Magistrates’ Court of Victoria, *Minutes of Evidence*, 20 October 2004, 272-273.



unlicensed premises to be a police member of or above the rank of inspector. Some legislation does not specify any rank<sup>262</sup> or status.<sup>263</sup>

As Victoria Police pointed out in its submission to the Committee,<sup>264</sup> the requirement that the applicant for a warrant under the *Crimes Act 1958* must be a senior police member is one of a number of safeguards in the Act that protects individuals from arbitrary invasion of privacy. The Committee agrees with the implication in the submission that the increased experience, training and other qualifications possessed by such an applicant would theoretically act as a protection against the abuse of warrant powers.

Differing rank requirements should relate to the gravity of the harm that would be caused by the exercise of the warrant power. Thus a covert warrant that authorises search without the knowledge of the occupiers of the relevant premises, presents a greater potential threat to individuals' privacy than a search conducted openly, in their presence. Consequently, these warrant provisions restrict who may apply for them, as the example of the *Terrorism (Community Protection) Act 2003* shows. In relation to search warrant powers that are exercised openly, the prevailing inconsistency noted above may be due to the largely ad hoc manner in which many warrant powers and procedures have developed.<sup>265</sup> Although Magistrate Bowles pointed out that Parliament had "a particular intention in mind when prescribing the rank of the applicant,"<sup>266</sup> the Committee has been unable to discern any rationale for the different ranks contained in the ordinary warrant provisions referred to.

At a practical level, all search warrants sought by Victoria Police are subject to internal review by a police member of officer rank, which ensures that all applications are subjected to some degree of consistent assessment before being presented to a magistrate.<sup>267</sup> While this is commendable as a way of minimising the potential effects of legislative provisions containing different applicant status[es], it circumvents the issue rather than addressing it.

Legislation in other jurisdictions appears to take a more consistent, but less restrictive, approach to the question of the applicant's status. The Commonwealth *Crimes Act 1914* (Cth), the Tasmanian *Search Warrants Act 1997* (Tas) and the

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<sup>262</sup> *Crimes Act 1958* s 92(1); *Surveillance Devices Act 1999* s 33(1) (governing search warrants but not surveillance warrants); *Firearms Act 1996* s 146(1); *Confiscation Act 1997* s 79(1).

<sup>263</sup> *Fisheries Act 1995* s 103. However, the Act refers to a warrant being issued to an authorised officer or member of the police force.

<sup>264</sup> Victoria Police, *Submission no. 25*, 1-3.

<sup>265</sup> *Warrant Powers and Procedures Discussion Paper*, 26.

<sup>266</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 273.

<sup>267</sup> Writing in 2000, Victoria Police said that "generally, warrants are granted when requested" and argued that "the internal vetting mechanism imposed by the Force on applications for search warrants has a great deal to do with the success of such applications to Magistrates": *Submission no. 21, Inspectors' Powers Inquiry*, 6.

Western Australian Criminal Code<sup>268</sup> do not require an applicant to be of a particular rank, or a member of a police force.<sup>269</sup> In New South Wales, a “member of the police force” may apply for a warrant,<sup>270</sup> while in Queensland a “police officer” may apply.<sup>271</sup>

The Committee believes that current provisions on the status of applicants for search warrants in Victoria are fragmented and inconsistent, particularly when compared to other jurisdictions. The Committee again stresses that to the greatest extent possible, the law should be accessible to the whole community. Provisions should be clear and certain to officials who use them and to citizens who may be affected by them. For this reason, the Committee believes that the rank of applicants for search warrants should as far as possible be consistent.

The Committee considers that the senior sergeant rank found in section 465 of the *Crimes Act 1958* is an appropriate standard, given that more search warrants are issued under that section than under any other Victorian provision<sup>272</sup> and that the Committee did not receive any evidence critical of that rank requirement. The Committee accordingly believes that all search warrant provisions should require that applications must be made by a police member of or above the rank of senior sergeant, unless this would have such a serious effect on Victoria Police’s ability to apply for warrants that it would undermine the purpose of the powers exercised under the warrant. The Government should consider the appropriate rank requirement in such cases.

One potential exception to the rank requirement of senior sergeant or above is warrants issued under section 81 of the *Drugs, Poisons and Controlled Substances Act 1981*, which currently require a lower rank of applicant.<sup>273</sup> The Committee is conscious that a large number of warrants are issued under this legislation and that there may be appropriate operational reasons for the lower rank requirement. Accordingly the Committee considers that further consultation with Victoria Police should be undertaken before any amendment of the current provisions of this Act.

Ensuring that non-police applicants are subject to a similar requirement for consistent qualifications requires a different approach because of the large variety of organisations that such applicants belong to and the diverse objectives that they pursue. The Law Reform Committee of the 54<sup>th</sup> Parliament discussed this matter in the Inspectors’ Powers Report and made the following recommendations:

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<sup>268</sup> The Western Australian Criminal Code is contained in the Schedule to the *Criminal Code Act Compilation Act 1913* (WA).

<sup>269</sup> *Crimes Act 1914* (Cth) s 3E(1); *Search Warrants Act 1997* (Tas) s 5(1); *Criminal Code* (WA) s 711.

<sup>270</sup> *Search Warrants Act 1985* (NSW) s 5(1).

<sup>271</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 68(1).

<sup>272</sup> The Committee lists available statistics in the table on p 59 above.

<sup>273</sup> Any member of the police force of or above the rank of sergeant or in charge of a police station.

Recommendation 16 That Acts clearly set out the process of authorisation of inspectors or cross-reference to the Act which does.

Recommendation 17 That authorisation provisions be as specific as possible. In particular that: legislation not confer inspectors' powers on a recipient categorised merely as a member of a particular Department or organisation; inspectors' powers not be conferred on a particular recipient simply because it is the most economically or administratively advantageous option; agencies have clear and appropriate qualification requirements and educational and training standards for their inspectors.

Recommendation 18 That, where non-government employees are authorised as inspectors, strong safeguards relating to monitoring and reporting on inspectors' activities and access to complaints mechanisms must be included.<sup>274</sup>

As stakeholders did not raise any issues about the rank or status of non-police applicants, this Committee will not revisit the issue.

Recommendation 3. That legislation containing warrant provisions be amended so that applications for search warrants brought by police must, as a minimum standard, be brought by a police officer of or above the rank of senior sergeant.

Recommendation 4. That the Government considers an appropriate rank requirement in cases where the effect of Recommendation 3 is to undermine the purpose of the powers exercisable under a search warrant.

## ***Access to application proceedings***

### **A right to be heard**

The *ex parte* nature of proceedings concerning an application for a search warrant denies the subjects of the warrant an opportunity to be heard on the application, particularly to review and comment on the evidence presented to the magistrate. Thus if a warrant is issued, an individual's privacy will be invaded and s/he will have had no ability to prevent or reduce the scope of the possible violation of rights. Moreover, once the warrant is issued, individuals subject to it do not have any ability to view the evidence relied on. The Committee considered whether this situation represents an acceptable balance between the need to protect individual privacy and the need for an effective criminal justice system.

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<sup>274</sup> *Inspectors' Powers Report*, 90-95. The discussion at pp 101-108 of the *Inspectors' Powers Report* is also relevant to this issue.

The Office of the Victorian Privacy Commissioner recommended allowing individuals who would be affected by the warrant to be heard on the contents of the application or of the warrant itself, either by giving notice of the application or by serving the warrant without executing it, unless to do so would defeat the object of the warrant:

Notice of an application for a warrant [where appropriate]... gives the affected person an opportunity to make submissions as to why the authority should not be granted or whether the scope of the authority should be limited in some way. Service of a warrant obtained *ex parte*, prior to its execution, again allows the affected person to question the basis and scope of the authority and, if accepted at face value, to ensure the power is carried out in accordance with the terms of the warrant or authority.<sup>275</sup>

There are legitimate policy reasons for the *ex parte* application and for not disclosing the evidence to individuals subject to a search warrant. Providing subjects with notice of an intention to search may undermine the purpose of the search by providing an opportunity for the destruction or concealment of evidence, thereby frustrating the investigatory function that warrants facilitate, or it may place informants at risk. In addition, the evidence relied on in support of search warrants “may not be provable beyond reasonable doubt, may in fact be hearsay and is very often confidential”.<sup>276</sup>

Moreover, the Committee does not believe that magistrates are incapable of providing effective independent scrutiny of search warrant applications, notwithstanding various claims made in evidence during the inquiry.<sup>277</sup> The Committee is also concerned by the potential administrative impact of a right to be heard.

Balancing these factors, the Committee does not find there to be sufficient reason to justify a recommendation to allow individuals subject to a search warrant a right to be heard on the application.

The remedy for individuals who believe that warrant applications were inappropriately sought or based on false information will by necessity be available only after the event.

## **Disclosure of evidence**

### ***During the investigation phase***

In its submission and oral evidence, Victoria Police highlighted similar concerns about providing application evidence to the subjects of search warrants:

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<sup>275</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 8.

<sup>276</sup> Victoria Police, *Submission no. 25*, 18.

<sup>277</sup> This evidence is discussed later in this chapter, at p 116.

[C]are should be exercised so that material that could disclose the identity of any person or put a person in jeopardy or reveal matters which may compromise investigations should [not be made available to the occupier of the premises to be searched].<sup>278</sup>

From an operational point of view [releasing application evidence] is a dangerous thing to do at the investigative stage. It is like public interest immunity: you may be disclosing informers, you may be disclosing avenues of inquiry that you are making, or investigative methods. In my opinion, while the investigation is going on those matters should not be made available to the householder whose premises have been searched.<sup>279</sup>

The Committee acknowledges the operational imperatives identified by Victoria Police. However, the Committee believes that, in principle, when an individual's privacy is curtailed as it is by a search under warrant, s/he should be entitled to know the nature of the evidence that was considered sufficient to justify the restriction, and that they should therefore be able to access the material submitted in support of the application for the search warrant. This general principle would, however, need to be subject to exceptions in appropriate circumstances.

This right already exists in New South Wales. Regulation 9 of the *Search Warrants Regulations 1999* provides that an occupier of the premises to which the search warrant relates or any other person on behalf of the occupier, may inspect the application for the warrant, which includes the record of the authorised justice, a copy of the occupier's notice and the report on the execution of the warrant unless the authorised justice issues a certificate that a document is not to be made available for inspection if it could disclose a person's identity and is likely to jeopardise that or any other person's safety or may seriously compromise the investigation of any matter. Section 13(3) of the *Act* provides a further safeguard to protect sensitive information from disclosure by prohibiting an issuing officer from recording any matter that might disclose the identity of a person if the issuing officer is satisfied that the person's safety might be jeopardised by recording the matter.

Magistrate Bowles raised two concerns about adopting a similar regime in Victoria, her first concern was:

The need for such a record [as required by section 13 of the Search Warrants Act 1985 NSW] and the advantage in such a record being maintained would have to be demonstrated for such a provision to be introduced in Victoria. It could be said that such a record represents double handling without any benefit to be gained.<sup>280</sup>

The Committee considers the need for record keeping later in this chapter. For present purposes, however, the Committee agrees that adopting the principle of access to application evidence would be, as Magistrate Bowles noted, "a major

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<sup>278</sup> Victoria Police, *Submission no. 25*, 13.

<sup>279</sup> Victoria Police, *Minutes of Evidence*, 20 October 2004, 224.

<sup>280</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 274.

departure for Victoria".<sup>281</sup> Nevertheless, the Committee believes that in principle access to application evidence is justified by the increased potential for transparency and accountability, two fundamental elements of due process, in the warrant application and issuing process. Victorians currently have restricted opportunities to view relevant application evidence. Both the former Deputy Ombudsman (Police Complaints) and the Privacy Commissioner told the Committee that they had a very limited ability to test the integrity of contested application evidence, although the former's successor, the Director of Police Integrity<sup>282</sup> has indicated that he intends to use his new powers to do so.<sup>283</sup> The alternative, pursuing criminal or civil claims in relation as a means of obtaining evidence about a contested warrant process, is time-consuming and expensive. In this context, Ian Freckleton also argues that while "civil claims could act as a catalyst for the accountability of police to the community for...abuses of power...the primary aim of such proceedings is to resolve disputes between litigants, not to audit the performance of the institutions of state".<sup>284</sup> Palmer and McCulloch note that "the literature is mixed in its appraisal of civil litigation as an effective police accountability mechanism".<sup>285</sup>

The Committee's proposal would therefore provide Victorian residents who are subjected to search warrants with a relatively expeditious way to obtain evidence of importance to them.

Magistrate Bowles second concern related to the resource implications of recording application evidence:

[M]agistrates and staff are under tremendous pressure to complete the work of the Court, and given that approximately 20 000 warrants were issued from the 1 July 2003 to 30 June 2004, were such requirements to be introduced it would constitute a further demand on their time [and on the Court's resources].<sup>286</sup>

The Committee discusses record keeping and makes a number of recommendations, including in relation to resources, later in this chapter. However, the Committee considers that access to the application evidence should be made available on request to the Magistrates' Court to view the copies of the evidence that are retained by the Court.<sup>287</sup> This could be done in various ways, for example by enabling individuals subject to the material to access the material at the Court. To protect the

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<sup>281</sup> Ibid.

<sup>282</sup> The Director of Police Integrity was formerly the Deputy Ombudsman (Police Complaints).

<sup>283</sup> Brian Hardiman, Deputy Ombudsman (Police Complaints), *Minutes of Evidence*, 5 November 2004, 306.

<sup>284</sup> Ian Freckleton, *Suing the Police: The Moral of the Disappointing Morsel*, (1996) 21(4) *AltLJ* 173.

<sup>285</sup> Jude McCulloch and Darren Palmer *Civil litigation by citizens against Australian police between 1994 and 2002 - Report to the Criminology Research Council (McCulloch and Palmer, Civil litigation)*, 84, at [www.aic.gov.au](http://www.aic.gov.au)

<sup>286</sup> Magistrate Bowles, *Minutes of Evidence*, 20 October 2004, 274.

<sup>287</sup> "Copies are kept of all documents provided to the court," Magistrate Bowles, *Minutes of Evidence*, 20 October 2004, 265.

integrity of the investigation, the applicant for the search warrant could state in the (original) application whether any or all of the evidence should not be disclosed and the grounds for the statement, and the issuing magistrate could determine which parts of the documents should be sealed. The provisions of the *Search Warrants Act 1985* (NSW) and associated regulations may also provide appropriate guidance for a Victorian mechanism.

In principle, individuals subject to a search warrant should be entitled to access the evidence submitted in support of the application for the search warrant.

Recommendation 5. That legislation be amended to provide that individuals subject to a search warrant are able to apply to the Magistrates' Court to view the Magistrates' Court's copy of application documents.

Recommendation 6. That the Government and Magistrates' Court, in consultation with other relevant stakeholders, establish a system to facilitate the implementation of Recommendation 5, with appropriate safeguards in place and having regard to section 13 of the *Search Warrants Act 1985* (NSW) and associated regulations.

### ***During the trial phase***

Victoria Legal Aid argued that;

Affidavits in support of applications for warrants should be disclosed or made available to the defendant. Currently defendants and their lawyers have no ability to look behind a warrant, and therefore one means of scrutiny is not available.<sup>288</sup>

Similarly, in a preliminary submission to the inquiry, lawyer Michael McNamara argued that non-disclosure prevented the defence ascertaining whether a search was conducted within the terms of the warrant authorising it.<sup>289</sup> The Victorian Aboriginal Legal Service made the same point in its submission.<sup>290</sup>

The proposal here is that the evidence in support of an application for a search warrant should be discoverable by the defence to ensure that the defendant can effectively scrutinise and respond to the prosecution case. Dr Steven Tudor considered that this;

would assist in the accountability of officers applying for and executing warrants.... In principle, this aspect of the prosecution "case" against a suspect/defendant ought to be as discoverable as

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<sup>288</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 194.

<sup>289</sup> Michael McNamara, *Preliminary submission no. 7*, (by telephone).

<sup>290</sup> Victorian Aboriginal Legal Service, *Submission no. 23*, 3.

any other aspect. Clearly, however, it may well be appropriate to make such disclosure conditional upon the interests of justice not being compromised.<sup>291</sup>

Dr Tudor referred the Committee to existing provisions in the *Magistrates' Court Act 1989* which allow non-disclosure where it is believed that disclosure will or is reasonably likely to: prejudice certain activities, including investigation, other law enforcement activity, fair trial or adjudication, to disclose confidential source information, or to endanger the lives or physical safety of certain groups of individuals.<sup>292</sup> These provisions apply generally to pre-hearing disclosure of information to defendants before the Court. The Committee notes that applying this range of exclusions to disclosure of warrant information in Victoria would result in a disclosure regime that is more restrictive than currently exists in this state and in other jurisdictions.

In response to the Committee's Discussion Paper, Victoria Police told the Committee that:

Even at the stage of a trial there is some reluctance to provide that material for the very same reasons: you may be disclosing informers or avenues of inquiry, operational methods and things like that. It is a matter that has to be looked at very finely.

You also have to be careful that the defence will trawl the pond, as it is called, looking for anything they can raise in any trial just to discredit police or something like that. The courts would have to ensure that if the defence were to have access to that sort of material, they were not just on a fishing expedition. There has to be some legitimate forensic purpose for them wanting the material. That is what the courts have said; they need a legitimate forensic purpose before they should have that sort of material. That means they need to show that they require it for a proper defence and they are not just looking for something to hang their hat on.<sup>293</sup>

The Committee believes that its previous recommendations on access to application evidence address this issue sufficiently.

### ***At other times***

Robert Hulme SC, Senior Counsel in the New South Wales Public Defender's Office and formerly a solicitor with the NSW Director of Public Prosecutions, suggested that there is a need for an additional means of disclosing information used in support of applications for warrants. He argued that in cases where investigations do not result in charges and trial proceedings, it is effectively impractical to scrutinise the merits of the application:

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<sup>291</sup> Dr Steven Tudor, *Submission no. 34*, 9.

<sup>292</sup> *Magistrates' Court Act 1989 Schedule 2*, Clause 1A(4).

<sup>293</sup> Neil Jepson, Victoria Police, *Minutes of Evidence*, 20 October 2004, 224.

Outside of criminal proceedings, though, there could be misuse of powers that under present procedures would not come to light and that might give rise to a justification for some civil action in the person. If, for example and hypothetically, the police completely misused their powers to obtain a search warrant on false information to search a person's place and caused great distress through that invasion of privacy, they found nothing and so no charges were laid and no criminal proceedings were brought, the person would have to dig to find whether the police were acting legitimately or in good faith. It should be a matter of regular disclosure of that sort of thing.<sup>294</sup>

The Committee believes that its earlier recommendation to permit access to application materials would address this concern.

### ***Allegations of illegitimate applications***

Some witnesses<sup>295</sup> raised concerns about the possibility of Victoria Police<sup>296</sup> members making questionable applications for search warrants by using false or misleading evidence in support of applications. Such conduct is reportedly intended to procure a warrant in circumstances where there may be insufficient evidence to justify its issue but where it is nevertheless believed by the applicant that search by warrant is appropriate for legitimate or illegitimate reasons.

The Committee explains the context for these allegations and then discusses them.

### **Illegitimate applications in Victoria**

As the Committee has noted above, search warrant applicants must ensure that "material before the magistrate or judge is not such as to mislead and that any omission of relevant material was inadvertent".<sup>297</sup>

The Ombudsman has noted that the making of illegitimate applications is not unknown in Victoria. This is not surprising, given that "history and commonsense suggest that a level of corruption must always be assumed to exist and that it is likely to be commensurate with the level of available opportunity... [The policing environment] can lead to 'noble cause corruption' – getting arrests and convictions at all costs or using high risk strategies..."<sup>298</sup>

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<sup>294</sup> Richard Hulme, Public Defender's Office (NSW), *Minutes of Evidence*, 31 August 2004, 32.

<sup>295</sup> Fitzroy Legal Service; Deputy Director, Office of Police Integrity.

<sup>296</sup> The Committee did not receive any allegations about other agencies engaging in such practices.

<sup>297</sup> *Lego Australia Pty Ltd v. Paraggio* (1994) 52 FCR 542, 569.

<sup>298</sup> The Ombudsman Victoria, *Annual Report 2002 - 2003*, 75.

A high profile case arose out of the police raid on Melbourne's Tasty Nightclub on 7 August 1994. Executing a warrant issued under s 81 of the *Drugs, Poisons and Controlled Substances Act 1981*, police strip-searched approximately 463 people on the premises.<sup>299</sup> In his report on the raid, the Deputy Ombudsman (Police Complaints) concluded that the affidavit that grounded the warrant was "inaccurate and appeared to [have been] embellished"<sup>300</sup> and that it should have been subjected to more rigorous internal review by police officers.<sup>301</sup>

The Deputy Ombudsman found that the problems he identified were not limited to one affidavit or officer. He accordingly recommended that Victoria Police Force Command "remind members of their very serious responsibilities relating to the preparation of affidavits for warrants" and "review instructions and training manuals to determine whether they "sufficiently stress the purpose of warrants, the necessity for accuracy of affidavits and the keeping of accurate records/notes of observations, and information on which affidavits might be based".<sup>302</sup>

The Committee considered the implementation of the Deputy Ombudsman's (Police Complaints) recommendations on the need to inform police members of the importance of ensuring that affidavits are verifiable.

Generally, police members are required by the *Police Regulation Act 1958* and the Victoria Police Code of Conduct and Code of Ethics to act ethically and in a way that is not likely to diminish public confidence in the police force. At an operational level, the Police Manual provides some guidance on the preparation of warrants but does not contain any provisions that deal specifically with the sorts of accuracy and record-keeping issues that the Deputy Ombudsman raised. The Committee has not had access to police training manuals and thus is not in a position to assess to what extent police members are given instruction on these matters. Nor is the Committee aware of whether Victoria Police considered that these instruments (the Police Manual and training manuals) *did* "sufficiently stress" the concerns of the Deputy Ombudsman (and therefore did not require amendment).

The Committee notes that the Police Manual requires that officers considering requests to authorise searches of property must ensure that a range of conditions are met, including that "there are reasonable grounds for the search" and that "the issue

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<sup>299</sup> The report of the Deputy Ombudsman (Police Complaints) into the raid refers to 463 individuals being searched. See also, *McCulloch and Palmer, Civil litigation*, 108; Ian Freckleton *Suing the Police: The Moral of the Disappointing Morsel* (1996) 21(4) *AltLJ* 173.

<sup>300</sup> *Tasty Nightclub Report*, 1. "While there is insufficient evidence to support a conclusion that [the police officer who applied for the warrant] has deliberately set out to swear knowingly false information in his affidavit, many of the generalisations presented as fact [in the affidavit], do not withstand close scrutiny": 52.

<sup>301</sup> *Tasty Nightclub Report*, 1. "[The officer] must take primary responsibility for this situation, but equally, so should his superiors who failed to question [him] on the contents of his affidavit": 52.

<sup>302</sup> *Tasty Nightclub Report*, 71.

of a warrant or authority (where applicable) is appropriate”.<sup>303</sup> As noted above, however, the instructions that cover how Police members obtain a search warrant are general in nature. Given the obvious importance of being able to verify the information in search warrant applications, the Committee believes that the Police Manual should be more explicit and therefore recommends that the Manual be amended to include specific reference to the search warrant application procedures that the Deputy Ombudsman identified as being deficient.

Recommendation 7. That Victoria Police amends section 7 of the Victoria Police Manual by inserting provisions that emphasise the purpose of warrants, the necessity for accuracy of affidavits, and that they should be supported by records of observations or other information.

### Evidence received by the Committee

In its submission, the Fitzroy Legal Service (FLS) said that it:

has been involved in many cases where clients (usually socially or economically disadvantaged...) have had search warrants under the *Drugs, Poisons and Controlled Substances Act* executed on their premises where nothing of value related to the reasons given in the application for that warrant is ultimately found or seized. FLS suspects that these warrants are being issued on merely speculative grounds, possibly based on wrong or exaggerated reasons.<sup>304</sup>

The FLS went on to cite two case studies, and indicated that its files contained other examples.

Brian Hardiman, Deputy Ombudsman (Police Complaints),<sup>305</sup> also raised the issue of applications based on illegitimate information.

Another aspect we want to get into [is] in terms of own motion investigations of searches. I have concerns that failed searches are possible indicators of corruption, either that the searches have been done for intimidation purposes or for example, there has been leaked information to the occupants of the house, there has been inaccurate intelligence or false or misleading affidavits. The issue of false or misleading affidavits is a vexed one for our office because it affects the question of how far we can go behind the warrant in question and magistrates' and judges' decision-making in terms of the information in the affidavit.

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<sup>303</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 6.4.

<sup>304</sup> Fitzroy Legal Service, *Submission no. 35*, 5.

<sup>305</sup> During this inquiry, the Ombudsman's police functions were transferred to the newly created Office of Police Integrity and Mr Hardiman became the Deputy Director, Police Integrity. When the Committee uses his former title throughout this report it reflects his position when he gave evidence.

In Mr. Hardiman's experience,

where we have looked at the details of affidavits...police have viewed affidavits as "a hurdle to be jumped" rather than a safeguard against unwanted intrusion of privacy.

All witnesses who gave evidence on police procedures and conduct agreed that the situation has improved significantly since the Tasty Nightclub raid. Nevertheless, given recent history in this area, the Committee was particularly concerned by witness allegations that the practice of making questionable applications continues. The Committee therefore sought further information.

The Fitzroy Legal Service was unable to provide any more evidence to substantiate its claims, as it does not have the resources to compile statistics.<sup>306</sup> As the Committee discusses elsewhere in this report, this mirrors the situation of other legal service providers who made allegations of improper conduct in relation to warrant powers.

Clearly, the anecdotal evidence of FLS is of limited use without a review of the source material in their case files. Unfortunately, the Committee did not have the resources to examine files for this inquiry.

The Deputy Director, Office of Police Integrity (OPI) gave the Committee an insight into the difficulty of investigating allegations of police abuse of the warrant application process.

The Chair - Are you able to quantify, based on your experience with investigations, the extent to which you believe there are false or misleading affidavits which might then be used as part of a fishing expedition or to harass particular sections of the community?

Mr Hardiman - No, I am not because we get very few complaints. Though when you look at an affidavit or a search warrant there might be a problem you often find that when the police do the search they actually find something. They may not find what they were actually looking for but they often find something that suggests the person is at least involved in a criminal activity. We have had problems with getting access to informers, obviously, and so you cannot question the sources of information in affidavits. It is something we have had suspicions about in the past but because we haven't had own motion powers to date, it is something we haven't been able to look at in depth. It is something we will be looking at in the future.<sup>307</sup>

Mr Hardiman advised the Committee that between 2001 and 2004 the Ombudsman received fewer than 14 complaints in relation to "seeking warrant[s] without

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<sup>306</sup> Fax, Will Crawford to Committee Research Officer, 20 December 2004.

<sup>307</sup> Brian Hardiman, Deputy Ombudsman (Police Complaints) *Minutes of Evidence, 5 November 2004*, 306. The Ombudsman believes that the "recent provision of 'own motion' powers and additional resources in my police jurisdiction will enable me to move for the first time from conducting purely reactive investigations to identifying and eliminating the causes of police misconduct and corruption arising from poor management and supervision". Ombudsman Victoria, *Second Interim Report, Ceja Task Force, Drug Related Corruption*, June 2004, 18.

sound/adequately testing grounds”.<sup>308</sup> Eight of these complaints were from Indigenous Australians.<sup>309</sup>

Victoria Police also provided complaints data to the Committee. During the financial year 2003 - 2004, the Ethical Standards Department recorded 143 complaints about the execution of search warrants. Only one complaint concerned an alleged improperly obtained warrant. The matter was investigated by the Ethical Standards Department and found to be unfounded.<sup>310</sup>

Victoria Police noted that some complaints are raised in other fora, such as criminal proceedings.

But in regard to the duty of a solicitor or a barrister to represent their client in a criminal matter, they have the obligation to test all the evidence, and often the evidence is warrant evidence. So while they may put certain matters to police during a criminal trial, they are not necessarily backing them up with complaints by other measures.<sup>311</sup>

In response to more general complaints about abuse of warrant powers by its members, Victoria Police noted that it is not in their interest not to comply with the law:

It is easy to make those sorts of statements that police regularly misuse warrant powers. Our submission and the written submission focus on the safeguards that are there, and the safeguards are many. Essentially Victoria Police, as all police around Australia do, executes warrants for the purposes of gaining evidence. That is our prime objective. We want to gain evidence to either prosecute somebody or decide not to prosecute somebody. In order for our evidence to be of value it has to satisfy the tests of the court...<sup>312</sup>

In addition Victoria Police stated that as an institution, it was “quite prepared” to work with complainants to resolve issues once it had received sufficient details of allegations.<sup>313</sup>

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<sup>308</sup> A total of 14 complaints about searches were received between 2001 and 2004. The majority of these concerned the justification for the warrant: letter, Deputy Director Police Integrity Brian Hardiman to Committee Research Officer, 20 January 2005.

<sup>309</sup> Letter, Deputy Director Police Integrity, Brian Hardiman to Committee Research Officer, 20 January 2005.

<sup>310</sup> Victoria Police classified the outcome of the investigation as “No complaint”, meaning “a query or complaint by a person that is subsequently found to be an action sanctioned by law, or a complaint lodged by a third party which is denied by the alleged victim who has no complaint to make”: Letter, Acting Superintendent Stephen Leane to Committee Research Officer, 7 April 2005.

<sup>311</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 216-217.

<sup>312</sup> *Ibid*, 217-218.

<sup>313</sup> *Ibid*, 219, reacting to allegations by the Victorian Aboriginal Legal Service that warrant powers are used to over-police Indigenous Australians.

The Committee also focuses on accountability for abuses of warrant powers in its discussions of the issuing and execution of search warrants and in the chapter on arrest warrants. For present purposes, however, an absence of evidence about improper search warrant applications is not evidence of an absence of such conduct. Darren Palmer concurred with Brian Hardiman<sup>314</sup> that, as with other allegations about abuses of warrant powers, the extent of this practice is unknown and requires further investigation:

I do think that more could be done in terms of supervision. I know things have changed but, as I indicated, the Ombudsman in his recent reports about the Drug Squad, did indicate serious concerns with the way in which pre-trial investigation was occurring in Victoria Police and I think with more detailed knowledge about how warrants are being exercised[,] ... actively soliciting information from people who have been the subject of warrants and doing that kind of work would inform us much more about the kinds of problems around practice, accountability and around issues such as training and supervision and management of the exercising of warrants. It would also address such things as the capacity of judicial officers to actually be able to properly make decisions in relation to the exercising of warrants. They are highly reliant upon the information provided by police, as I indicated earlier, and that can be open to abuse and previous commissions of inquiry have identified those issues.<sup>315</sup>

The Committee strongly agrees with Mr Palmer that quantifying the scale of alleged abuses of warrant powers is an essential prerequisite to assess, and where appropriate, improve the operation of the powers. Such knowledge should provide an informed basis for refining accountability mechanisms and practices, including, if supported by available data, the use of education and outreach programs to encourage complaints reporting.

One source of data is the case files maintained by VLA, VALS and other organisations. Indeed, Darren Palmer was one of the authors of a 1993 study that was based on a review and analysis of two years' worth of such files.<sup>316</sup> The Committee considers that recording and analysing appropriate information by legal service providers about allegations of abuse of force for a time-limited trial period would be of value in assessing the extent of the practices alleged in evidence during this inquiry. The Committee therefore recommends that the Department of Justice resources a project in which, for a period of at least 12 months, and if appropriate in consultation with the OPI, Victoria Legal Aid would record information about allegations of the use of false or misleading evidence in support of applications for search warrants. The project would include the publication of a report which analysed the data collected. The Committee also suggests that the Victorian

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<sup>314</sup> See footnote 307 and accompanying text.

<sup>315</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 325.

<sup>316</sup> Sam Biondo and Darren Palmer, *Report into Mistreatment by Police*, Federation of Community Legal Centres (May 1993).

*Mistreatment*, Fitzroy: Federation of Community Legal Centres, 1993.

Aboriginal Legal Service and community legal centres should be included in the project if those organisations considered this appropriate.

The Committee also notes that the Office of Police Integrity indicated in its evidence that it intended to use its own motion powers to investigate search practices. The Committee strongly supports this.

Recommendation 8. That the Office of Police Integrity uses its own motion powers to investigate the prevalence of the use of false or misleading evidence in support of applications for search warrants and of unjustified night time executions, and make appropriate findings and recommendations.

Recommendation 9. That the Department of Justice resources a project in which, for a period of at least 12 months, Victoria Legal Aid record information about allegations of the use of false or misleading evidence in support of applications for search warrants and that an analytical report on the data be prepared and published. That the Victorian Aboriginal Legal Service and community legal centres consider joining the recording and reporting study.

### **Sanction for improper search warrant applications**

Victoria Legal Aid (VLA) proposed the introduction of a legislative provision making it a specific offence to provide false and misleading information in an application for a warrant:

There is no such offence currently in Victorian law as we understand it, although there is such a provision in the New South Wales Search Warrants Act. It makes it a criminal offence to provide false information in support of an application for a warrant.<sup>317</sup>

The Committee's research appears to support VLA's view. Victorian Acts examined by the Committee are silent on the question of using false or misleading information to support warrant applications.<sup>318</sup>

Other sanctions are available. "Where there is fraud or misrepresentation, the warrant should be set aside".<sup>319</sup> Further, in Victoria anyone so using false or misleading information would be liable to internal disciplinary action by their employer. For example, such conduct would appear to constitute a clear breach of discipline falling within several qualifying actions under section 69 of the *Police Regulation Act 1958*.

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<sup>317</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 194.

<sup>318</sup> *Magistrates' Court Act 1989, Crimes Act 1958, Drugs, Poisons and Controlled Substances Act 1981, Confiscation Act 1997, Firearms Act 1996, Medical Practice Act 1994.*

<sup>319</sup> *Connellan; Freckleton, Criminal Procedure*, 2 - 5597.

Such conduct may also be actionable in civil litigation, for example, for defamation of the individuals that the information allegedly concerned.

In contrast, as VLA noted, section 12B of the *Search Warrants Act 1985* (NSW) makes it an offence for a person “in or in connection with an application for a search warrant, to give information to an authorised justice that the person knows to be false or misleading in a material particular”. The offence covers any information, not just that verified “on oath or affirmation or affidavit” and applies to applications in person and by telephone. The prohibited conduct is punishable by up to 100 penalty units or imprisonment for two years, or both.<sup>320</sup>

Similarly, section 3ZT of the Commonwealth *Crimes Act 1914*<sup>321</sup> and section 203P of the *Customs Act 1901* make it an offence punishable by up to 2 years imprisonment to “make, in an application for a warrant, a statement that the person knows to be false or misleading in a material particular”. Interestingly, Tasmania’s *Search Warrants Act 1997* (Tas), which as the Committee noted earlier in this chapter contains many identical provisions to the Commonwealth *Crimes Act 1914*, does not include a false application offence, although such an offence may be a part of other Tasmanian legislation. Section 82 of the *Vocational Education and Training Act 1994* (Tas) prohibits the making of false or misleading statements in information under the Act, which could include information in support of an application for a search warrant under section 70 of the Act. General search warrants legislation in Queensland and Western Australia is also silent on penalties for illegitimate applications.<sup>322</sup>

### **Should Victorian law include an offence provision?**

The Committee considered whether it is appropriate to recommend the creation of a Victorian statutory offence for providing false or misleading information in an application for a search warrant. The Committee recognises that any proposal to create an offence is particularly significant given that it advocates criminalisation of particular conduct. The Committee therefore sought to examine the evidence of the practice of using false or misleading material in applications and to assess whether a specific offence was necessary to detect and deter such conduct. Finally, the Committee considered the rationale behind the offence provisions in other jurisdictions.

As the Committee has stated, there is a lack of data that could be used to quantify the extent of illegitimate applications for search warrants. It is therefore not possible for the Committee to reach a finding about the extent of the practice or whether it would be influenced by making it subject to criminal sanction. The Committee also recognises that mechanisms presently exist to verify the integrity of warrant

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<sup>320</sup> *Search Warrants Act 1985* (NSW) s 12B.

<sup>321</sup> *Crimes Act 1914* (Cth) s 3ZT.

<sup>322</sup> *Police Powers and Responsibilities Act 2000* (Qld); *Criminal Code 1913* (WA).

applications. In particular, the issuing officer has the principal role to play in scrutinising warrant applications, and applicant agencies' internal procedures act as a further filter on the information used to support applications. These controls are designed to identify and halt unmerited applications. Any such rejection affects the ability of applicant agencies to progress their investigations. It is therefore in the operational interests of applicant agencies to ensure that their warrant applications are legitimate and made in good faith.

The Committee's research into the two jurisdictions that have offence provisions reveals that they were introduced to ensure best practice warrant powers and procedures were subject to exemplary standards. Thus the Commonwealth provision was inserted into the *Crimes Act 1914* by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, which was intended to provide

a comprehensive scheme for obtaining and executing search warrants.... It sets out the powers and obligations of police when carrying out any of these procedures and spells out the many safeguards to protect the rights of individuals.

The Bill is designed to make public the powers of police and the rights of individuals in the important areas of police investigation with which it deals. In the past, many of the areas covered have been dealt with in police instructions or general orders, which are not generally available to the public. This is incompatible with modern concepts of open administration and access to justice.<sup>323</sup>

The New South Wales provision was enacted in a 1991 amendment<sup>324</sup> to the *Search Warrants Act 1985* (NSW), which was itself enacted to "create a legislative regime to reform and modernize [*sic*] the law of search warrants [and] strengthen and unify traditional protections from unjustified searches".<sup>325</sup> Interestingly, the Second Reading Speech of the 1991 Act indicates that the offence was created "to cover false or misleading telephone applications",<sup>326</sup> although as the Committee has noted, the text of the provision applies to telephone and in-person applications.

While the Committee has not obtained any data on the use of section 12B, it notes that the provision has been retained and incorporated with the rest of the *Search Warrants Act 1985* (NSW) into the *Law Enforcement Powers and Responsibilities Act 2002* (NSW).<sup>327</sup> This new Act consolidates and codifies existing law to "help strike a

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<sup>323</sup> Duncan Kerr, Minister for Justice, *Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1993* [Cth], *Second Reading Speech*, 17 November 1993, 3030.

<sup>324</sup> *Search Warrants Amendment Act 1991* (NSW) Schedule 1.

<sup>325</sup> Terence Sheahan, *Miscellaneous Acts (Search Warrants) Amendment Bill* [NSW], *Second Reading Speech*, 27 February 1985, 3859.

<sup>326</sup> Peter Collins, Attorney-General, *Search Warrants (Amendment) Bill 1991* (NSW), *Second Reading Speech*, 11 December 1991, 4424.

<sup>327</sup> The Act is expected to come into force on 1 December 2005.

proper balance between the need for effective law enforcement and the protection of individual rights”.<sup>328</sup>

Although the Committee has not been able to complete an empirical assessment of the need for an offence provision, it is strongly of the view that Victoria’s laws should conform to or exceed best practice wherever possible and should be consistent with other appropriate jurisdictions in this respect. This is particularly the case where serious invasions of personal liberties are contemplated. The Committee considers that the potential harm caused by the use of false or misleading information in warrant applications can be extremely serious, as illustrated by the Tasty Nightclub incident. Although that event was an isolated incident and additional accountability mechanisms have been adopted in the intervening decade, the Committee believes that the creation of a Victorian offence is justified.

The Committee considers that the criminalisation of such conduct is appropriate to demonstrate our community’s commitment to protecting civil liberties from unjustified interference, and to help to deter applicants from subverting the warrant application process. In recognition of the broad applicability of these objectives, the Committee recommends that any offence should cover all warrant applications.

In relation to the level of the penalty for such an offence, the Committee notes that the NSW legislation provides for a fine of 100 penalty units (currently \$1,100), or two years imprisonment or both. The Commonwealth provision provides for a penalty of two years imprisonment. The Committee considers that a maximum penalty of imprisonment for two years is appropriate and recommends accordingly.

Recommendation 10. That legislation be amended to make it a criminal offence to knowingly use false or misleading information in an application for any type of warrant, and that the penalty for such an offence be a maximum of two years imprisonment.
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### ***Applications by telephone***

In some situations, it may be impractical for applicants to make an application in person or in writing when the need for the warrant arises. For example, an applicant may be in a remote location without physical access to an issuing officer, or may need to obtain and execute a warrant urgently after hours when few issuing officers are on duty in Victoria. The ability to make applications by telephone is therefore an important means of ensuring that agencies can achieve their objectives.

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<sup>328</sup> Bob Debus, Attorney-General, *Law Enforcement (Powers and Responsibilities) Bill 2002* [NSW], *Second Reading Speech*, 17 September 2002, 4846.

Very few Acts in Victoria expressly authorise the application for and issuing of warrants by telephone.<sup>329</sup> The Committee did not receive any evidence that might explain this, nor was it able to obtain data on the number of telephone applications in Victoria. This data is not recorded by the Magistrates' Court.<sup>330</sup> However, the Committee notes that the *Magistrates' Court Act 1989* permits the submission of affidavits by facsimile, and some other Acts containing warrant powers incorporate this provision by reference to search warrant rules in the Magistrates' Court Act.<sup>331</sup> Further, in their evidence to the Committee, magistrates Bowles and Hannan indicated that warrants are generally either brought or faxed to the Court.<sup>332</sup> Given the prevalence of fax technology, it is therefore possible that there is not a great need for the capacity to make applications by telephone.

Another possible explanation relates to the nature of the telephone application process, in which the issuing officer may be called upon to make a decision on limited oral evidence alone and without an opportunity to question the applicant in person. The Supreme Court of New South Wales considered these special characteristics of telephone applications in the case of *Commissioner of Police v Atkinson*,<sup>333</sup> where Gleeson CJ stated that because a telephone application is not accompanied by the protections contained in the ordinary method, it is to be regarded as "an exceptional method of obtaining a search warrant".<sup>334</sup>

Witnesses who appeared before the Committee similarly emphasised the importance of evidence being given in person and in writing where possible. Victoria Legal Aid opposed the routine use of telephone warrants and suggested that:

Their use should be limited to urgent situations where it is impractical (as opposed to inconvenient) to obtain a faxed warrant. VLA expects that this would rarely occur, as all police stations have fax machines that allow for proper written applications and proof to be provided in support of applications for warrants.<sup>335</sup>

The Criminal Bar Association argued that application by telephone "is the last resort. It has to be".<sup>336</sup> Wherever possible:

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<sup>329</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 273. The Committee will deal with the issuing of warrants in the next section and will therefore limit its discussion here to telephone applications.

<sup>330</sup> Letter, Chief Magistrate to Committee Research Officer, 27 June 2005.

<sup>331</sup> For example, *Crimes Act 1958* s 465.

<sup>332</sup> Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 264, 265.

<sup>333</sup> *Commissioner of Police v Atkinson* (1991) 23 NSWLR 495.

<sup>334</sup> *Ibid*, 499-500.

<sup>335</sup> Victoria Legal Aid, *Submission no. 21*, 3.

<sup>336</sup> S Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 169.

the applicant should appear before the justice or the magistrate and make application in the ordinary form.<sup>337</sup>

The Committee is satisfied that the power to apply for warrants by telephone is necessary for the effective functioning of agencies that have warrant powers, and should therefore be retained. However, consistent with its overall view that warrant powers should be the minimum necessary to achieve legitimate aims, the Committee stresses that the power should be limited to exceptional circumstances. The Committee therefore examined Victorian warrant telephone application powers to assess the circumstances in which they may be used.

Victorian law currently appears to recognise the exceptional nature of the power. The Committee's research reveals only two pieces of Victorian legislation that explicitly provide for telephone applications for search warrants. Both require the provision of written evidence in support of an application either at the time, or no later than 24 hours after, the application is made.

Section 81 of the *Confiscation Act 1997* permits applications by telephone if a police member believes it to be necessary "by reasons of urgency". The police member must prepare an affidavit of evidence before making the application but may make the application before the affidavit is sworn. The affidavit must be transmitted to the issuing officer by fax if a machine is available. Whether or not a warrant is issued, the applicant must, not later than the day following the making of the application, send the original affidavit duly sworn to the issuing officer who determined the application.<sup>338</sup> This provision was inserted into the Act by the *Confiscation Amendment Act 2003*, although it is not clear why the provision was considered necessary.<sup>339</sup>

The second set of telephone powers are contained in s10 of the *Terrorism (Community Protection) Act 2003*, which applies to covert search warrants.<sup>340</sup> The provisions are identical to those in the *Confiscation Act 1997*, save for the requirements that the application be made to and determined by a Supreme Court judge, that the original affidavit duly sworn be sent to the Supreme Court no later than one day after the making of the application and that the applicant obtain the approval of the Chief Commissioner of Police or a deputy or assistant commissioner.<sup>341</sup>

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<sup>337</sup> Ibid.

<sup>338</sup> *Confiscation Act 1997* s 81.

<sup>339</sup> The Second Reading Speech is silent on the telephone application provision.

<sup>340</sup> The Committee discusses covert warrants later in this chapter.

<sup>341</sup> However, the pre-application approval requirement is a consequence of the covert nature of warrants under this Act, rather than the power to make applications by telephone.

In contrast, the most frequently used Victorian search warrant provisions are generally silent on telephone applications.<sup>342</sup>

The Committee compared Victorian provisions with other jurisdictions. In the Commonwealth, Tasmania and the ACT, there is a general power to apply for warrants by “telephone, telex, facsimile or other electronic means” in cases, like Victoria, of urgent need, or “if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant”. Applications must include all information required to be provided in an in-person application but, as in Victoria, the application may, if necessary, be made before the information is sworn. The applicant must provide the issuing officer with the sworn information no later than 24 hours after making the application.<sup>343</sup> The Commonwealth Attorney-General declared that the provision contained in section 3R of the *Crimes Act 1914* (Cth) “provides a model for the framing of [Commonwealth] telephone warrant provisions”,<sup>344</sup> based on the recommendations of the Gibbs Committee’s 1991 ‘Review of Commonwealth Criminal Law’.

The Commonwealth provisions also include offences specific to telephone applications.<sup>345</sup>

In Queensland, applications may be made by “phone, fax or other similar facility” in cases of urgency or “other special circumstances” including the applicant’s remote location.<sup>346</sup> The sworn application is to be forwarded to the issuing officer at the “first reasonable opportunity”.<sup>347</sup>

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<sup>342</sup> With the noted exception of the *Confiscation Act 1997*, the following Acts considered by the Magistrates’ Court as containing the most frequently used warrant provisions do not contain provisions relating to telephone applications: *Business Franchise (Tobacco) Act 1974*; *Children and Young Persons Act 1989*; *Crimes Act 1958*; *Drugs, Poisons and Controlled Substances Act 1981*; *Firearms Act 1996*; *Fisheries Act 1995*; *Gambling Regulation Act 2003*; *Police Regulation Act 1958*; *Prostitution Control Act 1994*; and *Wildlife Act 1975*. The *Surveillance Devices Act 1999*, which was on the Magistrates’ Court list of frequent-use provisions, enables telephone applications for surveillance devices warrants and includes similar protections to the *Confiscation Act 1997* and the *Terrorism (Community Protection) Act 2003*.

<sup>343</sup> *Crimes Act 1914* (Cth) s 3R; *Crimes Act 1900* (ACT) s 205; *Search Warrants Act 1997* (Tas) s 15.

<sup>344</sup> Commonwealth Attorney-General, *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* (February 2004) (*A Guide To Framing Commonwealth Offences*), paragraph 9.5, at [www.ag.gov.au](http://www.ag.gov.au)

<sup>345</sup> A person must not misuse the issuing officer’s name, knowingly state on a form of warrant materially different information from the form authorised by an issuing officer, knowingly purport to execute a form of warrant that has not been approved by or is materially different from a form approved by an issuing officer, give the issuing officer a form of warrant that is not the one the person purported to execute. *Crimes Act 1914* (Cth) s 3ZU.

<sup>346</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 451 (2).

<sup>347</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 452 (4).

The Northern Territory imposes a different restriction on telephone applications, requiring that it be impracticable to make an application in person.<sup>348</sup> In contrast, New South Wales imposes a two part test. A telephone application for a search warrant is only permitted where there is an urgent need and it is impracticable to apply for the warrant in person. The Supreme Court of NSW held that this test requires that:

attention be paid to the circumstances in, and the time at which, a decision to apply for a warrant was made, and that an explanation be sought as to how it comes about that an application under the ordinary procedure [in the Act] was not made.<sup>349</sup>

During the recent review of the Act by the NSW Attorney-General's department, law enforcement agencies suggested that the practicability requirement should be removed, as following *Atkinson* the agencies had experienced difficulties obtaining warrants by telephone. Others involved in the review argued that:

the two prongs are a safeguard — that if the ability is there to get a search warrant whenever it is urgent and operationally you left it to the last minute to get a warrant, then all search warrants could be urgent and that would circumvent the safeguards which are in place if you have to seek a warrant in person and in front of an authorised justice.<sup>350</sup>

Ultimately this argument prevailed and both parts of the test were retained.

## Changes to the Victorian regime

The Committee notes that other jurisdictions have general provisions allowing applications by telephone and associated technologies and believes that similarly explicit general powers in Victorian legislation would assist in providing clear standards for the application process. As a practical matter, “[w]here legislation provides for the issue of a warrant to enter premises, it is usually desirable to allow for the issue of a warrant by telephone”.<sup>351</sup>

To ensure the broadest application, such a provision should be incorporated into the *Magistrates' Court Act 1989*, or in any consolidated search warrants legislation which may be enacted.

The Committee notes that most jurisdictions have a single test that relates to urgency. The Committee believes, however, that the additional requirement in New South Wales of practicability would ensure that telephone applications remain the exception by requiring applicants to establish why an in-person application was not appropriate.

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<sup>348</sup> *Police Administration Act* (NT) s 118(1).

<sup>349</sup> *Commissioner of Police v Atkinson* (1991) 23 NSWLR 495, 506.

<sup>350</sup> Daniel Noll, Attorney-General's Department, NSW, *Minutes of Evidence*, 1 September 2004, 47.

<sup>351</sup> *A Guide To Framing Commonwealth Offences*, paragraph 9.5.

The Committee therefore recommends that a dual test of urgency and practicability be inserted into the *Magistrates' Court Act 1989*.

Recommendation 11. That the Magistrates' Court Act search warrant provisions be amended to include a general power to apply for search warrants by telephone, fax or other similar means if the applicant believes it is necessary because of urgency and there is no practicable alternative.



## CHAPTER FOUR - WARRANTS FOR SEARCH AND SEIZURE – ISSUE

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Before a magistrate will issue a search warrant, the magistrate has to ensure that: the applicant is authorised to make the application; the affidavit has been duly sworn; the magistrate is satisfied that the criteria as contained in the relevant statute authorising the issuing of the warrant has been met; if there is a prescribed form for the search warrant, it is in that form; the particulars on the search warrant are consistent with the contents of the affidavit; there are reasonable grounds to believe or suspect that the property sought to be seized will be located at the address on the search warrant; and the search warrant conforms with such authorities as *Arno v. Forsyth* and *George v. Rockett*.

In the event a further affidavit is required or errors are identified on the search warrant, for example an incorrect address, any further affidavit material or amended search warrant shall be brought before the same magistrate for consideration. If the application is refused or further material is sought by the magistrate, any further material the police or prosecuting agency provides goes back before the magistrate so you cannot magistrate-shop and try to get another magistrate to issue the warrant. Affidavits will indicate whether there has been any previous application for a warrant for the nominated address and if so, whether the application was refused or if a warrant was granted, the result of that search and reasons for a further warrant being required. Copies are kept of all documents provided to the court and upon the warrant being issued it is faxed or handed to the applicant for execution. A copy of the affidavit and warrant submitted are also retained at the Court when the application is refused.<sup>352</sup>

### Introductory comments

The importance of the issuing phase was underlined in one of the leading cases that considered warrants, *George v Rockett*:

[...] the enactment of conditions, which must be fulfilled before a search warrant can be lawfully issued and executed, is to be seen as a reflection of the legislature's concern to give a measure of protection to [individual's privacy]. To insist on strict compliance with the statutory conditions

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<sup>352</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 264-265.

governing the issue of a search warrant is simply to give effect to the purpose of the legislation.<sup>353</sup>

In its submission to the Committee, the Criminal Bar Association (CBA) highlighted the principles that flow from that case:

- courts will insist on strict compliance with statutory conditions governing the issue of search warrants;
- an issuing officer must be satisfied about any matter that a statute requires him to be satisfied about;
- the warrant must disclose jurisdiction on its face.<sup>354</sup>

The CBA pointed out that these principles logically apply to all warrants issued under statutory provisions in Victoria and that such provisions should be:

unambiguous, consistent and above all designed to ensure that individual freedoms are not affected beyond that authorised by the terms of the specific warrant.<sup>355</sup>

In this context the process for considering warrant applications and issuing the warrants is a critical safeguard of individual rights. Accordingly, in this section the Committee considers

- who can issue warrants;
- what issuers consider before doing so;
- what records are kept of the issuing process;
- the scope and contents of warrants; and
- how long they remain valid.

## Who can issue warrants

[...] the known exercise of an independent scrutiny is the best check upon arbitrary action by those in authority.<sup>356</sup>

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<sup>353</sup> *George v Rockett* (1990) 170 CLR 104, 111.

<sup>354</sup> Criminal Bar Association, *Submission no. 12*, 3.

<sup>355</sup> *Ibid*, 4.

<sup>356</sup> *Parker v Churchill*, 63 ALR 326 at 334 (Burchett J).

As noted at the beginning of this chapter, in Victoria only a magistrate or judge can issue search warrants.<sup>357</sup> This reflects the fact that courts and tribunals have traditionally been more transparent decision-makers than the executive.<sup>358</sup>

It is only a judicial officer who has no interest in the outcome [who] is objective and has the necessary learning and understanding in relation to the importance of preserving people's rights when issuing warrants.<sup>359</sup>

The independent scrutiny that they provide “is the principal means of protection for the rights and interests of those who stand to be affected by the execution of a warrant”.<sup>360</sup>

The Office of the Victorian Privacy Commissioner (OVPC) explained how this protection works in practice.

Judicial oversight over the authorisation of powers of intrusion is vital to ensuring that the use of intrusive powers is kept to the necessary minimum; guarding against unfettered police discretion by ensuring that an independent umpire has a role; ensuring less intrusive measures are adopted, where alternative investigative means are available and practicable; and ensuring independent consideration of the best interests of...vulnerable individuals.<sup>361</sup>

Judicial scrutiny can also trigger what OVPC referred to as “‘back end’ accountability safeguards”,<sup>362</sup> such as reporting back to the issuing officer and statutory reports to Parliament about the number of warrants issued. The Committee discusses these elements of the warrant cycle later in this chapter.

An alternative view on judicial scrutiny of powers exercisable under warrant was put to the Committee's predecessor during the Inspectors' Powers Inquiry.

In a liberal and democratic society such as Victoria, the powers to enter and search premises...need not be exercisable only by application to the courts. Supervision by the agency head, with appropriate safeguards, is more efficient and timely than that which can be provided by the courts and should be preferred unless shown to be inappropriate or inadequate.

The requirement of application to the courts appears to be based on the assumption that only the courts can properly supervise these matters. However, an agency head can, with the appropriate safeguards, more adequately supervise these and other inspectors' powers,

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<sup>357</sup> Magistrates' Court Act 1989 ss 57(5) and (7).

<sup>358</sup> Justice Stuart Morris, *Where is Technology taking the Courts and Tribunals?* Court Developments – Updates and Developments Conference, 21 October 2004, at [www.aija.org.au](http://www.aija.org.au).

<sup>359</sup> Pauline Wright, Vice President, New South Wales Council for Civil Liberties, *Minutes of Evidence, 1 September 2004*, 62-63.

<sup>360</sup> Matthew Groves, *Not so Tasty* (1995) 20(3) AltLJ 123, 125.

<sup>361</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 8.

<sup>362</sup> *Ibid.*

particularly as the agency head is responsible to the relevant Minister, who, in turn, is responsible to Parliament.

The courts can ensure that an application for a warrant is properly grounded in the legislation and, in requiring a warrant to be returned to it upon execution, they can ensure that what was seized accords with what was authorised under the warrant.

However, an agency head can also supervise these matters. Further, the issuing court does not directly supervise the manner of execution of the warrant or order, or deal with complaints, which an agency head can. Supervision by the agency head is more resource-effective and timely than where application must be made to the courts.

If it were thought that supervision by the agency head was insufficient, it would be more practical for an independent body, for example, the Ombudsman or other independent Parliamentary Officer, to be given specific powers, including disciplinary powers to oversee the exercise of ... powers and to deal with complaints from the public.<sup>363</sup>

These comments were prompted by Consumer and Business Affairs Victoria's (CBAV) concerns that applying to court for search warrants (and document production orders) imposed an unjustified strain on its resources and did not appear to confer any benefit on the community.<sup>364</sup> In the submission, CBAV characterised warrants as a mechanism to facilitate entry because it authorises the use of force and "attracts more respect" than other forms of entry.<sup>365</sup>

Representatives of the CBAV appeared to reach a different conclusion in their oral evidence to the Committee of the 54<sup>th</sup> Parliament. They argued that while the *Fair Trading Act 1999* introduced stricter requirements for exercising certain powers of entry and search, their experience with warrants indicated that the new system "had not caused huge practical problems...they are labour intensive... they just take a little bit away from our response time and our effectiveness...[The warrant process] is certainly not impossible."<sup>366</sup>

The Committee of the 54<sup>th</sup> Parliament did not comment on CBAV's remarks in its final report. The current Committee has included them merely to illustrate the range of views on judicial oversight of the warrant process, and accordingly makes no further comment.

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<sup>363</sup> Consumer and Business Affairs Victoria, *Submission no. 32, Inspectors' Powers Inquiry*, 3.

<sup>364</sup> *Ibid.*, 3-4.

<sup>365</sup> *Ibid.*

<sup>366</sup> Consumer and Business Affairs Victoria, *Minutes of Evidence, 12 December 2001, Inspectors' Powers Inquiry*, 26.

## **Other jurisdictions**

Compared to other states and territories, Victorian law is restrictive as to who can issue warrants. Whereas Justices of the Peace (JPs) no longer have authority to issue search warrants in Victoria, they retain those powers in other jurisdictions in Australia. JPs can issue search warrants in Queensland, Tasmania, South Australia, Western Australia and the Northern Territory.<sup>367</sup>

The Committee heard that in some of these jurisdictions, such as WA, the physical size of the territory and the isolated nature of many communities necessitated the use of JPs to ensure the reasonable availability of issuing officers, although that rationale has been largely invalidated by technological developments, such as faxes, email and video links.<sup>368</sup> Moreover, the use of JPs has been criticised, in particular in WA. The recent Royal Commission into police corruption in that state was concerned that the characteristics of JPs were a contributing factor to the corruption identified in its inquiries:

There is no doubt that almost all Justices of the Peace are honest and conscientious, but the fact is that they are invariably lay persons with no particular legal skill, and often seem to achieve a state of inappropriate familiarity with police officers with whom they deal regularly.

The use of Magistrates' Court officers or particular designated persons, to issue search warrants, as opposed to Justices of the Peace, would lead to a more thorough and independent review of applications for warrants. It is sometimes suggested that the geography of Western Australia requires a more flexible system. Integrity, however, should not be sacrificed in the interests of expediency. In any event, given modern means of communication, including facsimile and e-mail, the requirement that warrants be issued by a magistrate or a particular designated person would not impact on the timeliness of police operations.<sup>369</sup>

The Royal Commission recommended that JPs should not be automatically authorised to issue warrants by virtue of their office. It argued that where it was necessary to authorise issuing officers who were not court officers, such individuals should undergo training “to ensure that the significance of the power and the basis for the issue of the warrant are understood”.<sup>370</sup>

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<sup>367</sup> *Police Powers and Responsibilities Act 2003* (Qld) s 68; *Drugs Act 1908* (SA) s 36; *Search Warrants Act 1997* (Tas) s 5; *Police Act 1892* (WA) s 70; *Criminal Code* (WA) s 711; and *Police Administration Act* (NT) s 117.

The WA royal commission into police conduct final report recommended that search warrants should no longer be issued by justices but by magistrates: Commissioner GA Kennedy, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report Volume II, 2004* (Kennedy Commission), Chapter 12, 307.

<sup>368</sup> Stephen Heath, Chief Magistrate of Western Australia, *Minutes of Evidence, 3 August 2004*, 137.

<sup>369</sup> *Kennedy Commission*, 309.

<sup>370</sup> *Ibid.*

In Queensland, the Criminal Justice Commission's review of police powers also highlighted concerns about the use of JPs, specifically that some in that state had rubber stamped warrant applications. The Commission recommended that only appropriately qualified JPs should be authorised to issue warrants.<sup>371</sup>

In New South Wales, search warrants are issued by "authorised justices", a class of officials defined in the legislation as magistrates or Registrars of a Local Court or the Registrar of the Drug Court or persons employed in the Attorney-General's Department and who are declared to be an authorised justice for the purposes of the Act.<sup>372</sup>

The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) defines authorised officers differently, as magistrates or Children's magistrates or Clerks of Local Courts or employees of the Attorney-General's Department so authorised. As already noted by the Committee, LEPRA is not yet in force. In evidence to the Committee, the New South Wales Council for Civil Liberties expressed the "firm belief" that the issuing authority should be restricted to judicial officers.<sup>373</sup>

The ACT also defines issuing officers more broadly than Victoria, as a judge, the registrar or a deputy registrar of the Supreme Court; or a magistrate; or if authorised by the Chief Magistrate to issue search warrants the registrar or deputy registrar of the Magistrates' Court.<sup>374</sup>

According to the Commonwealth Attorney-General's 2004 guidelines,

The Commonwealth has taken the view that Ministers, Justices of the Peace and departmental officers should not have warrant issuing powers. The greater independence of magistrates and the fact they are not responsible for enforcement outcomes ensures appropriate rigor in the warrant issuing process.<sup>375</sup>

This principle is consistent with the findings of the Senate Scrutiny of Bills Committee Report that examined search and seizure powers.<sup>376</sup>

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<sup>371</sup> *CJC Report*, 351–358. Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand* (1996) (*Tronc et al, Search and Seizure in Australia and New Zealand*), 275-279.

<sup>372</sup> *Search Warrants Act 1985* (NSW) s 3.

<sup>373</sup> Pauline Wright, Vice President, New South Wales Council for Civil Liberties, *Minutes of Evidence*, 1 September 2004, 62.

<sup>374</sup> *Crimes Act 1900* (ACT) ss 185, 194.

<sup>375</sup> Commonwealth Attorney-General, *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* (February 2004) (*A Guide To Framing Commonwealth Offences*), paragraph 9.7, at [www.ag.gov.au](http://www.ag.gov.au).

<sup>376</sup> "The power to issue warrants to enter and search premises should only be conferred on judges and

Another guideline recommends that powers to issue warrants to be executed by persons other than police officers should only be conferred on magistrates.<sup>377</sup>

However, the *Crimes Act 1914* (Cth) and the *Customs Act 1901* (Cth) define the issuing officer as a magistrate, justice of the peace or person employed in the court of a state or territory court who is authorised to issue warrants.<sup>378</sup>

## **Evidence received by the Committee**

### **Honorary justices as issuing officers**

In Victoria, JPs are “usually lay people who are appointed by the Governor in Council, on the recommendation of the state Attorney-General”.<sup>379</sup> Their role is now generally limited to witnessing Statutory Declarations and Affidavits although they previously had greater powers. The majority of witnesses heard by the Committee supported the retention of the existing relatively restricted regime to provide rigorous judicial oversight of warrant applications in Victoria.

The Office of the Victorian Privacy Commissioner recommended that:

[i]n principle, the courts should retain a broad discretion over whether powers of intrusion should be authorised, taking into account matters such as the availability of less intrusive methods of investigation and any impact on privacy.

Where it is decided to remove or dilute judicial oversight, additional safeguards may be necessary to ensure effective oversight and accountability over the granting and exercise of any powers of intrusion.<sup>380</sup>

The Magistrates’ Court’s position is that:

the current practice in Victoria should remain and only magistrates should have the power to issue search warrants. In my view and in the Court’s view, it is vital for an independent judicial officer to have the responsibility to issue search warrants given the authorisation that search

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magistrates (judicial officers); justices of the peace should not have this power, nor should a Minister or departmental officer”: *A Guide To Framing Commonwealth Offences*, paragraph 1.48. On 25 March 2004, the Senate referred the same subject-matter back to the Scrutiny of Bills Committee for further inquiry, at [www.aph.gov.au](http://www.aph.gov.au).

<sup>377</sup> *A Guide To Framing Commonwealth Offences*, paragraph 9.9.

<sup>378</sup> *Crimes Act 1914* (Cth) s 3C; *Customs Act 1901* (Cth) s 183.

<sup>379</sup> Department of Justice, *Justice of the Peace and Bail Justices Registry*, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>380</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 5.

warrants provide to a prosecuting agency - namely, to commit an act which would otherwise constitute a trespass.<sup>381</sup>

In contrast, the Royal Victorian Association of Honorary Justices (RVAHJ) suggested that appropriately trained “honorary justices” (justices of the peace and bail justices)<sup>382</sup> should be able to authorise search warrants out of hours. It argued that this proposal would provide greater scrutiny of applications than the current practice whereby the out-of-hours duty magistrate reviews a faxed application. The Association believes that this and the general telephone or fax system is not “the fairest or most efficient method [of determining applications] when other options exist”.<sup>383</sup> The Association also believes that its proposal is consistent with the Justice Statement’s goal of “having the law closer and more accessible to the community by allowing such matters to be dispensed [with] within the lowest appropriate jurisdiction”<sup>384</sup> and believes that the use of honorary justices would save costs.

The Association pointed out that JPs may authorise searches of persons under the *Customs Act 1901* (Cth) and that there is support in Victoria for increasing the involvement of honorary justices in the warrant cycle: the Police Association supports authorising Registrars or Bail Justices to review property seized under warrant.<sup>385</sup> Nevertheless, the Committee feels that such a function is significantly different from the task of reviewing warrant applications. Both of these stages in the warrant cycle act as safeguards against undue curtailment of rights. However, the latter process involves making a determination as to whether intrusions on individual liberties are justified, while the former is a partial verification that such intrusions have been conducted properly.

The Committee is therefore concerned by two of the implications of the Association’s proposal. The use of magistrates to review out of hours and fax or telephone applications seeks to ensure that the same standards of review apply to all warrant applications, regardless of how or when they are filed. The Magistrates’ Court advised the Committee that the quality of warrant applications is sufficiently high to enable most to be reviewed and ruled upon without the need for oral examination of the applicant by the magistrate. As long as such standards are maintained and the applicant is available to answer any queries from the duty magistrate, the Committee

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<sup>381</sup> Magistrate Jennifer Bowles, Magistrates’ Court of Victoria, *Minutes of Evidence, 20 October 2004*, 274.

<sup>382</sup> “Bail Justices are empowered to hear applications for bail under the Bail Act 1977 and applications for Interim Accommodation Orders for children under the Children and Young Persons Act 1989. This role usually involves being called-out to police stations at any hour of the evening or night, when courts are closed, to consider bail applications and similar matters”. Bail Justices can also witness statutory declarations and affidavits for use in Victoria. Department of Justice, *Justice of the Peace and Bail Justices Registry*, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>383</sup> Royal Victorian Association of Honorary Justices, *Submission no. 26*, 2.

<sup>384</sup> *Ibid.*

<sup>385</sup> Police Association, *Submission no. 9S*, 3.

is not satisfied that after-hours or fax or telephone applications are any more unfair than written applications tendered in person during court hours.

Moreover, as the Committee has not heard of any specific problems about the after-hours service operated by the Magistrates' Court (as opposed to general resource pressures on the Court), or about fax or telephone applications, the Committee believes that any efficiency gains in the RVAHJ's proposal would be outweighed by the inconsistencies and potential unfairness inherent in having magistrates consider some applications and honorary justices determine others. For the same reason, the Committee is not satisfied that honorary justices are the lowest appropriate jurisdiction in the context of the Justice Statement.

### **Stolen goods**

Dr. Steven Tudor drew the Committee's attention to a provision governing the issue of warrants for stolen goods under the *Crimes Act 1958*. Under section 92(1), a magistrate may grant a warrant to search for stolen goods if satisfied on oath or affidavit that there is a reasonable cause to believe that a person has the goods. Section 92(2) permits police inspectors and higher ranking officers to issue a written authority to search for stolen goods if the occupier of the premises to be searched has been convicted within the previous five years of handling stolen goods or of any dishonesty offence punishable by imprisonment, or if a person who has been convicted of handling stolen goods within the preceding five years has occupied the premises to be searched within the preceding twelve months.

In his submission, Dr Tudor argues that the section 92(2) authorisation is "in all relevant respects simply a species of warrant, except that it is issued by an officer of the agency that seeks to execute it". Based on this, he argues that the provision should be repealed as it violates the principle that the case for using a warrant should be subject to independent scrutiny.

I am not making any factual assertions that [section 92(2) authorisations are being issued] improperly...<sup>386</sup> [However,] though it may well be safe [to] assume that the senior officers who issue such "authorities" most often do [so] in [the] same circumstances that a magistrate would issue a warrant, the simple fact that police get "one of their own" to permit what would otherwise be an unlawful act appears to fly in the face of basic procedural fairness, [which] would normally require such "authorisation" to be made by a body at arm's length from the agency seeking the authorisation. There appears to be no significant policy reason why such warrants cannot be treated like other warrants and be issuable only by magistrates (and other judicial officers). Police may perhaps find it convenient to make the applications "in-house", but that consideration should not carry more weight than it merits.<sup>387</sup>

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<sup>386</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 292.

<sup>387</sup> Dr. Steven Tudor, *Submission no. 34*, 4.

The Committee notes that many warrant-like powers are exercised without external (i.e. judicial) scrutiny of the case for the use of the power. However, section 92(2) appears to be distinct from such powers because of the nature of the statutory justification for the removal of the requirement to seek judicial approval for a warrant. Unlike other warrantless powers, which are generally premised on the existence of emergency circumstances or a regulatory relationship such as licensing or compliance monitoring, the section 92(2) distinction is based, and solely based, on the criminal history of individuals affected by the power.

Dr Tudor posits this as a second ground for repeal of section 92(2).

[The provision] treat[s] persons with convictions of the kind referred to in that sub-section as second-class citizens. This is because such persons are being made subject to a distinct warrants regime that is prima facie less onerous on the police than in the usual case. The state should have very good grounds for subjecting persons with certain convictions to a lower standard of civil rights protection than is accorded to those without such convictions. Prima facie, such persons have already been convicted and sentenced.<sup>388</sup>

[S]tatistically speaking those people are more likely to be in possession of stolen property, but I would say that is the type of information you would want to present to the magistrate, in particular cases. To put it on a statutory basis, assuming that all people with such convictions should be subject to that lower standard I think is probably not so good.

I anticipate that my suggestion here will meet with a lot of resistance from police. I am sure that this would cause great inconvenience and cost. I am aware of those arguments and they are important but I think there are more fundamental types of issues here. However I am sure there will be a long debate before that provision disappears.<sup>389</sup>

The Committee asked Victoria Police to comment on Dr. Tudor's remarks. Victoria Police responded that it considered that section 92(2) should be retained:

The power to conduct a search for stolen goods without a warrant is strictly prescribed in the legislation and requires the written approval of a senior police officer of at least the rank of inspector. Victoria Police is not aware of any misuse of this provision and recommends that it be retained until further research establishes a basis for repeal.<sup>390</sup>

In considering these submissions, the Committee has examined the origins and purpose of relevant parts of section 92. The warrant power contained in subsection 92(1) is descended from the oldest common law warrant provisions. As the Committee discussed at the beginning of this chapter, the earliest search warrants were concerned with the recovery of stolen goods, with *Entick v Carrington*

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<sup>388</sup> Ibid.

<sup>389</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 292.

<sup>390</sup> Letter, Victoria Police Corporate Strategy and Performance Director Jenny Peachey to Committee Research Officer, 12 September 2005.

establishing that such cases formed the only exception to the prohibition on searching private houses.<sup>391</sup>

The Committee has been unable to determine the rationale for the section 92(2) authority. The existing provision has been variously modified.<sup>392</sup> Its limits have been explicitly and unambiguously acknowledged by the police. The Victoria Police Manual's (VPM) property search provisions emphasise that entry into premises should "normally be" by a search/arrest warrant and recognises that a section 92(2) authority does not provide the same protection as a warrant. The authority is only to be used in the "most urgent of circumstances". In all other circumstances, a warrant should be used, following the VPM warrant application and execution procedures.<sup>393</sup> This specific restriction of warrantless searches is reinforced by the VPM search provisions' general policy statement that "[u]nless exceptional circumstances exist, a specific warrant authorising entry must be taken out for all planned property searches".<sup>394</sup>

The Committee notes that the operational restriction of the section 92(2) authority to the "most urgent of circumstances" appears as a practical matter to be at least partly analogous to the restriction of other warrantless powers to emergency situations. Section 92(2) thus appears to be an anomaly. Its origin is perhaps an expression of the long held belief that combating theft was a matter of important public interest.<sup>395</sup> However, the Committee is concerned that, unlike other warrantless search provisions, section 92(2) codifies the exclusion of a whole class of people from the protection afforded by judicial scrutiny, based on their prior conduct.

The Committee considers that adequate provisions are already in place, using the general powers to obtain a warrant, to cover situations where a search for stolen goods is required. The fact that the Police Manual notes that the provision should only be used in the most urgent of circumstances indicates that its use is exceptional. Extremely urgent cases could be dealt with through existing common law powers of entry and search or by telephone or fax applications. The Committee also notes that Police are afforded greater protection by obtaining a warrant, as its issue is then subject to judicial scrutiny.

For these reasons, the Committee is not satisfied that a lack of evidence of misuse of the provision justifies its retention as Victoria Police argues. The Committee considers that the provision is both redundant and undesirable and should be repealed.

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<sup>391</sup> *Tronc et al, Search and Seizure in Australia and New Zealand*, 4; *George v Rockett* (1990) 93 ALR 483, 487. See also *Allit v Sullivan* (1988) VR 621, 634.

<sup>392</sup> Amended by *Justices (Amendment) Act 1969* No. 7876/1969 s 2(3); substituted by *Crimes (Theft) Act 1973* No. 8425/1973 s 2(1)(b); amended by *Courts (Amendment) Act 1990* No. 64/1990 s 20 (Sch. item 3(a)(b)).

<sup>393</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 12.4.

<sup>394</sup> *Ibid*, section 1.

<sup>395</sup> *Tronc et al, Search and Seizure in Australia and New Zealand*, 1996, 4.

Recommendation 12. That section 92(2) of the *Crimes Act 1958* be repealed.

## Determination of the application - standard of review

Accepting that fundamental rights of individuals are affected whenever a warrant is granted, it is imperative that careful consideration and scrutiny is carried out before a warrant is granted.<sup>396</sup>

The issuing officer must genuinely consider whether the grounds have been made out in the affidavit sworn by the applicant for the warrant. The courts have emphasised that issuing search warrants is a process that cannot simply be “rubber stamped”.<sup>397</sup>

The duty, which the Justice of the Peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the Justice of the Peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs.<sup>398</sup>

Consideration of the warrant application by the issuing officer is arguably the most important safeguard in the warrant cycle. It is here that the case for the invasion of an individual’s privacy is assessed and, where found to be sufficiently strong, given judicial sanction. Stakeholders made submissions on the differing standards of proof prescribed by Victorian statutes and made a number of allegations concerning the degree of scrutiny that magistrates’ exercise over some warrant applications. The Committee discusses these issues after providing an overview of the requirements for considering applications.

### **Summary of the requirements for reviewing applications**

Generally, to issue a legitimate warrant, the issuing officer must typically be satisfied that the applicant holds a belief<sup>399</sup> or suspicion<sup>400</sup> that there is evidence of a relevant

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<sup>396</sup> Victoria Legal Aid, *Preliminary Submission no. 15*, 3.

<sup>397</sup> Henry Aizen, Rod Saunders, *Search Warrants – A Practical Guide*, Law Institute Journal, October 1998, 48, 50, referring to *Parker v Churchill* (1985) 9 FCR 316 and *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 128 ALR 657.

<sup>398</sup> *George v Rockett* (1990) 93 ALR 483, 487, quoting *Parker v Churchill* 63 ALR, 326, 333 (Burchett J).

<sup>399</sup> *Crimes Act 1958* ss 92, 465; *Drugs, Poisons and Controlled Substances Act 1981* s 81(1).

<sup>400</sup> *Crimes Act 1958* s 317(9)(a); *Firearms Act 1996* s 146(2); *Fisheries Act 1995* s 103 (2); *Wildlife Act 1975*

offence on the premises and that the applicant has reasonable grounds for that state of mind.<sup>401</sup> The High Court considered these states of mind in *George v Rockett*. The full Court held that

A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust amounting to a slight opinion, but without sufficient evidence. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.<sup>402</sup>

That case concerned the now repealed search warrant provisions in section 679 of the *Queensland Criminal Code*. The Court stated that, in that context “the protection of property and privacy would be advanced” by a requirement for a belief in rather than a suspicion of, the existence of the thing to be searched for.<sup>403</sup> Connellan notes that the equivalent Victorian power, contained in section 465(1) of the *Crimes Act 1958* prescribes the more stringent test of belief on reasonable grounds that the thing exists.<sup>404</sup> As the Committee demonstrates in the following section, other Victorian statutes prescribe different states of mind that the applicant must hold.<sup>405</sup>

As Victoria Police pointed out in evidence to the Committee, there is no requirement that issuing officers themselves believe or suspect that evidence will be at the location to be searched.<sup>406</sup>

The issuing officer must ensure that a finding of reasonable grounds is supported by “credible facts and circumstances”.<sup>407</sup> Reasonable grounds “requires the existence of facts which are sufficient to induce that state of mind in a reasonable person”.<sup>408</sup> The requirement precludes the arbitrary exercise of many statutory powers”.<sup>409</sup>

If there is no relevant foundation for the state of mind, there is no ground for the exercise by the issuing officer of the power to issue the warrant. Any warrant issued in

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s 59C(2).

<sup>401</sup> *George v Rockett* 93 ALR (1990) 483, 488.

<sup>402</sup> *Ibid.*

<sup>403</sup> *Ibid.*, 491.

<sup>404</sup> Greg Connellan, in Ian Freckleton, *Criminal Procedure* (2004) (*Connellan; Freckleton, Criminal Procedure*), 2-5599.

<sup>405</sup> Some examples are listed in footnotes 399 and 400 above.

<sup>406</sup> Victoria Police, *Submission no. 25*, 12-13.

<sup>407</sup> *Crowley v Murphy* (1981) 34 ALR 496, 515.

<sup>408</sup> *George v Rockett* 93 ALR (1990) 483, 488.

<sup>409</sup> *Ibid.*

such circumstances is invalid, although evidence obtained through the execution of such warrants may still be admitted in subsequent proceedings.<sup>410</sup>

Under section 465(1) of the *Crimes Act 1958*, even when the preconditions for the issue of a warrant are satisfied, magistrates have a discretion whether or not to do so, although “it is difficult to conceive of any circumstance which would justify a refusal to issue once the pre-conditions had been satisfied”.<sup>411</sup> It is not, for example, justified to refuse to issue a warrant if the magistrate has concerns about the admissibility or any privilege attaching to evidence that might be seized.<sup>412</sup> This is because:

The warrant is issued for the purpose of investigation and because there are reasonable grounds to believe that it will “afford” evidence - that is, that its execution may either itself produce admissible evidence or provide information that may lead to the gathering of evidence that will be admissible.<sup>413</sup>

### **Levels of proof in Victoria**

In its Discussion Paper, the Committee sought views about standardising warrant provisions and asked “What criteria and standard of proof should be satisfied before a warrant can be issued?”<sup>414</sup> Victoria Legal Aid stated that “the current standard of proof is appropriate”, although without reference to specific warrant powers.<sup>415</sup> Victoria Police limited its response to section 465 of the *Crimes Act 1958*, stating that it believes that the current criteria and standard of proof “are satisfactory”<sup>416</sup> and that in combination with the three other safeguards in section 465 (rank of applicant, return of seized items to the court and challenge to the warrant in any subsequent proceedings, considered by the Committee elsewhere in this chapter), it effectively balances the interests of the state and citizens.<sup>417</sup> This opinion is properly viewed in the context of Victoria Police’s broader opinion that:

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<sup>410</sup> Pursuant to judicial discretion under *Bunning v Cross* [1978] 19 ALR 641. This discretion is discussed later in this chapter. *Connellan; Freckleton, Criminal Procedure*, 2-5598.

<sup>411</sup> *Long v Magistrates’ Court* (1997) 96 A Crim R 149, 153.

<sup>412</sup> *Clifford v Magistrates’ Court of Victoria* (1998) VSC 98.

<sup>413</sup> *Ibid*, paragraph 37.

<sup>414</sup> Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures, Discussion Paper* (July 2004) (*Warrant Powers and Procedures Discussion Paper*), 26.

<sup>415</sup> Victoria Legal Aid, *Submission no. 21*, 4.

<sup>416</sup> Victoria Police, *Submission no. 25*, 13.

<sup>417</sup> *Ibid*, 3.

warrant powers used by police are subject to intense scrutiny by the judicial system and except for a small number of examples, are used appropriately.<sup>418</sup>

Section 465 is of course only one of many warrant provisions. Other Victorian statutes prescribe different states of mind that the applicant must hold to justify the issue of a warrant. The requisite standard of proof in most cases is that the applicant possesses reasonable grounds to believe relevant circumstances. A small number of statutes prescribe reasonable grounds to suspect or, rarely, a requirement for unqualified belief, or simply evidence of the necessity of a warrant. All of these levels of proof operate by reference to general (such as a thing related to an offence) or specific categories (such as books or animals) of evidence.

The Committee lists some examples below.

### **States of mind referring to general categories of evidence**

- Reasonable grounds for suspecting that a relevant offence has been, is being or is about to be committed (the provision refers to offences in the Act).<sup>419</sup>
- Reasonable grounds for suspecting that there is or maybe within the next 72 hours on the premises a particular thing that may afford evidence of a relevant offence (the provision refers to specific offences in the Act).<sup>420</sup>
- Reasonable grounds to believe that there is a thing or things of a particular kind connected with a contravention of the Act or the regulations on any premises.<sup>421</sup>
- Satisfied by evidence, on oath or by affidavit, of an inspector that the warrant is necessary for the purpose of monitoring compliance with the relevant legislation.<sup>422</sup>

### **States of mind referring to specific categories of evidence**

- Reasonable cause to believe that any person has in custody or possession or on his premises any stolen goods.<sup>423</sup>
- A reasonable ground for believing that there is, or will be in the next 72 hours, in any building, receptacle or place anything in respect of which an indictable offence has been or is reasonably suspected to have been committed or is being or is

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<sup>418</sup> Ibid, 1.

<sup>419</sup> *Crimes Act 1958* s 317(9)(a); *Firearms Act 1996* s 146(2); *Electricity Safety Act 1998* s 131; *Building Act 1993* s 231B(2).

<sup>420</sup> *Surveillance Devices Act 1999* s 33(2).

<sup>421</sup> *Fair Trade Act 1999* s 122.

<sup>422</sup> *Prostitution Control Act 1994* s 61L(2).

<sup>423</sup> *Crimes Act 1958* s92 (1).

likely to be committed within the next 72 hours, or anything which there is a reasonable ground to believe will afford evidence of the commission of a relevant offence, or anything which there is a reasonable ground to believe is intended to be used for the purpose of committing any indictable offence against the person for which an offender may be arrested without warrant.<sup>424</sup>

- A reasonable ground for believing that there is or will be in the next 72 hours, on or in any land or premises anything in respect of which a relevant offence has been or is reasonably suspected to have been committed or is being or is likely to be committed within the next 72 hours, or anything which there is a reasonable ground to believe will afford evidence of the commission of a relevant offence, or any document relating to a transaction or dealing which is or would be a relevant offence.<sup>425</sup>
- Reasonable grounds for suspecting that there is, or may be within the next 72 hours, on the premises a particular thing that may be relevant to the administration or execution of a taxation law.<sup>426</sup>
- Reasonable grounds for believing that there is, or may be within the next 72 hours, any tainted property or any property forfeited under the Act in or on the premises.<sup>427</sup> A warrant must not be issued unless the mandatory application procedures have been complied with.<sup>428</sup>
- A reasonable ground for suspecting that there are on particular premises or at a particular place or in or on a particular vehicle any petroleum products, books, papers or other documents that are relevant to the administration or execution of the relevant Acts (which are listed in the provision).<sup>429</sup>
- A reasonable ground for suspecting that there are on particular premises any books which are relevant in determining whether relevant Acts (which are listed in the provision) are being or have been contravened.<sup>430</sup>
- Reasonable grounds for suspecting that there is on the premises a particular thing that may be evidence of the commission of an offence against this Act or the

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<sup>424</sup> Ibid, s 465(1).

<sup>425</sup> *Drugs, Poisons and Controlled Substances Act 1981* s 81(1).

<sup>426</sup> *Taxation Administration Law 1997* s 77(1).

<sup>427</sup> *Confiscation Act 1997* s 79(2).

<sup>428</sup> *Confiscation Act 1997* s 80(2). These procedures are outlined earlier in this chapter, at p 62.

<sup>429</sup> *Business Franchise (Tobacco) Act 1974* s 15A.

<sup>430</sup> *Accident Compensation Act 1985* s 240A.

regulations or of grounds for the suspension or cancellation of the registration of a medical practitioner or medical student.<sup>431</sup>

- Reasonable grounds to believe that there is in the premises to be searched an abandoned, diseased, distressed or disabled animal or an animal in respect of which a contravention of relevant legislation is occurring or has occurred (the provision refers to contraventions in the legislation).<sup>432</sup>
- Reasonable grounds for believing flora or fauna is being held in contravention of the Act in the premises to be searched.<sup>433</sup>
- On the evidence on oath or by affidavit of any authorised officer or member of the police force stating his belief that defined forest produce or timber resources is secreted in any place other than a forest.<sup>434</sup>
- Reasonable grounds for suspecting that a person is carrying on business at the premises as a prostitution service provider in contravention of the Act.<sup>435</sup>

Evidence provided to the Committee indicates that the different standards are due to the historical development of relevant legislation, often in isolation and that while some redrafting has followed model provisions,<sup>436</sup> in other situations, inconsistencies are retained.<sup>437</sup>

### **Improving consistency among the burdens of proof**

Interestingly, the Committee did not receive any evidence critical of individual burdens of proof that applicants must meet to justify the issue of a warrant. Taking into account this lack of any indication from among a broad range of Victorian stakeholders that specific thresholds are deficient and the large number of issues with which this inquiry is concerned, the Committee decided that it would not consider the operation of specific tests.

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<sup>431</sup> *Medical Practice Act 1994* s 93A(2). As noted in footnote 247 above, this Act is a model for 10 others. Thus, identical search warrant provisions are found in the *Chinese Medicine Registration Act 2000*, *Chiropractors Registration Act 1996*, *Dental Practice Act 1999*, *Nurses Act 1993*, *Optometrists Registration Act 1996*, *Osteopaths Registration Act 1996*, *Physiotherapists Registration Act 1998*, *Podiatrists Registration Act 1997*, *Psychologists Registration Act 2000*, *Pharmacists Act 1974*.

<sup>432</sup> *Prevention of Cruelty to Animals Act 1986* s 21A(2).

<sup>433</sup> *Flora and Fauna Guarantee Act 1984* s 57(4).

<sup>434</sup> *Forests Act 1958* s 83.

<sup>435</sup> *Prostitution Control Act 1994* s 63(2).

<sup>436</sup> For example the health practitioner Acts, listed in footnote 247 above.

<sup>437</sup> For example, section 61L of the *Prostitution Control Act 1984* was inserted by the *Prostitution Control (Amendment) Act 1999*.

Stakeholders did, however, raise structural, as opposed to substantive, concerns about the issuing thresholds in Victorian law, specifically the effects of different levels of proof that are listed above and the level of detail in some of the provisions. For example, Victoria Police suggested that the varying burdens of proof create confusion and are an example of inconsistencies in warrant powers that need to be addressed.<sup>438</sup> While Victoria Police has no evidence that there is significant operational dissatisfaction about the extent of powers available under warrant,<sup>439</sup> it supports:

any simplification of the legislation...[as] the tools of the trade for police are the legislation and warrant powers. The simpler that could be made for operational police and for the community to understand what powers exist, the more beneficial to the community I think that would be...<sup>440</sup>

Victoria Police referred the Committee to the *Search Warrants Act 1985* (NSW) for this purpose. That Act's standardised treatment of search warrant provisions in NSW legislation extends to the issuing phase. In relation to police applications for a warrant to search for things that are connected with particular indictable, firearms, prohibited weapons or narcotics offences,<sup>441</sup> or that are stolen or otherwise unlawfully obtained,<sup>442</sup> an authorised justice must be satisfied that there are reasonable grounds for issuing a search warrant before doing so. Part 3 of the Act imposes conditions on the authorised justice when determining whether there are reasonable grounds to issue a search warrant.<sup>443</sup> This provision applies to all search warrants issued under section 6, as well as those issued under 86 named Acts and any other Acts incorporating relevant parts of the *Search Warrants Act 1985* (NSW).<sup>444</sup> The Committee's examination of a sample of those Acts indicates that all repeat the section 6 requirement that an authorised justice must be satisfied that there are reasonable grounds for issuing a warrant before doing so.

The yet to be proclaimed *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) that will replace the *Search Warrants Act 1985* (NSW) incorporates section 6<sup>445</sup> and expands the list of relevant offences to include child pornography<sup>446</sup> and child

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<sup>438</sup> Victoria Police, *Submission no. 25*, 6.

<sup>439</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence 20 October 2004*, 215.

<sup>440</sup> *Ibid*, 215.

<sup>441</sup> *Search Warrants Act 1985* (NSW) s 5(1)(a)-(c).

<sup>442</sup> *Ibid*, s 5(1)(d).

<sup>443</sup> *Ibid*, s 12A(2).

<sup>444</sup> *Ibid*, s 10.

<sup>445</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 48.

<sup>446</sup> *Ibid*, s 47(1)(e).

prostitution.<sup>447</sup> The new Act also expands the application of the general search warrant provisions to 96 named Acts.<sup>448</sup>

The Committee notes that the NSW standard is substantively distinct from Victorian provisions that require reasonable grounds. In Victoria, a magistrate must expressly be satisfied that the applicant has reasonable grounds for the state of mind. In New South Wales, an authorised justice’s consideration of the factors relevant to determining the existence of reasonable grounds<sup>449</sup> for issuing the warrant would seem to include consideration of the applicant’s reasonable grounds for believing that the evidence is at the premises that the application pertains to.<sup>450</sup> However, unlike in Victoria, there does not appear to be any explicit nexus between the issuing officer’s state of mind and the applicant’s. While the effect may be the same, the Committee considers that the lack of a specific link results in a provision that is less clear, and therefore potentially weaker, than the levels of proof in many Victorian statutes. However, the Act does have the advantage of promoting consistent burdens of proof across NSW search warrant provisions, by imposing common provisions for certain warrants (Part 2 of the Act) and linking warrant powers in external legislation to its other minimum standards (Part 3).

The Criminal Bar Association also referred the Committee to other jurisdictions for possible standard legislation when it “urge[d] the Committee to consider Part 1AA of the *Crimes Act 1914* (Cth) as an appropriate model in relation to issue and execution”.<sup>451</sup> The Committee limits its discussion here to provisions relevant to the issuing phase, as it considers the form and contents of the warrant later in this chapter.

For present purposes, the Committee has considered section 3E(1) of the Commonwealth Act. This provides that an issuing officer may issue a warrant to search premises if the officer is satisfied that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential

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<sup>447</sup> Ibid, s 47(2).

<sup>448</sup> Ibid, schedule 2.

<sup>449</sup> The credibility of the application information and the relationship of the thing to the offence: see the text accompanying footnote 443 above.

<sup>450</sup> Under section 5 of the *Search Warrants Act 1985* (NSW), applicants must have reasonable grounds for believing that there is or, within 72 hours, will be in or on any premises a thing listed in the text accompanying footnote 441. Moreover, it is clear from the wording of search warrants issued under Part 2 of the Act that the authorised justice must believe that the applicant has reasonable grounds for his/her belief in relation to the items that are the subjects of the search. However, search warrants issued under Part 3 of the Act contain no such indication.

<sup>451</sup> Criminal Bar Association, *Submission no. 12*, 4.

material, which is defined<sup>452</sup> as a thing relevant to a relevant indictable or summary offence.<sup>453</sup>

The Committee considers that this provision is more simply expressed than s465(1) of the *Crimes Act 1958* and section 81 of the *Drugs, Poisons and Controlled Substances Act 1981*, and than the other levels of proof in Victorian legislation that are included in the preceding pages. It is, however, less stringent than the Victorian provisions which require reasonable grounds for believing.

The Commonwealth test was considered in 1990 by the Gibbs Committee that reviewed Commonwealth criminal law. It recommended that the Commonwealth retain the test of reasonable grounds for suspecting. The Committee found that the higher onus of belief was not justified because the applicant would not have entered the premises at the time of application.<sup>454</sup> This view influenced the Queensland Criminal Justice Commission's review of search warrant provisions, which recommended that the *issuing officer* must have reasonable grounds to suspect that the objects of the search are to be found on the relevant premises and that those objects are connected with an offence.<sup>455</sup>

In concurring with the Gibbs Committee, the CJC noted that:

The distinction between belief and suspicion is a very difficult one to draw and appears to be a semantic rather than practical distinction. Most police with whom the Commission officers spoke are unaware of the difference in practice. Their focus is on the reasonable grounds requirement rather than whether it requires a suspicion or a belief.<sup>456</sup>

However, Queensland law imposes a lesser standard on issuing officers, requiring them to be satisfied that there are reasonable grounds for suspecting evidence of "the commission of an offence or confiscation related evidence" at the premises or likely to be taken there within 72 hours.<sup>457</sup>

Having reviewed these various provisions, in particular the New South Wales regime and the general Commonwealth provision, the Committee agrees with stakeholders that the plethora of inconsistent standards of proof in Victoria is confusing and in need of reform. The Committee considers that all standards of proof for the issue of Victorian warrant provisions should in principle be consistent. Agencies should only

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<sup>452</sup> *Crimes Act 1914* (Cth) s 3C.

<sup>453</sup> Offence is defined in section 3C as an offence against a law of the Commonwealth (other than the *Defence Force Discipline Act 1982*), or a Territory; or a State offence that has a federal aspect.

<sup>454</sup> Gibbs Committee, 1990, paragraph 38.50, quoted in Criminal Justice Commission, *Report of a Review of Police Powers in Queensland, May 1993 (CJC Report)*, 359.

<sup>455</sup> *CJC Report*, 360-361 (emphasis added).

<sup>456</sup> *Ibid*, 361.

<sup>457</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 69.

be subject to inconsistent burdens of proof if they can justify that to do otherwise would genuinely undermine the purpose of the warrant power.

The Committee is particularly interested in the uniform standard in the NSW Act as a model for improving the consistency of Victorian burdens of proof, because of the large number of search warrant provisions in both NSW and Victoria. The Committee has also noted the simple and unambiguous language of section 3E(1) of the Commonwealth Act, notwithstanding its reliance on suspicion rather than belief. The Committee further observes that both of the most frequently used Victorian warrant provisions require reasonable grounds for believing that there is or will be evidence on the target premises.<sup>458</sup>

Having considered these factors, the Committee believes that Victorian warrant provisions should stipulate that the issuing officer must not issue a warrant unless satisfied that the applicant believes on reasonable grounds that there is, or will be within 72 hours of the issuing of the warrant, evidential material on the premises to be searched.

The Committee received a suggestion that section 465 *Crimes Act 1958* warrants should encompass summary as well as indictable offences<sup>459</sup> and invites the Government to consider this. More generally, the Committee urges the Government to consult with stakeholders about the appropriate scope and application of the in-principle standard developed above, and about how different agencies incorporate it into their enforcement regimes to ensure maximum consistency across Victorian warrant powers.

Recommendation 13. That legislation (except that referred to in Recommendation 14) be amended to provide that the burden of proof required for the issue of a warrant be that the issuing officer is satisfied that the applicant believes on reasonable grounds that there is, or will be within 72 hours of the issuing of the warrant, evidential material on the premises to be searched.

Recommendation 14. That legislation retain or incorporate a different burden of proof only where this departure from the standard recommended above can be justified as necessary to support the purpose of the warrant.

The Criminal Bar Association also criticised the lack of detail about how magistrates should determine the existence of the statutorily required state of mind. In the CBA's view,

<sup>458</sup> *Crimes Act 1958* s 465; *Drugs, Poisons and Controlled Substances Act 1981* s 81.

<sup>459</sup> Dr. Steven Tudor, *Submission no. 34*, 3; *Minutes of Evidence*, 5 November 2004, 291.

legislative provisions that provide for the issue and execution of search warrants should be unambiguous, consistent and above all designed to ensure that individual freedoms are not affected beyond that authorised by the terms of the specific warrant.<sup>460</sup>

The CBA argued that section 465 of the *Crimes Act 1958* and section 81 of the *Drugs, Poisons and Controlled Substances Act 1981* do not provide “sufficient specificity” and argued that Part 1AA of the *Crimes Act 1914* (Cth) provides “far greater detail of the requirements justifying the issue of a warrant and what is authorised by the warrant”.

While the Committee has noted that this provision appears to be more simply expressed than Victorian legislation, it does not appear to provide any more detailed information about the steps an issuing officer should take to be satisfied that the applicant has reasonable grounds for believing that evidence is or will be at the premises.

Such guidance is provided in New South Wales, where section 12A(2) of the *Search Warrants Act 1985* (NSW) requires that in determining whether there are reasonable grounds, the authorised justice must consider at least the reliability of the information on which the application is based, including the nature of the source of the information.<sup>461</sup> In considering whether such a condition is appropriate in Victoria, the Committee notes that search warrants may be issued by a wider range of individuals under the NSW Act than in Victoria and that there is therefore greater potential for authorised justices to exercise inconsistent levels of scrutiny of warrant applications. As some stakeholders alleged that Victorian magistrates do not appropriately scrutinise applications, the Committee considers the adoption of an explicit requirement to consider reliability in conjunction with its discussion of the allegations, in the next section of this chapter.

Victoria Legal Aid also suggested a number of requirements for the issuing officer to consider. In addition to a need for the applicant to demonstrate reasonable grounds for issuing a warrant,<sup>462</sup> VLA argued that issue should only occur if the applicant could demonstrate an objective basis for any belief held, could justify why informed consent for the search is unlikely to be obtained and why notice of a search ought not to be provided to the occupier of the relevant premises.<sup>463</sup>

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<sup>460</sup> Criminal Bar Association, *Submission no. 12*, 4.

<sup>461</sup> *Search Warrants Act 1985* (NSW) s 12A(2).

<sup>462</sup> VLA did not specify whether the obligation to fulfil these conditions should apply to the applicant for the warrant or the issuing officer. This is a relevant consideration given that the *Search Warrants Act 1985* (NSW) requires an issuing officer to be satisfied that there are reasonable grounds for issuing a warrant. Given that VLA’s discussion of Victorian standard of proof concerned section 465 of the *Crimes Act 1958*, the Committee has assumed that VLA intends that the applicant should be subject to the conditions it proposes.

<sup>463</sup> Victoria Legal Aid, *Submission no. 21*, 4.

The Committee considers that most Victorian provisions presently incorporate the requirement to demonstrate reasonable grounds and that this test provides an objective basis for the belief. The Committee's previous recommendation about consistent standards of proof would apply to any provision that does not currently include the two conditions.

In the Committee's view, the third condition would require applicants to explicitly demonstrate that other options short of a search pursuant to a warrant had been considered. Such an obligation would be consistent with the principle that agencies should always use the least intrusive or coercive means appropriate in the circumstances to achieve their objectives. An example of this approach to warrant powers is section 17(2)(c) of the *Surveillance Devices Act 1999*, which provides that, in determining an application for a warrant to use a surveillance device, a court must consider alternative means of obtaining the information or evidence sought through the surveillance.

Moreover, because magistrates retain applications, VLA's third condition would also preserve an independent record of applicants' reasons for not seeking informed consent and may therefore be of use in any subsequent challenges to the warrant. The VLA proposal may accordingly also offer enhanced accountability and transparency in the warrant process.

However, as the Law Reform Committee of the 54th Parliament found during the Inspectors' Powers Inquiry, informed consent provisions are generally not a practical alternative to search warrants. Witnesses told that Committee that search warrants are often obtained prior to a proposed search by informed consent because of the risk that consent will be refused or withdrawn after the search has commenced:

[E]ntry with informed consent is considered of little practical value to enforcement officers. Where entry and search is considered necessary to facilitate an investigation or to secure evidence, a search warrant is almost always obtained, since it will be necessary to obtain a warrant should the occupier decline to give informed consent, or withdraw consent during the search. The circumstance where informed consent is helpful is where the occupier is the complainant about the alleged offence, usually involving some third party. In that circumstance though, authorised persons are usually invited onto the premises and informed consent is probably only a formal version of an invitation.<sup>464</sup>

Victoria Police gave similar evidence during the present inquiry:

...if people voluntarily hand over material to the police, then they can ask for that material back at any stage, and the police do not have any authority to hang on to it either. They would have to hand that material back, whereas if it is obtained under a warrant then the police have the

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<sup>464</sup> Victorian Abalone Divers Association, Submission no. 20, 2-3, quoted in Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons* (30 May 2002) (*Inspectors' Powers Report*), 267.

authority to hang onto that material for as long as it is required as evidence or part of the investigation. There is that extra safeguard by using a warrant, even in that friendly situation as well. People may be friendly at one stage, and they may be unfriendly at another stage.<sup>465</sup>

In other words, in practice, search warrants are sought in most cases where legislation requires them in the absence of consent, even if consent is, or is expected to be, provided. The Committee is accordingly not satisfied that requiring agencies to specify in an application why informed consent is unlikely to be obtained will increase the effectiveness of the accountability mechanisms that are part of the warrant cycle, in particular the degree to which issuing officers scrutinise applications.

The Committee believes that similar considerations render VLA's fourth proposed criteria for the issue of a warrant - justification of why notice of an intended search ought not to be given to the occupier of the target premises - impractical. While it would be desirable to provide notice of a search, it will not be appropriate in many circumstances because of the potential that persons so informed will flee or conceal evidence. Although no evidence was received on this point, it appears to the Committee that the number of cases where such outcomes could be confidently ruled out would not be sufficient to justify a general requirement for applicants to demonstrate why notice should not be given.

### ***Magistrates' scrutiny of applications for warrants.***

A number of stakeholders claimed that magistrates do not subject applications to sufficient scrutiny before issuing a warrant.

As the Committee noted in its Discussion Paper, the Victorian Aboriginal Legal Service alleged that magistrates "rubber stamp" warrants. VALS reiterated this claim in its submission: "According to a VALS solicitor the warrant process is a 'sausage factory'..."<sup>466</sup>

In response to requests from the Committee for evidence to substantiate this claim, VALS made two subsequent submissions in which it provided examples of cases where it alleged that Victoria Police or magistrates had exceeded or abused warrant powers. However, in the Committee's view, the information does not establish the claims made by VALS, in particular the suggestion that warrants are routinely issued without genuine independent consideration and scrutiny of applications. The Committee qualifies this finding by stressing that, as with other evidence alleging abuses of warrant powers, it did not have the resources to conduct its own quantitative or qualitative empirical survey of data held by VALS and other relevant

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<sup>465</sup> Victoria Police, Minutes of Evidence, 20 October 2004, 219.

<sup>466</sup> Victorian Aboriginal Legal Service, *Submission no. 23*, 12.

service providers, or to interview case workers and client officers about their experiences.

The Committee also notes that VALS' claims are similar to evidence given by Victoria Legal Aid to the Inspectors' Powers Inquiry in 2002:

[...] 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.<sup>467</sup>

[...] VLA's experience is that we often attend court, appear in a trial in which there has been a large number of items seized [...]. 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 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.<sup>468</sup>

The Committee of the 54<sup>th</sup> Parliament did not address the claim in its report, and interestingly, VLA did not repeat it in the present inquiry.

During initial consultations for this inquiry, VLA raised a related concern, suggesting that magistrates in rural and regional areas of Victoria subjected warrant applications to less rigorous examination than their metropolitan counterparts.<sup>469</sup> VALS supported this claim, suggesting that:

due to caseloads, magistrates in rural areas conducted less rigorous evaluations of request for warrants than magistrates based in metropolitan areas, with Melbourne being the most rigorous.<sup>470</sup>

Yet in its formal evidence to the inquiry, VLA advised the Committee that a survey of its 12 regional offices indicated that:

the solicitors in charge ... did not see any real difference between rural and metropolitan courts or police. It has often been said that you can get away with things in country courts and with

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<sup>467</sup> Victoria Legal Aid, *Submission no. 19*, Inspectors' Powers Inquiry, 3.

<sup>468</sup> Carmen Randazzo, Victoria Legal Aid, *Minutes of Evidence, Inspectors' Powers Inquiry, 21 February 2002*, 2.

<sup>469</sup> Conversation Victor Stojcevski, Senior Policy and Research Officer, Victoria Legal Aid, April 2004.

<sup>470</sup> Victoria Legal Aid, *Submission no. 19*, Inspectors' Powers Inquiry, 3.

country police that you cannot get away with in the city because of the increased scrutiny. I do not think that is necessarily true, and that is not our experience in the field either.<sup>471</sup>

The Magistrates' Court and Victoria Police responded to claims about rubber stamping and inconsistency. The Court "totally reject[ed]" the allegations.

I [...] take whatever time is necessary to read the warrant and then ask someone to come and pick it up [...] I do not see the police officer at all. The police officer's only contact with me is via that affidavit. The amount of warrants that are sent back or rejected is illustrative of the point that magistrates do not, have not and will not rubber stamp warrants. We regard it as an incredibly important task. We regard it as part of the duty to which we have sworn. We reject wholeheartedly any suggestion that we do not carry out our function.<sup>472</sup>

[...] In addition, there has not been criticism in the superior Courts of magistrates inappropriately issuing search warrants or failing to appropriately scrutinise search warrants.<sup>473</sup>

The Committee was unable to obtain statistics about the number of warrants rejected, either in absolute terms or as a proportion of warrant applications.

However, Victoria Police stated that in its experience "magistrates scrutinise applications from Victoria Police very carefully and it is not uncommon that supplementary affidavits are required".<sup>474</sup> On the other hand:

The Victoria Police MFID [Major Fraud Investigation Division] in particular is of the view that magistrates often misconstrue the test that applies. It appears that many magistrates think that they have to be satisfied that evidence will be in the place to be searched, whereas the proper test is whether they are satisfied that the applicant has reasonable grounds to believe that the evidence will be on the premises.<sup>475</sup>

Similarly, the Chinese Medicine Registration Board advised the Committee that

anecdotal information from other boards is that the obtaining of warrants can be a complex process and that magistrates vary significantly in their attitudes to requests for warrants.<sup>476</sup>

The Committee has considered these various allegations and the responses to them against the lack of research in this area. The Committee stresses firstly, that there was near unanimity among witnesses that the majority of warrants are issued properly and appropriately, and secondly, that the evidence it has received does not substantiate the allegations. The Committee also notes that Victoria's relatively

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<sup>471</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 20 October 2004, 201.

<sup>472</sup> Magistrate Hannan, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 279.

<sup>473</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 275.

<sup>474</sup> Victoria Police, *Submission no. 25*, 12.

<sup>475</sup> *Ibid.*, 13.

<sup>476</sup> Chinese Medicine Registration Board *Submission no. 16*, 1.

restrictive definition of issuing officer reduces the potential for abuse of the issuing phase of the warrant cycle.

Nevertheless, the Committee considers that the claims, taken together, are serious, even if they represent perception more than reality. Consistent with its views about the importance of community views of the justice system,<sup>477</sup> and with its earlier comments and recommendations for additional study of warrant powers,<sup>478</sup> the Committee believes that the basis of the perceptions summarised here should be further investigated.

There are limited opportunities to obtain qualitative data on issuing processes. Magistrates' decisions to issue warrants are *prima facie* not reviewable by the Ombudsman or the Privacy Commissioner.<sup>479</sup> Another potential source of information is the ability to challenge warrants, or evidence obtained under their authority, in consequential court proceedings, which, as discussed later in this chapter, may lead to the evidence being excluded. Obviously that avenue is not available if proceedings are not initiated.

The Committee has already recommended more detailed empirical investigation of warrant applications and believes that similar analysis of issuing data is merited. Darren Palmer commented on the value of such work in this context:

[It would] address such things as the capacity of judicial officers to actually be able to properly make decisions in relation to the exercising of warrants. They are highly reliant upon the information provided by police, as I indicated earlier, and that can be open to abuse...<sup>480</sup>

The Committee therefore extends its earlier recommendations concerning analysis of available data on applications for warrants.

Recommendation 15. That the Office of Police Integrity uses its own motion powers to investigate the prevalence of the inappropriate issue of search warrants and make appropriate findings and recommendations.

Recommendation 16. That the Department of Justice resources a project in which, for a period of at least 12 months, Victoria Legal Aid record information in cases where it appears that search warrants were issued inappropriately, and that an analytical report on the data be prepared and published. That the Victorian Aboriginal Legal Service and community legal centres consider joining the recording and reporting study.

<sup>477</sup> The Committee discussed this in Chapter Two of this report, at p 35.

<sup>478</sup> See footnote 315 above.

<sup>479</sup> *Ombudsman Act 1973* s 13; *Information Privacy Act 2000* s 10.

<sup>480</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 325.

In this context, the Committee returns to the requirement found in section 12A(2)(a) of the *Search Warrants Act 1985* (NSW) for issuing officers to consider the reliability of the information on which the application is based, including the nature of the source of the information, when determining whether the applicant has the relevant state of mind.<sup>481</sup> The Committee has already noted that New South Wales defines issuing officer more broadly than Victoria. Issuing officers in the former jurisdiction may thus not have the experience and expertise of their Victorian colleagues, and therefore, detailed and explicit stipulation of matters for issuing officers to consider seems appropriate. In Victoria, the Magistrates' Court evidence emphasised the importance that Victorian issuing officers attach to the task of determining warrant applications. The Committee believes that consideration of the reliability of the material supporting the warrant application would implicitly be a factor in any assessment of a warrant application undertaken in Victoria.

Accordingly, the Committee is not satisfied that a legislative provision equivalent to s12A(2)(a) of the *Search Warrants Act 1985* (NSW) is justified in Victoria. However, the Committee considers that the provision is a useful guide for issuing officers and an enhancement to the transparency and clarity of issuing officers' responsibilities and consequently invites relevant Courts to include it in their Practice Directions on warrant procedures.

<p>Recommendation 17. That relevant Victorian Courts include the provisions of s12A(2)(a) of the <i>Search Warrants Act 1985</i> (NSW) in their Practice Directions on warrant procedures.</p>
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Finally on this issue, the Committee is concerned by Victoria Police's report that some magistrates appear to misconstrue the test to be satisfied for the issue of some warrants. Other witnesses suggested that enhanced education could ensure that the issuing process remains rigorous.<sup>482</sup> The Committee believes that the importance of the interests at stake in a decision to issue a warrant, and the large number and variety of warrant powers and procedures justify initial and continuing education to enhance magistrates' and Judges' knowledge of warrant powers and procedures. The Committee recommends that the relevant Courts consider whether existing education and training opportunities are sufficient.

Many witnesses stressed that record keeping and monitoring reports to the issuing officer on the execution of the warrant are important mechanisms for identifying potentially inappropriately issued warrants. The Committee considers record keeping

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<sup>481</sup> *Search Warrants Act 1985* (NSW) s 12A(2).

<sup>482</sup> Chinese Medicine Registration Board *Submission no. 16*, 3; Pauline Wright, New South Wales Council for Civil Liberties, *Minutes of Evidence*, 1 September 2004, 63.

in the next section and deals with the reporting function later in this chapter, in its discussion of post-execution issues.

## Record keeping

The greater the level of accountability that is imposed on police and Courts at each stage of the process, the greater the likelihood that there will be strong compliance governing the issue and execution of warrants. We recommend that accountable record[s] be maintained by both police and the Court of each warrant issued, of each warrant executed and of all items seized.<sup>483</sup>

A requirement that agencies report their entry and search activities to Parliament is an effective way of ensuring that records are kept and that the process is open and available to public scrutiny and comment. When personal and property rights are potentially restricted by legislative provisions in the public interest it is arguable that the public should know of the extent to which such provisions are exercised.<sup>484</sup>

Record keeping is an important element of the transparency and accountability of the warrants system, in particular the issuing and execution stages. When courts hear and determine applications for search warrants, they generally do so in chambers and there is no opportunity for anyone other than the applicant to be heard on the application. An obligation on issuing agencies to document information about the warrant in a standard form that is then retained would create a record that could be examined in the course of any subsequent scrutiny of the proceedings and decisions that produced the warrant. Such a requirement could also serve as a useful reminder to issuing officers of their duties and responsibilities. For these reasons, both of these record keeping functions are relevant to applicants. Indeed, stakeholders recommended that data on the use of warrants should be recorded by applicants and issuing officers. The Committee therefore examines record keeping by agencies that use warrants and by issuing officers.

### ***Record keeping by agencies that use warrants***

The warrant application itself is of course a record of the information considered to justify the issue of a warrant. Many Victorian provisions also impose internal reporting obligations in relation to the use of warrant powers, although the Committee's research indicates that they apply to powers of entry in general rather than specifically to entry under warrant. For example, sections 137 and 138 of the *Fair Trading Act 1999* require inspectors to report any warrant or warrantless entries to premises to the

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<sup>483</sup> Criminal Bar Association, *Submission no. 12*, 10.

<sup>484</sup> Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure, Questioning and Detention by Authorised Persons*, Discussion Paper (October 2001) 25.

Director of Consumer Affairs Victoria within seven days after the entry. The report must contain “all relevant details of the entry” including the time, place and purpose of the entry, details of seizures, samples or copies taken or made and other things done on the premises, and the time of departure from the premises. The Director is required to maintain a register of that information. The *Electricity Safety Act 1998* requires similar reporting and registering of information for warrantless entries but contains no similar requirements in respect of warrant powers, which are dealt with in a separate section of the Act. The commonly used search warrant legislative provisions of the *Crimes Act 1958* and the *Drugs, Poisons and Controlled Substances Act 1981* are also silent on this issue, as are the *Fisheries Act 1995*,<sup>485</sup> the model provisions of the health practitioner registration Acts and other provisions cited by the Magistrates’ Court as being the most commonly utilised.

In contrast, other types of legislative warrant provisions do include stringent record-keeping requirements. These reflect the significantly greater invasion of personal liberties effected by surveillance and interception warrants. As such they can usefully be viewed as a high watermark of record keeping standards.

One example is the *Surveillance Devices Act 1999*, which requires individuals from various agencies<sup>486</sup> to report to Parliament each year on a number of matters, including the number of applications for various surveillance, tracking and related warrants, and the number issued.<sup>487</sup>

The Criminal Bar Association drew the Committee’s attention to the *Telecommunications (Interception) Act 1979* (Cth) and endorsed many of its detailed obligations as a model for Victoria.<sup>488</sup> Part 8 requires the recording of various information, including a statement as to whether each warrant application was withdrawn, refused or issued, each warrant issued, the day and time on which execution began, the duration of execution and the name of officials who execute the warrant.<sup>489</sup> The Commissioner of the Australian Federal Police (AFP) is required to keep a General Register of warrants and record in it information including the date of issue of each warrant, the issuing officer, the agency to which it was issued, the name of the person to whom it relates, its duration and in some cases, the offence that the warrant relates to.<sup>490</sup> The Register is to be delivered to the relevant Minister for

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<sup>485</sup> However, sections 101H-I include detailed reporting requirements relating to personal searches.

<sup>486</sup> The Chief Commissioner of Victoria Police, the Chief Executive Officer of the Australian Crime Commission, the Director of Police Integrity and the Secretaries of the Departments of Sustainability and the Environment and of Primary Industries: *Surveillance Devices Act 1999* s 37(1).

<sup>487</sup> The reports under section 37(1) pertain to the following warrants: listening device warrant, optical surveillance device warrant, data surveillance device warrant, tracking device warrant, composite warrant, a retrieval warrant. *Surveillance Devices Act 1999* ss 3, 13(1).

<sup>488</sup> Criminal Bar Association, *Submission no. 12*, 10.

<sup>489</sup> *Telecommunications (Interception) Act 1979* (Cth) ss 79-80.

<sup>490</sup> *Ibid*, s 81A.

inspection at least once every three months.<sup>491</sup> The Minister is required to prepare an annual report setting out how many ordinary and telephone warrant applications were made, withdrawn and refused in the reporting period; how many warrants specified conditions relating to execution; information about offences;<sup>492</sup> information about the effectiveness of the warrants, measured by reference to the number of prosecutions instituted or likely to be instituted;<sup>493</sup> the total expenditure incurred by agencies in connection with the execution of warrants;<sup>494</sup> information about the availability of issuing officers and the extent to which particular types of officers have been used.<sup>495</sup>

Another statutory regime imposes recording and reporting requirements, in relation to covert search warrants. Under section 13 of the *Terrorism (Community Protection) Act 2003*, the Chief Commissioner of Victoria Police must record and annually submit to the Government a report of the number of ordinary and telephone warrant applications, the number rejected, the number of warrants issued, the number of premises covertly entered, the number of times that items were seized, the number of times that items were substituted for seized items and any other information considered by the Government to be appropriate. The reports are to be made public by tabling them in Parliament within a specified period of being received by the Government.

Beyond Victoria, police search warrant provisions also include record keeping obligations. The *Police Powers and Responsibilities Regulations 2000* (Qld) requires the recording of the name of the person in possession of the place and anyone detained, if known; when and where the search took place; the purpose of the search; a description of anything seized because of the search; whether anything was damaged because of the search; and information about the return, destruction or disposal of anything seized. The Act authorising the Regulations entitles anyone owning a place that is the subject of a warrant or warrantless search under the Act to obtain a copy of information recorded in the police register about the search, within three years of the search. The request must be complied with as soon as reasonably practicable.<sup>496</sup>

In Victoria, record keeping in relation to search warrants is mandated at an operational level. For example, the Victoria Police Manual requires members wishing to conduct planned searches, including under warrant, to satisfy various written

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<sup>491</sup> *Ibid*, s 81B.

<sup>492</sup> *Ibid*, s 100.

<sup>493</sup> *Ibid*, s 102.

<sup>494</sup> *Ibid*, s 103(a).

<sup>495</sup> *Ibid*, s 103(ab).

<sup>496</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 415(2). Section 416 restricts disclosure in certain circumstances. The provisions implement a similar recommendation of the Criminal Justice Commission in its proposals for a computerised register of police searches: Criminal Justice Commission, *Review of Police Powers and Responsibilities*, Recommendation 11.5, 467.

approval procedures. Officers wishing to conduct a search must document the search details on a standard form<sup>497</sup> and obtain a search number from the police Search Register<sup>498</sup> before seeking approval. The completed form and supporting documents must be reviewed by an officer,<sup>499</sup> who must then record his or her decision. Where searches are approved, the record must include the search level, whether any special instructions apply and whether additional documentation is required. The officer must also enter details of approvals in their official logs and record reasons for non-approvals.<sup>500</sup> Prior to executing the search, “all relevant details” are to be recorded in the police Search Register.<sup>501</sup> After the search, various details, including the results of the search and information about any use of force, must be recorded and notified to various officials.<sup>502</sup>

Similarly, the State Revenue Office maintains a Register of Notices and Search Warrants issued.<sup>503</sup> No other stakeholders provided information on their record keeping practices.

This issue has been examined in the context of inspectors’ powers. In 2000, the Commonwealth Senate recommended that:

Each agency, person or organisation which exercises powers of entry and search under legislation should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.<sup>504</sup>

The Commonwealth Government did not accept the recommendation. It considered that then extant legislative safeguards governing warrant and warrantless entry were sufficient to ensure effective scrutiny of entry and seizure powers. In relation to warrants, the Government added that the courts could examine any question about validity or execution and make appropriate findings.<sup>505</sup>

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<sup>497</sup> Levels 2 and 3 searches require additional documentation: Victoria Police Manual, *VPM Instruction 105 - 2, Searches of properties*, updated 2 August 2004, section 5.1.

<sup>498</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 6.1.1.

<sup>499</sup> Ibid, section 6.2.

<sup>500</sup> Ibid, section 6.5.

<sup>501</sup> Ibid, section 8.1.

<sup>502</sup> Ibid, section 11.3.

<sup>503</sup> State Revenue Office, *Submission no. 20*, 4. The SRO is empowered under the *Taxation and Administration Act 1997* and the *First Home Owner Grant Act 2000* to compel individuals and organisations to do certain things by issuing written notices.

<sup>504</sup> Commonwealth Senate Committee for the Scrutiny of Bills, *Inquiry into Entry and Search Provisions in Commonwealth Legislation, Fourth Report of 2000*, Recommendation 3.

<sup>505</sup> Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Bills Fourth Report - Entry and Search Provisions in Commonwealth Legislation, August 2003 (Australian Government, Senate Report Response)*, 5-6.

The topic was revisited by the Law Reform Committee of the 54<sup>th</sup> Parliament during its Inspectors' Powers Inquiry. That Committee considered the two prongs of the Commonwealth Senate Committee's recommendation: whether agencies should be required to maintain a central record of the use of their inspectors' powers in relation to search and seizure powers exercisable with and without a warrant; and whether such records should be reportable to Parliament. Most stakeholders criticised the proposals as impractical in light of the frequency with which the powers were used, and unnecessary given that non-legislative reporting processes were considered to be adequate and in many cases required that data be included in annual reports to Parliament.<sup>506</sup>

However, the Office of the Chief Electrical Inspector, which as noted above, is required to report the use of powers under the *Electricity Safety Act 1998*, had no objection to making the reports publicly available at the close of any proceedings arising from the use of powers. The Victorian Abalone Divers Association agreed:

that each agency should keep centralised records of numbers and types of warrants sought, the success of the application, and number of warrants executed. Apart from being available for accountability purposes, such information will be valuable for the agency to guide its officer training by focussing the training on specific areas.<sup>507</sup>

The Committee of the 54<sup>th</sup> Parliament, which reported before the publication of the Commonwealth Government's response to the Senate report, concluded that "the collection of gross statistics and reporting of overall figures of usage rather than the details of every case should not be an impossible or overtly costly task" and that such data should be reported annually to Parliament after the removal of information that could identify specific individuals.<sup>508</sup> The Committee considered that the burden of reporting could be reduced by incorporating data into existing annual reports.

Based on these findings, the Committee recommended that

- agencies be required to collect and maintain statistical data about the use of the powers they administer, including incidence of use, number, type and status of complaints;
- agencies report annually to Parliament, preferably via their annual reports, about the use of the powers and any complaints received;
- the Government considers what information should be contained in the report and issue reporting guidelines to assist agencies.<sup>509</sup>

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<sup>506</sup> *Inspectors' Powers Report*, 122-124.

<sup>507</sup> Victorian Abalone Divers Association, *Submission no. 20, Inspectors' Powers Inquiry*, 7.

<sup>508</sup> Law Reform Committee, *Inspectors' Powers Report*, 125.

<sup>509</sup> Law Reform Committee, *Inspectors' Powers Report*, Recommendations 31-33.

In its statutory response to the Report, the Government acknowledged the role of record keeping in maintaining accountability and reviewing and improving agencies' enforcement activities, "[i]n particular...where more intrusive or coercive types of powers are exercised". However, it added that "the appropriate level of detail and manner of collection may vary from agency to agency, depending, among other things, on the inspection powers they administer, resources and privacy issues". The Government also supported in principle that agencies' annual reports should include data collected via record-keeping, and agreed to consider "the benefits of [reporting] guidelines".<sup>510</sup>

The present Committee shares its predecessor's view that the collection of statistical and limited qualitative data about the use of invasive powers is justified by the effects of the powers. In the context of warrant powers, various data, such as the numbers and types of warrants applied for, granted, not granted, executed, not executed and followed up or not followed up with further proceedings could provide a useful resource for further research and scrutiny of warrant use. Such statistics may draw attention to and occasion further analysis of the warrant practices of particular agencies that experience a high level of unsuccessful warrant applications, or particular geographic or functional sections within an agency that apply for an unusually large number of warrants. The Committee recognises, of course, that such raw data is of limited use on its own and without context, but nevertheless considers that the imposition of consistent data collection obligations is justified by the evidence presented during the inquiry and already referred to, indicating that there is a lack of comprehensive knowledge about the use of Victorian warrant provisions.

The Committee expects that many agencies with warrant powers already record key information about their use, both as part of their internal processes that govern applications for and execution of warrants and as part of their efforts to improve operational performance and service delivery. The Committee therefore considers that the administrative implications of its conclusions should not be overly costly.

The Criminal Bar Association made an important point in relation to the resources required to keep records of the sort contemplated by the Committee:

...the other side of the coin is that because of the very fact that there are so many issued, perhaps that really does highlight the problem and the need for a record or records to be kept of those warrants that are issued and for there to be a procedure in place for those records to be made available for inspection.<sup>511</sup>

The Committee also concurs with its predecessor in concluding that agencies should report annually to Parliament on their use of warrants and any complaints received, including appropriate comment on emerging trends. Moreover, the Ombudsman and

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<sup>510</sup> Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee's Final Report on The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*, 11 June 2003, 10-11.

<sup>511</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 165.

the Office of Police Integrity should review the data periodically and make appropriate recommendations.

Finally, consistent with its belief in the importance of the transparency of warrant powers, the Committee supports allowing individuals who are subjected to a warrant to obtain a written record of the relevant contents of the relevant search warrant register(s), subject to the removal of any information that could compromise agencies' operations.

In light of the above analysis, the Committee makes the following recommendations in relation to record keeping by agencies that use warrant powers.

Recommendation 18. That primary legislation be amended to require each agency with warrant powers to create and maintain a search warrants register and record the following information in it:

- (a) number and dates of ordinary and telephone applications made, withdrawn, granted, rejected, including reapplications;
- (b) details of the legislative provision authorising each warrant application;
- (c) basis for the reasonable belief justifying each application;
- (d) details of any offences relevant to each warrant;
- (e) date of issue and name of issuing officer;
- (f) date, time and duration of the execution of each warrant and name of executing officials;
- (g) name(s), if known, of any person(s) present on the premises and any arrests;
- (h) details of any use of force;
- (i) results of the search, including description and details of any disposal of seized items;
- (j) statistics on proceedings initiated as a result of the use of warrant powers;
- (k) number of complaints received and how resolved;

and that the Government consider what other information should be recorded.

Recommendation 19. To facilitate effective comparative analysis of agencies' practices, that the Government work with agencies to develop a standard template on which to base search warrant registers maintained pursuant to Recommendation 18.

Recommendation 20. That agencies prepare a de-identified version of the data contained in search warrant registers and publish it annually on their websites and report it to Parliament, preferably as part of their annual reports.

Recommendation 21. That the Ombudsman and the Office of Police Integrity review the data periodically and make appropriate recommendations.

Recommendation 22. Without prejudice to any proceedings relating to the warrant, that individuals subject to a search recorded in a search warrant register have a right of access to the recorded information, suitably edited to remove information that would identify agencies' personnel or compromise agencies' operations.

### **Record keeping by issuing officers**

Section 57(2) of the *Magistrates' Court Act 1989* requires that the person issuing a warrant must "cause the prescribed particulars of the warrant to be entered in the register". In its submission to the Inspectors' Powers Inquiry and its evidence to this inquiry, the Court stated that the Register contains the date of issue, Register number, address for execution, legislative provision authorising issue and the name of the issuing magistrate.<sup>512</sup>

Monthly returns are provided by each region to the Melbourne Magistrates' Court detailing the number and type of warrants issued. The after-hours registrar maintains the statistics for the after-hours service. The types of warrant are classified as I have broken them down on page 1 of that handout. There is greater particularity in the records maintained by the after-hours service. You can see that *Children and Young Persons Act* warrants are detailed, as are Commonwealth warrants.<sup>513</sup>

The warrant provisions of many Victorian Acts incorporate the requirement to enter details of the warrant in the Register by reference to the *Magistrates' Court Act 1989*. The obligation would anyway logically apply to all warrants issued by magistrates.

The Inspectors' Powers Report identified two limitations with the Register. First, the Register does not state whether a warrant has been executed. Each warrant is accompanied by a report detailing the results of search, which is attached to the Court's file relating to the relevant warrant. The execution status of each warrant is thus determined by the contents of the results of the search report. This means that statistical data developed from the contents of the Register do not give any indication of the proportion of warrants that have been executed. The Committee of the 54<sup>th</sup> Parliament did not address this issue in its final report. In this inquiry, the Court suggested that "any compilation of statistics could be misleading due to the legislative

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<sup>512</sup> Magistrates' Court of Victoria, *Submission no. 43, Inspectors' Powers Inquiry, 2*; Magistrate Bowles, Magistrates' Court, *Minutes of Evidence, 20 October 2004*, 265. In relation to search warrants, Regulation 304 of the *Magistrates' Court General Regulations 2000* prescribes only the type of warrant issued and the date of issue.

<sup>513</sup> Magistrate Bowles, Magistrates' Court, *Minutes of Evidence, 20 October 2004*, 265.

provisions in place”,<sup>514</sup> such as different reporting requirements and the practice of using warrants available under s 465 of the *Crimes Act 1958* in place of more specific warrants.<sup>515</sup>

The second limitation that the Committee of the 54<sup>th</sup> Parliament identified was that data about the issue of warrants issued under most Acts is not “readily identifiable”.<sup>516</sup> The Committee recommended that the Court rectify this by reviewing the Register to allow for the easy identification of warrants issued under particular Acts.<sup>517</sup>

During this inquiry, the Committee sought advice from the Court as to whether any changes have been made in the operation of the Register. In late 2004, the Court advised the Committee that Recommendation 41 of the Inspectors’ Powers Inquiry had not been implemented, due to an administrative oversight:

It is not the case that the Court was resistant to the recommendation....[I]nternal procedures of the Court concerning the issuing of search warrants are now being reviewed. The review includes the particulars contained in the Search Warrants Register and procedures to facilitate all documentation in respect of each warrant being retained at the Court issuing the warrant.<sup>518</sup>

A Practice Direction updating the Register was issued by the Court on 24 December 2004. It requires that each Register entry indicates which Act and section the application relates to.<sup>519</sup> The Committee is satisfied that this measure implements its predecessor Committee’s recommendation.

However, the Committee considers that additional amendments to the Register are justified. As with agencies that apply for and execute warrants, the Committee considers that an increase in the type of data stored in the Register will facilitate more informed analysis and review of warrant practices, including by the Court itself either as part of individual magistrates’ reviews of warrant applications or more generally, and that it can thereby fulfil an important function as an independent check on issuing agencies’ records.

The Register currently records whether a warrant was granted or refused but not whether an application was returned for an applicant to provide more evidence. The third outcome is of potential interest, both to the Court and to accountability mechanisms such as the Office of Police Integrity (OPI), as it may indicate trends that would give cause for further investigation. For example, a magistrate considering a

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<sup>514</sup> Ibid.

<sup>515</sup> Police Association, *Minutes of Evidence, 20 October 2004*, 257.

<sup>516</sup> Inspectors’ Powers Inquiry, 167.

<sup>517</sup> Inspectors’ Powers Inquiry, recommendation 41.

<sup>518</sup> Letter, Chief Magistrate to Committee Chairman, 15 November 2004.

<sup>519</sup> Magistrates’ Court of Victoria, *Practice Direction 34/2004*; letter, Chief Magistrate to Committee Research Officer, 27 June 2005.

subsequent related warrant may be prompted to more rigorous scrutiny of the application. Or the OPI may wish to review particular police practices in greater depth. The Committee therefore considers that the Register should also record whether an application for a search warrant was returned to the applicant for additional evidence. The Register should also, if it does not already, record the date of magistrates' decisions to grant, reject or return applications.

The Court additionally advised the Committee that, apart from the after hours service, it does not maintain statistics of the various modes (in person, by telephone, by fax) of application, although it noted that it could produce statistical data for in person and fax applications "upon perusing the Affidavit material and search warrants filed at the Court". As with the decision to return a warrant to the applicant, the Committee believes that recording how an application is filed is of value and not resource intensive. The Register should therefore be expanded to record the mode of all applications, rather than just those made outside the Court's normal hours.

The Committee believes that gross data from the Register should be included in the Court's annual reports and that individuals should have a right to obtain information about them that is held on the Register.<sup>520</sup> The Committee also urges the Ombudsman and the Office of Police Integrity to review the Register periodically and make appropriate recommendations.

Recommendation 23. That the Magistrates' Court's search warrants Register be amended to record:

- (a) whether a warrant application is returned to the applicant for further evidence to be provided;
- (b) the date of decisions to grant, reject or return applications for further evidence to be provided;
- (c) the number and dates of in person, fax and telephone applications made, withdrawn, granted and rejected, including reapplications.

Recommendation 24. That a statistical summary of the Magistrates' Court's search warrants Register be included in the Court's annual reports.

Recommendation 25. That the Ombudsman and the Office of Police Integrity review the Magistrates' Court's search warrants Register periodically and make appropriate recommendations.

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<sup>520</sup> A similar right already exists under section 18(4) of the *Magistrates' Court Act 1989*, which provides that a party to a proceeding may inspect without charge that part of the register that relates to that proceeding.

Recommendation 26. Without prejudice to any proceedings relating to the warrant, individuals subject to a search recorded in the Magistrates' Court's search warrants Register have a right of access to the recorded information, suitably edited to remove information that would inappropriately identify any person.

Recommendation 27. That the obligations and rights in Recommendation 23 to Recommendation 26, including the contents of the Magistrates' Court's search warrants Register be prescribed by primary legislation, rather than by Regulation or Magistrates' Court Practice Direction.

The Committee believes that the recording of additional information would have considerable merit but understands that the Court's resources and current technological limitations make this impractical. The Committee therefore makes the following recommendation.

Recommendation 28. That, the Magistrates' Court considers amending the search warrants Register to record:

- (a) the basis for the reasonable belief justifying each application;
- (b) details of any offences relevant to each warrant;
- (c) name(s) of any person(s) present on the premises and any arrests;
- (d) details of any use of force;
- (e) results of the search, including description and details of any disposal of seized items

The Committee also considered more detailed record keeping, in light of stakeholder submissions and certain legislation. Victoria Legal Aid proposed that the Court should record the place, items and person subject to the warrant, and the outcome of the warrant including when it was executed, what was seized and whether there were any incidents during execution.<sup>521</sup> The Criminal Bar Association urged that in all cases a record be kept of the material placed before the issuing officer which grounds the issue of the warrant "so that at least a record exists which can later be subject to review".<sup>522</sup>

Some of that data is already stored. The existing Register already records the place subject to the warrant, while the warrant application contains the name of any person

<sup>521</sup> Victoria Legal Aid, *Submission no. 21*, 5.

<sup>522</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 169.

and items subject to the search. Search outcomes are made a part of the Court file via the results of search report, which includes sections detailing items seized, persons arrested, directions on seized property and how the warrant was served.<sup>523</sup> Thus, while the Committee agrees that there should be an independent record of the sort of post-issue events that stakeholders identified, it considers that it is inefficient to require the Magistrates' Court to create such records given the existence of the search report and application. The Court currently retains copies of all documents provided to it and matches the warrant application with the results of the search report.<sup>524</sup>

Interestingly, one piece of legislation already includes additional record keeping obligations that go beyond the statistical data required for the Register. Under sections 82, 97C and 97O of the *Confiscation Act 1997*, a magistrate or judge who issues a search or seizure warrant or a property management warrant "must cause a record to be made of all relevant particulars of the grounds s/he has relied on to justify the issue of the warrant" and may omit anything from the record that "might disclose the identity of a person if the magistrate or judge believes on reasonable grounds that to do so might jeopardise the safety of any person".<sup>525</sup>

The Magistrates' Court noted that while these provisions are similar to the general requirement to create a record that is contained in the *Search Warrants Act 1985* (NSW), they are particular to the *Confiscation Act 1997* and therefore not a general requirement in relation to Victorian search warrant legislations. In fact, the confiscation provisions are identical to two of the three subsections of the relevant part of the New South Wales legislation.<sup>526</sup> The third subsection authorises regulations to make provision for the keeping of records in connection with the issue and execution of search warrants, the inspection of any such records, and any other matter in connection with any such records. Section 9 of the *Search Warrants Regulations 1999* (NSW) requires the retention, at the court specified in the occupier's notice for at least six years from the warrant issue date, of each warrant application, a copy of the occupier's notice and the execution report. These documents may be inspected by the occupier of the premises to which the search warrant relates or by any other person on behalf of the occupier.

The Magistrates' Court considered that:

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<sup>523</sup> The Committee has identified appropriate modifications to the report but discusses these later in this chapter in the section on reporting back.

<sup>524</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 265.

<sup>525</sup> Property management warrants authorise entry, search, inspection and in some cases seizure to the value of certain property while its future is determined: Rob Hulls, Attorney-General, *Confiscation (Amendment) Bill*, *Second Reading Speech*, 1 May 2003, 1316.

<sup>526</sup> *Search Warrants Act 1985* (NSW), sections 13(1), 13(3).

The basis for granting a search warrant should be apparent upon the magistrate reading the affidavit material or hearing evidence on oath. One would expect the records prepared by the authorised justices in New South Wales to contain extracts of the relevant contents of the affidavit.<sup>527</sup>

As already noted, the Court considers that imposing a general requirement to record this sort of information could “represent double handling without any benefit to be gained” and would have an impact on magistrates who are already “under tremendous pressure to complete the work of the Court”.<sup>528</sup>

As with the VLA suggestion, the Committee agrees that expanding the *Confiscation Act 1997* recording regime into a general requirement of the sort contained in the New South Wales Act has the potential to duplicate existing Victorian data retention practices. The Committee therefore considers that current practices in respect of warrant applications and results of search should be codified, with modifications to ensure that information provided to occupiers of the target premises are also retained.

In relation to the right of access to such material by occupiers or their representative that is provided by the NSW legislation, the Committee believes its proposed right to apply to the Court for access to warrant materials is more appropriate.<sup>529</sup> The number of applications is such that omitting sensitive information routinely, which is the consequence of a right to view the material, is likely to require significant resources and be an inefficient use of them given that it is difficult to predict how many warrant files will never be subject to requests for access. Editing on a case by case basis involves fewer resources and therefore should not, initially at least, exert an unreasonable demand on the Court.

The Committee is therefore satisfied that the proposed right to apply for access, together with recommendations for access to statistical data held by agencies and the Court, balances the competing demands of transparency and operational efficiency. If the proposal is implemented, the Court, the Ombudsman and the OPI should monitor demand and make appropriate recommendations for review or reform.

Recommendation 29. That the *Magistrates’ Court Act 1989* be amended to require the retention by the issuing officer of all documents pertaining to ordinary and telephone applications for search warrants, copies of the information provided to the occupier/s of the target premises and the results of search report.

<sup>527</sup> Magistrate Jennifer Bowles, *Magistrates’ Court of Victoria, Minutes of Evidence, 20 October 2004, 274*

<sup>528</sup> *Ibid.* This is discussed earlier in this chapter in the context of access to application proceedings, at footnote 280 and accompanying text.

<sup>529</sup> Recommendation 5 to Recommendation 6 above and accompanying text.

The Committee is sensitive to the demands on the Court and agencies and is therefore aware that its recommendations in this area will not be without cost. To some degree that can be offset by maximising the technological capacity of existing systems. For example, by using electronic templates and forms for warrants and linking them to matching information fields in the Register, it should be possible to enter standard details into warrant forms and then automatically generate Register entries for issuing officers to review and approve.

The Committee was surprised to hear evidence from the Court that individual court houses are not linked to each other by computer. This impacts on the reporting back function, which the Committee discusses later in this chapter, and the search warrants Register. The Chief Magistrate advised the Committee that separate search warrant registers are maintained in the Registry of each Court and that these are not linked by computer. Monitoring is carried out by each Senior Registrar providing monthly returns of the numbers of warrants issued. This is clearly less efficient than it could be: computerisation, centralisation and networking of the Registers could provide ongoing real time data on warrants. Moreover, this lack of an ability to store warrant data in a way that makes it accessible electronically by all Court venues seems inconsistent with trends evident in other information produced by the Court. Recent Annual Reports have detailed plans to upgrade the Court's information technology network connecting 52 locations<sup>530</sup> and its pioneering use of IT in areas such as video conferencing.<sup>531</sup> The current three Year Strategic Plan notes that all Courts are equipped with technology that enables the receipt and transfer of information to police and Correctional Services, and that the initiation and enforcement of civil cases can now be processed electronically.<sup>532</sup>

The Committee therefore considers that data should be entered into a central computerised search warrants Register, and should be available in real time to all Court venues as an aid to determining warrant applications.

Recommendation 30. That the Government ensures that, as a matter of urgency, Magistrates' Court venues' computer systems are able to share and compile records and statistics pertaining to the issue and use of warrants. In particular, the Court's multiple search warrant registers should be computerised, centralised and networked.

Recommendation 31. That the Magistrates' Court ensures that all data pertaining to the issue and use of warrants generated by each venue is stored in a manner that facilitates the sharing of information in real time across different venues, while incorporating appropriate data security and redundancy protections.

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<sup>530</sup> Magistrates' Court of Victoria, *Annual Report 2003 - 2004*, 42.

<sup>531</sup> Magistrates' Court of Victoria, *Annual Report 2002 - 2003*, 65.

<sup>532</sup> Magistrates' Court of Victoria, *3 Year Strategic Plan 2003/04 - 2005/06*, 5.

Finally on record keeping, the Committee notes that warrants issued by judges of the Supreme or County Courts pursuant to section 57(7) of the *Magistrates' Court Act 1989* are also subject to the record keeping requirements of section 57(2). There appears, however, to be some overlap between legislative regimes governing the Courts. While the *Supreme Court Act 1986*, *Country Court Act 1958* and associated regulations are silent about record keeping in relation to warrants, section 21(3) of the *County Court Act 1958* requires the Registrar to enter all verdicts, orders and judgements in the register.

The Committee believes that record keeping obligations should be explicit and consistent across all Courts and issuing officers. One option for achieving this would be to link the registers of the three Courts. The Committee notes that the Attorney-General's Justice Statement proposed an "integrated courts management system" for Victoria's Supreme, County and Magistrates' Courts and the Victorian Civil and Administrative Tribunal (VCAT), which would appear to support some form of common access point and information storage standard for all Victorian jurisdictions. Among the benefits of this proposal would be improved data and statistics.<sup>533</sup> The Committee accordingly urges the Government to ensure that record keeping and access standards are consistent across the Supreme, County and Magistrates' Courts.

Recommendation 32. That Recommendation 23 to Recommendation 31 apply to search warrants issued by judges of the Supreme and Country Courts under section 57(7) of the <i>Magistrates' Court Act 1989</i> .
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### ***Additional comments on the management of warrants***

A related issue was raised by the Fitzroy Legal Service (FLS), which advised the Committee that it experiences difficulties locating arrest warrants (for clients who fail to answer bail) and PERIN warrants. The Committee discusses this here because it is fundamentally an issue of record keeping.

Many of the FLS' clients can have "chaotic" criminal histories. In such cases, the FLS has found that locating outstanding warrants is "confusing" and "very difficult", reportedly because of the:

... unrecorded movement of warrants between the Court and the other police or prosecuting agencies who may hold them at any given time before being finally lodged with the [Victoria Police] Warrants Unit for central recording and filing. The sheriff's office does not file warrants within [the Warrants Unit] and as such, a search of the Warrants Unit will not locate these warrants.

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<sup>533</sup> Attorney-General's Justice Statement, May 2004, 44-45.

In the FLS' experience, the register of unexecuted warrants produced by Victoria Police:

...it is not a comprehensive list and so when we request a list from the Warrants Unit and get a negative response saying there are no outstanding warrants, that does not guarantee that there are not any number of warrants sitting at individual stations around Melbourne.<sup>534</sup>

... This is a cumbersome process which makes it very difficult for practitioners to ensure that their client (who may be homeless, difficult to contact, etc) goes through the process of having the matters disposed of through the court system.<sup>535</sup>

This is said to result in hardship for the FLS' clients:

...[I]n representing someone, it is often good to know what their offences are and what their pending offences are to best represent them. It also has the added disadvantage for clients in that if they feel they have overcome all their issues and have dealt with them in court and still have outstanding warrants that they are not aware of, and we are not aware of, at any moment they could be approached to have those warrants executed and hence have further legal proceedings. I think it is only fair that someone who is wanting to face the music and deal with their past should be able to have access to all the matters and have them dealt with in one go if they choose to, rather than having the constant fear of further proceedings coming against them.<sup>536</sup>

The FLS proposed the development of an electronic register:

of all police and PERIN court warrants regardless of where the hard copy warrant is located. This should be accessible to those involved in the process of executing the warrants, including practitioners on behalf of those on whom the warrants are to be executed, subject to any reasonable privacy or security constraints.<sup>537</sup>

The other flaw in the system of warrant procedure we have identified [is] that courts will occasionally issue warrants in error where someone is on summons and so if that takes place, our clients may be placed in custody until the unexecuted warrants have been relisted. That is really a matter for the courts to address in their procedures. Potentially that could also be addressed by a central register that has the status of criminal proceedings.<sup>538</sup>

The Committee is concerned by the FLS' account of its experiences, notwithstanding the lack of more detailed evidence to measure the scale of the problems described. It is clearly imperative that members of the community or their advocates are able to

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<sup>534</sup> William Crawford, Fitzroy Legal Service, *Minutes of Evidence*, 5 November 2004, 297.

<sup>535</sup> Fitzroy Legal Service, *Submission no. 35*, 4.

<sup>536</sup> William Crawford, Fitzroy Legal Service, *Minutes of Evidence*, 5 November 2004, 297.

<sup>537</sup> Fitzroy Legal Service, *Submission no. 35*, 5.

<sup>538</sup> William Crawford, Fitzroy Legal Service, *Minutes of Evidence*, 5 November 2004, 297.

obtain accurate information about proceedings pending against them, and that it should be clear and reasonably simple for them or their representatives to do so.

The Committee therefore asked Victoria Police to provide information about the type of warrants data that it records. Victoria Police responded as follows:

- most warrants executed by Victoria Police are not recorded in a comprehensive state wide collection. Information relating to warrants is contained in a “large number of small regional and other databases”;
- non-classified executions of search warrants of residential premises are recorded on the Victoria Police Law Enforcement Assistance Program database;
- the Special Projects Unit handles all surveillance device and telephone interception warrant applications for the whole of Victoria Police.<sup>539</sup>

The limited nature of information recorded by Victoria Police and the shortcomings of its data management systems have been acknowledged by the Chief Commissioner<sup>540</sup> and highlighted by other institutions, such as the Office of Police Integrity (OPI)<sup>541</sup> and the Drugs and Crime Prevention Committee of the Parliament of Victoria.<sup>542</sup> The OPI issued a report on the Law Enforcement Assistance Program (LEAP) database in 2005. It noted that there are over 200 separate databases in use and recommended that they should be consolidated into a Force-wide information system.<sup>543</sup>

The Committee notes that following the 2005 OPI report, the Government has agreed to replace the LEAP database. The Committee recommends that the new database should be capable of recording data relating to the application for and execution of all warrants by Victoria Police.

Recommendation 33. That the replacement for the Law Enforcement Assistance Program database includes the capability to record data about the application and execution of all warrants (excluding covert warrants) by Victoria Police.

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<sup>539</sup> Letter, Victoria Police Corporate Strategy and Performance Director Jenny Peachey to Committee Research Officer, 12 September 2005.

<sup>540</sup> Office of Police Integrity, *Investigation into Victoria Police's Management of the Law Enforcement Assistance Program (LEAP) (OPI LEAP Report)*, 1, 10.

<sup>541</sup> *OPI LEAP Report*, footnote 540.

<sup>542</sup> Victorian Parliament Drugs and Crime Prevention Committee, *Inquiry into Crime Trends, Fifth Report*, October 2002.

<sup>543</sup> *OPI LEAP Report*, footnote 540, 9–13.

The Committee also believes that there should be a central electronic repository for information about all warrants issued in Victoria, accessible to any individual named in the warrant, or their representatives. The Committee considers that the registers maintained by issuing Courts are logically more comprehensive than the information held by applicant agencies. Different agencies hold records of different warrants. Court registers, on the other hand, record all warrants issued, including search, seizure, arrest, remand, imprisonment, detention and the hundreds of thousands of penalty enforcement warrants issued annually.<sup>544</sup> Using the court registers as the central repository for warrants data is also consistent with the principle that warrants are at all times court documents and thus courts are the most appropriate source of information.

Such a central database could be created from the records of the Supreme, County and Magistrates' Courts. Entries could be automatically generated by issuing officers in the three courts through the use of appropriately linked electronic forms and standard information types. This would not necessarily duplicate the work of the search warrants Register discussed in previous pages, as the system could be designed to generate entries for both the general repository of warrants and the search warrants Register from the single set of data used to issue each (search) warrant.

The Committee considers that the general database should contain sufficient information to enable the identification and location of warrants relating to a particular individual, such as the names of individual/s subject to the warrant, applicant and issuing officer; the type and date of issue of the warrant; and the legislative basis for the warrant.

Access to the warrants database could be authorised by a provision similar to section 18(4) of the *Magistrates' Court Act 1989*,<sup>545</sup> appropriately amended to allow access by individuals named in the relevant warrant.

The Committee believes that the technical and policy aspects of this issue are ripe for consideration by the Government as part of the Attorney-General's plans to integrate data collection across the justice system.

Recommendation 34. That all Victorian warrants that are not covert warrants be recorded in a central warrants database that is accessible by individuals named in the warrant, or their legal representatives. That as part of its plans to improve the capacity of Victorian courts to collate and collect data, the Government considers how to develop such a database from existing warrants data recorded by the Supreme, County and Magistrates' Courts.

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<sup>544</sup> *Magistrates' Court Act 1989* s 57(2).

<sup>545</sup> Section 18(4) states that "a party to a proceeding may inspect without charge that part of the register that relates to that proceeding".

Recommendation 35. That the database contain sufficient information to enable the identification and location of warrants relating to a particular individual, such as the names of individual/s subject to the warrant, applicant and issuing officer; the type and date of issue of warrant; and the legislative basis for the warrant.

## Period of validity of a search warrant

The maximum life of Victorian search warrants is determined either by statute or by the decision of the issuing justice. Victorian provisions stipulate various periods of validity for search warrants once issued. In evidence to the Committee, Magistrate Bowles remarked that expiry provisions are “all over the place”.<sup>546</sup> This was another area that Victoria Police indicated caused confusion and required improved consistency.<sup>547</sup>

The Magistrates’ Court helpfully provided some examples of the different validity periods, which the Committee has supplemented with its own research.

Warrant must include an expiry date:

- up to three days: *Fisheries Act 1995* s 103(4).
- no later than seven days: *Building Act 1993* s 231B(4)(f); *Firearms Act 1996* s 146(3); *Prostitution Control Act 1994* s 63(4)(c); *Surveillance Devices Act 1999* s 33(3)(f); *Wildlife Act 1975* s 59C(3)(f); *Transport Act 1983* s 129H; *Medical Practice Act 1994* s 93A(3)(f); *Pharmacy Practice Act 2004* s 129(4)(f).
- no later than 28 days: *Agricultural Industry Development Act 1990* s 51A; *Fair Trade Act 1999* s 122(3)(d); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* s 71(3)(d); *Road Safety Act 1983* s 128(6)(e); *Prevention of Cruelty to Animals Act 1986* s 21A(4)(d); *Prostitution Control Act 1984* s 61L(3)(d); *Police Regulation Act 1958* s 86W(3)(d); *Tobacco Act 1987* s 36F(3)(d).
- “not exceeding 30 days”: *Terrorism (Community Protection) Act 2003* s 8(3)(g).
- “within one month”: *Drugs, Poisons and Controlled Substances Act 1981* s 81(3).
- “at the end of the period of 1 month” after issue or earlier on execution: *Confiscation Act 1997* s 97H(2).

<sup>546</sup> Magistrate Jennifer Bowles, Magistrates’ Court of Victoria, *Minutes of Evidence*, 20 October 2004, 271.

<sup>547</sup> Victoria Police, *Submission no. 25*, 6.

- no specified limit: *Crimes Act 1958* ss 92, 317, 465; *Confiscation Act 1997* s 79; *Business Franchise (Tobacco) Act 1974* s 15A; *Forests Act 1958* s 83; *Gambling Regulation Act 2003* ss 2.5.21, 2.5.39. Relevant prescribed warrant forms in each case are also silent about the period of validity of the warrant.

The general rules in the *Magistrates' Court Act 1989* and the associated search warrant general form<sup>548</sup> do not contain any provisions about the life of warrants.

The Committee is concerned at the range of time limits, in particular the lack of explicit expiry date in some provisions.

### ***Absence of explicit stipulation of expiry time***

Dr. Steven Tudor characterised the lack of a time provision in the most commonly used Victorian search warrant provision as a “major weakness”.<sup>549</sup> The Committee agrees. On their face, statutory provisions that do not impose time limits appear to justify a search for an indefinite time. This is inconsistent with the principle that warrants should authorise the minimum necessary invasion of privacy. Indeed, it is less restrictive than the temporal provisions of some general warrants, such as that contained in section 67 of the *Summary Offences Act 1953* (SA), which remain in force for six months, or less if specified in the warrant.<sup>550</sup>

The courts have provided some guidance on this question. At common law, it appears that where no express time limit is specified for a warrant, one must be implied:

It would be intolerable for an authority to enter premises to search to be unlimited in time. A Justice would normally assume that a warrant to search for stolen goods would be executed as promptly as was practicable and reasonable. If that was not possible or not desired, the warrant, if issued, should be revoked or surrendered.<sup>551</sup>

That quote is taken from the case of *R v Applebee*, in which it was held that a search and seizure conducted one month after the issue of the warrant was unlawful because it had not been executed within a reasonable time.<sup>552</sup>

However, more recently, the Supreme Court of South Australia held that the implication of a reasonable time for the execution of a warrant could be inferred in *Applebee* because the authorising provision contained no stipulation about the duration of the warrant. The court, which was concerned with an arrest warrant, found

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<sup>548</sup> *Magistrates' Court (General) Regulations 2000* Schedule 5, Form 15.

<sup>549</sup> Dr. Steven Tudor, *Submission no. 25*, 2 - 3.

<sup>550</sup> *Summary Offences Act 1953* (SA) s 67(3).

<sup>551</sup> *R v Applebee* (1995) 79 A Crim R 554, 6.

<sup>552</sup> *R v Applebee* (1995) 79 A Crim R 554.

that the inclusion in the warrant provision of a stipulation that the warrant remained in force until executed constituted a time limit, which was sufficient for the court to find that the passage of 24 years between the issue and execution of the warrant did not invalidate the warrant.<sup>553</sup>

The Magistrates' Court told the Committee that "[s]ubject to the nature of the investigation, it would be anticipated that warrants would be executed as soon as practicable after they have been issued"<sup>554</sup> but considered it "appropriate that time limits be introduced in respect of the life of all search warrants".<sup>555</sup> Given the importance of the interests that are affected by warrants, the Committee strongly agrees.

The Committee notes that its predecessor made a similar finding in the Inspectors' Powers Inquiry. The Committee of the 54<sup>th</sup> Parliament recommended that statutes conferring search warrant powers on authorised officers should contain "a sun-set clause on warrant validity" as part of a suite of common protections.<sup>556</sup> The Government supported in principle a set of protections, including "that it be clear ...when [a search warrant] expires", and agreed to further consider whether the protections should be included in legislation or left to the issuing magistrate to specify.<sup>557</sup> In late 2004, the Attorney-General advised the Committee that his Department "encourages other Government Departments to develop new laws in relation to inspection powers in a manner that is consistent" with the Government response to the Inspectors Powers Inquiry Report.<sup>558</sup>

The Committee interprets these comments to indicate Government support for clear limits on inspection powers but is concerned by the ambiguity implicit in the Attorney-General's letter.<sup>559</sup> The Committee has considered its preceding discussion in light of this and the exclusion of police and Sheriff powers from the Inspectors' Powers Inquiry. Accordingly, the Committee supports its predecessor's recommendation in relation to explicit expiry times and extends it to all warrant powers.

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<sup>553</sup> *Loveridge v Commissioner of Police (SA)*, (2004) SASC 195. The case concerned an arrest warrant. The court found in favour of the subject of the warrant for reasons beyond the scope of this discussion.

<sup>554</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 275.

<sup>555</sup> *Ibid.*

<sup>556</sup> Law Reform Committee, *Inspectors' Powers Report*, Recommendation 44, 173.

<sup>557</sup> Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee's Final Report on The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*, 11 June 2003, 14-15.

<sup>558</sup> Letter, Attorney-General to Committee Chairman, 1 November 2004.

<sup>559</sup> The ambiguity arises from the Attorney-General's statement in his letter that his Department encourages other areas of government to develop relevant laws in a manner consistent with the Government's commitment to consider whether time limits and other protections should be enshrined in legislation or left to the discretion of issuing magistrates.

The Committee's recommendation on this issue appears at the conclusion of its discussion on time periods, at page 145.

### ***Appropriate periods of validity***

The different expiry periods in existing Victorian provisions would appear to reflect both the *ad hoc* nature of the development of some warrant powers and the operational context in which some of the powers are exercised. For example, longer periods such as that under section 81 of the *Drugs, Poisons and Controlled Substances Act 1981* may be necessary to ensure that appropriate personnel and other resources are available to the applicant agency to execute the warrant, or to devise the best approach to the execution of a warrant in a complex, potentially changing and/or dangerous situation. On the other hand, shorter periods would appear to be justified in relation to telephone applications given the urgency that is a precondition in such cases.

There have been efforts to improve the consistency of time limits, as part of broader model provisions used by some agencies, for example the 11 medical practitioner registration Acts overseen by the Department of Human Services.

The Committee received evidence about potential time limits. Commenting on section 465 of the *Crimes Act 1958*, Dr. Steven Tudor argued that limits should be clear but reasonable and that warrants of a similar nature be consistent unless there is good reason for variation.<sup>560</sup>

The Magistrates' Court supported consistent time periods if possible but emphasised the importance of considering the views of various actors in the warrant process. The Court also advocated different timelines for telephone applications and other applications made to the Court.<sup>561</sup>

Darren Palmer suggested that the diversity of needs for different warrants to address different situations could be addressed by using scaled time periods, possibly with mechanisms for renewal or extension of the warrant.<sup>562</sup>

The Committee believes that in principle expiry periods should be consistent and should constitute the shortest amount of time that is reasonably necessary to execute the warrant. Inconsistent periods should be capable of objective justification by the agency that uses the particular warrants.

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<sup>560</sup> Dr. Steven Tudor, *Submission no. 25*, 2-3.

<sup>561</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 275.

<sup>562</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 327. Dr. Tudor also suggested the possibility of extensions in situations of "reasonable need": Dr. Steven Tudor, *Submission no. 25*, 2 - 3.

The Committee’s recommendation on this issue appears at the conclusion of its discussion on time periods, at page 152.

The Committee has explored options for specific expiry periods by comparing current Victorian time limits with other jurisdictions.

### Ordinary warrants

Where it is proposed to search for and, if found, to seize evidence relating to an offence, urgency would be assumed.<sup>563</sup>

In New South Wales, section 20 of the *Search Warrants Act 1985* provides a uniform time frame within which search warrants are to be executed. Warrants expire when the first of three events occurs: the passage of 72 hours from the time of issue (which can be extended by a further 72 hours);<sup>564</sup> withdrawal by the issuing authorised justice; or execution.

The Magistrates’ Court pointed out that such a regime is significantly different from the situation in Victoria, most obviously because:

Apart from warrants issued pursuant to the Fisheries Act and telephone warrants for tracking devices obtained under the *Surveillance Devices Act*, none of the other warrants which are frequently issued by the Court provide for warrants to cease to have effect after 72 hours.<sup>565</sup>

The Court suggested that accordingly “Parliament is going to have to critically evaluate the current provisions in Victoria”.<sup>566</sup>

The 72/144 hour limit is shorter than other jurisdictions with consistent expiry periods. Warrants under the Commonwealth Crimes and Customs Acts are valid for up to the end of seven days after the day that the warrants are issued.<sup>567</sup> Dr. Steven Tudor felt that such a limit would appear to be a reasonable imposition on warrants issued under section 465 of the *Crimes Act 1958*.<sup>568</sup>

The seven day period was recommended by the Gibbs Committee’s Review of Commonwealth Criminal Law, which concluded that the period “would make a

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<sup>563</sup> *R v Applebee* (1995) 79 A Crim R 554, 6.

<sup>564</sup> *Search Warrants Act 1985* (NSW) ss 20(4), (5).

<sup>565</sup> Magistrates’ Court of Victoria, *Minutes of Evidence*, 20 October 2004, 271.

<sup>566</sup> *Ibid.*

<sup>567</sup> *Crimes Act 1914* (Cth) s 3E(5A); *Customs Act 1901* (Cth) s 198(3A).

<sup>568</sup> Dr. Steven Tudor, *Submission no. 25*, 2-3; *Minutes of Evidence*, 5 November 2004, 291.

reasonable allowance for unexpected eventualities in respect of warrants not issued by telephone.”<sup>569</sup>

The Gibbs Committee also influenced the Queensland Criminal Justice Commission’s review of police search and seizure powers, although it seems to have ultimately been persuaded by the recommendation of the Queensland Criminal Code Review Committee for a period of seven days, or longer as detailed in the warrant. The Commission recommended that non-telephone warrants be valid for seven days or longer if specified in the warrant and the issuing authority is satisfied that the nature of the investigation justifies the longer period.<sup>570</sup>

The Queensland Parliamentary Criminal Justice Committee that reviewed the CJC report rejected the CJC’s recommendation as it felt that the seven day limit applicable in the Commonwealth was appropriate. It proposed a validity period not exceeding seven days.

The *Police Powers and Responsibilities Act 2000* (Qld) stipulates that warrants are valid for seven days,<sup>571</sup> or for 72 hours in the case of evidence believed likely to be taken to a place within 72 hours.<sup>572</sup>

The distinction in the Queensland legislation is interesting. Dr. Steven Tudor raised the 72 hour availability criterion in his evidence to the Committee:

There is some confusion in that the conditions of the issue of a Section 465 warrant referred to evidence being available in 72 hours. Does that mean the warrant is available for 72 hours? It is simply not clear on its face.<sup>573</sup>

In fact, the Committee’s research indicates that none of the warrant provisions that include actual or potential availability of evidence within 72 hours as a ground of issue restrict the life of warrants so issued to 72 hours. However, the Committee does not consider that there is, or should, be a nexus between the likely presence of evidence within 72 hours and the possibility of a 72 hour time limit on the warrant. The Committee therefore believes that the temporal validity of such warrants should be consistent with that of other types of search warrants.

In relation to other non-telephone warrants, the Committee agrees with the importance of consistency and a degree of operational flexibility. Having examined Victorian and other jurisdictions and evidence received, the Committee considers that:

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<sup>569</sup> Review of Commonwealth Criminal Law, *Fourth Interim Report*, No. 319 of 1990 (AGPS) (*Gibbs Committee Fourth Interim Report*), paragraph 39.5.

<sup>570</sup> Criminal Justice Commission, *Review of Police Powers and Responsibilities*, Recommendation 8.13, 396.

<sup>571</sup> *Police Powers and Responsibilities Act 2000* (Qld), s72(1).

<sup>572</sup> S72(2).

<sup>573</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 291.

- In principle, search warrants should be valid until the end of seven days from the time of issue, or the time of execution, or withdrawal, or cancellation, whichever event occurs first.
- Expiry periods of longer than seven days should be included in warrant provisions only when a longer period can be objectively justified by the agency seeking prolonged validity. In such cases, there should be a presumption that warrants expire at the end of seven days. This will allow agencies to continue to have available warrants with longer validity where there is good cause to do so while reinforcing the principle of seven day validity.
- Expiry periods longer than seven days should be explicitly enumerated in warrant provisions and the warrants themselves, and should not exceed 30 days. This is consistent with transparent law-making and the present upper limit of Victorian search warrant provisions.

Application of this principle would require amendments to a large number of existing Acts and in a number of cases would reduce the current period for execution from 30 days (or similar), to seven days unless a specific case has been made out for a particular warrant, for up to a 30 day period. It would also place time limits on execution of warrants currently issued under Acts which do not have these provisions.

The Committee recommends that those Acts which contain warrant provisions which have no set expiry period be reviewed and amended as a matter of urgency. The Committee noted above its concern that warrants issued under the Crimes Act, which make up the largest number of warrants issued, currently have no limit on the time for execution. Evidence heard by the Committee highlighted this particular omission in expiry period as being a significant concern.

The Committee acknowledges that the changes recommended here represent a significant departure from the existing situation, but believes that such change is necessary. In the Committee's view a situation where a warrant cannot be executed within the 30 day period should be a rare occurrence. Where such a situation does arise, a fresh application for a warrant can be made.

Recommendation 36. That legislation be amended, to apply an expiry period of seven days, with the possibility of an extension to a maximum of 30 days where this can be justified, to all warrants issued.

Recommendation 37. That Acts which currently contain warrant provisions without an expiry period be amended as a matter of urgency.

Recommendation 38. That all such legislative amendment include a requirement that the expiry period is clearly marked on the warrant.

## Telephone warrants

Victorian law imposes no separate time limits on telephone warrants. In contrast, the *Search Warrants Act 1985* (NSW) prescribes that they expire 24 hours after issue. Under the Commonwealth Crimes and Customs Acts, telephone warrants are subject to the same seven day expiry period as ordinary warrants.<sup>574</sup> However, the Gibbs Committee concluded that “a much shorter duration for such a warrant is called for” because of the special nature of telephone warrants. Ultimately, the Committee recommended a 48 hour limit.<sup>575</sup> Similarly, the Criminal Justice Commission recommended a maximum of 48 hours for Queensland warrants, considering that “the more limited the period, the more it will discourage use of this facility except in urgent circumstances”.<sup>576</sup> The Queensland legislation, however, mirrors the Commonwealth in that it does not prescribe a separate expiry period for telephone warrants.

The Committee notes that the two explicit telephone warrant provisions in Victorian legislation - section 81 of the *Confiscation Act 1997* and section 10 of the *Terrorism (Community Protection) Act 2003* - both require the existence of urgent circumstances. Like the Commonwealth and Queensland reviews, the Committee believes that a more restrictive period of validity is justified for telephone warrants as a way of ensuring that applications are indeed confined to urgent situations. The Committee considers that a 24 hour maximum period is appropriate.

<p>Recommendation 39.                      That legislation be amended to impose a limit on telephone warrant validity until the end of a maximum of 24 hours from the time of issue, or the time of execution, or withdrawal, or cancellation, whichever event occurs first.</p>
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<sup>574</sup> *Crimes Act 1914* s 3R(4); *Customs Act 1901* s 203M(4).

<sup>575</sup> *Gibbs Committee Fourth Interim Report*, paragraph 39.4.

<sup>576</sup> Criminal Justice Commission, *Review of Police Powers and Responsibilities*, Recommendation 8.12, 393.

# CHAPTER FIVE - WARRANTS FOR SEARCH AND SEIZURE - EXECUTION

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## Introductory comments

The execution of search warrants has been identified ... as an area of high risk. These risks include not only the obvious opportunity for violent confrontation but also the ever increasing risk of civil litigation. The Force has been extremely active promoting best practice in the area of search warrant issue and execution and at this time believes that, as far as police are concerned, there are no immediate issues that need to be addressed in regard to them.<sup>577</sup>

The searching of premises and the seizure of property/exhibits is a high risk policing function, considering the opportunities and temptations police face when locating stolen goods, illicit drugs and/or money. From time to time, the credibility and integrity of police actions have been questioned.<sup>578</sup>

The execution of search warrants is perhaps the most critical stage in the warrant cycle. Warrants are an effective evidence-gathering method but “the very nature of this power and its exercise...represent significant risks to individual freedoms”. As the quotations above indicate, it is at the execution phase that the effects on and risks to individual rights crystallise, through the actions of officials executing the warrant and of individuals otherwise present in the premises to be searched. Courts have therefore insisted on strict compliance with the terms of the warrant and together with government have imposed a range of legal and practical safeguards to preserve the interests of those who are affected by warrants and those who execute them.

In *Crowley v Murphy* Lockhart J of the Federal Court provided some general guidance on the procedures that police should follow when executing search warrants:

- First, like most statutory powers, the power of enforcing a search warrant must be exercised in good faith.
- Second, the power must be exercised for the purpose for which it was conferred. It must not be used for some ulterior purpose. If, for example, it is used to punish the

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<sup>577</sup> Victoria Police, *Submission no. 21, Inspectors' Powers Inquiry*, 6.

<sup>578</sup> NSW Police Service, *Education Package for Video/Audio Recordings of Search Warrants and Planned Operations*, quoted in *R v Jiminez* [2000] NSWCCA 390, paragraph 5.

person whose premises are to be entered and searched, plainly that is an ulterior purpose.

- Third, the power must be exercised fairly, having regard to all the circumstances.
- Fourth, it must be exercised having regard to those affected by its exercise and, in particular, to the rights of those persons.
- Fifth, the officer executing the warrant must strictly follow the directions contained in it and must not exceed the limits of the authority it confers.<sup>579</sup>

In this section, the Committee considers the following issues that were referred to by stakeholders, in the order that they generally arise during the execution of a search warrant:

- Time of entry
- Multiple entries
- Information provided to persons present at the target premises
- Use of force during the execution of search warrants
- Videorecording the execution of search warrants
- Presence of an independent person during the execution phase
- Seizure of items under a search warrant
- Legal professional privilege

## Time of entry

Execution of a search warrant late at night or early in the morning ('night time execution') has a potentially greater impact on civil liberties than execution during the day:

Execution of warrants by night has a particular dread to it. The pre-dawn bang on the door has association with the activities of authoritarian states and their oppressive instrumentalities. ...[Searches] in the small hours intimidate sleeping people. They alarm children and neighbours. They have the potential to be particularly humiliating, as individuals struggle from their beds in various states of undress or unpreparedness.<sup>580</sup>

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<sup>579</sup> *Crowley v Murphy* [1981] 34 ALR 496.

<sup>580</sup> *Carroll v Mijovich* (1991) 58 A Crim R 243, 254 (Kirby P).

As the New South Wales Court of Appeal also noted in the judgement from which the above quote is taken, there are clearly legitimate reasons for executing search warrants outside 'normal' hours, such as urgency or intelligence assessments that suggest a need for the greater degree of surprise that is generally offered by night-time entry. The subject raises issues of the appropriate balance between individual rights, efficiency and consistency.

### ***The law in Victoria and other jurisdictions***

At common law, it was thought that a search warrant could not be executed at night.<sup>581</sup> Richard Fox suggests that this is the cause of the common occurrence of an explicit power to allow a search day or night in statutory provisions authorising the issue of search warrants.<sup>582</sup> However, in *Walker v West*, Rath J held that there was no general rule that a search warrant must be executed during the day. He found that the police members who execute the warrant have discretion to decide the time of execution, although the timing must not be "oppressive".<sup>583</sup>

Victorian legislative regulation of the practice is inconsistent. In modern day Victoria, the majority of search warrant provisions are silent about the time of execution, including sections 92 and 465 of the *Crimes Act 1958*. Of those that are not, section 317(9)(a) of the *Crimes Act 1958* authorises any member of the police force named in the warrant to enter and search relevant locations at any time for evidence of an offence connected with explosive substances. Similarly, section 81(3) of the *Drugs, Poisons and Controlled Substances Act 1981* provides that "a member of the police force to whom the warrant is addressed may at any time or times by day or night" carry out acts authorised by the warrant.

Other Acts use one of two effectively identical formulations that implicitly grant issuing officers discretion to stipulate execution times but do not appear to restrict permissible times:

- Warrants must state whether entry is authorised to be made at any time of the day or night or during stated hours of the day or night<sup>584</sup>
- Warrants must state whether entry is authorised to be at any time or during stated hours<sup>585</sup>

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<sup>581</sup> Hale, *History of the Pleas of the Crown*, Vol 2, 150, quoted in Richard Fox, *Victorian Criminal Procedure 2005* (2005), 128.

<sup>582</sup> Richard Fox, *Victorian Criminal Procedure 2005* (2005), 128.

<sup>583</sup> *Walker v West* [1981] NSWLR 570, 582.

<sup>584</sup> Examples include the *Police Regulation Act 1958* ss 86W(3)(c), 100A(3)(c); *Prostitution Control Act 1984* ss 61L(3)(c), 63(4)(b); *Fair Trading Act 1999* s 122(3)(c).

A more restrictive provision is found in section 342(2) of the *Crimes Act 1958*, which stipulates that search warrants issued in connection with extraterritorial offences must not be executed at night, although a magistrate can authorise execution at night, or during specified hours of the night.

Other jurisdictions impose varying levels of control over the time of execution. The New South Wales government recognised that night searches are more intrusive than those conducted during daytime and legislated to require specific authorisation of all night time searches conducted pursuant to all NSW warrants.<sup>586</sup> Thus under the *Search Warrants Act 1985* (NSW), a warrant must be executed by day, which is defined as being between 6am and 9pm, unless the issuing officer authorises execution at night. Such authorisation can only be given when the issuing officer is satisfied that there are reasonable grounds for doing so. Reasonable grounds include where the sought items are likely to be available, or other relevant circumstances exist, only at night; where it is considered safer to execute the warrant at night; and where night time execution would ensure the presence of an occupier, thereby avoiding the need for forcible entry.<sup>587</sup>

Queensland's Criminal Justice Commission review of police powers considered that the detail in section 19 of the New South Wales Act provided "a helpful guide to police and issuing authorities while allowing some flexibility". In its 1993 report, the Commission recommended that generally no warrant should be executed between 10pm and 6am unless specifically authorised by an issuing officer, and that legislation should outline circumstances in which such authorisations could be granted.<sup>588</sup> The *Police Powers and Responsibilities Act 2000* (Qld) permits execution at night but requires that in such cases the search warrant lists the hours when the target place may be entered.<sup>589</sup>

Legislation in Western Australia and the ACT includes similar presumptions in favour of day time searches. Warrants must be executed by day (the ACT legislation provides that warrants cannot be executed between 9pm and 6am of the following day) unless the issuing officer authorises night time searches.<sup>590</sup> In the ACT authorisation can be granted only where the issuing officer is satisfied that it would not be practicable to conduct the search at another time or it is necessary to prevent loss, concealment or destruction of evidence.<sup>591</sup> Search warrants issued in the

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<sup>585</sup> Examples include: *Firearms Control Act 1996* s 146(3)(e); *Wildlife Act 1975* s 59C(3); *Medical Practice Act 1994* s 93A(3)(e); *Surveillance Devices Act 1999* s 33(3).

<sup>586</sup> Peter Collins, Attorney-General, *Search Warrants Amendment Bill 1991* (NSW), *Second Reading Speech*, 13 November 1991, 4425.

<sup>587</sup> *Search Warrants Act 1985* (NSW) ss 19(1) - 19A(1).

<sup>588</sup> Criminal Justice Commission, *Report of a Review of Police Powers in Queensland, May 1993*, 399-402, at 402.

<sup>589</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 73(d).

<sup>590</sup> *Criminal Code 1911* (WA) s 711; *Crimes Act 1900* (ACT) s 194(9).

<sup>591</sup> *Crimes Act 1900* (ACT) s 194(9).

Commonwealth and in the ACT must indicate the time during which execution is authorised.<sup>592</sup>

### ***Evidence considered by the Committee***

Victoria Police indicated that, in practice, most warrants are executed “in reasonable hours” and with notice.

Many warrants are executed on commercial premises and can only be done so during business hours. Many warrants are executed on private premises and these are usually done in the morning when it is expected that the occupiers will be home.<sup>593</sup>

The Magistrates’ Court reviewed the NSW Act and suggested that any decision to adopt a similar scheme in Victoria to govern the time of execution should include consideration of whether there is evidence of unjustified execution of search warrants at inappropriate times.<sup>594</sup>

The Committee also heard one comment that specifically concerned night time execution. Victoria Legal Aid stated that in its experience, warrants were commonly executed at night or early in the morning, apparently without good cause:

The problem we see in our mental health practice, our Children’s Court practice and our practice involving intellectually disabled persons is that when these people are raided at night, often unnecessarily — there seems to be no reason for it other than the police members’ shifts — they do not have access to support services, particularly housing services and clinical services, meaning that they often remain in custody overnight unnecessarily.<sup>595</sup>

VLA was unable to provide data to substantiate the above comments or additional allegations about other aspects of the conduct of individuals and organisations with warrant powers. The Committee discusses this general lack of evidence during its analysis of the use of force while executing warrants,<sup>596</sup> where it notes that there appear to be very few complaints about inappropriate conduct by executing officials. The Committee believes that the recommendations it has developed to assess the extent of the incidence of unjustified use of force during the execution of search warrants<sup>597</sup> should enable a similar evaluation of the timing of searches.

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<sup>592</sup> *Crimes Act 1914* (Cth) s 3E(5)(f); *Crimes Act 1900* (ACT) s 194(5)(f).

<sup>593</sup> Victoria Police, *Submission no. 25*, 14.

<sup>594</sup> Magistrate Jennifer Bowles, Magistrates’ Court of Victoria, *Minutes of Evidence*, 20 October 2004, 275.

<sup>595</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 20 October 2004, 196.

<sup>596</sup> The discussion begins at p 169 below.

<sup>597</sup> See Recommendation 52 to Recommendation 55, at p171-182 below.

## Conclusions

Local complaints data is, however, only one source for consideration in law reform initiatives. The Committee believes that it is axiomatic that night time searches carry more potential for harm than those carried out at other times. The Committee agrees with Victoria Legal Aid that the day-night execution distinction is one of “the key areas where people are at risk” in respect of search warrants.<sup>598</sup> Other States and some Victorian legislation have recognised the potential risks and considered them serious enough to require a positive intervention by an issuing officer to authorise night time execution of a search warrant, which in the words of the NSW Court of Appeal in *Carroll v Mijovich*, “are to be conserved to cases of the clearest, proved necessity”.

Victorian legislation is therefore inconsistent, both internally and with other jurisdictions. The Committee is not aware of any reason justifying this situation and believes that consistency can be improved without sacrificing operational effectiveness, through the wider application of the controls that are already present in some Victorian legislation, in particular section 342(2) of the *Crimes Act 1958*.

Accordingly, the Committee concludes that all Victorian warrant provisions should limit the execution of searches to day time hours, unless the applicant can demonstrate reasonable grounds for night time execution. The types of information required to rebut the presumption against night time searches in New South Wales and the ACT seem to be appropriate models for Victorian legislative reform that will preserve the legitimate interests of law enforcement officials in night time searches.

Recommendation 40. That legislation be amended to require the execution of search warrants during day time hours unless the applicant can demonstrate reasonable grounds justifying night time execution.

Recommendation 41. That the Government consider defining reasonable grounds to include circumstances such as those listed in section 19A(1) of the *Search Warrants Act 1985* (NSW) and section 194(9) of the *Crimes Act 1900* (ACT).

## Searches that continue from day into night

An operational difficulty with the day-night distinction arises in situations where a search warrant authorises entry by day but the search extends beyond that period. In one such case in which the search concluded at night time, the Victorian Supreme Court upheld a decision that the part of the search that occurred after sunset was unauthorised and thereby constituted a trespass.<sup>599</sup>

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<sup>598</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 20 October 2004, 196.

<sup>599</sup> *Myer Stores Ltd v Soo* [1991] 2 VR 597, 631.

However, searches of premises are inherently unpredictable and it is therefore often impossible to estimate how long will be required to execute warrants. Clearly there is a need for an approach that both upholds the protective rationale at the heart of the day-night distinction and does not unduly impinge on the operational capacity of agencies that execute the warrants. The Criminal Bar Association considered this question:

[The search proceeds as authorised during the day and] all of a sudden it is night time, 'We have to stop now', but they are only part way through because they have found a lot more than they thought was going to be there. It would be absurd to say in those circumstances, 'Sorry, your time is up. You are out of here'. There needs to be flexibility but that needs to be something that has as part of it the usual protections – that an extension is given by an appropriate issuing officer that permits further time to be allocated ... [and that] some record [is] kept that an extension has been given to allow the search to continue.<sup>600</sup>

The CBA proposal for extension by issuing officers is designed to ensure that searches can proceed beyond the period originally authorised, that the decision to extend is made independently of the executing officials after a review of the reasons said to justify more time to conduct the search, and that records are kept of the decision.

The CBA was the only Victorian stakeholder to comment on this issue. The Committee was also assisted by the debate that has been occurring in New South Wales on the same topic, which has arisen as part of that State's review of the *Search Warrants Act 1985* (NSW).

Courts in New South Wales have ruled that in the case of warrants authorising searches by day, acts permitted by the warrant must be completed before the 9pm limit that applies under the *Search Warrants Act 1985* (NSW).<sup>601</sup> New South Wales law enforcement agencies sought legislative amendments to allow them a discretion to continue day searches beyond 9pm. The proposal was opposed by the Legal Aid Commission and the Law Society, who argued that the power to make a decision to extend a search should rest with issuing officers. The New South Wales Council for Civil Liberties agreed but suggested that where possible, the evidence should be secured on the premises and the search should resume during the subsequent day period.<sup>602</sup>

In evidence to the Committee, the New South Wales Attorney-General's Department indicated that operational reasons for continuing a day search beyond the 9pm limit could justify an extension, and that the preferred mechanism would be via approval by

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<sup>600</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 169.

<sup>601</sup> *R v Winter and Fuchs* [1999] District Court of NSW (Unreported, 16 June 1999).

<sup>602</sup> Pauline Wright, New South Wales Council for Civil Liberties, *Minutes of Evidence*, 1 September 2004, 66.

an issuing officer.<sup>603</sup> The results of the NSW review had not been made public at the time this report was prepared.

The Committee believes that the authorised period for the execution of a search warrant should be capable of extension where reasonable grounds justifying the continuation of a search exist. To preserve the protections inherent in search warrants, the Committee considers that the power to grant extensions should be limited to issuing officers and that records should be kept of the decision and the reasons supporting it. These conclusions should be viewed in light of Recommendation 40 above.

Recommendation 42. That legislation be amended to provide for the extension of the period during which the execution of search warrants is authorised, where an issuing officer is satisfied that reasonable grounds exist for doing so. That the Government considers defining reasonable grounds to include circumstances such as those listed in section 19A(1) of the *Search Warrants Act 1985* (NSW) and section 194(9) of the *Crimes Act 1900* (ACT).

Recommendation 43. That legislation allow executing agencies to request extensions by telephone or other appropriate means of communication.

Recommendation 44. That legislation require that written reasons for the request for an extension of the authorised period be included in the report to the court on the execution, and that those reasons and the issuing officer's decision to grant or refuse the request be included in the record of warrant proceedings retained by the court.

## Multiple entries

The English case of *R v Adams* is authority for the common law rule that, in the absence of contrary statutory provisions, only one entry is allowed on a search warrant.<sup>604</sup> Most Victorian warrant provisions are silent about the number of times executing officials may enter a premises on the same warrant. Many authorise entry

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<sup>603</sup> "If for some reason your operation is going to go over the 9 o'clock limit you can say to the authorising justice that you are going to go over by an hour or two; I think that is something that could be accommodated": Attorney-General's Department of NSW, *Minutes of Evidence*, 1 September 2004, 46.

<sup>604</sup> *R v Adams* [1980] QB 575. That case, which is cited by Richard Fox and in *Criminal Law Victoria*, concerned a search warrant issued under the English *Obscene Publications Act 1959*: Richard Fox, *Victorian Criminal Procedure 2005* (2005), 128; *Criminal Law Victoria* s 92.55.

within the period that the warrant is valid.<sup>605</sup> In contrast, section 81(3) of the *Drugs, Poisons and Controlled Substances Act 1981* authorises entry “at any time or times”.

Dr Steven Tudor argued that:

[i]t should also be made clear in legislation that a search warrant permits only one execution (or single entry), within the time period within which the warrant may be executed. That is to say, a warrant should cease to be executable either upon its first execution or at the expiry of the time for execution, whichever comes first. A person should not be subject to an unpredictable number of searches.<sup>606</sup>

Dr Tudor expanded on this in subsequent oral evidence to the Committee. He argued that in principle, further entries to the same premises should only be possible under a fresh warrant, although he accepted the need for multiple entries in particular circumstances.<sup>607</sup> Such situations could include investigations of drug offences or where there is an unanticipated need for expert assistance with the execution of the warrant and it is not immediately available.

The Criminal Bar Association also felt that “once a warrant is executed, it is spent. [T]here should [not] be any right of re-execution under a warrant”.<sup>608</sup>

The Committee did not receive evidence about this issue from other Victorian stakeholders.

The competing interests in this situation were summarised by the Gibbs Committee in its review of Commonwealth criminal law. On the one hand, officers executing a search warrant must be able to leave the premises with the intention of returning a very short time later under the original warrant, and it should not matter in circumstances where one officer remains on the premises. On the other hand, an occupier who has been subjected to an entry and search under a warrant should not face subsequent entry and search on the same warrant. The Committee struck a balance by proposing that legislation should clarify the right of police officers to leave and re-enter (by force if necessary) premises on the same warrant within an hour, or longer if agreed in writing with the occupier, if the occupier is informed of the officers’ intention to return and re-enter the premises.<sup>609</sup>

The Gibbs Committee proposals were largely adopted and promulgated in section 3J(2) of the *Crimes Act 1914* (Cth), which authorises executing officials to complete

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<sup>605</sup> Examples include the *Firearms Act 1996* s 146; *Nurses Act 1993* s 88A; *Fair Trading Act 1999* s 122; *Medical Practice Act 1994* s 93B.

<sup>606</sup> Dr. Steven Tudor, *Submission no. 34*, 3.

<sup>607</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 291.

<sup>608</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 170.

<sup>609</sup> [Reference to Gibbs Committee], discussed in Criminal Justice Commission, *Report of a Review of Police Powers in Queensland*, May 1993, 431.

the execution of a search warrant under the Act after suspending execution and leaving the premises for up to an hour, or such longer period as is agreed to in writing by the occupier.

The Criminal Justice Commission, which reviewed the Gibbs Committee recommendations, reached a narrower conclusion. It recommended that legislation should specify that the power to enter under a search warrant includes a power of re-entry where the re-entry is “so associated in time or circumstance that it may be regarded as part of the initial entry and search authorised by the warrant”.<sup>610</sup> Although the Queensland Parliamentary Criminal Justice Committee endorsed the recommendation,<sup>611</sup> the search warrant provisions of the *Police Powers and Responsibilities Act 2000* (Qld) appear to include a general right of re-entry.<sup>612</sup>

The issue has also arisen in New South Wales, where one solution being considered is to require telephone authorisation of re-entry.<sup>613</sup> The New South Wales Council for Civil Liberties suggested that a new warrant should be sought to authorise re-entry. The Council argued that this should not be overly demanding because information discovered during the search that was considered to justify the need for re-entry would presumably be sufficient to obtain a new warrant, and the application could be via telephone given the likely urgency of the need to re-enter the premises. The Committee understands that no decision had been made at the time of writing this report.

While the Committee would like to have received more evidence on this subject, it has formed some preliminary conclusions. In principle, a blend of the CJC and Commonwealth schemes would appear to meet operational demands and preserve the rights of occupiers or other persons present on the premises. Thus multiple entries on the same warrant should be authorised but subject to two restrictions. First, re-entry should be possible only within a short period of time after the departure of officials executing the warrant. The length of time is a matter for the Government to determine in consultation with stakeholders and could be varied by written agreement of persons present on the premises, although any subsequent withdrawal of such consent may affect the validity of re-entry and any consequent action. Second, re-entry should only be permitted in situations where the second and subsequent entries are so closely connected to the purpose of the original entry that they can be legitimately regarded as part of the execution of the original warrant. To effect re-entry after the period contemplated by the first proposed restriction, or for purposes other

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<sup>610</sup> Criminal Justice Commission, *Report of a Review of Police Powers in Queensland, May 1993*, 432.

<sup>611</sup> Queensland Parliamentary Criminal Justice Committee, *Report 23B: Review of the Criminal Justice Commission's Report on Police Powers in Queensland Volumes I - III*, 30 August 1994, 107 - 108.

<sup>612</sup> Section 74(1) authorises entry. Schedule 4 defines the power to enter a place as including the power to re-enter.

<sup>613</sup> Attorney General's Department of NSW, *Minutes of Evidence, 1 September 2004*, 44.

than those contemplated by the second proposed restriction, officials should apply for a fresh warrant, by telephone if appropriate.

In all cases of re-entry, officials executing the warrant should keep records of reasons for re-entry, any agreement or opposition by the occupier and logs of departure, re-entry and other relevant times. These should be included in the report back to the court.

Recommendation 45. That legislation be amended to allow multiple entries on the same warrant only where re-entry is within a short period of time and so closely associated with the original entry that it can reasonably be regarded as part of the execution of the original warrant.

Recommendation 46. That officials executing search warrants keep records pertaining to all re-entries, including reasons for re-entry, any agreement or opposition from occupiers of the premises and logs of departure, entry and other relevant times. That such records be included in the report to the court on the execution, and, together with the issuing officer decision to grant or refuse a request for a fresh warrant, be included in the record of warrant proceedings retained by the court.

## Information provided to persons present at the target premises

It is important that an occupier whose premises are to be searched pursuant to a warrant be informed of his or her rights and of the extent of the search authorised by the warrant.<sup>614</sup>

An important aspect of warrant powers and procedures is the requirement to give the occupiers or other persons present at the place to be searched information about the search. The purpose of the requirement is to provide affected persons with a reasoned basis for the infringement of their rights that the warrant authorises and that the search will result in. This safeguard is thereby designed to provide a certain level of accountability and transparency in the use of the powers.

This issue was considered by the Law Reform Committee of the 54<sup>th</sup> Parliament in the Inspectors' Powers Inquiry. In its report, the Committee referred to the obligation to provide an occupier with details of the search warrant as one of the "common protections" found in Victorian warrants legislation. The Committee noted that the obligation was not consistently present in Victorian Acts and concluded that it and other protections should be included "unless there are compelling reasons for their

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<sup>614</sup> Criminal Justice Commission, *Report of a Review of Police Powers in Queensland, May 1993*, 418.

exclusion”.<sup>615</sup> As no reasons were provided to the Committee, it recommended that search warrant provisions contain “common protections including but not limited to announcement before entry, and that a copy of the warrant is to be given to the occupier”.<sup>616</sup>

In its response to the Inspectors’ Powers Report, the Government stated that it supported the recommendation in principle and would “give further consideration as to what matters need to be put in legislation or whether they are best left to the issuing magistrate to specify”.<sup>617</sup>

In this inquiry, the Committee asked stakeholders to comment on the implementation of the recommendation. Its discussion here is concerned with the provision of details of the warrant to the occupier. The Committee also explores the directly related issue of whether other information should also be provided to the occupier.

## **Victorian law**

Victorian law regulates what information is to be provided to occupiers, although this is another area in which there is legislative inconsistency. While the *Magistrates’ Court Act 1989* is silent on this issue, some legislation includes an obligation to give occupiers certain information. Usually, officials executing the warrant are required to identify themselves to the occupier and give him or her a copy of the warrant.

Section 93C of the *Medical Practice Act 1994* is typical:

### **93C. Copy of warrant to be given to occupier**

If the occupier or another person who apparently represents the occupier is present at premises when a search warrant is being executed, the person or persons named in the warrant must—

(a) identify themselves to that person by producing their identification card for inspection by that person; and

(b) give to that person a copy of the execution copy of the warrant.

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<sup>615</sup> Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons* (30 May 2002) (*Inspectors’ Powers Report*), 171-173.

<sup>616</sup> *Ibid*, Recommendation 43, 173.

<sup>617</sup> Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee’s Final Report on The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*, 11 June 2003, 14.

Other Acts contain identical or very similar requirements.<sup>618</sup> Some legislation requires that where the occupier is not at the place to be searched, officials must provide the information to another person present, regardless of whether they represent the occupier.<sup>619</sup>

The *Confiscation Act 1997* is a notable exception to this trend. It authorises three types of search warrants: search warrants governed by sections 79-97; search and inspection warrants governed by sections 97A-97L; and search and seizure warrants governed by sections 97M-97W. Provisions regulating search and inspection and search and seizure warrants require executing officials to:

- identify themselves to the occupier and give him or her a copy of the warrant, or;
- if the occupier is not present, identify themselves to another person present and give him or her a copy of the warrant, or;
- if they believe that no-one is present at the target premises, or they have given a copy of the warrant to a person at the premises who is not the occupier, give the occupier a copy of the warrant “as soon as practicable but not more than seven days after the warrant is executed”.<sup>620</sup>

Uniquely in Victoria, section 83 of the Act requires that occupiers be provided with a notice specifying the name of the applicant and issuing officer, date and time of issue, address or description of the target premises and a summary of the nature of the warrant and the powers conferred by it. Police members executing the warrant must serve the notice on entry to the premises or as soon as practicable after entry or execution.<sup>621</sup> If the occupier or another person apparently aged 18 or over and in charge of the premises is not present on the premises, service may be postponed by the issuing officer for periods of up to six months if s/he is satisfied that there are reasonable grounds to do so.<sup>622</sup>

A standard occupier’s notice is contained in Schedule 2 of the *Confiscation Regulations 1998*. The Committee notes that the general information contained in the notice, and in the standard warrant forms on which it is based,<sup>623</sup> is significantly

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<sup>618</sup> *Firearms Act 1996* s 148; *Transport Act 1983* s 129J; *Taxation Administration Act 1997* s 79; *Police Regulation Act 1958* ss 86X(4), 100C; and the ten medical practitioner Acts that are modelled on the *Medical Practice Act 1994*.

<sup>619</sup> *Fair Trading Act 1999* s 124(2); *Fisheries Act 1995* s 103B(2); *Tobacco Act 1987* s 36H; *Prostitution Control Act 1984* s 61N(2).

<sup>620</sup> *Confiscation Act 1997* ss 97E, 97Q.

<sup>621</sup> *Ibid*, s 83(3).

<sup>622</sup> *Ibid*, ss 83(4)-(5).

<sup>623</sup> Schedules 1E-1F of the *Confiscation Regulations 1998* contain a form for search warrants issued under s 79-79A of the *Confiscation Act 1997*. This form is included in Appendix Eight.

clearer than Victorian principal warrant forms, such as those for warrants authorised under section 81 of the *Drugs, Poisons and Controlled Substances Act 1981*,<sup>624</sup> section 465 of the *Crimes Act 1958*<sup>625</sup> and the general form in the *Magistrates' Court General Regulations 2000* that is used in cases where statutes do not include a warrant form.<sup>626</sup> This greater clarity is partly attributable to the fact that the occupier's notice is addressed to the occupier or other relevant person and as such is presented in a more understandable way, whereas the warrant forms are addressed to officials of the agencies empowered to execute them.<sup>627</sup> The effect is that the information describing the *Confiscation Act 1997* warrants is likely to be easier for occupiers or other relevant persons to understand.

In addition, sections 84 and 84A of the *Confiscation Act 1997* preserve the right of the occupier to see the warrant that the occupier's notice is based on, by imposing disclosure duties on officials executing the warrants:

**84. Duty to show search warrant**

A member of the police force executing a search warrant must produce the warrant for inspection by an occupier of, or a person who is in charge of, the premises if requested to do so.

**84A. Duty to show seizure warrant**

A member of the police force executing a seizure warrant must produce the warrant for inspection by any person present during the execution of the seizure warrant, if that person— (a) has an interest in the property being seized; or (b) is in charge of the property being seized.

In contrast, some Acts, including the *Magistrates' Court Act 1989*, do not contain an obligation to provide persons present at the target location with information. Notable among these are the Acts containing the most commonly used Victorian warrant powers and procedures.<sup>628</sup>

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<sup>624</sup> *Drugs, Poisons and Controlled Substances Act 1981* Schedule 10.

<sup>625</sup> *Crimes (Search Warrant) Regulations 2004* Schedule 5.

<sup>626</sup> *Magistrates' Court General Regulations 2000* Schedule 5, Form 15. The forms in this and the previous two footnotes are included in Appendix Five of this report.

<sup>627</sup> Nevertheless, the warrant forms referred to in footnote 623 above are also more informative than their counterparts referred to in the preceding three footnotes.

<sup>628</sup> *Crimes Act 1958* ss 92, 465 (provisions governing warrants issued under sections 317(9) 341 and 466 are also silent); *Drugs, Poisons and Controlled Substances Act 1981* s 81. Note that the *Firearms Act 1996* does include the obligation: see footnote 618 above. Other legislation that is silent on this issue includes the *Infertility Treatment Act 1995*; the *Casino Control Act 1991* and the *Accident Compensation Act 1985*. Section 63 of the *Prostitution Control Act 1984* allows inspectors to obtain a warrant but, unlike section 61N of the same Act, contains no obligation to provide information to occupiers or others at the target premises. It is not clear whether the obligation in section 61N extends to the warrant provisions in section 63.

To some extent this omission is vitiated by agencies' practices. For example, the Victoria Police Manual requires that, where applicable, the search commander must:

ensure that the occupier's copy of the warrant or authority is served on the owner, occupier or person believed to be in charge of the premises at the first opportunity after entry. If no one is present to receive the occupier's copy, [it is to be] file[d] with the execution copy, pending any request from the owner or occupier.<sup>629</sup>

The Manual also requires that executing officials endorse the execution copy with the name and address of the person on whom the copy was served, or a description of the person if they have refused to provide those details.<sup>630</sup>

Similarly, the Department of Primary Industries has developed guidelines and training manuals that cover how its authorised officers apply for and execute warrants. This is consistent with the Department's statement in its submission that it intends to amend (as the opportunities arise) its portfolio legislation that does not include an obligation to give a copy of the warrant to the occupier.<sup>631</sup>

### ***Other jurisdictions***

Sections 83, 84 and 84A of the *Confiscation Act 1997* are substantively identical to sections 15 and 16 of the *Search Warrants Act 1985* (NSW). The New South Wales provisions are analogous to the general provisions on search warrants in the Victorian *Magistrates' Court Act 1989*, in that they generally apply to all NSW search warrants.

The occupier's notice provisions of the NSW Act were one of the major innovations of the legislation when it was adopted in 1985. The NSW Attorney-General at the time explained:

This notice will be given to every occupier of premises subject to search under a valid warrant. The notice will contain details concerning the reason for the search and the nature of the powers conferred by the warrant. The language of the notice will be plain so as to enable the occupier to check that the warrant has been properly issued. The notice will contain advice in relation to

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<sup>629</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 9.4.

<sup>630</sup> *Ibid.*

<sup>631</sup> Most of the legislation for which the Department is responsible already contains the obligation. One Act (*Petroleum (Submerged Lands) Act 1998*) that does not require service of an occupier's copy of a warrant is part of a national regulatory regime and therefore cannot be amended independently by the Victorian Government. DPI committed to raise the issue at the appropriate inter-jurisdictional Ministerial forum: Department of Primary Industries, *Submission no. 11*, 3.

seeking legal assistance should the occupier be dissatisfied with any aspect of the search. The occupier will keep this notice.<sup>632</sup>

Forms five and six of the *Search Warrant Regulations 1999* (NSW) contain standard occupier's notices. The layout and content of these documents are clear and appear to be significantly more understandable and less intimidating to occupiers than copies of the warrant or even the occupier's notice under the *Confiscation Act 1997*. Whereas the Victorian occupier's notice is a series of boxes and a page of unbroken text, the NSW forms' use headings<sup>633</sup> and plain language to explain what the occupier and others involved in the execution of the search warrant may and may not do.<sup>634</sup> The Committee is impressed by the accessibility of these forms.<sup>635</sup>

The NSW Act also retained the requirement to show the original warrant and both this requirement and the requirement to provide an occupier's notice are preserved in sections 67 and 69 of the (unproclaimed) *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

In Queensland, police officers executing search warrants on occupied premises must give a copy of the warrant to the occupier and a pro forma statement summarising the person's rights and obligations under the warrant, or if the occupier is not present, leave a copy of those documents in "a conspicuous place". If officers reasonably suspect that giving the person the copy may "frustrate or otherwise hinder the investigation or another investigation", they can delay providing the documents. The delay can last only for as long as they continue to have the reasonable suspicion and they or another officer involved in the investigation remain in the vicinity of the place being searched for the purpose of keeping it under observation.<sup>636</sup>

The statement of rights and obligations must include:

- the nature of the powers a police officer may exercise under the warrant;
- that the senior police officer present during the search must, as soon as reasonably practicable, identify themselves;
- that the occupier may ask another police officer present for certain identification particulars; and

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<sup>632</sup> Terrence Sheahan, Attorney-General, *Miscellaneous Acts (search warrants) Amendment Bill* [NSW], *Second Reading Speech*, 27 February 1985, 3860.

<sup>633</sup> The headings are: Expiry, Force, The powers given by the search warrant, Issue details, Basis for the issue of the warrant, Challenging the issue of the warrant or conduct of the search, Limitations on the powers conferred, Inspection.

<sup>634</sup> For example, the form begins "IMPORTANT INFORMATION FOR OCCUPIERS CONCERNING THE SEARCH WARRANT", explains the occupier's rights and how to challenge the warrant.

<sup>635</sup> The forms are included in Appendix Nine of this report.

<sup>636</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 75.

- the effect of the Act's provisions governing receipts for seized property, the right to inspect seized documents, the limitation on the period of detention for search, the return of seized things and the right of persons to be given a copy of information in the register.<sup>637</sup>

The Criminal Justice Commission that reviewed Queensland Police several years before these provisions were enacted believed that there were a number of ways of providing occupiers with information about their rights and the permissible boundaries of the search. After considering requirements to provide an occupier's notice, a copy of the warrant or both documents, the Commission concluded that the most appropriate approach was to provide a copy of the search warrant "which is drafted in simple language and includes the rights of the occupier".<sup>638</sup> The Commission was particularly influenced by the need to minimise the administrative burden, which it felt would be greater if multiple forms were required to be provided to occupiers. The Commission recommended that a copy of the search warrant be provided to the occupier on entry to the premises, or left in a conspicuous place where the premises are unoccupied.<sup>639</sup> The Parliamentary Criminal Justice Committee's Review of the Commission's report endorsed the recommendation.<sup>640</sup>

In the Commonwealth sphere, section 3H of the *Crimes Act 1914* mirrors some Victorian provisions in requiring executing officers to identify themselves to an occupier present at the premises being searched, or to a person apparently representing them there, and "make available" to such person a copy of the warrant. During the review of the Bill that included that provision by the Commonwealth Senate Scrutiny of Bills Committee, it was suggested that the requirement should be replaced by an obligation to provide an occupier's notice, similar to the NSW regime.<sup>641</sup> The Commonwealth Minister of Justice felt that the result would be:

another clerical imposition with very limited practical benefit. The search warrants will contain [sufficient] details [to provide] direct evidence of the ambit of the warrant. The warrants will be well-designed and in a clear form to aid the understanding of all involved, the executing officer, the issuing officer, the occupier and the courts.<sup>642</sup>

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<sup>637</sup> Ibid, schedule 10, section 4.

<sup>638</sup> Criminal Justice Commission, *Report of a Review of Police Powers in Queensland, May 1993*, 418.

<sup>639</sup> Ibid.

<sup>640</sup> Queensland Parliamentary Criminal Justice Committee, *Report 23B: Review of the Criminal Justice Commission's Report on Police Powers in Queensland Volumes I - III*, 30 August 1994, 101.

<sup>641</sup> Dr. Jill Hunter, senior law lecturer, University of New South Wales, *Submission no. 9, Commonwealth Senate Scrutiny of Bills Committee review of Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1993*, 59.

<sup>642</sup> Letter, Commonwealth Minister of Justice Duncan Kerr to Chairman, Commonwealth Scrutiny of Bills Committee, *Commonwealth Senate Scrutiny of Bills Committee review of Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1993*, 184.

As discussed in previous Chapters, the warrant provisions that the Justice Minister foreshadowed in the above comments were endorsed by the Criminal Bar Association as substantially simpler and clearer than the principal existing Victorian provisions.<sup>643</sup> The CBA representative who attended the Committee's hearings, Stephen Shirrefs, a barrister who often deals with Commonwealth search warrants, told the Committee that in his experience, "because [they] are so specific as to what is and what is not authorised, it is possible early on in the search to determine whether or not what has occurred is within power or beyond power".<sup>644</sup>

### ***Evidence received by the Committee***

As noted in the introduction to this report, the Attorney-General responded to the Committee's request for information about the implementation of particular recommendations contained in the Inspectors' Powers Report. In relation to the present issue, he advised the Committee that the Department of Justice "encourages other Government Departments to develop new laws...in a manner that is consistent with the Government response" to recommendation 43 (which proposed that search warrant provisions contain common protections including announcement before entry and the provision of a copy of the warrant to the occupier).<sup>645</sup>

This policy was reflected in the submission from the Department of Primary Industries (DPI), in which the DPI stated that it intended to amend legislation to bring it into line with the protections contemplated in recommendation 43.<sup>646</sup> DPI also noted that like the Government in general, its efforts to improve the consistency of its portfolio legislation are based on the *Fair Trading Act 1999*.<sup>647</sup> The Committee recalls that under that Act, where the occupier is not at the place to be searched, officials must provide the information to another person present, regardless of whether they represent the occupier.<sup>648</sup>

The Office of the Chief Electrical Inspector and the Nurses Board of Victoria also confirmed that the legislation relevant to their activities contained the protections set out in recommendation 43 of the Inspectors' Powers Report.<sup>649</sup> Similarly, the

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<sup>643</sup> Criminal Bar Association, *Submission no. 12*, 4-6.

<sup>644</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 162.

<sup>645</sup> Letter, Attorney-General to Committee Chairman, 1 November 2004.

<sup>646</sup> Department of Primary Industries, *Submission no. 11*, 3.

<sup>647</sup> Department of Primary Industries, *Submission no. 11*, 3. The Act is "applied with a measure of consistency across Government".

<sup>648</sup> *Fair Trading Act 1999* s 124(2). The development and use of the Act as a model for inspectors' powers and obligations was discussed by the Law Reform Committee of the 54<sup>th</sup> Parliament in the Inspectors Powers Report, p247 - 259.

<sup>649</sup> Office of the Chief Electrical Inspector, *Submission no. 2*; Nurses Board of Victoria, *Submission no. 6*.

Department of Human Services stated that inspectors appointed by other regulatory boards under various health practitioner legislation are subject to the same obligations.<sup>650</sup>

A major concern raised by Victoria Legal Aid (VLA) in its submission was a perceived lack of knowledge about their rights among individuals affected by warrants. To remedy this, VLA argued that:

officials entering premises should be required to tell occupiers about their rights under the system. Something such as standard and multicultural brochures setting out the rights and responsibilities of occupiers of premises should be introduced.<sup>651</sup>

VLA felt that the occupier's notice provisions of the *Search Warrants Act 1985* (NSW) would be an "attractive way" of communicating with occupiers and other affected persons when the warrant is executed, and suggested some general community education about "people's rights under the warrant system"<sup>652</sup>.

Witnesses in New South Wales told the Committee that although the occupier's notice is relatively clear, understanding it nevertheless pre-supposes and requires a certain level of literacy, which many members of the community may not possess. Jane Sanders, a solicitor with the Shopfront Youth Legal Centre, noted that many of her clients were in that position. She suggested that there should be a requirement for officials executing the search warrant to explain a person's rights verbally in addition to serving the occupier's notice.<sup>653</sup> Daniel Noll of the NSW Attorney-General's Department made a similar point:

[In relation to] the ability of a person to understand the process or even read the process - for instance, they could be totally *compos mentis*, but simply not read English and not understand what the police officer is saying to them. Or they might not be able to read the occupier's notice, which is in English.<sup>654</sup>

However, Mr Noll indicated that police have measures in place to address this situation:

The submission [to the review of the Search Warrants Act] from the police administration was that its officers are trained to recognise these sorts of circumstances in all matters, so similarly there are safeguards or standing operating procedures in place to deal with those situations as they arise. Certainly in [relation to] rights [in other areas] ... there are all those sorts of

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<sup>650</sup> Department of Human Services, *Submission no. 19*, 4.

<sup>651</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 193.

<sup>652</sup> *Ibid*, 194. As the Committee discussed in Chapter Four (at p116), VLA also argued that, before a search warrant can be issued, an applicant should justify to the issuing officer why notice of an intended search ought not to be given to an occupier.

<sup>653</sup> Jane Sanders, Shopfront Youth Legal Centre, *Minutes of Evidence*, 31 August 2004, 18.

<sup>654</sup> Daniel Noll, NSW Attorney-General's Department, *Minutes of Evidence*, 1 September 2004, 53.

safeguards where if a person is recognised as being mentally ill, has an intellectual disability or does not speak English there are provisions for calling the person's guardian or in their absence an independent responsible person, or if the person is a foreign national, calling in a translator or a person from the foreign national's embassy or consulate. There are all those sorts of rights, but they only flow when a person has been arrested. In between there is another grey area where you have to rely on the standard operating procedures of police, and they are trained to recognise these situations because it is in their best interests to recognise them at an early stage and deal with them.<sup>655</sup>

## **Discussion and conclusions**

The Committee considers that legislation prescribing the information to be provided to an occupier or other persons should be consistent, unless there are compelling reasons otherwise. With the exception of covert warrants, where giving the occupier details of the warrant may undermine the purpose of the warrant, the Committee was not presented with any such compelling reasons. The Committee discusses communicating with the targets of covert search warrants in Chapter Seven.<sup>656</sup>

In relation to the content of information to be provided, the Committee is concerned by the lack of clearly expressed detail contained in most Victorian search warrants. It is important that individuals affected by a search warrant understand their rights and obligations under the warrant: when they do not, the protection intended to be conferred by the obligation to provide information is not available to them and an important safeguard in the warrants regime is undermined. Having considered the occupier's notice provisions of the *Confiscation Act 1997* and the *Search Warrants Act 1985* (NSW) and the evidence it has received, the Committee therefore considers that information should include, in plain language, the following details:

- why the warrant has been issued;
- who issued the warrant, where and when;
- who will execute the warrant;
- when the warrant may be executed and when it will cease to be valid;
- what is permitted under the warrant;
- what persons in the place subject to the warrant must do and the consequences for not doing so;
- the rights of persons in the place subject to the warrant; and

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<sup>655</sup> Ibid.

<sup>656</sup> The discussion begins at p 278 below.

- what persons in the place subject to the warrant may do if they are dissatisfied with any aspect of the warrant or its execution.

The Committee invites the Government to consider what other details should be included in an occupier's notice, and to have regard to section 83 of the *Confiscation Act 1997* and section 15 of the *Search Warrants Act 1985* (NSW) for that purpose.

The Committee agrees with Victoria Legal Aid that information should be accessible to people from different cultural or linguistic backgrounds and accordingly believes that agencies should ensure that the above information is available in languages that reflect the range of individuals who are subject to search warrants. Agencies should carry blank forms in other languages to serve on any individuals from non-English speaking backgrounds who are encountered during the execution of the warrant.

The Committee suggests that it may be appropriate for the Department of Justice to produce a single template of information and circulate it to agencies with warrant powers.

The Committee also considers that agencies should ensure that their officials who execute warrants are able to assist persons at the place to be searched who do not understand the written information.

Moreover, as every person in the place to be searched will be affected by the execution of the warrant, the Committee believes that if there is no one present who appears to be in control of the place, the above information should be provided to any person in the place (but not necessarily every person).

A review of the law and evidence detailed above leads the Committee to conclude that the information should be provided either in a copy of the warrant or in an occupier's notice. In the latter case, it would be necessary to preserve a right to see the warrant, as that rather than the occupier's notice is the authority for the search.

Including the information in the warrant has a number of advantages. It would avoid the need for the additional, duplicative and ongoing administrative work involved in producing an occupier's notice. It would also promote increased clarity within the warrant, and is arguably appropriate given the role of the warrant in the search.

On the other hand, an occupier's notice is specifically addressed to the individuals whose rights are curtailed by the warrant. Recipients could be provided with the original, unlike the current practice of serving sometimes unsigned copies of the warrant. Moreover, the Committee believes that the resulting administrative burden can be greatly reduced by developing a template form as discussed in the preceding paragraphs and computerising the issue of warrants and occupier's notices: data could thus be keyed in once by the issuing magistrate (or the applicant where a draft warrant is attached to an application) and be inserted into both documents. The Committee also notes that occupier's notices have been introduced into Victoria by the *Confiscation Act 1997* and have been a part of search warrants law in New South

Wales for 20 years, where they have recently been retained after a comprehensive review of that law.

On balance, therefore, the Committee considers that officials executing search warrants should be required to serve an occupier's notice at the time of entry or as soon as practicable thereafter, unless there are compelling reasons not to do so, and should be required to show on request a copy of the warrant to any person in the place subject to the warrant. The Committee believes that the Government should determine the most appropriate approach to suspending or vacating the obligation to serve an occupier's notice, and in doing so should have regard to section 83 of the *Confiscation Act 1997* and section 15 of the *Search Warrants Act 1985* (NSW) and any amendments that follow the latter Act's review.

Recommendation 47. That legislation be amended to require agencies to provide information about search warrants to persons in the place to be searched, and that such information must include, in plain English and other appropriate languages the following:

- (a) why the warrant has been issued;
- (b) who issued the warrant, where and when;
- (c) who will execute the warrant;
- (d) when the warrant may be executed and when it will cease to be valid;
- (e) what is permitted under the warrant;
- (f) what persons in the place subject to the warrant must do and the consequences for not doing so;
- (g) the rights of persons in the place subject to the warrant;
- (h) what persons in the place subject to the warrant may do if they are dissatisfied with any aspect of the warrant or its execution.

Recommendation 48. That agencies ensure that their officials who execute warrants are trained to assist persons at the place to be searched who do not understand the written information provided pursuant to Recommendation 47.

Recommendation 49. That, if there is no one present during the execution of a search warrant who appears to be in control of the place being searched, the information pursuant to Recommendation 47 be provided to any person in the place.

Recommendation 50. That legislation be amended to require officials executing search warrants to serve an occupier's notice in accordance with Recommendation 47 at the time of entry or as soon as practicable thereafter, unless there are compelling reasons not to do so, and to show on request a copy of the warrant.

A related issue is the requirement in many Acts containing warrant provisions that officials identify themselves when executing search warrants. This issue was discussed in depth in the Inspectors' Powers Report,<sup>657</sup> which noted identification procedures are "part of the set of 'safeguard' provisions in the Acts which ensure that individuals are aware of [officials'] identity and powers".<sup>658</sup> The Committee of the 54<sup>th</sup> Parliament recommended that legislation should require inspectors to produce identification automatically when they exercise powers of entry.<sup>659</sup> In its response, the Government:

support[ed] in principle that when someone is to be subject to inspection powers they should be able to know that the person exercising those powers does so with authority. To that end, legislation should require that inspectors identify themselves before exercising inspection powers. The precise nature of that identification may need to vary with circumstances to take account of practicalities and privacy issues. For example, the most effective form of identification may not always be the production of a card.<sup>660</sup>

The Committee did not receive any evidence that merited revisiting its predecessors conclusions or recommendation on this matter. Given their relevance to the present inquiry, the Committee accordingly endorses them, with a qualification to accommodate cases where identification may not be appropriate (such as searches conducted pursuant to a covert search warrant), and extends them to all agencies and officials with warrant powers.<sup>661</sup>

Recommendation 51. That legislation require officials executing search warrants to produce identification at the time of entry, or as soon as practicable thereafter, unless there are compelling reasons not to do so.

## Use of force during the execution of search warrants

The Committee heard allegations that agencies use inappropriate force during the execution of search warrants. The Committee first outlines the relevant law and procedure and then discusses the claims.

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<sup>657</sup> *Inspectors' Powers Report*, 95-100.

<sup>658</sup> *Ibid*, 99.

<sup>659</sup> *Ibid*, Recommendation 19, 100.

<sup>660</sup> Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee's Final Report on The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*, 11 June 2003, 9.

<sup>661</sup> For the avoidance of doubt, the Committee limits its conclusion here to Recommendation 19 of the Inspectors' Powers Report.

## ***The law and procedure on the use of force***

Search warrants issued in Victoria automatically authorise the person to whom they are directed to “break, enter and search” relevant premises.<sup>662</sup> For warrants to search for people, the relevant premises is any place where a person named or described in the warrant is suspected to be. Those warrants also authorise the arrest of such persons. For warrants to search for things, the pertinent premises is any place named or described in the warrant. Those warrants authorise the arrest of any person apparently having possession, custody or control of the article, thing or material and require that such items be taken before the Magistrates’ Court to be dealt with.<sup>663</sup>

Some specific purpose legislation formulates the authority to use force slightly differently, for example providing that authorised persons may “enter the premises specified in the warrant, if necessary by force”,<sup>664</sup> or “enter, by force if necessary, the premises or part of the premises named or described in the warrant”,<sup>665</sup> or “enter, if need be by force, the land or premises named in the warrant”,<sup>666</sup> or “if it is reasonably necessary to do so, break open any receptacle in or on the premises for the purpose of [the] search”.<sup>667</sup> In some cases, these different formulations are used in the same Act.<sup>668</sup> Other legislation is silent, relying on the general authority in the *Magistrates’ Court Act 1989* provisions.<sup>669</sup> The Committee is not aware of any reason justifying these inconsistencies.

At common law, the authorisation of entry if necessary by force “would usually justify the use of such force as is reasonably necessary to break open a door to gain access to the premises”.<sup>670</sup>

It appears to the Committee that the various different formulations of the authority to use force are more the result of historical accident than conscious intention. The result is a mix of inconsistent and potentially confusing provisions.

The Committee notes with interest that the warrant provisions that govern searches conducted by the Director, Police Integrity include a clear procedure for the use of force during the execution of search warrants. Section 86X of the *Police Regulation*

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<sup>662</sup> *Magistrates’ Court Act 1989* s 78(1)

<sup>663</sup> *Ibid.*

<sup>664</sup> *Fair Trading Act 1999* s 122(2)(a), *Prostitution Control Act 1994* s 61L.

<sup>665</sup> *Surveillance Devices Act 1999* s 33(2)(a).

<sup>666</sup> *Drugs, Poisons and Controlled Substances Act 1981* s 81(3)(a).

<sup>667</sup> *Confiscation Act 1997* s 85.

<sup>668</sup> Compare, for example, sections 85 and 97B(2)(c) of the *Confiscation Act 1997*.

<sup>669</sup> For example, *Medical Practice Act 1994*, *Infertility Treatment Act 1995*, *Firearms Act 1996*. Interestingly, the search warrant provisions in section 63 of the *Prostitution Control Act 1994* do not mention force, in contrast to the search warrant powers of section 61L in the same statute. See footnote 664 and accompanying text above.

<sup>670</sup> *Crowley v Murphy* (1980) 52 FLR 123, 129 (Franki J).

*Act 1958*, which is titled “Procedure for Executing Warrant”, stipulates that the person executing the warrant must:

- announce that s/he is authorised by the warrant to enter the premises;
- if the person has been unable to obtain unforced entry, give any person at the premises an opportunity to allow entry to the premises, unless s/he believes, on reasonable grounds that immediate entry to the premises is required to ensure the safety of any person; or that the effective execution of the search warrant is not frustrated; and
- identify himself or herself to the occupier of the premises, or in their absence another person at the premises; and give them a copy of the warrant.

To ensure consistency and increase confidence in the actions of individuals and organisations with warrant powers, the Committee therefore believes that the *Police Regulation Act 1958* procedure should be used as a model for all Victorian warrant provisions.

Recommendation 52. That Victorian warrant provisions be amended to include a procedure that mirrors or is modelled on section 86X of the <i>Police Regulation Act 1958</i> .
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The use of force is extensively internally regulated by agencies. Every search conducted by members of Victoria Police is subject to multiple use of force controls contained in the Police Manual, which explicitly and implicitly emphasise that force must be carefully considered, necessary and appropriate in the circumstances. The Committee details these below to illustrate the efforts of Victoria Police to ensure that its search warrant powers are used appropriately.

Before the search:

- As well as being required to establish reasonable grounds for believing that the search is necessary, police members must establish that any force used is necessary and not disproportionate to the objective sought to be achieved.<sup>671</sup>
- All searches must be classified as Level 1, 2 or 3,<sup>672</sup> based on the risks involved, foreseeable resistance and the likelihood of force being required. Each

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<sup>671</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 1.

<sup>672</sup> Level one: entry likely to be granted, surprise entry not required and police presence identified; or entry is refused and none of the conditions in levels two or three exist.

classification is determined by a “thorough risk assessment incorporating intelligence gathered and consideration of all relevant factors” and must be the safest and most appropriate in the circumstances.<sup>673</sup>

- Reconnaissance of the target premises is to be undertaken to support an effective search plan for all Level 2 and 3 searches and where otherwise possible.
- Before seeking approval to conduct a search, a police member must attempt to determine the known history of the premises (if any), determine the identity and history of the occupants, complete a LEAP database check on the property to be searched and any known suspects and occupants.<sup>674</sup>
- The officer approving Level 2 and 3 searches must approve an Operation Order that includes a thorough risk assessment, reasonably foreseeable contingencies, and methods of entry and withdrawal from the premises. The authorising officer can require an Operation Order for level 1 searches.<sup>675</sup>

During the search:

- Police members must introduce and identify themselves as police and explain their purpose, use the minimum amount of force, where force is required, cause the least amount of damage necessary in the course of the entry and search, not unduly restrict the movement of occupants of searched premises and request admission before forcing entry, unless sound reasons exist for not doing so, and those reasons must be included in the Operations Order.<sup>676</sup>
- The commander of each search operation is required to continually assess the operation to ensure that only the minimum required force is used.<sup>677</sup>
- Where “an error occurs” while conducting a search, an Officer or Divisional Patrol Manager must attend the location and “take steps to alleviate any trauma or

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Level two: no threat posed to a third party or likelihood of a hostage situation and no armed resistance likely, evidentiary items may be readily destroyed, likelihood of offender fleeing or high probability of potentially hazardous materials or substances present.

Level three: probability of confrontation with a person who is armed or is reasonably suspected to be armed with a firearm or other lethal weapon; prior history of significant violence (including of mental disorder manifesting in violent behaviour); safety of a third party is at risk or high level of security present or hazardous entry likely (e.g., man traps), where specialist skills, equipment or entry techniques are required. Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 4.1.

<sup>673</sup> Ibid, section 1.

<sup>674</sup> Ibid, section 6.1.1.

<sup>675</sup> Ibid, section 5.3.

<sup>676</sup> Ibid, section 9.1.

<sup>677</sup> Ibid, section 9.2.

damage incurred”.<sup>678</sup> Where damage occurs during entry or search, the commander must contact an Officer or Divisional Patrol Manager before leaving the property. Any damage must be photographed. The Officer or Divisional Patrol Manager must attend and inspect the damage, discuss the matter with the owner or occupier where practicable and submit a report to the Divisional Manager in whose Division the search occurred. The Manual also advises police members that owners or occupiers may claim restitution for any loss or damage caused to property by police members due to actions undertaken in the course of duty.

- If the search results in injury or trauma, the search commander or officer present must facilitate appropriate medical care and notify the Ethical Standards Division.<sup>679</sup>
- If a search does not cause damage or injury, police members are to request the owner/occupier to acknowledge this on the rear of the search warrant prior to leaving the search scene. If the occupier refuses to do so, police members are required to follow an established procedure concerning damage to property.<sup>680</sup>

After the search:

- Where force is used by or against police, police members are required to record the details on the Use of Force Register. The Register is principally intended “to meet the safety needs of operational police and the community”. The information in the Register is said to facilitate the “identification of contemporary trends in the operational environment, particularly the safety of police and the community; development of training strategies and techniques to address identified risks; development of appropriate operational safety equipment; development of pursuit strategies and appropriate training”.<sup>681</sup>

The instructions in the Police Manual are reinforced by the practical education that all police members undergo. During the inquiry, the Committee attended a training session at the Victoria Police Academy and observed a Level 2 search exercise.<sup>682</sup> The Committee is grateful to Victoria Police for this opportunity. In a pre-exercise briefing for the Committee, police instructors explained that teaching has been centralised into one unit to promote consistency and tight control over the development and delivery of approved training. Training in tactical aspects of high risk warrants has been developed since 1993. Police educators told the Committee that an independent review of the training and feedback from trainees, local, regional and

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<sup>678</sup> Ibid, section 9.9.

<sup>679</sup> Ibid, section 11.2.

<sup>680</sup> Ibid, section 9.4.

<sup>681</sup> Ibid, section 4.

<sup>682</sup> Four members of the Committee and one member of staff attended the Victoria Police Academy on 15 July 2005.

international stakeholders supported the conclusion that the course is meeting its objectives.

The session raised two issues of potential concern to the Committee. The Committee heard anecdotal evidence during the observation of the execution of search warrants which suggested that some of the 'best practices' developed and taught through training courses had not been implemented operationally. No more information was provided about this allegation.

Concerns were also raised about an aspect of the classification of searches by level. The Committee heard suggestions that some search proposals that are initially classified as Level 2 are rejected, reclassified as Level 1 and then resubmitted and approved by an authorising officer. It was put to the Committee that such practices, which were described as problematic, are primarily a consequence of resource constraints: they were said to occur because of a lack of sufficiently trained personnel in particular police regions to execute Level 2 searches.

The Committee was unable to obtain further information on these issues and is therefore not in a position to reach any definitive conclusions. However, the Committee notes with concern that it appears that some Victoria Police procedures are not being thoroughly implemented due to resource pressures. Such a situation is clearly undesirable, regardless of the cause. The Committee therefore concludes that the Chief Commissioner of Victoria Police should ensure the availability of sufficient appropriately trained personnel to give effect to police procedures, in particular those that govern search warrants.

The Committee also makes a general observation that based on their viewing of the training session at the Police Academy, Victoria Police training procedures that relate to search warrants, are designed to promote best practice and are quite rigorous.

### **Non-police agencies**

Although many other agencies are empowered to execute search warrants, police training and skills in the use of force are recognised to be of particular value and police therefore frequently play a role in executing warrants issued to other agencies. As the Inspectors' Powers Inquiry Report detailed, some Acts require a police presence for the execution of search warrants,<sup>683</sup> while "many agencies automatically bring the police along when executing a warrant",<sup>684</sup> or in all cases (involving warrant and warrantless powers) where occupiers resist entry:

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<sup>683</sup> *Inspectors' Powers Report*, 180. The Committee referred to the *Accident Compensation Act 1985*, s240A, and the *Liquor Control Reform Act 1998*, s130.

<sup>684</sup> *Ibid*, 185.

Where the exercise of power involves force or physical interference it is carried out with the assistance of the police. It should be pointed out that this [...] would only occur in extreme and rare circumstances.<sup>685</sup>

We are not in the business of engaging in what might become a somewhat physical encounter. Our staff are not trained for that. I see that as an occupational health and safety issue, whereas the police are trained to act in the circumstances. Therefore, we prefer the police to effect entry on our behalf.<sup>686</sup>

Victoria Legal Aid believed that police should always assist searches:

[w]here the exercise of power involves force or physical interference with people or property.... Members of departments or agencies should never use force unless there is a need to protect oneself from risk of injury.<sup>687</sup>

The Law Reform Committee of the 54<sup>th</sup> Parliament considered that a mandatory assistance requirement was “generally inappropriate” as it would prevent Victoria Police prioritising requests for assistance. The present Committee ultimately considered it “desirable” that inspectors obtain the assistance of the police where entry and search was likely to involve force or interference with persons or property.<sup>688</sup> The present Committee has not received any evidence that casts any doubt on that conclusion.

The Committee does believe, however, that the Police Manual’s level of detail and rigour should constitute a minimum standard for the regulation of the power to use force to conduct a search. Although the Inspectors’ Powers Inquiry Report dealt with training of inspectors in the use of their powers, it did not specifically discuss agencies’ approaches to effecting entry and search and the use of force.<sup>689</sup> The Committee therefore does so here. It considers that all agencies whose personnel are involved in the execution of search warrants, with or without the assistance of the police, should require their personnel to comply with or exceed applicable Police Manual provisions on the use of force.

**Recommendation 53.** That agencies whose personnel are involved in the execution of search warrants require their personnel to comply with or exceed applicable provisions of the Victoria Police Manual on the use of force during searches of property.

<sup>685</sup> Department of Human Services, *Submission no. 33, Inspectors’ Powers Inquiry*, 5.

<sup>686</sup> Dr B Robinson, Environment Protection Agency, *Minutes of Evidence, Inspectors’ Powers Inquiry*, 12 December 2001, 53.

<sup>687</sup> Victoria Legal Aid, *Submission no. 19, Inspectors’ Powers Inquiry*, 6.

<sup>688</sup> *Inspectors’ Powers Report*, 32, 186.

<sup>689</sup> *Ibid*, 101-108.

## ***Allegations about the improper use of force***

Victoria Legal Aid (VLA) and the Victorian Aboriginal Legal Service (VALS) argued that Victoria Police Manual provisions on the conduct of searches are “not rigorously enforced”.<sup>690</sup> VLA emphasised that “obviously,...most police searches that take place are conducted entirely appropriately, with appropriate authority and with sometimes a quite appropriately sensitive approach to the occupier”.<sup>691</sup> However,

[a common complaint in VLA’s experience] is unnecessary or premature use of force against property and against the person, and the use of violence particularly. Even for fairly routine-type offences, householders are not given an opportunity to allow entry. Often forced entry is occasioned irrespective of the circumstances. This is not something that we hear every single day, but it is something that comes up routinely throughout the course of our operations. That is the no. 1 issue.

There are two limbs to this. One is where a warrant is obtained unnecessarily, where there is really no reason for the householder to refuse cooperation with police and where a warrant is seen as an unnecessary level of intrusion; and then, when the warrant is being executed, there is that issue of undue force on property and persons.

... We have heard reports of police officers coming through the windows of premises without even bothering to knock on the front door, in circumstances where they are searching for cannabis being grown in a pot out the back and things like that...<sup>692</sup>

VLA knows of cases where clients have unnecessarily had their door smashed, been thrown to the floor and handcuffed before they are even aware that there is a warrant. This has resulted in trauma for children.<sup>693</sup>

We also hear about unnecessarily rude and threatening behaviour by police and officers in communication with the subject of the warrant.<sup>694</sup>

VALS reported anecdotal evidence that in some cases premises that have been searched pursuant to a warrant “are left in a ransacked state and the owner of the premises does not receive restitution for loss or damage. Section 11.1 of topic 105-2 of the Police Manual, which provides for restitution, is not carried out”.<sup>695</sup> Similarly, VLA submitted that its experiences led it to conclude that controls on the execution of

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<sup>690</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 195; Victorian Aboriginal Legal Service, *Preliminary submission no. 17*, 4.

<sup>691</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 197.

<sup>692</sup> *Ibid*, 195.

<sup>693</sup> Victoria Legal Aid, *Submission no. 21*, 3.

<sup>694</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 195.

<sup>695</sup> Victorian Aboriginal Legal Service, *Preliminary submission no. 17*, 4.

warrants were ineffective and that there was “a clear need for standing rules about the way that warrants should be executed”.<sup>696</sup>

The Committee has already set out Victoria Police’s response to allegations about the misuse of warrant powers.<sup>697</sup> On the specific issue of the execution phase, Acting Superintendent Leane told the Committee that:

In order for our evidence to be of value, it has to satisfy the tests of the court, [which] are that the execution of the warrant follows procedure and that we do not unnecessarily do anything in the execution of the warrant that would jeopardise the use of that evidence in any subsequent trial.<sup>698</sup>

As with other claims about search warrants, VLA and VALS were able to provide only anecdotal evidence to support the allegations relating to the execution phase. The volumes of both organisations’ caseloads and the pressure on their resources prevent systematic collation or analysis of evidence of possible abuses of warrant powers. VLA discussed this limitation:

VLA’s database does not record...allegations concerning excessive use of force...Rather our hard copy client files record the details of clients and their interactions with police and other agencies. A manual trawl of our files is not feasible in the circumstances...[H]owever, I am content to rely on my original evidence. That is, VLA through its extensive network of lawyers<sup>699</sup> in the field regularly receive reports from clients about the excessive use of force upon the execution of warrants of arrest, search and seizure. Similar complaints are received in relation to unnecessary damage to property.<sup>700</sup>

Some data is available from other sources. Of the 143 complaints about the execution of search warrants that were recorded by Victoria Police’s Ethical Standards Unit in financial year 2003 - 2004, 62 concerned inappropriate use of force or related conduct.<sup>701</sup>

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<sup>696</sup> Victoria Legal Aid, *Submission no 21*, 5.

<sup>697</sup> At footnotes 310-313 and accompanying text above.

<sup>698</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence, 20 October 2004*, 217-218.

<sup>699</sup> VLA is the largest criminal law practice in Victoria and employs 130 lawyers through the State. Clearly, its staff encounter search warrant issues many thousands of times every year.

<sup>700</sup> Letter, Victoria Legal Aid Divisional Manager Michael Wighton to Committee Research Officer, 11 November 2004.

<sup>701</sup> Letter, Acting Superintendent Stephen Leane to Committee Research Officer, 7 April 2005.

Type of complaint	Number of allegations	Outcome of investigation
Assault	11	3 withdrawn, 7 unsubstantiated, 1 no complaint
Property damage	29	1 not substantiated, 28 unable to determine
Rudeness	3	2 withdrawn, 1 unable to determine
Aggressive/insulting/insensitive manner	12	1 no complaint, 1 unfounded, 5 not substantiated, 4 not specified, 1 public incident resolution
Leaving premises untidy	4	3 not substantiated, 1 no complaint
Improper entry	3	Not substantiated

**Table 3. Selected complaints to Victoria Police about search warrants: 2003 - 2004.**<sup>702</sup>

As Victoria Police informed the Committee that it is not able to produce statistics about the total number of search warrants it executes, it is difficult to interpret this

<sup>702</sup> Victoria Police defines these outcomes as follows:

*Unable to determine* – the available evidence does not permit the investigator to establish whether the complaint is true or not.

*Not substantiated* – the weight of available evidence does not support the account of events as described by the complainant, but is weighted in favour of the account given by the employee.

*Unfounded* – available evidence clearly establishes that there are no grounds for the complaint whatsoever.

*No complaint* – a query or complaint by a person that is subsequently found to be an action sanctioned by law, or a complaint lodged by a third party which is denied by the alleged victim who has no complaint to make.

*Public incident resolution* - a process designed to resolve incidents involving members of the public and Victoria Police employees without the need for lengthy investigations. It is used to address minor breaches of police rules and procedures and includes allegations of duty failure. This includes: loss or misuse of property, failing to respond promptly or to provide adequate service; failing to take appropriate or necessary action; allegations of rudeness, abruptness, overzealousness, allegations of threatening or harassing behaviour or some other unreasonable or non-compliant behaviour; allegations of minor forces associated with arrest or other lawful activity, not serious enough to be considered as a serious assault, yet suitable for PIR; complaints based on a misunderstanding of facts, law or police practices and procedures; and other matters determined by ESD as suitable for PIR. PIR must only be used where the conduct of the subject employee appears to have been both lawful and reasonable and a full explanation is all that is necessary. Letter, Acting Superintendent Stephen Leane to Committee Research Officer, 7 April 2005; Victoria Police Manual, *VPM Instruction 210-2, Public Incident Resolution*, updated 8 June 2004; *VPM Instructions 210-4, Investigations of complaints and incidents, 8.2*, version of 7 March 2005.

data accurately. Using search warrants data available from other sources, such as the Magistrates' Court figure of 10 131 search warrants issued in the financial year 2003 - 2004 under key Victorian legislation,<sup>703</sup> it seems clear that the total number of complaints submitted to Victoria Police is statistically small, at approximately 0.5%. The police noted that although complaints in criminal proceedings are more common, they are not followed up with formal complaints through other mechanisms. Ultimately, "the judiciary will oversight these powers and make determinations about whether the evidence is in or the evidence is out".<sup>704</sup>

However, VLA queried the validity of both complaints to courts and the police as indicators of abuse of warrant powers:

proving unlawful or excessive use of force does not necessarily result in the evidence gathered being ruled inadmissible. The rate of success in excluding police evidence due to excessive use of force is not an indicator of the frequency of occurrence of such incidents. Nor should the rate of prosecutions of police members for assault or damage to property - successful or not - be seen as indicative of the frequency of occurrence of these incidents. Therefore the courts cannot be relied upon alone to regulate the behaviour of agencies exercising powers under warrants.<sup>705</sup>

VLA also argued that few of its clients lodge formal complaints due to "fear of potential repercussions".<sup>706</sup>

It is also a reality that a lot of our clients are not well educated and do not feel particularly empowered to come forward with complaints of that nature. It is our job as their representatives to take those complaints on and to prosecute them as best we can. Sometimes they are only ever raised in terms of defending police allegations. They are not raised separately. They are not taken as complaints to the Ombudsman's office, and they are certainly not prosecuted. They usually appear as defending, say, an allegation by police that the client assaulted them. The standard situation is where a client will complain that they have been assaulted in the course of arrest or search or interview at the police station, and the police will counter allege that they used force but used it to defend themselves against our client.

So we are forced, in defending police charges, to raise the issue, with varying degrees of success, depending on the quality of the evidence and the view of the court hearing the charges. ... There are not a very large of number of police that are prosecuted in Victoria for those sorts of offences, but I am not sure that is indicative of the occurrence of it.<sup>707</sup>

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<sup>703</sup> The figure comprises: 4784 and 1547 warrants issued under the *Crimes Act 1958*, s92 and s465; 3541 warrants under the *Drugs, Poisons and Controlled Substances Act 1981*, s81; and 269 warrants under the *Firearms Act 1996*, s146.

<sup>704</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 218.

<sup>705</sup> Letter, Victoria Legal Aid Divisional Manager Michael Wighton to Committee Research Officer, 11 November 2004.

<sup>706</sup> Victoria Legal Aid, *Submission no. 21*, 5.

<sup>707</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 197.

Despite the low incidence of formal complaints, VLA believes that there is a perception in the community that unnecessary force is used “relatively frequently”.<sup>708</sup>

The Ombudsman has a long experience with allegations of abuse of warrant powers. His deputy indicated that the office receives so few complaints about non-police agencies’ use of their search and seizure powers that they are “virtually non-existent”.<sup>709</sup> In contrast, complaints about police searches have historically been among the most common and serious complaints received by the organisation:

Indeed police raids, and they were better characterised as raids rather than searches in my view, were one of the Deputy Ombudsman, Barry Perry’s, first public interest investigations. From that public interest investigation we made a number of recommendations about how raids were to be carried out. Those recommendations were essentially adopted by the police setting out the procedures to be followed and standardising practices throughout the force.<sup>710</sup>

The Deputy Director of Police Integrity considered that the resulting police standing orders, in particular the development of the three level police search hierarchy outlined above, have over time led to a significant reduction in complaints arising from police searches.<sup>711</sup> In recent years, an average of approximately 24 complaints have been made annually. Very few of these concern force:

We very rarely get complaints these days of assault or undue force that occurs during the course of the execution of a search warrant. That was a very common complaint in the early days. That partly reflects not only improved strategies in terms of execution of warrants ... but it also reflects a lot of work we have done with what we call an assault complaint reduction strategy....

Assault complaints arose from 1989 to a high of about 1800 in 1995 - 1996 when the Ethical Standards Department commenced and this just wasn’t good enough in our view....

The net result of [the strategy] has been a reduction in assault complaints from 1800 to something like 400 in the last few years and that continues to [decrease].<sup>712</sup>

However, another common source of complaints - damage to seized property - confirms that complaints data is not necessarily an accurate indicator of abuses:

Police failures that are substantiated in recent years have tended to relate to failure of police to give receipts and properly document property at the time and theft, particularly of money. Again,

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<sup>708</sup> Ibid.

<sup>709</sup> Brian Hardiman, Deputy Director, Office of Police Integrity, *Minutes of Evidence*, 5 November 2004, 304.

<sup>710</sup> Ibid.

<sup>711</sup> Ibid.

<sup>712</sup> Ibid, 305.

notwithstanding the low level of complaints, the fact is that there have been proven allegations made against former Drug Squad members which weren't reflected in complaints.<sup>713</sup>

The Deputy Director of Police Integrity linked some of this misconduct to the requirement to produce seized property as exhibits before the court, noting that the former Victoria Police drug squad was “awash with seized drugs”.<sup>714</sup>

More generally, a 2001 study carried out at the request of the then Deputy Police Ombudsman confirmed that the most common failure of police during searches was the “failure of police to properly record, properly issue receipts at the time and [rarely] of taking property back to magistrates within a reasonable length of time”.<sup>715</sup> A 2003 review revealed that although the number of property handling complaints was small - 34 in three and a half years - problems persisted with the receipting and identification of items, and the Deputy Director of Police Integrity remains concerned that not all relevant matters are formally notified to his office as complaints.<sup>716</sup> The Committee considers these views and Victoria Police's procedures for regulating the handling of such property,<sup>717</sup> as part of its discussion of seizure of property later in this chapter.

The Deputy Director of Police Integrity advocates videorecording of property searches to minimise the risk of property handling problems occurring. The Committee explores this in the next section of the report.

## **Conclusions**

There are inevitably circumstances in which the types of force that VLA complains of - such as entry through windows and immobilisation of occupants - are necessary to preserve evidence or reduce the risk to executing officials and occupants of the premises. Evidence heard by the Committee also indicates that Victoria Police has significantly improved its procedures for the use of force and its complaint handling apparatus.

The Committee remains concerned, however, by two aspects of the discrepancy between the experiences of high volume legal service providers such as VLA and VALS, and those of institutions that execute search warrants and receive and resolve complaints.

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<sup>713</sup> Ibid.

<sup>714</sup> Ibid.

<sup>715</sup> Ibid.

<sup>716</sup> Ibid.

<sup>717</sup> For example, Victoria Police Manual, *VPM Instructions 105-2, Searches of properties; 114-6, Drugs in police possession; 114-7, Firearms in police possession; 114-8, Money in police possession; 114-10, Miscellaneous property.*

First, the absence of quantitative data from the former has prevented the Committee from properly evaluating these divergent views. The Committee believes that the community as a whole would benefit from the insights to be gained from a more accurate accounting and analysis of incidents of inappropriate use of force, and accordingly supports a review of relevant evidence, including case files maintained by VLA, VALS and other organisations as appropriate. The Committee's finding here matches its conclusion about the importance of quantifying the extent of allegations of illegitimate applications for and inappropriate issue of search warrants. As in its recommendations on those issues, the Committee believes that the Office of Police Integrity's stated intention to use its own motion powers to investigate searches should be strongly supported. The Committee therefore considers that recording and analysing appropriate information by legal service providers about allegations of abuse of force for a time-limited trial period would be of value in assessing the extent of the practices alleged in evidence during this inquiry.

Second, there appears to be a remarkable difference in perceptions between Victoria Police and advocacy organisations such as the Victorian Aboriginal Legal Service and Victoria Legal Aid. This in itself is not surprising, given the mandates, activities and pressures on both type of organisations. The Committee is nevertheless concerned that such significant differences of opinion about an issue as serious as the use of force against occupiers of target premises suggest that two critical components of the justice system are not communicating effectively. The Committee therefore believes that the Office of Police Integrity (OPI) should explore with these and other affected organisations ways of improving perceptions, for example via the Aboriginal liaison officers employed by the OPI and Victoria Police and a review of the effectiveness of Victoria Police instructions and training on the use of force.

Recommendation 54. That the Office of Police Integrity uses its own motion powers to investigate the incidence of improperly executed search warrants and the use of unnecessary or disproportionate force during the execution of search warrants, and make appropriate findings and recommendations.

Recommendation 55. That the Department of Justice resources a project in which for a period of at least 12 months, Victoria Legal Aid records information about allegations of abuse of force during the execution of search warrants and that an analytical report on the data be prepared and published. That the Victorian Aboriginal Legal Service and community legal centres consider joining the recording and reporting study.

## Videorecording the execution of search warrants

In its discussion paper, the Committee asked stakeholders whether searches were recorded and if not whether it would be possible or desirable to do so.<sup>718</sup>

Videorecording the execution of a search warrant can protect the rights of individuals present on the premises to be searched and of the officials executing the warrant.<sup>719</sup>

The integrity of the process is substantially enhanced by the fact that the activity has been recorded.<sup>720</sup>

It is during the execution of search warrants that video taping provides the most reliable account of what occurred and serves as an additional valuable tool to eliminate both corruption and unjustified complaints.<sup>721</sup>

A 'real time' record of a search can reveal how entry was effected, whether occupier's rights were respected, what, and how, evidence was discovered, and more generally how occupiers and executing officials acted during the search. The potential for increased certainty about what occurred during a search can reduce the occurrence, complexity and expense of consequential proceedings, arguably producing speedier justice and substantial savings for the legal system. Significant limitations offset these possible accountability and efficiency gains: various factors that affect the ability of an operator to create a true and accurate record of the search; and resources required to procure large quantities of expensive equipment and training in its use.

This issue was highlighted by the Law Reform Committee of the 54<sup>th</sup> Parliament during its Inspectors' Powers Inquiry, although, its final report did not consider the *value* of videorecording of searches and therefore made no recommendations on the matter.<sup>722</sup> The present Committee therefore considers the merits of using videorecording in Victoria, by examining the situation here and elsewhere and the

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<sup>718</sup> The Inspectors' Powers Discussion Paper included the same question: Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons - Discussion Paper*, 19.

<sup>719</sup> It has long been recognised that the recording of certain interactions between police, other agencies and the public can protect the rights of all parties involved. For example, a 1986 report on police powers recommended the tape recording of police interviews of suspects to protect suspects from abuse of powers and police from unjustified allegations by suspects: Victorian Consultative Committee on Police Powers of Investigation, *Custody and Investigation: Report on Section 460 of the Crimes Act 1958*, 1986, 82-90.

<sup>720</sup> Commissioner GA Kennedy, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report Volume II*, 2004, 142.

<sup>721</sup> NSW Police Service, *Education Package for Video/Audio Recordings of Search Warrants and Planned Operations*, quoted in *R v Jiminez [2000] NSWCCA 390*, paragraph 5.

<sup>722</sup> The Inspectors' Powers Report does outline relevant privacy concerns, which the Committee highlights in the following paragraph of this report: *Inspectors' Powers Report*, 155-158.

views of stakeholders. Relevant parts of Inspectors' Powers Inquiry submissions on videorecording are included by the Committee in its analysis.

### **Victoria and other jurisdictions**

Victorian law provides that certain procedures must or, in some cases, should if practicable be recorded on video. Examples include aspects of questioning of suspects,<sup>723</sup> some fingerprinting<sup>724</sup> and forensic procedures<sup>725</sup> and examinations of individuals in relation to organised crime offences or investigations conducted by the OPI.<sup>726</sup> Some search and entry powers include the authority to make video recordings (or audio recordings or sketches) as a means of gathering evidence.<sup>727</sup> Such a purpose is obviously more limited than the creation of a record of the use of the powers. Moreover, all of those powers can be exercised without a warrant. The Committee has thus found no Victorian legislative provisions that deal with videorecording of the execution of search warrants, although the requirement in many Acts that a warrant must state any conditions to which it is subject would seem to authorise an issuing magistrate to require the videorecording of the execution.

The Victoria Police Manual is also silent on the subject. However, the Police recently completed a trial of videorecording of searches within the Major Drug Investigation Division, deciding whether or not to use video on the basis of a risk assessment prior to the execution of each warrant. In fact, all executions during the pilot period were videorecorded, although a lack of time and funds restricted the recordings to selected parts of the search process.<sup>728</sup> This project was reportedly one of a range of Victoria Police responses to the findings of its internal inquiry into what the Ombudsman described as the "catastrophic breakdown" of management and controls in the former Drug Squad.<sup>729</sup>

Other jurisdictions regulate and carry out videorecording of searches. The Committee was told that the New South Wales Police Service routinely video recordss searches conducted by its members.<sup>730</sup> The practice apparently began sporadically with police across the state seeking assistance from the forensics department's video unit. As

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<sup>723</sup> *Crimes Act 1958* ss 464B(5H), 464H.

<sup>724</sup> *Ibid*, ss 464K(8), 464M(9).

<sup>725</sup> *Ibid*, ss 464ZA(4)-(5).

<sup>726</sup> *Major Crimes (Investigative Powers) Act 2004* s 45; *Police Regulation Act 1958* s 86PB.

<sup>727</sup> For example: *Infertility Treatment Act 1985* s 21V(c); *Taxation Administration Act 1997* s 76(2)(b); *Wildlife Act 1975* ss 59(1)(b), 59A(a), 59B(a), 60(1)(b); *Environment Protection Act 1970* s 55(1E)(2); *Transport Act 1983* ss 129E(d), 129F(3)(b); *Children's Services Act 1996* ss 36(1)(c), 38(3)(a).

<sup>728</sup> Letter, Acting Superintendent Stephen Leane to Committee Research Officer, 7 April 2005.

<sup>729</sup> Ombudsman Victoria, *Second Interim Report, CEJA Task Force, Drug Related Corruption*, June 2004, 6.

<sup>730</sup> Daniel Noll, Attorney-General's Department, NSW, *Minutes of Evidence, 1 September 2004*, 42.

demand exceeded capacity, local units purchased and used their own video equipment, and inconsistencies emerged.<sup>731</sup> The practice was standardised during the Wood Royal Commission's investigation of NSW police misconduct, specifically the concerns it had about search warrants: the inquiry and the Police Commissioner recognised that the execution of search warrants had provided opportunities for corruption.<sup>732</sup> The police thus issued Standard Operating Procedures (SOPs) for the Execution of Search Warrants, which required that a video officer be present to film property searches under warrant, and an accompanying education package. The SOPs were said to provide "a comprehensive best practice guideline outlining duties and responsibilities for video operators".<sup>733</sup> The Commission concluded that the need for such video and other accountability mechanisms was "obvious" in light of the evidence it received.<sup>734</sup>

Western Australia has a similar history on this issue. There is no legislative requirement to videorecord search warrants, but a practice of doing so has developed in respect of drugs, weapons and other serious offences.<sup>735</sup> Like NSW, a Royal Commission recently examined the state police force and found that the majority of the corruption uncovered in its inquiry related to the execution of search warrants.<sup>736</sup> The Commission detailed inconsistent police video operating procedures and practices, with some requiring the consideration of videorecording of warrants where practicable.<sup>737</sup> It concluded that a requirement to video the execution of the search warrant was "an obvious measure to reduce the risk of corrupt[ion]"<sup>738</sup> as it "would improve the integrity of the search and protect officers against allegations of

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<sup>731</sup> Email, NSW Police Legal Services Senior Research Officer Rye Cook to Committee Research Officer, 21 January 2005.

<sup>732</sup> Commissioner Justice JRT Wood, *Royal Commission into the New South Wales Police Service, Final Report, Volume II: Reform*, May 1997, 321; Police Commissioner Ryan, Comments during launch of Standard Operating Procedures, quoted in email, NSW Police Legal Services Senior Research Officer Rye Cook to Committee Research Officer, 21 January 2005.

<sup>733</sup> NSW Police Service, *Education Package for Video/Audio Recordings of Search Warrants and Planned Operations*, quoted in *R v Jiminez [2000] NSWCCA 390*.

<sup>734</sup> Commissioner Justice JRT Wood, *Royal Commission into the New South Wales Police Service, Final Report, Volume II: Reform*, May 1997, 321.

<sup>735</sup> Mark Cuomo, Aboriginal Legal Service of Western Australia, *Minutes of Evidence, 2 September 2004*, 109-110; David McKenzie, Legal Aid Commission of Western Australia, *Minutes of Evidence, 2 September 2004*, 131; Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence, 19 October 2004*, 167.

<sup>736</sup> Commissioner GA Kennedy, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report Volume II*, 2004, 310.

<sup>737</sup> The Commission found the requirement to be "so vague as to be virtually meaningless": Commissioner GA Kennedy, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report Volume II*, 2004, 142.

<sup>738</sup> *Ibid.*

impropriety”.<sup>739</sup> The Commission accordingly recommended amendment of the Criminal Investigation Bill, then being drafted, to provide that evidence be inadmissible if it resulted from an unrecorded search, unless the police concerned can provide a reasonable explanation for the lack of a video film. The Commission also recommended the amendment of police operating procedures to “render recording compulsory, whether or not the legislation is changed”.<sup>740</sup> The Committee is not aware of the progress of the implementation of these recommendations.

In Queensland, the execution of covert search warrants must be video recorded if practicable.<sup>741</sup> The Queensland Public Interest Monitor views all videos to verify the propriety of the search.<sup>742</sup>

In the Commonwealth sphere, it is “fairly common” for agencies to video record or audiotape the execution of search warrants.<sup>743</sup> In 2000, the Commonwealth Senate Standing Committee on the Scrutiny of Bills attempted to expand the practice when it recommended that, where practical, all executions of search warrants should be recorded on audio or videorecord.<sup>744</sup> The Government considered that it would be inappropriate to impose that obligation on all agencies, although it did not state its reasons for that belief.<sup>745</sup>

### ***Evidence received by the Committee***

Stakeholders in the warrants inquiry expressed various views. With different qualifications, the Victorian Aboriginal Legal Service, the Criminal Bar Association and Victoria Legal Aid recommended that all searches should be taped. VALS supported video or audio recording.<sup>746</sup> The CBA and VLA suggested that recording would not be necessary where it was impracticable or unreasonable to do so, the CBA arguing that the executing officer should be responsible for establishing that the circumstances of

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<sup>739</sup> Ibid, 310.

<sup>740</sup> Ibid.

<sup>741</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 152(e); *Crime and Misconduct Act 2001* (Qld) s 152(e).

<sup>742</sup> Public Interest Monitor, *Fifth Annual Report of the Public Interest Monitor delivered pursuant to the Police Powers and Responsibilities Act 2000 & the Crime and Misconduct Commission Act 2001*, 10.

<sup>743</sup> Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Bills Fourth Report - Entry and Search Provisions in Commonwealth Legislation, August 2003*, 16.

<sup>744</sup> Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation, Fourth Report of 2000* (6 April 2000) ('Senate Report') 128.

<sup>745</sup> Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Bills Fourth Report - Entry and Search Provisions in Commonwealth Legislation, August 2003*, 16.

<sup>746</sup> Victorian Aboriginal Legal Service, *Submission no. 23*, 14.

the particular case reach that standard.<sup>747</sup> The CBA also identified the major limitation of any recording device:

it is controlled by the person who has hold of the camera and who is executing the warrant... they choose when to turn it on and when to turn it off.<sup>748</sup>

Some submissions focused on the purpose of videorecording and its possible effects on individuals' rights. Victoria Police questioned whether recordings would be "admissible as evidence of the search in court proceedings or [would] only be used as an accountability mechanism, to ensure that police comply with procedures and otherwise act lawfully".<sup>749</sup> VLA argued for careful consideration of the circumstances in which the former would be permissible:

courts generally do not like to admit evidence that is prejudicial against the defendant unless there is strong probative value in the evidence. It may occur that their reaction at 3.00 a.m. to the police being at their front door could be seen as being an admission of guilt or a consciousness of guilt, and that might not be fair to admit against a person to prove the substantive charges behind the warrant; whereas it might be appropriate to admit against a defendant if the defendant alleged behaviour on the police's part or if they tried to complain about police behaviour. It just depends on the circumstances, really.<sup>750</sup>

This distinction is reflected in some existing provisions on videorecording. Section 464 of the *Crimes Act 1958* makes recordings of forensic procedures inadmissible except to establish or rebut claims that unreasonable force was used to carry out the procedure, or to assist in determining the admissibility of certain types of other evidence that an accused alleges was obtained by the use of unreasonable force.<sup>751</sup>

The Committee believes that in principle this scheme should also apply to the videorecording of the executions of search warrants: film of items of evidence would remain admissible in accordance with current law and practice; and portions of video that record events other than the seizure of evidence would be admissible in more limited circumstances. However, the Committee has not considered this in detail, believing that that is more appropriately dealt with by the Law Reform Commission during its review of the *Evidence Act 1958*.

During the Inspectors' Powers Inquiry, the Office of the Victorian Privacy Commissioner (OVPC) argued that video and audio recording of the exercise of intrusion powers could seriously and adversely affect privacy. While some of the

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<sup>747</sup> Victoria Legal Aid, *Submission no. 21*, 7; Criminal Bar Association, *Submission no. 12*, 6, Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 161.

<sup>748</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 167.

<sup>749</sup> Victoria Police, *Submission no. 25*, 14.

<sup>750</sup> Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 200; Victoria Legal Aid, *Submission no. 19*; *Inspectors' Powers Inquiry*, 7.

<sup>751</sup> *Crimes Act 1958* s 464ZE(4).

Commissioner's concerns were unrelated to warrants, his underlying argument is relevant to the present inquiry:

[Consider] the subject's knowledge that s/he is ... under the eye of a camera and that a permanent record, potentially able to be copied and disclosed, is also being made, and the grave implications for privacy and its underlying purposes are clear.<sup>752</sup>

The Commissioner suggested that video or audio recording may be unnecessary as the potentially protective role it plays could be achieved by the less invasive means of having "an appropriately senior and independent witness" present at the search.<sup>753</sup> The CBA also recommended the presence of an independent third person but not as a substitute for videorecording.<sup>754</sup>

Given the potentially serious implications for privacy, the Commissioner proposed a set of questions that should be used to develop "precise procedures" for any videorecording regime:

How long will the video or audio recording run and how much detail of the entry and search will be gathered? For example, will there be limits placed on tracking and zooming?

What part of the entry and search procedure will be recorded?

How intrusive will the recordings be?

How long will the recording be retained?

Who will have access to the recordings? Will the individual have access?

What safeguards will prevent the tape being doctored, copied, altered and distributed or otherwise misused?<sup>755</sup>

The Inspectors' Powers Report, which included these questions, recommended that agencies should "develop internal systems for compliance with the *Information Privacy Act 2000* and other dimensions of privacy where relevant".<sup>756</sup>

Two of the organisations with the greatest operational experience of warrants – Victoria Police and the Magistrates' Court - also gave evidence on this topic. Victoria Police submitted that any requirement to videorecord searches would have "massive

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<sup>752</sup> Office of the Victorian Privacy Commissioner, *Submission no. 38, Inspectors' Powers Inquiry*, 16-17.

<sup>753</sup> *Ibid*, 17.

<sup>754</sup> Rather, the CBA suggested that such an independent person could be present where issuing officers considered their presence to be "expedient", such as where it was believed that the occupier would be unable to understand the warrant and its execution: Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 161-162.

<sup>755</sup> Office of the Victorian Privacy Commissioner, *Submission no. 38, Inspectors' Powers Inquiry*, 17.

<sup>756</sup> *Inspectors' Powers Report*, 157.

resource implications” which would “place an additional strain on already limited [capacity]”.<sup>757</sup> The pilot video project equipment costs were in excess of \$15 000, excluding training.

Interestingly, in his evidence to the Committee, Deputy Director of Police Integrity Brian Hardiman did not seem unduly concerned about the cost implications. The Kennedy Royal Commission reached a similar conclusion:

The Police Service was able to equip all officers with sound and video taping equipment of interviews when the law was changed to require admissions to be recorded in order to be admissible. The cost of providing an adequate supply of video cameras would not be prohibitive. In any event, as the experience with the requirement for the recording of admissions also indicates, the cost saving from the lack of Court resources in resolving frequent controversies over the circumstances of a search, would offset the cost of providing the camera equipment.<sup>758</sup>

Victoria Police has communicated with its counterpart in New South Wales about the latter’s experiences and is thus certainly aware of the potential additional benefits of videorecording suggested by police and other stakeholders there. Members of the New South Wales Public Defenders Office told the Committee that the routine videorecording of searches under warrant in the state had contributed to a “revolution in the way that criminal trials are conducted”.<sup>759</sup> The New South Wales Police stated that “the best video and audio evidence will ensure early pleas of guilty by the accused and integrity of the police investigation and the evidence”.<sup>760</sup> And indeed, the availability of video evidence there has reportedly led to fewer contested charges and reduced opportunities for defendants to challenge evidence.<sup>761</sup> The Attorney-General’s Department agreed that these factors could be expected to substantially reduce the costs of court cases.<sup>762</sup>

The Victoria Police submission raised two additional practical questions: whether the recording should be made in real time (from the moment when executing officers attempt entry to the premises) or after entry has been effected; and the ease with which the scrutiny of police conduct through videorecording could be avoided. In oral

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<sup>757</sup> Victoria Police, *Submission no. 25*, 14.

<sup>758</sup> Commissioner GA Kennedy, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report Volume II*, 2004, 311.

<sup>759</sup> Richard Button, Public Defenders Office NSW, *Minutes of Evidence*, 31 August 2004, 29.

<sup>760</sup> Email, NSW Police Legal Services Senior Research Officer, Rye Cook, to Committee Research Officer, 21 January 2005.

<sup>761</sup> “Trials are not bogged down with lengthy evidentiary hearings in order for a judge to make a decision as to whether an admission or a product of a search should be allowed in or rejected, because of the requirement for taping. If it is all being recorded, first, it keeps police aware of their responsibilities, and second, there can be no argument about what has happened” Robert Hulme SC, Public Defenders Office NSW, *Minutes of Evidence*, 31 August 2004, 33.

<sup>762</sup> Daniel Noll, Attorney General’s Department, NSW, *Minutes of Evidence*, 1 September 2004, 48-49.

evidence to the Committee, Victoria Police expanded on these comments and drew out a number of complex conceptual and logistical issues:

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

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

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

Will it achieve our aim of accountability or not? If it does not, how much will it cost to get to where we are and how satisfied can we be that the execution of a warrant will be more accountable than it was before? Also, how much concern do we have about the warrants being executed at the moment and the way the police are doing them? Are the other safeguards not sufficient? The avenues of complaint and judicial review and the challenging of a warrant are not complicated processes. Any person can attend the Magistrates' Court and request a review. The warrant is filed at the Magistrates' Court and the property is in the possession of police, and it is not an expensive endeavour to ask a magistrate to reconsider whether or not police should be in possession of certain property once a warrant has been executed. A lot of competing issues have to be considered before any sort of conclusion is reached and before the government spends millions and millions of dollars on videotapes — until we get to the next technology — and on training and equipment.<sup>763</sup>

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<sup>763</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 223.

The New South Wales incident that the police referred to was the case of *R v Jiminez*, in which the NSW Police Service video record of the execution of a search warrant did not include the most critical part of the search, namely the alleged discovery of drugs on the accused's body. The accused was convicted in relation to the drugs despite the trial judge's considerable doubt about the police evidence advanced to explain why the discovery was not filmed, which included concerns about the camera batteries, the privacy of the accused and the safety of the police members. The NSW Court of Criminal Appeal overturned the conviction after finding that:

the excuses advanced to justify such non filming lacked weight. The video camera was available in the flat and used to record minor matters but not what mattered. No good reason was advanced for taking such a course. The need to film the critical part of the search was obvious to all. The purpose of having a video camera at any search is to avoid disputes.<sup>764</sup>

The Magistrates' Court indicated that it already accepts videorecordings of certain types of seized items, usually those whose conditions change over time, such as cannabis plants, as part of the report to court on the execution of the warrant. However, Magistrate Hannan was not convinced of the value of a requirement to videorecord searches and felt that it could be difficult to implement given the dark or cramped locations that many searches include.<sup>765</sup>

Similar reasons were cited by the Government in early 2003 as the basis for declining to require the videorecording of the execution of covert search warrants:

There are many ways in which a videotape could be unreliable or misleading, whether intentionally or not. Unlike a police interview, where it is relatively easy to clearly videotape all of the participants for the whole of the interview, the circumstances of covert entry are likely to make it more difficult for police to comprehensively videotape the entry and search. For example, entry and search may take place in near darkness or in confined spaces and as police move through a premises it is likely that not all the police will be in the scan of the video at all times.<sup>766</sup>

The Deputy Director of Police Integrity agreed that there are practical issues that complicate and potentially limit the effectiveness of videorecording:

This is not a simple procedure because sometimes searches have to be conducted in different rooms by different members at the one time so it raises questions of who is in charge of the video....When a house is raided, often rooms are raided and especially if there are multiple occupants the police try and walk down each room and so it may mean multiple video recorders are required. You are often not sure how many people are in the house; prior intelligence should

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<sup>764</sup> *R v Jiminez* [2000] NSWCCA 390, paragraph 66.

<sup>765</sup> Magistrate Hannan, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 278.

<sup>766</sup> Bruce Mildenhall, Parliamentary Secretary to the Premier, *Terrorism (Community Protection) Bill 2003*, *Second Reading Debate*, Legislative Assembly, 20 March 2003, 424.

be obtained where possible, so the video operator has the problem of selecting what should actually be videoed.<sup>767</sup>

However, in his opinion, “the value of [the practice] has proved its worth”.<sup>768</sup> Indeed, in the financial year 2003 - 2004, the Police Ombudsman (as the office was called then) was able to use a videorecording of an execution of search warrant to exonerate a police member accused of damaging property in the searched premises. Because “there are real difficulties without video evidence in just assessing what police have done and what the person might have done afterwards”,<sup>769</sup> the Police Ombudsman has argued for many years that Victoria Police should introduce videorecording of search warrants.<sup>770</sup> The Ombudsman’s latest annual report restated his view that police should video the execution of search warrants “where possible”,<sup>771</sup> while the Ombudsman believes “strongly” that videorecording of all drug searches should be mandatory.<sup>772</sup>

## **Reform in Victoria**

Victorian practice may move in this direction. Notwithstanding the limitations on the effectiveness of video records as an accountability mechanism, in the wake of its trial of the technology, Victoria Police told the Committee that it is contemplating the introduction of videorecording the execution of search warrants as a standard procedure across the Crime Department, Crime Investigation Units and Regional Surveillance Units. A decision on recording would follow a risk analysis based on an evaluation of the nature of the search, the prospects that force would be used and violence would occur. The Police believe that such videorecording would reduce the number of complaints about police behaviour during the execution of search warrants.<sup>773</sup>

The Committee agrees with stakeholders that videorecording of the execution of search warrants is both valuable and limited depending on the circumstances. The New South Wales experience suggests that the justice system as a whole will benefit from the use of videorecording. In the Committee’s view, therefore, the limitations do not vitiate the value of the mechanism, they merely reinforce the importance of a carefully calibrated approach to the issue. Concerns about what is and is not recorded are also legitimate and the Committee believes that they can best be resolved

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<sup>767</sup> Brian Hardiman, Deputy Director, Office of Police Integrity, *Minutes of Evidence*, 5 November 2004, 305, 307.

<sup>768</sup> *Ibid*, 305.

<sup>769</sup> *Ibid*.

<sup>770</sup> *Ibid*, 307.

<sup>771</sup> Ombudsman, *Annual Report 2003 - 2004*, 73.

<sup>772</sup> Ombudsman Victoria, *Second Interim Report, CEJA Task Force, Drug Related Corruption*, June 2004, 7.

<sup>773</sup> Letter, Acting Superintendent Stephen Leane, Victoria Police, to Committee Research Officer, 7 April 2005.

through practical application. The Committee therefore urges Victoria Police to extend its trial and considers that the Office of Police Integrity should review the pilot projects and make appropriate conclusions and recommendations to Victoria Police and the Government.

More broadly, the Committee attaches significant weight to the views of the Police Ombudsman/Office of Police Integrity, given that institution's role as well as its intimate and historical knowledge of police practices. The Committee therefore endorses calls by the Police Ombudsman/Office of Police Integrity for the police to video record searches wherever possible and proposes that other agencies that execute search warrants should be subject to the same standard, given that such searches carry the same potential for actual or unjustified allegations of abuse of powers. The Committee suggests that every search warrant application should include an indication of whether the execution will be video recorded and that applicants should provide a reasonable explanation for each decision not to video record a search. The Committee believes that the practice should be regulated through legislative provision and standard operating procedures that agencies should develop in consultation with Victorian stakeholders and institutions in other jurisdictions with relevant experience.

Given the unfortunate history of police activities in respect of drug searches in this state and elsewhere,<sup>774</sup> the Committee also endorses the Ombudsman's recommendation that the police should video record the execution of all search warrants relating to drug offences. Such a step is likely to help improve Victoria Police's credibility in this important law enforcement area and make a practical contribution to reducing police misconduct. The Committee invites the Government to consider extending that requirement to other offences.

The Committee urges the Government to fund these initiatives, as both an important measure to improve public confidence in agencies with warrant powers and to protect the rights of agency staff and members of the community.

Recommendation 56. That legislation be amended to require the videorecording of the execution of all search warrants relating to drug offences.

Recommendation 57. That the Government considers requiring the videorecording of the execution of search warrants relating to other offences.

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<sup>774</sup> The problems of Victoria Police's former drug squad have been documented. Elsewhere, the Kennedy Royal Commission concluded that evidence from Western Australia and New South Wales indicated that "stealing money from the premises of drug dealers and irregularities in relation to the handling of drugs located, have unfortunately been common. Predictably in none of these instance was a video taping made": Commissioner GA Kennedy, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report Volume II*, 2004, 310.

Recommendation 58. That agencies with search warrant powers develop standard operating procedures for the videorecording of searches. In doing so, agencies should work with the Office of the Victorian Privacy Commissioner to address privacy concerns arising from videorecording.

Recommendation 59. That the Office of Police Integrity reviews the results of Victoria Police's pilot videorecording projects and makes appropriate recommendations.

## Presence of an independent person during the execution phase

One way of increasing the effectiveness of videorecording of searches, and more generally of strengthening the controls on the execution of search warrants, is for a person independent of the search team to attend and observe the execution. This has the advantage of providing a neutral record of the search against which can be measured the accounts of officials executing the warrant and any allegations made by occupiers or other people in the searched premises.

The Criminal Bar Association (CBA) suggested that the Committee should consider requiring such a mechanism in circumstances where it was deemed desirable by the issuing officer. The CBA thought that appropriate situations could include the execution of covert search warrants and the execution of warrants on premises where it was believed likely that individuals at the premises were members of a "vulnerable or disadvantaged group or are perhaps suffering from some form of disability that would make it difficult for them to be able to respond to what is taking place".<sup>775</sup> In such cases, the independent observer would "protect the right of the individual whose rights have otherwise been abrogated by the exercise of power".<sup>776</sup>

The Royal Victorian Association of Honorary Justices argued that Justices of the Peace could act as independent observers, citing their experience in witnessing and approving the execution of Federal search warrants in complex matters to ensure that the terms of the warrant are complied with as an indication of their suitability for this role.<sup>777</sup>

While it is likely to have value as an additional accountability mechanism, the use of an independent person could involve significant costs, whether such a person is drawn from within or outside the agency executing the warrant. In addition to the

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<sup>775</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 161-2, 167, 170.

<sup>776</sup> *Ibid*, 170.

<sup>777</sup> Royal Victorian Association of Honorary Justices, *Submission no. 26*, 2.

basic requirement to devote additional personnel to the search, the availability of the designated independent person may affect the ability of agencies to execute searches.

The Committee did not receive any evidence from Victorian stakeholders on the impact of these costs, although the New South Wales Council for Civil Liberties considered that they were justified because of the value of independent assurance that warrants are executed properly.<sup>778</sup>

In fact, the mechanism has been in use in New South Wales for some time. As part of its package of anti-corruption reforms, in 1997 the Police Service introduced a requirement for independent observers to be present at searches.<sup>779</sup>

The Police Service Standard Operating Procedures stipulate the responsibilities of the observers:

The independent Observer is NOT to take any actual part in the search and WILL:

Sight the Search Warrant: Read the search warrant.

Be Alert: Remain alert and closely monitor the search procedures.

Fully briefed on responsibilities: Be properly briefed by the case officer on all relevant aspects of the search and the responsibilities of this role.

Independent Records: Complete the independent observers form. Make contemporaneous notes of other matters considered appropriate and report any complaints or indiscretions to the case officer, Unit Commander or Patrol Commander.

Execution: Be present at the premises at the time of the execution of the search warrant.

Presence in premises: Enter as soon as practicable after the occupant/visitors have been secured but prior to the commencement of the property search.

Occupier's Notice: Confirm that the occupants of the premises are served with the Occupiers' Notice and the provisions of the notice are adequately explained to the occupier.

Continual Monitoring: Remain, at all times, with the search team and exhibit officer as each individual room of the premises is searched and record the entry of any other police person. Where the occupier is not present, be satisfied that the reason for the execution is valid.

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<sup>778</sup> Pauline Wright, New South Wales Council for Civil Liberties, *Minutes of Evidence*, 1 September 2004, 64.

<sup>779</sup> New South Wales Police Service, *Standard Operating Procedures* 1997, cited in Commissioner Justice JRT Wood, *Royal Commission into the New South Wales Police Service, Final Report, Volume li: Reform*, May 1997, 396.

Location of exhibits: Be aware of and view 'things' (exhibits) located during the search in situ prior to removal.

Certification of each seizure: Certify the description of the property, the quantity of drugs or amount of money located (counted in presence and sealed in Exhibit Bag) through endorsement of the property Seizure/Exhibit Form. (Initial each seizure entry)

Certification of Search Records: Certify the case Officers Action Sheet at the completion of the search.

Property Seizure/Exhibit Form: Endorse the Exhibit officers Property Seizure/Exhibit Form to verify that the occupier had the opportunity to view and sign the form.<sup>780</sup>

Beyond the cost implications, there are of course limits to the effectiveness of an independent observer. On a practical level, one observer would seem to have the same restricted ability to see the actions of the executing team in premises being searched by multiple officials as one video camera does. There are also particular concerns about the use of observers from the same agency as the officials that are executing the warrant. The New South Wales experience indicates that in such cases, informal attitudes, cultures or other pressures present in agency officials may, or may be perceived to, exert more influence on the observer than the duty to perform an independent assessment of the search. Thus the Wood Royal Commission recommended that the observer should not be a member of the Police Service in cases where "large amounts of cash or drugs are expected to be located" during the execution of search warrants.<sup>781</sup>

In its subsequent judgement in *R v Jiminez*, the NSW Criminal Court of Appeal considered why the appellant did not complain to the observer about the circumstances in which heroin was allegedly seized during the search:

The appellant was in a position of considerable disadvantage at the flat. There were a considerable number of police officers present there, that is, about nine of them. ... The appellant, indeed most citizens, would have felt overwhelmed in the situation. It is quite unrealistic to expect the appellant to make complaints to [the independent observer]. He regarded him as another police officer and not a source of comfort or independence. To describe [the observer] as an independent police officer does not advance matters.<sup>782</sup>

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<sup>780</sup> New South Wales Police Service, *Standard Operating Procedures – Search Warrants*, version of 31 October 2002, *Duties of Independent Observers*.

<sup>781</sup> Commissioner Justice JRT Wood, *Royal Commission into the New South Wales Police Service, Final Report, Volume II: Reform*, May 1997, 396.

<sup>782</sup> *R v Jiminez* [2000] NSWCCA 390, paragraph 48.

## Conclusions

The Committee has not heard sufficient evidence to form a concluded view about whether there should be a requirement for an independent person to attend and observe the execution of search warrants. Given the apparent benefits and the costs, the Committee believes that the Government should examine the suitability of the mechanism, in consultation with stakeholders.

Recommendation 60. That the Government considers the suitability of including in search warrant provisions a requirement that an independent observer be present during the execution of search warrants. In doing so, the Government should consider the experiences of New South Wales and other jurisdictions as appropriate, and consult with the Office of Police Integrity, Victoria Police, Victoria Legal Aid, the Criminal Bar Association, the Victorian Aboriginal Legal Service, the Office of the Victorian Privacy Commissioner and other relevant stakeholders.

## Seizure of items under a search warrant

Another fundamental aspect of search warrant powers and procedures is the extent of the authority to seize items that is conferred by a warrant. Whenever agencies apply for search warrants, “their aim is usually to find and seize some evidence of an offence”.<sup>783</sup> Seizures of evidence which do not fall within the scope of the warrant can lead to evidence being excluded, which can undermine prosecutions and other enforcement actions.<sup>784</sup> In general, therefore, the effectiveness of agencies’ operations depends, in part, on evidence being seized legally.

Warrants are an important mechanism for regulating what can be seized. Generally in Victoria, the warrant itself contains a description of the things that may be seized.<sup>785</sup> For example, the *Magistrates’ Court Act 1989* authorises the search and seizure of any thing described in the warrant.<sup>786</sup> Other Acts impose additional conditions to be

<sup>783</sup> Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand* (1996) (Tronc et al, *Search and Seizure in Australia and New Zealand*), 201.

<sup>784</sup> In Chapter Five the Committee discusses the admission of evidence in court proceedings after the execution of the search.

<sup>785</sup> In *Allit v Sullivan* [1988] VR 621 Brooking J pointed out a key distinction between Victorian warrants and Commonwealth warrants issued under what was section 10 of the *Crimes Act 1914* (now Part 1AA of the same Act): Commonwealth warrants authorise seizure by reference to the offence/s detailed in the warrant “in the sense that the executing officer is himself to determine whether possible subjects of seizure have the necessary connection with the offence”.

<sup>786</sup> *Magistrates’ Court Act 1989* s 78(b)(i). Items so seized are to be brought “before the Court to be dealt with according to law”. The Committee discusses this aspect of seizure in Chapter Six. Section 93A(2)(b) of the

satisfied before seizure is permitted under the warrant. For example, warrants issued under section 124 of the *Fair Trading Act 1999* authorise the seizure of a thing or things of a particular kind named or described in the warrant and which the executing official believes on reasonable grounds to be connected with the alleged contravention of the Act that justified the issue of the warrant.<sup>787</sup> On the other hand, some legislation defines permissible seizures by reference to the offence rather than particular things that are believed to be evidence thereof. For example, the *Firearms Act 1996* permits police members named in the warrant to search for and seize “any evidence of an offence named or described in the warrant”.<sup>788</sup>

Agencies with warrant powers impose additional constraints on their officials. For example, Victoria Police policy is to only seize property where necessary.<sup>789</sup>

The Committee received evidence on three aspects of the seizure of evidence: seizure of items not contemplated in the warrant; the issuing of receipts for seized items; and the handling and retention of seized items after the warrant has been executed. The Committee considers the first two issues below. Because the third issue is closely related to the post-execution report to court, the Committee examines it in Chapter Six, in its discussion of reporting back.

### ***Seizure of items not contemplated in the warrant***

It is impossible to predict accurately what items will be found at a place being searched under a warrant. It is therefore not unusual for officials executing warrants to come across things that are not covered by the warrant but which are of interest, for example as potential evidence of an offence that is unconnected to the original purpose of the particular search warrant being executed. The law regulates how agencies and courts deal with such items.

The Committee received submissions arguing that the law was unclear and should accordingly be reformed. Before discussing these, the Committee will set out the principles and law relating to the seizure of items not specified in the warrant.

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*Medical Practice Act 1994* and mirror provisions in the other ten health practitioner Acts contain similar provisions. Similarly, section 97N(2)(c) of the *Confiscation Act 1997* authorises persons named in the warrant to search for and seize property specified in the warrant.

<sup>787</sup> Section 100A of the *Police Regulation Act 1958* contains an identical provision.

<sup>788</sup> *Firearms Act 1996* s 146(2)(b). In Chapter four, the Committee recommended amending Victorian legislation to replace the various characterisation of what may be seized with the concept of evidential material. The relevant recommendations and accompanying discussion begin at p 109 above.

<sup>789</sup> Victoria Police Manual, *VPM Instruction 114-10, Miscellaneous property*, updated 11 July 2003, section 1.

## The principle behind such seizures

In examining this issue during its Inspectors' Powers Inquiry, the Law Reform Committee of the 54<sup>th</sup> Parliament captured the essence of the philosophical objection to such seizures:

The question as to whether authorised persons can seize property or undertake other investigation activity which is not directly covered by the warrant goes to the heart of the question as to just how much protection warrant provisions really offer. If items can be seized which do not fall within the scope of the relevant warrant, how can warrants be said to be "a practical safeguard which both common law and statute provide against arbitrary interference with the personal liberty and property of the individual"?<sup>790</sup>

Against this view is the argument that a weighing up of the infringement of individual rights against the benefits accruing to the society as a whole, and practical considerations relating to the effectiveness of policing, justify the seizure of items in the circumstances. This latter view was supported by all stakeholders who commented on this issue in the current inquiry.

Among agencies that use warrant powers, Victoria Police argued that:

it would make a mockery of the law if police were not able to seize inadvertently discovered evidence. It would be a nonsense for police investigating a burglary and in possession of a warrant to ignore drugs located, or arrest the suspect, secure the premises and then obtain a [fresh] warrant to search for drugs.<sup>791</sup>

Similarly, the Department of Primary Industries told the Committee that:

on occasions when [DPI Fisheries Investigators execute] warrants [with Victoria Police and other enforcement agencies], offences under other legislation are apparent.... The ability to seize this property immediately is an important mechanism for gathering evidence for prosecutions. Warrants limiting this ability would result in loss of evidence and would also require further warrants to be issued and executed.

[The exercise of the principles] eliminates a duplication of effort and lengthy time delays at the premises where the original warrant is executed. The continuation of these doctrines is important for DPI to carry out its duties in a cooperative manner with other enforcement agencies.<sup>792</sup>

Dr Steven Tudor suggested that:

Where the police enter places pursuant to a warrant entirely lawfully and uncover evidence of crimes unrelated to the warrant issued, it is common sense that they should be able to do

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<sup>790</sup> *Inspectors' Powers Report*, 192, quoting *Challenge Plastics Ltd v The Collector of Customs for the State of Victoria* (1993) 42 FCR 397, 405.

<sup>791</sup> Victoria Police, *Submission no. 25*, 18.

<sup>792</sup> Department of Primary Industries, *Submission no. 11*, 4.

something about that. If you are entering looking for drugs and you find stolen property or a corpse, or whatever it might be, clearly you don't expect the police to turn a blind eye. Something has to be done about it.<sup>793</sup>

Liberty Victoria also supported seizure but supported a requirement that the officials should go before a magistrate within 24 hours of the seizure and seek a warrant for the items.<sup>794</sup> The Committee discusses this retrospective 'cure' for the absence of a warrant after discussing the current state of the law in this area.

## The law relating to such seizures

### Victoria

The Inspectors' Powers Report includes an analysis of the legislative and common law regulation of this type of seizure. The Committee of the 54<sup>th</sup> Parliament noted that while some legislation explicitly authorises the seizure of things not described in the warrant, the scope of such provisions is "very limited". This is perhaps unsurprising given the limited reach of inspectors' powers: whereas inspectors may discover material related to any offence during the execution of a warrant, the application of their powers is limited to specific subject matter offences or to contravention of specific legislation. This is reflected in statutory provisions that authorise seizure of:

- animals not described in a warrant, if the inspectors believe that the animal is at risk;<sup>795</sup>
- samples of things not described in the warrant if the inspector believes that they will afford evidence of the contravention of the *Fair Trading Act 1999* or a related class of legislation;<sup>796</sup>
- things not described in the warrant if an authorised officer believes on reasonable grounds that they are connected with the offence or another offence against the Act that authorised the warrant and that it is necessary to seize the things.<sup>797</sup>

However, the Committee noted that only a small number of Acts contained such provisions. This situation does not appear to have changed in the period between the Inspectors' Powers Report and this inquiry.<sup>798</sup>

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<sup>793</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 293.

<sup>794</sup> Liberty Victoria (Brian Walters SC speaking on this occasion in his then capacity as Vice President of the organisation), *Minutes of Evidence*, 19 October 2004, 190.

<sup>795</sup> *Prevention of Cruelty to Animals Act 1996* s 24G.

<sup>796</sup> *Fair Trading Act 1999* s 125.

<sup>797</sup> *Fisheries Act 1995* s 103; *Wildlife Act 1975* s 59C. Section 100D of the *Police Regulation Act 1958* provides similar authorisation to members of the police force in relation to particular offences under that Act.

In such cases, where legislation is silent, the common law provides authorisation for seizure of items not included in a search warrant. Again, however, the Committee of the 54<sup>th</sup> Parliament observed that the authority is limited: the relevant cases concern searches by police.

Indeed, police members' authority to seize items not mentioned in the warrant is primarily derived from common law, as the most frequently used Victorian warrant provisions - sections 92 and 465 of the *Crimes Act 1958* and section 81 of the *Drugs, Poisons and Controlled Substances Act 1981* - are silent on the issue.

At common law:

It is well settled that if, in the course of a lawful search, evidence of another offence is discovered, that evidence may be seized, notwithstanding the lack of a warrant to enter and seize the item/s that provide such evidence.<sup>799</sup>

Such seizures are described as chance discovery or inadvertent discovery. These terms reflect the requirement that for the seizures to be lawful, officers must "merely stumble across [them] in the course of an otherwise lawful search".<sup>800</sup> In order to seize items not mentioned in the warrant, officials must be in the place legally and suspect on reasonable grounds that the items in question are evidence of an offence.<sup>801</sup>

Tronc, Crawford and Smith note that the development of the law in this area has been controversial. *Ghani v Jones*, still widely relied on by police, has been criticised as unsound in principle because of what is regarded as its significant expansion of the common law powers of the police. The case was nevertheless applied in Australia, although a 1993 Australian Federal Court decision held that the extension of police powers was not consistent with Australian law, Heerey J expressing his concern that *Ghani v Jones* could be used to circumvent the scrutiny imposed by the requirement to obtain and comply with a warrant.<sup>802</sup>

### **Other jurisdictions**

Other jurisdictions empower police to seize items not included in the warrant.

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<sup>798</sup> For example, the eleven health practitioner Acts do not include provisions authorising such seizures.

<sup>799</sup> *Chic Fashions v Jones* [1968] 2 QB 299.

<sup>800</sup> *R v Applebee* (1995) A Crim R 554 (Higgins J).

<sup>801</sup> *Chic Fashions v Jones* [1968] 2 QB 299; *Ghani v Jones* [1970] 1 QB 693 (Denning MR); *Reynolds v Commissioner of Police of the Metropolis* [1985] 2 WLR 93, 105.

<sup>802</sup> *Challenge Plastics Pty Ltd v The Collector of Customs for the State of Victoria* (1993) 42 FCR 397, 405. The Committee's necessarily brief examination of the common law is drawn from *Tronc et al, Search and Seizure in Australia and New Zealand*, 17-21, 210-205.

The Commonwealth *Crimes Act 1914* requires the issuing officer to state in the warrant that it authorises the seizure of things found at the place in the course of the search if the executing police member believes on reasonable grounds that they are relevant to an indictable offence not connected to the warrant and that seizure is necessary to prevent their concealment, loss or destruction or their use in committing an offence.<sup>803</sup>

In New South Wales, the *Search Warrants Act 1985* authorises police members executing search warrants to seize any thing not mentioned in the warrant that s/he finds in the course of executing the warrant, and believes on reasonable grounds to be connected with any offence.<sup>804</sup> The Occupier's Notice prescribed under the Act includes a statement that items that are not mentioned in the warrant can be seized during the search.

Queensland police members are empowered to seize a thing s/he reasonably suspects is evidence of the commission of an offence, whether or not the thing or the offence relates to the warrant.<sup>805</sup> This followed the Criminal Justice Commission (CJC) review of Queensland police powers. The CJC recommended that police be entitled to seize objects other than those in the warrant that provide evidence of the offence in the warrant, or objects that provide evidence of an indictable offence not mentioned in the warrant, in both cases where the objects are discovered in the course of a "reasonable search pursuant to the terms of the original warrant".<sup>806</sup> The Parliamentary Criminal Justice Committee review of the Committee's report endorsed the recommendation.<sup>807</sup>

## Evidence received by the Committee

The Committee received four preliminary submissions arguing that the law in this area is unclear.<sup>808</sup> In oral evidence, Dr Tudor told the Committee that:

The matter of inadvertent discovery of evidence of other offences is an area of law which is currently very unsettled and only a matter of common law. I think police practices are largely uncontroversial because there seems to be a settled agreement as to what the common law requires, but the next time an appeal case comes up with this it will be very unclear. Some English cases in the 1960s are *Ghani v Jones*, a federal court matter [*Challenge Plastics*], an

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<sup>803</sup> *Crimes Act 1914* (Cth) s 3E(7).

<sup>804</sup> *Search Warrants Act 1985* (NSW) s 7(1).

<sup>805</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 113.

<sup>806</sup> Criminal Justice Commission, *Report of a Review of Police Powers in Queensland, May 1993*, 425.

<sup>807</sup> Queensland Parliamentary Criminal Justice Committee, *Report 23B: Review of the Criminal Justice Commission's Report on Police Powers in Queensland Volumes I - III*, 30 August 1994, 102-104.

<sup>808</sup> Dr. Chris Corns, Dr. Steven Tudor, Brian Walters SC, Victoria Legal Aid, *Preliminary submissions*, Discussion Paper, 58-59.

ACT [*R v Applebee*] matter referring to some Victorian cases – it is a very unsatisfactory form of law at the moment. If there was a clear-cut Court of Appeal matter in Victoria which laid down the law it wouldn't be so bad, but it is a very unsettled area.<sup>809</sup>

Liberty Victoria concurred:

The state of the law in Australia, as I understand it, is this: although in England, under the decision of Lord Denning in *Ghani v. Jones* ... if a policeman goes into a premises on a warrant, finds evidence of another crime, they can take that evidence, but the law in Australia seems to be the contrary; you cannot take it. The decision is *Challenge Plastics* ...by Justice Heerey in the Federal Court. Liberty Victoria does not think that is sensible.<sup>810</sup>

Victoria Police, however, argued that the law is not unclear: “there is a wealth of authority which proclaims that such a power exists[,] for example *Ghani v Jones*, *Chic Fashions*, *Applebee* and *Goldberg v Brown*”.<sup>811</sup> The last case was decided by the Victorian Supreme Court and as such may have gone some way to addressing Dr. Tudor's concern. However, the Committee observes that the case appears to concern general common law powers of police to seize items, rather than seizure of items discovered in the course of the execution of a warrant.

In its Discussion Paper, the Committee asked what principles should govern inadvertent discovery and whether sanctions should apply where those principles are breached. The Committee received two suggestions.

Dr. Tudor suggested that the procedure for dealing with such seizures should be clarified in legislation, based on the *Crimes Act 1914* (Cth), and should include an immediate report to the officer who issued the warrant about what additional evidence was discovered.

That is all fairly much common sense, I don't think it is too controversial and the details should be thrashed out between the police and the drafters. I do think it is very desirable that you put it on a statutory footing just to clarify the situation.<sup>812</sup>

As already noted, Liberty Victoria suggested that seizures should be retrospectively authorised by seeking a new warrant for the items within 24 hours of the seizure.

## Discussion and conclusions

The Committee observes that while the development of the common law powers of seizure of things not mentioned in the warrant has been eventful, Victoria Police, who

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<sup>809</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 293.

<sup>810</sup> Brian Walters, SC, Liberty Victoria, *Minutes of Evidence*, 19 October 2004, 190.

<sup>811</sup> Victoria Police, *Submission no. 25*, 18.

<sup>812</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 293.

are the major users of the powers, are satisfied that the law is sufficiently certain to enable them to make this type of seizure and did not propose any change to the powers to improve their operation.

The Committee is, however, once again concerned by the lack of consistency in this area of warrant powers and procedures. The Committee is not aware of any reason that justifies some officials being subject to statutory regulation of inadvertent discovery while others are bound by common law. Accordingly, the Committee considers that all legislation containing warrant powers should include provisions, consistent unless there is a compelling reason for inconsistency, for dealing with the discovery of things not specified in the warrant.

Having reviewed relevant common law, Victorian Acts and other jurisdictions, the Committee believes that it is appropriate that legislation should authorise police members who are lawfully executing search warrants to seize things that are not specified in the warrant if they believe on reasonable grounds that such things are evidential material. The requirement for the search to be lawful preserves the common law rule that police should discover the things in question by chance, rather than as a result of an intention to search for things not specified in the warrant.<sup>813</sup>

This proposal is also consistent with the Committee's recommended standard of proof for warrant applications.<sup>814</sup> As it did in respect of that recommendation, the Committee invites the Government to consider an appropriate definition of evidential material in the context of the power to seize items outside the scope of the warrant, in particular whether the power should be limited to things that have the required nexus to an indictable offence, in line with the Commonwealth regime, or should cover things that have the requisite link to any offence, as the New South Wales and Queensland legislation provides.

The Committee is not satisfied that seizure should also depend on a belief that it is necessary to preserve the evidence or prevent its use in an offence, as it does under the Commonwealth regime. Given the difficulty of predicting what may happen to evidence that is identified as relevant, the Committee questions how often such an additional obligation would actually constrain the exercise of the power to seize evidence.<sup>815</sup> The Committee's proposed provisions would in any event allow police to leave evidence in situ where appropriate.

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<sup>813</sup> See Greg Connellan's comments on *R v Applebee* (1995) A Crim R 554: Greg Connellan, in Ian Freckleton, *Criminal Procedure* (2004) (Connellan; Freckleton, *Criminal Procedure*), 2-5604.

<sup>814</sup> The Committee's discussion of the standard of proof and relevant recommendations begins at p 109.

<sup>815</sup> The Committee's concern here mirrors its assessment of the proposal from Victoria Legal Aid to require applicants for warrants to demonstrate why entry by consent is not possible.

Recommendation 61. That legislation be amended to authorise police members who are lawfully executing a search warrant to seize things that are not specified in the warrant, if they believe on reasonable grounds that such things constitute evidential material.

The Committee has restricted the preceding conclusion and recommendation to police members because of the limited authority of other officials who execute search warrants. The powers of such officials are generally restricted to subject-specific Acts, which preclude the grant of a general power of seizure of inadvertent discoveries.

The Law Reform Committee of the 54<sup>th</sup> Parliament phrased the issue as follows:

Allowing authorised officers to seize material unrelated to their search warrant would arguably be too great an intrusion on the rights of the individual. On the other hand, not allowing authorised officers to take any action would hinder effective law enforcement.<sup>816</sup>

That Committee suggested that one way of balancing those competing interests “would be to introduce a right to preserve the scene and notify the appropriate authorities by way of an approved and monitored procedure”.<sup>817</sup> The Committee recommended:

That consideration be given to conferring on inspectors a limited power to preserve a scene for a set period of time if they encounter clear evidence of crimes which are not within the scope of their own powers.<sup>818</sup>

The Government responded that it would consider the recommendation.<sup>819</sup>

The Committee also urged agencies to ensure that they had formalised reporting systems for dealing with evidence of criminal activity beyond their jurisdiction.

The present Committee has not received any comments on these conclusions, although a number of submissions to the warrants inquiry highlighted the practice of agencies executing search warrants in cooperation with Victoria Police, thereby avoiding the limitation on non-police powers.<sup>820</sup> The Committee nevertheless

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<sup>816</sup> *Inspectors’ Powers Report*, 196.

<sup>817</sup> *Ibid*, 197.

<sup>818</sup> *Ibid*.

<sup>819</sup> Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee’s Final Report on The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*, 11 June 2003, 16.

<sup>820</sup> Examples are Department of Primary Industries, *Submission no. 11*; Environmental Protection Agency, *Submission no.27*.

considers that its predecessor's view offers a potential alternative approach<sup>821</sup> and accordingly endorses its findings and recommendations.

### ***Receipts for seized items***

The practice of issuing an occupier, or other person in the place being searched, with itemised receipts for property seized during the search is another way of improving the fairness and efficiency of warrant powers and procedures. A record of things seized or otherwise affected by the search (for example, damaged or modified) can be useful in responding to allegations about the conduct of the search. It may both protect executing officials from unfounded claims about the search's impact and assist individuals affected by the search in securing restitution of their property.

The Deputy Director, Police Integrity gave evidence about the problems that arise with receipts. Before discussing this, the Committee will summarise the consistency of the law in this area.

### **Victorian law**

Victorian legislation contains a range of receipt provisions.<sup>822</sup>

- Some Acts require an authorised officer or Victoria Police member who seizes items under a warrant from a person who is present at the time of the seizure to give the person a written receipt for the thing seized as soon as practicable.<sup>823</sup>
- Others provide that executing officials must as soon as practicable after seizure give to an occupier who requests it a copy of any thing seized in the search that can be "readily copied". Receipts must be provided to the occupier for items that are not so copied.<sup>824</sup>
- Some legislation provides that executing officials who retain possession of documents seized under warrant must give a copy of the documents to the person formerly in possession of them, within 21 days of the seizure.<sup>825</sup>
- Other Acts require the issue of a receipt in a prescribed form.<sup>826</sup>

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<sup>821</sup> The Committee notes that agencies prefer to be accompanied by Victoria Police in particular circumstances, for example where force may or will have to be used to gain entry.

<sup>822</sup> Many apply to a range of powers, including seizure without a warrant. In discussing these provisions, the Committee limits its assessment and analysis to seizures under warrant.

<sup>823</sup> *Fisheries Act 1995* s 104.

<sup>824</sup> *Police Regulation Act 1958* s 86Y; *Medical Practice Act 1994* s 93D and provisions based on that in the other ten health practitioner Acts.

<sup>825</sup> *Fair Trading Act 1999* s 127 (1).

- The *Wildlife Act 1975* imposes relatively detailed obligations on executing officials. They are explicitly prohibited from seizing things unless they “make out or tender” to the person apparently in possession of the things a written receipt for the sample taken or thing seized. If they are unable to ascertain the identity of the owner or custodian of the things, the officials must leave a receipt with or post it to the person apparently in charge of the thing. Moreover, they must take reasonable steps to return the thing to the person from whom it was seized if the reason for its seizure no longer exists.<sup>827</sup>

Many other Victorian Acts are silent, including the *Magistrates’ Court Act 1989* common provisions on search warrants and the most frequently used specific warrant provisions, such as section 92 and 465 of the *Crimes Act 1958* and section 81 of the *Drugs, Poisons and Controlled Substances Act 1981* .

At an operational level, the Victoria Police Manual contains extensive and detailed instructions regarding the seizure and receipting of property. General procedures require that when property is seized, the commander at the scene must, where practicable, and preferably at the location of the seizure, ensure:

- that a receipt for the property is issued to the suspect or representative;
- that a list of the property is compiled and counter-signed by a suspect, representative or other independent person, or a second police member if the suspect has not counter-signed (if there is non-compliance with this procedure because of impracticality, this must be justified in a report, which is to be attached to the relevant record created in the Victoria Police Property Book);
- that the property is labelled and made secure, see section 4.3;
- that the property is recorded in the Property Book and lodged in a property store as soon as practicable; and
- that any legislative requirements in relation to the seized property are followed.<sup>828</sup>

At the time of seizure or as soon as practicable thereafter, certain items, including those most commonly seized, must be secured in a Tamper Evident Audit Bag (TEAB). Every opening of a sealed TEAB must be recorded in the relevant Property

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<sup>826</sup> *Domestic (Feral & Nuisance) Animals Act 1994* .

<sup>827</sup> *Wildlife Act 1975* s 60B.

<sup>828</sup> Victoria Police Manual, *VPM Instruction 114-4 Exhibits and Seized Property*, version of 11 July 2003, section 4.1

Book record.<sup>829</sup> Additional specific instructions and procedures apply to drugs, firearms, money, vehicles and miscellaneous property.<sup>830</sup>

## Other jurisdictions

Other jurisdictions impose a general requirement to issue receipts for property under warrant. Under the Commonwealth *Crimes Act 1914* and Tasmania's *Search Warrants Act 1997*, officials executing the warrant must provide a receipt for all things seized.<sup>831</sup> The Commonwealth goes further, however, by requiring executing officers to give to an occupier who so requests it a copy of any thing seized in the search that can be "readily copied" and possession of which is not an offence.<sup>832</sup>

In New South Wales, a person who seizes goods under a warrant must provide an occupier who is present with a receipt where it is reasonably practical to do so.<sup>833</sup>

In contrast, Queensland's legislation sets out police obligations in some detail:

Receipt for seized property.

If a police officer seizes anything under this Act or a warrant, the police officer must, as soon as is reasonably practicable after seizing the thing—

(a) if the person from whom it is seized is present—give or cause to be given to the person a receipt for the thing; or

(b) if the occupier of the premises is not present—leave a receipt for the thing in a conspicuous place.

(2) The receipt must describe the thing seized and include any other information required under the responsibilities code.

(3) However, if the police officer reasonably suspects giving the person the receipt may frustrate or otherwise hinder the investigation or another investigation, the police officer may delay complying with subsection (1), but only for so long as—

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<sup>829</sup> These include drugs (except "fresh or moist cannabis material"), jewellery, cash, firearms where practicable, and other items as decided by relevant authorised personnel: Victoria Police Manual, *VPM Instruction 114-4 exhibits and seized property*, version of 11 July 2003, section 4.3.

<sup>830</sup> Victoria Police Manual, *VPM Instruction 114-6 Drugs in police possession; 114-7 Firearms in police possession; 114-8 Money in police possession; 114-9 Motor vehicles in police possession; 114-10 Miscellaneous property*.

<sup>831</sup> *Crimes Act 1914* (Cth) s 3Q; *Search Warrants Act 1997* (Tas) s 14.

<sup>832</sup> *Crimes Act 1914* (Cth) s 3N. Similar provisions in Victorian legislation appear to be based on this section (examples are listed in footnote 824 above). Notably, however, the Victorian legislation requires copies or receipts, whereas the Commonwealth regime appears to entitle a qualified individual to both.

<sup>833</sup> Search Warrants Regulations 1999 (NSW), clause 7.

(a) the police officer continues to have the reasonable suspicion; and

(b) that police officer or another police officer involved in the investigation remains in the vicinity of the place to keep it under observation.

(4) Also, this section does not apply if the police officer reasonably believes there is no-one apparently in possession of the thing or the thing has been abandoned.<sup>834</sup>

### **Improving consistency**

As with other aspects of warrant powers and procedures, the Committee believes Victorian law should contain consistent receipt requirements. Having considered local and national legislation, the Committee considers that Victorian provisions should include the following minimum elements:

- receipts must be issued for all things seized during the execution of a search warrant, other than statutory covert warrants, and given to the occupier or other appropriate person as soon as practicable;<sup>835</sup>
- receipts should include sufficient detail to enable identification of the things seized;
- receipts should include clear information about what could happen to seized items and the rights of individuals with an interest in the seized items, including how to challenge any seizure;<sup>836</sup>
- receipts should be signed by the senior official executing the warrant and, where possible, by the occupier or other person to whom the receipt is given;
- if no-one is present during the search, the receipt should be left prominently in the place or served on an appropriate person at a later date;
- receipt forms should be available in appropriate languages, and with appropriate assistance, consistent with the Committee's conclusions and recommendations at p167 above.

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<sup>834</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 380.

<sup>835</sup> Queensland receipt provisions do not apply to covert search warrants: *Police Powers and Responsibilities Act 2000* (Qld) s 379.

<sup>836</sup> There is the potential for some overlap here with the Committee's recommendations concerning the provision of information to individuals at the place being searched. The Committee considers that any duplication would not be significant as it envisages that occupiers' notices would contain generic information about rights, whereas the receipt provisions would deal specifically with seizures.

Recommendation 62. That legislation be amended to include receipt provisions that meet the following requirements:

- (a) officials executing search warrants, other than covert search warrants, must give as soon as practicable to the occupier of the place being searched, or other appropriate person, a receipt for all things seized;
- (b) receipts must include sufficient detail to enable identification of seized items;
- (c) receipts must include clear information about what could happen to seized items and the rights of individuals with an interest in the seized items, including how to challenge any seizure;
- (d) receipts must be signed by the senior official executing the search and, where possible, by the occupier of the place being searched or other appropriate person;
- (e) where no such person is present during the search, receipts must be left in a prominent place or served at a later date;
- (f) receipt forms should be available in appropriate languages and agencies should ensure that their officials who execute warrants are trained to assist individuals at the place to be searched who do not understand the forms.

### **Evidence about receipts**

As the Committee noted earlier in this chapter, a 2001 risk assessment of property handling, conducted at the request of the then Police Ombudsman, found that two of the most common problems arising from the execution by police of search warrants were the “failure of police” to properly document seized items and to issue receipts for them.<sup>837</sup>

Brian Hardiman, the Deputy Director of Police Integrity, provided the Committee with an update on the situation:

In 2003 I revisited that issue. From 1 July 1999 to 30 January 2003 there were 34 complaints recorded in relation to property handling, 10 of those substantiated and those 10 were basically in relation to failure to issue receipts. Even where receipts are issued, police often fail to properly document what is actually seized. They give a generic description of the item – it might be a box of tools. There are particular problems with identifying documents. We have particular problems identifying computer discs – how do you differentiate between computer discs? Given the

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<sup>837</sup> Brian Hardiman, SC, Office of Police Integrity, *Minutes of Evidence*, 5 November 2004, 305.

number of police searches, the number of complaints is probably low but again I am not convinced that we capture all complaints. I am continually reinforcing this with the police and give lectures about the need for proper property handling with police procedures. Operation CEJA abounds with proven and likely evidence of theft, which were not subjects of complaint.<sup>838</sup>

The theft of items encountered during searches highlights the limited protection that receipts offer. While occupiers may dispute their accuracy in bad faith, information in receipts may also be deliberately falsified or manipulated for the benefit of executing officials and/or the occupier. Mr. Hardiman outlined one such scenario:

I think that one of the reasons why police have been able to get away with theft of very substantial amounts of money in the Drug Squad scenario is partly because of the asset seizure legislation, because the crook has nothing to lose, he knows he is going to lose the assets or money anyway and there is actually an advantage for a crook who is in possession of large amounts of money, for the police to declare a smaller amount of money because it may then bring it within simply possession rather than trafficking. It can be seen by the crook and the police to be a win-win situation, if you like.<sup>839</sup>

The Committee noted earlier that Victoria Police provides its members with detailed operational instructions about property receipting. The Victoria Police Manual stipulates that the following procedures are to be followed when members seize drugs or money.

#### Drugs:

For all drugs received, whether to be held as an exhibit or not:

- separate from other property
- if seized from more than one person or from different locations (e.g. separate rooms of a house) treat as separate exhibits
- cannabis vegetable material must be treated separately from other drugs
- exhibits should be bagged, sealed and labelled at the time of the finding or seizure for storage in a tamper evident audit bag
- enter in the Property Book, with a general description, using separate entries for each exhibit.<sup>840</sup>

#### Money:

When cash money is seized as an exhibit:

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<sup>838</sup> Ibid.

<sup>839</sup> Ibid.

<sup>840</sup> Victoria Police Manual, *VPM Instruction 114-6, Drugs in police possession*, version of 11 July 2003, section 4.3.

- it must be counted: if it is not practical to count the money at the scene of the seizure, e.g. required for forensic analysis, it must be sealed in a Tamper Evident Audit Bag; for amounts apparently more than \$1 000 an Officer or senior sergeant must assess the risk of counting and storing and may attend the scene; for other amounts a Sub-officer must supervise the counting;
- secure in a tamper evident audit bag;
- record in the Property Book;
- issue a receipt according to VPM 114-4;
- if necessary, photograph the money;
- retain money: if of significant evidentiary value, in the station safe; in all other situations, pay into Central Banking System (CBS). The Station Manager is responsible for deciding whether to bank or retain the property. If not banked, a report clearly justifying this action must be made and recorded in the Property Book entry. If banked, record the banking date on the Property Book receipt and the Property Book number in the pay-in-book.<sup>841</sup>

Victoria Police provided the Committee with data about allegations of theft relating to the execution of search warrants. Of 43 theft complaints received in the financial year 2003 – 2004, Victoria Police’s Ethical Standards Unit was unable to determine 23 and found 18 to be unsubstantiated, one to be unfounded and one that was not a complaint.<sup>842</sup>

As the Committee observed previously in this chapter, Victoria Police is taking other action to reduce the potential for theft, by introducing videorecording of some searches, an approach that the Police Ombudsman has recommended for some time.

## Conclusions

The Committee notes that the Director, Police Integrity has extensive powers to investigate the sorts of practices and allegations that Mr. Hardiman gave evidence about, and that Mr. Hardiman has expressed the Director’s intention to use them to do so. The Committee again strongly supports the Director’s approach and urges the Office of Police Integrity to investigate practices, including training and complaints handling, relating to the issuing of receipts for items seized during the execution of search warrants and to make appropriate recommendations. The Committee believes that this conclusion is encompassed by its recommendations to the OPI to investigate the existence and prevalence of abuses of warrant powers and accordingly makes no additional recommendation on this specific matter.

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<sup>841</sup> Victoria Police Manual, *VPM Instruction 114-8, Money in police possession*, version of 11 July 2003, section 5.1.

<sup>842</sup> Letter, Acting Superintendent Stephen Leane, Victoria Police, to Committee Research Officer, 7 April 2005.

## Legal professional privilege

Legal professional privilege is a common law concept that protects the confidentiality of communications between a client and their legal advisor.

[It] is a critical feature of the administration of justice. It serves to encourage people to make full and frank disclosures to their lawyers, who are then placed in a much better position to provide accurate legal advice.<sup>843</sup>

[T]he best explanation of the doctrine is that it is "a practical guarantee of fundamental, constitutional or human rights". ... [It] protects the rights and privacy of persons ... by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.<sup>844</sup>

Brian Walters SC explained the basis of the privilege:

It is very important for people to be able to get legal advice so that they can act in accordance with the law. That is really the theoretical foundation for legal professional privilege. ... Legal professional privilege does not belong to the lawyer; it belongs to the client.<sup>845</sup>

The doctrine frequently arises during the execution of search warrants,<sup>846</sup> especially when lawyers' offices are searched: lawyers and their clients can potentially rely on the privilege to resist producing documents in an investigation and in any subsequent trial.

In the Inspectors' Powers Report, the Law Reform Committee of the 54<sup>th</sup> Parliament discussed the evolution and scope of the privilege's application.<sup>847</sup> The Committee will not recap its predecessor's analysis of the relevant law. That Committee found that judicial interpretation of the privilege in relation to inspectors powers was "inconsistent and confusing"<sup>848</sup> and recommended that the application of the privilege should be

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<sup>843</sup> Michael Edelstein, *Legal professional privilege*, (2004) 78(11) LIJ, 54.

<sup>844</sup> *Carter v. Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121, 161 (McHugh J), quoted in Criminal Bar Association, *Submission no. 12*, 6-7.

<sup>845</sup> Brian Walters, SC, Liberty Victoria, *Minutes of Evidence*, 19 October 2004, 185-186.

<sup>846</sup> Legal professional privilege also arises in relation to the use of material obtained pursuant to surveillance and interception warrants. The Committee considers this aspect of the privilege in its discussion of those warrants, in Chapter Four of this report.

<sup>847</sup> *Inspectors' Powers Report*, 145-150. A more recent and comprehensive discussion is contained in the current multi-law reform agency review of the uniform Evidence Acts: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts, Discussion Paper* (July 2005), 369-405. Under the Uniform Acts, the privilege is characterised as "client legal privilege".

<sup>848</sup> *Inspectors' Powers Report*, 149-150.

clarified in statutes containing inspectors' powers. In response, the Government recognised the importance of the privilege and stated that the privilege will apply unless expressly abrogated by legislation.<sup>849</sup>

However, stakeholders in both inquiries did raise other concerns about agency practices, the efficiency of Victorian procedures for dealing with claims of privilege and more generally about the regulation of the privilege. The Committee therefore addresses them, after outlining how the operation of the privilege is currently facilitated.

### ***The privilege in practice generally***

Documents to which the privilege attaches may not be inspected or seized during the execution of a search warrant, unless the legislative basis for the warrant expressly or by necessary implication excludes the privilege.<sup>850</sup> This poses a practical problem for officials executing the warrant and individuals seeking to rely on the privilege:

It is simply impossible for a police officer executing a warrant to make an instant judgment on the admissibility, probative value or privileged status of the documents which he may encounter in his search.<sup>851</sup>

Therefore, to uphold the integrity of the privilege, the parties involved in the search must ensure the protection of the documents from investigation by executing officials. In effect, the search must be suspended in relation to the documents that are subject to a claim of privilege. The Victorian Supreme Court set out a procedure for doing so to be followed in relation to warrants issued under section 465 of the *Crimes Act 1958*:

It would seem therefore appropriate that a solicitor who *bona fide* and reasonably claimed that documents were entitled to legal professional privilege, upon making such a claim upon the execution of a section 465 warrant under the Victorian *Crimes Act 1958*, would be entitled to place such documents in an envelope or box, and to accompany the same with the executing officer to the issuing justice or to any other justice, there to argue the issue or to have the documents detained until a definitive ruling can with due expedition be obtained. If such a course was taken, I doubt that it could be argued that the executing officer was hindered in the execution of his duty.<sup>852</sup>

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<sup>849</sup> Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee's Final Report on The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*, 11 June 2003, 13.

<sup>850</sup> *Baker v Campbell* (1983) 153 CLR 52, cited in Richard Fox, *Victorian Criminal Procedure 2005* (2005), 131-132.

<sup>851</sup> *Baker v Campbell* (1983) 153 CLR 52, 83 (Mason J), quoted in *Allit v Sullivan* [1988] VR 621, 628 (Murphy J).

<sup>852</sup> *Allit v Sullivan* [1988] VR 621, 630 (Murphy J).

The key to the success of this procedure, and therefore to the operation of the privilege, is that members of the police force and legal profession “cooperate in a reasonable and responsible way”.<sup>853</sup> Police and the legal profession have done so through a series of protocols to facilitate the operation of the privilege. In 1990 the Australian Federal Police (AFP) and the Law Council of Australia adopted procedures, updated in 1997 that provide as follows:

- the executing officer should, before executing the warrant and seizing documents identified as being potentially within the scope of the warrant, give the lawyer the opportunity to claim legal professional privilege in respect of any of those documents;
- if the lawyer does so, s/he should be prepared to indicate to the executing officer the grounds upon which the claim is made and in whose name the claim is made;
- the executing officer, under the supervision of the lawyer, should seal in a container all documents subject to the claim;
- the search team in cooperation with the lawyer should then prepare a list of the documents containing general information about their nature;
- the list and container/s should be endorsed to the effect that by agreement the warrant has not been executed in relation to those documents and that they have been sealed and will be transferred into the custody of the justice who issued the warrant or other agreed independent third party pending resolution of the disputed claims;
- the list and the container should then be signed by the executing officer and the lawyer who should together deliver both to the third party;
- the lawyer may then initiate court proceedings to attempt to establish the privilege, or may agree with the executing agency to the appointment of independent lawyers to assess the documents and determine the merits of the privilege claims.<sup>854</sup>

The Committee heard that similar protocols are in place in Victoria, New South Wales and Western Australia.<sup>855</sup> The Victorian arrangement has been agreed between

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<sup>853</sup> *Baker v Campbell* (1983) 153 CLR 52, 97, quoted in *Allit v Sullivan* [1988] VR 621, 628 (Murphy J).

<sup>854</sup> *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and like Institutions in Circumstances where a claim of Legal Professional Privilege is made*, 3 March 1997.

<sup>855</sup> *Inspectors' Powers Report*, 150; Daniel Noll, Attorney General's Department of NSW, *Minutes of Evidence*, 1 September 2004, 56; Pauline Wright, New South Wales Council for Civil Liberties, *Minutes of Evidence*, 1 September 2004, 86; David McKenzie, Legal Aid Commission of Western Australia, *Minutes of Evidence*, 2 September 2004, 133.

Victoria Police, the Victorian Bar and the Law Institute of Victoria, pursuant to which documents subject to a claim of privilege are sealed and taken before a court to determine the claim.<sup>856</sup> As the Committee discusses below, it has not been able to obtain a copy of the Victorian protocol and therefore bases the following analysis on stakeholder evidence.

### **Agencies' practices**

A representative of the Criminal Law Section of the Law Institute of Victoria claimed that the Victorian protocol did not always work:

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.<sup>857</sup>

The Committee of the 54<sup>th</sup> Parliament received too little evidence to reach any conclusion about how agencies' dealt in practice with claims of privilege during a search, although it recommended that agencies ensure that they have a protocol in place for dealing with the seizure of documents that are subject to legal professional privilege claims.<sup>858</sup>

In the light of that discussion and recommendation and the Inspectors' Powers Inquiry's exclusion of police powers and practices, this Committee sought more information about agencies' practices concerning legal professional privilege. The Discussion Paper asked how agencies dealt with claims, whether the Victorian protocol was effective and whether agencies had adopted analogous mechanisms.<sup>859</sup>

Victoria Police responded that solicitors from the Major Fraud Investigation Division (MFID) advise members executing warrants where it is believed that privilege issues may arise. The Victoria Police Manual in fact requires members to obtain such specialist advice before seeking the issue of a search warrant in relation to circumstances in which the privilege is "likely" to arise.<sup>860</sup> In practice, the police appear to go further than the instruction requires: Victoria Police solicitor Neil Jepson indicated that MFID solicitors attend searches where their advice about the privilege has been sought.

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<sup>856</sup> Criminal Bar Association, *Submission no. 12*, 9.

<sup>857</sup> Danny Holding, Law Institute of Victoria, *Minutes of Evidence, 13 December 2001, Inspectors' Powers Inquiry*, 154.

<sup>858</sup> *Inspectors' Powers Report*, 152.

<sup>859</sup> Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures Discussion Paper*, 47-48.

<sup>860</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 5.7.

According to Mr Jepson, the MFID solicitors are able to resolve 99% of claims directly with the solicitor claiming the privilege without needing to refer the matters to court for determination. Moreover, a majority of the matters that are remitted to court are apparently cases where the claimant has been unable to obtain advice from his or her client about whether a privilege claim should be made. Most of these cases are reportedly resolved without a hearing, as the claimants are able to speak to their clients.

However, it was stressed that this practice was not used to undermine the privilege or the rights of those claiming it:

[Resolution of claims between the parties] is done without the MFID solicitor actually seeing the document.<sup>861</sup>

[O]perational police have clear instructions [in the event of a claim of legal professional privilege during the execution of a search warrant] that the solicitor [claiming privilege] is entitled to put the documents in an envelope; to seal them in any way s/he wants, and we take them directly to the magistrate. They are not opened by the police. It is a matter for the magistrate to determine issues of privilege. We do not negotiate. .... It is not a decision for the police to make.<sup>862</sup>

Brian Walters SC said that in his experience Victoria Police and the AFP had properly maintained privilege when it was claimed.<sup>863</sup>

Based on the evidence it has received, the Committee is satisfied that existing procedures adequately protect the privilege in relation to warrants involving Victoria Police. As the Committee did not hear from stakeholders about other agencies' practices, it is unable to reach any conclusions about their treatment of claims for privilege.

### ***The efficiency of Victorian procedures***

The Criminal Bar Association argued that although the privilege is effectively protected by the Victorian protocol, the requirement to take documents before a court makes the determination process slower and less efficient than the Commonwealth protocol. That requirement is apparently a consequence of the unique Victorian legislative requirement to take all items seized under a search warrant before a

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<sup>861</sup> Victoria Police, *Submission no. 25*, 16.

<sup>862</sup> Victoria Police, *Minutes of Evidence, 20 October 2004*, 224.

<sup>863</sup> Brian Walters SC, *Liberty Victoria, Minutes of Evidence, 19 October 2004*, 187.

court.<sup>864</sup> The CBA accordingly recommended the inclusion of independent non-court arbitration in the Victorian procedure to increase its flexibility and efficiency.<sup>865</sup>

Evidence received by the Committee demonstrates that a pre-court mechanism is already in use in some Victorian warrant situations. The general legislative requirement to take items before the court therefore does not appear to prevent the parties resolving claims without resorting to the court for a determination.

Brian Walters SC talked about his experience of “a more streamlined procedure”: he indicated that he had been briefed by Victoria Police to act as “an honest broker” by advising independently of the police and the party claiming the privilege whether seized documents did in fact contain privileged material. Mr Walters noted that the arrangement was *ad hoc*, which he considered was “not ideal”, even though it had worked in the circumstances.<sup>866</sup>

Victoria Police also provided evidence of efforts to determine privilege claims more efficiently than resorting to court:

It is usually the practice that if legal professional privilege is claimed, the solicitor from the MFID [Major Fraud Investigation Division] will sit with the solicitor making the claim and s/he will go through the documents explaining what the document is and why it is privileged. This is done without the MFID solicitor actually seeing the document. In this way, the vast majority of claims are resolved. Those documents where agreement cannot be reached are sealed and taken to the Magistrates’ Court where arrangements for a contest hearing are made. Issues of privilege are resolved by the Magistrates’ Court.

The Committee believes that the ad hoc arrangements for resolving claims without resort to court could be improved, and that a formal pre-court process would, in principle, improve the consistency, flexibility and efficiency of the operation of legal professional privilege. The Committee therefore recommends that the organisations responsible for the state protocol consider amending it to include an appropriate pre-court process in which the parties involved in a claim of legal professional privilege nominate an independent arbitrator to review and determine the claim in the first instance. A list of agreed arbitrators could be maintained by the Supreme Court, or other Victorian court. As with current police practice, where the independent arbitrator is unable to reach a determination, or a party contests it, the documents concerned should be sealed and taken to the court for resolution of the claims.

**Recommendation 63.** That the Victorian protocol on legal professional privilege be amended to formalise the existing ad hoc practice of using an independent arbitrator to hear and determine claims of privilege in the first instance.

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<sup>864</sup> *Crimes Act 1958* s 465(1); *Magistrates’ Court Act 1989* s 78(1)(b).

<sup>865</sup> Criminal Bar Association, *Submission no. 12*, 9.

<sup>866</sup> Brian Walters SC, Liberty Victoria, *Minutes of Evidence*, 19 October 2004, 187.

## **Regulation of the privilege**

### **Is there a need for legislative procedures on the privilege?**

In *Arno v Forsyth*, Fox J suggested that legislation might be necessary to deal with the dilemma caused by the competing needs of securing admissible evidence and protecting client's legitimate legal interests.<sup>867</sup> In an echo of this, the Committee heard evidence about the possibility of legislative regulation of the procedure for facilitating the privilege. The Committee has already noted VLA's reasoning that codification would improve certainty about the scope and operation of the privilege. Brian Walters SC argued that the Victorian protocol should be legislated as that would provide more protection of the privilege than a "mere...agreement" between the parties.<sup>868</sup> A similar argument was put by the New South Wales Crime Commission when it proposed a statutory scheme for dealing with claims of privilege in that State. It believed that that was preferable to the prevailing agreement between the Law Society of New South Wales and the NSW Commissioner of Police, which depended on the goodwill of the parties and on genuine claims of professional privilege being maintained. However, other NSW stakeholders, including the Attorney-General's office and the NSW Council for Civil Liberties, thought that the protocol approach was effective.<sup>869</sup> Procedures for dealing with claims of privilege in New South Wales therefore continue to be governed by the protocol.

Some Victorian legislation in fact already includes procedures for dealing with legal professional privilege claims. These are included among the reforms introduced in the *Major Crime (Investigative Powers) Act 2004* and affect related legislation. Thus identical procedures apply to searches without warrant carried out as part of investigations conducted by the Office of Police Integrity under the *Police Regulation Act 1958* and the *Whistleblowers Protection Act 2001*.<sup>870</sup>

These provisions require that items over which a privilege claim has been made are to be sealed. Officers conducting the search are to transmit the sealed items to a registrar of the Magistrates' Court for safe custody. Within three days of transmission, the Director, Police Integrity must apply to the Magistrates' Court to determine whether or not the item is subject to legal professional privilege. The Magistrates' Court may make various consequential findings and orders. The registrar must dispose of the document in accordance with any court order or agreement between the parties involved in the privilege claim, or if no application is made for

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<sup>867</sup> *Arno v Forsyth*, [1986] 65 ALR 125, 129.

<sup>868</sup> Letter, Brian Walters, SC, Liberty Victoria, to Committee Research Officer, 16 November 2004.

<sup>869</sup> Daniel Noll, Attorney-General's Department of NSW, *Minutes of Evidence*, 1 September 2004, 56; Pauline Wright, New South Wales Council for Civil Liberties, *Minutes of Evidence*, 1 September 2004, 86.

<sup>870</sup> *Police Regulation Act 1958* ss 86VB(3), 86VC(2), 86VE; *Whistleblowers Protection Act 2001* ss 61BB(3), 61BC(2), 61BE-61BF.

determination of the claim, must release the sealed item to a person who appears to be entitled to the benefit of the privilege.<sup>871</sup>

Failure to comply with the requirements to seal items and unauthorised opening of sealed items are subject to punishment by either or both 120 penalty units or imprisonment for 12 months.<sup>872</sup>

For reasons discussed earlier,<sup>873</sup> the Committee believes that these legislative procedures should be amended to provide for agreed independent arbitration of claims for legal professional privilege.

Recommendation 64. That the legal professional privilege procedures of the *Major Crime (Investigative Powers) Act 2004* be amended to provide for agreed independent arbitration of privilege claims without resort to court, as proposed in Recommendation 63 above.

The *Major Crime (Investigative Powers) Act 2004* also provides procedures for addressing privilege claims made by an individual required to answer questions or produce documents to the Chief Examiner.<sup>874</sup> These are different in certain respects from the OPI provisions, such as:

- less stringent requirements for the time of transmission of sealed documents;<sup>875</sup>
- a longer period for the Chief Examiner to apply to the Magistrates' Court for a ruling on the privilege;<sup>876</sup>
- an explicit right for the claimant to appear and be heard on the application;<sup>877</sup>
- more restrictive options for disposal by registrars of items subject to a claim;<sup>878</sup>
- reduced discretion for magistrates hearing the application.<sup>879</sup>

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<sup>871</sup> *Police Regulation Act 1958* ss 86VE-86VF; *Whistleblowers Protection Act 2001* ss 61BE-61BF.

<sup>872</sup> *Police Regulation Act 1958* ss 86VE(3), 86VE(9); *Whistleblowers Protection Act 2001* ss 61BE(3), 61BE(9).

<sup>873</sup> This is discussed at pp 217-218 above.

<sup>874</sup> *Major Crime (Investigative Powers) Act 2004* ss 41-42.

<sup>875</sup> Under the OPI provisions, sealed items must be transferred to a registrar immediately. The Chief Examiner must do so within three days.

<sup>876</sup> The Chief Examiner has seven days to make an application, the Director, Police Integrity must do so within three days.

<sup>877</sup> *Major Crime (Investigative Powers) Act 2004* s 42(4).

<sup>878</sup> Under section 42, the registrar must return sealed items to the claimant in the event that no application is made to the Magistrates' Court. Under the OPI provisions, the registrar must return them to "a person who appears to be entitled to the benefit" of the privilege.

The Committee notes these apparent inconsistencies but does not comment further as they do not raise issues of direct relevance to its discussion of search warrants.

Brian Walters SC gave another reason for codification of procedures. He felt that the privilege was such an important component of the legal system that “the community as a whole should have a say [in its operation] through legislation”.<sup>880</sup> Certainly the legislative process would enable broader community awareness of and participation in the operation of the privilege than the present agreement between key stakeholders.

Moreover, the Committee’s experience indicates that some of those stakeholders are themselves unaware of the Victorian protocol. Neither the Victorian Bar Association nor the Law Institute of Victoria (LIV) were able to provide the Committee with information about the protocol beyond that contained in the Inspectors’ Powers Report,<sup>881</sup> or a copy of it. Their communications with the Committee indicated that they seemed to be unaware of its existence.<sup>882</sup> This situation does not appear to have a substantive effect on the operation of the privilege, as the LIV advises member solicitors with queries concerning Victorian warrants to apply and follow the Federal procedures agreed between the AFP and the Law Council. The Committee is nevertheless concerned by the apparently inconsistent levels of knowledge about the Victorian protocol that its research revealed. While the Criminal Bar Association is able to advise its members on both the Federal and state procedures, the LIV does not appear to be in a position to provide the same service to its members. It is axiomatic that an understanding of the Victorian procedures is critical to those members because of their work advising and representing clients.

## Conclusions

The Committee is not aware of any justification for the differences in the regulation of the procedures to be followed when claims for privilege are made that it has identified, in particular the existence of relevant provisions in some legislation but the silence on the issue in most Victorian Acts. The Committee believes that professional and broader community awareness and understanding of the privilege and its operation will be enhanced by the adoption of a consistent approach and that the relevant provisions of the *Major Crime (Investigative Powers) Act 2004*, amended in accordance with Recommendation 63 and Recommendation 64 above, are an

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<sup>879</sup> Section 42 provides that Magistrates must make certain orders. The OPI provisions provide that they may do so.

<sup>880</sup> Brian Walters SC, Liberty Victoria, *Minutes of Evidence*, 19 October 2004, 186.

<sup>881</sup> The Bar Association referred the Committee to the Inspectors’ Powers Report for information.

<sup>882</sup> Email, Victorian Bar Association Research Officer to Committee Research Officer, 9 December 2004; email, Law Institute of Victoria Ethics Solicitor to Committee Research Officer, 21 February 2005. The LIV Ethics Solicitor stated that she had heard “rumours” about the existence of the Victorian protocol but was unaware of it.

appropriate source for such an approach. The Committee accordingly considers that the Government should codify procedures for claims of legal professional privilege in relation to all search warrants and all agencies empowered to execute them.

Recommendation 65. That legislation be amended to include procedures for dealing with claims of legal professional privilege in all Victorian search warrant provisions, using as a model, section 86VE of the *Police Regulations Act 1958* and section 61BE of the *Whistleblowers Protection Act 2001* as amended in accordance with Recommendation 63 and Recommendation 64 above.

### Definition of legal professional privilege

In its Discussion Paper, the Committee also asked whether legal professional privilege should be defined or modified in legislation.<sup>883</sup> Victoria Legal Aid suggested that there was some “uncertainty on both the police and legal profession’s sides about exactly what the extent of legal professional privilege is”.<sup>884</sup> Victoria Police partly supported that statement with its comment that the biggest difficulty it experiences in relation to the privilege is that solicitors claiming the privilege are “not really sure what is privileged or not”.<sup>885</sup>

VLA thought that a “central rule or a codification of the rules” relating to legal professional privilege would be “very useful”.<sup>886</sup> Victoria Police on the other hand recommended against a legislative definition or modification of the existing doctrine, arguing that the concept is “well understood” from the common law. It felt that recent confusion about the scope of the privilege was a result of the Commonwealth codifying a definition in the *Evidence Act 1995*<sup>887</sup> that was different from the common law standard. “It is likely that any further attempts to define what legal professional privilege is will only cause further confusion”.<sup>888</sup>

While it can be argued that fixing a definition in legislation would increase clarity among individuals involved in the execution of warrants where the privilege is invoked, the Committee is not satisfied that the evidence it has heard justifies such an approach. The Committee observes that, unlike other sections of this report recommending codification of warrant powers and procedures, individuals’ interest in

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<sup>883</sup> Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures Discussion Paper*, 47-48.

<sup>884</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 202.

<sup>885</sup> Neil Jepson, Victoria Police, *Minutes of Evidence*, 20 October 2004, 224.

<sup>886</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 202.

<sup>887</sup> *Evidence Act 1995* (Cth) s 118. That Act also applies by agreement in the Australian Capital Territory. Identical definitions are contained in New South Wales and Tasmanian legislation: *Evidence Act 1995* (NSW) s 118; *Evidence Act 2001* (Tas) s 118.

<sup>888</sup> Victoria Police, *Submission no. 25*, 16.

the privilege will generally be advocated by their solicitors, who can reasonably be expected to know the scope of such a fundamental rule of law.



## CHAPTER SIX - WARRANTS FOR SEARCH AND SEIZURE - POST-EXECUTION ISSUES

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### **Accountability to the court for use of the warrant**

A warrant is a court document. One of the ways in which Victorian law recognises this is by prescribing some accountability to the court after the execution of the warrant: officials to whom warrants are issued are required to explain their actions under the warrant to the issuing court. The principal way this occurs in Victoria is through the requirement in the *Magistrates' Court Act 1989* that an execution copy of a warrant must be returned to the Court after execution,<sup>889</sup> and that persons to whom search warrants are directed are to bring seized items “before the Court so that the matter may be dealt with according to law”.<sup>890</sup> The latter requirement, unique to Victoria, “provides an early opportunity to assess whether the terms of the warrant have been complied with and whether the retention of seized items is justified”.<sup>891</sup>

The Committee received evidence about three aspects of these examples of court regulation of search warrants: the scope of the requirement to take seized property before the court; the handling by the court of seized property; and other requirements to report to the court. These are considered in this section.

### ***The requirement to take seized property before the court***

#### **Law and practice in Victoria**

The *Magistrates' Court Act* provisions on this issue apply to all search warrants under Victorian legislation. Section 465(3) of the *Crimes Act 1958* essentially repeats the *Magistrates' Court Act 1989*,<sup>892</sup> in that a warrant authorises police members to search for things and to seize and carry them before the Magistrates' Court to be dealt with according to law.

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<sup>889</sup> *Magistrates' Court Act 1989* s 57(10).

<sup>890</sup> *Magistrates' Court Act 1989* s 78(b)(ii).

<sup>891</sup> Criminal Bar Association, *Submission no. 12*, 9

<sup>892</sup> Although the *Crimes Act* obviously predates the *Magistrates' Court Act*.

The origins and operation of the requirement in section 465 of the *Crimes Act 1958* were explored by the Victorian Supreme Court in *Allit v Sullivan*. Murphy J stated that the provision can be traced to section 8 of the 1910 *Crimes Act* of Victoria, which was itself based on the Canadian Criminal Code.<sup>893</sup>

Seized items should be taken before a justice without delay. Moreover, “it is the duty of the issuing justice or the justice to whom the things seized are carried to deal with them according to law. This is not a duty which can be treated as a formality”.<sup>894</sup>

Brooking J offered some guidance about how the justice should deal with seized items:

If goods have been seized as suspected stolen property, and it appears that they were not stolen, then they will be restored by the justice to the possessor, but if it appears that they were stolen then they will be deposited by the justice in the hands of the police [citation omitted]. Where criminal proceedings have been commenced or are in contemplation the justice should give effect to the common law right of the police to retain possession of property required for the prosecution [citations omitted]... it would be proper to allow the police to retain possession of things seized not only for the purpose of using them as evidence but also for the purpose of using them in the course of investigation.<sup>895</sup>

There are exceptions to the rule, although the two that the Committee is aware of are technical rather than substantial. The first recognises that it is not practical to take all items before the court. Section 78(5) of the *Magistrates’ Court Act 1989* therefore provides that “bulky or cumbersome” seized items may be brought before the court by giving evidence on oath to the court as to the present location of the items and by producing a photograph.<sup>896</sup>

A second possible exception concerns inadvertent discovery of items outside the scope of the warrant. Victoria Police made the point that because such evidence is not covered by the search warrant, under a strict interpretation of the law, such seizures do not need to be returned to court. Victoria Police nevertheless takes such items to court to be dealt with according to law.<sup>897</sup>

The Court in *Allit v Sullivan* also stated that the requirement for the issuing magistrates to deal with seized items means that such items are not automatically

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<sup>893</sup> *Allit v Sullivan* [1988] VR 621, 625 (Murphy J).

<sup>894</sup> *Allit v Sullivan* [1988] VR 621, 627 (Murphy J).

<sup>895</sup> *Allit v Sullivan* [1988] VR 621, 639 (Brooking J).

<sup>896</sup> In some cases, the Magistrate may be brought before the seized items, as under section 5(2) of the *Magistrates’ Court Act 1989*, the court can sit anywhere. The Victoria Police Manual stipulates that where it is impractical or dangerous to transport seized items to the court, police members may invite Magistrates to attend the location and deal with the items there. Victoria Police Manual, *VPM Instruction 114-4 Exhibits and Seized Property*, version of 11 July 2003, section 5.1.

<sup>897</sup> Victoria Police, *Submission no. 25*, 18-19.

available to the police or prosecution.<sup>898</sup> The warrant itself authorises search and seizure but not retention:

The power and the duty of the police officer executing a warrant is to take what he has seized before a justice to be dealt with by him according to law: once he has seized the goods, that is his only power in relation to them. He is not entitled, for example, to retain what he has seized for the purpose of facilitating his investigations instead of taking the seized property before a justice [citation omitted]. If the things the subject of the warrant are documents, the warrant gives the officer no power to read them except for the purpose of identifying what he is to seize. Once he has identified and seized the documents, his task is to take them before a justice.<sup>899</sup>

Accordingly, seizures under a search warrant containing a requirement to take seized items before a justice are provisional, as the justice may order the return of the property.<sup>900</sup>

The Court's reasoning confirms a fundamental truth of all warrants:

A warrant should be seen not simply as licensing [individuals authorised to execute it] to do what would otherwise be unlawful, but as a court order for the bringing of certain items to it, such that the person executing the warrant is effectively acting as the agent of the court.<sup>901</sup>

While other Australian jurisdictions require some seized property to be taken before a justice or issuing officer,<sup>902</sup> Victoria is the only one that applies the requirement to property seized under all search warrants.<sup>903</sup>

The Magistrates' Court told the Committee how the review requirement operates in practice:

[magistrates] are provided with the physical items, unless there is provision that if they are too bulky, a photograph can be provided — if it is a car that has been seized, for example. But if you had a drug raid, the cannabis plants are brought back, any paraphernalia involved in the cultivation of the cannabis, the trucks will arrive with all of the property therein. The police will have packaged it up into brown paper bags, depending on what it is; they will have a detailed log where they have itemised everything that has been seized, we will be given a copy of that. I guess I can only talk about my practice, which is to then go through it item by item, confirm that it meets the identity that is contained in the log, speak to the police. If it is a drug matter, ordinarily I would be saying, 'It is cannabis. I am assuming you will be wanting to convey this to the

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<sup>898</sup> *Allit v Sullivan* [1988] VR 621, 627 (Murphy J), 638 (Brooking J).

<sup>899</sup> *Allit v Sullivan* [1988] VR 621, 639 (Brooking J).

<sup>900</sup> *Allit v Sullivan* [1988] VR 621, 641 (Brooking J).

<sup>901</sup> Department of Justice, *Submission no. 26*, Inspectors' Powers Inquiry, 34.

<sup>902</sup> *Crimes Act 1914* (Cth) ss 3ZV–3ZW; *Police Powers and Responsibilities Act 2000* ss 426–427; *Criminal Code* (WA) s 711 s 714; *Search Warrants Act 1985* (NSW) s 7.

<sup>903</sup> Section 78(1)(b)(ii) of the *Magistrates' Court Act 1989* applies to all search warrants issued in Victoria.

forensic science laboratory for an analysis to take place'. If they have seized computers for child pornography, for example, they will be wanting it to go to the police computer crime area.<sup>904</sup>

The Court gives effect to the requirement through a Result of Search form, which is completed prior to the seized items being brought to Court. It contains the following particulars:

- if a warrant is unexecuted, a statement of reasons; otherwise
- details of when the search warrant was executed;
- upon whom the copy of the warrant was served and the address;
- signed acknowledgment by the person who is served the warrant that s/he has received a copy of the warrant; and
- details of whether any damage was caused at the place that was searched.<sup>905</sup>

### **Evidence received by the Committee**

Stakeholders raised three issues about the requirement to take seized items before magistrates:

- whether, and how, the practice should continue;
- the role of occupiers in the process; and
- the management of warrant files.

### ***Whether, and how, the practice should continue***

Victoria Police argued that in most cases the requirement “adds no value to the process of law enforcement or investigation of offences”.<sup>906</sup> However, Magistrate Bowles’ explained the importance of the process:

... it is my opinion that it provides a further check and balance on the seizure of property. Itemised lists are prepared by the police with the knowledge that the lists and property will be taken before a magistrate, and it is my view that the practice is another means by which the court maintains some control over the execution of a search warrant and ensures that the respective interests of the citizen and the police are maintained.<sup>907</sup>

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<sup>904</sup> Magistrate Jennifer Bowles, Magistrates’ Court of Victoria, *Minutes of Evidence*, 20 October 2004, 266-267.

<sup>905</sup> *Ibid*, 265-266, 276.

<sup>906</sup> Victoria Police, *Preliminary submission no. 9*.

<sup>907</sup> Magistrate Jennifer Bowles, Magistrates’ Court of Victoria, *Minutes of Evidence*, 20 October 2004, 269.

Interestingly, in *Allit v Sullivan*, Murphy J noted that:

In my opinion, the circumstances of this case suggest that the procedure required by section 465 in connection with search warrants may not in all cases be carried out to the letter. In fact it has been murmured, although there is no evidence to this effect, that police executing section 465 search warrants rarely carry the things seized to the issuing justice or any other justice as the Act and warrant order, before appropriating the things seized. Should this be so, it is illegal, and would probably expose the police to action for trespass, for failure to follow the simple and clear terms of the warrant requiring the executing constable to carry the things seized to the issuing justice or any other justice to be dealt with according to law.<sup>908</sup>

The Magistrates' Court investigated Murphy J's suggestion by examining search warrants issued at one venue (Sunshine) in a one month period. The review indicated that seized items are being brought before the court in compliance with the law.<sup>909</sup>

On the other hand, the Court's considered view is that seized items should not be returned for directions from magistrates. On behalf of the Court, Magistrate Hannan told the Committee that:

It takes up an enormous amount of magisterial time, it takes up an enormous amount of registrars' time [<sup>910</sup>] and we have at various times questioned the value of it. If we are looking for a position to ensure that all the items that are seized are being produced it seems somewhat strange to rely upon the police being at a property and then coming to us some days or hours later as being a safeguard.<sup>911</sup>

The Court has proposed an alternative to magistrates viewing property. Occupiers would be provided with information about their rights in relation to the warrant and their ability to make certain applications and challenges.

In the event that the Court retains the role of reviewing seized items, its secondary position is that the responsibility should be delegated to registrars with particular qualifications and training.<sup>912</sup> The Police Association supported this proposal, particularly as a means of relieving the pressure on magistrates serving in rural locations.<sup>913</sup>

The Court's position is:

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<sup>908</sup> *Allit v Sullivan* [1988] VR 621, 633.

<sup>909</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 276.

<sup>910</sup> A registrar is present with a Magistrate during the viewing and disposal of seized property: Magistrate Hannan, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 269.

<sup>911</sup> Magistrate Hannan, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 269.

<sup>912</sup> Magistrate Bowles disagrees with the Court's official position, for the reasons stated at p 228: Magistrate Hannan, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 269.

<sup>913</sup> Greg Davies, Police Association, *Minutes of Evidence*, 20 October 2004, 258.

purely resource-driven...Resource wise, we have significant difficulty continuing to accommodate this. At the Melbourne Magistrate's Court we dedicate a magistrate every day to the position of chamber magistrate, and that basically involves issuing search warrants and returning property. Given the value of our magistrates' time, we are concerned with devoting one magistrate a day to doing those tasks.<sup>914</sup>

The Court argues that the Commonwealth regime, where seized property is not brought before issuing officers, is appropriate for state matters in Victoria, particularly as "there has been no identified difficulty with the process that does not involve [property] being produced to a magistrate".<sup>915</sup>

Indeed, successive Commonwealth Governments have twice in recent years examined proposals to give issuing officers responsibilities at the "back end" of warrant procedures. In 1994, the Senate Standing Committee on Legal and Constitutional Affairs considered the addition to the *Crimes (Search Warrants and Powers of Arrest) Bill 1993* of a requirement for the person to whom a search warrant is issued to report back in writing to the issuing officer. The Government was concerned about the usefulness of such a mechanism.<sup>916</sup>

More recently, the Commonwealth Government declined to follow a recommendation from the Senate to adopt a requirement for officials to return the warrant to the court after execution.<sup>917</sup> The Government determined that such a requirement would not enhance existing accountability mechanisms, and in particular would not necessarily "provide additional protection or safeguards" during the execution of the warrant. The Government also felt that most issues would be likely to arise during a prosecution, and that existing laws on admissibility of evidence would allow the court to determine whether the warrant was lawfully executed.<sup>918</sup>

The Committee is concerned by the implications of the Magistrates' Court proposal. Placing the responsibility for challenging seizures under warrants exclusively on occupiers is inconsistent with the thrust of the Committee's conclusions and recommendations throughout the preceding chapters on search warrants. Given the imbalance of power during searches between occupiers and officials executing the warrant, the Committee agrees with Magistrate Bowles that the review of seized items is an important part of the warrant cycle. Indeed, the review completes the cycle. The Committee therefore does not endorse the Magistrates' Court proposal to end the practice of taking seized items before the Court. Moreover, the Committee believes

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<sup>914</sup> Magistrate Hannan, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 269.

<sup>915</sup> *Ibid.*

<sup>916</sup> The Committee discusses this reporting back requirement, found in various Acts, later in this Chapter.

<sup>917</sup> Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 2000, 112-113.

<sup>918</sup> Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Bills Fourth Report - Entry and Search Provisions in Commonwealth Legislation*, August 2003, 11-12.

that the obligation should logically be extended to property that is seized but is not specific in the warrant, and notes that Victoria Police already takes such property before the Court.<sup>919</sup>

Recommendation 66. That legislation be amended to require property that is seized that is not specified in a search warrant, to be taken before the Magistrates' Court.

In relation to the Court's alternative position of transferring the responsibility to appropriately qualified registrars, the Committee notes that legislation enacted since the Court gave evidence in this inquiry contemplates such an approach. The *Magistrates' Court (Judicial Registrars and Court Rules) Act 2005* creates the office of judicial registrar in Victoria. The position is a hybrid of a judicial and administrative office: judicial registrars will not be judicial officers but "will be able to exercise some judicial power".<sup>920</sup> In the Bill's Second Reading Speech, the Attorney-General noted that judicial registrars are used in several Australian jurisdictions to "assist the judiciary in managing their workload in an efficient and cost-effective way without compromising either the independence or the quality of judicial decision making".<sup>921</sup>

The consequential provisions of the *Magistrates' Court Act 1989* allow the Court to make rules delegating to judicial registrars any or all of the Court's powers except the powers to make certain orders, impose certain sentences and hear and determine appeals.<sup>922</sup> The Attorney-General stated that judicial registrars would hear "relatively routine or less complex" matters currently heard by magistrates, including the inspection of property seized under search warrants".<sup>923</sup> In August 2005, the Court published guidelines delineating the initial powers of judicial registrars. These are:

- to determine applications of drivers to be re-licensed and applications for the reduction of time in the obtaining of a report;
- to determine minor criminal and quasi-criminal offences;
- inspection of property seized under a search warrant;

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<sup>919</sup> The Committee discusses this at p 226.

<sup>920</sup> Rob Hulls, Attorney-General, *Magistrates' Court (Judicial Registrars and Court Rules) Bill 2005, Second Reading Speech*, Legislative Assembly, 21 April 2005, 653.

<sup>921</sup> *Ibid.*

<sup>922</sup> *Magistrates' Court Act 1989* s 161.

<sup>923</sup> Rob Hulls, Attorney-General, *Magistrates' Court (Judicial Registrars and Court Rules) Bill 2005, Second Reading Speech*, Legislative Assembly, 21 April 2005, 653.

- to determine minor civil proceedings including proceedings arising under the *Magistrates' Court Civil Procedure Rules 1999*;
- assessments of costs; and
- the conduct of mediations, pre-hearing conferences, directions hearings and case conferences.<sup>924</sup>

The Act also provides that a magistrate can re-hear a matter determined by a judicial registrar, either on its own motion or in response to a request from a party to the proceeding.<sup>925</sup>

The Committee notes the Court's support for this legislative development and the existing practice of registrars accompanying magistrates during inspections of seized property, a practice that has afforded non-magistrates an opportunity to acquire the experience and expertise in reviewing seized property. In light of both factors, the Committee supports the use of judicial registrars in place of magistrates to inspect property seized under search warrants. The Committee considers it important, however, that there should be no diminution in the level of scrutiny of seized property. In this context, the Committee notes that the *Magistrates' Court Act 1989* provides for the development of guidelines in relation to the skills and qualifications required by judicial registrars<sup>926</sup> and urges that such guidelines should ensure that judicial registrars provide the same degree of accountability for seized items as magistrates.

After considering the evidence of the Magistrates' Court and Victoria Police about the resources required to bring seized evidence before the Court, the Committee believes that there may be further opportunities to improve the efficiency of the review process without diminishing the accountability inherent in it. In particular, the Committee believes that consideration should be given to expanding the permissible circumstances in which photographs of items and evidence on oath of their location can be taken before the Court in place of the items themselves. As the Committee noted earlier, at present photographs can only be used where the items are "bulky or cumbersome"<sup>927</sup> The Committee invites the Government to consult further with stakeholders on this issue.

Recommendation 67. That the Government consults with stakeholders about how the use of photographic evidence to comply with the requirement to take seized property before the Court could be expanded.

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<sup>924</sup> Magistrates' Court of Victoria, *Guidelines for the appointment of judicial registrars*, August 2005.

<sup>925</sup> Magistrates' Court Act 1989 s 16K.

<sup>926</sup> Rob Hulls, Attorney-General, *Magistrates' Court (Judicial Registrars and Court Rules) Bill 2005*, Second Reading Speech, Legislative Assembly, 21 April 2005, 654.

<sup>927</sup> *Magistrates' Court Act 1989* s 78(5). This is discussed in the text accompanying footnote 896 above.

### ***The role of occupiers and other affected persons in the process***

In the opinion of the Criminal Bar Association, the ex parte nature of the hearing that occurs as part of the review by the court of seized items reduces its potential as a safeguard. The Association recommended that the executing officer be required to advise any parties affected by the warrant of the time of the hearing to give them an opportunity to raise issues relevant to the execution.<sup>928</sup>

The Committee is not satisfied that the introduction of a requirement for such notification is necessary. The Committee has recommended that occupiers' notices be issued for all search warrants (with qualified exceptions attaching to covert and other warrants) and believes that such information should allow occupiers or other affected persons at the search to petition the court to be heard or to otherwise raise issues about the execution. In that context, an additional notification requirement would presently appear to be an unjustified administrative burden. The Committee notes that it is the experience of Victoria Police that occupiers do not seek to appear "very frequently".<sup>929</sup>

It is not clear whether occupiers and other affected parties have a right to be heard on the return of seized items to the court. In *Condello v Hennessey*, the Victorian Supreme Court suggested both that an occupier may have a right to be heard on the directions to be given at the return of the warrant, and that magistrates may have jurisdiction to hear an occupier's application to revisit the directions.<sup>930</sup> In a more recent case dealing with the return of property to its owner in the interests of justice under section 78(6) of the *Magistrates' Court Act 1989*, the Court stated that there would need to be express provision in the relevant legislation removing the right to be heard for such a result to follow: "[i]t cannot have been contemplated by Parliament that such a right would simply disappear in the absence of any express statement to the contrary".<sup>931</sup>

The Committee believes that these issues should be clarified because of the legitimate interests of individuals in the seized items. A right to be heard on the appropriate directions for dealing with seized property seems to be a more efficient and fairer way of challenging seizures than existing civil action remedies or the ability to challenge the admissibility of evidence at trial.<sup>932</sup> The availability of the latter avenue

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<sup>928</sup> Criminal Bar Association, *Submission no.12*, 9.

<sup>929</sup> Victoria Police, *Submission no. 25*, 10. Section 78(6) allows the Court to order the return of seized items to their owners if it can be done "consistently with the interests of justice".

<sup>930</sup> *Condello v Hennessey* [1991] BC9100589 (Unreported, Supreme Court of Victoria, Phillips J, 14 November 1991), 6, 11.

<sup>931</sup> *Fernandes v Butler & Ors* [2002] VSC 267, paragraph 28.

<sup>932</sup> The Committee limits its discussion of the scope of the right to challenges relating to seized items because other issues concerning the execution of the warrant are more appropriately dealt with through the range of civil, criminal and institutional remedies detailed in Chapter Two, at p 38 above.

is unpredictable, being dependant on prosecution. As the Committee has not received sufficient evidence to reach a concluded view, it supports the right to be heard in principle and invites the Government to consider whether it is appropriate, who should have such a right and how it might be facilitated.

Recommendation 68. That the Government considers whether and how to recognise a right of occupiers and other affected persons to raise issues relevant to seized items during the court's directions hearing pursuant to sections 78(b)(ii) of the *Magistrates' Court Act 1989* and 465 of the *Crimes Act 1958*.

### ***Management of warrant files***

Another issue identified by the Magistrates' Court is the management of warrant files. As the warrant should be returned as soon as practicable after execution, in cases where warrants are executed outside the geographical jurisdiction of the issuing venue, the executing officials may return the warrant to the court at a different venue. It is then necessary to combine files and records from two venues. This situation is exacerbated by the fact that, as the Committee noted in its discussion on record keeping, different venues of the Court are not linked by computer. The effect is to make it difficult for magistrates to know whether warrants that they have authorised have been executed and what items have been seized.<sup>933</sup>

The Committee does not consider that consequence to be particularly problematic: as Magistrate Bowles pointed out, having different magistrates issue the warrant and review seized items is itself a check and balance on the use of the powers conferred by the warrant,<sup>934</sup> assuming that all magistrates have the necessary expertise. However, the situation is inefficient because of the need to physically travel to the issuing venue to consolidate the data pertaining to the issuing and directions phases (or send a copy of the result of search to the issuing venue), rather than being able to do so electronically from the court venue to which the seized items are taken. The present system appears to increase the potential for the occurrence of record keeping errors, while the transfer of the warrant files themselves between venues is described by the Magistrates' Court as "probably less than ideal".<sup>935</sup>

The Committee notes the Magistrates' Court's view that "[m]aybe there need to be some different court procedures that enable the files to be married up at all times".<sup>936</sup> The Committee agrees and accordingly urges the Magistrates' Court to consider how

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<sup>933</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 266.

<sup>934</sup> *Ibid.*

<sup>935</sup> Magistrate Hannan, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 267.

<sup>936</sup> *Ibid.*

to improve the situation and refers to its previous discussion and recommendations concerning record keeping.<sup>937</sup>

## ***Dealing with seized property***

### **Allegations of inconsistent approaches by magistrates**

The Police Association argued that the benefits of the court review of seized property are “often outweighed by its restrictions” because of inconsistencies in the way that magistrates treat seized property:

There is not exactly a uniformity of application across the state with respect to magistrates. They have, necessarily and quite properly, their own views on how legislation is interpreted, and until and unless there is firm legislation that clearly sets out the required steps, or there is some sort of decided precedent from a superior court, those contravening views are going to continue.

Many magistrates, having viewed the property that has been seized under warrant, hold the view that the property can only be retained for the purposes of analysis at the State Forensic Science Laboratory, production in court, or return to the rightful owner. This makes it impossible to interview a suspect and put allegations to him or her in relation to that property. ...

The magistrate's view is that that provision is not allowed or is not catered for in the legislation. Similarly, if ... the police [are unable to locate the owner of property seized under warrant] ... we could not make a request of the public to come and view the property in an attempt to find the identity of the rightful owner. ...

Most magistrates are hesitant to accept digital photographs because of the [ease with which they can be tampered with]....

So there are a number of issues in relation to the treatment of property seized under warrant once it has been viewed and instructions received by a magistrate, and much of that revolves around the magistrate's opinion of what should or should not happen. In our view there is an open door there that needs to be shut, and some clarity obtained in relation to that.<sup>938</sup>

The Association emphasised that it was concerned with the manner in which magistrates exercised their discretion to deal with seized property, rather than the underlying substantive issues:

[Our members'] perception is that there is [no express authority for particular uses of seized items] and people will be open to criticism if they allow what they possibly believe to be an

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<sup>937</sup> The discussion begins at p 134 above.

<sup>938</sup> Greg Davies, Police Association, *Minutes of Evidence*, 20 October 2004, 257-258.

incorrect use of the property to occur, so they basically play it safe and say, 'No, you cannot do it'.<sup>939</sup>

The practical effects of such alleged inconsistencies were said to be two-fold:

- an inability to return stolen property to its owners; and
- alternative charging in situations where seized items could not be used in interviews of suspects.<sup>940</sup>

The Committee put the Police Association submissions to magistrates Hannan and Bowles, who responded that magistrates understand the law and apply it successfully every day. Magistrate Hannan, who is the Court's Supervising magistrate for criminal matters, thought the comments were "surprising in the extreme. I have never heard such an assertion".<sup>941</sup>

Magistrate Bowles explained how directions are given: magistrates complete the section in the Return of Search form headed "Directions given after articles seized", which states that:

The above items have been brought before me to be dealt with according to law.

[1] I direct that items numbered [space for item numbers] be retained in the possession of police pending production at court if required.

[2] I direct that items numbered [space for item numbers] be returned to (Name) (Address)

[3] I direct that items numbered [space for item numbers] may be conveyed to the Forensic Science Laboratory for analysis. I understand that these items may be altered from their original state as a result of analysis.

[Sections for magistrate to sign and date form]<sup>942</sup>

The *Magistrates' Court Act 1989* contains additional directions. If property has been taken from a defendant and in the opinion of the Court the property or part of it can be returned consistently with the interests of justice and with the safe custody of the defendant, the Court must direct that the property or part of it be returned to the defendant or to such other person as the defendant nominates.<sup>943</sup> The Court may also direct the return of property to its owner, if in the opinion of the Court it can be returned consistently with the interests of justice. In the latter situation, magistrates

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<sup>939</sup> Ibid, 259.

<sup>940</sup> Ibid, 260. The Association regarded this as the less serious of the two consequences.

<sup>941</sup> Magistrate Hannan, Magistrates' Court of Victoria, *Minutes of Evidence, 20 October 2004*, 267-268.

<sup>942</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence, 20 October 2004*, 267-268; Result of Search Form.

<sup>943</sup> *Magistrates' Court Act 1989* s 42.

may impose any conditions that they consider appropriate on the return of property.<sup>944</sup> That provision was enacted to clarify the powers of magistrates, thereby implementing a recommendation of the Legal and Constitutional Committee of the Victorian Parliament in its report on the law relating to stolen goods. During that Committee's inquiry, Victoria Police argued that while the Magistrates' Court had the power to direct the return of stolen property to an owner, this did not normally occur. The Committee was told that magistrates were reluctant to exercise their discretion in favour of an order for the return of stolen goods to their owners until related charges had been heard.<sup>945</sup>

The Victorian Supreme Court has considered the use of seized property by police in investigations. In *Allit v Sullivan*, Brooking J considered that once the property had been taken before a Justice:

[t]he cases show that it would be proper to allow the police to retain possession of things seized not only for the purpose of using them as evidence but also for the purpose of using them in the course of investigation.<sup>946</sup>

The Committee asked magistrates Hannan and Bowles to comment on the possibility that the first direction in the Result of Search form may be interpreted by some magistrates as limiting the ability of police to use items listed for the purposes of an investigation. Magistrate Hannan implied that the source of uncertainty may be the interpretation of the word "use".<sup>947</sup> After reviewing the Police Association submission, Magistrate Bowles informed the Committee that:

The evidence which I gave before the Committee represents my practice and my understanding of the general practice of the magistrates when property is brought before the Court, It [is also] consistent with my prior experience working at [Victoria Police]. However, as magistrates are independent judicial officers, I am unable to state what the practice is of all magistrates.<sup>948</sup>

The Chief Magistrate concurred and added that the question of whether property should be available for public viewing to locate owners is not generally an issue that arises at the time that the property is taken before the court.<sup>949</sup>

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<sup>944</sup> *Magistrates' Court Act 1989* s 78(6).

<sup>945</sup> Legal and Constitutional Committee of the Parliament of Victoria, *Report upon Law Relating to Stolen Goods (Livestock)* (1991), 15–16, Recommendation 9. The provision is discussed in *Fernandes v Butler & Ors* [2002] VSC 267 (1 July 2002).

<sup>946</sup> *Allit v Sullivan* [1988] VR 621, 639 (Brooking J).

<sup>947</sup> Magistrate Hannan, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 268.

<sup>948</sup> Letter, Magistrate Bowles to Committee Research Officer, 19 November 2004.

<sup>949</sup> Letter, Chief Magistrate of Victoria to Committee Chairman, 19 November 2004. The Chief Magistrate also noted that "once the evidentiary purposes for seizing the property have ceased, the prosecution is entitled to apply for forfeiture of the property which could include the property being forfeited to the Minister and disposed of in accordance with [his or her] directions".

The Magistrates' Court made no comment on the Police Association claim about magistrates' willingness to accept digital photographs in place of seized items (tendered pursuant to section 78(5) of the *Magistrates' Court Act 1989*).

### ***How other jurisdictions approach judicial power to make directions***

Legislation in other jurisdictions provides varying degrees of direction about the disposal of seized goods. In Queensland, the *Police Powers and Regulations Act 1997* requires police who have seized certain items<sup>950</sup> to apply within 30 days of the seizure to a justice of the peace or magistrate for an order in relation to the seized items. The issuer's powers are set out in section 427:

- (1) After considering the application, the issuer may, in relation to the seized thing, order—
  - (a) that it be kept in the possession of a police officer until the end of—
    - (i) any investigation in relation to which the thing may be relevant; or
    - (ii) any proceeding in which the thing may be relevant; or
    - (iii) any appeal against a decision in a proceeding in which the thing is relevant; or
  - (b) that it be photographed and returned to its owner or the person who had lawful possession of it before it was seized on condition that the owner or person undertakes to produce it before a court in any later proceeding involving the thing; or
  - (c) that it be returned to the person who the issuer believes is lawfully entitled to possess it; or
  - (d) if the person entitled to possess the thing is unknown, that the thing be disposed of; or
  - (e) for a thing seized for a reason mentioned in section 426(1)(b) or (c), that it be dealt with in the way decided by the commissioner; or
  - (f) that it be disposed of or destroyed; or

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<sup>950</sup> Section 426 requires an application in relation to items seized as evidence of the commission of an offence, or to prevent a person from using the thing to cause harm to a person, or to prevent an offence or a breach of the peace occurring. Various situations are not subject to the requirement, including where a proceeding has been started in which the seized items may be relevant, or consent to the continued retention of the items has been given by its owner or the person who had lawful possession of them before seizure, or the items have no intrinsic value, or will perish before they can be returned to whoever lawfully possessed it, or they are or are used in the manufacture of a dangerous drug, or they are weapons that the person from whom they were seized may not legally possess.

(g) that it be dealt with by way of a proceeding under section 424 or 425 or a forfeiture proceeding.

(2) The issuer may, in the order, impose any conditions the issuer considers appropriate, including, for subsection (1)(a), a condition limiting the time for which a police officer may keep possession of documents seized as evidence.

In Western Australia, sections 714 and 716 of the *Criminal Code* also permit a justice to give various instructions about the fate of seized goods, for the purposes of preserving evidence, returning items to their owners or for another purpose. The Commonwealth *Crimes Act 1914* contains detailed rules for the retention or return of seized property.<sup>951</sup> In New South Wales, section 7(3) of the *Search Warrants Act 1985* provides that after items seized pursuant to the Act have been produced in evidence, or when they are not required as evidence, they shall be disposed of as a court or magistrate may direct.

### **Conclusions**

The Committee reiterates the importance of consistency and the avoidance of doubt, or the perception of the existence of either. While the Committee considers that the Return of Search form is for the most part clearly set out, there appears to be a potential ambiguity about the scope of police action permitted pursuant to the first direction, that items be retained in the possession of the police pending production at court if required. The Committee therefore invites the Magistrates' Court to consider whether there is any need to clarify its Result of Search form and procedures and the guidance provided to magistrates in how to implement them, in particular the scope of the directions for the use of seized items and the use of digital photographs.

Recommendation 69.	That the Magistrates' Court clarifies the Result of Search Form and procedures and guidance provided to magistrates to implement them, in particular the scope of directions for the use of seized items in police investigations and the use of digital photographs.
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### **Allegations about delays in dealing with seized property**

Victoria Police also expressed concerns about the requirement to take seized property before the court. The most common difficulty it experiences is:

delays in being able to use the material seized in any interviews with suspects [because of a lack of available magistrates]. It is often the case that suspects are arrested at the time warrants are

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<sup>951</sup> *Crimes Act 1914* (Cth) ss 3F, 3ZV–3ZW.

executed and there have been instances of long delays, resulting in people being in custody for extended periods before material seized can be used.<sup>952</sup>

It was suggested that such delays could be addressed by increasing the availability of after hours magistrates, or providing an exemption from the requirement when “people are in custody waiting to be interviewed and it is considered desirable to use seized material in the interview”.<sup>953</sup>

The Committee recalls the Magistrates’ Court’s concerns about the resources required to discharge its responsibility to review seized property.<sup>954</sup> The Committee believes that the introduction of judicial registrars and consideration of increased use of photographic evidence may improve the efficiency of the review process and therefore refers to its earlier discussions of these issues.<sup>955</sup>

### **Allegations that property is a contributing factor in corruption cases**

Finally, the Deputy Director, Police Integrity argued that as a consequence of the requirement to produce actual exhibits rather than photographs and analyses, Victoria Police had to retain and store “far too much property”. This was said to have contributed to corruption:

the police drug squad in the past has been awash with seized drugs. The length of time for seized property is a really big problem, and it is not just a police problem, it is a court problem as well.<sup>956</sup>

Mr. Hardiman recognised that “police procedures for conducting searches are pretty good and the deficiencies are generally sheeted home to individual members not complying with the provisions rather than the systemic problems”. He believed, however, that “exhibit handling and police information management systems need drastic overhaul”,<sup>957</sup> despite the numerous instructions in the Victoria Police Manual that deal with property and exhibits.<sup>958</sup>

The Committee considers that this is another issue that the Office of Police Integrity is best equipped to examine and propose appropriate reform action. Accordingly, it makes no further comment.

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<sup>952</sup> Victoria Police, *Submission no. 25*, 19.

<sup>953</sup> Victoria Police, *Submission no. 25*, 19.

<sup>954</sup> The Committee outlines the Court’s views at p 229.

<sup>955</sup> The Committee discusses these issue at pp 232-232.

<sup>956</sup> Brian Hardiman, Deputy Director, Office of Police Integrity, *Minutes of Evidence*, 5 November 2004, 305.

<sup>957</sup> *Ibid*, 307.

<sup>958</sup> These are referred to at footnote 830 above and accompanying text.

### ***Other requirements to report to the court***

The statutory requirement to take seized items before the court obviously facilitates scrutiny of a limited group of warrants: only those whose execution results in items being seized. While the Magistrates' Court practice has been to require a Result of Search form to be completed for all search warrants issued, the requirement is not codified in statute. The legislative framework governing accountability for the warrant to the court is therefore inconsistent. Similarly, the *Magistrates' Court Act 1989* requirement for the return of warrants to the court is limited to those that are executed and does not indicate whether information about the execution process should be provided with the returned warrant.

The Committee, noting this and stakeholder concerns about accountability for the use of warrant powers and procedures, which have been discussed throughout the preceding chapters, considered how to improve the consistency and clarity of existing mechanisms for the scrutiny of warrants by the court. The Committee focused on other models for reporting to the court on the warrant.

#### **Victoria**

Some Victorian legislation imposes additional reporting requirements on officials who execute search warrants. Section 81(4) of the *Drugs, Poisons and Controlled Substances Act 1981* requires a police member to whom the warrant was addressed and who has executed it to:

[...]

(b) cause to be lodged with the registrar of the Magistrates' Court at the venue nearest to the land or premises where the warrant was executed a report signed by the member and containing particulars of—

(i) all searches undertaken;

(ii) all persons arrested; and

(iii) all things and documents seized and carried away; and

(iv) all samples taken; and

(v) all things destroyed or disposed of—

in execution of the warrant.

The inclusion of the fifth item and the restriction of the reporting obligation to executed warrants appear to be the only differences between that provision and the Return of Search Form used by the Magistrates' Court.

The *Confiscation Act 1997* is another piece of legislation that contains additional reporting requirements. The various warrant provisions contain slightly different obligations. Under sections 89, 97I and 97U, the person to whom the warrant was issued must within 10 days after the expiry of the warrant report in writing to the issuing officer:

- (a) stating whether or not the warrant was executed; and
- (b) if the warrant was executed—setting out briefly the result of the execution of the warrant (including a brief description of anything seized); and
- (c) if the warrant was not executed—setting out briefly the reasons why the warrant was not executed; and
- (d) in the case of a search warrant, stating whether or not an occupier's notice has been served in connection with the execution of the warrant; [...].<sup>959</sup>

Notably, these provisions cover all warrants, not just those that have been executed.

Sections 89 and 97I require that additional information specific to the warrant powers under those parts of the Act be included in the reports.<sup>960</sup>

Reports under sections 97I and 97U must be in the prescribed forms, which are contained in Schedules 4C and 4E of the *Confiscation Regulations 1998*. Although section 89 does not prescribe a form, the Regulations contain a generic report form.

Section 89 reports can be submitted to a magistrate or judge other than the issuer if the latter is unavailable.<sup>961</sup>

Both the *Drugs, Poisons and Controlled Substances Act 1981* and the *Confiscation Act 1997* include a right of access to the report for particular individuals affected by the execution of the warrant, which is facilitated by application to the Magistrates' Court to inspect the report. Affected individuals are:

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<sup>959</sup> *Confiscation Act 1997* s 89(1). Sections 97I and 97U repeat the first three conditions and, fourthly, require the report to state whether or not a copy of the warrant was given to the occupier or another person at the premises.

<sup>960</sup> Section 89 requires the inclusion of statements about: whether or not a notice of the execution of a seizure warrant has been given in accordance with section 88A; and whether or not an embargo notice has been issued under section 93 in connection with the execution of the search warrant and a brief description of the property subject to the notice.

Section 97I requires a statement about whether or not a copy of any inventory made of the property inspected and a notice as required by section 97J were given to any person who has an interest in the property inspected.

<sup>961</sup> *Confiscation Act 1997* s 90.

- a person arrested during the execution of the warrant, or the owner or occupier of the searched premises or of property seized or destroyed or disposed of during the execution of the warrant;<sup>962</sup>
- a person who is an owner or occupier of the searched premises or has an interest in property seized or embargoed as a result of the execution of the warrant.<sup>963</sup>

Other Victorian search warrant legislation generally does contain provisions prescribing a report to court on the execution (or non-execution) of the warrant.<sup>964</sup> Notably, neither of the Acts that contain model search and seizure provisions - the *Fair Trading Act 1999* nor the *Medical Practice Act 1994* - include the requirement. The same is true of the *Police Regulation Act 1958*, which as the Committee has noted in several places in this report, contains some of the most modern and extensive Victorian search warrant provisions.

### Other jurisdictions

In New South Wales, reports are required for all search warrants. The person to whom the warrant was issued must within 10 days of execution or expiry of the warrant submit a written report to the issuing officer. The prescribed contents of the report include identical items to those required under the three *Confiscation Act 1997* provisions outlined above. The New South Wales legislation also requires copies of the search warrant and occupier's notice in the case of telephone warrants where those documents were not provided to the occupier, and other particulars as may be prescribed.<sup>965</sup>

Tony Lynch, a senior solicitor of the Legal Aid Commission of NSW, told the Committee that in his experience, reporting by the police had been "a bit slack", which he suggested was due to a lack of appreciation of the importance of the mechanism:

the police kept saying, 'Yes, but what if the place is empty?'. That goes down as a zero result, therefore the officer might be less inclined to give me a warrant next time. We are saying, 'No, no, no. You don't understand'. What we are trying to do is suggest that we have a system that reflects the importance of the whole process for the whole of the time. Our view is that ... there is

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<sup>962</sup> *Drugs, Poisons and Controlled Substances Act 1981* s 81(5).

<sup>963</sup> *Confiscation Act 1997* s 89(3) s 97I(3) s 97U(3).

<sup>964</sup> Reporting is required in relation to covert warrants issued under the *Terrorism (Community Protection) Act 2003* s 11. In its Discussion Paper, the Committee stated that reports are also required under various inspection regimes and cited the *Associations Incorporation Act 1981* s 37P, and the *Legal Practice Act 1996* s 196: Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures, Discussion Paper* (July 2004) (*Warrant Powers and Procedures Discussion Paper*), 36. However, reports under those and similar Acts concern the results of the inspectors' investigations (aspects of which may proceed without a warrant) and are submitted to the relevant regulatory body, rather than the Magistrates' Court.

<sup>965</sup> *Search Warrants Act 1985* (NSW) s 21.

a formal reporting back of the result, simply so that in a sense the issue, execution and closure of that warrant, and all of them, is properly noted - end of story.<sup>966</sup>

In two jurisdictions, recommendations for the creation of similar statutory obligations to make some form of report on action taken under search warrants have not been accepted.

As the Committee noted above,<sup>967</sup> a 1994 Commonwealth Senate Standing Committee on Legal and Constitutional Affairs examined the appropriateness of modifying the *Crimes (Search Warrants and Powers of Arrest) Bill 1993* to include a reporting back requirement similar to that found in the New South Wales Search Warrants Act.<sup>968</sup> In response, the former Minister for Justice questioned whether “busy court staff [could] really provide effective scrutiny of the results of searches” and what implications it would have for States and Territories that did not have a reporting back requirement. He was also concerned that it might divert police from “operational work”, duplicate existing mechanisms to examine police files and become “yet another requirement which is high on paperwork and low on practical utility”.<sup>969</sup> The Government felt that reporting back should be canvassed at the Standing Committee for Attorneys-General. The Committee is unaware as to whether this occurred but notes that the *Crimes Act 1914* (Cth) does not contain a requirement to report to the court on the use of the warrant.

More recently, the Commonwealth Government declined to follow the more limited recommendation of the Senate Standing Committee for the Scrutiny of Bills that the Victorian procedure for the return of the warrant should be applied to Commonwealth warrants.<sup>970</sup> The Committee notes that the Senate Standing Committee is currently reviewing the Government’s response and other relevant issues that have arisen since the publication of its report in 2000.<sup>971</sup>

In Queensland, the Criminal Justice Commission recommended that police officers in charge of the execution of a search warrant should report the outcome to the issuing authority within 10 days of execution or expiry of the warrant and that following such a report, the issuing authority should make orders for the custody of any seized

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<sup>966</sup> Tony Lynch, Legal Aid Commission of NSW, *Minutes of Evidence*, 31 August 2004, 12.

<sup>967</sup> The Committee discusses this issue at p 230 above.

<sup>968</sup> The Committee discusses this reporting back requirement, found in various Acts, later in this Chapter.

<sup>969</sup> Letter from Duncan Kerr, Commonwealth Minister for Justice, to Senator Barney Cooney, Chair of the Senate Standing Committee on Legal and Constitutional Affairs, quoted as Appendix 3 of Report by Senate Standing Committee on Legal and Constitutional Affairs, *Crimes (Search Warrants and Powers of Arrest Bill) Amendment Bill 1993*, (February 1994), 184.

<sup>970</sup> Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Bills Fourth Report - Entry and Search Provisions in Commonwealth Legislation*, August 2003, 11-12

<sup>971</sup> On 25 March 2004, the Senate referred the matter back to the Scrutiny of Bills Committee for further inquiry, at [www.apf.gov.au](http://www.apf.gov.au).

property.<sup>972</sup> The Parliamentary Criminal Justice Committee's review of the Commission's report modified the recommendation to require reporting within 72 hours of execution or expiry.<sup>973</sup> However, the *Police Powers and Responsibilities Act 2000* (Qld) and associated regulations do not contain a reporting requirement. The Act requires that, where reasonably practicable, the person executing a warrant records on the warrant the date and time of execution, the names of persons the warrant was executed on and of occupiers of premises where it was executed, and details of the executing officer.<sup>974</sup>

Two witnesses raised concerns about the suitability in Victoria of a comprehensive reporting requirement such as exists in New South Wales. Echoing the former Commonwealth Minister for Justice, New South Wales barrister Robert Hulme SC questioned the effectiveness of submitting a report to the issuing court as a way of enhancing the accountability and oversight of the use of warrant powers:

It may or may not be practical, and it may or may not be effective for a justice of the peace or a magistrate who is issuing warrants to have a continual back flow of paperwork and to be reading it all and thinking about whether what has transpired was what was envisaged at the time the warrant was issued....

In terms of just search warrants...I envisage the number would be considerable, and I cannot imagine that those who are issuing them in those numbers would have the time to review [the report].<sup>975</sup>

He suggested that an independent body might carry out such a function, although he did not believe it would necessarily be any better than review by the issuing officer of a report on the warrant.<sup>976</sup>

Magistrate Bowles said it was arguable that existing Victorian processes offered greater accountability than the NSW reporting requirement. She referred to involvement of occupiers in the reporting process in Victoria by virtue of the requirement for them to sign the section on the Return of Search form that deals with damage to property during the search, and the fact that seized property itself is generally produced before a magistrate.<sup>977</sup>

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<sup>972</sup> Criminal Justice Commission, *Report of a Review of Police Powers in Queensland, May 1993*, 464-465.

<sup>973</sup> Queensland Parliamentary Criminal Justice Committee, *Report 23B: Review of the Criminal Justice Commission's Report on Police Powers in Queensland Volumes I - III*, 30 August 1994, 126-128.

<sup>974</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 395. The Act requires reports on the use of covert search warrants (s 156) and empowers issuing officers to require reports in relation to surveillance warrants (s 127).

<sup>975</sup> Robert Hulme SC, Public Defenders Office NSW, *Minutes of Evidence, 31 August 2004*, 30.

<sup>976</sup> *Ibid.*

<sup>977</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence, 20 October 2004*, 276.

## Discussion and conclusions

The Committee recognises that a requirement to report to court on the use of the powers conferred by a warrant is not a panacea for their potential misuse. However, it is an important part of the accountability framework: it constitutes another check on the use of the powers; and it establishes another record of actions taken under a warrant, one that is available for qualitative and quantitative analysis of the kind envisaged by the Committee in some of its recommendations in this report.<sup>978</sup> The Committee therefore supports a reporting requirement, and notes that this conclusion accords with Parliament's long held belief,<sup>979</sup> expressed through legislation, in the principle that officials to whom a warrant is issued should answer to the issuing court for their actions under the warrant. Currently in Victoria, there are three regimes in force that may be characterised as requiring a form of report to court: the production of seized property before the court for it to be dealt with "according to law" (*Magistrates' Court Act 1989* s 78(1)(b)(ii); *Crimes Act 1958* s 465); the return of the warrant to court after execution (*Magistrates' Court Act 1989* s 57(10)); and the reporting requirements in the *Drugs Poisons and Controlled Substances 1981* and the *Confiscation Act 1997*. The Committee's research indicates that these three mechanisms in combination generally offer greater accountability than reporting obligations in other Australian jurisdictions. However, the return to court requirement is limited to executed warrants and the statutory requirement to provide a comprehensive report appears in only two pieces of legislation.<sup>980</sup> The Committee believes that these inconsistencies should be addressed unless there are compelling reasons not to do so.

There appears to be no good reason to restrict the return to court requirement to warrants that have been executed. Indeed, Magistrate Bowles recommended that legislation should require the return of all warrants, and noted that a search of a sample of Court records indicated that police do appear to return unexecuted warrants, although it is unclear what proportion are returned. The Committee considers that a requirement to return unexecuted warrants is consistent with the principle that warrants are court documents: as such, they should be returned to the court when they are no longer required. The Committee therefore believes that unexecuted warrants should be returned to the court as soon as practicable after expiry.

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<sup>978</sup> Recommendation 8 to Recommendation 9; Recommendation 15 to Recommendation 16; Recommendation 54 to Recommendation 55

<sup>979</sup> As noted earlier in this chapter, the requirement for court review of items seized under a warrant under section 465 Crimes Act dates back to at least the 1910 Victorian Crimes Act.

<sup>980</sup> The Committee has already dealt with the requirement to produce seized property and concluded that it should be retained. Clearly that obligation cannot be applied to all warrants as property can only be seized if the warrant is executed.

Similarly, the Committee is unaware of any substantive reason for the different reporting obligations in, on the one hand, the two pieces of drugs and confiscation legislation and, on the other, other Acts containing warrant powers. The Committee concludes that a consistent approach to reporting is necessary and therefore considers that existing obligations in section 81(4) - (5) of the *Drugs, Poisons and Controlled Substances Act 1981* and in sections 89, 97I and 97U of the *Confiscation Act 1997* (which are essentially identical to section 21 of the *Search Warrants Act 1985* (NSW)) should be extended to other Victorian legislation containing warrant powers. Moreover, as the Result of Search form that is required by the Magistrates' Court in respect of all search warrants contains many of the elements in these provisions, the Committee recommends that it be incorporated into the reporting mechanism it is proposing, as a way of consolidating reporting back procedures, by creating a single form.

The Committee believes that legislation should require that all reports contain the following information:

- whether the warrant was executed;
- reasons for non-execution;
- the date, time and place of execution;
- names of individuals who executed the warrant and individuals who were present at the premises;
- whether an occupier's notice was served;
- a list of seized property;
- confirmation countersigned by the occupier or other appropriate individual that receipts were issued for seized property;
- a description countersigned by the occupier or other appropriate individual of any damage that occurred during the search;
- confirmation countersigned by the occupier or other appropriate individual that they were informed of their rights to challenge the warrant;
- additional information as prescribed by specific legislation;
- a section on directions to be given by the magistrates pursuant to section 78(b)(ii) of the *Magistrates' Court Act 1989*.

Legislation should also require a right of access to the reports, consistent with existing rights in the *Drugs, Poisons and Controlled Substances Act 1981* and the *Confiscation Act 1997*.

While extending the reporting requirement to other search warrants would have resource implications, the Committee notes that a significant proportion of all Victorian search warrants are issued under the *Drugs, Poisons and Controlled Substances Act 1981* and that no stakeholders advocate modification of that reporting requirement. Further, as with its conclusions in relation to information to be provided to individuals affected by the execution of search warrants, the Committee believes that the resource requirements can be reduced through the development and use of template forms and electronic management and collation of relevant warrants data. The Committee has noted that a consolidation of the reporting back requirements could produce a single form for reporting which would incorporate the existing Result of Search form, and produce improved records without increasing workloads.

Recommendation 70. That legislation be amended to require the return to the court of unexecuted warrants as soon as practicable after their expiry.

Recommendation 71. That legislation be amended to require a report on the outcome of all search warrants, containing the following information:

- (a) whether the warrant was executed;
- (b) reasons for non-execution;
- (c) the date, time and place of execution;
- (d) names of individuals who executed the warrant and individuals who were present at the premises;
- (e) whether an occupier's notice was served;
- (f) a list of seized property;
- (g) confirmation countersigned by the occupier or other appropriate individual that receipts were issued for seized property;
- (h) a description countersigned by the occupier or other appropriate individual of any damage that occurred during the search;
- (i) confirmation countersigned by the occupier or other appropriate individual that they were informed of their rights to challenge the warrant;
- (j) additional information as prescribed by specific legislation;
- (k) a section on directions to be given by magistrates pursuant to section 78(5) of the *Magistrates' Court Act 1989*.

Recommendation 72. That legislation permit individuals affected by the warrant to apply to the issuing court for access to relevant reports on the outcome of search warrants.

## Admissibility of improperly obtained evidence

The Committee observed in its Discussion Paper that individuals who are subjected to prosecution that involves evidence seized during the execution of a search warrant may be able to contest the admissibility of the evidence if it was obtained in violation of the terms of the warrant or otherwise improperly.<sup>981</sup>

The law provides that where such evidence is obtained through police misconduct, it may be excluded for reasons of public policy.<sup>982</sup> In *Bunning v Cross*, the leading Australian case on this issue, the High Court offered four such reasons:

- the right of society to insist that those who enforce the law respect it;
- the protection of citizens from improper or unlawful treatment;
- the necessity of enabling Courts to protect the integrity of their processes, by not legitimising improper conduct;
- the necessity of maintaining public confidence in the administration of justice by preventing it from being brought into disrepute.<sup>983</sup>

The possibility of exclusion therefore reflects the principle that “convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price”.<sup>984</sup>

At common law, exclusion is a matter to be decided by the judges hearing the particular case in which a defendant argues that evidence was obtained improperly: in other words, the courts have a discretion to admit such evidence. This common law doctrine governs Victorian warrant powers and procedures. During the inquiry, the Committee received evidence arguing that Victoria should adopt a different legal rule, namely the statutory regulation of admissibility contained in section 138 of the Evidence Acts in use in several other Australian jurisdictions. The Committee considers those submissions after outlining the common law in Victoria and the uniform *Evidence Act* alternative.

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<sup>981</sup> *Warrant Powers and Procedures Discussion Paper*, 41-42.

<sup>982</sup> There is also a discretion to exclude improperly obtained evidence on grounds of fairness. As this is generally concerned with the rights of an accused person to a fair trial, in particular the impact of improperly obtained confessional statements, the Committee will not consider it here: *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159.

<sup>983</sup> *Bunning v Cross* (1978) 141 CLR 54 at 75-78, referred to in Criminal Bar Association, *Submission no. 12*, 11.

<sup>984</sup> *R v Ireland* (1970) 44 ALJR 263.

## **The common law doctrine**

The present discretion to exclude or admit improperly obtained evidence has developed as a result of the High Court's flexible approach to admissibility:<sup>985</sup>

The fact that relevant evidence has been unlawfully or irregularly obtained does not of itself afford a reason for refusing to admit it in evidence...although if it has been so obtained that is a matter to be considered, along with all the other relevant circumstances, in determining whether the evidence should be admitted against an accused person in a criminal trial.<sup>986</sup>

In *R v Ireland*, the Court confirmed the existence of the discretion and identified two broad considerations that are relevant to its exercise:

Whenever [it appears that evidence of relevant facts or things has been ascertained or procured by means of unlawful or unfair acts], the judge has a discretion to reject the evidence. ... In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand, there is the public need to bring to conviction those who commit criminal offences. On the other hand, there is the public interest in the protection of the individual from unlawful and unfair treatment.<sup>987</sup>

Several years later, in *Bunning v Cross*, the Court held that the above statement represented Australian law, and set out five specific criteria for evaluating the two policy imperatives that the judges in *Ireland* crystallised. In deciding how to exercise their discretion, judges should consider:

- whether the breach by officials involved in obtaining the evidence was deliberate or reckless;
- the cogency of the evidence;
- the ease of complying with the law in obtaining the evidence;
- the nature of the offence;
- in cases where the impropriety concerns a breach of statute, the intentions of the legislature in limiting powers.<sup>988</sup>

In the later case of *Ridgeway*, the High Court elucidated another factor to be considered in the exercise of the discretion. In cases in which the commission of a crime was itself procured by the police for the purposes of obtaining a conviction, the

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<sup>985</sup> English courts have taken a more restrictive approach, discussed by Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand* (1996) (Tronc et al, *Search and Seizure in Australia and New Zealand*), 324-328.

<sup>986</sup> *Wendo v The Queen* (1964) 109 CLR 559.

<sup>987</sup> *R v Ireland* (1970) 44 ALJR 263.

<sup>988</sup> *Bunning v Cross* (1978) 141 CLR 54 at 78-80.

Court held that to exclude evidence, there must be “a degree of harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances”.<sup>989</sup> As a consequence of this decision, it has become difficult to exclude evidence obtained by necessity through police participation in criminal activities, such as undercover operations in drug investigations.<sup>990</sup> Given the seriousness of the offences that such investigations uncover, there are clearly sound public policy reasons for admitting such evidence.

More recently, in his dissenting judgement in *R v Swaffield; Pavic v The Queen*, Kirby J added two more factors to be considered:

- whether the conduct would involve the court giving or appearing to give effect to illegality or impropriety in a way that would be incompatible with the functions of a court, or which might damage the repute and integrity of the judicial process;<sup>991</sup>
- whether the conduct would be contrary to or inconsistent with a right of the individual which should be regarded as fundamental.<sup>992</sup>

### ***The Evidence Act doctrine***

*Bunning v Cross* is also the basis of the statutory doctrine contained in section 138 of the uniform Evidence Acts,<sup>993</sup> which are in force in federal courts, the Australian Capital Territory,<sup>994</sup> New South Wales,<sup>995</sup> Tasmania<sup>996</sup> and Norfolk Island.<sup>997</sup> The legislation was introduced following reviews of the laws of evidence that were carried out by the Australian and the New South Wales Law Reform Commissions.<sup>998</sup>

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<sup>989</sup> *Ridgeway v The Queen* (1995) 184 CLR 19, at 37. Exclusion is more likely in cases in which the police conduct constitutes the principal offence to which the charged offence is ancillary, or where the police conduct creates or itself constitutes an essential ingredient of the crime charged: Bram Presser, *Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence*, 25 Melbourne U. L. R. 757 (*Presser, Judicial Discretion*), at 761.

<sup>990</sup> *Presser, Judicial Discretion*, 761 and footnotes accompanying text.

<sup>991</sup> This factor essentially repeats the rationale in *Bunning v Cross*: text accompanying footnote 983 above.

<sup>992</sup> *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159, at 212 – 213.

<sup>993</sup> The term reflects the fact that the various Acts are substantially identical.

<sup>994</sup> *Evidence Act 1995* (Cth)

<sup>995</sup> *Evidence Act 1995* (NSW).

<sup>996</sup> *Evidence Act 2001* (Tas).

<sup>997</sup> In 2004, Norfolk Island passed legislation that is substantially the same as the New South Wales legislation.

<sup>998</sup> Australian Law Reform Commission, *Evidence*, ALRC 38, 1987; New South Wales Law Reform Commission, *Evidence*, NSWLRC 56, 1988. The latter endorsed the bulk of the former's recommendations, including its draft legislation.

Section 138(1) states:

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Section 138 does not define 'improperly' obtained evidence.<sup>999</sup>

Section 138(3)<sup>1000</sup> lists the factors that a court may take into account in conducting the balancing exercise specified in s 138(1):

Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

One commentator has noted the symbiotic relationship between the common law and the uniform Evidence Act, "in that the legislation was modelled around existing rules and has influenced the development of those rules subsequent to its enactment".<sup>1001</sup>

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<sup>999</sup> However, section 138(2) lists the circumstances when an admission will be taken to have been improperly obtained.

<sup>1000</sup> Section 138(2) concerns evidence related to admissions made during questioning, which is outside the scope of the current inquiry.

Thus, for example, Kirby J's second additional factor concerning the impact of the conduct at issue on an accused's fundamental rights essentially mirrors the sixth factor in section 138(3) of the uniform Evidence Act.

However, the statutory discretion differs from *Bunning v Cross* in a number of ways, of which the most relevant for present purposes are that:

- the onus of proof is reversed, so that the party adducing the evidence must establish that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence;
- it includes factors that must be taken into account in the exercise of the discretion; and
- it applies to both civil and criminal proceedings.

The most notable aspect of the statutory doctrine is the reversal of the burden of establishing the admissibility of the evidence. In its 1987 report, the Australian Law Reform Commission (ALRC) explained the reason for the shift:

the policy considerations supporting non-admission of the evidence suggest that, once misconduct is established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained. Practical considerations support this approach. Evidence is not often excluded under the *Bunning v Cross* discretion. This suggests that the placing of the onus on the accused leans too heavily on the side of crime control considerations.<sup>1002</sup>

In a 2001 study of cases decided before and after the enactment of the uniform Evidence Act, one commentator suggested that the reverse onus functions as “a legislative ‘helping hand’ ... to ensure integrity and competence in police services”. He argued that the legislation provides judges “with a better opportunity to fulfil their prescribed role as the guardians’ guardians”.<sup>1003</sup>

During the course of this inquiry, the ALRC and the New South Wales and Victorian Law Reform Commissions commenced a joint review of the uniform Evidence Acts.<sup>1004</sup> In an early stage of the review, the ALRC asked how section 138 of the Acts has operated in practice, whether it has raised any concerns and how any such concerns

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<sup>1001</sup> *Presser, Judicial Discretion*, 762 and footnotes accompanying text.

<sup>1002</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1, 1985, 964.

<sup>1003</sup> *Presser, Judicial Discretion*, at 785.

<sup>1004</sup> Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Review of the Uniform Evidence Acts - Discussion Paper*, July 2005.

should be addressed, in particular, whether the factors to be taken into account in section 138(3) require clarification.<sup>1005</sup>

The Commissions received one submission suggesting that the onus of proof in section 138 should be reversed to reflect the common law discretion. They concluded, however, that:

the onus of proof in s 138 helps to provide an appropriate balance between the public interest in crime control and the rights of accused persons. The Commissions consider that no convincing case has been made out for revisiting the policy basis of s 138 and therefore recommend that no changes be made in relation to the onus of proof or to the balancing test required by the section.<sup>1006</sup>

The Commissions summarised other concerns as follows:

The primary concern expressed in relation to s 138 pertains to the factors in s 138(3) and how they should apply to the balancing test. Whilst some judicial officers express the view that these factors are facilitative and do not create any difficulties, other commentators express concern that it is uncertain what weight ought to be given to each factor and whether the factors weigh in favour of or against admission. One view is that the section should be amended so as to specify how the factors in s 138(3) should be applied to the balancing test. Another view is that such difficulties should not be resolved via legislative amendment, and that judicial education is a preferable solution.<sup>1007</sup>

The Victorian Law Reform Commission's terms of reference relating to the review specifically require it to advise on the action required to facilitate the introduction of the "Uniform Evidence Act" into Victoria.<sup>1008</sup>

## ***Evidence received by the Committee***

The Criminal Bar Association (CBA) noted that the common law admissibility doctrine "might appear to provide a sufficient justification for the exclusion of illegally obtained evidence, [but] in practice it is only in a few rare instances that evidence of this kind is excluded". These comments from the Association, which represents 330 barristers, echo the findings of the ALRC 18 years ago:

The notion of there being a reverse onus has the benefit that it places the onus on the prosecution to provide in an evidentiary form a basis for the evidence being admitted if the onus

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<sup>1005</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995, Information Paper 28*, 2004, Q 12–7, 12–8, 12–9.

<sup>1006</sup> Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Review of the Uniform Evidence Acts - Discussion Paper*, July 2005, 437.

<sup>1007</sup> *Ibid*, 434 (footnotes omitted).

<sup>1008</sup> Terms of Reference, Victorian Law Reform Commission Review of the Evidence Act 1958, paragraph 1.

is reversed. Presently, as I indicated earlier, unlawfully obtained evidence is prima facie admissible and the onus is on an accused to demonstrate why it should be excluded, and the accused is often at a forensic disadvantage because they only get to see really the tail end of the process.

If it is reversed, the prosecution, who do have available to them all information in relation to the stages through which the process evolved insofar as putting together the affidavit material that was required or the evidence on oath, as far as the process itself governing the issue, the warrant itself, and what occurred in the course of the execution of the search is concerned, should be able to justify if appropriate that that evidence be admitted, and justify it by the criteria that is set out in section 138, which really covers most of the issues that arise under the *Bunning v. Cross* discretion.<sup>1009</sup>

The CBA argued that the primary reason for this is because the onus “is on an accused to demonstrate why [improperly obtained evidence] should be excluded, and the accused is often at a forensic disadvantage because they only get to see really the tail end of the process”.<sup>1010</sup>

Dr. Steven Tudor felt that the common law judicial discretion was deficient because it “cannot be very predictable”.<sup>1011</sup> He proposed a reversal of the onus of proof, and referred the Committee to section 464Q of the *Crimes Act 1958* for consideration. This provision obliges the prosecution to establish why evidence that has been obtained through breaching the relevant law should be admitted, and stipulates conditions under which it may be.<sup>1012</sup> Dr. Tudor additionally felt that the provision retained the flexibility of the common law but was better structured.<sup>1013</sup>

During its hearings, the Committee asked stakeholders to comment on section 138 of the uniform Evidence Act and its suitability to Victoria, as the issue was not specifically canvassed in the Discussion Paper. Two stakeholders responded. The

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<sup>1009</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1, 1985, 964.

<sup>1010</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 166.

<sup>1011</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 291.

<sup>1012</sup> 464Q. Evidence of fingerprints

(1) Evidence in respect of fingerprints taken from a person is inadmissible as part of the prosecution case in proceedings against that person for an offence if (a) the requirements of sections 464K to 464N have not been complied with; or (b) the fingerprints or any record, copy or photograph of them should have been but have not been destroyed as required by section 464O or 464P.

(2) A court may admit evidence in respect of fingerprints otherwise inadmissible by reason of sub-section (1)(a) if (a) the prosecution satisfies the court on the balance of probabilities that the circumstances are exceptional and justify the reception of the evidence; or (b) the accused consents to the reception of the evidence.

(3) For the purposes of sub-section (2)(a), the probative value of the fingerprints is not to be regarded as an exceptional circumstance.

<sup>1013</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 291.

CBA and Liberty Victoria supported the reversal of the onus from defence to prosecution.<sup>1014</sup>

The CBA endorsed the section 138 scheme, noting that it “covers most of the issues that arise under the *Bunning v. Cross* discretion... but in a legislative form”.<sup>1015</sup>

At the same time, the Association argued that evidence improperly obtained under a surveillance warrant should be subject to a more restrictive regime, because the circumstances of the issue and use of the warrant are often subject to public interest immunity claims that limit a defendant’s ability to challenge the evidence. The breach of trust involved in using such warrants improperly to obtain evidence would be particularly egregious, and thus the Association, supported by Brian Walters SC, recommended making evidence obtained illegally via surveillance devices inadmissible, rather than subject to discretionary exclusion.<sup>1016</sup> The Committee discusses this issue in Chapter Eight.

Victoria Police stated that it was not aware of any problems in relation to the current legal framework in relation to admissibility in Victoria, which it felt was “clear, well established, and understood by the courts, legal stakeholders and police”.<sup>1017</sup> It considered that further research should be conducted to establish a demonstrable need for reform before any amendments are made to the current regime.

## **Discussion and conclusions**

The Victorian Government has stated that it intends to implement the uniform Evidence Act in this State.<sup>1018</sup> Given this and the Committee’s focus on one very specific issue that is regulated by the Act, the Committee limits its discussion here to the appropriateness of the putative Victorian Act including an equivalent of section 138.

As noted, the most remarkable element of the statutory doctrine is the reversal of the burden of establishing the admissibility of evidence. Indeed, the change in onus would be possibly the most consequential effect of any Victorian shift from the common law

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<sup>1014</sup> The third supporter was Robert Hulme SC of the New South Wales Public Defender’s Office, *Minutes of Evidence*, 31 August 2004, 32.

<sup>1015</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 166.

<sup>1016</sup> Criminal Bar Association, *Submission no. 12*, 12; Brian Walters SC *Submission no. 36*. The Association referred the Committee to section 77 of the *Telecommunications (Interception) Act 1979* (Cth) as a possible model for such a change.

<sup>1017</sup> Letter, Victoria Police Corporate Strategy and Performance Director Jenny Peachey to Committee Research Officer, 12 September 2005.

<sup>1018</sup> *Attorney-General’s Justice Statement*, May 2004, 27.

to the statutory position, particularly in relation to prosecutorial strategy and resources.

The current situation in Victoria is that both presumptions operate. As the joint law reform commission review explained:

In those states and territories that have not adopted the uniform legislation, the law of evidence is a mixture of statute and common law, together with applicable rules of court.

Under s 79 of the *Judiciary Act 1903* (Cth), the laws of each state or territory—including the laws relating to procedure, evidence, and the competency of witnesses—are binding on all courts exercising federal jurisdiction in that state or territory. The effect of this is that the courts of the states and territories, when exercising federal jurisdiction, apply the law of the state or territory rather than the *Evidence Act 1995* (Cth), except for those provisions that have a wider reach.

The passage of the *Evidence Act 1995* (Cth) ... has had the effect of achieving uniformity among federal courts wherever they are sitting, but there is no uniformity among the states or territories when exercising federal jurisdiction. As a practical example, a Melbourne barrister defending a client charged with a federal crime before the Victorian Supreme Court would use that state's evidence law; but would use the *Evidence Act 1995* (Cth) if appearing before the Federal Court, the Federal Magistrates' Court or the Family Court on a different matter the following day.<sup>1019</sup>

Similarly, barristers with state crime cases and federal court work would use both admissibility doctrines.

The Committee considers that such a stark inconsistency in two systems that operate with such proximity is clearly inefficient, of questionable fairness and should therefore be addressed. The Committee notes the strong trend towards improving national consistency in evidence laws. In 1991, Australian Attorneys-General gave in principle support to a uniform legislative scheme throughout the country.<sup>1020</sup> On a practical level, the three law reform commissions involved in the current joint review of the uniform Acts are working in association with the Queensland Law Reform Commission, which is also conducting an inquiry into the issue. The Northern Territory Law Reform Committee has been asked to undertake a review and the Attorney-General of Western Australia has reportedly formally placed the matter on the State's legislative agenda.<sup>1021</sup>

In assessing section 138 of the uniform Acts as a means of improving consistency, the Committee is also mindful of the potential impact on prosecutions. The Criminal Bar Association argued that it should not be overly onerous to establish that evidence should be admitted:

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<sup>1019</sup> Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Review of the Uniform Evidence Acts - Discussion Paper*, July 2005, 29-30 (footnotes omitted).

<sup>1020</sup> *Ibid*, 28.

<sup>1021</sup> *Ibid*, 29.

If [the onus] is reversed, the prosecution, who do have available to them all information in relation to the stages through which the process evolved insofar as putting together the affidavit material that was required or the evidence on oath, as far as the process itself governing the issue, the warrant itself, and what occurred in the course of the execution of the search is concerned, should be able to justify if appropriate that that evidence be admitted.<sup>1022</sup>

The Committee believes that there is a legitimate public policy basis for reversing the onus. At present, the party responsible for the improper conduct may benefit from it unless the admissibility of the evidence is successfully challenged. Moving to the section 138 model would require such a party to acknowledge the impropriety and establish why the conduct should nevertheless be overlooked. The Committee believes that this approach offers potentially greater accountability in respect of the conduct of law enforcement officials than the current approach, where admissibility must be contested by an accused to challenge improper conduct.<sup>1023</sup>

Therefore, having considered the broad support for section 138, in particular the reverse onus doctrine it embodies, as well as the apparent absence of material problems that have arisen in the decade since it was first enacted and the benefits of improved consistency and fairness to accused persons, the Committee believes that Victorian law should be made consistent with section 138, and that any new Victorian evidence legislation should include a reverse onus provision.

<p>Recommendation 73. That Victorian legislation includes a provision consistent with section 138 of the uniform Evidence Act.</p>
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## **Auditing the report to court and other search warrant records**

In the early stages of this inquiry, Greg Connellan SC, a barrister who has had extensive practical experience of warrant powers, suggested that the reporting back process could usefully be subjected to an ongoing audit. He argued that while the reporting stage functioned well, reviewing the reports to the court would be one way of reducing the possibility of “rubber stamping” the execution reports or of applicants coming to regard the reporting requirement as less important over time.<sup>1024</sup> In its Discussion Paper, the Committee noted that this could be useful in determining whether issuing authority staff are in fact able to perform effective oversight of the

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<sup>1022</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 166.

<sup>1023</sup> The Australian Law Reform Commission and legal commentator Bram Presser made similar points, as the Committee discusses at p 253

<sup>1024</sup> Conversation, Greg Connellan and Committee Legal Research Officer, 15 April 2004.

aspects of warrant powers covered in the reports.<sup>1025</sup> The Committee accordingly asked stakeholders whether the requirement to report to the Court after the execution of a warrant should be subject to oversight, and for their views on the most appropriate way of doing so.

### ***Evidence received by the Committee***

Mr. Connellan's proposal was primarily concerned with surveillance warrants.<sup>1026</sup> Other stakeholders supported it and suggested that other warrants and records (rather than just the record of the report to court) should also be subject to such an audit. Victoria Legal Aid (VLA) argued that "a formalised independent audit compliance system is needed for all warrants".<sup>1027</sup> Similarly, Brian Walters SC recommended "some sort of independent audit that people trust" in relation to the seizure of property.<sup>1028</sup>

William Crawford, on behalf of Fitzroy Legal Service, strongly supported a random audit of search warrants as "a good way of enforcing accountability". Mr Crawford was concerned that in respect of search warrants, "[t]here is no capacity at the moment at the tail end of [the warrant process, after the search is complete] to test the veracity of the claims made in the original application".<sup>1029</sup>

As Darren Palmer noted, an audit could also have uses beyond individual cases. He suggested that one way of measuring the use of warrants and the effectiveness of that use would be to review "performance measures", such as how often warrants are issued and the outcomes "in terms of the connection between warrants and arrests and prosecutions and convictions".<sup>1030</sup> In principle, the Committee agrees but notes that data on arrests, prosecutions and convictions are unlikely on their own to provide a reliable indicator of the effectiveness of warrants in light of the range of diverse factors, including the availability and admissibility of evidence, the limits of intelligence used to justify the issue of search warrants, police and prosecutorial resources and tactical considerations, that influence such outcomes.

Three stakeholders made specific recommendations about possible auditing mechanisms. The Criminal Bar Association recommended that the Ombudsman should be responsible for ensuring that agencies and courts retain records of

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<sup>1025</sup> *Warrant Powers and Procedures Discussion Paper*, 38-39.

<sup>1026</sup> Conversation, Greg Connellan and Committee Legal Research Officer, 15 April 2004. The *Surveillance Devices Act 1999* s20 requires the person to whom warrants are issued under the Act to report to the Supreme Court on various aspects of the use of the warrants.

<sup>1027</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 195.

<sup>1028</sup> Brian Walters, SC, Liberty Victoria, *Minutes of Evidence*, 20 October 2004, 189.

<sup>1029</sup> William Crawford, Fitzroy Legal Service, *Minutes of Evidence*, 5 November 2004, 297.

<sup>1030</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 324.

warrants issued and executed and of seized items.<sup>1031</sup> The CBA referred the Committee to Part VIII of the *Telecommunications (Interception) Act 1979* (Cth) as a model for how the Ombudsman might fulfil such a role.

In brief, the Act requires certain Commonwealth agencies to make and retain certain detailed records about their use of warrants authorising interception and requires the Commonwealth Ombudsman to inspect, at least twice in each financial year, those records to ascertain both their accuracy and the agencies' compliance with the Act.<sup>1032</sup> The Ombudsman is obliged to report the results of its inspections to the Minister at least annually and may carry out additional inspections and make additional reports at any time.<sup>1033</sup> The Act also grants the Ombudsman various powers necessary to fulfil its inspection and reporting functions.<sup>1034</sup>

Brian Hardiman, the Deputy Director, Police Integrity, commented on the CBA proposal. He argued that the model in the *Telecommunications (Interception) Act 1979* would be "very onerous" as it would require the Ombudsman to verify the accuracy of the large volume of records that would be generated by the thousands of warrants issued in Victoria each year:

[T]his can only be done by a comparison with the warrants themselves and other records such as property seizure records.

The Ombudsman's office, in order to ensure compliance, would be required to inspect all of these records. This would be a very time-consuming and onerous task, primarily because the records are likely to be paper based, not centrally located and very large in volume.<sup>1035</sup>

Mr Hardiman also pointed out that recent legislation could achieve the same purpose as the proposed inspection regime. Indeed, the *Major Crime (Investigative Powers) Act 2004*, empowers the Director, Police Integrity to investigate any matter relevant to the achievement of his or her statutory objectives<sup>1036</sup> of ensuring that the highest ethical and professional standards are maintained in the force and that police

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<sup>1031</sup> Criminal Bar Association, *Submission no. 12*, 10.

<sup>1032</sup> *Telecommunications (Interception) Act 1979* (Cth) ss 80 - 81, 85. The Committee discusses the relevance of the Act to Victorian surveillance warrants in Chapter Eight.

<sup>1033</sup> *Telecommunications (Interception) Act 1979* (Cth) ss 82, 84.

<sup>1034</sup> *Telecommunications (Interception) Act 1979* (Cth) ss 86-87. These include powers to enter relevant locations, to access agency records at reasonable times and to require agency personnel to provide relevant information.

<sup>1035</sup> Letter, Deputy Director, Police Integrity Brian Hardiman to Committee Research Officer, 14 December 2004.

<sup>1036</sup> *Major Crime (Investigative Powers) Act 2004* s 81(1) (replacing *Police Regulation Act 1958* ss 86NA(1)). As the Committee noted in Chapter Two, this provision specifies that the Director Police Integrity may investigate the conduct of a member of the force, police corruption or serious misconduct generally, or any of the policies, practices or procedures of the force or of a member of the force, or the failure of those policies, practices or procedures.

corruption and serious misconduct is detected, investigated and prevented.<sup>1037</sup> The Director may conduct such investigations regardless of whether “any proceedings are on foot, or are instituted, in any court or tribunal that relate to or are otherwise connected with the subject-matter of the investigation”.<sup>1038</sup> Similarly, Victoria Police told the Committee that OPI’s powers are:

extremely rigorous and effective oversight mechanisms, and any aspect of warrant practices and procedures is within the scope of the [OPI] director’s investigative jurisdiction. This scope can be invoked either by the director’s own motion or by way of a complaint from an individual in the community.<sup>1039</sup>

In light of his other comments, Mr Hardiman recommended that a better approach would be for CBA members to refer complaints - which could include allegations of impropriety or ineffective accountability mechanisms - to the OPI, which may then investigate them:

The [OPI] is now in a position legislatively and resource wise to pro-actively look at issues raised by the [Criminal Bar] Association and undoubtedly will do so in due course.<sup>1040</sup>

After considering Mr Hardiman’s comments, the CBA acknowledged the practical implications of its proposal to increase the role of the Ombudsman. It also felt that the approach suggested by Mr. Hardiman “is a sensible alternative which provides independent and effective scrutiny on a case by case basis”.<sup>1041</sup> In light of this, the Committee makes no further comment on the CBA proposal.

The second specific recommendation was made by VLA, which felt that it would not be appropriate to expect the Ombudsman’s office to assume responsibility for auditing warrant powers because of the demands of that institution’s existing range of duties and its “reactive role” and limited powers.<sup>1042</sup> VLA accordingly proposed the establishment of an independent monitor to run what it called a “formalised audit compliance system”. Such a monitor should have:

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<sup>1037</sup> *Major Crime (Investigative Powers) Act 2004* s 90 (replacing *Police Regulation Act 1958* ss 102BA).

<sup>1038</sup> *Major Crime (Investigative Powers) Act 2004* s 81(3) (replacing *Police Regulation Act 1958* ss 86(3) - (4)).

<sup>1039</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 215.

<sup>1040</sup> Letter, Deputy Director, Police Integrity Brian Hardiman to Committee Research Officer, 14 December 2004.

Interestingly, before the OPI was created and its powers delineated, the Ombudsman recommended ‘back end’ auditing of surveillance warrant applications by an external body to increase accountability: Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross - border Investigative Powers for Law Enforcement: Report*, November 2003, 393, footnote 230.

<sup>1041</sup> Letter, CBA Vice Chairman Stephen Shirrefs, SC to Committee Research Officer, 4 February 2005.

<sup>1042</sup> Victoria Legal Aid, *Submission no. 21*, 6.

a broad range of powers or roles, including developing training modules for relevant authorities, handling, receiving and investigating complaints against police, correction officers and other officials who use such powers, and generally having an ongoing audit process to ensure compliance with the statutory scheme.<sup>1043</sup>

VLA acknowledged that “with all the different demands on the public purse, establishing another oversight body might be seen as problematic”. However, it felt that, given “the likely increase in surveillance warrants in the future, [and] given current issues, it seems to be an appropriate balancing mechanism”.

VLA made its proposal before the effects of the legislative changes to the structure and powers of the Ombudsman’s office were clear. As the Committee has detailed above and elsewhere in this report,<sup>1044</sup> following those changes, the OPI has proactive powers and intends to use them to investigate compliance with statutory requirements and procedures that relate to search and other warrants.

Finally, as noted in the preceding discussion on reporting back, when the Committee was in New South Wales, Robert Hulme SC expressed concerns about the ability of issuing officers to effectively scrutinise the execution of warrants, particularly given the volume of search warrants issued.<sup>1045</sup> He suggested that an alternative might be an independent body to receive and review documentation relating to the use of warrants, although he also stated that he did not think it would be any better than the existing mechanisms.<sup>1046</sup>

## Conclusions

In this and preceding chapters, the Committee has established that there are numerous safeguards throughout the warrant cycle that are designed to ensure that the application, issue and execution of search warrants are legitimate, and has proposed ways of enhancing the fairness, consistency and efficiency of many of these mechanisms. In particular, the Committee has noted that available data about search warrants are insufficient to reach any firm conclusions about the extent of inappropriate practices by agencies that use warrant powers and procedures.<sup>1047</sup> The Committee’s findings and detailed recommendations about record keeping<sup>1048</sup> and the

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<sup>1043</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 201.

<sup>1044</sup> See footnote 307 and accompanying text in Chapter four.

<sup>1045</sup> Robert Hulme SC, Public Defenders Office NSW, *Minutes of Evidence*, 31 August 2004, 30.

<sup>1046</sup> *Ibid.*

<sup>1047</sup> See the text preceding Recommendation 8, Recommendation 15, and Recommendation 54.

<sup>1048</sup> See Recommendation 18 to Recommendation 35.

collection and review of data concerning application, issue and execution of warrants<sup>1049</sup> are designed to address this lacuna.

The Committee has considered these factors together with the new OPI powers that should facilitate greater scrutiny of both individual cases of alleged abuse of warrant powers and procedures and related systemic issues. In light of these, the Committee does not believe that an auditing process over and above those that it has already discussed and recommended is presently justified. The Committee believes that a more appropriate priority is an assessment of the extent of misconduct related to warrant powers, and the resulting level of need for additional accountability measures beyond those that it has proposed throughout this report.

For the same reasons, the Committee is not satisfied that an independent monitor of the sort proposed by Victoria Legal Aid (and in a different form by Robert Hulme SC) is presently necessary.<sup>1050</sup> The Committee is particularly concerned about the resources required to establish and staff a new institution and the potential for duplicating the work of the OPI and Ombudsman.

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<sup>1049</sup> See Recommendation 8, Recommendation 9, Recommendation 15, Recommendation 16, Recommendation 54, Recommendation 55.

<sup>1050</sup> VLA proposed a similar institution during the Inspectors' Powers Inquiry. Its main focus would have been the training of authorised officers but it would also receive and address complaints about the use of search warrants. Ultimately, the Law Reform Committee of the 54<sup>th</sup> Parliament recommended a standards unit to evaluate training programs and set minimum training standards. *Inspectors' Powers Report*, 107-108.



# CHAPTER SEVEN - WARRANTS FOR SEARCH AND SEIZURE – OTHER ISSUES

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## Covert search warrants

Covert search warrants authorise entry, search and seizure on premises without the knowledge of the occupier. The warrant thereby authorises a significant impingement on the occupier's rights:

The very person who is the subject of the search warrant will not know anything about it and will have no ability, through the process of law, to deal with or oppose it or know anything about the detail of the search warrant. It is a dramatic step.<sup>1051</sup>

For that reason, covert warrants are exceptional and subject to more rigorous conditions than overt warrants. In Victoria, covert search warrants are specifically authorised in only one piece of legislation, the *Terrorism (Community Protection) Act 2003*, in relation to one type of offence, terrorism. Evidence to the Committee also outlined the practice of warrants issued under general warrant provisions being executed covertly. These warrants, although not specifically identified in legislation as covert warrants, are also discussed in this chapter.

The Committee intends that its recommendations should be regarded as a set of principles to govern covert search warrants generally, unless otherwise stipulated. The Committee believes that its approach is appropriate both as a way to establish general standards for covert search warrants and in the context of the evidence it heard that supported greater clarity about covert search powers and practices that relate to offences other than terrorism. The Committee discusses this evidence after outlining existing covert search warrant provisions and issues relevant to them.

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<sup>1051</sup> Andrew McIntosh, MLA (Kew), *Terrorism (Community Protection) Bill 2003, Second Reading Debate*, Legislative Assembly, 19 March 2003, 376.

## ***Terrorism (Community Protection) Act 2003***

In the Government's words, the *Terrorism (Community Protection) Act 2003*:

...[i]s a measure which is designed to protect the entire Victorian community from terrorist acts.

...[It contains] important new powers and obligations to ensure that there is in Victoria an adequate framework to prevent, and in a worst-case scenario respond to, a terrorist act. While the new measures are robust, they are also finely balanced to ensure that important civil liberties are not unduly infringed.<sup>1052</sup>

As a consequence of the exceptional circumstances that the Act is designed to respond to, it contains provisions which go beyond those found in other acts which authorise warrants, such as entry by impersonation and substitution of things seized.<sup>1053</sup> As a counterbalance to these powers, conditions imposed on their exercise are also much more restrictive than on warrants issued under general provisions. Some of these are listed below:

- Applications must be approved at the highest level of Victoria Police - the Chief Commissioner, a Deputy Commissioner or an Assistant Commissioner - and can only be made if the applicant reasonably believes or suspects the existence of three conjunctive circumstances: a terrorist act has been, is being, or is likely to be, committed; and the entry and search of the premises would substantially assist in preventing or responding to that terrorist act or suspected terrorist act; and it is necessary for that entry and search to be conducted without the knowledge of any occupier of those premises.<sup>1054</sup>
- Warrants can only be issued by a judge of the Supreme Court, who must consider the nature and gravity of the terrorist act or suspected terrorist act, the extent to which the exercise of powers under the warrant would assist in preventing it, the likely effect on any person's privacy and any conditions to which the warrant may be made subject.<sup>1055</sup>
- The person to whom a warrant is issued must report to the Supreme Court within seven days of the expiry of the warrant. The report must include several types of detailed information, including which powers were exercised, how

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<sup>1052</sup> Steve Bracks, Premier, *Terrorism (Community Protection) Bill 2003, Second Reading Speech*, Legislative Assembly, 27 February 2003, 164.

<sup>1053</sup> *Terrorism (Community Protection) Act 2003* s 9(1)(a) s 9(1)(d) respectively.

<sup>1054</sup> *Ibid*, s 6(1).

<sup>1055</sup> *Ibid*, s 8(2).

conditions in the warrant were complied with, the period during which entry and search were conducted, who entered the premises, what was done, and if known, “the benefit of the execution of the warrant to the prevention of or response to” an actual or suspected terrorist act.<sup>1056</sup> It is an offence not to make a report.

- Submission by the Chief Commissioner of Victoria Police to the Minister of an annual report that includes the number of ordinary and telephone warrants applied for and issued, the number of rejected applications, the number of premises entered covertly, the number of occasions on which items were seized, or placed and on which electronic equipment was operated. The Minister can request the inclusion of additional information that s/he considers appropriate. The report is to be tabled in Parliament within a specified period.<sup>1057</sup>
- The Act must be reviewed by 30 June 2006 and expires on 1 December the same year.<sup>1058</sup>

The legislation contains additional safeguards found in other warrant provisions, such as:

- a requirement that applications be in writing;<sup>1059</sup>
- restriction of telephone proceedings to situations of urgency;<sup>1060</sup>
- a prohibition on a judge issuing a warrant unless the application sets out the grounds on which the warrant is being sought, the applicant has provided any further information that the Court requires and that all information is sworn.<sup>1061</sup>

In the first financial year of the Act’s operation, Victoria Police did not make any applications for covert search warrants.<sup>1062</sup>

Speakers in the Parliamentary debate on the Bill were unanimous in acknowledging the need for such covert search powers, given the potential that attacks such as those committed in the United States of America in 2001 and Indonesia in 2002 (and subsequently in the United Kingdom in 2005) could be attempted in Australia. The

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<sup>1056</sup> Ibid, s 11.

<sup>1057</sup> *Terrorism (Community Protection) Act 2003*, s13.

<sup>1058</sup> Ibid, s 38 s 41 respectively.

<sup>1059</sup> Ibid, s 7 (1).

<sup>1060</sup> Ibid, s 10.

<sup>1061</sup> Ibid, s 7(2).

<sup>1062</sup> Victoria Police, *Annual Report, 2003/04 Terrorism (Community Protection) Act 2003*, tabled in Parliament 6 September 2005.

extraordinary harm that such events could inflict on the community thus justified the “extraordinarily intrusive”<sup>1063</sup> powers.

However, many in Parliament and in the broader community, while agreeing that law enforcement agencies should have the powers and resources to enable them to counter such threats, argued that additional protections are needed to prevent abuses of covert search warrant powers. The Fitzroy Legal Service and Liberty Victoria proposed that all covert searches be videorecorded. The Office of the Victorian Privacy Commissioner (OVPC), in its submission to the Parliamentary Scrutiny of Acts and Regulations Committee’s (SARC) statutory review of the Bill,<sup>1064</sup> suggested a wide ranging set of additional safeguards. Many of these were repeated or incorporated by reference in evidence to the Committee during the warrants inquiry and are therefore included in the Committee’s discussion of covert search warrant powers.<sup>1065</sup>

### **Independent scrutiny of applications – the Public Interest Monitor**

A number of witnesses supported the creation of a Public Interest Monitor (PIM) in Victoria. This institution was established in 1997 in Queensland to act as an independent party to test certain warrant applications and make appropriate arguments to the issuing court about the existence of any public interest that should prevent the granting of the applications. Stakeholders argued that such a mechanism could constitute an important additional protection against abuse of covert search and surveillance warrant powers in Victoria. The Committee therefore outlines the PIM’s role and then discusses stakeholder views.

This section contains the Committee’s conclusions only in relation to covert search warrants, as the Committee believes that the merits of a PIM in respect of Victorian surveillance warrants are properly considered in the context of its detailed discussion of those warrants, which occurs in Chapter Eight.

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<sup>1063</sup> Peter Ryan, Leader of the National Party, *Terrorism (Community Protection) Bill 2003, Second Reading Debate*, Legislative Assembly, 19 March 2003, 380.

<sup>1064</sup> SARC’s review was published in Scrutiny of Acts and Regulations Committee, *Alerts Digest 1*, 2003, 55.

<sup>1065</sup> The Fitzroy Legal Service and Liberty Victoria video recording proposals were addressed in Chapter Five, during the Committee’s discussion of the video recording of searches.

## The role of the PIM

In Queensland, applications for and use by police and the Crime and Misconduct Commission (CMC) of surveillance and covert search warrants are scrutinised by the PIM.<sup>1066</sup> The PIM does so by:

- monitoring compliance by police officers and the CMC with requirements relating to applications for covert and surveillance warrants, including that applicants must notify the PIM of warrant applications and provide a copy of the report on the exercise of powers authorised by each covert warrant;
- giving to relevant authorities a report on non-compliance with those requirements, whenever the PIM considers it appropriate;
- appearing at hearings of such applications to test their validity, by questioning applicants and witnesses and making submissions on the appropriateness of the application; and
- gathering statistical information about the use and effectiveness of covert and surveillance warrants.<sup>1067</sup>

The PIM must prepare and transmit to the relevant Minister an annual written report on the use of covert and surveillance warrants under the two relevant Acts.<sup>1068</sup>

The Law Reform Commission of New South Wales has highlighted the public interest element of the PIM's work:

In exercising these powers, the PIM examines among other things whether the balance in a particular case lies with the public interest in privacy or the public interest in the detection and prosecution of serious criminal offences.<sup>1069</sup>

In introducing the Bill to enact the PIM, the Queensland Government considered that it would prove to be “an additional and essential safeguard in the processing of applications”.<sup>1070</sup> The PIM itself considers the position to be a “unique and

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<sup>1066</sup> *Police Powers and Responsibilities Act 2000* (Qld) ss 157-162 ; *Crime and Misconduct Commission Act 2001* (Qld) ss 324-328.

<sup>1067</sup> *Police Powers and Responsibilities Act 2000 (QLD)* ss 148(4), 156, 159; *Crime and Misconduct Commission Act 2001* (Qld) ss 156, 326.

<sup>1068</sup> *Police Powers and Responsibilities Act 2000 (QLD)*, s160; *Crime and Misconduct Act 2001* (Qld) s 327.

<sup>1069</sup> Law Reform Commission of New South Wales, *Surveillance*, Report 98 (2001), paragraph 6.46, referring to PIM Report 1998, 6 and *Heery v Criminal Justice Commission* [2000] QSC 063, No. 9636 of 1997.

<sup>1070</sup> T. R. Cooper Minister for Police and Corrective Services, *Police Powers and Responsibilities Bill 1997*, *Second Reading Speech*, 30 October 1997, 4085.

fundamentally significant step forward in the process of accountability of investigative agencies”.<sup>1071</sup>

The value of the PIM has been acknowledged by the Queensland Supreme Court. In *Heerey v Criminal Justice Commission*,<sup>1072</sup> the Court found that the PIM had “significantly addressed” objections to judges determining applications for listening device warrants in closed court and without review. In Justice White’s experience, the PIM’s independent compliance monitoring and appearance at application hearings was “of great assistance in balancing competing interests of criminal investigation and the right to privacy”.<sup>1073</sup>

Proposals have recently been made to increase the PIM’s role and reduce that of the courts in respect of covert search warrants in Queensland. Presently, agencies that execute covert search warrants must provide a compliance report to the issuing court within seven days of execution. The PIM receives copies of those reports. There is no explicit reporting requirement in respect of surveillance warrants but a practice has developed of issuing judges imposing a requirement in the warrant that applicants must provide an affidavit of compliance with the warrant to the PIM. Supreme Court judges there have suggested that the judiciary’s role in reviewing the covert search warrant reports is not an effective check on the use of the powers and that the reporting process “tends to involve the judiciary further in the investigative process”.<sup>1074</sup>

In light of those views and the inconsistency in reporting requirements for covert search and surveillance warrants, the Parliamentary Crime and Misconduct Committee (PCMC) recently recommended the removal of the legislative requirement that a report on the exercise of the powers under a covert search warrant be provided to the issuing judge.<sup>1075</sup> The PCMC also proposed allowing the PIM to apply to the Supreme Court for directions about any matter relevant to the exercise of powers under covert or surveillance warrants.<sup>1076</sup>

The Queensland Government did not support those recommendations at the time because of ongoing initiatives to harmonise cross border investigative laws and powers. The national model laws that emerged from that process include a bill concerning surveillance devices that contains an explicit requirement for a report back

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<sup>1071</sup> Public Interest Monitor, *Third Annual Report, 2000*.

<sup>1072</sup> The Criminal Justice Commission and the Queensland Crime Commission were amalgamated into the Crime and Misconduct Commission in 2001. The role of the PIM was retained in legislation governing the CMC.

<sup>1073</sup> *Heery v Criminal Justice Commission* [2000] QSC 063, No. 9636 of 1997.

<sup>1074</sup> Parliamentary Crime and Misconduct Committee, *Three Year Review of the Crime and Misconduct Commission, Report No 64*, March 2004, 46.

<sup>1075</sup> *Ibid.*

<sup>1076</sup> *Ibid.*, 47.

to the issuing judge on the exercise of the powers under a surveillance warrant.<sup>1077</sup> The Government stated that it would seek feedback from other jurisdictions about whether to adopt the model or seek recognition from them of the Queensland regime (in which surveillance warrant reports are provided to the PIM rather than the issuing court).<sup>1078</sup> Thus, from the Government's perspective, while there is uncertainty about the future of the existing reporting back provisions used for surveillance warrants, it was not appropriate to extend the regime to covert search warrants.<sup>1079</sup>

### ***Evidence received by the Committee***

In suggesting the PIM as a suitable model for the Committee's consideration,<sup>1080</sup> OVPC identified two benefits of the Queensland regime. The PIM:

relieves the court, firstly, of having to advocate the public interest on its own; and secondly, from being drawn further into a police investigation by having to scrutinise all the underlying material, the conduct of the warrant and its effectiveness after the fact. That role is taken over by the public interest monitor, not the court.<sup>1081</sup>

Victoria Legal Aid agreed that the ability of a third party such as the PIM to appear and argue the public interest in situations where a defendant or suspect was not party to the proceedings sounded "like a very good way to ensure that there is an alternative view put to a court".<sup>1082</sup> Brian Walters SC, on behalf of Liberty Victoria, also felt that independent scrutiny could assist in ensuring that the warrant was sought to investigate an offence rather than:

just gathering information on bad people...There can be an overlap, and it can be difficult to draw the distinction between the two, but a magistrate - or for that matter a justice of the Supreme Court - sitting hearing an application for a warrant is rarely going to be able to mount

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<sup>1077</sup> Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement, Report*, November 2003.

<sup>1078</sup> Queensland Government, *Government Response to the Parliamentary Crime and Misconduct Committee Report No. 64 - Three Year Review of the Crime and Misconduct Commission*, 10 September 2004, 9-10.

<sup>1079</sup> On 7 June 2005, the Government introduced the *Cross-Border Law Enforcement Legislation Amendment Bill*, which retains the PIM's front end and back end roles and adopts the model law's requirements in relation to inspection, record-keeping and reporting. The Committee discusses this legislation in Chapter Eight.

<sup>1080</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 9. The OVPC made the same point in its submission to SARC's review of the *Terrorism (Community Protection) Bill 2003*: Office of the Victorian Privacy Commissioner, *Submission to the Victorian Parliament Scrutiny of Acts and Regulations Committee in relation to the Terrorism (Community Protection) Bill*, March 2003, 14-16, at [www.privacy.vic.gov.au](http://www.privacy.vic.gov.au).

<sup>1081</sup> Michelle Fisher, Office of the Victorian Privacy Commissioner, *Minutes of Evidence, 19 October 2004*, 177.

<sup>1082</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence, 19 October 2004*, 201.

the counter-argument as well as an independent advocate might. I do not know what the experience is as to how cumbersome the process is.<sup>1083</sup>

Darren Palmer suggested that the PIM's role in challenging the warrant application and reviewing the execution would contribute to enhanced protection of individual rights:

[Effective protection of citizens' rights requires that] if a person believes that something has occurred which is inappropriate...there are mechanisms to deal with substantive rights in terms of not simply being able to make a complaint some time down the track, but actually being much more empowered as in the suggestion of a public interest monitor which may be able to act in relation to challenging both the warrant itself and conditions in relation to the warrant with things such as seized property, for instance.<sup>1084</sup>

We need to really talk more about the way in which we can ensure that citizens' rights are protected against invasion of privacy. Again I point to such things as the public interest monitor.<sup>1085</sup>

In contrast, Victoria Police and the Government do not believe that a PIM is appropriate for Victoria. Both believe that the current regime of safeguards, primarily the requirement for a Supreme Court Judge to hear the application, provide sufficient scrutiny of applications and protection from abuse of the warrant powers:

The police perspective is that what the Parliament has asked is for a Supreme Court judge to consider these issues. It is our position that a Supreme Court judge has the capacity to make the balancing decision without the need for further referral to other parties to give him or her advice in regard to the issues. It is always open to the judge to seek that advice if they are unsure.<sup>1086</sup>

Victoria Police emphasised that the issuing officer is required to consider the balance between the interests of the individual and the interests of the state to intrude in each case.<sup>1087</sup>

Similarly, in the debate on the *Terrorism (Community Protection) Bill*, the Government rejected a PIM for Victoria, "as the involvement of a Supreme Court judge is sufficient to safeguard the public interest".<sup>1088</sup>

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<sup>1083</sup> Brian Walters, Liberty Victoria, *Minutes of Evidence*, 20 October 2004, 191.

<sup>1084</sup> Darren Palmer, *Minutes of Evidence*, 5 November 2004, 327.

<sup>1085</sup> *Ibid*, 323.

<sup>1086</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 216.

<sup>1087</sup> The point was made in reference to surveillance warrants but covert search warrant provisions impose an identical balancing obligation: of the *Terrorism (Community Protection) Act 2003* requiring the issuing court to consider the impact of the offence, the effectiveness of the warrant and the likely impact on any individual's privacy.

On the other hand, a spokesperson for the Supreme Court indicated that the Court's ability to scrutinise warrants could be improved, as it currently lacked the resources to effectively control the process. It was suggested that the PIM proposal appeared to have merit and could usefully be further investigated.<sup>1089</sup>

The Government also highlighted the fact that while Queensland has a PIM, three other Australian jurisdictions had considered and rejected the mechanism. The South Australian Parliament's Legislative Review Committee and the Law Reform Commission of New South Wales examined the PIM in the context of surveillance warrants and concluded that other safeguards contained in the relevant legislative schemes (including oversight by the Ombudsman or Privacy Commissioner, limits on the use of overt information and limited notification to the targets of surveillance), provided issuing officers with sufficient information about the public interest in each case.<sup>1090</sup> The Commonwealth Senate Joint Committee on the National Crime Authority also decided not to recommend a PIM in relation to controlled operations. It felt that the involvement of a third party in warrant applications would adversely affect operational efficiency and "that little, if anything, would be gained by the appearance of a PIM to argue the public interest". Existing safeguards were considered sufficient to ensure the protection of the public interest.<sup>1091</sup> The PIM proposal was revived by members of the Commonwealth Senate Legal and Constitutional Legislation Committee in 2001 but was ultimately not considered in the resulting report.<sup>1092</sup>

### ***A PIM for Victoria?***

The Committee agrees with the views of Victoria Police and the Government about the role of the issuing officer as an independent scrutineer of the warrant application. That, after all, is the reason that all warrant applications are determined by courts.

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<sup>1088</sup> Jenny Mikakos, Parliamentary Secretary for Justice, *Terrorism (Community Protection) Bill 2003*, *Second Reading Debate*, Legislative Council, 10 April 2003, 858.

<sup>1089</sup> Conversation, spokesperson for the Supreme Court and Committee Research Officer, 12 September 2005.

<sup>1090</sup> South Australian Parliament Legislative Review Committee, *Report of the Legislative Review Committee concerning an Inquiry into a Proposal to Create a Public Interest Advocate in Relation to Listening Devices*; Law Reform Commission of New South Wales, *Surveillance*, Report 98 (2001), paragraph 6.47. A minority report published with the South Australian report favoured the PIM proposal, which was also considered in 1999, when opposition parties unsuccessfully put forward amendments to the *Listening Devices Act. 1992* (ACT). The New South Wales finding is not final as the Commission's final report on Surveillance has yet to be published.

<sup>1091</sup> Parliamentary Joint Committee on the National Crime Authority (since renamed the Parliamentary Joint Committee on the Australian Crime Commission) *Street Legal - The involvement of the National Crime Authority in Controlled Operations*, 6 December 1999, paragraph 4.69, at [www.aph.gov.au](http://www.aph.gov.au).

<sup>1092</sup> The Australian Democrats recommended the establishment of PIMs to participate in warrant applications relating to "long-term or serious controlled operations": Senate Legal and Constitutional Legislation Committee *Inquiry into the Provisions of the Measures to Combat Serious and Organised Crimes Bill 2001*, Additional Comments by Senator Brian Greig on behalf of the Australian Democrats, 57-58.

The Committee also accepts that empowering only the most senior judicial officers in Victoria to issue covert search (and surveillance) warrants is a significant protection given the experience and expertise of such judges. This and the other restrictions, already detailed by the Committee, on the issue and use of these warrants reflect the importance that Parliament, the Government and law enforcement agencies attach to limiting the extraordinary effects of these warrant powers. Moreover, additional scrutiny is possible, through the new powers of the Office of Police Integrity (OPI). Its capacity to conduct own motion investigations into police practices<sup>1093</sup> would appear to enable that institution to review the use of covert search warrant powers by police.

Having noted the strength of the existing safeguards the Committee then considered a number of opinions and suggestions, which had been raised in evidence and in submissions and public comment at the time the Bill was debated, which supported the establishment of a PIM or similar independent agent to enhance existing accountability mechanisms for Victorian covert search warrants.

The first proposition was that existing checks and balances, while extensive, remain limited in fundamental ways. While the rigour with which Victoria Police would consider and then prepare an application for a covert search warrant is not in doubt, that review is, as a matter of fact, not independent. Further, issuing judges are required both to adopt a 'devil's advocate' role during the application hearing to test the strength of the police argument, and to then determine the application. Lastly, the statutory reporting safeguards and any OPI review necessarily occur after the power has been exercised, while the OPI review is also necessarily unpredictable and ad hoc in nature.

The Victorian Privacy Commissioner made similar points in his submission to the Scrutiny of Acts and Regulation Committee and noted that the PIM could address such limitations:

While judicial scrutiny and reporting back to court are desirable measures, and their inclusion in the [Act] is strongly supported, they are limited. Victoria's ... covert warrant procedure has no independent third party to test the police application or to put a countervailing argument to the court about why the application ought not, in the public interest, be granted....The [PIM's role] is to assist the court to test the claims of law enforcement and intelligence agencies.<sup>1094</sup>

Indeed, the PIM recently explained why the position is necessary and how its work complements existing safeguards:

[A]s observed by Kirby J in *Ousley v R* (1991) 192 CLR 69, 'even a conscientious Supreme Court judge, busily performing such an administrative function amidst pressing judicial duties

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<sup>1093</sup> These powers are discussed in Chapter Two.

<sup>1094</sup> Office of the Victorian Privacy Commissioner, *Submission to the Victorian Parliament Scrutiny of Acts and Regulations Committee in relation to the Terrorism (Community Protection) Bill*, March 2003, 17, at [www.privacy.vic.gov.au](http://www.privacy.vic.gov.au).

might, [not address the requirements as the act requires]. The PIM's' role is to assist the issuer in this regard.

[...]

Given the difficulties in practice of going behind the face of the warrant[,] the fundamental rights of the individual are therefore best protected by attempting to ensure the process is as correct as possible at the application stage. That is not to say that the PIMs are in some way an advocate for the absent party. Rather it is to recognise a practical limitation of the process that impacts on the balancing process.

Because we generally have a longer opportunity to consider and test the materials against the criteria in the relevant acts than does the issuer and for the reasons outlined above we have to be vigilant that the material[s] are carefully scrutinised before the application and any deficiencies are explored.<sup>1095</sup>

The broader benefits of the PIM were highlighted during the Queensland Parliamentary debate on the Bill establishing the office:

The impact on the community will be that the independence and integrity available through the office of the PIM will increase public confidence in the use by police of those investigating tools. The availability of the monitor to question the applicant, cross-examine witnesses and make submissions during the hearings of applications is not provided for in any other jurisdiction within Australia. It represents a significant leap forward in balancing competing public interests, the right to privacy and the right to have criminals brought to justice.<sup>1096</sup>

The Committee notes the support of Queensland's Supreme Court judges for the PIM's role, referred to earlier in this section and reinforced by the PIM.<sup>1097</sup> Those judges are uniquely placed within Australia to evaluate the value of a third party scrutineer of warrant applications. Similarly, the suggestion by a spokesperson for the Supreme Court of Victoria that the Court's ability to scrutinise warrants could be enhanced should be given due consideration.

Concerns about the impact of a PIM on the operational efficiency of law enforcement agencies had a bearing on the Commonwealth Senate's rejection of the PIM model. These concerns were countered by the argument that most of the Queensland PIM's work at the application stage is carried out in close cooperation with the applicant agency and that objections to or concerns about the warrant application are usually resolved before the issuing judge considers it.<sup>1098</sup> By improving the standard of warrant

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<sup>1095</sup> PIM, *Fifth Annual Report*, 7-8.

<sup>1096</sup> R. K. Hollis (Redcliffe), *Police Powers and Responsibilities Bill 1997, Second Reading Speech*, 18 November 1997, 4343.

<sup>1097</sup> PIM, *Third Annual Report*; Conversation Robert Sibley, PIM, and Committee Legal Research Officer, 16 June 2005.

<sup>1098</sup> PIM, *Fifth Annual Report*, 8, 10.

applications, that practice was said to assist applicants and issuing judges. It is apparently exceptional for the PIM to have concerns that merit the examination of witnesses at hearings, while the PIM only “infrequently” debates the form or conditions in the proposed warrant.<sup>1099</sup>

In addition, OVPC suggested that establishing a PIM function in Victoria would not necessarily involve major additional resources or institutional change, as the role could be performed by existing state officeholders such as the Ombudsman and the Privacy Commissioner, or by senior legal professionals. Indeed, the Queensland PIM is a part-time position whose present occupant is a barrister and university lecturer.

Finally, the Committee notes that a PIM remains an option for other Australian jurisdictions. The *Corruption and Crime Commission Act 2003 (WA)* requires that the Ministerial review of its operation and effectiveness consider the addition of a PIM to the legislation.<sup>1100</sup>

The Committee notes that the issues canvassed above were all considered during the process of the enactment of the *Terrorism (Community Protection) Act 2003*. There has been insufficient time since that legislation came into force for any assessment of the Act’s effectiveness. The Committee therefore notes the arguments for and against the establishment of a PIM or like body, and believes that it is an issue which should be monitored and remain under review. As noted earlier the Act must be reviewed by 30 June 2006 and the Committee therefore suggests that the issues raised here are considered as part of that review.

### **Other matters for the issuing judge to consider**

The Committee identified some inconsistencies in the provisions of the *Terrorism (Community Protection) Act 2003* as compared to the Victorian *Surveillance Devices Act 1999* and Commonwealth legislation.

OVPC, in its submission to the Scrutiny of Acts and Regulations Committee,<sup>1101</sup> recommended that the issuing judge should be required to consider additional matters, including whether any other warrants have been sought in relation to the person or place who is the subject of the application being determined, whether and why any such warrant applications were rejected, the benefits derived from previous warrants, the extent to which “conventional, less intrusive” methods of investigation have been used and how effective or prejudicial these are likely to be. The submission noted that these proposals reflect identical or similar provisions in existing

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<sup>1099</sup> Ibid, 10.

<sup>1100</sup> *Corruption and Crime Commission Act 2003 (WA)* s 226(1a)(e).

<sup>1101</sup> Office of the Victorian Privacy Commissioner, *Submission to the Victorian Parliament Scrutiny of Acts and Regulations Committee in relation to the Terrorism (Community Protection) Bill*, March 2003, 16, at [www.privacy.vic.gov.au](http://www.privacy.vic.gov.au).

legislation in Victoria, Queensland<sup>1102</sup> and the Commonwealth.<sup>1103</sup> In particular, section 17(2) of the *Surveillance Devices Act 1999* requires issuing judges to have regard to alternative means of obtaining the evidence sought to be obtained and any previous surveillance warrant sought or issued in connection with the same offence. While not prescribing the level of detailed scrutiny proposed by OVPC, these provisions do oblige issuing officers to consider the need for the warrant to be covert. As such, they reinforce the principle that covert warrants (of any type) authorise serious invasions of individual rights and therefore should be contemplated only after other less intrusive means have been exhausted.

The Committee believes that the *Terrorism (Community Protection) Act 2003* should contain provisions consistent with those in the *Surveillance Devices Act 1999*,<sup>1104</sup> as both Acts contain the threshold requirement that an applicant's state of mind must include a reasonable belief or suspicion that covert action is necessary.<sup>1105</sup> The Committee notes that the Government indicated during debate on the *Terrorism (Community Protection) Bill 2003* that the standard of proof for the issue of a covert search warrant in relation to terrorism "is modelled on" the test for the issue of a surveillance device.<sup>1106</sup> More generally, "the covert search warrant provisions largely mirror the safeguards in the *Surveillance Devices Act*".<sup>1107</sup> Thus, three of the four factors that an issuing judge is to consider in the later Act are taken from the *Surveillance Devices Act 1999*. The fourth factor, concerning any condition to which the warrant may be subject, allows a judge to impose additional controls on the covert search warrants, such as the notice to target requirement discussed in the next section.

The general protection conferred by the fourth factor demonstrates that the *Terrorism (Community Protection) Act 2003* contains additional safeguards to the *Surveillance Devices Act 1999*. Other examples are the restriction of warrants to actual or suspected terrorism offences, the far more restrictive class of law enforcement personnel who can authorise an application for a warrant and the requirement that an

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<sup>1102</sup> *Police Powers and Responsibilities Act 2000* (Qld) ss126, 135, 138, 140, 148, 150.

<sup>1103</sup> *Telecommunications (Interception) Act 1979* (Cth) ss 42, 46-46A.

<sup>1104</sup> The covert search warrant legislation enacted by the New South Wales Government also contains these requirements. Applications must include details of any previous covert search warrants issued in relation to the subject premises and issuing judges must consider alternative means of obtaining the sought information: *Terrorism (Police Powers) Act 2005* (NSW) s 27J(1)(i) s 27K(2)(e) respectively. The Act includes additional protections, including that an issuing judge should consider the reliability of the information in the application, including the nature of the source of information (s 27K(2)(a)), and keep a record of all relevant particulars used to justify the issue or refusal of a warrant (s 27L(1)).

<sup>1105</sup> *Surveillance Devices Act 1999*, s15(1)(b); *Terrorism (Community Protection) Act 2003*, s6(1)(c).

<sup>1106</sup> Jenny Mikakos, Parliamentary Secretary for Justice, *Terrorism (Community Protection) Bill 2003*, *Second Reading Debate*, Legislative Council, 10 April 2003, 858.

<sup>1107</sup> *Ibid*, 857.

applicant suspect or believe that the desired entry and search will “substantially assist” in responding or preventing an actual or suspected terrorist attack.

The Committee is of the view that the gravity of the intrusion occasioned by covert warrants, which is reflected in the safeguards already contained in the *Terrorism (Community Protection) Act 2003*, and the desirability of consistency between similar Victorian legislation, may justify the addition to the Act of an explicit legislative obligation on issuing officers to consider alternative and past approaches to obtaining the material sought through the warrant.

As part of its review of the *Terrorism (Community Protection) Act 2003*, the Committee suggests that the Government considers amending the Act to include an explicit requirement for issuing officers to consider alternative means of obtaining the desired material and past efforts to obtain warrants for the same material or offence.

### **Notice to the target**

Requiring an agency that executes a warrant to inform the target or occupier of targeted premises that a covert search has been executed is an important safeguard against abuse of covert powers. The provision of notice enables targets to seek advice about the appropriateness of the use of the powers and its potential consequences, and reflects the principle that the covert power is used only in special circumstances. There is no explicit power in the Act to require notice, although OVPC highlighted the fact that the explanatory memorandum to the Bill gave a notice requirement as an example of a condition that an issuing Judge could impose on a warrant under clause (now section) s8(1). OVPC was concerned that such an obligation was not made explicit in the legislation given the importance of minimising the invasion of individual liberties.<sup>1108</sup>

In his evidence to this Committee during the warrants inquiry, Brian Walters SC made a similar argument in relation to covert warrants in general:

Where it is a covert operation, obviously you will not tell [the target about the existence of the warrant] at the time, but it seems to me that there is a strong case for making people aware of it at a later time.<sup>1109</sup>

In the explanatory memorandum to the Bill, the Government also recognised the importance of notifying the target/s of covert warrant operations:

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<sup>1108</sup> Office of the Victorian Privacy Commissioner, *Submission to the Victorian Parliament Scrutiny of Acts and Regulations Committee in relation to the Terrorism (Community Protection) Bill*, March 2003, 17, at [www.privacy.vic.gov.au](http://www.privacy.vic.gov.au); see also Office of the Victorian Privacy Commissioner, *Submission no. 17, Warrants Inquiry*, 8-9.

<sup>1109</sup> Brian Walters, SC, Liberty Victoria, *Minutes of Evidence*, 20 October 2004, 187.

[Notice to the target of a search] provides an additional safeguard to the issuing of a covert warrant and is intended to ensure that the covert warrant power is not abused.<sup>1110</sup>

However, the Government did not support an explicit notice requirement, believing that the general power in section 8(2)(d) to impose conditions was sufficient:

Clause 8(2)(d) of the Bill enables the judge to impose conditions on the warrant. The explanatory memorandum notes that:

[This] provides the court with a discretion to impose any other conditions on the warrant that it considers necessary and appropriate in the circumstances. For example, the reason why the search has to be covert may be temporary. If the reasons for the covert search will be short-lived, the court could impose a condition that the police notify the occupier of the searched premises after a certain period. This provides an additional safeguard on the issuing of a covert search warrant and is intended to ensure that the covert search warrant power is not abused.

The power to impose conditions is a flexible one. It could also cover situations where it was appropriate to impose conditions on what was to be done with information obtained during the search.<sup>1111</sup>

The Committee agrees that flexibility is important.

The Committee notes that given the circumstances in which covert warrants are sought and issued, it is likely to be a minority of applications which would require the subsequent issue of a notice to the target. In many, if not most, cases a notice requirement would be inappropriate as it could jeopardise continuing investigations. However, in those few cases where a notice could be given, the Committee considers that this could provide a useful monitoring function on the use of covert warrants.

A notification requirement could be implemented in a number of ways. For example, issuing Judges could be required to consider the inclusion of a notice requirement in the warrant, which could also include a statement to the effect that the warrant is invalid if the obligation is not fulfilled. Alternatively, the existing reporting back requirement could trigger consideration by the court of whether it is appropriate to give notice. OVPC suggested that appropriate circumstances would include where a person was subsequently charged or where an innocent party has been targeted by the warrant.

Another alternative is the approach taken in New South Wales' *Terrorism (Police Powers) Act 2005* (NSW). Within six months of the execution of the warrant, the person who executed it would be required to submit a draft occupier's notice to the

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<sup>1110</sup> *Terrorism (Community Protection) Bill*, Explanatory Memorandum, cl 8.

<sup>1111</sup> Letter, Premier Steve Bracks to the Scrutiny of Acts and Regulations Committee: Scrutiny of Acts and Regulations Committee, *Alert Digest 4*, 2003, Ministerial Response to Comments on *Terrorism (Community Protection) Bill*, *Alert Digest* 2003, 180.

issuing judge for approval. If approved, the notice would be given to a variety of individuals connected to the warrant. The service of the occupier's notice may be postponed for up to six months at a time, but not for more than 18 months unless the issuing judge is satisfied of the existence of exceptional circumstances. The Bill also contains detailed proposed contents for the occupier's notice.<sup>1112</sup>

As with the discussion above of the desirability of a PIM or similar agency, the Committee notes that the issues canvassed here concerning a notice to the target of a covert search were considered during the process of the enactment of the *Terrorism (Community Protection) Act 2003*. Similarly, the Committee notes that there has been insufficient time since that legislation came into force for any assessment of the Act's effectiveness. The Committee again takes the view that an appropriate course of action is to suggest that the issues raised here be considered as part of the review of the Act which must take place by 30 June 2006.

### **Annual reports on the use of covert powers**

As noted earlier in this chapter the *Terrorism (Community Protection) Act 2003* section 13 requires the submission of an annual report by the Chief Commissioner of Police to the Attorney-General, who must then table the report in Parliament. The report must be submitted to the Minister "as soon as practicable after the end of each financial year".

The Committee notes with some concern that Victoria Police submitted its report for the first financial year of the Act's operation (2003 - 2004) to the Attorney-General in early July 2005 and that it was tabled in Parliament on 7 September 2005, more than 14 months after the end of the relevant financial year.

While the report states that Victoria Police did not make any covert search warrant applications in 2003 - 2004,<sup>1113</sup> the reporting obligation remains and the submission

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<sup>1112</sup> *Terrorism (Police Powers) Act 2005 Act (NSW)* ss 27U-V. This and other covert warrant provisions were inserted into the Act by the *Terrorism Legislation Amendment (Warrants) Act 2005*. Section 27U(2) prescribes the following contents for the occupier's notice: the name of the person who applied for the warrant; the name of the eligible Judge who issued the warrant; the dates when the warrant was issued and executed; the address or other description of the subject premises; the number of police officers, staff members of the New South Wales Crime Commission or intelligence gathering officers who entered the subject premises for the purposes of executing, or assisting in the execution of, the warrant; a summary of the nature of the warrant (including the grounds on which a covert search warrant may be issued) and the powers conferred and exercised under the warrant; a description of any thing seized or placed in substitution for a seized thing; a description of any thing returned or retrieved under section 27R and the date on which the thing was returned or retrieved; if the occupier was not, at the time that the warrant was executed, believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed - a statement to that effect; and any other matters required by the regulations.

<sup>1113</sup> Victoria Police, *Annual Report, 2003 - 2004 Terrorism (Community Protection) Act 2003*, tabled in Parliament 6 September 2005.

and subsequent Parliamentary tabling of the report affords the community an opportunity to scrutinise the use of and potentially the impact of covert search warrant powers. For such scrutiny to be effective in identifying relevant practices and trends, it should occur in a timely manner, which in turn depends on the timely availability of data on the use of the powers. It is particularly important to the maintenance of public confidence that the safeguards function effectively.

The Committee notes that the Victorian provisions on this issue are less restrictive than a number of other jurisdictions, which require, or propose to require, the relevant authority to submit the annual report as soon as practicable, but within four months of the end of the financial year that forms each reporting period.<sup>1114</sup> A similar reporting regime under the *Surveillance Devices Act 1999* requires reporting within three months of the end of each financial year.<sup>1115</sup> Considering the importance of the reporting function and the reporting practice to date, the Committee believes that section 13 of the *Terrorism (Community Protection) Act 2003* should be subject to a time limit, and that three months is appropriate as it will provide consistency with similar Victorian legislation.

Recommendation 74. That Section 13 of the *Terrorism (Community Protection) Act 2003*, be amended to require the submission of annual reports under that section as soon as practicable, but within three months of the end of the financial year that forms the reporting period.

If the foregoing recommendation is implemented, annual reports concerning the use of covert search warrants under the *Terrorism (Community Protection) Act 2003* will always be tabled while Parliament is sitting, during its annual spring session. This is consistent with the Committee's belief that Members of Parliament provide more effective transparency and accountability while they are assembled together. The Committee therefore expresses its strong preference for the tabling of documents while Parliament is in session.

However, for the sake of completeness, the Committee also considered the issue of the tabling of annual reports when Parliament is in recess. The Act does not make provision for tabling when the Houses are not sitting, with the practical effect being to delay public access to the reports. This may undermine an important aspect – transparency - of the accountability of covert powers. While this situation is arguably not overly significant, given that the reports would be tabled on the next sitting date, usually no more than a few weeks later, it is inconsistent with other legislation that includes provisions for the tabling of reports when Parliament is not sitting. For

<sup>1114</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 160(1); *Crime and Misconduct Act 2001* (Qld) s 328(1); *Terrorism (Police Powers) Act 2005* (NSW) s 27ZB(2).

<sup>1115</sup> This discussion begins at p 368 below.

example, the *Police Regulation Act 1958* states that where the tabling date for a report from the Director, Police Integrity (DPI) falls within a period when the Parliament is in recess, the Director and Parliament officials are to take steps to ensure the public dissemination of the report, including the publication of the report on the DPI's website and the transmission of copies to all members of Parliament.<sup>1116</sup> The Committee believes that the publication obligations in respect of covert powers should be made consistent with those relating to less intrusive regimes.

Recommendation 75. That, if Recommendation 74 is not implemented, section 13 of the *Terrorism (Community Protection) Act 2003* be amended to provide that where the Parliamentary tabling date for reports on the use of covert search warrant powers falls outside Parliamentary sitting periods, such reports be publicly disseminated, using the regime in section 102K of the *Police Regulation Act 1958* as a model.

### **Other jurisdictions' legislation authorising covert search warrants in relation to terrorism**

As this report was being prepared, New South Wales and Western Australia introduced covert search warrant provisions relating to terrorism and South Australia indicated that it would do so.<sup>1117</sup> Due to the timing of the Western Australia and South Australia Bills, the Committee has only considered the New South Wales legislation in this report.

The Committee notes that the NSW Act contains a number of protections that are not included in the Victorian legislation, such as additional requirements for applications<sup>1118</sup> and issuing judges,<sup>1119</sup> a scheme for preparing and approving occupiers' notices,<sup>1120</sup> provisions making it an offence to provide false information in an application<sup>1121</sup> and mandatory review by the Ombudsman for a period of two years of covert search warrant powers.<sup>1122</sup> The Committee suggests that the Government

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<sup>1116</sup> *Police Regulation Act 1958* s 102K.

<sup>1117</sup> The *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW) amended the *Terrorism (Police Powers) Act 2005* (NSW); *Terrorism (Extraordinary Powers) Bill 2005* (WA), introduced into the Western Australia Legislative Assembly on 14 September 2005; *Police Powers (Prevention and Response to Terrorism) Bil 2005* (SA), referred to in Premier of South Australia, *New Counter-Terrorism Plans*, 13 September 2005.

<sup>1118</sup> *Terrorism (Police Powers) Act 2005* (NSW) s 27K.

<sup>1119</sup> *Ibid*, s 27J.

<sup>1120</sup> *Ibid*, s 27U-27V.

<sup>1121</sup> *Ibid*, s 27Y.

<sup>1122</sup> *Ibid*, s 27ZC. The Committee discussed other aspects of the NSW Acts, at footnotes 1104 and above and accompanying text.

considers the appropriateness of adopting these protections as part of the 2006 review of the Victorian Act.

### ***Covert search powers and practices not related to terrorism***

OVPC suggested that the current law governing covert searches of property not related to terrorism offences is ambiguous and should be clarified:

The *Terrorism (Community Protection) Act 2003* clearly authorises covert search and seizure, without a doubt. What we are suggesting for the committee's attention is that there does not appear to be clear authorisation under the law for covert search and seizure other than in that context. It is something that is worth attention because I am sure from a law enforcement point of view there will be appropriate exercises of covert search and seizure, but what we are drawing the committee's attention to is that there appears to be a gap. It is only in the context of that quite recent legislation that it appears to be quite clearly authorised.<sup>1123</sup>

In its submission, OVPC explained what it considered to be the impact of the lack of provision for covert warrants beyond terrorism offences:

The absence of clear legislative authority for powers such as these is not in the public interest, nor in the interest of law enforcement... Lack of clear authority to exercise intrusive powers may:

- a. result in the loss of valuable evidence that is either not collected by police due to their uncertain authority, or is ruled inadmissible by a court as being unfairly or unlawfully obtained...;
- b. enable law enforcement agencies to disregard the legislature's safeguards protecting privacy and civil liberties; and
- c. undermine the sense of legitimacy on which any police force in a democratic society ultimately depends.<sup>1124</sup>

OVPC urged the Committee to:

consider regularising covert powers in Victoria. Doing so would provide clear guidance to the police and the wider community about what are acceptable and unacceptable activities, ensuring that encroachment on individuals' privacy and civil liberties is limited to what is necessary and proportionate to investigate serious crime. Legislative guidance would also assist in the prosecution of serious offenders by reducing the risk of evidence being judicially excluded as having been unlawfully or unfairly obtained. Finally, legislative amendment would enhance public

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<sup>1123</sup> Paul Chadwick, Office of the Victorian Privacy Commissioner, *Minutes of Evidence*, 20 October 2004, 179.

<sup>1124</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 6.

confidence in the accountability of police by ensuring that covert activities are monitored and reviewed.<sup>1125</sup>

The Committee's research confirms that there does not appear to be any other explicit Victorian authorisation for covert search or seizures under warrant. In particular, neither the three most commonly used warrant provisions (sections 92 and 465 of the *Crimes Act 1958* and section 81 of the *Drugs, Poisons and Controlled Substances Act 1981*), nor the relevant general provisions of the *Magistrates' Court Act 1989* that are imported by reference into many warrant provisions, explicitly require an occupier to be present during the search.

The Committee believes that it is axiomatic that covert searches of property should be strictly regulated and has therefore considered whether covert search warrants should be permitted in relation to offences other than terrorism by examining the occurrence and regulation of such searches under warrant.

### **The occurrence of covert property searches under warrant**

The Committee heard evidence that covert searches do occur in Victoria in circumstances other than investigations related to terrorism offences.

Although legislation is silent, the Victorian Police Manual (VPM) provides explicit instruction on how a covert property search should be carried out. It states that "Police members must not conduct a search of an unoccupied property unless exceptional circumstances exist".<sup>1126</sup> The VPM distinguishes between searches where it is known that the owner or occupier of the premises is not present, and those where the premises are found to be unoccupied. In the former situation, two safeguards are imposed in addition to the normal VPM search protections. The member in charge of the search must inform the officer empowered to authorise the search; and, unless otherwise approved by an Assistant Commissioner or Commander, the search must be supervised by a relatively senior police member (an officer or divisional patrol manager). In relation to property found to be unoccupied, the member in charge of the search must immediately request the attendance of an Officer or Divisional Patrol Manager and remain at the premises until they attend, unless impractical. In both situations, the Officer or Divisional Patrol Manager must ensure the property is secure prior to their departure.

### **The regulation of covert property searches**

Clearly, there are legitimate circumstances in which covert property searches are justified, such as emergencies. The Committee's concern focuses on situations where

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<sup>1125</sup> Letter, Office of the Victorian Privacy Commissioner to the Committee Chairperson, 29 November 2004.

<sup>1126</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 10.

there is no such urgency. A number of witnesses argued that covert search warrants are justified in some cases, including OVPC and the Criminal Bar Association:

I have difficulties with the notion of covert search warrants because there is no-one there, or no independent person there, who can assess what is taking place....However, I am going to be hard pressed to suggest that in no situation should covert searches be permitted. Law enforcement officers would consider them to be at least at times a necessary part of their investigative function where they have long-term investigations taking place.... In those circumstances I can understand a justification for a covert search... I think there is clearly a place for them but the circumstances in which they arise need to be properly circumscribed.<sup>1127</sup>

As the Committee noted at the beginning of this report,<sup>1128</sup> covert search warrants are a useful tool for investigating offences where there may be evidence of preparations for criminal activity but insufficient evidence to pursue a prosecution. The covert nature of the search warrant improves the efficiency of law enforcement by providing an opportunity for agencies to justify surveillance or other activity that would secure sufficient evidence to support future criminal proceedings. In contrast, an overt warrant could frustrate efforts to identify and halt criminal activity because suspects could be made aware of interest in their activities and may consequently discontinue their conduct or carry it out elsewhere.

Similar arguments have recently been made in other jurisdictions. During the review of the *Search Warrants Act 1985 (NSW)*, New South Wales law enforcement organisations proposed legislative reform to permit covert search warrants that would enable the gathering of information about serious crime without alerting suspects. They argued that the warrants would:

... be useful in the example of the manufacture of drugs because it involves the bringing together of things which may not be illegal, depending on whether they are classed as precursors to drug production or not, but which at some stage will be put together and caused to become an illegal substance. The argument is that covert search warrants would allow undercover operatives to go in and see what stage the drug manufacturing process was up to, so some operational decisions could be made about when a normal search warrant could be exercised to seize evidence of the drug manufacture....

The trouble is that if you use a normal search warrant then you go in and that is it. Whatever stage it is at you would get them for whatever manufacturing is going on, but it is not helpful in fully breaking rings because, for instance, the distribution strata of the drug operation will not become involved in the actual manufacturing process until a certain point. Therefore if you are

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<sup>1127</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 170-171. The relevant OVPC evidence was discussed at footnotes 1123-1125 above and accompanying text.

<sup>1128</sup> The Committee discusses this at p 32 above.

wanting to break entire rings and get Mr Big and all this sort of thing it is better to have some sort of idea of when is the optimum time to go in.<sup>1129</sup>

The Committee heard evidence that the situation in relation to covert searches in NSW is similar to that in Victoria, in that they are currently carried out without there being specific legislative provision for a warrant to be authorised to be carried out covertly.

Witnesses in New South Wales opposed the proposal for legislative reform. One organisation with comprehensive experience of the legal system argued that it would constitute a “gross erosion of the essential safeguards of the search warrants scheme”.<sup>1130</sup> The New South Wales Council for Civil Liberties also opposed legislating to permit any covert property searches, considering that:

the risks of covert search warrants are so great that just the fact that they might make law enforcement easier in that sense is not a reason for introducing them. That balance between the rights of the individual to carry out their proper business without fear of interference and intrusion against the state’s right to investigate and prosecute the crime has to be kept, and we think covert warrants tip that balance much too far in favour of the state. [They should only be available] in really exceptional circumstances.<sup>1131</sup>

While acknowledging that searches were currently being undertaken covertly, the Council of Civil Liberties felt that subsequent monitoring of police behaviour by courts when considering admissibility of evidence was a better safeguard than legislative amendment:

Of course we do receive anecdotal reports of that [covert searches] happening not infrequently, and I think really that the police’s capacity to conduct searches without effectively notifying the occupier of the premises being searched does occur in any event under the current regime without the need for enshrining covert warrants in the legislation....

The courts, of course, when they are presented with evidence that has been gathered under circumstances where the law has not been complied with, have a discretion to accept or reject that evidence, and in our view the courts tend to use their discretion pretty well in that sense. They look at the circumstances and whether it was reasonable for that to have occurred. We think that kind of oversight of what is going on now works better. Really, if you authorise covert warrants in legislation it just opens the door for that outweighing of the balance that I was talking to you about before, whereas now the police in urgent circumstances can gather that evidence in the way we have discussed, and the courts then decide whether that evidence should be

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<sup>1129</sup> New South Wales Attorney-General’s Department, *Minutes of Evidence*, 1 September 2004, 55-56.

<sup>1130</sup> New South Wales Attorney-General’s Department, Criminal Law Review Division, *Search Warrants Act 1985 Working Party Issues Paper* (March 2001) (*Search Warrants Act Issues Paper*). The contents of the paper were confidential at the time this report was prepared. The NSW Attorney-General’s Department gave the Committee permission to refer to the contents without attribution.

<sup>1131</sup> Pauline Wright, New South Wales Council for Civil Liberties, *Minutes of Evidence*, 1 September 2004, 65, 69.

admissible. If there has been a real abuse by the police in those circumstances, then of course the police officers may find themselves in trouble in terms of committing an offence. We think the system as it works now is preferable to legislating for covert warrants.<sup>1132</sup>

The issue of the subsequent admissibility of evidence was an argument used in favour of legislation by the Australian Federal Police in its 1999 submission to the Commonwealth Senate Standing Committee for the Scrutiny of Bills Inquiry into Entry and Search Provisions in Commonwealth Legislation:

[...] officers would find it useful to be able to enter premises to take photographs or fingerprints, or obtain other secondary evidence of criminal conduct. This is particularly the case in long term investigations of a serious nature, especially where organised crime is involved. The ability to conduct covert searches to gather evidence, albeit in secondary form, i.e. via photographic, video and photocopy images, as an operation progresses, would be invaluable.<sup>1133</sup>

We would like legislative amendment to make those sorts of provisions lawful, so that we can obtain the evidence necessary without jeopardising any future prosecutions or, indeed, the ongoing nature of the operations.<sup>1134</sup>

The AFP proposed that the issuing officer should authorise such warrants and that the requirements to give occupiers copies of warrants and a receipt for seized items should be replaced by the attendance of an independent police member at the search and eventual notification of the search to the occupier. As with the Committee's current inquiry, stakeholders who were not law enforcement agencies supported covert search warrants as a necessary investigative tool but advocated strong accountability measures.<sup>1135</sup> In the final analysis, the Senate Committee concluded that "while aware that covert search warrants might make law enforcement easier, the risks are such that the Committee is opposed to recommending such searches".<sup>1136</sup>

In both New South Wales and the Commonwealth, it was argued that covert searches would breach the intention of the relevant legislative regime. The NSW Attorney-

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<sup>1132</sup> Pauline Wright, Vice President, New South Wales Council for Civil Liberties, *Minutes of Evidence*, 1 September 2004, 69.

<sup>1133</sup> Australian Federal Police, *Submission no. 12, Senate Standing Committee for the Scrutiny of Bills, Inquiry into Entry and Search Provisions in Commonwealth Legislation*, 6.

<sup>1134</sup> Australian Federal Police Association, *Minutes of Evidence, Senate Standing Committee for the Scrutiny of Bills, Inquiry into Entry and Search Provisions in Commonwealth Legislation*, 13 September 1999, 211.

<sup>1135</sup> Michael Rozenes QC, *Minutes of Evidence, Senate Standing Committee for the Scrutiny of Bills, Inquiry into Entry and Search Provisions in Commonwealth Legislation*, 14 September 1999, 332.

<sup>1136</sup> Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation, Fourth Report of 2000* (6 April 2000) (*Senate Report*) 140. The Government noted the conclusion and indicated that the issue would remain under consideration: Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Bills Fourth Report - Entry and Search Provisions in Commonwealth Legislation, August 2003* (*Australian Government, Senate Report Response*), 17.

General's Department considered that covert searches were "not against the provisions of the *Search Warrants Act 1985* but certainly against the spirit of it".<sup>1137</sup> The AFP suggested that while it had been lawful prior to the enactment of Part 1AA (which contains the search warrant provisions) of the *Crimes Act 1914* (Cth) to search premises under warrant without prior notification to the occupier:

it is arguable that it would defeat the intended fairness inherent in Part 1AA if a warrant holder deliberately arranged matters to ensure that the occupier was denied an opportunity to exercise the rights afforded under the Part. The rights given to the occupier [to be given a copy of the warrant and to be present during the search] are expressed to be conditional on the occupier or another person being present at the time of the search.<sup>1138</sup>

This quote notes that the occupier safeguards contained in sections 3H (copy of the warrant) and 3P (right to be present) apply only where the occupier or a person representing the occupier is present at the premises. Nevertheless, "the DPP have advised [that] the AFP should adopt a cautious approach and proceed on the assumption that a warrant ... does not authorise the conduct of a covert search in any form, in that it is not open to an executing officer to plan a search of a premises with the knowledge that premises are unoccupied".<sup>1139</sup>

In contrast, Queensland legislation explicitly permits the police and the Crime and Misconduct Commission to apply for and execute covert search warrants for serious offences<sup>1140</sup> and subjects them to a range of more stringent safeguards than apply to overt warrants, such as more extensive requirements for the issuing judge to consider and independent oversight of the powers by a third party public interest monitor. The powers conferred by the warrants are considered to be justified by the gravity of the relevant offences and to be appropriately controlled by the legislative protections that accompany the powers.<sup>1141</sup>

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<sup>1137</sup> Robert Hulme, SC, New South Wales Attorney General's Department, *Minutes of Evidence, 1 September 2004*, 55. Interestingly, section 15 of the Act permits the service of an occupier's notice to be postponed for up to six months by an authorised justice if s/he is satisfied that there are reasonable grounds for the postponement. This provision led the Queensland Criminal Justice Commission to conclude that the Act appeared "to contemplate the covert execution of a search warrant as it is difficult to imagine other circumstances in which an issuing authority would authorise postponement of the service of an occupier's notice": Criminal Justice Commission, *Report of a Review of Police Powers in Queensland, May 1993*, 380.

<sup>1138</sup> Australian Federal Police, *Submission no. 12, Senate Standing Committee for the Scrutiny of Bills, Inquiry into Entry and Search Provisions in Commonwealth Legislation*, 7.

<sup>1139</sup> *Ibid.*

<sup>1140</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 148(1); *Crime and Misconduct Commission Act 2001* (Qld) s 148.

<sup>1141</sup> *Police Powers and Responsibilities Bill 1997* (Qld), *Explanatory Memorandum, 2; Police and Other Legislation Amendment Bill 2004* (Qld), 3.

Relevant offences in Queensland were initially limited under the *Police Powers and Responsibilities Act 1997* to organised crime, defined as “an ongoing criminal enterprise to commit serious indictable offences in a systematic way involving a number of people and substantial planning and organisation”,<sup>1142</sup> and under the *Crime and Misconduct Act 2001* to criminal activity that involves an indictable offence punishable on conviction by a term of imprisonment not less than 14 years, or criminal paedophilia, or organised crime. Police and CMC powers have since been expanded to cover terrorism<sup>1143</sup> and other serious crimes.<sup>1144</sup> The result of these powers, in the view of OVPC, is that they “provide clear and limited authority for the use of covert powers in the investigation of designated crimes”.<sup>1145</sup>

Other States’ anti-corruption organisations are apparently able to conduct covert searches as a consequence of their general powers. For example, the West Australian investigators of the Corruption and Crime Commission can enter premises without the knowledge of the occupier where it is considered necessary to do so in order to effectively investigate misconduct by a public officer.<sup>1146</sup> Further, section 101(8) appears by implication to permit covert entry to premises under search warrants.<sup>1147</sup> The effect of the provision is that appropriately authorised officials may use force to gain access to premises if they suspect on reasonable grounds that to

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<sup>1142</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 148(1) Schedule 4. When the warrants were introduced, a serious indictable offence was an indictable offence that involved any serious risk to or actual loss of a person’s life; serious risk of or actual serious injury to a person; serious damage to property endangering the safety of any person; serious fraud; serious loss of revenue to the State; official corruption; serious theft; money laundering; conduct related to prostitution or SP bookmaking; child abuse including child pornography; or a drug offence punishable by at least 20 years imprisonment: *Police Powers and Responsibilities Bill 1997, Explanatory Memorandum*, 57-58.

<sup>1143</sup> *Terrorism (Community Safety) Amendment Act 2004* (Qld) ss 12(2), 33.

<sup>1144</sup> Unlawful homicide, attempted murder, conspiracy to murder, offences that involve serious risk or occurrence of serious injury or death and for which a convicted person is liable to life imprisonment: *Police and Other Legislation Amendment Act 2005* s 21. The CMC definition was expanded to include “something that is preparatory to the commission of criminal paedophilia, organised crime or terrorism; or undertaken to avoid detection of, or prosecution for, criminal paedophilia, organised crime or terrorism”: *Terrorism (Community Safety) Amendment Act 2004* (Qld) s 12(2).

<sup>1145</sup> Letter, Office of the Victorian Privacy Commissioner to Committee Chair, 29 November 2004.

<sup>1146</sup> Michael Cashman, Corruption and Crime Commission, *Minutes of Evidence*, 2 September 2004, 122-123; *Corruption and Crime Commission Act 2003* (WA) s 121.

<sup>1147</sup> “Before an authorised person acting under a warrant uses force that may cause damage to any property in order to gain access or entry to a place or thing, the authorised person must, if reasonably practicable (a) give the occupier of the place a reasonable opportunity to allow the authorised person entry or access to the place; or (b) give the person who has possession or control of the thing a reasonable opportunity to allow the authorised person to have access to the thing, as the case requires, unless the authorised person suspects on reasonable grounds that to do so would frustrate the effectiveness of the search permitted by the warrant or would endanger any person.”

permit an occupier to allow entry or access to sought items would frustrate the effectiveness of the search or would endanger anyone.

The Queensland experience is instructive for Victoria. The covert search warrant powers enacted in the *Police Powers and Responsibilities Act 1997* followed the Criminal Justice Commission's 1993 report on police powers. The Commission found that, like Victoria now, Queensland legislation of that period contained no explicit reference to covert execution of search warrants, and that in general it was "unclear" whether legislation authorised such a practice.<sup>1148</sup> The report highlighted what it considered to be the ambiguous covert search authority conferred by the *Search Warrants Act 1985* (NSW). The report also considered the Law Reform Commission of Canada's decision not to recommend covert search and seizure powers because of concerns that they would impede effective review of the legality of police conduct. The Commission concluded that covert search, particularly in the context of "increasingly sophisticated organised crime", had "the potential to assist major crime investigations" and recommended that a warrant to covertly enter and search premises should be available in certain circumstances. As it was sensitive to what it called the "grave risks" of covert search warrants, the Commission qualified the proposal by imposing strict limits on the availability of the warrants: the application could only relate to serious indictable offences, could only be authorised by a senior police officer, and made to a Supreme Court Judge, who had to be satisfied that a covert warrant was justified; a written execution report had to be provided to the issuing judge within 72 hours of execution; and the issuing judge should specify a time limit for the service of written notice of the search on the occupier.

Interestingly, when the Queensland Parliamentary Criminal Justice Committee reviewed the CJC report, it rejected the recommendation that warrants be available to undertake covert searches. The Committee was influenced by other jurisdictions' rejection of such a power and its concern that the proposed safeguards on covert warrants had been proved to be "less than effective" in Queensland.<sup>1149</sup>

However, like the CJC, this Committee considers that ambiguity in the relevant legal framework – in this case, Victorian legislation – about covert search warrants should be clarified. Like the CJC, it is acutely aware of the tensions that arise in relation to the issue. Once again, it is a question of the correct balance, between on the one hand the "sound operational basis"<sup>1150</sup> for the powers and the "quite profound conceptual problems"<sup>1151</sup> that flow from the concealed nature of the execution of the warrant. While the Committee shares stakeholders' concerns about the effects of the

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<sup>1148</sup> Criminal Justice Commission, *Report of a Review of Police Powers in Queensland*, May 1993, 379.

<sup>1149</sup> Queensland Parliamentary Criminal Justice Committee, *Report 23B: Review of the Criminal Justice Commission's Report on Police Powers in Queensland Volumes I-III*, 30 August 1994, 82.

<sup>1150</sup> Daniel Noll, New South Wales Attorney General's Department, *Minutes of Evidence*, 1 September 2004, 55.

<sup>1151</sup> *Ibid.*

latter, it is, like a broad range of stakeholders, not satisfied that covert searches of property should be prohibited.

The Committee believes that the legitimate potential uses, and therefore the benefits to the community's interest in effective investigation and prosecution of serious crime, of covert searches are significant and that the interests of fairness, efficiency and consistency can be best served by recognising the value to the community of such searches and explicitly providing for them in legislation. To ensure the transparency and accountability of those exercising the powers, such powers should be subject to rigorous safeguards, and in particular should be brought within the scrutiny of the issuing officer, rather than being dealt with as an operational matter covered only by police procedures. The New South Wales Attorney-General's Department put this line of reasoning succinctly:

The argument is that if they are doing it anyway, we should really be designing a scheme which adequately puts strong safeguards in place rather than just leaving it to the ad hoc use of the normal scheme.<sup>1152</sup>

The Committee notes that this proposal is an acknowledgement of an existing practice and is not intended to restrict the legitimate use of covert search powers. The Committee notes however that details of how often Victoria Police carry out property searches covertly are not available. Hence the Committee cannot speculate as to the operational impact of regulating the use of covert searches by legislation. The Committee does note that the Police Manual provisions require authorisation or involvement by a senior officer and that this suggests that the practice is treated by Police as other than a routine matter.

The Committee believes that in the current law enforcement climate of heightened awareness of both the need for enforcement agencies to have the tools to carry out their work, and fears of the possible misuse of powers by exploiting community fears and anxieties, it is in the interests of all participants that the extent of any power is clear and that there are clear mechanisms to regulate and scrutinise the use of such a power.

The Committee therefore proposes that covert searches should be the subject of legislative regulation. The Committee considers that covert searches should only be performed under the authority of a warrant and that all warrant provisions should stipulate whether the powers that they contain may or may not be exercised covertly and in what circumstances. The availability of covert search warrants should be restricted to the most serious offences and subject to the safeguards already outlined in the preceding discussion of covert search warrants.

In developing this legislative response, the Government will need to consult with stakeholders about appropriate additional powers and protections that should be part

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<sup>1152</sup> Ibid.

of a covert warrants regime for investigations not related to terrorism. The Office of Police Integrity, Office of the Victorian Privacy Commissioner, Victoria Police, the Director of Public Prosecutions, Liberty Victoria, Victoria Legal Aid and other stakeholders should be invited to submit proposals.<sup>1153</sup> Stakeholders and the Government should consider the provisions of sections 148 - 162 of the *Police Powers and Responsibilities Act 2000* (Qld), the *Terrorism (Police Powers) Act 2005* (NSW) as amended by the *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW), legislation resulting from the *Terrorism (Extraordinary Powers) Bill 2005* (WA) and *Police Powers (Prevention and Response to Terrorism) Bill 2005* (SA), part eight of the *Telecommunications (Interception) Act 1979* (Cth), part two of the *Terrorism (Community Protection) Act 2003* and part four of the *Surveillance Devices Act 1999*.

The Committee believes that any resulting covert search warrants regime should be subject to a review that is consistent with section 38 of the *Terrorism (Community Protection) Act 2003*.

Recommendation 76. That legislation be amended to:

- (a) allow covert searches of property only with express authority clearly stated in a warrant;
- (b) require that the warrant must specify in what circumstances the execution may be carried out covertly;
- (c) restrict the availability and use of covert search warrants to exceptional circumstances in the most serious offences and to a narrow class of permissible applicants;
- (d) set rigorous safeguards including requiring:
  - (i) a Supreme Court judge to determine applications;
  - (ii) applicants to demonstrate why, and issuing judges to be satisfied that, covert search is necessary and justified;
  - (iii) a report within a specified period on execution or non-execution;
  - (iv) a rebuttable presumption that the target of the search shall be notified of its occurrence as soon as practicable; and
  - (v) prompt and public annual reporting and trend analysis on the use of the powers.

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<sup>1153</sup> Some have already suggested several accountability mechanisms, such as a public interest monitor, the presence of an independent person during the execution of covert search warrants and contained in part eight of the *Telecommunications (Interception) Act 1979* (Cth): Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 170-171; Letter to Committee Chair, 4 February 2005; Paul Chadwick, Office of the Victorian Privacy Commissioner, *Minutes of Evidence*, 19 October 2004, 176.

Recommendation 77. That any resulting covert search warrants regime be subject to a review within three years.

## Other issues raised by Victoria Police

Victoria Police brought four additional issues to the Committee’s attention.

### ***Control of crime scenes***

Victoria Police argued that in situations where its members are executing search warrants in an area that is a crime scene, they have no power to restrict people from moving about the search area. It noted that if police do attempt to control the movement of individuals within the area subject to the search warrant, they may be liable to claims of false imprisonment. However, the availability of such a power can enable police to act to prevent interference with or loss of evidence at the search scene.

In such situations, Victoria Police stated that police rely on provisions relating to hindering or interfering with police. However, it submitted that those powers are “inadequate” and argued that:

police need a clear statutory power to detain or control the movement of people in premises while a warrant is being executed. This should include control over who can enter or leave the premises.<sup>1154</sup>

While Victoria Police stated that contamination of evidence in such situations is not common, it considers that there is a gap in existing powers that should be addressed.

No other stakeholders commented on this aspect of warrant powers.

The Committee notes that legislation in other jurisdictions provides police with powers to control crime scenes. In Queensland, the *Police Powers and Responsibilities Act 2000* (Qld) permits police officers to control the movement of people at a crime scene, and confers on them a range of other powers relating to the discovery or preservation of evidence at the crime scene.<sup>1155</sup> These powers were originally enacted in the *Police Powers and Responsibilities Act 1997* (Qld). Police officers must apply to a Supreme Court judge or a magistrate for the issue of a crime scene warrant to authorise the

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<sup>1154</sup> Victoria Police, *Submission no. 25*, 8.

<sup>1155</sup> *Police Powers and Responsibilities Act 2000* (Qld) ss 93–94.

establishment of a crime scene where the crime scene is not a public place.<sup>1156</sup> If an application is refused, the place subject to it ceases being a crime scene.<sup>1157</sup>

New South Wales has recently enacted similar provisions, in the *Law Enforcement (Powers and Responsibilities) Act 2002*, although as noted earlier in this report, that legislation had not been proclaimed at the time of publication of this report.<sup>1158</sup> When the Act comes into force, the crime scene provisions will create new law in New South Wales.<sup>1159</sup> These provisions are based on the Queensland legislation.<sup>1160</sup> The crime scene warrant powers are not intended to be a substitute for search warrants.<sup>1161</sup> However, a number of concerns have been expressed about the potential breadth of the New South Wales powers and the apparent overlap with powers available to police in that state under search warrants.<sup>1162</sup>

**Recommendation 78.** That legislation be amended to provide police with clear powers to establish and control crime scenes.

## **Search of vehicles**

Victoria Police argued that the most notable deficiency with the warrant provisions of section 465 of the *Crimes Act 1958* is the lack of power to search vehicles. The Act currently permits searches of any “building, receptacle or place”. In *Coward v Allen*, the Federal Court held that a car is not a place and could only be searched under a search warrant if it is on the property that is the subject of the warrant.<sup>1163</sup>

Victoria Police explained the impact of this restriction on its members’ work:

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<sup>1156</sup> *Police Powers and Responsibilities Act 2000* (Qld) ss 83(1)–(2), 87–90.

<sup>1157</sup> *Police Powers and Responsibilities Act 2000* (Qld) ss 83(6).

<sup>1158</sup> *Law Enforcement (Powers and Responsibilities) Act 2002*, (NSW), Part 7 (s 94: crime scene warrants; s 95: crime scene powers). Under section 92(4), a police officer may exercise crime scene powers for a period less than three hours without a crime scene warrant.

<sup>1159</sup> Mary Spiers, Senior Policy Officer, Criminal Law Review Division, New South Wales Attorney-General’s Department *The Consolidation of Law Enforcement Powers (updated)* (February 2004) (*Spiers, Consolidation of Law Enforcement Powers*), 7.

<sup>1160</sup> New South Wales Parliamentary Library/Gareth Griffith, *Police Powers in New South Wales: Background to the law Enforcement (Powers and Responsibilities) Bill 2001, Briefing Paper 11/2001* (August 2001) (*Griffith, Police Powers in New South Wales*), 36.

<sup>1161</sup> *Spiers, Consolidation of Law Enforcement Powers*, 7.

<sup>1162</sup> Andrew Haesler, NSW Public Defender’s Office, *The Law Enforcement (Powers and Responsibilities) Act 2002*, (August 2005), at [www.lawlink.nsw.gov.au/](http://www.lawlink.nsw.gov.au/).

<sup>1163</sup> *Coward v Allen* (1984) 52 ALR 320, 333–334.

[if a motor vehicle] is out in the street in front of the premises, for example, or if it is being driven down the road, [it] cannot [be] search[ed] pursuant to a warrant under section 465 of the *Crimes Act 1958*. We have had problems at the Major Fraud Investigation division with that very problem, where people suspected of committing crimes of identity fraud are travelling around from shop to shop using fake credit cards et cetera. We have wanted to stop and search their vehicle, but we have not been able to get a warrant for that very purpose because a vehicle is not covered in the terms of [section 465].<sup>1164</sup>

The next most frequently-used Victorian warrant provision, section 81 of the *Drugs, Poisons and Controlled Substances Act 1981*, similarly restricts vehicle searches under warrant to those “found on or in” the land or premises that are the subject of the warrant.<sup>1165</sup>

While Victoria Police members have other powers under legislation and common law to search vehicles without a warrant,<sup>1166</sup> the current limits in the *Crimes Act 1958* (and the *Drugs, Poisons and Controlled Substances Act 1981*) are inconsistent with other legislation in Victoria and in other jurisdictions.

Notably, the *Confiscation Act 1997* defines premises to include vehicles.<sup>1167</sup> The Act’s previous definition of premises was expanded by the *Confiscation (Amendment) Act 2003*, because:

The Confiscation Act currently enables a police officer to seize tainted or forfeited property from any premises under a search warrant. This does not provide police with the power to seize property that is not in or on premises. For instance, a car parked in a street is not on any ‘premises’. The bill will enable police to obtain a court order for the seizure of tainted or forfeited property from a public place. This will be another valuable tool for police.<sup>1168</sup>

Search warrant provisions in the Commonwealth, New South Wales and Queensland define the premises or place that is subject to the warrant as including vehicles.<sup>1169</sup> The Western Australia Criminal Code authorises search under warrant “in any house, vessel, vehicle, aircraft, or place”.<sup>1170</sup>

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<sup>1164</sup> Neil Jepson, Victoria Police, *Minutes of Evidence*, 20 October 2004, 220.

<sup>1165</sup> *Drugs, Poisons and Controlled Substances Act 1981* s 81(3)(c).

<sup>1166</sup> An overview of these powers is provided in Janey Tootell, *Entry, Search and Seizure – Vehicles in Victoria* (June 2001), available from the Victorian Parliamentary Library.

<sup>1167</sup> *Confiscation Act 1997* s 3(1).

<sup>1168</sup> Rob Hulls, Attorney-General, *Confiscation (Amendment) Act 2003, Second Reading Speech*, 1 May 2003, 1316.

<sup>1169</sup> *Crimes Act 1914* (Cth) s 3C; *Search Warrants Act 1985* (NSW) s 3 (and *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3); *Police Powers and Responsibilities Act 2000* (Qld) Schedule 4; *Criminal Code* (WA) s 711.

<sup>1170</sup> *Criminal Code* (WA) s 711.

The Committee considers that the justification for the expansion of the definition of premises in the *Confiscation Act 1997* applies equally to other search warrant provisions. Including vehicles within the meaning of premises would improve the consistency of Victorian law and, potentially, the efficiency of law enforcement agencies. The Committee therefore believes that legislation should be amended accordingly.

Recommendation 79.	That legislation be amended to include vehicles within the definition of premises subject to a search warrant.
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### ***Search and seizure of computer hard drives***

Victoria Police argued that a further deficiency in Victorian warrant provisions concerns the limited power to make copies of hard drives on computers found in premises subject to search under warrant.<sup>1171</sup> Seizing a copy of the contents of hard drives minimises disruption to their owners, whose computers are often critical to their businesses. Victoria Police referred the Committee to a Federal Court ruling that taking an image of a hard drive does not constitute seizure of the property.<sup>1172</sup> The property is contained on the hard disk, and an image, as the name suggests, is merely a copy of that property.

In its ordinary meaning, the word “seizure” is inapplicable to the copying of information in electronic form. ... The downloaded electronic information is a replication of the information found on the premises. The original information is not “moved”. ...

The fact that the legislation, by virtue of the definition of “evidential material”, contemplates that material in electronic form, may be “seized” (without identifying the manner by which it may be seized) does not demonstrate that material in electronic form can be “moved” in accordance with ... the *Crimes Act*. ...

While the material [downloaded from computers in the premises being searched to storage devices brought to the premises by executing officers] was copied and the storage device onto which it was copied was moved, the material itself remained where it was.<sup>1173</sup>

The *Crimes Act 1914* (Cth) deals with this limitation by authorising the taking of a copy of data found at the premises, by making a copy of a hard drive either on a device brought to the premises or on a device at the premises if the occupier of the

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<sup>1171</sup> Victoria Police, *Submission no. 25*, 8.

<sup>1172</sup> *Hart v Commissioner, Australian Federal Police and Others* (2002) 196 ALR 1.

<sup>1173</sup> *Hart v Commissioner, Australian Federal Police and Others* (2002) 196 ALR 1, 17–25.

premises consents in writing.<sup>1174</sup> These powers were created by the *Cybercrime Act 2001* (Cth):<sup>1175</sup>

The proposed provision would allow officers to copy all the data on a piece of electronic equipment (by imaging a computer hard drive for example) in situations where an initial search of the data uncovers some evidential material or where the officer believes on reasonable grounds that the equipment might contain evidential material.<sup>1176</sup>

The Federal Court subsequently considered the provisions. In *Kennedy v Baker*, Branson J stated that:

...if the executing officer or constable assisting believes on reasonable grounds that data from a particular source accessed by operating a computer might constitute evidential material, s/he may copy the data from that source to a disk, tape or other associated device brought to the premises. A computer hard drive is, in my view, a single source of data within that meaning.

[In light of the amendments to the *Crimes Act 1914* [Cth] by the *Cybercrime Act 2001* [Cth]], I conclude that the better view [of the law] now is probably that the taking of the imaged hard drive from the Premises did constitute a 'seizure' of the copy data on it within the meaning of [the search warrant provisions] of the *Crimes Act*.<sup>1177</sup>

Victorian legislation has no power analogous to those contained in the *Crimes Act 1914* (Cth) provisions outlined above. As a result, police usually obtain the consent of computer owners to copy hard drives. The drive is physically removed from the computer and taken for copying. Unlike the Commonwealth regime, the copy is given to the owner and the original drive is retained by Victoria Police.

Obviously when you do that you are disrupting the business of the organisation you have seized the information from. We do not like to do that, so some simplistic means or some authority to be able to copy the hard drive at the premises for later analysis would be of great benefit.<sup>1178</sup>

Victoria Police stated that this problem arises “relatively frequently”. It considered it to be “clearly desirable” that Victorian legislation should provide a power equivalent to that under the *Crimes Act 1914* (Cth).<sup>1179</sup>

The Committee believes that Victoria Police’s proposal could potentially reduce the inconvenience to computer owners of this aspect of current warrant powers and procedures. The Committee therefore considers that Victorian warrant provisions

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<sup>1174</sup> *Crimes Act 1914* (Cth) s 3L (1A)–(1B).

<sup>1175</sup> *Cybercrime Act 2001* (Cth) Schedule 2.

<sup>1176</sup> *Cybercrime Act 2001* (Cth), Explanatory Memorandum, 16–17.

<sup>1177</sup> *Kennedy v Baker* [2004] FCA 562, paragraphs 66, 108.

<sup>1178</sup> Neil Jepson, Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 222.

<sup>1179</sup> Victoria Police, *Submission no. 25*, 8.

should be amended to provide the same powers that exist under the Commonwealth legislation.

Recommendation 80. That legislation be amended to enable officials executing search warrants to make copies of hard drives at the premises being searched, to retain these copies rather than the original hard drive and to leave the original hard drive with the owner where appropriate.

### **Friendly warrants**

Another specific reform proposed by Victoria Police concerns situations where search warrants may not be the most appropriate mechanism to obtain evidence and/or to further an investigation. It stated that in many cases dealt with by its Major Fraud Investigation Division the holder of the evidence that the search warrant is directed towards obtaining is willing to make the evidence available but because of other constraints, is unable to do so. This situation arises most frequently with financial institutions. Victoria Police believes that such organisations “are able to provide information and material to law enforcement agencies without the need for a search warrant, if it is provided for the purposes of a criminal investigation”.<sup>1180</sup> However, in Victoria Police’s experience, banks believe that they are unable to do so because of client confidentiality and other privacy concerns:

The bank owes a common law duty of confidentiality to the customer and some banks, on their interpretation of *Tournier’s Case*, believe that it requires a warrant in order to release the documentation and, at the same time protect itself from potential civil litigation.<sup>1181</sup>

Warrants executed in such situations are referred to as “friendly warrants”, reflecting the expectation that it will not be necessary to arrest anyone at the target premises.<sup>1182</sup> Victoria Police suggested that using warrants in such circumstances is inefficient because of the resources required to prepare affidavits to support the applications, given that the evidence is obtained without any “invasion of a person’s property”.<sup>1183</sup>

An alternative to using search warrants to obtain information from third parties is some other form of requirement for such parties to produce the material. Victoria Police suggested a notice compelling a bank to provide requested information and suggested some controls on the use of such notices. For example, they would only be issued by an officer and only when satisfied of certain criteria, such as the absence of

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<sup>1180</sup> *Ibid*, 5.

<sup>1181</sup> *Ibid*, 5.

<sup>1182</sup> *Long v Magistrates’ Court of Victoria* (1997) 96 A Crim R 149.

<sup>1183</sup> Victoria Police, *Submission no. 25*, 6.

a need to use force or to arrest any person. Another requirement could be to record the reasons justifying the use of the notice.<sup>1184</sup>

Victoria Police referred the Committee to the notice provisions contained in the *Confiscation Act 1997*. The information notice mechanism in that Act is subject to a number of controls. Notices can only be issued:

- to a financial institution and only if the issuer reasonably believes that a relevant individual has been or is about to be involved in or to benefit from the commission of a relevant offence, or a notice is required to satisfy a relevant order made in relation to a relevant offence;<sup>1185</sup>
- by prescribed persons or by members of Victoria Police authorised for that purpose by the Chief Commissioner; issuers must sign and make a written record of the reasons used to justify the issue of the notice.<sup>1186</sup>

The type of information that notices can require financial institutions to produce is limited and prescribed. Notices must contain certain information and be given to financial institutions in prescribed ways. It is an offence to fail to comply with a notice or to disclose its existence except in prescribed circumstances.<sup>1187</sup>

A form of information notice is available in New South Wales and Queensland, where the mechanism is referred to as a notice to produce.

Under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), where there are reasonable grounds to believe that an authorised deposit-taking institution holds documents that may be connected with an offence committed by a third party, an authorised officer may issue a notice to produce relevant documents if satisfied that there are reasonable grounds to suspect that the institution holds the documents and is not a party to the offence. It is an offence to fail to comply with a notice.<sup>1188</sup> Notices are subject to the safeguards applicable to search warrants under the Act, except for the requirements relating to announcement before entry and occupier's notices.<sup>1189</sup>

These powers are said to codify existing police practice of obtaining documents from financial institutions. As in Victoria, it has been noted that search warrant powers are

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<sup>1184</sup> Ibid.

<sup>1185</sup> *Confiscation Act 1997* ss 118D – 118E.

<sup>1186</sup> Ibid, ss 118B–118D, 118F.

<sup>1187</sup> Ibid, ss 118G–118K.

<sup>1188</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* ss 53–58.

<sup>1189</sup> Ibid, s 59(2).

not always necessary, as banks produce specific documents on request rather than having police search through all their records for the ones they require.<sup>1190</sup>

In Queensland a police officer who reasonably suspects a “cash dealer” holds documents that contain evidence of the commission of an offence by a third party or relevant evidence in relation to a “confiscation related activity” by a third party, may apply to a magistrate for a production notice instead of a search warrant. Applications must be sworn and contain prescribed information, including the grounds on which a notice is sought and any relevant production notices issued within the previous year. A magistrate can only issue a notice if satisfied that there are reasonable grounds for suspecting that documents held by the cash dealer are eligible evidence and the cash dealer is not a party to the offence. A police officer can inspect, take extracts from, copy and or seize documents produced under a notice. It is not an offence to fail to comply with a notice.<sup>1191</sup>

The *Confiscation Act 1997* also contains two other types of non-warrant orders that require the production of relevant material:

- Monitoring orders. The Director, Police Integrity or a member of Victoria Police may apply to the Supreme Court for an order to a financial institution to give information about transactions on a relevant account. Applications must be supported by an affidavit stating that the applicant believes that a relevant individual has been or is about to be involved in or to benefit from the commission of a relevant offence. The Supreme Court may require additional information. Monitoring orders must contain prescribed contents. It is an offence to fail to comply with an order or to disclose its existence except in prescribed circumstances.<sup>1192</sup>
- Production orders. A member of Victoria Police may apply to a court for an order requiring a person convicted of, or reasonably believed to have committed, a relevant offence to produce or make available for inspection any documents in their control or possession that are relevant to identifying, locating or quantifying certain property. An application must be supported by an affidavit that includes the applicant’s belief that a target person possesses or controls such documents and sets out the grounds for that belief. The court may require an applicant to provide any other information that it requires about the application. A member of Victoria Police may inspect, take extracts from or make copies of any documents produced or made available under a production order. The person to whom an order is issued must give the issuing officer a written report stating whether the order was executed and either the result of the execution including a description of relevant

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<sup>1190</sup> Spiers, *Consolidation of Law Enforcement Powers*, 7.

<sup>1191</sup> *Police Powers and Responsibilities Act 2000* (Qld) ss 97-101.

<sup>1192</sup> *Confiscation Act 1997* ss 115-118.

documents, or reasons why the order was not executed. It is an offence to fail to comply with, or to obstruct compliance with, the order.<sup>1193</sup>

Production order provisions are also contained in New South Wales<sup>1194</sup> and Queensland<sup>1195</sup> legislation.

The Committee supports the use of notices on a broader basis than currently provided for in the *Confiscation Act 1997*. The Committee notes that whereas Victorian provisions authorise police or other prescribed persons to issue notices, legislation in other jurisdictions requires an application to an independent issuing officer. The Committee has not heard sufficient evidence to reconcile these positions and believes that the Government should do so in consultation with stakeholders.

Recommendation 81. That legislation be amended to provide for the issue of production notices instead of search warrants in appropriate circumstances, and that the Government determine such circumstances and the appropriate issuing authority for such notices.

## Consolidation of search warrant powers and procedures

In this and the preceding four chapters of the report, the Committee has examined warrant powers and procedures and detailed a range of inconsistencies and lacunae both across and between relevant legislation and common law. In general, the Committee's analysis tends to support stakeholder views about the state of the law that were expressed throughout the inquiry.

Several submissions and witnesses advocated codification and consolidation of powers to address the situation. Shortly after the inquiry commenced, for example, Dr. Steven Tudor argued that reform of warrant provisions should be directed towards achieving a "consolidation of the current disparate sources of law and providing more detailed legislative provisions currently the subject of common law".<sup>1196</sup> Similarly, Dr. Chris Corns of La Trobe University Law School suggested that such an outcome would "provide greater clarity, consistency, certainty [and] simplicity".<sup>1197</sup>

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<sup>1193</sup> *Confiscation Act 1997* ss 100-108.

<sup>1194</sup> *Confiscation of Proceeds of Crime Act 1989* (NSW) ss 68-72 (monitoring orders), 58-64 (production orders); Griffith, *Police Powers in New South Wales*, 36.

<sup>1195</sup> *Police Powers and Responsibilities Act 2000* (Qld) ss 105-112.

<sup>1196</sup> Dr. Steven Tudor, *Preliminary submission no. 12*.

<sup>1197</sup> Dr. Chris Corns, *Preliminary submission no. 18*.

The Committee outlined these and similar concerns in its Discussion Paper and sought comment on how such a consolidation might occur, in particular on the appropriateness of enacting a single piece of legislation to regulate warrant powers and/or a set of model provisions. The Committee also asked what minimum protections any model provisions should contain.<sup>1198</sup>

Throughout this report, the Committee has explored questions of codification and model provisions in relation to various aspects of search warrants and has proposed appropriate specific recommendations. In this section the Committee brings its discussion of search warrants to a close by examining stakeholder responses to its broader questions about consolidation and considering appropriate mechanisms for consolidation.<sup>1199</sup>

### ***The rationale for consolidating powers***

In Victoria, there is not uniformity, there is not transparency, there is not specificity in legislation to deal with...search warrants...[T]he parameters are not clearly defined.<sup>1200</sup>

Consistency and transparency in the grant and exercise of powers is essential if the community is to have confidence in and acceptance of the persons and agencies required to exercise them.<sup>1201</sup>

If there is no clarity about what the powers are and what the authorities are allowed to do, then there is no protection of rights.<sup>1202</sup>

Consolidation typically involves the organisation of disparate items into a united and therefore more coherent system. Such an approach to warrant powers could produce inter-related benefits that include improved:

- fairness and effectiveness – the replacement of diverse and inconsistent laws with a set of widely applicable standard provisions can improve the efficiency of law enforcement agencies and the fairness of provisions to members of the community affected by the laws, by removing differences in their rights and obligations that have no sound legal or policy basis;

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<sup>1198</sup> Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures, Discussion Paper* (July 2004) (*Warrant Powers and Procedures Discussion Paper*), 28-35.

<sup>1199</sup> To carry out this analysis the Committee has inevitably found it necessary to restate some of the evidence outlined elsewhere in this report.

<sup>1200</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence, 19 October 2004*, 161–162.

<sup>1201</sup> Office of Gas Safety, *Submission no.16*, Inspectors' Powers Inquiry, 1.

<sup>1202</sup> Darren Palmer, *Minutes of Evidence, 5 November 2004*, 327.

- clarity, transparency and certainty – standard provisions provide a reference point for agencies with warrant powers, issuing officers and members of the community, who can thereby easily find out the content of the law and how it affects and empowers them;
- simplicity and flexibility – the wide application of consolidated provisions facilitates simpler monitoring, future development and reform of the law, because modifications to the core provisions presumptively affect all the powers that are regulated by them.

In varying degrees, consolidation of search warrant powers is evident in a number of jurisdictions. Legal commentator John Bishop describes the practice as a modern trend to encapsulate “the litany of statutory provisions authorising the issue of search warrants” in a general statute on search warrants.<sup>1203</sup> Examples are the comprehensive legislation in force in New South Wales (the *Search Warrants Act 1985* (NSW)) and other standard provisions contained within Acts that regulate police and similar agencies’ powers, such as Part 1AA of the *Crimes Act 1914* (Cth), Chapters 3, 11 and 12 of the *Police Powers and Responsibilities Act 2000* (Qld) and the *Search Warrants Act 1997* (Tas).

Consistency in this area is also evident outside legislation. In its Report on Entry and Search Provisions in Commonwealth Legislation, the Senate Standing Committee for the Scrutiny of Bills noted that the Attorney-General’s Department and the Office of Parliamentary Counsel examine proposed entry provisions against a set of guidelines.<sup>1204</sup> This practice led to the development of de facto model provisions which are used to assist in the drafting of new provisions. The preferred model provisions are Part 1AA of the *Crimes Act 1914* (Cth).<sup>1205</sup>

The appropriateness of adopting such a centralising approach in Victoria has been examined before. In its Inspectors’ Powers Report, the Law Reform Committee of the 54<sup>th</sup> Parliament recommended that the Department of Justice consider consolidated legislation, such as an expanded *Magistrates’ Court Act 1989* or a separate legislative instrument modelled on the *Search Warrants Act 1985* (NSW), as a way of enhancing the clarity and transparency of search warrant provisions that are relevant to inspectors powers.<sup>1206</sup> The Government stated that it would give further consideration

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<sup>1203</sup> John Bishop, *Criminal Procedure*, 1998, 193-194.

<sup>1204</sup> The current version of the guidelines was issued in 2004: Commonwealth Attorney-General, *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* (February 2004) (*A Guide To Framing Commonwealth Offences*).

<sup>1205</sup> Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation, Fourth Report of 2000*, 93–95.

<sup>1206</sup> Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons* (30 May 2002) (*Inspectors’ Powers Report*), 170.

“as to whether legislative reforms might improve the operation of search warrants”.<sup>1207</sup> The Attorney-General subsequently advised the Committee this was another issue from the Inspectors’ Powers Report that the Government wished the Committee to explore in more depth. Accordingly, the Committee anticipates that the Government will consider further action on the Inspectors’ Powers Report consolidation recommendation after it has had the opportunity to review this report.<sup>1208</sup>

### **Evidence received by the Committee about consolidation**

The evidence received by the Committee on the specific issue of consolidation focused on the need to improve the clarity of the powers, both for agencies whose officials experience the operational problems caused by the plethora of warrant provisions, and for members of the community whose rights are affected by the existence and execution of the powers.

Brian Hardiman, Deputy Director, Police Integrity, summarised the deficiencies of the present situation:

I think the whole regime of the issue of warrants is spread around a large number of pieces of legislation. It is complex and is not always very transparent or clear. ...

I think the public are often confused about what police and other law enforcement officers can do. The police themselves I think find it difficult. I know whenever I get a complaint about the issue of a search warrant, and I am not a lawyer and so I have to go back to the current legislation, and often it is extremely tortuous and is not easily understood. I think clarity of the purposes for which warrants can be obtained needs to be expressed better in the legislation that relates to search warrants.<sup>1209</sup>

As the most frequent user of search warrant powers and procedures, Victoria Police’s perspective was particularly valuable. The organisation supported “any simplification of legislation” relating to warrant powers, noting that they are “the tools of the trade for police”.<sup>1210</sup>

The simpler [they] could be made for operational police and for the community to understand, the more beneficial to the community I think that would be.<sup>1211</sup>

Victoria Police expanded on the point in its submission:

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<sup>1207</sup> Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee’s Final Report on The Powers of Entry, Search, Seizure and Questioning by Authorised Persons, 11 June 2003* (Victorian Government, *Inspectors’ Powers Response*), 14.

<sup>1208</sup> Letter, Attorney-General to Committee Chairman, 1 November 2004.

<sup>1209</sup> Brian Hardiman, Deputy Director, Office of Police Integrity, *Minutes of Evidence, 5 November 2004*, 307.

<sup>1210</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence, 20 October 2004*, 215.

<sup>1211</sup> *Ibid.*

Consistency across the range of warrant provisions is an issue that does need to be addressed. The variations of powers across entry, search and seizure warrants require consolidation. These types of warrants are all investigatory warrants designed to balance the need for effective investigation of crime with the need to ensure individual rights and privacy are protected. The variations in oversight, type of supporting documentation and processes, time frames, and post-execution requirements probably lead to more administrative mistakes than any other issue. Consolidation or standardisation of processes across various classes or types of warrants is entirely appropriate so long as none of the powers that currently exist are eroded.

Inconsistencies across search warrants in Victorian legislation creates confusion due to the following differences: level of proof...; powers of entry, arrest, search and seizure; life of the warrant...; rank of police member required to obtain a warrant...; specific requirements particular to specific warrants...

A common act incorporating the warrants from all existing acts may have merit and remove confusion arising from these inconsistencies. Such a model has been introduced in New South Wales. The Committee's attention is drawn to the *Search Warrants Act 1985* (NSW).<sup>1212</sup>

The Police Association told the Committee that in the view of its members, who comprise 98% of the police force in Victoria:<sup>1213</sup>

there are far too many types of search warrants at present. [Our members] deal basically with two Acts [the *Crimes Act 1958* sections 92(1) and 465; and the *Drugs, Poisons and Controlled Substances Act 1981*, section 81] that provide them with a search warrant for almost every conceivable reason they might need one. ... [Thus], in any number of acts of Parliament there are specific provisions for search warrants which are not used because others can be used in their place.<sup>1214</sup>

It seems to us eminently sensible to do away with the plethora of search warrants that exist, many of which are never used by our members, and we would submit that in a lot of instances many of our members would not even know that they existed. Therefore, neither would quite a large number of people involved in other law-enforcement agencies. ... A simplification, while retaining the constraints or the checks and balances that the public demand and that the Police Association wants to see remain is obviously, in our view, the easiest and most effective way to go.<sup>1215</sup>

Magistrate Bowles also supported consolidation, while emphasising the scale of that goal:

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<sup>1212</sup> Victoria Police, *Submission no. 25*, 6–7.

<sup>1213</sup> Over 98% of the police force in Victoria are members of the Association: Greg Davies, Police Association, *Minutes of Evidence*, 20 October 2004, 257.

<sup>1214</sup> *Ibid*, 257, 262.

<sup>1215</sup> *Ibid*, 257.

I think there is a lot to be said for having standardisation and trying to get over the situation we are currently in. But it is important to understand that a huge amount of work will be required to make a determination as to what are the appropriate standard conditions. That will mean adopting what is in some Acts and amending what is in other Acts for the sake of standardisation.<sup>1216</sup>

## Discussion

The Committee's research supports the thrust of stakeholders' comments. In the context of consolidation, the Committee has identified three notable characteristics of the present Victorian scheme of warrant powers and procedures.

The first characteristic is a structural inconsistency, concerning the use of model provisions. Some appear in the *Magistrates' Court Act 1989*,<sup>1217</sup> where they effectively stand alone, independent of any legislation or other law conferring warrant powers on specific industries or law enforcement functions. Among other things, they state the Court's authority and stipulate what persons authorised to apply for and execute warrants must do. However, other provisions contained in legislation that governs the warrant powers of specific industries and enforcement regimes are effectively model provisions because of their widespread application beyond a particular piece of specific purpose legislation.<sup>1218</sup> These provisions are so located because they have been developed and deployed as standard terms to ensure consistency between like agencies and/or like powers, which are generally directed towards regulating industries and/or protecting the economic, health and other interests of the state and its population.

Because the model provisions in the specific purpose legislation that the Committee has examined also stipulate the warrant powers and obligations of officials authorised under the relevant legislation, the Committee does not believe that they are substantively distinct from the general powers and obligations contained in the *Magistrates' Court Act 1989*. As noted, both sets of provisions provide minimum search warrant standards, either de jure (the *Magistrates' Court Act 1989* provisions) or de facto (the specific purpose legislation model provisions). The structural inconsistency that the Committee referred to above is therefore that model provisions have been incorporated, in varying degrees, into specific purpose legislation (such as the *Medical Practice Act 1994* and the *Taxation Administration Act 1997*) and

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<sup>1216</sup> Magistrate Jennifer Bowles, *Magistrates' Court of Victoria, Minutes of Evidence, 20 October 2004*, 271.

<sup>1217</sup> Model provisions that apply to all warrants issued by the Court are found in sections 57-60 of the *Magistrates' Court Act 1989*. Sections 75-78 contain model provisions specifically applicable to search warrants.

<sup>1218</sup> For example, many pieces of legislation contain identical or near - identical provisions that regulate the application for a warrant, what a warrant must state, the powers of entry on a warrant, the provision of an announcement before entry, the use of assistants, the power to seize inadvertently discovered items, the provision of a copy of the warrant to an occupier and the provision of receipts for and return of seized items.

thematic legislation (such as the *Fair Trading Act 1999* and the *Dangerous Goods Act 1995*) rather than into the *Magistrates' Court Act 1989*.

A second characteristic of Victorian warrant provisions is their fragmentation, for example:

- warrant provisions govern varying elements of the powers conferred by each Act;<sup>1219</sup>
- aspects of some warrants are subject to regulation by the common law, while the same aspects of other warrants are regulated by statute, for example the length of time that a warrant remains valid and procedures for dealing with claims of legal professional privilege;
- potential model provisions, such as those governing the provision of a written execution report to court, record keeping and legal professional privilege, appear in very few Acts.<sup>1220</sup>

The third notable characteristic is a duplication of provisions. Some of the warrant powers and procedures found in the *Magistrates' Court Act 1989* are replicated in some specific purpose legislation, including:

- the requirement that an application for a search warrant be supported by evidence on oath or affidavit; and<sup>1221</sup>
- the requirement to take seized property before a magistrate.<sup>1222</sup>

Dr. Steven Tudor pointed out that this form of duplication is useful on a practical level because it creates a self-contained regulatory regime:

the regulation of inspection powers is very much a part of the regulation of those industries and that should be in the one subject-specific area. Everyone in the [relevant] industry would then

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<sup>1219</sup> Compare s 92 and s 465 of the *Crimes Act 1958* with s 81 of the *Drugs, Poisons and Controlled Substances Act 1981* and ss 79–97W of the *Confiscation Act 1997*. Similarly, the *Forests Act 1958* contains one search warrant provision, governing in general terms the application and execution of a warrant to search for “secreted forest produce” (s 83); the *Infertility Treatment Act 1995* also contains only one warrant provision, but it regulates the application and issue of search warrants and powers under the warrant (s 162); provisions in the *Fisheries Act 1995* (ss 103–104) and the *Firearms Act 1996* (ss 146–148) govern application, issue, execution, announcement before entry, provision of copies of the warrant to individuals at the premises being searched and the seizure of items.

<sup>1220</sup> *Confiscation Act 1997*; *Police Regulation Act 1958*; *Drugs, Poisons and Controlled Substances Act 1981*.

<sup>1221</sup> *Magistrates' Court Act 1989* s 75(2); *Fair Trading Act 1999* s 122(2); *Forests Act 1958* s 83; *Police Regulation Act 1958* s 86W(2); *Crimes Act 1958* s 465.

<sup>1222</sup> *Magistrates' Court Act 1989* s 78(1)(b)(ii); *Crimes Act 1958* s 465.

know that the [relevant specific Act] is the main one they need to refer to. From that practical point of view I think it is desirable to preserve, where relevant, those specific provisions.<sup>1223</sup>

However, the Committee notes that specific purpose legislation generally retains a reference to the *Magistrates' Court Act 1989*, typically in the following form, or a variation of it:

Except as provided by this Act, the rules to be observed with respect to search warrants under the *Magistrates' Court Act 1989* (other than section 78 of that Act) extend and apply to warrants under this section.<sup>1224</sup>

### **Options for consolidation**

The general overall trend of most policy thinking in this area is to consolidate as much as possible the various scattered provisions relating to warrants. Some dispersal is quite appropriate...but whenever possible it would be desirable from all sides to have the provisions consolidated.<sup>1225</sup>

There are a number of ways of consolidating existing statutory and common law provisions. The most comprehensive appears to be to create a single piece of legislation that would deal with all search warrants and include variations to reflect the needs of the different types of agencies that use warrant powers and procedures. The Police Association supported this approach, recommending a single Act containing three types of search warrant:

We believe, and our submission states, that search warrants for every occasion if you like, can be dealt with in three categories. These are warrants to search for persons, warrants to search for things or evidence, and extraterritorial or extradition warrants. Obviously there would need to be various categories within those warrants, but outside of those three provisions it would be not only extraordinary but we do not think the situation would arise where anything else would be needed. ... Creating a three warrant structure would provide the opportunity for Parliament to untangle the mess that our members find themselves in.<sup>1226</sup>

Such a comprehensive Act would be a significant departure from the current state of Victorian law, which has in recent years distributed search warrant provisions across a range of specific purpose legislation. The Committee believes that it would be an onerous task to review that legislation and then remove the powers to consolidated

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<sup>1223</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 294.

<sup>1224</sup> This example is found in the *Police Regulation Act 1958* s 86W(4)

<sup>1225</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 290-291.

<sup>1226</sup> Police Association, *Submission no. 9*, 2; Greg Davies, Police Association, *Minutes of Evidence*, 20 October 2004, 257.

legislation. Further, as Dr. Tudor suggests,<sup>1227</sup> such a process would be likely to result in less certainty for authorised persons who utilise their warrant powers within a self-contained legislative regulatory framework.

An alternative would be to enact several pieces of consolidated legislation that correspond to the purposes or character of the powers. Individual legislation containing agencies' warrant powers could refer to thematic model legislation, such as a police warrant powers statute and an inspectors' warrant powers statute. In Victoria, many inspectors' warrant powers are already based on model provisions, for example the *Fair Trading Act 1999* and the *Medical Practice Act 1994*. The Committee questions whether the creation of a series of overarching warrants Acts would significantly improve the present situation in relation to inspectors' powers, in particular as some of the existing and proposed powers and procedures in such Acts would be identical. On the other hand, Victoria has no consolidated source of police warrant powers such as exists in other jurisdictions, such as Part 1AA of the *Crimes Act 1914* (Cth), Parts 5, 15 and 17 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (unproclaimed), various chapters of the *Police Powers and Responsibilities Act 2000* (Qld) and the regime proposed in the *Criminal Investigation Bill 2004* (WA).<sup>1228</sup>

Dr. Tudor endorsed such a thematic approach, arguing that section 465 of the *Crimes Act 1958* "should become the standard legislative source for warrants in criminal investigation. It should be revised to make it clearer and more comprehensive in scope. This would benefit both investigators and those affected by criminal investigations".<sup>1229</sup> He suggested that the revised provisions could sit in a new criminal investigation statute and that the warrant provisions of the *Magistrates' Court Act 1989* might also be "fruitfully removed" into such an Act.<sup>1230</sup>

Dr. Tudor also recommended that the revisions to section 465 should be consistent with Part 1AA of the *Crimes Act 1914* (Cth) where possible, both to facilitate consistency between state and Commonwealth investigations of criminal offences and because "those provisions are certainly much clearer and more comprehensive than the state provisions".<sup>1231</sup>

The Criminal Bar Association also endorsed Part 1AA of the *Crimes Act 1914* (Cth), believing it to be a good overall model for creating greater transparency and clarity in

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<sup>1227</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 290-291.

<sup>1228</sup> The Bill "provides a comprehensive regulatory framework with respect to the issuing and execution of search warrants in relation to all offences", although it does not require the videorecording of searches: Commissioner GA Kennedy, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report Volume II*, 2004, 308.

<sup>1229</sup> Dr. Steven Tudor, *Submission no. 12*, 1.

<sup>1230</sup> *Ibid.*, 2.

<sup>1231</sup> Dr. Steven Tudor, *Minutes of Evidence*, 5 November 2004, 290; *Submission no. 12*, 1.

relation to Victorian warrants. In the CBA's view, the Commonwealth Act succeeds where significant parts of Victorian legislation do not:

[W]hat really needs to be clear in legislation in this state, when power is given to act coercively to affect a person's privacy, to affect their property, to affect their home, that those rights and obligations are clearly defined, that they are clearly defined in the legislation, that authorises the issuing officer to give power to a law enforcement officer to engage in exercising a search warrant ... and that the document, the warrant itself, sets out in the clearest possible terms what the rights and the obligations of the parties are so that the person to whom the warrant is issued, from the face of the warrant can see clearly within strict parameters, their rights, so that the person who is affected by it once they look at the document sees what their obligations are and can see what rights have been given by the issuing officer.<sup>1232</sup>

While Part 1AA sets out extensive rights and obligations relating to search warrants, Victoria Police argued that major elements of the Part were "far too complex" and unable to be understood by non-lawyers.<sup>1233</sup>

The Committee has analysed various provisions of Part 1AA throughout the preceding chapters and, where appropriate, has made recommendations that are consistent with its provisions. For that reason, it does not believe that Part 1AA as a whole is necessarily an appropriate model for Victoria.

A third approach to consolidation is provided by the *Search Warrants Act 1985* (NSW), whose provisions the Committee has also analysed throughout its examination of Victorian search warrants. Given the Act's obvious relevance to this discussion, the Committee discusses it in some detail.

The Act was designed as a "single system for the issuing of search warrants"<sup>1234</sup> to address what had become an inconsistent and ad hoc set of powers. It has three main features:

- a general provision permitting applications for warrants in respect of certain offences;
- a definition of search warrant that incorporates search warrants in respect of those offences, and search warrants authorised by a plethora of other Acts;
- a set of procedures and template forms governing rights and responsibilities in respect of the application, execution and post-execution stages, which applies to both categories of search warrants.

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<sup>1232</sup> Stephen Shirrefs, SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 160; *Submission no. 12*, 4–6.

<sup>1233</sup> Neil Jepson, Victoria Police, *Minutes of Evidence*, 20 October 2004, 220.

<sup>1234</sup> Terrence Sheahan, Attorney General, *Miscellaneous Acts (search warrants) Amendment Bill* [NSW], *Second Reading Speech*, 27 February 1985, 3859-3860.

The effect is to provide consistent, standardised administrative provisions for all search warrants in New South Wales.<sup>1235</sup> The incorporation of the Act into the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) has not modified this core function (nor other features of the Act).<sup>1236</sup>

The *Search Warrants Act 1985* did not replace the plethora of search warrants legislation in New South Wales. Rather those statutes confer powers to use search warrants but require applicants to follow the procedure in the Act.

In the context of this inquiry, the essential feature of the *Search Warrants Act 1985* is its consolidated procedural machinery, applicable to all search warrants:<sup>1237</sup>

The virtue of that [is] that there is a central, clear mechanism for obtaining warrants in all circumstances. There are simple and easy-to-understand standards that apply to every such instance, and it reduces all of the inconsistencies that are presently in place...<sup>1238</sup>

Similarly, the Magistrates' Court believed that legislation based on the *Search Warrants Act 1985* "would invariably promote consistency and fairness".<sup>1239</sup> Based on the evidence it heard in New South Wales, the Committee agrees. At the same time, the Committee observes that enshrining only the procedure in a central statute appears to be more efficient and simpler than transplanting from existing legislation both the procedures and the substantive provisions that confer the powers to use search warrants.

## Conclusions

The Committee accordingly believes that the regime in the *Search Warrants Act 1985* provides a model of an appropriate mechanism for establishing procedures to govern all search warrants in Victoria. Under this approach, search warrant procedures would be consolidated into a central statute but the power to use search warrants would remain within existing specific purpose and thematic Acts. The Committee believes that the content of the procedures legislation should be based on the Committee's recommendations in this and the preceding four chapters.

The Committee has also considered the form of the consolidated legislation it is proposing. As well as the New South Wales approach of creating an independent statute, the Committee considered the appropriateness of the *Magistrates' Court Act 1989* as a location for standard Victorian procedures. Such an approach is consistent with the character of warrants and with current law and practice: warrants are court

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<sup>1235</sup> Daniel Noll, NSW Attorney-General's Department, *Minutes of Evidence*, 1 September 2004, 58.

<sup>1236</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 46–52, 59–80 Schedule 2.

<sup>1237</sup> In this it differs from other models that the Committee has examined.

<sup>1238</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 20 October 2004, 202.

<sup>1239</sup> Magistrate Jennifer Bowles, Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 271.

documents; the *Magistrates' Court Act 1989* already contains standard conditions and forms; magistrates and judges issue all Victorian search warrants; and legislation containing warrant powers and procedures generally already refers to the *Magistrates' Court Act 1989*. However, the primary function of this act is to establish the Court, and its jurisdiction and procedures, and to ensure its fair and efficient operation.<sup>1240</sup> The consolidation of search warrant powers has a broader focus and such provisions may therefore be better located in a stand alone statute.

On balance the Committee believes that an independent statute would be preferable, providing a clear and readily identifiable source of the procedures relating to search warrants. If the Government does not consider this to be an appropriate mechanism for reforming search warrant procedures, the Committee believes that the *Magistrates' Court Act 1989* provides the most suitable alternative approach.

These proposals can be expected to enhance the fairness, consistency and efficiency of warrant provisions. However, as with the Committee recommendations for substantive legal reform, their implementation will need to take account of the different purposes of some warrant powers and the range of circumstances in which they operate. The Magistrates' Court echoed this when it cautioned of the need to ensure that:

safeguards currently built into our legislation are not lost for the sake of consistency....

[B]efore Parliament could determine the appropriate provisions of such an Act, there would need to be a careful analysis of current provisions and any special requirements which pertain to particular search warrants.<sup>1241</sup>

The Committee shares the Court's concern and therefore proposes that it should be possible to opt out of the standard procedures in limited circumstances, possibly where agencies could show that following the standard procedures would undermine the purpose of their powers. The Committee suggests that agencies should be required to establish a case for exemption from each standard provision, rather than being able to seek a comprehensive exemption from all standard procedures.

The Committee suggests that agencies directly involved in the operation of search warrant powers may wish to consider which safeguards and special purpose powers would conflict with the standard procedures proposed throughout this report. Such a consideration could occur either on a case by case basis as opportunities to review legislation arise, or as part of a comprehensive evaluation of legislation, for example by the Legal Policy Unit of the Department of Justice.

The Committee therefore recommends the following scheme as one option for instituting standard procedures to govern Victorian search warrants:

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<sup>1240</sup> *Magistrates' Court Act 1989* s 1.

<sup>1241</sup> Magistrates' Court of Victoria, *Minutes of Evidence*, 20 October 2004, 271, 277.

- the creation of a new Act which consolidates standard search warrant provisions, in line with the Committee’s recommendations in the preceding chapters;
- the retention of existing Acts conferring search warrant powers, which will continue to authorise relevant officials to use search warrants;
- the presumption that all other aspects of search warrant powers conferred by existing Acts will be governed by the standard procedures in the new Act;
- the provision in existing Acts conferring search warrant powers of such special conditions and exemptions from the standard procedures as are justified, consistent as far as possible with the purpose and effect of the standard procedures in the new Act.

Recommendation 82. That the Government undertakes consolidation of Victorian search warrant powers and procedures, modelled on the *Search Warrants Act 1985* (NSW) and including the following elements:

- (a) the creation of a new Act which consolidates standard search warrant provisions in line with the Committee’s recommendations in Chapters Three to Seven;
- (b) the retention of existing Acts conferring search warrant powers, which will continue to authorise relevant officials to use search warrants;
- (c) the presumption that all other aspects of search warrant powers conferred by existing Acts will be governed by the standard procedures in the new Act; and
- (d) the provision in existing Acts conferring search warrant powers of such special conditions and exemptions from the standard procedures as are justified, consistent as far as possible with the purpose and effect of the standard procedures in the new Act.

Finally, the Office of the Victorian Privacy Commissioner drew the Committee’s attention to the importance of standards in a national context, specifically whether Victorian reforms could promote greater consistency in warrant powers within and between other Australian jurisdictions:

The absence of consistency across jurisdictions puts at risk the safeguards and standards adopted in any one jurisdiction, and again may result in the lowest common denominator prevailing.<sup>1242</sup>

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<sup>1242</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17*, 2–3.

OVPC suggested that the Committee consider whether it would be appropriate to ask the Model Criminal Code Officers' Committee (MCCOC)<sup>1243</sup> of the Standing Committee of Attorneys-General to develop:

a set of nationally consistent principles or guidelines for warrant powers and procedures, having regard to the need and desirability for national consistency, the effect on privacy and other civil liberties of inconsistency, and methods for encouraging or mandating compliance with the national principles or guidelines.<sup>1244</sup>

While the Committee notes that a number of jurisdictions have recently reviewed search warrant powers, it supports efforts to enhance consistency and the promotion of standards for warrant powers. Accordingly, the Committee invites the Government to consider raising the matter with the Standing Committee of Attorneys - General.

Recommendation 83. That the Government considers asking the Standing Committee of Attorneys - General to develop a set of nationally consistent guidelines for search warrant powers and procedures.

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<sup>1243</sup> The Model Criminal Code is a cooperative project between the Commonwealth, State and Territory governments. The aim of the project is to develop uniform national criminal laws, which can be adopted by States and Territories. The scheme provides an opportunity to review the current state of the criminal law in Australia and to develop legislation based on best practice: [www.ag.gov.au/](http://www.ag.gov.au/) (description from <http://www.lawlink.nsw.gov.au/>).

<sup>1244</sup> Office of the Victorian Privacy Commissioner, *Submission no. 17, 2*.

# CHAPTER EIGHT - WARRANTS FOR SURVEILLANCE AND TELECOMMUNICATION INTERCEPTION

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## Introduction

This chapter looks at warrants for the use of surveillance devices and for telecommunications interception. Surveillance devices include listening devices, optical surveillance devices, tracking devices and data surveillance devices. Telecommunication interception involves the recording of conversations passing through telecommunication services. While surveillance devices are covered by state legislation, because telecommunication services are a federal responsibility under the Constitution,<sup>1245</sup> the power of interception can only be granted through Commonwealth legislation.

Warrants for surveillance and telecommunication interception share with covert warrants,<sup>1246</sup> the common feature of secrecy which by necessity, surrounds their issue and execution and which clearly sets them apart from other types of warrants.

The majority in the High Court case of *Grollo v Palmer* described the issue of interception warrants as follows:

Not only is the application for an interception warrant made *ex parte*; the very issue of a warrant and the identity of the judge who issues it are not disclosed. Unlike a warrant to enter, search and seize, its execution may go undetected by the person against whom or against whose interests the warrant is executed. Unlike a warrant to enter, search and seize, there is no return made on the execution of the warrant which permits a determination of its lawfulness, a review of its due execution and a disposition of the fruit of the execution. Because of the secrecy necessarily involved in applying for and obtaining the issue of an interception warrant, no records are kept which would permit judicial review of a judge's decision to issue a warrant. Nor are reasons given for such a decision.<sup>1247</sup>

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<sup>1245</sup> *Commonwealth of Australia Constitution Act 1900* s 51(v).

<sup>1246</sup> Covert warrants are discussed in Chapter Seven.

<sup>1247</sup> *Grollo v Palmer, Commissioner of Australian Federal Police* (1995) 131 ALR 225, 236-7 (Brennan CJ, Deane Dawson and Toohey JJ.). The defendants in this case had argued that legislation which gave selected judges the power to issue interception warrants was invalid or alternatively that the power was contrary to the constitutional

The majority characterised the decision to issue an interception warrant as follows:

The decision to issue a[n interception] warrant is, for all practical purposes, an unreviewable, in camera exercise of executive power to authorise a future clandestine gathering of information.<sup>1248</sup>

The majority concluded that because these warrants occupy a special category it is essential that an impartial authority control their use:

...[I]t is precisely because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today's continuing battle against serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law's protection of privacy and property (both real and personal), be authorised to control the official interception of communications.<sup>1249</sup>

These warrant powers allow extensive intrusions into personal privacy with little opportunity for the affected individual to seek relief from or review of the exercise of the powers. Consequently, in order for the powers to meet the requirements of fairness they must be proportionate to the perceived harm which they are aimed at preventing. Because of the serious nature of the abrogation of individual rights, the possible harm must also be serious in order to justify the use of the power.

The progressive widening of such powers must also be carefully monitored to ensure that each expansion is considered on its merits. Academic Simon Bronnitt has noted a trend in criminal justice towards the 'normalisation' of originally extraordinary investigative powers:

Electronic surveillance, like emergency legislation adopted to combat terrorism was initially tolerated as an exceptional measure for designated offences which were not amenable to ordinary investigative techniques. But once adopted, these 'exceptional' powers become an accepted and in due course an indispensable feature of the Australian criminal justice system.<sup>1250</sup>

As a general principle safeguards imposed on the issue of warrants for telecommunication interception and surveillance should be stronger and more restrictive than those applied to search warrants. This chapter confirms that this is generally the case in Victorian legislation.

As noted above, warrants for surveillance and telecommunication interception share with covert warrants, the common feature of secrecy, and a comparison with the

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imperative of the separation of powers. Both arguments failed and judges continue to be the "impartial authority" referred to in the quotes above who hear and determine applications for interception warrants.

<sup>1248</sup> Ibid, 237, quoted in the submission of the Victorian Bar Association, *Submission no. 12*, 10.

<sup>1249</sup> Ibid.

<sup>1250</sup> Simon Bronnitt, *Electronic Surveillance, Human Rights and Criminal Justice*, (1997) 3(2) AJHR 183.

safeguards imposed on covert warrants will also be part of this chapter. However, a distinguishing feature of telecommunication interception and surveillance warrants is their greater connection, and consequent greater consistency, with other state and territory jurisdictions. This move towards greater consistency is also seen in the recent development of federal, state and territory legislation related to terrorism.<sup>1251</sup>

The legislative regime for interception warrants is driven by the Commonwealth *Telecommunications (Interception) Act 1979* which ensures cross jurisdictional consistency. Although surveillance warrants are governed by state legislation, there has also been a recent focus on consistency between state and territory legislation for these warrants. In April 2002 a Leaders Summit on Terrorism and Multijurisdictional Crime was held involving the Attorney-General and police chief from each state and territory and the Commonwealth. Agreement was reached on a number of reforms:

to enhance arrangements for dealing with multi-jurisdictional crime. In particular they agreed to introduce model laws for a national set of powers for cross-border investigations covering controlled operations, assumed identities, electronic surveillance devices and witness anonymity.<sup>1252</sup>

The Committee's discussion of the Victorian *Surveillance Devices Act 1999* will consider the impact of these initiatives in some detail.

Interception and surveillance are governed by separate legislative regimes and are discussed separately. However, the issues of consistency and fairness for both Acts are discussed together as they arise in the description of surveillance device warrants, which follows the description of the telecommunication interception regime.

## Telecommunication Interception

Telecommunication interception is governed by the Commonwealth *Telecommunications (Interception) Act 1979*. Interception in this context means 'real time' communications which are passing through the telecommunications system and does not include stored communications. However, the introduction of new technologies such as email, SMS messaging and voicemail, has made the situations in which such messages can be considered to be still passing through the telecommunications system and when they can be considered stored, much less certain.

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<sup>1251</sup> In Victoria, the *Terrorism (Community Protection) Act 2003*, in NSW the *Terrorism (Police Powers) Act 2005* (NSW).

<sup>1252</sup> Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-Border Investigative Powers for Law Enforcement Report* (November 2003) (JWG Report) i.

A proposal to specifically exclude 'stored' or 'delayed access' information from the *Telecommunications (Interception) Act 1979* and thereby allow access without an interception warrant (a search warrant would be required), was contained in the *Telecommunications Interception Legislation Amendment Bill 2002*, but was removed from the final version of the Bill following a Senate Legal and Constitutional Legislation Committee report.<sup>1253</sup>

The *Telecommunications (Interception) Amendment (Stored Communications) Act 2004* addressed many of the concerns which led to the removal of the proposal from the 2002 Bill and amended the Act to include a definition of 'stored communication' as one which is stored on any equipment, but does not include storage on a highly transitory basis as an integral function of the technology used in its transaction.<sup>1254</sup> In May 2004 during the Second Reading Speech for the *Telecommunications (Interception) Amendment (Stored Communications) Bill 2004*, the Federal Attorney-General noted that the amendments addressed immediate operational difficulties but also recognised the need for a comprehensive review of the "contemporary relevance of Australia's interception regime".<sup>1255</sup> The provisions in the Act applied only to interceptions which occurred during the 12 month period from the commencement of the relevant section of the Act which was 15 December 2004. In March 2005 the Attorney-General announced a review of the *Telecommunications (Interception) Act 1979*. The review will:

...ensure the interception regime remains effective and suited to modern forms of communication.

...

The review will have regard to privacy concerns and the need for accountability as well as the benefits interception provides law enforcement and national security agencies...<sup>1256</sup>

The final report of this review was released in August 2005 and recommended that:

the distinction between intercepting real time communication and accessing stored communication be maintained.<sup>1257</sup>

While the current provisions have a sunset clause, this report suggests that it is likely that these provisions will be the basis for future provisions.

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<sup>1253</sup> Senate Legal and Constitutional Legislation Committee, *Report into Telecommunications Interception Legislation Amendment Bill 2002 and other Bills* (May 2002).

<sup>1254</sup> *Telecommunications (Interception) Act 1979* s 7(3A).

<sup>1255</sup> Philip Ruddock, Attorney-General, *Telecommunications (Interception) Amendment (Stored Communications) Bill 2004*, [Cth], *Second reading speech, House of Representatives, Debates*, 27 May 2004, 29130.

<sup>1256</sup> Philip Ruddock, Attorney-General, *Media Release*, 18 March 2005.

<sup>1257</sup> Anthony Blunn, *Report of the Review of the Regulation of Access to Communications* (August 2005) 26.

The Victorian *Telecommunications (Interception) (State Provisions) Act 1988* gives Victoria Police the power to intercept telecommunications in accordance with the Commonwealth Act.<sup>1258</sup> Warrants authorising agencies other than the Australian Security Intelligence Organisation (ASIO) to intercept telecommunications are made under Part VI of the Commonwealth Act and are referred to in the Victorian legislation as Part VI warrants.

### **The Commonwealth Act**

The provisions of the *Telecommunications (Interception) Act 1979* are discussed below. The Committee makes no recommendations for changes to the Commonwealth Act.

The Commonwealth Act sets up a regime which recognises 'eligible authorities' which are listed in the interpretation section of the Act (section 5). These authorities include the police forces of each state and the Northern Territory, and other specified bodies in NSW and Western Australia. At the request of the relevant state, any of these eligible authorities may be declared an 'agency' for the purposes of the Act by the Attorney-General, provided they comply with specified preconditions.

The Act then allows for an application for a warrant to be made to an eligible Judge or nominated Administrative Appeals Tribunal (AAT) member, by an agency and specifies who may make the application on behalf of the agency.<sup>1259</sup> In Victoria only Victoria Police is a declared agency under the Act and for Victoria Police the application can be made by an officer of the Police Force.<sup>1260</sup> Where other agencies in a state have been declared an eligible authority, the Act specifies which officers of the relevant agency may make an application for a warrant.<sup>1261</sup>

In New South Wales and Western Australia, bodies other than the relevant police force have also been declared agencies.<sup>1262</sup> When the Victorian Government set up the Office of Police Integrity in 2004, the fact that it was not an agency authorised to undertake telecommunications interception was raised as a criticism of the likely effectiveness of the body. Recently announced amendments to the *Telecommunications (Interception) Act 1979*<sup>1263</sup> will however allow the Office of Police Integrity to receive intercepted information, once amendments to the *Major Crime (Investigative Powers) Act 2004* are in place.

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<sup>1258</sup> *Telecommunications (Interception) (State Provisions) Act 1988* s 1.

<sup>1259</sup> *Telecommunications (Interception) Act 1979* s 39.

<sup>1260</sup> *Ibid*, s 39(2)(c).

<sup>1261</sup> *Ibid*, s 39(2).

<sup>1262</sup> For example, in NSW the Independent Commission Against Corruption, the Crime Commission and the Police Integrity Commission and in WA, the Anti-Corruption Commission, and the Corruption and Crime Commission.

<sup>1263</sup> Philip Ruddock, Attorney-General, *Media Release 164/2005*, 14 September 2005.

## Application

Applications can be made for a warrant to authorise:

- interceptions of communications to or from a nominated telecommunication service;
- interceptions of communications to or from any telecommunication service that a named person is using or is likely to use;
- entry onto premises.

The Act sets out the form of the application, its required contents and the details which must be included in the affidavit accompanying the application.<sup>1264</sup> Information which must be provided for a telephone application is also specified<sup>1265</sup> and the Judge or AAT member may require further information to be provided.<sup>1266</sup>

Different provisions apply to warrants in relation to two classes of offences.

**Class 1 offences** are defined in section 5 of the Act and are the most serious offences:

- murder or kidnapping or like offences;
- narcotics offences;
- conduct involving an act or acts of terrorism;
- offences against certain divisions of the Commonwealth *Criminal Code*: 72 (International terrorist activities using explosive or lethal devices); 101 (Terrorism); 102 (Terrorist Organisations); or 103 (Financing Terrorism);
- aiding, abetting, counselling or procuring the commission of these offences;
- being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of these offences
- conspiring to commit these offences

**Class 2 offences** are defined in section 5D of the Act and include a large number of serious offences which must be punishable by imprisonment for life or for a period, or maximum period of at least 7 years. A non-exhaustive list includes such offences as conduct endangering life or likely to cause serious injury; serious arson; serious fraud; and child pornography.

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<sup>1264</sup> *Telecommunications (Interception) Act 1979* ss 40-42.

<sup>1265</sup> *Ibid*, s 43.

<sup>1266</sup> *Ibid*, s 44.

The provisions which apply to the two classes of offences will be discussed separately.

### **Telecommunications interception warrant for class 2 offences**

For a warrant related to the less serious class 2 offences the Judge or nominated AAT member (issuing officer) must be satisfied on the basis of the information provided to them, of the following:

- that Division 3 (dealing with the form and content of applications) has been complied with;
- in the case of a telephone application – it was necessary because of urgent circumstances that the application be made by telephone;
- there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the services;
- information likely to be obtained by the interception would be likely to assist in connection with the investigation of a class 2 offence in which the person is involved;
- and having regard *only* to the following matters:
  - how much the privacy of any person or persons would be likely to be interfered with;
  - the gravity of the conduct constituting the offence or offences being investigated;
  - how much the information would be likely to assist in connection with the investigation;
  - to what extent methods of investigating the offence or offences that do not involve interception, have been used or are available;
  - how much the use of such methods would be likely to assist in connection with the investigation;
  - how much the use of such methods would be likely to prejudice the investigation, whether by delay or for any other reason.<sup>1267</sup>

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<sup>1267</sup> Ibid, s 46.

## Telecommunications interception warrant for class 1 offence

For the issue of a warrant for the more serious class 1 offences the issuing officer must consider a similar, but less restrictive, list of factors. The first four requirements listed above still apply. However, the matters to which the issuing officer must have regard are reduced in number and there is no specific prohibition on considering other matters. In particular the issuing officer for a warrant for a Class 1 offence is not required to take into account the following factors which must be considered for the Class 2 offence warrant:

- how much the privacy of any person or persons would be likely to be interfered with;
- the gravity of the conduct constituting the offence or offences being investigated;
- how much the use of such methods would be likely to assist in connection with the investigation.<sup>1268</sup>

The rationale for not requiring a consideration of the gravity of the conduct constituting the offence is clearly that, with the very serious offences classified as Class 1 offences, this factor has been addressed by definition. It is less clear why the consideration of the extent to which a person's privacy would be interfered with should not also be a requirement for the issue of a warrant for a Class 1 offence. The seriousness of the offence would ensure that this consideration was given less weight than perhaps would normally be the case, but it may not be appropriate to completely remove it. This point has been raised by academic Simon Bronniti who comments that the current situation with regard to class 1 offences "gives insufficient weight to the fundamental importance of privacy".<sup>1269</sup> The requirement to consider the effect on a person's privacy before granting a warrant is contained in the *Surveillance Devices Act 1999*<sup>1270</sup> and the *Terrorism (Community Protection) Act 2003*.<sup>1271</sup>

The lack of obligation to consider how much the use of interception would be likely to assist the investigation, may also have been excluded because of the seriousness of the offence and the fact that for such serious matters even a small chance of accessing useful information is worthwhile. In addition, the impossibility in many instances relating to these offences of knowing in advance what the quality or quantity of evidence is likely to be, may make consideration of its utility inappropriate.

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<sup>1268</sup> Ibid, s 45.

<sup>1269</sup> Simon Bronniti, *Electronic Surveillance, Human Rights and Criminal Justice*, (1997) 3(2) AJHR 183.

<sup>1270</sup> Section 17.

<sup>1271</sup> Section 8.

It is also possible for the issuing officer to consider these factors if s/he thought it appropriate as they are not specifically excluded from considering factors not included in the list, in the way that they are for the Class 2 offences applications.

### **Warrant to enter premises**

The application for the issue of a warrant for entry onto premises can only be made where an application for a warrant under section 45 or 46 could be made.<sup>1272</sup> It is available only as an adjunct to the main function of the Act – that of intercepting telecommunications, and is used infrequently.<sup>1273</sup>

The warrant may authorise entry onto premises in order to install, maintain, use or recover equipment or a line used in the interception.<sup>1274</sup> The warrant must state whether entry is authorised at any time of the day or night, or only between specified hours.<sup>1275</sup> The warrant may allow entry without “permission first being sought or demand first being made”,<sup>1276</sup> that is a clandestine entry, and may authorise any measures which the issuing officer is satisfied are necessary and reasonable for that purpose.

For this warrant application to be granted the issuing officer must be satisfied that:<sup>1277</sup>

- for technical reasons connected with the nature or operation of the service or of the telecommunications system; or
- where execution of the warrant by employees of a telecommunications carrier might jeopardise security of the investigation;

it would be impracticable or inappropriate to proceed otherwise than by the use of equipment or a line installed on the relevant premises.

The warrant must be in the prescribed form and signed by the Judge or nominated AAT member who issued it.<sup>1278</sup> It may specify conditions or restrictions relating to the interceptions<sup>1279</sup> and must specify the period for which it will be in force which can be

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<sup>1272</sup> *Telecommunications (Interception) Act 1979* s 48(1).

<sup>1273</sup> In Victoria only three applications were made in the year 2003 - 2004 and no applications were made in the two years preceding, see *Telecommunications (Interception) Act 1979*, Report for the year ending 30 June 2004, Australian Government Attorney-General's Department (2005), 21.

<sup>1274</sup> *Telecommunications (Interception) Act 1979* s 48(4).

<sup>1275</sup> *Ibid*, s 48(5)(a).

<sup>1276</sup> *Ibid*, s 48(5)(b).

<sup>1277</sup> *Ibid*, s 48(3).

<sup>1278</sup> *Ibid*, s 49(1).

<sup>1279</sup> *Ibid*, s 49(2).

up to 90 days.<sup>1280</sup> This period may not be varied but a further warrant may be issued in respect of the same person or telecommunication service.<sup>1281</sup> The warrant must contain short particulars of each offence alleged.<sup>1282</sup>

### Telephone Applications

In urgent circumstances an application can be made by telephone by the Commissioner of Police or a person authorised by her/him in writing.<sup>1283</sup> Particulars of the urgent circumstances which require the telephone warrant must be provided to the issuing officer.<sup>1284</sup> Once a telephone warrant has been completed and signed the issuing officer must, as soon as practicable, inform the applicant of the terms of the warrant and the day and time at which it was signed, and give the warrant to that person.<sup>1285</sup> The issuing officer must keep a copy of the warrant.

The applicant for the warrant must obtain a sworn affidavit from each person who provided information for the application within one day after the day on which the warrant was issued, and provide these to the judge or AAT member.<sup>1286</sup> Where these provisions are not complied with the issuing officer may revoke the warrant in writing.<sup>1287</sup>

In 2003 - 2004 Victoria Police applied for and were granted 27 telephone applications of a total of 269 applications under the Act.<sup>1288</sup> This represents approximately 10% of applications made.

### Defective Warrant

Where a defect occurred in connection with the issue or execution of a warrant, information obtained by an interception may nevertheless be used if the relevant court, tribunal, body or authority is satisfied that the defect or irregularity was not substantial, and that but for the irregularity, the interception would have complied with the Act, and that in all the circumstances the irregularity should be disregarded.<sup>1289</sup>

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<sup>1280</sup> *Ibid*, s 49(3).

<sup>1281</sup> *Ibid*, ss 49(4)&(5).

<sup>1282</sup> *Ibid*, s 49(7).

<sup>1283</sup> *Ibid*, s 40.

<sup>1284</sup> *Ibid*, s 43.

<sup>1285</sup> *Ibid*, s 50.

<sup>1286</sup> *Ibid*, s 51.

<sup>1287</sup> *Ibid*, s 52.

<sup>1288</sup> *Telecommunications (Interception) Act 1979*, Report for the year ending 30 June 2004, Australian Government Attorney-General's Department (2005) 18-19.

<sup>1289</sup> *Telecommunications (Interception) Act 1979* s 75.

## Use of Intercepted Information

The evidence gathered by telecommunication interception may be used in proceedings which are defined as exempt proceedings under the Act.<sup>1290</sup> Exempt proceedings are listed in section 5B of the Act and include any prosecution for a serious offence which is in turn defined as an offence which is, or has been, a class 1 or 2 offence. These categories of offences have been described above. However, once information has been given in evidence in an exempt proceeding, that information can later be used in any proceeding.<sup>1291</sup>

## Inadmissibility of intercepted information

Section 74 of the Act allows the use in evidence of lawfully obtained information in exempt proceedings. Section 77 makes all intercepted material, whether obtained lawfully under the Act or unlawfully, inadmissible in evidence in any proceedings except those permitted by specified sections of the Act. Hence unlawfully obtained information is not admissible under the Act.

In addition, any unlawful interception is prohibited under section 7(1) of the Act. Section 63 of the Act prohibits dealing with intercepted information, including giving such information in evidence in a proceeding. Section 105 of the Act makes contravention of either of these sections an offence with a maximum penalty of six months imprisonment.

## *The Victorian Act*

Having been authorised by the Commonwealth *Telecommunications (Interception) Act 1979* to make applications for telecommunication interceptions, the Victorian *Telecommunications (Interception) (State Provisions) Act 1988* sets out the functions of Victoria Police when a telecommunications interception warrant is sought and issued and includes extensive requirements for the keeping of records, a responsibility held by the Chief Commissioner.

## Documents to be kept

Section 5 lists the records to be kept in connection with the issue of a warrant as follows:

- a certified copy of each warrant issued to the Police - (s 5(a));

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<sup>1290</sup> Ibid, s 74.

<sup>1291</sup> Ibid, s 75A.

- a copy of each notification under section 53(1)(b) of the Commonwealth Act (warrant issued by telephone) of the issue of such a warrant - (s 5(b));
- a certified copy of each instrument revoking such a warrant - (s 5(c));
- a certified copy of each certificate issued under section 61(4) of the Commonwealth Act (relating to the execution of the warrant) - (s 5(d));
- a copy of each authorisation by the Chief Commissioner of Police under section 66(2) of the Commonwealth Act (officer or classes of officers authorised to receive information obtained by interception) - (s 5(e)); and
- particulars of any telephone application for a Part VI warrant (warrant authorising interception) made by the Police (s 5(f)).

Section 6 lists other records connected with interceptions which must be kept. In relation to each application for a Part VI warrant, the Chief Commissioner must cause to be recorded in writing, as soon as practicable after the happening of the relevant events, and kept, a statement including:

- whether the application was withdrawn or refused or issued – (s 6(1)(a));
- in relation to a restricted record (a record obtained by telecommunication interception, whether or not in contravention of the Commonwealth Act<sup>1292</sup>) in the possession of the Police, particulars of the interception warrant; of each time it came into the possession of the Police or ceased to be in the possession of the Police; and each agency or body or individual who received or supplied the restricted record – (s 6(1)(b));
- particulars of each use made by the Police of lawfully obtained information - (s 6(1)(c));
- particulars of each communication of lawfully obtained information by Police to an outside person or body - (s 6(1)(d)); and
- particulars of each occasion when lawfully obtained information was given in evidence in a relevant proceeding<sup>1293</sup> in relation to the Police.

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<sup>1292</sup> Ibid, s 3.

<sup>1293</sup> In the Commonwealth Act, section 5, a proceeding is defined as: a proceeding or proposed proceeding in a federal court or in a court of a State or Territory; a proceeding or proposed proceedings, or a hearing or proposed hearing, before a tribunal in Australia, or any other body, authority or person in Australia having power to hear or examine evidence; or an examination or proposed examination by or before such a tribunal, body, authority or person.

## **Documents to be given to the Victorian Police Minister**

Section 7 sets out the documents which must be provided by the Chief Commissioner of Police to the Minister responsible for Police:

- a copy of each warrant issued to the police and each document of revocation of a warrant where this occurs, as soon as practicable after the issue or revocation – (s 7(1)(a));
- within 3 months after a warrant ceases to be in force, a written report on the use made of information obtained and the communication of that information to persons other than officers of the police force – (s 7(1)(b));
- as soon as practicable and within 2 months after each 30 June a written report which contains information which complies with the requirement of Division 2 of Part IX of the Commonwealth Act and which can be derived from the records of the Police Force – (s 7(1)(c)).

## **Documents to be given to the Victorian Attorney-General**

The Chief Commissioner of Police must provide to the Attorney-General, the records referred to in dot points one and three above, but for point one, the time frame is changed to within 28 days after the warrant ceases to be in force.<sup>1294</sup>

## **Documents to be given to the Commonwealth Minister**

The Act requires that a copy of the reports and documents provided to the state Minister responsible for Police, must be given to the relevant Commonwealth Minister as soon as practicable after receiving the report or document.<sup>1295</sup>

## **Keeping and destruction of records**

The Chief Commissioner of Police is required to ensure that ‘restricted records’<sup>1296</sup> in the possession of the Police Force are kept in a secure place, where they are not accessible to persons other than persons who are entitled to deal with them.<sup>1297</sup> Where the Chief Commissioner of police is satisfied that the record is not likely to be required

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<sup>1294</sup> *Telecommunications (Interception) (State Provisions) Act 1988 s 7.*

<sup>1295</sup> *Ibid*, s 8.

<sup>1296</sup> *Ibid*, s 3: “restricted record” means a record obtained by an interception, whether or not in contravention of section 7(1) on the Commonwealth Act, of a communication passing over a telecommunications system.

<sup>1297</sup> *Ibid*, s 9(1).

for a permitted purpose in relation to the Police Force, s/he must cause the record to be destroyed forthwith.<sup>1298</sup>

## Functions of the Ombudsman

The Ombudsman's function are set out in Part 3 of the Act. S/he may inspect the records kept by the police force pursuant to this Act to ascertain compliance, report to the Minister for Police and do anything incidental or conducive to the performance of these functions.<sup>1299</sup> S/he must undertake these inspections at least twice during each financial year.<sup>1300</sup> Within 3 months of the end of the each financial year the Ombudsman must report to the Minister for Police in writing about the results of the inspections undertaken and give a copy of this report to the Chief Commissioner of Police and the Attorney-General. The Ombudsman may make such a report at any time, in addition to this annual report.<sup>1301</sup> If of the opinion that an officer of the Police Force has contravened a provision of the Commonwealth Act, or section 7(1)(a) or (b), the Ombudsman may include this fact in his/her report.<sup>1302</sup>

A copy of inspection Reports produced under section 11 of the Act must be sent by the Police Minister to the Commonwealth Minister as soon as practicable after receipt.<sup>1303</sup>

## Powers of the Ombudsman

For the purposes of inspecting the records the Ombudsman may, after notifying the Chief Commissioner of Police, enter at any reasonable time premises occupied by the Police and is entitled to full and free access to all records. S/he is entitled to copy records and may require an officer of the Police Force to provide relevant information. The Chief Commissioner of Police is required to ensure that the Ombudsman receives such assistance as is reasonably required.<sup>1304</sup>

Section 16 of the Act gives the Ombudsman power to require the provision of relevant information "despite any other law". The Act specifically provides that a person will not be excused from answering a question or providing access to a document on the grounds that:<sup>1305</sup>

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<sup>1298</sup> Ibid, s 9(2).

<sup>1299</sup> Ibid, s 10.

<sup>1300</sup> Ibid, s 11.

<sup>1301</sup> Ibid, s 12.

<sup>1302</sup> Ibid, s 13.

<sup>1303</sup> Ibid, s 21.

<sup>1304</sup> Ibid, ss 14-15.

<sup>1305</sup> Ibid, s 16.

... giving the answer or providing the document as the case may be, would contravene a law, would be contrary to public interest or might tend to incriminate the person or make the person liable to a penalty...

This information is however not admissible in evidence against the person except in a proceeding for a prosecution under this Act.<sup>1306</sup>

### **Efficiency of the Act**

The recording and reporting requirements imposed by the Commonwealth Act<sup>1307</sup> are extensive and a significant amount of statistical information is made available each year in the Annual Report on the Act which is tabled in the Commonwealth Parliament.

The latest available report for the year ending 30 June 2004<sup>1308</sup>, makes the following comments on the effectiveness of the Act:

There remains a consistent view among agencies that telecommunications interception continues to be an extremely valuable investigative tool. Agencies have again noted that evidence gathered through the execution of an interception warrant can lead to the successful conclusion of an investigation in circumstances where alternative evidence is uncorroborated, unavailable or insubstantial.<sup>1309</sup>

The following table extracts from the report the number of warrant applications made, and the outcome of the applications, in Victoria and for comparative purposes also in NSW. In NSW figures for both the Police and the New South Wales Crime Commission are included.

	2001- 2002			2002 - 2003			2003 - 2004		
	VIC Police	NSW Police	NSW CC	VIC Police	NSW Police	NSW CC	VIC Police	NSW Police	NSW CC
<b>Warrants applications:</b>									
<b>Made</b>	343	392	644	406	383	803	269	470	827
<b>Refused/ withdrawn</b>	2	0	0	0	1	5	0	7	3
<b>Issued</b>	341	392	644	406	382	798	269	463	824

**Table 4. Applications for Warrants: 2001 - 2002 – 2003 - 2004.**

<sup>1306</sup> Ibid, s 16.

<sup>1307</sup> *Telecommunications (Interception) Act 1979* ss 99-104.

<sup>1308</sup> *Telecommunications (Interception) Act 1979*, Report for the year ending 30 June 2004, Australian Government Attorney-General's Department, 2005.

<sup>1309</sup> Ibid, 15.

The figures for Victoria show a fair degree of variation over the three years recorded, with a significant reduction in applications in 2003 - 2004 from the previous year.

NSW police figures also show considerable variation. The most remarkable figure for NSW however is the number of warrants issued to the Crime Commission. This figure, which has risen in each of the three reported years, is close to twice the number issued to police in the same period. Indeed if the figures for the two other NSW eligible authorities<sup>1310</sup> are added to the two figures above, the total number of warrants issued in NSW in the 2003 - 2004 period is 1 380 compared to the Victorian figure of 463.

Section 102 of the Commonwealth Act specifically requires that the report contain statistics indicating the effectiveness of warrants which are issued under the Act in terms of the number of arrests made and the resulting prosecutions in which lawfully obtained information was given in evidence.

The Report lists Victoria as having made 437 arrests as a result of telecommunications interception warrants in 2003 - 2004 compared to 383 in 2002 - 2003 and 423 in 2001 - 2002. Prosecutions and convictions are recorded below.

	2001 - 2002			2002 - 2003			2003 - 2004		
	VIC Police	NSW Police	NSW CC	VIC Police	NSW Police	NSW CC	VIC Police	NSW Police	NSW CC
<b>Warrants issued</b>	341	392	644	406	382	798	269	463	824
<b>Arrests</b>	423	297	313	383	222	399	437	474	643
<b>Prosecutions</b>	238	303	127	317	798	215	390	868	398
<b>Convictions</b>	235	161	122	304	429	204	374	644	295

**Table 5. Arrests on the basis of lawfully obtained information, and prosecutions and convictions in which lawfully obtained information was given in evidence: 2001 - 2002 – 2003 - 2004.**

The Report also provides figures for the number of eligible warrants. An eligible warrant is defined in the Act<sup>1311</sup> as a warrant in force during a reporting year and in

<sup>1310</sup> ICAC - 31 warrants, and the Police Integrity Commission - 62 warrants, in 2003 - 2004.

<sup>1311</sup> *Telecommunications (Interception) Act 1979*, s.102.

relation to which a prosecution was instituted or was likely to be instituted. By comparing the number of eligible warrants to the overall number of warrants in force during the year, it is possible to get a general indication of the proportion of warrants which yield information used in a prosecution. In 2003 - 2004, the percentage of total warrants which were eligible warrants was 75.9% in Victoria as compared to 65.13% in 2002 - 2003. As a comparison in 2003 - 2004 the figures for NSW were, NSW Police 78.4% and NSWCC 82.4%.

The Report notes that statistics recorded in its tables should be interpreted with caution:

...particularly in presuming a relationship between the number of arrests, prosecutions (which include committal proceedings) and convictions in a reporting year. An arrest in one reporting year may not result in a prosecution/committal (if at all) until a later reporting year and any resulting conviction may be recorded in that or an even later reporting period. Moreover, the number of arrests may not equate to the number of charges laid (some or all of which may be later prosecuted) as an arrested person may be prosecuted and convicted for a number of offences. Further, the tables may understate the effectiveness of interception in so far as, in some cases, prosecutions may be initiated, and convictions recorded, without the need to give intercepted information in evidence. In particular, agencies report that telecommunications interception effectively enables investigators to identify persons involved in, and the infrastructure of, organised criminal activities, particularly drug trafficking syndicates. In many cases the weight of evidence obtained through telecommunications interception results in defendants entering guilty pleas, thereby obviating the need for the information to be introduced into evidence.<sup>1312</sup>

A further reason for caution in interpreting these figures is the impossibility of knowing whether the information obtained through telecommunication interception was the basis upon which a conviction was recorded.<sup>1313</sup>

The amount of detail provided in these reports is a useful accountability mechanism as it provides a record of the usage levels of this type of warrant. The figures suggest also that the warrants which are granted are producing useful outcomes in the majority of cases.

There is some concern, however, at the increasing number of warrants being issued and the cost involved in their use. In March 2004, Senator Natasha Stott Despoja, commenting on the Report on the Act for the year ending June 2003, noted:

There are some very worrying statistics in this report. It tells us that in 2002-03 a total of 3,058 warrants were issued to law enforcement agencies in Australia. This is an increase of 22 per cent in the number of warrants issued during the previous year. It is even more significant if you

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<sup>1312</sup> *Telecommunications (Interception) Act 1979*, Report for the year ending 30 June 2004, Australian Government Attorney-General's Department, 2005, 39.

<sup>1313</sup> Simon Bronnitt, *Electronic Surveillance, Human Rights and Criminal Justice*, (1997) 3(2) AJHR 183.

consider that last year's figure also represented a massive increase in the number of warrants issued in comparison to previous years.

...

Another interesting issue highlighted by the report is the enormous cost associated with interception warrants, with more than \$25 million being spent in connection with the execution of warrants during the past year.<sup>1314</sup>

The figures for the 2003 - 2004 reporting period show no significant increase in the total number of warrants issued Australia wide from the previous year.<sup>1315</sup> However, the recorded costs incurred by agencies in connection with the execution of warrants rose in the same year from \$25 051 963, to \$27 717 594, representing a 10.6% increase. The Victorian situation saw a decrease in the number of warrants issued from 406 in 2002 - 2003 to 269 in 2003 - 2004 (33.7% decrease) with an increase in the spending from \$3 231 205 to \$3 339 484 (3.4% increase).

The Committee did not receive any direct comment from witnesses on the efficiency of the Act and provides the figures above as a brief summary of available information.

### ***Fairness and consistency***

In the previous chapters covering search warrants (Chapters Three to Seven), the Committee has made recommendations for improved consistency for the issue and execution of warrants, and through these recommendations has sought to set minimum standards. While warrants for the interception of telecommunications have special features which set them apart from search warrants, the principles which have been developed in the preceding chapters as applicable to search warrants remain a useful point of comparison. The Committee's approach in this report has been to advocate consistency unless a compelling reason for deviation from the standard can be demonstrated. This basic principle can be applied to all types of warrants, without precluding the possibility that in some circumstances there may be a justifiable need for substantial exceptions.

Those areas in which the legislative provisions relating to telecommunication interception warrants and surveillance device warrants do not apparently meet the minimum standards recommended for search warrants are discussed as they arise in the following general discussion of the *Surveillance Devices Act 1999*. This approach allows for the two acts to be compared at the same time as their general fairness and consistency is considered.

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<sup>1314</sup> Natasha Stott Despoja, *Senate Hansard Debate*, 9 March 2004, 21142-3.

<sup>1315</sup> 2002 - 2003: 3058 warrants issued. 2003 - 2004: 3028 warrants issued. This represents a decrease of about 1%.

## Surveillance warrants

Surveillance devices are regulated by the *Surveillance Devices Act 1999* (Vic) and are predominantly used by Victoria Police. The Act also allows applications to be made by the Australian Crime Commission, the Department of Primary Industries and the Department of Sustainability and Environment.<sup>1316</sup>

In preliminary consultations carried out with key stakeholders on the scope of this inquiry, surveillance devices were identified as an area of particular concern. Barrister Brian Walters S.C., whose comments were later endorsed by the Criminal Bar Association in their submission to the Committee commented:

All warrant powers have problems at present, but amongst the most open to abuse are the surveillance device warrants, which are proliferating in number and which produce an enormous amount of product, management of which is a logistical problem. The issuing authority will never be in a position to hear all the product of such a warrant. Legal professional privilege is almost impossible to protect. The huge product generated can also make the prosecution process almost impossibly unwieldy. Misuse of this product can occur, and the benefit must be weighed against the disadvantages. The justification required for the issue of such warrants should be tightened.<sup>1317</sup>

In contrast Victoria Police held the view that Victoria's legislation was already comprehensive and provided a high level of accountability.

Having been involved in the cross-border development of surveillance device legislation ...it was seen and acknowledged that Victoria had in fact the tightest and probably the most comprehensive surveillance device legislation. And it was used as a model for the national model on that basis: because of the nature of the accountability of the Victorian regime compared with other states in Australia.<sup>1318</sup>

In addition to the different opinions expressed by stakeholders as to the current appropriateness of the *Surveillance Devices Act 1999*, a further matter for the Committee to consider was the consistency of the Act with equivalent legislation in other jurisdictions. While the regulation of surveillance devices is a matter for state and territory legislation, the possibility of greater consistency between jurisdictions and of mutual recognition of warrants granted, has recently been the subject of a major report.

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<sup>1316</sup> *Surveillance Devices (Amendment) Act 2004* s 5.

<sup>1317</sup> Brian Walters SC, *Preliminary submission*.

<sup>1318</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 216.

## **Report of the Joint Working Group on National Investigation Powers**

The November 2003 report, *Cross-Border Investigative Powers for Law Enforcement*, was produced by the Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers (JWG). It was prepared as an initiative of the Leaders Summit on Terrorism and Multijurisdictional Crime. In the introduction to the Report it is noted that:

Contemporary policing requires law enforcement agencies to undertake covert investigations that extend beyond the boundaries of any one jurisdiction. Organised crime networks such as drug cartels and motorcycle gangs operate with relative ease across jurisdictional borders. To address this increasing threat it is critical that law enforcement agencies adopt a nationally coordinated and cooperative approach to law enforcement.<sup>1319</sup>

In furtherance of this aim, on 5 April 2002 the Prime Minister and state and territory leaders agreed to a number of reforms including the introduction of model laws for cross-border investigations covering, inter alia, surveillance devices. The JWG was established to develop the model laws. In relation to the desirability of model legislation the JWG comments:

Model legislation has proved to be an effective tool for achieving consistency and enhancing the ability of law enforcement agencies to investigate criminal activities both within and across State and Territory borders. Model legislation has been used successfully to promote national consistency in many areas of criminal investigation and prosecution ...<sup>1320</sup>

The JWG notes that while using model legislation does not prevent jurisdictions from making adjustments to meet individual circumstances, it may nevertheless be advantageous to the state to adopt the same powers for inter and intra state investigations:

The use of the same powers for intrastate and interstate investigations would avoid the complexities that could arise from the operation of two different sets of investigative powers. It would eliminate the need for law enforcement agencies to determine at an early stage in an investigation whether the criminal activities that are the subject of the investigation extend to other jurisdictions or are confined to one jurisdiction.<sup>1321</sup>

The Model Bill proposed in the Report would allow a mutual recognition whereby a warrant obtained by the police in one state, from a judge in that state, would allow those police to operate in all other states. They would not have to obtain another warrant in the other state and they would not have to rely on the police force of the other state. The Report notes that this approach:

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<sup>1319</sup> *JWG Report*, i.

<sup>1320</sup> *Ibid*, v.

<sup>1321</sup> *Ibid*, v.

eliminates the need to apply for separate warrants or authorities in each jurisdiction... [and] means that investigating police do not have to rely on the resources of their interstate counterparts and risk the operation falling in priority behind local policing imperatives.<sup>1322</sup>

The Report advises that the model laws have been developed to conduct public discussion and have not been endorsed by either the Standing Committee of Attorneys-General or the Australasian Police Ministers Council. It notes however that there is a keenness by both ministerial councils to settle the model laws expeditiously.

In Victoria the *Surveillance Devices (Amendment) Act 2004* was enacted to provide for the mutual recognition of warrants between state and territory jurisdictions, and received royal assent on 25 May 2004. This Act has yet to commence however, and during the Second Reading Speech for the bill the fact that it did not contain a default commencement date was explained as follows:

This is to allow time for necessary commonwealth regulations to be made in relation to the powers and duties that have been conferred on officers of the Australian Crime Commission in the bill. In addition, the commonwealth government will need to pass legislation to enable the commonwealth Ombudsman to perform the oversight role in the bill. After the commonwealth has taken this action, the bill can be proclaimed.<sup>1323</sup>

To date the legislation has not commenced, however, its provisions will be considered in the analysis of the Act as it is likely to commence towards the end of 2005.<sup>1324</sup>

### ***Scope of the Act***

The *Surveillance Devices Act 1999* regulates the installation, use and maintenance of surveillance devices.<sup>1325</sup> The Act also restricts the use of information obtained through use of such a device, establishes the procedures for obtaining warrants and emergency authorisations for installation and use, creates offences for misuse and imposes secure storage and destruction requirements. The Act replaced the *Listening Devices Act 1969*.

Surveillance devices covered by the Act include:

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<sup>1322</sup> Ibid, vi.

<sup>1323</sup> Rob Hulls, Attorney-General, *Surveillance Devices (Amendment) Bill, Second Reading Speech*, 1 April 2004, 537.

<sup>1324</sup> Informal advice from the Director of Criminal Policy in the Department of Justice, is that Commonwealth regulations are currently being drafted and could be in place by the end of 2005, however no official timeline was available: conversation, Department of Justice Legal Policy Unit Criminal Law Policy Director to Committee Executive Officer, 19 September 2005.

<sup>1325</sup> *Surveillance Devices Act 1999* s 1. Note that the *Surveillance Devices (Amendment) Act 2004* will also include 'retrieval' in this section, which will bring it into line with the Model Bill.

- Listening devices – s 6
- Optical surveillance devices – s 7
- Tracking devices – s 8
- Data surveillance devices – s 9

For each type of surveillance device Part 2 of the Act prohibits installation, use or maintenance without a warrant or an emergency authorisation, or in accordance with a law of the Commonwealth. Depending on the type of device in use, the relevant potential user and activity are prohibited as follows:

**Listening device** – use by a person, to overhear, record, monitor or listen to a private<sup>1326</sup> conversation to which the person is not a party, without the express or implied consent of each party to the conversation;

**Optical surveillance device** – use by a person, to record visually or observe a private activity to which the person is not a party, without the express or implied consent of each party to the activity;

**Tracking device** – use by a person, to determine the geographical location of a person without the express or implied consent of that person, or an object without the express or implied consent of a person in lawful possession or having lawful control of that object;

**Data surveillance device** – use by a law enforcement officer, to record or monitor the input of information into or the output of information from, a computer without the express or implied consent of the person on whose behalf that information is being input or output.

In relation to an optical surveillance device there is also no prohibition on its use by a law enforcement officer in the performance of his or her duties if the occupier of the premises concerned authorises the use, and it is reasonably necessary for the protection of any person's lawful interests.

The definitions used in the *Surveillance Devices Act 1999* to describe the various devices are generally identical to or at least consistent with those used in the Model Bill. The Model Bill has provided in its definition of a surveillance device the same four main devices as used in the *Surveillance Devices Act 1999*. However, the Model Bill

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<sup>1326</sup> Note that the *Surveillance Devices (Amendment) Act 2004* will remove the word 'private' to comply with the Model Bill provisions. In addition the amending Act will include a provision which will allow a law enforcement officer to monitor or record a private conversation to which s/he is not a party to if at least one party to the conversation agrees and the officer is working in the course of her or his duty and believes it is reasonably necessary to monitor or record the conversation for the protection of any person's safety. The effect of this provision is that no warrant is necessary in this situation.

also includes “a device of a kind prescribed by the regulations”<sup>1327</sup> which will enable new devices to be included within the scope of the legislation and allow the incorporation of new technologies. The *Surveillance Devices (Amendment) Act 2004* will amend the *Surveillance Devices Act 1999* to include this additional provision.

A further omission from the *Surveillance Devices Act 1999* is that within the definition of “record” the Model Bill has included a record in a digital form whereas the Act does not specifically include this, referring only to audio and visual records. The amending Act does not correct this inconsistency. The Committee believes that the inclusion of digital records recognises the reality of modern recording practices and should be included.

Recommendation 84. That the <i>Surveillance Devices Act 1999</i> be amended to include digital records in the definition of ‘record’.
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### **Restrictions on communication and publication of private conversations and activities**

Part 3 of the Act restricts the use of material obtained by the use of a listening device, an optical surveillance device or a tracking device.

Section 11 of the Act prohibits a person from knowingly communicating or publishing a record or report of a private conversation or private activity<sup>1328</sup> and section 12 prohibits a law enforcement officer from publishing or communicating any information gained from a computer which has been gathered by a data surveillance device.<sup>1329</sup> Both sections provide situations in which the prohibition does not apply relating to consent and law enforcement type activities.

In relation to consent, the prohibition does not apply where the communication or publication is made with the express or implied consent of *each* party to the private conversation or private activity. Note that the effect of this section combined with the provisions relating to the recording of conversations or activities, would allow recording by a party to the conversation or activity without the consent of all parties but would prohibit communication or publication without the consent of all parties. Similarly, express or implied consent of the person on whose behalf information is input into or output from a computer, will negate the prohibition.

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<sup>1327</sup> *JWG Report*, 367, Model Bill, Clause 3.

<sup>1328</sup> *Surveillance Devices Act 1999* s 11.

<sup>1329</sup> *Ibid*, s 12.

## **Authorisations for Use**

Authorisation for the use of surveillance devices is covered by Part 4 of the Act, and Division 1 covers warrants. The *Surveillance Devices (Amendment) Act 2004* will completely replace the existing Part 4, Division 1 to make the provisions more closely aligned to the Model Bill. As the Act is likely to commence at the end of this year, the following analysis will be predominantly of the amending Act's provisions.

A warrant may be issued for one of the four types of surveillance devices listed above.<sup>1330</sup> In addition, a composite warrant may be issued for the use of more than one type of device or where a device has more than one kind of function. A warrant may also be issued for retrieval of a device.

### **Application for a warrant**

An application for such a warrant must come from a law enforcement officer.<sup>1331</sup> The Act defines such an officer as:<sup>1332</sup>

- a member of the police force;
- a member of the Australian Crime Commission who is also a member of a police force;
- a prescribed member of the Office of Police Integrity; or
- an authorised officer<sup>1333</sup> within the meaning of the *Conservation, Forests and Lands Act 1987* (but this officer may not apply for an emergency authorisation)

The application must be approved by a senior law enforcement officer<sup>1334</sup> or an authorised police officer.<sup>1335</sup> This requirement that an application be approved by a senior officer is not part of the Model Bill, which leaves the decision with the law enforcement officer. In this regard the *Surveillance Devices (Amendment) Act 2004*

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<sup>1330</sup> *Surveillance Devices (Amendment) Act 2004* s 9, new Part 4, Division 1 s 13.

<sup>1331</sup> *Surveillance Devices (Amendment) Act 2004* s 9, new Part 4, Division 1 s 15.

<sup>1332</sup> *Surveillance Devices Act 1999* s 3.

<sup>1333</sup> An authorised officer is a public servant appointed by the relevant Secretary of the Department, under s 83, *Conservation, Forests and Lands Act 1987*.

<sup>1334</sup> *Surveillance Devices Act 1999*, s 3: "senior law enforcement officer" means: in relation to the Police Force, the Chief Commissioner, a Deputy Commissioner or Assistant Commissioner or a person appointed by the Chief Commissioner; in relation to the Australian Crime Commission the Chief Executive officer or an examiner; in relation to the Office of Police Integrity the Director or a prescribed member of staff; in relation to the authorised Officer under the *Conservation, Forests and Lands Act*, the Secretary of the Department.

<sup>1335</sup> *Ibid*: "authorised officer" means a member of the Police Force of or above the rank of inspector, appointed by the Chief Commissioner of Police.

has opted to retain a provision from the *Surveillance Devices Act 1999* even though it is not contained in the Model Bill. The JWG Report notes that it received submissions on this point from a number of agencies.<sup>1336</sup>

The Queensland Government recommended that the application be confined to “senior officers” and Privacy Victoria recommended that some constraints apply without specifying what these should be. The JWG concluded that as the application is made to a judicial officer who must be satisfied in relation to specified criteria, this was sufficient.

The provisions in the Victorian legislation include an additional layer of vetting of the application prior to judicial consideration. In this respect the Act is similar to the *Terrorism (Community Protection) Act 2003* which requires the Chief Commissioner, a Deputy Commissioner or an Assistant Commissioner of Victoria Police to approve applications for covert search warrants, which may be made by any police member. Where this process involves a thorough review and appraisal of the application, it achieves the same outcome as would a requirement that applications can only be made by specified senior officers. In the case of both Acts, the greater level of intrusion into individual privacy which they allow is recognised by the high level of approval needed before an application can be made.

In Chapter Four of this Report the Committee recommended that the required rank for applications for search warrants be standardised to a senior sergeant or above. For search warrants there is no legislative requirement that approval be obtained from a higher ranking officer. Hence, although the initial decision to make an application must be made by a higher ranking officer than is the case under the *Surveillance Devices Act 1999*, because the decision requires no further approval, it is in effect a decision taken by a lower ranking officer.

The Committee did not receive any submissions noting any problems with the current provisions, and believes that the current situation in Victoria should remain. The Committee notes that this inconsistency with the model provisions does not appear to create difficulties for cross border recognition of warrants as indicated by its retention in the *Surveillance Devices (Amendment) Act 2004*.

### **Justification for the warrant**

The law enforcement officer must, on reasonable grounds suspect or believe that:

- an offence has been, is being, is about to be or is likely to be committed, and
- the use of a surveillance device is or will be necessary for the purpose of an investigation into that offence or of enabling evidence or information to be

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<sup>1336</sup> JWG Report, 383-385.

obtained of the commission of that offence or the identity or location of the offender.<sup>1337</sup>

In this provision the factors that the applicant must suspect or believe are equivalent to those contained in the Model Bill. The provision in the *Surveillance Devices (Amendment) Act 2004* specifically provides that the applicant must hold her or his suspicion or belief 'on reasonable grounds', as does the Model Bill. These words are not however included in the current Victorian provisions.

The Model Bill uses the same terminology in section 9 in relation to the issuing officer who must be satisfied that there are reasonable grounds for the suspicion or belief founding the application.

This dual test which specifically refers to a belief or suspicion on reasonable grounds at both the application and issue stages, is arguably redundant as the requirement that the issuing officer be satisfied on reasonable grounds (of the applicants belief or suspicion) would necessitate the applicant being able to convince the issuing officer of her or his reasonable grounds for the suspicion or belief. There would be no substantial difference to the outcome of a decision as long as the test is at least applied at the issuing stage. An advantage however of including the requirement at the application stage could be a reinforcement and reminder to the applicant of the level of belief or suspicion required for the application to succeed.

The *Telecommunications (Interception) Act 1979* in common with the *Surveillance Devices Act 1999* refers to a test of reasonable grounds only at the stage the issue. In that Act the issuing officer must be satisfied that there are reasonable grounds for suspecting (note that belief is not included) that a particular person is using or is likely to use the telecommunication service. This applies the test more selectively than the *Surveillance Devices Act 1999* as it does not require that all the matters which the issuing officer must consider are subject to the test of 'reasonable grounds for suspecting'. For other aspects of the determination of the application the issuing office is required to be 'satisfied on the basis of the information given'.

The *Terrorism (Community Protection) Act 2003* uses the dual test specifying at both the application and issuing stage that a suspicion or belief must be held on reasonable grounds.

The *Surveillance Devices (Amendment) Act 2004* will bring the *Surveillance Devices Act 1999* into line with the provisions of both the Model Bill and the *Terrorism (Community Protection) Act 2003* and the Committee believes that this is appropriate.

Provisions applying to search warrants, covered in Chapter Four of this report, contained a different type of inconsistency, this being between the use of the terms 'belief' or 'suspicion'. The conclusion reached for search warrants was that although

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<sup>1337</sup> *Surveillance Devices (Amendment) Act 2004* s 9, new Part 4, Division 1 s 15(1).

there would be little practical difference in outcomes from the words used, as the majority of the most commonly used existing warrant provisions used a test of belief, this should be adopted as the standard. Hence the *Surveillance Devices Act 1999*, the *Terrorism (Community Protection) Act 2003* and the *Telecommunications (Interception) Act 1979* are all inconsistent with the standard recommended for search warrants, with the first two using belief or suspicion and the *Telecommunications (Interception) Act 1979* referring only to suspicion. A requirement which allows a warrant to be obtained on a suspicion rather than a belief is on its face a less strict requirement. The discussion of this issue in Chapter Four notes however that the difference in practice is minimal.

Consistency in these provisions is complex. In relation to the issue of a test of suspicion or belief, the *Surveillance Devices Act 1999* is consistent with the *Terrorism (Community Protection) Act 2003* and the *Telecommunications (Interception) Act 1979*<sup>1338</sup>, but requires a lower standard than the standard recommended for search warrants.

The Committee accepts that there is little practical difference in outcome associated with the differing wording used. In relation to the state of mind of the applicant, the Committee believes that given the use of the suspicion or belief test in each of the comparable acts, namely the *Terrorism (Community Protection) Act 2003*, the *Telecommunications (Interception) Act 1979* and the Model Bill is appropriate for the use of suspicion or belief to remain in the *Surveillance Devices Act 1999*. This conclusion is reached despite its inconsistency with the standard recommended for search warrants. The Committee believes that there are stronger arguments for consistency with Acts which are designed to cover similar situations, than there are for a consistency with the search warrants provisions in this instance.

### **Offences in relation to which a surveillance warrant may be granted**

A major difference between the *Surveillance Devices Act 1999* and the Model Bill is that the Model Bill provides that an application can be made in relation to a “relevant offence”, while the *Surveillance Devices Act 1999* applies to any offence. This difference is maintained in the *Surveillance Devices (Amendment) Act 2004*, when it is used within Victoria. However, the *Surveillance Devices (Amendment) Act 2004* provisions which allow warrants to authorise installation or use of surveillance devices outside of the Victorian jurisdiction, also precludes the issue of such a warrant if the offence in relation to which the warrant is sought, is not a relevant offence.<sup>1339</sup> A relevant offence is defined in the same terms as in the Model Bill, as:

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<sup>1338</sup> While the TI Act requires only a suspicion, this is a lower standard than belief, and hence would encompass a situation where the applicant held a belief.

<sup>1339</sup> *Surveillance Devices (Amendment) Act 2004* s 13, new Part 5, Division 1 s 31G.

- An offence against the law of this jurisdiction punishable by a maximum term of imprisonment of 3 years or more; or
- An offence against the law of this jurisdiction that is prescribed by the regulations for the purposes of this definition.<sup>1340</sup>

The situation in relation to offence thresholds for surveillance warrants was considered by the JWG in its discussion paper, revealing the following situation (at the time the report was prepared):

- Victoria, Northern Territory, Western Australia and South Australia – any offence
- NSW and Tasmania – indictable offences only
- Queensland – for most devices, a serious indictable offence

The discussion paper noted that while the ‘any offence’ threshold would in theory allow a surveillance device to be used for the investigation of minor offences, that in practice this was not likely to be the case.

The experience to date in those jurisdictions with a similar threshold indicates that, in practice warrants are only sought and issued in connection with more serious offences. This is supported by the fact that the warrant issuer in these jurisdictions must have regard to the nature and gravity of the relevant offence and the extent to which the privacy of any person is likely to be affected before issuing the warrant. ...[this provision] would arguably act as a safeguard against the inappropriate issue of surveillance device warrants for minor offences.<sup>1341</sup>

The JWG received 11 submissions on this point. The threshold of an offence punishable by imprisonment for three years or more, used in the Model Bill was supported by Privacy NSW, Privacy Victoria and the Information Commissioner of the Northern Territory, the latter suggesting listing categories of offences as is done in the *Telecommunications (Interception) Act 1979*. Seven submissions,<sup>1342</sup> including the Victorian Bar and the Criminal Bar Association, recommended a higher threshold either based on the 7 year threshold used in the *Telecommunications (Interception) Act 1979* or a higher 10 year threshold. Victoria Police supported the ‘any offence’ threshold currently used in the Victorian legislation. It is important to keep in mind that these submissions were made in the context of establishing cross-border consistency rather than being comments on the existing Victorian situation.

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<sup>1340</sup> *JWG Report*, 364, Model Bill s 3.

<sup>1341</sup> *JWG Discussion Paper*, 231.

<sup>1342</sup> *Ibid*, 387: these agencies were: Victorian Criminal Bar Association; Victorian Bar; Queensland Government, NSW Council of Civil Liberties, International Commission of Jurists – Australian section; Law Council of Australia; Law Society of NSW.

The Victoria Police submission<sup>1343</sup> noted that they would not support any winding back of the current Victorian provisions. They noted that the 3 year threshold could miss some offences for which they argued surveillance warrants should be available, giving examples of some firearm related offences, and gaming and licensing matters.

The JWG concluded that for the Model Bill they would tread a middle ground between the 7 year threshold used in the *Telecommunications (Interception) Act 1979* and the 'any offence' threshold used in most state legislation. However, they recognised that some specific offences for which it would be desirable to have access to surveillance technology, may be missed by the 3 year threshold and for this reason included the second part of the provision which allowed some offences to be prescribed in regulations. Which offences would be prescribed would be up to the individual jurisdictions.

The Committee notes that in adopting the regime contained in the Model Bill, jurisdictions could by the use of prescribed offences, reach the 'any offence' threshold in a defacto way. It may be preferable to have a clear threshold which reflects the seriousness of the offence. As penalty levels are set with the seriousness of the offence as the major consideration, where the penalty level falls below the threshold this by definition indicates that it is not considered a sufficiently serious offence.

The Committee believes that the similarities between the considerations relevant to the use of telecommunications interceptions and surveillance devices require that consistency between the legislation governing both is desirable unless there is good reason to deviate. Both relate to covert surveillance activities which by their nature involve the most serious incursions into personal privacy rights. The *Terrorism (Community Protection) Act 2003* also has very specific provisions setting out the offences to which it applies.

The Committee received one submission which commented specifically on the issue of thresholds for the issue of a warrant. The Criminal Bar Association of Victoria included the following recommendations in their submission:

The secrecy that attends all stages of the issuing and execution of surveillance device warrants is a matter for concern. Whilst it is understandable that there is a requirement for secrecy, an appropriate balance must be maintained between the use of these devices and the protection of individual rights. This is especially so given the proliferation of surveillance device warrants and the enormous quantity of recorded product that is obtained...The capacity for misuse of warrants is a matter of considerable concern.

To ensure that there is an appropriate balance we make the following recommendations:

- i) The preconditions for the issue of a surveillance device warrant be tightened.

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<sup>1343</sup> Submissions to the JWG are at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

ii) There be greater clarity of the circumstances under which a warrant is required.<sup>1344</sup>

The Committee considered the legislation in NSW and Queensland, both jurisdictions which apply a threshold before a surveillance warrant can be sought.

In NSW the requirement that the matter be an indictable offence<sup>1345</sup> actually provides only a minimal level of protection given that only very minor offences in general remain in the category of summary offence.

In Queensland the threshold for most types of surveillance warrants is that the relevant offence must be a serious indictable offence<sup>1346</sup> which is defined as including:

An offence involving:

- serious risk to, or actual loss of, a person's life;
- serious risk to or actual, serious injury to a person;
- serious damage to property in circumstances endangering the safety of any person;
- serious fraud;
- serious loss of revenue to the State;
- official corruption;
- serious theft;
- money laundering;
- conduct related to prostitution or SP bookmaking;
- child abuse, including child pornography;
- an offence against the *Drugs Misuse Act 1986* punishable by at least 20 years imprisonment;
- an offence against the *Weapons Act 1990* involving the trafficking of weapons or explosives or the unlawful manufacture of weapons.<sup>1347</sup>

In considering these different approaches to threshold offences, the Committee has also been conscious that in an application for a warrant the judicial officer to whom

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<sup>1344</sup> Criminal Bar Association, *Submission no. 12*, 10.

<sup>1345</sup> *Listening Devices Act 1984* s 15.

<sup>1346</sup> *Police Powers and Responsibilities Act 2000* s124.

<sup>1347</sup> *Police Powers and Responsibilities Act 2000* Schedule 4.

the application is made, must consider the nature and gravity of the offence when deciding whether to issue the warrant. This point was raised by the JWG and by Victoria Police. Both identified the judicial consideration of this matter as an appropriate safeguard to prevent the use of surveillance warrants for minor or inappropriate matters.

The Committee agrees that the requirement for surveillance warrants to be issued by a judicial officer is a powerful safeguard against the inappropriate issue of such warrants. However, the Committee considers that the current legislation does not sufficiently reflect the principle that covert warrants should only be available for and issued in exceptional circumstances. The Committee sees no justification for this to apply only to warrant applications which have extra-jurisdictional effect.

The Committee therefore recommends that the *Surveillance Devices Act 1999* be amended to restrict the use of surveillance warrants to specified serious offences. The Committee has noted above that it believes in relation to this issue, the appropriate comparison is with the *Telecommunications (Interception) Act 1979* which limits the availability of warrants to offences which are punishable by a maximum penalty of 7 years imprisonment or more or life. However, this would impose a higher threshold than the Model Bill which uses a three year maximum penalty and the Committee considers that this would be undesirable. The Committee therefore recommends that the three year maximum penalty apply in the *Surveillance Devices Act 1999* to all warrant applications. This would avoid the need to determine in advance which warrants would require extra jurisdictional effect.

The Committee has indicated above that it has some concerns about the Model Bill provision which allows other offences to be included by regulation. However, given the Committee's view that the threshold should be increased from 'any offence' and the comments of Victoria Police that this may miss some important offences, the Committee considers that it would be appropriate to also include this provision which would allow some flexibility for including offences when special circumstances could be demonstrated. This would also achieve consistency with the provisions relating to warrants with extra jurisdictional operation and with the Model Bill.

Recommendation 85. That the *Surveillance Devices Act 1999* be amended to provide that a warrant may only be granted for the use of a surveillance device in relation to a relevant offence which is defined as:

- (a) an offence punishable by a maximum term of imprisonment of three years or more, or for life; or
- (b) an offence that is prescribed by the regulations

## Supporting affidavit

The application must be supported by an affidavit setting out the grounds on which the application is sought,<sup>1348</sup> however the application can be made before an affidavit is prepared if the immediate use of the surveillance device is necessary and the preparation of an affidavit before the application is made would be impractical.<sup>1349</sup> In this case an affidavit must be sent to the judge or magistrate who determined the application, not later than the day following the application. The affidavit must be provided whether or not a warrant was issued.<sup>1350</sup> These provisions are mirrored in the Model Bill apart from the Bill allowing 72 hours for the affidavit to be provided.

## Remote Application

An application may be made by telephone, facsimile or other form of communication, if it is impracticable for the law enforcement officer to apply in person.<sup>1351</sup> This test of impracticability is consistent with the Model Bill provisions but is in contrast to the test used in the *Telecommunications (Interception) Act 1979* and the *Terrorism (Community Protection) Act 2003* which both use urgency as the basis of a telephone application.

In Chapter Four of this Report the Committee recommended that in relation to search warrants, a dual test of urgency and impracticability would ensure that telephone applications remain the exception by requiring applicants to establish why an in person application was not appropriate.

The Committee on the whole believes that in this instance, consistency with the Model Bill is sufficient, due to the desirability of maintaining national consistency of legislation. Hence the Committee makes no recommendation for change.

As an alternative, consideration could be given to the introduction of a dual test of urgency and practicability as the inconsistency created with the Model Bill is not likely to create practical difficulties.

## Public Interest Monitor

A discussion of the desirability of establishing a Public Interest Monitor (PIM) similar to that found in the Queensland *Police Powers and Responsibilities Act 2000* can be found in Chapter Seven of this report in relation to applications for covert warrants

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<sup>1348</sup> *Surveillance Devices (Amendment) Act 2004* s 9, new Part 4, Division 1 s 15(4).

<sup>1349</sup> *Ibid*, s 15(5).

<sup>1350</sup> *Ibid*, s 15(6).

<sup>1351</sup> *Ibid*, s 16.

and will not be repeated here. However, comments raised in the context of the JWG are covered below.

The JWG raised the PIM model in its discussion paper but considered that existing safeguards were sufficient:

Ultimately it will be up to the Judiciary to ensure that it has the necessary information to balance the public interest in law enforcement against the right of individuals to be protected against unjustified police intrusion. The model legislation provides for judicial scrutiny of the warrant application process as well as annual reporting requirements to ensure law enforcement agencies are accountable to the Executive and Parliament with regard to the use of surveillance devices. It is therefore arguable that the PIM role is unnecessary. Another concern about the role is the practicality of having a PIM attend application hearings which can be made at short notice and at any time of the day or night.<sup>1352</sup>

In its final report the JWG noted that it received 6 submissions relating to the PIM model. The Queensland PIM outlined in his submission, the features of surveillance applications which he believed justified the involvement of an independent third party:

- the application for a warrant is made in the absence of the suspected party;
- the issue of the warrant and the identity of the judge who issued it are not disclosed;
- the execution may go undetected by the person against whom, or against whose interests, the warrant is issued;
- there is no return made on the execution of the warrant which permits a determination of its lawfulness, a review of its due execution and a disposition of the fruits of its execution;
- because of the secrecy necessarily involved in applying for and obtaining a warrant, no records are kept that would permit judicial review of a judges decision to issue the warrant (other than the affidavit of the applicant); and
- no reasons are given for such a decision.<sup>1353</sup>

The Queensland Government in their report noted that the PIM allowed for “front end” safeguards rather than relying on “back end” accountability measures such as reporting requirements.<sup>1354</sup>

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<sup>1352</sup> JWG Discussion Paper 247.

<sup>1353</sup> JWG Report, 391-3.

<sup>1354</sup> Ibid, 391.

Victorian agencies who responded to this issue in the JWG Report included the Victorian Ombudsman, Privacy Victoria and Victoria Police. The JWG reports on the comments of the Victorian Ombudsman as follows:

The Victorian Ombudsman also emphasised the critical importance of ensuring the accuracy and objectivity of the contents of affidavits sworn in support of warrant applications. Referring to long standing concerns about process in this area, he recommended “back end” auditing of warrant applications by an external body to increase accountability in this area.<sup>1355</sup>

In evidence to our inquiry the Ombudsman stated that he believed that the current Victorian legislation, which has been amended since the JWG Report, has a number of built-in accountability mechanisms that are efficient:

Under the *Surveillance Devices (Amendment) Act 2004* the Ombudsman has been delegated responsibility for monitoring the use of surveillance devices by Victoria Police... I had some input into the Victorian version of the model provisions and have actually got some greater accountability in terms of reporting direct to the Parliament and the Minister, than is contained in the model provisions.<sup>1356</sup>

He noted that gathering evidence by surveillance devices is a “valuable police tool” and “less risky than relying on evidence of informers and many controlled operations”. He went on to say:

I spoke before about making the stakes too high for police in getting results and making arrests and detecting crime, and I would prefer to allow the legislation to run, perhaps with a sunset clause on it, and for us to report on its workings and then make recommendations based on the facts if it needs to be changed.<sup>1357</sup>

While the Ombudsman does not specifically refer in his comments to a PIM he clearly stated his preference for improvements in back end accountability in the earlier JWG Report. In evidence to our Committee he expressed his view that these concerns have been taken up by recent amendments to the *Surveillance Devices Act 1999*. The accountability mechanisms and reporting requirements referred to here are discussed in more detail later in this chapter.

The Office of the Victorian Privacy Commissioner (OVPC) supported a PIM type system both in its submission to the JWG and its evidence to the current inquiry. In its written submission OVPC recommended that:

It would be desirable for an independent party, perhaps experienced senior counsel appointed for the purpose under statute, to have the opportunity to scrutinise the warrant application, test it

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<sup>1355</sup> Ibid, 393.

<sup>1356</sup> Brian Hardiman, Deputy Ombudsman, *Minutes of Evidence*, 5 November 2004, 302.

<sup>1357</sup> Ibid, 306.

and make arguments to the Court as appropriate about whether the application ought not, in the public interest to be granted.<sup>1358</sup>

In evidence to the Committee, Michelle Fischer of OVPC stated:

The other advantage that the public interest monitor has is that it relieves the court, firstly, of having to advocate the public interest on its own, and secondly, from being drawn further into a police investigation by having to scrutinise all the underlying material, the conduct of the warrant and its effectiveness after the fact. That role is taken over by the public interest monitor, not the court.<sup>1359</sup>

Victoria Police provided the contrary view in both their submissions to JWG and to the Committee. When asked by the Committee to comment on whether a PIM would be appropriate for Victoria, Superintendent Leane stated:

The police perspective is that what the Parliament has asked is for a Supreme Court judge to consider the issues. It is our position that a Supreme Court judge has the capacity to make the balancing decision without the need for further referral to other parties to give him or her advice in regard to the issues. It is always open to the judge to seek that advice if they are unsure.<sup>1360</sup>

In the JWG Report the Victoria Police procedure is summarised as follows:

A specialised unit within Victoria Police prepares warrant applications, including supporting affidavits. These applications are then vetted by the Chief Commissioner's Legal Advisor's Office which is staffed by the Victorian Government Solicitor's Office. A solicitor from the Legal Advisor's Office attends court to make the application.<sup>1361</sup>

Having set out their procedure Victoria Police commented:

This is a significant and credible oversight process. There is no demonstrated need to build in a further aspect.<sup>1362</sup>

The Committee in its deliberations considered that the power to appear in court at the hearing of an application and act as an advocate in the public interest is the most important role of the PIM,<sup>1363</sup> and also the function which could not be carried out by an existing body.

The arguments for such a role focused on the timing of this input to the process, most notably that it came as the application was being considered and could thus

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<sup>1358</sup> Privacy Victoria, *Submission no. 17*, 9.

<sup>1359</sup> Michelle Fisher, Office of the Victorian Privacy Commissioner, *Minutes of Evidence*, 19 October 2004, 177.

<sup>1360</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 216.

<sup>1361</sup> *JWG Report*, 391.

<sup>1362</sup> Victoria Police submission to JWG, 11. Submissions to the JWG are at [www.justice.vic.gov.au/crossborder](http://www.justice.vic.gov.au/crossborder).

<sup>1363</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 159(2)(b).

potentially prevent an unnecessary breach of privacy, rather than merely dealing with the proceeds of the breach. This is referred to above as a front end safeguard. The success of this argument rests on the assumption that the presence of a PIM will bring to the process some additional information, or provide some insights which would not otherwise be available to the judicial officer hearing the application. This is also the essence of the argument which the Queensland PIM provides as justification for the presence of an independent third party at the time the application is determined.

The Committee was not on the whole persuaded that the presence of a PIM would bring significant additional information to the process, and instead agreed with those commentators who noted that the experience and knowledge of the judicial officers hearing these applications was already considerable. The Committee considered the back end safeguards, of monitoring and reporting offered sufficient protection against any potential abuses.

A further argument for a PIM was that the PIM could, by discussions with Police prior to the application reaching court, potentially identify and resolve some problems with the applications, thus saving the courts time. In the opinion of the Committee this argument has more validity, but would not be sufficient in itself to justify the establishment of PIM.

The Committee therefore concludes that it is not necessary for a Public Interest Monitor or equivalent to be part of the surveillance devices regime. It notes however the comments made in Chapter Seven that it would be appropriate when the *Terrorism (Community Protection) Act 2003* is reviewed, for the government to revisit the issue of establishing a PIM or equivalent body. If a decision to establish such a body were made in relation to the *Terrorism (Community Protection) Act 2003*, the Committee considers that it may be appropriate for surveillance warrant applications to also be reviewed by that body.

### **Issue of a warrant**

The Supreme Court may issue any type of surveillance device warrant authorised under the Act, while a Magistrates' Court may issue only a tracking device warrant or a retrieval warrant for a tracking device which it has issued.<sup>1364</sup> This arrangement for who may issue a warrant is the same as that used in the Model Bill. The application will be heard in a closed court.<sup>1365</sup>

The court must be satisfied before issuing a warrant that there are reasonable grounds for the suspicion or belief upon which the application is based. In making this decision the court must have regard to:

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<sup>1364</sup> *Surveillance Devices (Amendment) Act 2004* s 9, new Part 4, Division 1 s 14.

<sup>1365</sup> *Ibid*, s 15(6).

- the nature and gravity of the alleged offence;
- the extent to which the privacy of any person is likely to be affected;
- alternative means of obtaining the evidence or information sought;
- the evidentiary value of any evidence sought;
- any previous warrant sought in connection with the same offence.<sup>1366</sup>

In relation to an application for a retrieval warrant, before issuing the warrant the court must consider the extent to which the privacy of any person is likely to be affected, and the public interest in the retrieval taking place.<sup>1367</sup>

As noted above the Committee believes that the principle that covert warrants should only be available for and issued in exceptional circumstances may not be sufficiently reflected in the current legislation.

Above the Committee has considered two ways in which additional safeguards could be incorporated into the Act. The Committee has recommended imposing a threshold on offences which could attract the use of a surveillance warrant, but did not support the establishment of a Public Interest Monitor to be present when applications for warrants are made.

As an additional or alternative safeguard, the Committee considered a proposal that the first matter which the issuing officer would be required to consider when assessing an application for a warrant, would be the fact that the issuing of a surveillance device warrant should always be reserved for special circumstances and that for other than a serious indictable offence, should occur only in exceptional circumstances.

This proposal was put to the JWG in a submission by the Criminal Bar Association of Victoria. Their submission was adopted by the Victorian Bar, the Law Council of Australia and the Law Society of New South Wales. The submission states:

It is noted that the “seriousness of the offence” is one of the matters which a Judge must take into account when deciding whether or not to issue a warrant. It is submitted that the issuing of a surveillance warrant other than in the case of a serious indictable offence should be exceptional and that any legislation should make specific provision to that effect.<sup>1368</sup>

The Committee has noted above the more general recommendations made by the Criminal Bar Association in their submission to our inquiry. These are that the

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<sup>1366</sup> Ibid, s 17.

<sup>1367</sup> Ibid, s 20E(2).

<sup>1368</sup> Criminal Bar Association submission to JWG, 28.

preconditions for the issue of a surveillance device warrant be tightened and that there be greater clarity of the circumstances under which a warrant is required.

The Committee did not receive other submissions on this particular point of articulating in the Act that surveillance warrants for other than serious indictable offences should be issued only in exceptional circumstances. It was not a specific proposal in the discussion paper nor did it arise in public hearings. However, the general issue of tightening the situations in which surveillance warrants are issued was raised.

As noted above the Committee considers that the knowledge and experience of the judicial officers making the decisions in these applications is considerable. The insertion of this provision would make the intention of Parliament clear in relation to surveillance warrants. This is that the Parliament wishes to confine their use to serious matters which can justify the considerable abrogation of personal privacy that such a warrant allows. It will then be the task of the judicial officer to consider the application with the knowledge of this clearly articulated purpose.

The Committee is aware that this provision does not appear in the Model Bill but does not consider that its incorporation into Victorian legislation would represent a substantial departure from the Model bill, nor would it affect potential mutual recognition of warrants between state jurisdictions.

The Committee therefore recommends that the *Surveillance Devices Act 1999* section 17(2) be amended in this way. The Committee notes that the necessity for this provision may depend on whether or not Recommendation 85 is implemented. If no threshold is placed on the seriousness of the offence in relation to which an application for a surveillance device can be made, the importance of this recommendation will increase. As the current 'any offence' provision places the *Surveillance Devices Act 1999* at odds with the Model Bill and the *Telecommunications (Interception) Act 1979*, the inclusion of an alternative safeguard which acts to restrict surveillance device warrants predominantly to serious offences would have the effect of promoting consistency of outcome.

Recommendation 86. That the *Surveillance Devices Act 1999* section 17(1) be amended by adding the following provision:

*“(d) in the case of an application for a warrant relating to an offence other than a serious indictable offence - that exceptional circumstances exist.”*

## Content of a warrant

The *Surveillance Devices (Amendment) Act 2004* will replicate the Model Bill provisions in relation to the content of the warrant. The warrant must state that the judge or magistrate is satisfied of the matters referred to in section 17(1) and has had regard to the matters referred to in section 17(2). It must specify:<sup>1369</sup> the name of the applicant; the alleged offence; the date of issue; the kind of device authorised and other details depending on the type of device to be used; the name of the law enforcement officer primarily responsible for executing the warrant; any specific conditions; and the time within which a report must be made to the judge or magistrate.

In addition it must specify the period not exceeding 90 days,<sup>1370</sup> during which the warrant will be in force

In relation to a telephone or facsimile warrant the court must inform the applicant of the terms of the warrant and the date and time of issue. These particulars must be recorded in a register at the court, and the court must provide a copy of the warrant to the applicant as soon as practicable.<sup>1371</sup>

The provisions in the *Surveillance Devices Act 1999* are similar to the provisions in the *Surveillance Devices (Amendment) Act 2004*, with the following main exceptions:

- the provisions do not require a recital stating that the judge or magistrate is satisfied of the relevant matters and has had regard to the relevant matters;
- there is no requirement to name the applicant;
- there is a requirement that the name of any law enforcement officer who may use the device be listed (the *Surveillance Devices (Amendment) Act 2004* requires only the name of the law enforcement officer primarily responsible for executing the warrant).

The issue of the naming of any law enforcement officers who will execute the warrant was considered in the JWG Report which noted that this requirement only applied to NSW and Victoria. The JWG asked for comment on whether this requirement may be too onerous where a large number of personnel may, for example, need to use a surveillance device. The JWG received three responses to this question. The NSW Police Service submitted that the requirement was too onerous, while Privacy Victoria

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<sup>1369</sup> *Surveillance Devices (Amendment) Act 2004* s 9, new Part 4, Division 1 s 18.

<sup>1370</sup> *Ibid*, s 18.

<sup>1371</sup> *Ibid*, s 18(4).

stated that the requirement should remain in Victoria. The Criminal Bar Association of Victoria took a middle ground as follows:

There would appear to be good reason for establishing the precise identities of persons installing and operating devices, however, it would appear to be unduly restrictive to require, for example that the warrant should nominate each person who is entitled to receive signals from a tracking device or listen to or watch conversations or events monitored.<sup>1372</sup>

This point was not one about which the Committee received evidence during its inquiry. The Committee notes that the *Surveillance Devices (Amendment) Act 2004* approach of requiring the name of only the law enforcement officer primarily responsible for executing the warrant, is coupled with a requirement that a report to the court on the execution of a warrant must name each person involved in its execution. This appears to the Committee to offer an appropriate safeguard.

### **Duration of the warrant**

The Committee received a submission from the Criminal Bar Association which recommended that the duration of the warrant be reduced from 90 days to 30 days. This was one of a number of recommendations which they made on the basis that the capacity for misuse of surveillance device warrants required additional safeguards.<sup>1373</sup>

This matter was considered by the JWG which included the 90 day period in the Model Bill. The JWG noted that 90 days was consistent with the *Telecommunications (Interception) Act 1979*, and with legislation in Victoria, NT, WA and SA. In NSW the period is 21 days and in Queensland 30 days. The JWG expressed the view that the 90 day period was a middle ground which allowed sufficient time for the surveillance to take place and also for the device to be retrieved. They commented:

There are operational reasons why a 21 or 30 day period is arguably not long enough to effect covert entry, installation of devices, the carrying out of the surveillance to achieve the purpose for which the warrant was issued, and the removal of equipment... For example, entry and installation may be delayed if the premises are occupied and the officers involved in the operation have to wait until an appropriate time to covertly install the device. The experience under regimes with a 21 day period is that police are usually obliged to return to the court for extensions. This can waste the police and court resources and may impact negatively on the investigation.<sup>1374</sup>

When the New South Wales Law Reform Commission considered their 21 day period recently, they concluded that 30 days would provide an appropriate compromise.

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<sup>1372</sup>Criminal Bar Association submission to JWG, 29.

<sup>1373</sup> Criminal Bar Association, *Submission no. 12*, 10.

<sup>1374</sup> *JWG Report*, 257.

This extension [from 21 days] strikes a reasonable balance between an unrealistically short time-frame on the one hand and unnecessary invasions of privacy on the other. A term longer than this, for example 90 days...weakens the high degree of accountability which covert surveillance requires and which a shorter timeframe secures. It also encroaches on justifiable levels of intrusion into the privacy of individuals. A provision allowing the eligible judge to issue further warrants in respect of the same operation would address any need for further time to achieve the object of the surveillance activity... [T]he proposed Surveillance Act should provide that further warrants, each not exceeding a period of 30 days, would require a fresh application. This will enable the eligible judge to scrutinise whether the extension of the surveillance is appropriate in the circumstances.<sup>1375</sup>

When the Committee considered this issue in relation to search warrants in Chapter Four of this Report it recommended that warrants expire after 7 days unless a case has been made out for a longer period which may be up to 30 days. Where the warrant is issued via a telephone application, the Committee recommended that the warrant remain valid for 24 hours only. In the *Terrorism (Community Protection) Act 2003* a warrant may remain valid for 30 days. This is substantially consistent with the recommended standard which would allow a period of up to 30 days where this can be justified. A warrant which could be sought under the *Terrorism (Community Protection) Act 2003* is likely to satisfy this criteria.

By contrast both the *Surveillance Devices Act 1999* and the *Telecommunications (Interception) Act 1979* allow a warrant to remain in force for a maximum of 90 days, and this applies also to telephone warrants. One clear justification for longer periods of validity for a surveillance device and a telephone interception warrant is that the execution will take place over a longer period of time. While a search warrant execution will take only the time necessary to search the premises, telephone interception and surveillance device warrants are granted in order to collect material over what may be an extended period of time.

The Committee was not persuaded by the arguments to reduce the maximum period. It notes that if the issuing officer felt that a shorter time was appropriate this restriction could be imposed. The Committee concluded that the current 90 day period, which is consistent with the *Telecommunications (Interception) Act 1979*, and the position in a number of other state jurisdictions, is appropriate, and therefore makes no recommendation for change.

### **Extension and variation of a warrant**

The *Surveillance Devices (Amendment) Act 2004* replicates the provision in the Model Bill for extension and variation of surveillance device warrants.

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<sup>1375</sup> New South Wales Law Reform Commission, *Surveillance: An interim report* (February 2001), 237-8.

An application for extension or variation can be made at anytime before the expiry of the warrant and can request an extension not exceeding 90 days.<sup>1376</sup> An application under the section can be made more than once. The requirements which must be met are essentially the same as those required for the original application to be granted. The *Telecommunications (Interception) Act 1979* does not include provision for extension or variation, however there is no prohibition on reapplication. There would therefore appear to be no substantial difference in the two approaches. There were no submissions from stakeholders which dealt in any depth with this issue, however one submission which could relate to the issue of extension is discussed below.

### **Revocation and discontinuance of a warrant**

Provisions for revocation and discontinuance are also very similar in the *Surveillance Devices (Amendment) Act 2004* and the Model Bill. An obligation is placed on the law enforcement officer to whom the warrant is issued to inform the chief officer of the law enforcement agency if the warrant becomes unnecessary.<sup>1377</sup> The chief officer if satisfied that this is the case, must take steps to ensure the warrant is revoked. This is similar to provisions in the *Telecommunications (Interception) Act 1979*.<sup>1378</sup>

Victoria Legal Aid raised the issue of the need for review of the continuing relevance of surveillance device warrants:

VLA is of the view that legislation should require review of surveillance warrants by the court to consider whether continuing surveillance is justified.<sup>1379</sup>

It is not clear whether an ongoing review role is suggested here or whether the review would be upon an application for extension of an existing warrant. In relation to ongoing review the Committee believes that the provision outlined above which requires the relevant law enforcement officer to monitor the ongoing necessity of the device is an appropriate safeguard.

In relation to an extension, the Criminal Bar Association also made a recommendation that:

Prior to there being an extension of an existing warrant, justification for the extension should be demonstrated from the product previously recorded.<sup>1380</sup>

The Committee notes the discussion above in relation to an extension of a warrant. The existing provisions cover the same requirements as those which must be met

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<sup>1376</sup> *Surveillance Devices (Amendment) Act 2004* s 9, new Part 4, Division 1 s 20.

<sup>1377</sup> *Ibid*, s 20B.

<sup>1378</sup> *Telecommunications (Interception) Act 1979*, s13.

<sup>1379</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence*, 19 October 2004, 195.

<sup>1380</sup> Criminal Bar Association, *Submission no. 12*, 10.

when an application is being brought for the first time. Again the Committee believes that the current provisions are adequate and appropriate. The Committee does not agree that previously recorded product must be sufficient on its own to justify the extension. Rather the Committee considers the existing provisions would allow the issuing officer to give the appropriate weight to the value of the previously recorded product.

### **Authority of the warrant**

In relation to particular types of warrants, the particular activities authorised are set out the *Surveillance Devices (Amendment) Act 2004*, in what will become section 19 of the amended *Surveillance Devices Act 1999*.

The installation, use, maintenance and retrieval of the device, or any enhancement equipment, is the basic authority provided. A number of specific activities are then authorised which would allow for installation, use, maintenance or retrieval. These include such activities as the breaking open of any thing; the connection of the device to an electrical supply or a telephone system, and the use of the electricity or telephone system; the temporary removal of a vehicle or other object from the premises to install etc a device; and the entry by force if necessary onto the premises or specified premises adjoining or providing access to the premises.

These provisions are similar to the provisions in the Model Bill. The provisions were largely uncontentious in the development of the Model Bill although there was some discussion about the need to allow for the installation of a surveillance device on a person, meaning on the clothes of a person. Problems arose where the warrant was required to specify the object to which the device would be attached, as it was not always possible to specify a particular item of clothing. Victoria Police in their submission to JWG noted that it was through their involvement that this issue was included in the discussion paper. They preferred an explicit provision permitting installation of a surveillance device on a person without that person's knowledge.<sup>1381</sup>

The JWG concluded that provisions which allowed warrants to be issued in relation to a specified *class* of objects would overcome this problem. This provision appears in the Model Bill and in the *Surveillance Devices (Amendment) Act 2004*.

The Model Bill contains a provision which allows a surveillance device warrant to authorise the doing of anything reasonably necessary to conceal the fact of its installation, use, maintenance or retrieval.<sup>1382</sup> This provision has been included in the *Surveillance Devices (Amendment) Act 2004*.

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<sup>1381</sup> Victoria Police submission to JWG, 12.

<sup>1382</sup> *JWG Report*, 410, Model Bill, clause 11(4)

A requirement that the surveillance device may only be used by a law enforcement officer in the performance of his or her duty is contained in both the *Surveillance Devices Act 1999* and the Model Bill. The *Surveillance Devices Act 1999* also contains an additional safeguard which requires that a law enforcement officer proposing to execute a warrant must have authority in writing from the relevant senior law enforcement officer (who authorised the application for the warrant) before doing so<sup>1383</sup>, however this provision has not been included in the *Surveillance Devices (Amendment) Act 2004*.

## Emergency authorisations

In some emergency situations a surveillance device can be used without a warrant. Although this does not initially involve a warrant, when an application is made to the court for approval of the emergency authorisation, the judge may at that time if approval is given for the authorisation, issue a warrant for the continued operation of the device. Applications for emergency authorisations cannot be made by the Department of Primary Industries or the Department of Sustainability and Environment.

The provisions of the *Surveillance Devices (Amendment) Act 2004* are the same as the Model Bill in most respects.

A law enforcement officer makes an application to a senior officer of the agency, orally, in writing, by telephone, facsimile or other form of communication.<sup>1384</sup> The law enforcement officer must suspect or believe on reasonable grounds that:<sup>1385</sup>

- there is an imminent threat of serious violence to a person, or substantial damage to property; and
- the use of a surveillance device is immediately necessary for the purpose of dealing with the threat; and
- the circumstances are so serious and the matter is of such urgency that the use of the surveillance device is warranted, and
- it is not practicable in the circumstances to apply for a warrant.

The authorisation may then be given by the senior officer, if s/he is satisfied that there are reasonable grounds for the suspicion or belief on which the application is

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<sup>1383</sup> *Surveillance Devices (Amendment) Act 2004* s 9, new Part 4, Division 1 s 18(5).

<sup>1384</sup> *Surveillance Devices (Amendment) Act 2004* s 10, new Part 4, Division 3 s 26.

<sup>1385</sup> *Ibid.*

founded.<sup>1386</sup> The authorisation can authorise anything which a warrant could authorise.<sup>1387</sup>

The Victorian legislation also contains provisions for obtaining emergency authorisations in relation to serious drug offences.<sup>1388</sup> The inclusion of these provisions was suggested to the JWG by Victoria Police. The JWG decided against their inclusion in the Model Bill, but without providing any discussion of their reasons. The Committee notes that these provisions have been included in the *Surveillance Devices (Amendment) Act 2004* and the departure from the Model Bill is thus perpetuated. Whilst this issue has been recently considered in the context of the amending act, the Committee believes that it is an issue which should be kept under review.

The emergency authorisation is an extreme measure which allows significant invasions of privacy without the oversight of a judicial officer in the first instance. This is reflected in the general provisions which refer only to situations where there is an imminent threat of serious violence to a person or substantial damage to property. The use of the device must be so urgent that a remote application cannot be made.

The Committee has some concerns that the equivalent provisions relating to a serious drug offence require no such threat to persons or property but instead rely on the nature of the offence. The Committee considers that the general provisions provide the appropriate level of emergency and is of the view that only when this level has been reached should a drug related offence qualify for an emergency authorisation. The Committee recommends that this issue be the subject of ongoing review to establish whether there is sufficient justification for the continuing inclusion of the provision which relates solely to drug offences.

**Recommendation 87.** That the Government continues to review the use of the provision in the *Surveillance Devices Act 1999* which allows an application for an emergency authorisation in relation to serious drug offences, to establish whether there is sufficient justification for the continuing inclusion of the provision.

Within two business days after giving the authorisation the senior officer must apply to a Supreme Court judge for approval of the exercise of the powers under the authorisation.<sup>1389</sup> The judge must then consider the appropriateness of the authorisation and is particularly required to be “mindful of the intrusive nature of using a surveillance device”. If s/he is satisfied on reasonable grounds of the necessity for

<sup>1386</sup> Ibid, s 26(3).

<sup>1387</sup> Ibid, s 26(4).

<sup>1388</sup> Ibid, s 27.

<sup>1389</sup> *Surveillance Devices (Amendment) Act 2004* s 10, new Part 4, Division 3 s 28.

the authorisation, the application can be approved, and the judge may issue a warrant for the continued use of the device.<sup>1390</sup> If not approved the judge may order that the use of the device cease and that the device be retrieved.

In the last three reporting years only Victoria Police has applied for emergency authorisations and the numbers remain small.<sup>1391</sup> All applications have been granted.

### Dealing with the records obtained

Each chief law enforcement officer,<sup>1392</sup> has a responsibility to deal appropriately with the information obtained. Every record or report obtained must be kept in a secure place and not accessible to those not entitled to deal with it.<sup>1393</sup> The records or reports must be destroyed when the chief officer is satisfied that they are not longer required for various purposes authorised by the Act – in general in connection with the investigation or prosecution of an offence, the making of a decision of whether to prosecute, or any disciplinary proceedings.<sup>1394</sup>

Barrister Brain Walters SC raised three practical issues associated with the large volume of material collected by surveillance devices, and with telecommunications interception. The amount of material can be substantial and could include large quantities of material which are not related to the investigation. The three issues are:

- no comprehensive audit process exists for assessing the information collected;
- police may vet information and withhold parts of the record;
- the possible loss of legal professional privilege.

Mr Walters told the Committee:

Material is being obtained and police are doing the best they can, often with vast amounts of material. If you have seen the volume of intercepts in a drug trail for example you would know we are talking about folders and folders of transcripts, and that is just what is considered

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<sup>1390</sup> Ibid, s 30.

<sup>1391</sup> Victoria Police applied for four such authorisations in 2002 and three each in 2003 and 2004.

<sup>1392</sup> *Surveillance Devices Act 1999* s 3: “chief law enforcement officer” means, depending on the agency whose law enforcement officer was issued the warrant, the Chief Commissioner of Police, the Chief Executive Officer of the Australian Crime Commission, the Director of the Office of Police Integrity, or in relation to an authorised officer within the meaning of the *Conservation, Forests and Lands Act 1987*, the person who appointed the authorised officer under the Act .

<sup>1393</sup> *Surveillance Devices (Amendment) Act 2004* s 13, new Part 5, Division 31 s 30H.

<sup>1394</sup> Ibid.

relevant. There is a whole lot of other stuff. No-one is actually auditing it. In relation to ... listening devices... there should be some kind of audit that people can trust.<sup>1395</sup>

A related issue is the preliminary vetting of the material by police. Mr Walters provides an example:

...[Y]ou may have a listening device in a premises and you are looking for conversations which will give evidence or lead you to believe that there is a conspiracy to traffic drugs or something of that nature. It is very important as defence counsel that you have all the conversations, because often a pattern is being relied on to give meaning to certain words in various contexts. But here is one thing that can happen and has happened in one case. Police said, 'No we will not give you this, this and this phone conversation'. When asked why, they said, 'It is a private matter.'

When pressed it turned out that the wife of the suspect was having an affair with somebody else and this would have impinged on her privacy. One cannot criticise the police for taking that view – that is appropriate - but on the other hand why should I trust them and why should I have to trust them, because it is just possible that there is something that would be really valuable. On the other hand why should I be placed in the position of having to tell my client as a duty of disclosure that his wife was having an affair with someone else?<sup>1396</sup>

A further related issue raised by Mr Walters SC is the potential loss of legal professional privilege when conversations are recorded.

The first requirement of legal professional privilege is that the communication concerned is confidential. ...

The reason I raise that is that of course there is a serious argument that conversations between solicitor and client in the course of surveillance would give rise to the loss of privilege unless Parliament said 'No this material is to be treated as confidential for the purposes of the protection of privilege.' So we think there is a difficulty with privilege generally in relation to warrants, but in relation to surveillance devices and particularly listening devices where no-one who is party to the conversation knows what is happening, it is an issue that, at the moment, is not protected. ...

I think that is a long-term problem for the law. Increasingly it is important that police have the power to use technological means to deal with crime, and the concomitant of that is providing the appropriate protection. Obviously the product should be regarded as confidential at least until such time as it is tendered in court.<sup>1397</sup>

The Committee did not receive other submissions on these related issues. However, they raise some important problems which appear not to have been dealt with adequately to date. When asked who could provide the oversight of material, Mr

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<sup>1395</sup> Brian Walter SC, Liberty Victoria, *Minutes of Evidence*, 19 October 2004, 189.

<sup>1396</sup> Ibid.

<sup>1397</sup> Ibid 185-6.

Walters suggested that a magistrate issuing the warrant may be the appropriate person in relation to the first two issues raised. Mr Walters comments focus on the need for oversight to be provided by a person other than the trial judge as he notes that:

..often it will be material that will be completely prejudicial or otherwise irrelevant to what is already a complex task.<sup>1398</sup>

The Committee has dealt in Chapter Six with the requirement relating to search warrants, for things seized to be taken before the court. This is seen as an important accountability measure and the Committee recommends that it remain in place. The material recorded by surveillance devices is not required to be delivered to the court, but its use must be described to the court<sup>1399</sup> and the court may make an order that the information be dealt with in specified ways.<sup>1400</sup>

The difference between these two types of evidence is that while the physical delivery of material seized under a search warrant will generally allow its identification, the general description of material produced by surveillance will not identify its content. For objects, it is generally reasonable clear what they are and this is sufficient. For records, and this would apply equally to records seized under a search warrant, the content is the critical issue and this cannot be determined without reading or otherwise accessing the information.

To date there has been no requirement placed on courts to audit the material received. In practical terms this is entirely understandable. In Chapter Six the Committee heard that the requirement to sight seized items is already proving onerous for the Magistrates' Court.

While the issues raised here indicate a significant problem, the Committee received no other evidence relating to this point, nor did it receive any suggestions for ways to deal with the problem. It would seem that many of the issues could be resolved by an audit of the material being undertaken by an independent person who could determine what material is irrelevant/private and what should be excluded as privileged material. However for this to be done properly it would need to be done by a judicial officer. There would be obvious and significant resource implications in establishing such a system of audit.

Consequently although the Committee recognises the problems, it cannot conclude on the evidence before it that the very resource intensive requirement for all material to be fully audited by a judicial officer is currently justified. The Committee believes that this matter should be the subject of further assessment of the extent of the

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<sup>1398</sup> Ibid. Note that while a magistrate can issue a tracking device warrant, only a Supreme Court judge can issue the other types of warrant authorised under the Surveillance Devices Act 1999.

<sup>1399</sup> *Surveillance Devices (Amendment) Act 2004* s 13, new Part 5, Division 2, s30K.

<sup>1400</sup> Ibid.

problem by the Government though consultation with relevant stakeholders. The Committee notes that the Criminal Bar Association would be well placed to survey its members on their views of the extent of the problem, and any suggestions for overcoming the current deficiencies, providing an important resource for the Government's future deliberations.

### **Admissibility of improperly or illegally obtained evidence**

Two witnesses raised with the Committee the issue of the admissibility of evidence obtained improperly by the use of a surveillance device. In Chapter Six the Committee considered the issue in relation to warrants generally and concluded that the provisions of the uniform Evidence Act should be introduced. These provisions would reverse the onus of proof as it rests under common law, to place the onus of establishing the admissibility of evidence onto the prosecution.

The Criminal Bar Association distinguishes evidence obtained by use of a surveillance device as requiring a stricter regime of exclusion when obtained illegally, than is the case generally. Commenting that in only a very few cases is evidence excluded using the current common law discretion, the CBA continues:

This is primarily because the onus of establishing the necessary criteria for exclusion rests on an accused who forensically is in a position of disadvantage. This is especially so with respect to evidence obtained under a surveillance device warrant where the circumstances of its issue and its use is often protected by claims of public interest immunity.

Accordingly we recommend the adoption of provisions similar to s 77 of the *Telecommunications (Interception) Act 1979* (Cth) which renders illegally intercepted communications inadmissible in Court.

Alternatively at the very least illegally recorded material should be rendered inadmissible subject to the establishment by the prosecution of exceptional circumstances justifying its reception.

The benefit of such a variation to the common law position is as follows:

- i) It helps redress the imbalance that presently exists by virtue of the secrecy and lack of scrutiny that shrouds the use of these devices;
- ii) It places an onus on law enforcement officers to ensure that the conditions governing the use of these devices are strictly complied with.<sup>1401</sup>

Barrister Brian Walters SC agreed with the CBA submission.

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<sup>1401</sup> Criminal Bar Association, *Submission no. 12*, 12.

Surveillance device warrants are readily capable of misuse. The certainty that evidence would be excluded if any short cuts are taken would provide a strong and needed incentive to ensure compliance.<sup>1402</sup>

In evidence to the Committee the CBA continued to draw on the similarities in circumstances of telecommunication interception warrants and surveillance device warrants and argued for a consistency of approach to illegally obtained evidence on this basis:

In relation to surveillance devices we can see no reason why the same sort of regime that exists ... in part 8 of the *Telecommunications (Interception) Act 1979* should not also be adopted in relation to surveillance devices, given the particular nature of that sort of coercive power and the exercise of that power.<sup>1403</sup>

The JWG did not address the issue of illegally obtained evidence in its report, and the *Surveillance Devices Act 1999* and amending Act have also not addressed the issue. Unlike the *Telecommunications (Interception) Act 1979* which prohibits use of any information recorded by telecommunication interception except in accordance with the Act, the Model Bill and *Surveillance Devices (Amendment) Act 2004* prohibit the use of 'protected information' which is defined as information obtained from the use of a surveillance device under a warrant or emergency authorisation. Evidence obtained illegally would arguably be evidence not obtained under a warrant and therefore outside of the Act's regulation.

The Committee's recommendation in Chapter Six to adopt the provisions of the uniform Evidence Act to reverse the onus in relation to illegally obtained evidence, if implemented, will go some way to overcoming the disadvantage which a defendant would currently suffer in attempting to exclude illegally obtained evidence in relation to evidence covertly collected in circumstances about which the defendant will know very little. Some evidence may however still be admissible under the provisions of the uniform Evidence Act where the prosecution can prove their case for admission.

The Committee considers that the logic which excludes any illegally obtained evidence obtained by telecommunication interception applies equally to evidence obtained through a surveillance device. The agencies which exercise the powers to covertly obtain evidence must be subject to strict compliance regimes if the public is to retain its confidence in those agencies' ability to protect the public's interest. Given the lack of opportunity for public scrutiny, any situation which retrospectively legitimises the inappropriate use of covert powers is likely to undermine such public confidence.

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<sup>1402</sup> Brain Walters SC, *Submission no. 36*, 2.

<sup>1403</sup> Stephen Shirrefs SC, Criminal Bar Association, *Minutes of Evidence*, 19 October 2004, 165.

In addition to its belief that there are good public policy grounds for excluding illegally obtained evidence in this situation, the Committee is confident that the exclusion of illegally obtained evidence will be an issue in only a small minority of cases.

The Committee recommends that the *Surveillance Devices Act 1999* be amended to specifically make inadmissible evidence illegally collected by a surveillance device.

Recommendation 88. That the *Surveillance Devices Act 1999* be amended to specifically make inadmissible evidence illegally collected by a surveillance device without a properly authorised warrant.

### Reporting to the Court

The *Surveillance Devices (Amendment) Act 2004* contains the same provision as the Model Bill in relation to reporting to the Court. Section 30K of the Act requires that a person to whom a warrant is issued, provide a report to the court within the time specified in the warrant.<sup>1404</sup> The report must state whether or not a surveillance warrant was used and if it was:

- state the name of each person involved in the execution of the warrant;
- state the kind of the surveillance device used;
- state the period during which the device was used;
- state the name, if known, of any person whose conversations or activities were overheard, recorded, monitored, listened to or observed by the use of the device;
- state the name, if known, of any person whose geographical location was determined by the use of a tracking device;
- give details of any premises on which the device was installed, or any place at which the device was used;
- give details of any object in or on which the device was installed, or any premises where the object was located when the device was installed;
- give details of the benefit to the investigation of the use of the device and of the general use made or to be made of any evidence or information obtained by the use of the device;
- give details of the compliance with the conditions if any to which the warrant was subject.

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<sup>1404</sup> *Surveillance Devices (Amendment) Act 2004* s 113, new Part 5, Division 2 s 30K.

Where a warrant is extended or varied, the report must state the number of extensions or variations, and the reasons for them. The Committee received no evidence addressing this reporting requirement.

### Notice to the Target

The Office of the Victorian Privacy Commissioner suggested that a provision should be included in the *Surveillance Devices Act 1999*, requiring that notice be given to the subject of surveillance, after surveillance is completed, unless there is a reason not to.<sup>1405</sup>

In relation to this issue, the JWG agreed to amend the model bill to include a provision which allowed a judge or magistrate to make orders following the receipt of a report. The provision provides as follows:

On receiving a report, the judge or magistrate may order that any information obtained from or relating to the execution of the warrant or any record of that information be dealt with in the way specified in the order.<sup>1406</sup>

This provision has been included in the *Surveillance Devices (Amendment) Act 2004*.<sup>1407</sup> While this would allow a target to be notified it does not place an obligation on the court to notify unless there is a justifiable reason not to.

In Chapter Seven the Committee considered whether, in appropriate cases, after a covert search had been undertaken under the *Terrorism (Community Protection) Act 2003*, the target of the search or the occupier of the searched premises should be notified that the search took place. This would occur only where it would not prejudice an investigation, or the safety of any person. While making no specific recommendation the Committee suggested that the matter should be considered further in an upcoming review of the legislation. The discussion contained in Chapter Seven (which includes discussion of equivalent NSW legislation which requires notice to the target) is applicable also to surveillance device warrants and telecommunication interception warrants. It has also been noted that equivalent legislation in Canada does provide for the notification of 'innocent persons', and that this obligation has not apparently proved to be unduly onerous.<sup>1408</sup>

The Committee has noted that this is an issue which should be kept under review in relation to the *Terrorism (Community Protection) Act 2003* and would suggest that if that Act is amended subsequent to the review (to be undertaken by 30 June 2006) the

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<sup>1405</sup> Michelle Fisher, Office of the Victoria Privacy Commissioner, *Minutes of Evidence*, 19 October 2004, 175.

<sup>1406</sup> *JWG Report*, 480, Model Bill subclause 34(4).

<sup>1407</sup> *Surveillance Devices (Amendment) Act 2004* s 13, new Part5, Division 2 s 30K(4).

<sup>1408</sup> Simon Bronnit, *Electronic Surveillance, Human Rights and Criminal Justice*, (1997) 3(2) AJHR 183, referring to *Criminal Code 1985 (Canada)* s196.

*Surveillance Devices Act 1999* should similarly be amended to impose an obligation to report unless a case is made out to the court for the waiver or delay of this obligation.

## Record Keeping

The *Surveillance Devices (Amendment) Act 2004* introduces some additional record keeping requirements. In the Second Reading Speech the Attorney-General noted these:

... the bill obliges law enforcement agencies to keep detailed records, including a register of warrants and emergency authorisations, and details of the way the agencies use, communicate and eventually destroy information obtained from surveillance devices.<sup>1409</sup>

The provisions include the requirement that a register of warrants and emergency authorisations be maintained.<sup>1410</sup> This is similar to the requirements in the *Telecommunications (Interception) Act 1979*. The Criminal Bar Association recommended that such a regime be incorporated into the *Surveillance Devices Act 1999* in its submission which predated the *Surveillance Devices (Amendment) Act 2004*. The Committee believes the amendments have addressed this issue.

## Ombudsman's Role in Monitoring

The *Surveillance Devices (Amendment) Act 2004* will incorporate a new monitoring function for the Ombudsman into the *Surveillance Devices Act 1999*. The Ombudsman will be required to inspect the records of an agency to determine the extent of compliance with the Act.<sup>1411</sup> To undertake this role the Ombudsman may, with notice, enter at any reasonable time the premises of an agency and is entitled to full and free access to all relevant records of the agency.<sup>1412</sup> The Ombudsman must report to Parliament at six monthly intervals on the results of these inspections.<sup>1413</sup>

These provisions are not as specific as the equivalent provisions contained in the *Telecommunications (Interception) Act 1979*.<sup>1414</sup> The *Terrorism (Community Protection) Act 2003* has no equivalent role for the Ombudsman.

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<sup>1409</sup> Rob Hulls, Attorney-General, *Surveillance Devices (Amendment) Bill, Second Reading Speech*, 1 April 2004, 537.

<sup>1410</sup> *Surveillance Devices (Amendment) Act 2004* s 13, new Part 5, Division 2 s 30O.

<sup>1411</sup> *Surveillance Devices (Amendment) Act 2004* s 13, new Part 5, Division 3 s 30P.

<sup>1412</sup> *Ibid.*

<sup>1413</sup> *Ibid.*, s 30Q.

<sup>1414</sup> *Telecommunications (Interception) Act 1979*, Part 3.

The Criminal Bar Association submission, made before the *Surveillance Devices (Amendment) Act 2004* was enacted, recommended that:

The agency to whom the warrant is issued be required to report to the issuing officer and/or the Ombudsman on the nature and quantity of the product recorded under the warrant.<sup>1415</sup>

The Office of Police Integrity submission, received after the *Surveillance Devices (Amendment) Act 2004* was enacted, stated that the recommendation had largely been overtaken by events, namely the new monitoring function of the Ombudsman.<sup>1416</sup>

In addition the *Surveillance Devices (Amendment) Act 2004* has extended the matters upon which an officer to whom a warrant is issued must report to the court, including the requirement to give details of the benefit to the investigation of the use of the device and of the general use made of any evidence or information obtained by the use of the device.<sup>1417</sup>

### **Penalties for breach of the Act**

The Criminal Bar Association also recommended that the penalties for breaching the *Surveillance Devices Act 1999* be increased without specifying what increase they would consider appropriate.<sup>1418</sup>

The *Surveillance Devices (Amendment) Act 2004* does increase the penalties for breach in certain circumstances. The use, communication or publishing of protected information will carry a maximum penalty of 2 years imprisonment which is the same as the equivalent provision in the *Surveillance Devices Act 1999*. However, the amending act will include a new provision which will carry a maximum penalty of 10 years imprisonment. This will apply where the breach is done with the intention of endangering the health or safety of any person, or prejudicing the effective conduct of an investigation into an offence. The same penalty applies where the act is done with knowledge that, or recklessness as to whether, that outcome will eventuate.

The Committee considers that these new penalty provisions are appropriate.

### **Annual Reports**

Again the *Surveillance Devices (Amendment) Act 2004* contains the same provision as the Model Bill. The amending act extends the reporting requirements contained in the *Surveillance Devices Act 1999* as it currently operates.

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<sup>1415</sup> Criminal Bar Association, *Submission no. 12*, 11.

<sup>1416</sup> Office of Police Integrity, *Submission no. 37*, 3.

<sup>1417</sup> *Surveillance Devices (Amendment) Act 2004* s 13, new Part 5, Division 2, 30K(viii).

<sup>1418</sup> Criminal Bar Association, *Submission no. 12*, 11.

The chief officer of each law enforcement agency must provide a report to the Minister, as soon as practicable (and at any event within 3 months) after the end of each financial year.<sup>1419</sup> The reports must include the following information:

- the number of applications for warrants by, and the number of warrants issued to, law enforcement officers of their agency;
- the number of applications for emergency authorisations by, and the number of emergency authorisations given to, law enforcement officers of their agency;
- the number of remote applications for warrants;
- the number of applications for warrants or emergency authorisations refused and the reasons for the refusal;
- the number of applications for extensions of warrants, and the number granted or refused and the reasons;
- the number of arrests made on the basis (wholly or in part) of the information obtained by the use of a surveillance device;
- the number of prosecutions that were commenced in which information obtained by the use of a surveillance device was given in evidence and the number of those prosecutions in which a person was found guilty;
- for Victoria Police, the name and rank of each person appointed as a senior officer and if any person so appointed is below the rank of commander, the reasons for that appointment;
- any other information relating to the use of surveillance devices and the administration of the Act that the Minister considers appropriate.<sup>1420</sup>

All the information must be presented in such a way as to identify the number of warrants issued and emergency authorisations given in respect of each different kind of device.

The Minister must table in Parliament the report from each agency within 15 sitting days of receiving the report.<sup>1421</sup>

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<sup>1419</sup> *Surveillance Devices (Amendment) Act 2004* s 13, new Part 5, Division 2 s 30L . The relevant responsible officers are: the Chief Commissioner of Police, the Chief Executive Officer of the Australian Crime Commission, the Director of the Office of Police Integrity, the Secretary to the Department of Sustainability and Environment in relation to an authorised officer within the meaning of the *Conservation, Forests and Lands Act 1987*, and the Secretary to the Department of Primary Industries in relation to authorised officers within the meaning of the *Fisheries Act 1995*.

<sup>1420</sup> *Ibid*, s 30L.

The JWG in their Discussion Paper invited comment on whether the administrative burden placed on law enforcement agencies in compiling these statistics would be too onerous. Of six submissions which commented on the issue, all but one (NSW Police) supported the proposal. No Victorian agencies commented. The JWG concluded in their Final Report that:<sup>1422</sup>

outcome statistics on the number of arrests, prosecutions and convictions based on the use of surveillance devices should be retained in the model bill. Whilst these statistics should be interpreted with caution, they do provide some basis for assessing the effectiveness of the use of surveillance devices in prosecuting crime.

These provisions for information to be contained in an annual report are similar to those contained in the *Telecommunications (Interception) Act 1979* although they are not quite as extensive.<sup>1423</sup> They are more extensive however than the reporting requirements in the *Terrorism (Community Protection) Act 2003*. The requirement that reports be prepared within three months of the end of the reporting period is not contained in the *Telecommunications (Interception) Act 1979* or currently in the *Terrorism (Community Protection) Act 2003*. However, the Committee has recommended that a similar provision be inserted in the *Terrorism (Community Protection) Act 2003* in Chapter Seven and considers that the inclusion of this provision in the *Surveillance Devices (Amendment) Act 2004* adds weight to that recommendation as it would enhance consistency. The Committee considers that the current provisions of the *Surveillance Devices (Amendment) Act 2004* are appropriate.

## **Efficiency**

As noted above the legislation requires agencies to report on their use of surveillance devices and emergency authorisations. Under the *Surveillance Devices (Amendment) Act 2004* the reporting requirements will be significantly enhanced and will include indicators of effectiveness. Under the current Act agencies have been required to report only: the number of applications for warrants and emergency authorisations made and issued; the name and rank of each person appointed as a senior law enforcement officer under s3(3); if any person appointed as a senior law enforcement officer is below the rank of commander, the reason for this appointment; and any other information the Minister considers appropriate.

The table below shows a summary of the statistics provided by the liable agencies. The Office of Police Integrity (OPI) is also required to report under the Act. The OPI

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<sup>1421</sup> Ibid, s 30L(4).

<sup>1422</sup> JWG Report, 487.

<sup>1423</sup> *Telecommunication (Interception) Act 1979* ss 99-104.

was established on 16 November 2004 and has reported that no applications were made by them in the 2004 calendar year.

	Applications for warrants			Warrants issued			Applications for emergency authorisations			Emergency authorisations granted		
	2002	2003	2004	2002	2003	2004	2002	2003	2004	2002	2003	2004
<b>Victoria Police</b>	167	143	150	167	143	150	4	3	3	4	3	3
<b>Australian Crime Commission</b> <sup>1424</sup>	0	0	10	0	0	10	0	0	0	0	0	0
<b>Department of Primary Industries</b>	-	7	8	-	7	8	n/a	n/a	n/a	n/a	n/a	n/a
<b>Department of Sustainability and Environment</b>	0	-	4	0	-	4	n/a	n/a	n/a	n/a	n/a	n/a

**Table 6. Applications for warrants and emergency authorisations: 2002 – 2004.**

In their Annual Report for 2002, the Department of Sustainability and Environment commented:<sup>1425</sup>

The controlled used of these devices through the support of Victoria Police has significantly improved the Department's efficiency in conducting investigations into serious fisheries offences.

The Department of Primary Industries made the same comment in their report of 2004.<sup>1426</sup>

<sup>1424</sup> Although authorised by the *Surveillance Devices Act 1999* to make applications for warrants during 2002 and 2003, other legislative amendments were required before the ACC could make such applications. These were all in place as of 11 March 2004.

<sup>1425</sup> Department of Sustainability and Environment, *Surveillance Devices Act 1999 – Annual Report 2002*, p1.

<sup>1426</sup> Department of Primary Industries, *Surveillance Devices Act 1999 – Annual Report 2004*, p1.

The Committee welcomes the changes to the *Surveillance Devices Act 1999* which will require additional reporting and believes the additional information available in future years will allow a degree of assessment of efficiency not currently possible.

## CHAPTER NINE - PENALTY ENFORCEMENT WARRANTS

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### Introduction

Penalty enforcement warrants are a mechanism for enforcing a category of monetary sanctions that are imposed on people who commit certain minor offences. The sanctions are imposed by way of infringement notices that are issued by officials of State, associated and local authorities to individuals who have broken laws relating to matters such as parking, speeding, littering, drinking in public and travelling on public transport without a ticket. These penalties are also referred to as “on-the-spot fines”. The warrants<sup>1427</sup> are issued under section 82 of the *Magistrates’ Court Act 1989* and are part of the Penalty Enforcement by Registration of Infringement Notice scheme (PERIN) through which the sanctions are enforced if they are not paid by the offender by the due date stated in the infringement notices. Schedule 7 of the *Magistrates’ Court Act 1989* contains detailed procedures for regulating the scheme.

During the inquiry, the Committee received more evidence about these warrants and the broader PERIN system than any other issue except search warrants. Stakeholders argued that some penalty enforcement warrants are issued inappropriately or unnecessarily. Although all of the warrants are issued lawfully under the *Magistrates’ Court Act 1989*, in some cases the behaviour of the individuals subject to them could be more effectively addressed through mechanisms other than enforcement by the PERIN Court and Sheriff’s Office. More generally, there was a widespread perception that the PERIN system was unfair to disadvantaged people and that reforms were accordingly necessary to enhance the system’s capacity to respond more appropriately in particular cases. The Committee also learned that the experience of many stakeholders who play a part in the PERIN system has produced proposals to reduce this unfairness, and a number of groups organised by stakeholders are pioneering creative approaches in this area.

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<sup>1427</sup> In this chapter, the Committee will refer to the warrants as “penalty enforcement warrants” and “PERIN warrants”.

Much of the evidence therefore raised issues about the processes leading up to and following on from the issue of the warrants. This fact is a reflection of the integral role that warrants play in the PERIN system. Their execution facilitates the final resolution of the infringement matter through enforcement, discharge or variation of the sanction. The interaction of Sheriff's Office personnel executing the warrants with the individuals subject to them is in many cases also the only mechanism for identifying individuals who are experiencing difficulties dealing with the sanction imposed on them through the infringement notice.

The terms of reference for this inquiry request the Committee to have particular regard to the need to promote fairness, consistency and efficiency in considering reform of warrant powers and procedures. In light of the submissions and oral evidence that it received, the Committee decided to examine aspects of the PERIN system beyond the warrant provisions and procedures themselves, to consider ways of reducing the very large number of warrants that are issued each year. In the rest of this chapter, therefore, the Committee outlines the history, procedures and scale of the PERIN system and then examines the fairness, consistency and efficiency of the system in the context of the evidence it received.

To assist with the conduct of this part of the inquiry, the Committee held a forum in May 2005 that was attended by stakeholders from throughout the PERIN system.<sup>1428</sup> The forum provided an opportunity for the PERIN Court, Department of Justice, issuing agencies, prosecution and defence lawyers and a range of community advocates and representatives to come together and share perceptions of the system and ideas about how to improve it.<sup>1429</sup> The Committee found the discussions to be very valuable and formally expresses its appreciation to the participants for attending and participating as fully as they did.

## The infringement notice system

### *History*

Infringement notices are a mechanism for imposing monetary penalties as a way of disposing of an offence.<sup>1430</sup> The concept was introduced to Victoria by the *Road Traffic*

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<sup>1428</sup> The participants are listed in Appendix Three.

<sup>1429</sup> To promote a comprehensive exchange of perspectives and ideas, the Committee agreed not to attribute comments made during the forum discussions. Accordingly, where comments are referred to in this chapter, the Committee sources them to the "PERIN Forum" rather than the specific speaker/s.

<sup>1430</sup> The Public Accounts and Estimates Committee compares infringement notices with other fines in its *Report on Outstanding Fines and Unexecuted Warrants, Twenty First Report to Parliament* (September 1997) (PAEC, *Outstanding Fines*), 7-10.

(*Infringements Act*) 1959 and was initially limited to parking offences. The Government of the time highlighted the benefits of the new scheme: for the state and associated agencies, it would save time and administrative costs; for the offender, it would avoid the need to go to court and the recording of a conviction for the offence.<sup>1431</sup>

A recent Monash University study completed in partnership with the Department of Justice noted that in the period since 1959:

the use of 'on-the-spot fines', or penalty infringement notices, as a punishment for minor offences in Victoria ha[s] grown steadily ... to the point where it had become the primary means of dealing with minor violations of the law.<sup>1432</sup>

That expansion reflected the original benefits of the system:

The growing use of this system for dealing with minor offences can be attributed to the efficiency with which it deals with large numbers of offenders in a convenient manner and the significant financial benefits it provides in terms of reduced court costs and raised revenue. Before the infringement notice scheme was established, figures on offences brought before the lower courts from 1954 onwards in Australia supported United Kingdom estimates that 50-70% of Magistrates' Court time was devoted to road traffic offences. For instance, in 1971 in Victoria, of 270,045 convictions recorded in the Magistrates' Courts, 69.4% (187,328) were for driving offences. Twenty years later, in 1991, after infringement notices were well in place in the state, these offences amounted only to 28.8% of all offences charged. In 1990/91 the 2.3 million infringement notices issued in Victoria alone had a face value of between \$142 and \$157 million.<sup>1433</sup>

### ***How the infringement notice system works***

The procedures for dealing with infringement notices are detailed and complex. The Committee sets them out here to assist readers.<sup>1434</sup>

**Step 1** Agencies that wish to use the infringement notice scheme approach the Department of Justice to consider whether an offence is suitable to become an

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<sup>1431</sup> Arthur Rylah (Attorney-General), Victorian Parliamentary Debates, Legislative Assembly, 1959-1960, Volume 258, 249-250, referred to in PAEC, *Outstanding Fines*, 10.

<sup>1432</sup> Richard Fox (Monash University) and the Department of Justice, *On the Spot Fines and Civic Compliance, Final Report Volume II* (2003) (*Fox, On the Spot Fines II*), 35 (references omitted).

<sup>1433</sup> *Fox, On the Spot Fines II*, 35 (references omitted).

<sup>1434</sup> As noted, the procedures are contained in the *Magistrates' Court Act 1989 Schedule 7* (section 99 of the Act provides that the Schedule 7 provisions may be used instead of commencing proceedings against a person who commits a relevant offence). The Committee has also drawn on the description of the process contained in Fitzroy Legal Service, *The Law Handbook* (2005), (*Fitzroy, Law Handbook*) 160-168.

infringement enforceable by PERIN. If this is appropriate, the agency drafts regulations to have itself included in Schedule 9 of the *Magistrates' Court (General Regulations) 2000* and to have the infringement notice prescribed in Regulation 1203, and makes administrative arrangements with the PERIN court.<sup>1435</sup>

Step 2 An individual commits a relevant offence.

Step 3 The relevant agency's authorised officers issue the individual with an infringement notice containing a monetary penalty. The individual may pay the penalty, request that the agency waive the penalty or agree to delayed payment or payment by instalments, or request that the matter be heard in the Magistrates' Court.

Step 4 If the fine is unpaid after 28 days and the individual has taken no action in relation to payment, the issuing agency sends a courtesy letter.<sup>1436</sup> Agencies may require the payment of additional costs related to the courtesy letter.

Step 5 If the fine is unpaid after another 28 days and the individual has again taken no action in relation to payment, the issuing agency refers the matter to the PERIN Court. This is a venue of the Magistrates' Court that was established in 1986<sup>1437</sup> and which deals with the processing and enforcement of infringement notices and penalties. The Court does not conduct hearings to make decisions, which are instead "made by the Registrar and Deputy Registrars as quasi-judicial Officers of the Court".<sup>1438</sup>

Step 6 The Court issues an enforcement order that includes a requirement that the offender pay PERIN registration costs in addition to the penalty and courtesy letter administration costs.<sup>1439</sup>

- The individual may pay the penalty or make a request to the PERIN Court for: an extension of time to pay; variation of costs; payment by instalments; or a revocation of the notice (if the individual did not commit the offence or had a valid reason for committing it).<sup>1440</sup>
- If the enforcement order is revoked, the matter is remitted to the issuing agency for consideration of withdrawal of the notice. If the issuing agency withdraws it, no further action is taken. If the agency does not revoke the notice, the individual remains bound to pay the penalty in the notice: all that has changed is that the PERIN Court has stopped its action to enforce the notice. In such cases, the

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<sup>1435</sup> Department of Justice, *Submission no. 38*, 8-9.

<sup>1436</sup> *Magistrates' Court Act 1989 Schedule 7*, cl 3.

<sup>1437</sup> Department of Justice, *PERIN Court Overview*, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>1438</sup> Magistrates' Court of Victoria, *The PERIN Magistrates' Court*, at [www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au).

<sup>1439</sup> *Magistrates' Court Act 1989 Schedule 7*, cl 4-5.

<sup>1440</sup> *Ibid*, cl 7, 10.

matter is referred to the Magistrates' Court for determination.<sup>1441</sup> The Magistrates' Court holds a hearing at which the agency and the individual have the opportunity to present evidence.

- If an application for revocation of the enforcement order is not granted, the individual may have the application for revocation transferred to the Magistrates' Court, where the enforcement order may be revoked and the alleged offence heard and determined.<sup>1442</sup>
- An agency may also apply for revocation of an enforcement order, in which case the PERIN Court must grant revocation.<sup>1443</sup>
- The Registrar of the PERIN Court also has discretion to withdraw the enforcement order if the matter is considered to be more appropriately dealt with by the Magistrates' Court.<sup>1444</sup> An individual or his or her legal, medical or other representatives can apply to the Registrar for revocation. Cases in which enforcement orders are revoked but penalties are not withdrawn by the issuing agency are referred to the Magistrates' Court Special Circumstances List (SCL) for hearing and determination.<sup>1445</sup>

Step 7 If an enforcement order is not revoked and the individual does not respond to it within 28 days, the PERIN Court issues a penalty enforcement warrant. Additional consequential costs are then payable by the individual who is subject to the warrant.<sup>1446</sup>

Step 8 After the warrant is issued, the Sheriff's Office makes a demand for payment on the individual and delivers a written statement setting out a summary of the provisions of Schedule 7 that govern the allowance of time to pay, payment by instalments and applications for revocation of the enforcement order.<sup>1447</sup>

- The individual then has seven days to pay the penalty and costs or apply to the PERIN Court for: an extension of time to pay; a variation of the amount to pay; permission to pay by instalments; or revocation of the enforcement order.<sup>1448</sup> The procedure for revocation is the same as that in Step 5 above.

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<sup>1441</sup> Ibid, cl 10(5).

<sup>1442</sup> Ibid, cl 10(6), 11, 13.

<sup>1443</sup> Ibid, cl 10(3).

<sup>1444</sup> Ibid, cl 10A.

<sup>1445</sup> The Special Circumstances List is discussed in the following section.

<sup>1446</sup> *Magistrates' Court Act 1989 Schedule 7*, cl 8. The warrants are authorised under section 82B of the Act.

<sup>1447</sup> Ibid.

<sup>1448</sup> Ibid.

- The Sheriff can seize and take possession of the personal property of an individual in default but may not remove it unless s/he believes on reasonable grounds that it is necessary to prevent its disposal or removal.<sup>1449</sup> The warrant authorises the person to whom it is directed to break, enter and search any premises for personal property.<sup>1450</sup>

Step 9 At the end of the seven day period, the Sheriff's officers may take any step necessary to execute the warrant, including selling seized property, unless the individual concerned has obtained an extension of time to pay or an instalment order.

Step 10 If the Sheriff's officers cannot find sufficient personal property of the individual subject to the warrant to meet the penalty and additional costs, they may "break, enter and search" for the individual and must take him or her to a police station or jail.<sup>1451</sup>

An arrested individual is then released either to discharge the penalty and costs by entering into a Custodial Community Permit,<sup>1452</sup> if appropriate and the individual consents, or to appear before the Magistrates' Court for sentencing.<sup>1453</sup>

Step 11 In cases referred to the Magistrates' Court, the Court may make certain orders.

- If it is satisfied that the individual suffers from a mental disorder, an intellectual impairment, a brain injury or dementia, the Court may discharge the fine in whole or in part or adjourn the matter for up to six months, subject to any conditions it considers to be appropriate. In cases resumed after an adjournment, the Court may discharge the fine in whole or in part if it is satisfied that the individual has complied with any conditions and has no means to pay the fine or has a reasonable excuse for not paying it.<sup>1454</sup>
- In cases where the Court discharges part of a fine or does not grant an adjournment, it may order: imprisonment at the rate of 1 day per \$100 outstanding; imprisonment for a period up to 2/3 less than that period; or the imposition of a

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<sup>1449</sup> Ibid, s 82D(1)(b); schedule 7, cl 8.

<sup>1450</sup> Ibid, s 82D(1)(a).

<sup>1451</sup> Ibid, s 82D(1)(c).

<sup>1452</sup> A Custodial Community Permit (CCP) allows an individual to do unpaid community work under supervision instead of being imprisoned to discharge the penalty and costs. A CCP can only be issued if the Secretary of the Department of Justice is satisfied that adequate consideration has been given to the safety and welfare of the prisoner and members of the public; facilities exist for the provision of adequate and suitable escort and transport where necessary; and the CCP complies with any requirements set out in regulations. The Secretary may impose any conditions on the permit that s/he thinks are appropriate: *Corrections Act 1986* ss 57–57D.

<sup>1453</sup> Department of Justice, *Submission no. 38*, 7.

<sup>1454</sup> *Magistrates' Court Act 1989* Schedule 7, cl 23.

Community Based Order<sup>1455</sup> where the Court determines that exceptional circumstances apply.<sup>1456</sup>

- On some occasions, a magistrate may adjourn the matters and divert them to the SCL.<sup>1457</sup>

Processing costs are added to the original penalty at various stages in the process:

Cost description	Amount	Total
Courtesy letter	\$18.82	\$18.82
PERIN Court registration	\$40.91	\$59.73
Enforcement order issue	\$22.03	\$81.76
Penalty enforcement warrant issue	\$46.16	\$127.92

**Table 7. Infringement system processing costs<sup>1458</sup>**

As an outstanding penalty moves through the system, the total amount owing can grow significantly. Common examples are parking infringements, where a \$50 penalty would grow by 252% to approximately \$178 by the time a penalty enforcement warrant is issued; and public transport offences, where a \$150 penalty debt would increase by 85% to approximately \$278 by the warrant stage.

## ***The use of the infringement notice system***

### **Infringement notices**

The scale of the infringement notice system was described by Richard Fox in 2003:

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<sup>1455</sup> A Community Based Order (CBO) provides for the punishment or treatment within the community of an individual, such as through the performance of unpaid work or attendance at treatment or educational programs: *Sentencing Act 1991 ss 36–43*.

<sup>1456</sup> *Magistrates' Court Act 1989* Schedule 7, cl 24.

<sup>1457</sup> Letter, Magistrates' Court of Victoria Diversion Coordinator Simon Walker to Committee Research Officer, 18 February 2005.

<sup>1458</sup> Each stage incurs a cost expressed in fee units: *Magistrates' Court (Fees, Costs and Charges) Regulations 2001*, regulation 7. One fee unit = \$10.49: conversation, Magistrates' Court of Victoria and Committee Research Officer, 21 September 2005.

There are 50 Victorian Acts which permit the issuing of infringement notices...There are 117 issuing agencies enforcing legislation that imposes penalties ranging from \$20 to \$4000 per infringement, together with potent ancillary sanctions such as demerit points and licence suspension.<sup>1459</sup>

The Committee's research indicates that by 2005, the number of Acts had grown to 64<sup>1460</sup> and the number of issuers to 130.<sup>1461</sup> The Committee was told that approximately 1250 offences are dealt with through infringement notices and PERIN proceedings.<sup>1462</sup> The two main issuers of notices are Victoria Police and local government authorities.

As the following table shows, the number of notices issued increased from 2.3 million in 1990 - 1991 to 3.45 million in 2001 - 2002. This 48% rise reflects an increased use of the infringement notice mechanism and new offences occasioned by technological developments, such as road tolls and an increasing use of cameras.<sup>1463</sup> The increase in the proportion of notices issued by Victoria Police from 41.5% of all notices in 1990

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<sup>1459</sup> Richard Fox (Monash University) and the Department of Justice, *On the Spot Fines and Civic Compliance, Final Report Volume I (Fox, On the Spot Fines I)*, 122. In contrast, in 1997 infringement notices could be issued under 26 Acts: *PAEC Outstanding Fines*, 10.

<sup>1460</sup> A search in September 2005 of the Victorian Legislation and Parliamentary Documents database for the term "infringement notice" returned the following legislation: *Accident Compensation (Occupational Health and Safety) Act 1996; Accident Compensation Act 1985; Agricultural and Veterinary Chemicals (Control of Use) Act 1992; Australian Grands Prix Act 1994; Building Act 1993; Children and Young Persons Act 1989; Commonwealth Games Arrangements Act 2001; Cooperatives Act 1996; Country Fire Authority Act 1958; Dangerous Goods Act 1985; Electricity Industry Act 2000; Electricity Safety Act 1998; Environment Protection Act 1970; Estate Agents Act 1980; Extractive Industries Development Act 1995; Fair Trading Act 1999; Firearms Act 1996; Fisheries Act 1995; Gambling Regulation Act 2003; Gas Industry Act 2001; Health Services Act 1988; Heritage Act 1995; Liquor Control Reform Act 1998; Livestock Disease Control Act 1994; Local Government Act 1989; Magistrates' Court Act 1989; Marine Act 1988; Melbourne Market Authority Act 1977; Metropolitan Fire Brigades Act 1958; Mineral Resources Development Act 1990; Monetary Units Act 2004; Motor Car Traders Act 1986; Planning and Environment Act 1987; Plant Health and Plant Products Act 1995; Private Security Act 2004; Residential Tenancies Act 1997; Tobacco Act 1987; Transport Act 1983; Conservation, Forests and Lands Act 1987; Domestic (Feral and Nuisance) Animals Act 1994; Domestic Building Contracts Act 1995; Domestic Building Contracts and Tribunal Act 1995; Electoral Act 2002; Equipment (Public Safety) Act 1994; Fundraising Appeals Act 1998; Gas Safety Act 1997; Introduction Agents Act 1997; Major Events (Crowd Management) Act 2003; Melbourne City Link Act 1995; Mitcham-Frankston Project Act 2004; Non-Emergency Patient Transport Act 2003; Occupational Health and Safety Act 2004; Parliamentary Precincts Act 2001; Prevention of Cruelty to Animals Act 1986; Road Management Act 2004; Road Safety Act 1986; Second-Hand Dealers and Pawnbrokers Act 1989; Stock (Seller Liability and Declarations) Act 1993; Summary Offences Act 1966; Trade Measurement (Administration) Act 1995; Travel Agents Act 1986; Utility Meters (Metrological Controls) Act 2002; Water Efficiency Labelling and Standards Act 2005.*

<sup>1461</sup> Department of Justice, *What is PERIN*, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>1462</sup> Conversation, PERIN Court Senior Deputy Registrar Mark Haladjian and Committee Research Officer, 21 July 2004.

<sup>1463</sup> *PAEC Outstanding Fines*, 27–28.

- 1991 to 58% in 2001 - 2002 reflects “concerted efforts over the [period] to reduce the road toll”.<sup>1464</sup>

Agency	1990 – 1991	2001 - 2002	2002 – 2003	2003 - 2004
Victoria Police (traffic camera, fixed penalty office, toll enforcement)	973 210 (41.5%)	2 004 856 (58%)	No data	No data
Local government and other agencies	1 369 703 (58.5%)	1 450 090 (42%)	No data	No data
Total	2 342 913	3 454 946	No data	3 200 000 <sup>1465</sup>

**Table 8. Infringement notices issued: 1990 - 1991, 2001 - 2004**<sup>1466</sup>

### PERIN enforcement orders and warrants

The following table details the numbers of notices referred to the PERIN Court and the number of penalty enforcement warrants issued and actioned.

Measure	1990 - 1991	2001 - 2002	2002 - 2003	2003 - 2004
Notices issued	2 342 913	3 454 946	No data	3 200 000
Notices registered at PERIN Court	377 531 <sup>1467</sup>	664 509 <sup>1468</sup>	882 766 <sup>1469</sup>	768 061 <sup>1470</sup>

<sup>1464</sup> Fox, *On the Spot Fines I*, 21. Unless otherwise stated, the data in this section is taken from Fox, *On the Spot Fines I*, 22–27; and Richard G Fox, *Criminal justice on the spot: infringement penalties in Victoria* (1995) (Fox, *Infringement Penalties*), Chapter Five. The Department of Justice states that a similar rationale explains subsequent rises: Department of Justice, *Annual Report 2002 - 2003*, 61.

<sup>1465</sup> This figure is an estimate based on figures from a number of agencies: email, Department of Justice Infringements Framework Project manager Mick Bourke to Committee Research Officer, 28 September 2005.

<sup>1466</sup> Figures for 1990 - 1991: Fox, *On the Spot Fines I*, 22-27; and Richard G Fox, *Criminal justice on the spot: infringement penalties in Victoria* (1995) (Fox, *Infringement Penalties*), Chapter Five.

<sup>1467</sup> Fox, *Infringement Penalties*, 104.

<sup>1468</sup> Magistrates' Court of Victoria, *Annual Report 2002 - 2003*, 34.

<sup>1469</sup> Magistrates' Court of Victoria, *Annual Report 2002 - 2003*, 34. This 33% rise on the previous year is attributed to “the Government’s road safety initiatives, the work of Victoria Police and an increase in infringements issued by local councils”: Department of Justice, *Annual Report 2002 - 2003*, 61.

<sup>1470</sup> Magistrates' Court of Victoria, *Annual Report 2003 - 2004*, 19.

As a % of notices issued	16.11%	19.2%	NA	24%
PERIN warrants issued	228 378 <sup>1471</sup>	531 607 (e) <sup>1472</sup>	715 684 <sup>1473</sup>	615 575 <sup>1474</sup>
As a % of notices issued	9.75%	15.39%	NA	19.23%
As a % of notices registered	60.5%	80%	81.07%	80.15%
PERIN warrants actioned by Sheriff's Office	No data	161 971 (e) <sup>1475</sup>	338 893 (e) <sup>1476</sup>	406 768 <sup>1477</sup>
As a % of warrants issued	NA	30.47%	47.35%	66.08%
As a % of notices issued	NA	4.69%	NA	12.71%

**Table 9. Enforcement orders and warrants issued by the PERIN Court: various years**

The Sheriff's Office actioned more than 400 000 PERIN warrants in 2003 – 2004. The PERIN warrant is therefore, by a considerable margin, the most heavily used Victorian warrant.<sup>1478</sup>

<sup>1471</sup> Fox, *Infringement Penalties*, 119.

<sup>1472</sup> This figure is an estimate, produced from information obtained from the Department of Justice, which advised the Committee that penalty enforcement warrants are issued in 80% of cases registered with the PERIN Court. The Committee therefore applied that multiplier to the numbers of notices registered with the Court: Conversation, Department of Justice Senior Policy Officer Andrew Crawshaw and Committee Research Officer, 20 July 2004.

<sup>1473</sup> Email, Department of Justice Senior Policy Officer Andrew Crawshaw and Committee Research Officer, 28 September 2005.

<sup>1474</sup> Ibid.

<sup>1475</sup> This figure is an estimate, ascertained by applying the Department of Justice's formula used to generate the 2003 - 2004 figure to the 2001 - 2002 and 2002 - 2003 figures on warrants actioned by the Sheriff's Office. The Department stated that 97.72% of all warrants actioned by the Sheriff's Office in 2003 - 2004 were criminal warrants, and that 85-90% of them were PERIN-related warrants. The Committee therefore applied these percentages (the Committee used 85% as the second multiplier and thus actual figures may be higher) to the 194 724 and 408 000 warrants respectively actioned by the Sheriff's Office in 2001 - 2002 and 2002 - 2003: Department of Justice, *Submission no. 38*, 4-5; (Sheriff's Office warrant figures: Department of Justice, *Annual Report 2002 – 2003*, 84; *Annual Report 2001 - 2002*, 24; Victorian Auditor-General, *Auditor-General's Report, Results of financial statement audits for agencies with other than 30 June 2004 balance dates, and other audits*, May 2005 (*VAG 2005 Report*), 62).

<sup>1476</sup> Refer to footnote 1475 above.

<sup>1477</sup> Department of Justice, *Submission no. 38*, 4-5. The numbers actioned in December 2003 and January and February 2004 varied between 8000 and 12500, in contrast to 31250 in November 2003 and between 43500 and 62400 in the other months of the year: Department of Justice, *Submission no. 38*, appendix.

## PERIN and fairness, efficiency and consistency

### *Introductory comments*

It is widely accepted that the use of infringement notices does in general provide the beneficial outcomes that were used to justify their introduction to Victoria and increasing use in the decades since.<sup>1479</sup> In most cases, the system is therefore fair, efficient and consistent.

For individual offenders:

[t]he infringement notice scheme is a form of 'bargain basement justice' in which the procedures have been greatly simplified with most aspects of detection and processing automated. The caseload is deliberately designed to take little or no account of individual circumstances or moral culpability and the monetary penalties are fixed rather than tailored to means. ...

The justification for this approach is convenience and expediency.... The alleged offender avoids a court appearance and a conviction and is subject to a fixed, but lower, penalty.<sup>1480</sup>

It saves people the time and expense of going to court on matters they do not wish to contest while preserving their right to do so if they wish. No prosecutorial action is required in the cases in which the penalty is paid and, as a consequence, agencies are saved the prohibitive cost of prosecuting large volumes of cases.<sup>1481</sup>

For the state:

[t]he diversion of minor cases out of the main court system frees up magistrates and court staff to focus on the more serious criminal cases. The procedures also lend themselves to the cost saving advantages of automation, computerisation and timely processing. The result is efficient, cost-effective enforcement of compliance with road safety rules, local parking by - laws and other instances where on-the-spot fines can be issued.<sup>1482</sup>

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<sup>1478</sup> In the same year, the Magistrates' Court issued approximately 20 000 search warrants and arrest warrants: Magistrates' Court of Victoria, *Submission no. 29*.

<sup>1479</sup> Magistrates' Court of Victoria, *Annual Report 2003 - 2004*, 19; Department of Justice, *Annual Report 2003 - 2004*, 48; West Heidelberg Community Legal Service, *The PERIN Court: A Discussion Paper* (July 2004) (WHCLS *PERIN Discussion Paper*); Public Interest Law Clearing House Homeless Persons Legal Clinic, *Submission no. 4*, 16; Gary Sullivan, *Minutes of Evidence, 20 October 2004*, 244, 252.

<sup>1480</sup> Fox, *On the Spot Fines I*, 121.

<sup>1481</sup> Department of Justice, *PERIN Court Overview*, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>1482</sup> *Ibid.*

This is felt to be true “even though 10-20% of infringement notices issued lead to unpaid and overdue fines being registered with the PERIN Court for enforcement”.<sup>1483</sup> Data in Table 9 above indicate that approximately 75-85% of infringement notices were paid without agencies needing to resort to PERIN proceedings. In 1990 - 1991 approximately 90% of penalties were eventually paid. These figures led the Public Accounts and Estimates Committee (PAEC) to conclude in 1997 that the infringement notice “system can be said to be working well”.<sup>1484</sup> In 2004, the Government stated that more than 90% of fines were being cleared, more than 80% without follow up.<sup>1485</sup> More recently, the Victorian Auditor-General found that an average of 78% of traffic camera fines and on-the-spot fines are paid within 112 days of the fine being issued.<sup>1486</sup>

Notwithstanding what appears to be the infringement notice system’s fundamental efficacy as an approach to widespread offending behaviour, there are various concerns about the way that it operates. These can be grouped into four categories:

- the way in which the system deals with people who do not or cannot navigate it because of their particular needs or characteristics;
- the organisation and oversight of the system as a whole;
- effective enforcement against recalcitrant offenders; and
- the efficiency of the Sheriff’s Office in executing warrants.

These issues are inter-related. The PERIN scheme is fundamentally designed to deal with unpaid fines, and to provide an effective means of securing payment from individuals who have not done so. However, the efficiency-inspired automation of the system combined with limited consistency between and coordination of agencies leads to inappropriate cases being pursued through “the enforcement corridor”, resulting in outcomes of questionable fairness for such individuals.<sup>1487</sup> Further, the existence and persistence of offenders who manipulate the system necessitates a particularly careful consideration of any proposals to increase the opportunities for diverting individuals who cannot, or arguably should not, pay their penalties.<sup>1488</sup> Finally, amid concerns about increasing levels both of unpaid penalties and of debts that are considered unlikely to be collected, it has been reported that the Sheriff’s Office lacks a consistent or systematic approach to the targeting of warrants for

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<sup>1483</sup> Fox, *On the Spot Fines II*, 35.

<sup>1484</sup> PAEC *Outstanding Fines*, 71.

<sup>1485</sup> *Attorney-General’s Justice Statement*, May 2004, (*Attorney-General’s Justice Statement*), 32.

<sup>1486</sup> VAG 2005 Report, section 3.1.

<sup>1487</sup> Magistrates’ Court of Victoria, *Enforcement Review Program* (paper provided to the Committee in January 2005), 2.

<sup>1488</sup> Various speakers, *PERIN Forum*, 10 May 2005 (*PERIN Forum*).

execution and that there are major limitations in the databases the Office relies on to execute warrants.<sup>1489</sup> In that context, the Auditor-General recently noted that the rate of successful payment outcomes for PERIN warrants issued to enforce infringement notice penalties has run at between 4% and 16.6% between 2001 and 2004.<sup>1490</sup>

Evidence received by the Committee in this inquiry was overwhelmingly concerned with the experiences of people who have had difficulty with the infringement notice system because of their needs or characteristics. Many stakeholders raised related issues about the organisation of the system and the role of warrants and the Sheriff's Office. The Committee decided to consider these issues together, focusing on the system's impact on disadvantaged people. This is consistent with the approach taken by stakeholders and with the direction of initiatives aimed at reforming the system, which are discussed below.

It is also appropriate given that, while the proportion of disadvantaged people going through the system is statistically very small,<sup>1491</sup> the actual number of people involved is considerable. For example, 6% of people who had been fined told the Monash University/Department of Justice study that the reason they did not pay the penalty was that they could not afford to.<sup>1492</sup> Applying that multiplier to the number of registered (i.e. unpaid) infringement notices in 2001 - 2002,<sup>1493</sup> (the year for which data was produced for the study) produces a figures of approximately 40 000 people who stated that they could not afford to pay the penalty imposed on them. While it is likely that the number of cases is smaller because many individuals have multiple outstanding notices,<sup>1494</sup> the figure is nevertheless sufficiently large to be of significant concern, particularly as it does not fully<sup>1495</sup> include other categories of disadvantage.

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<sup>1489</sup> *VAG 2005 Report*, sections 3.4-3.5 and previous VAG Reports referred to therein. Approximately \$554 million was outstanding at 30 June 2004, of which \$351.5 million was considered by the Department of Justice as being unlikely to be collected: *VAG 2005 Report*, section 3.3.1 (references omitted).

<sup>1490</sup> The rate, which relates to warrants for PERIN and other fines, fluctuated. It "remains low and only a very small percentage (around 3%) of the amounts owing to state and non-state agencies that have reached the warrant stage are actually being collected in cash". As that statement indicates, this data excludes non-cash methods of discharging infringement notice penalties, such as CCPs, imprisonment and CBOs: *VAG 2005 Report*, section 3.

<sup>1491</sup> The data in Table 2 above indicate that between 85 and 90% of infringement notices are paid before being registered at the PERIN Court. It is not clear what proportion of the remaining 10-15% of penalties are unable to be paid or are inappropriate due to the circumstances of the individuals subject to them. It has been estimated that up to one third of challenges to infringement notices issued by the Victoria Traffic Camera Office are made in bad faith: *PERIN Forum*.

<sup>1492</sup> *Fox, On the Spot Fines, I*, 115.

<sup>1493</sup> 664 509 notices were registered in 2001 - 2002: Table 9, p 382 above.

<sup>1494</sup> In 2003 - 2004, the Sheriff's Office averaged a total (PERIN and non-PERIN) of 478 550 warrants against 93 955 people, an average of 5 warrants per person: Department of Justice, *Submission no. 38*, appendix.

<sup>1495</sup> Many individuals experience multiple forms of disadvantage simultaneously.

Further, as the Committee discusses below, the consequences for such people of coming within the jurisdiction of the system are significant and potentially damaging.

The Committee's approach also reflects a desire to avoid duplication where possible. Thus, for example, the Committee has not specifically examined the effectiveness of the Sheriff's Office in collecting PERIN fines, or related questions of recalcitrant debtors and uncollected or bad penalty debt, because the Victorian Auditor-General has recently analysed these matters and the Public Accounts and Estimates Committee is currently assessing that report and the Government's response.<sup>1496</sup>

This Committee is aware, however, that its focus on the experiences of disadvantaged people does overlap to some degree with the Government's ongoing review of the infringement system. The Committee nevertheless believes that its focus is justified by both the Committee's independent character and the fact that many of the stakeholders who have been involved in the Government's review also gave evidence to the Committee.

### ***Individuals who experience difficulties with the infringement system***

Most of the offences which fall within the infringement notice system are ones of strict liability. The scope for the exercise of individual discretion, such as informal or formal warnings, or individualised sentences, is also far more reduced than in conventional criminal processing.<sup>1497</sup>

VCOSS believes that the automation of cases preventing the individualisation of sanctions, and the limited scope of the 'special services' provisions results in a disproportionate and discriminatory incidence of warrants and arrests targeting people experiencing homelessness, disability, disorder or severe financial hardship.<sup>1498</sup>

The Committee considers it important to emphasise firstly that the PERIN system works well for the vast majority of people who commit infringing behaviour, and secondly that the problems that this and other inquiries have revealed<sup>1499</sup> are a consequence of the complexities of an automated system that deals with millions of fines every year, rather than the result of any potential or alleged abuses of the powers and procedures of the PERIN system. In particular, advocacy groups who

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<sup>1496</sup> VAG 2005 Report, section 3; Public Accounts and Estimates Committee, *Inquiry into the 2005 - 2006 Budget Estimates Hearings*, at [www.parliament.vic.gov.au](http://www.parliament.vic.gov.au).

<sup>1497</sup> Fox, *On the Spot Fines I*, 121.

<sup>1498</sup> The Victorian Council of Social Service (VCOSS), *Submission no. 30*, 4.

<sup>1499</sup> As the Committee will discuss in the remainder of the chapter, many of the issues that stakeholders raised during this inquiry mirror or are similar to those considered by the Public Accounts and Estimates Committee in its 1997 report, *PAEC Outstanding Fines*.

gave evidence generally praised the flexibility and empathy of officials who they had encountered in the course of addressing their clients' needs.<sup>1500</sup>

The Monash University/Department of Justice study *On the Spot Fine and Civic Compliance* that the Committee referred to earlier<sup>1501</sup> measured perceptions of the infringement system and what made people comply with it. The authors reported that people are less likely to comply with laws and procedures that they believe to be unfair, and listed the following concerns as contributing to perceptions of unfairness in the infringement system:

- the lack of alternatives, such as cautions, to issuing infringement notices;
- the lack of payment options in respect of infringement notices, in particular the fact that issuing agencies do not accept instalment payment plans;
- the lack of information contained in infringement notices and PERIN Court documentation in relation to individuals' rights and options;
- the imposition of set penalties in infringement notices regardless of the financial capacity of the individuals concerned;
- the failure of issuing agencies and the PERIN Court to take into account individuals' circumstances;
- the lack of any mechanism for the conversion of fines to community work; and
- the threat of imprisonment following execution of penalty enforcement warrants.<sup>1502</sup>

Stakeholders told the Committee that, largely due to these characteristics, the infringement notice system presents significant problems for financially and socially disadvantaged people,<sup>1503</sup> including:

- individuals with diagnosed and undiagnosed physical and mental illnesses and disabilities;
- individuals experiencing homelessness or poverty;

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<sup>1500</sup> PERIN Forum; Victoria Legal Aid, *Minutes of Evidence, 20 October 2004*, 204.

<sup>1501</sup> This is discussed at footnote 1432 above and accompanying text.

<sup>1502</sup> Fox, *On the Spot Fines, Executive Summary*. The findings were summarised in PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 19-20.

<sup>1503</sup> Isabel Collins, Elizabeth Crowther, Mental Illness Fellowship of Victoria, Victorian Mental Illness Council, *Minutes of Evidence, 19 October 2004*; Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence, 20 October 2004*; Gary Sullivan, *Minutes of Evidence, 20 October 2004*; Godfrey Moase, Western Suburbs Legal Service, *Minutes of Evidence, 20 October 2004*; William Crawford, Fitzroy Legal Service, *Minutes of Evidence, 5 November 2004*; various speakers, *PERIN Forum*.

- individuals with drug and alcohol dependencies;
- individuals whose cultural or linguistic background or developmental stage inhibits their ability to comprehend or comply with the system, for example, respectively people from non-English speaking backgrounds and young people.

The infringement notice system has a disproportionate effect on such individuals for a range of reasons:<sup>1504</sup>

- many are disproportionately susceptible to receiving fines because they possess a limited capacity to justify behaviour that is considered to constitute an infringement notice offence but for which they may have an excuse that is considered acceptable by issuing agencies; or the infringing behaviour may be a manifestation of their status or disadvantage; or they are more visible than other members of the community; or financial pressures encourage prioritisation of essential needs, resulting in infringing behaviour, such as fare evasion;<sup>1505</sup>
- a limited ability to make judgements, informed choices or to understand the consequences of actions, affects individuals' capacity to avoid behaviour that results in the issue of infringement notices, particularly as most offences do not require an intention to offend,<sup>1506</sup> and to take action to deal with the notices once they are issued;
- some individuals' who have a limited ability to deal with penalties are further intimidated by a lack of accessible information about their options and rights;
- many financially disadvantaged individuals have a limited capacity to deal with infringement notices for reasons that include the relative impact of flat rate fines on them and the lack of a fixed address at which to receive correspondence;

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<sup>1504</sup> Victorian Aboriginal Legal Service, *Preliminary submission*; Youth Affairs Council of Victoria, *Preliminary submission*; Isabel Collins, Elizabeth Crowther, Mental Illness Fellowship of Victoria, Victorian Mental Illness Council, *Minutes of Evidence, 19 October 2004*; Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Submission no. 4, Minutes of Evidence, 20 October 2004*; Gary Sullivan, West Heidelberg Community Legal Service, *Minutes of Evidence, 20 October 2004*; Godfrey Moase, Western Suburbs Legal Service, *Minutes of Evidence, 20 October 2004*; Victorian Council for Social Services, *Submission no. 30*; William Crawford, Fitzroy Legal Service, *Minutes of Evidence, 5 November 2004, Submission no. 35*; various speakers, *PERIN Forum; WHCLS PERIN Discussion Paper*.

<sup>1505</sup> Victorian Council of Social Service, *Submission no. 30, 4-5*; Godfrey Moase, Western Suburbs Legal Service, *Minutes of Evidence 20 October 2004, 227-228*; PILCH Homeless Persons' Legal Clinic, Youthlaw, and West Heidelberg Legal Service, *Disadvantage and Fines - Submission to the Victorian Government Regarding the Enforcement of Unpaid Fines Against Financially and Socially Disadvantaged People*, August 2003 (*PILCH et al, Disadvantage and Fines*), 7, 10.

<sup>1506</sup> Such cases are referred to as strict liability offences.

- the inconsistency of different agencies' policies on reviewing and withdrawing infringement notices, granting extensions to pay and the instalment payment plans reduces opportunities for paying penalties early (before they escalate through the PERIN process) and leads to inconsistent treatment of similar cases, which places additional demands on individuals and their representatives, particularly where there are outstanding penalties from multiple agencies;
- the limited options available to magistrates after the execution of a warrant do not afford an opportunity to consider circumstances that may mitigate an individual's conduct that resulted in the fines and associated costs.

These factors in isolation or combination cause considerable stress to individuals who are already by definition particularly vulnerable members of the community. The Committee was told that the infringement system may:

- cause, contribute to or maintain poverty and/or homelessness, because of the high and fixed level of infringement penalties and the limited options for paying them early;<sup>1507</sup>
- have an impact on individuals' mental health, because of the stress experienced by many as a result of the complexities of the infringement system and its relative lack of flexibility;
- have an impact on the effectiveness of treatment programs, in particular those that require ongoing purchases of medical supplies, because of the obligation to pay infringement penalties and associated costs in addition to ongoing living and medical expenses;<sup>1508</sup>
- have an impact on relations between individuals with mental illnesses and their families, particularly in cases where families pay the penalties and costs or where families undertake intensive interventions to reduce the scope for individuals' infringing behaviour.<sup>1509</sup>

Officials of the Magistrates' Court described the impact of the PERIN system on some of these individuals as follows:

This group of offenders is at the margins of society. They suffer from homelessness, intellectual disability, psychiatric illness, alcoholism, substance abuse, family fragmentation and severe social dysfunction. In addition, they often fall outside even the most basic safety net such as the night shelters system, because they are often extremely transient and display antisocial behaviour. It is these factors that interfere with the implementation of consistent case

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<sup>1507</sup> Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence*, 20 October 2004, 232-233.

<sup>1508</sup> William Crawford, Fitzroy Legal Service, *Minutes of Evidence*, 5 November 2004, 298-299.

<sup>1509</sup> Isabel Collins, Elizabeth Crowther, Mental Illness Fellowship of Victoria, Victorian Mental Illness Council, *Minutes of Evidence*, 19 October 2004, 206, 209.

management, and as a consequence, prevent them from being able to address their financial commitments in even the most minimal way.

These offenders present a range of issues with respect to processes associated with the enforcement of fines. Significant numbers of infringement notices are being issued by enforcement agencies against these individuals with special needs, who may not comprehend the consequences of their actions, have no capacity to pay the fines and do not have any assets that can be seized and sold. The result of not being able to pay means that PERIN Court orders and subsequent warrants are issued against them.<sup>1510</sup>

Fitzroy Legal Service described the impact of PERIN on its clients:

As a drug and alcohol outreach lawyer, the author of this submission sees many clients facing multiple and complex issues, including undiagnosed mental health issues, financial, housing and health crises. These issues often arise against the backdrop of individuals seeking to overcome an addiction, and requiring a stable and stress-free environment to achieve their goals. The added stress of multiple fines and the ultimate threat of imprisonment can have a destabilising effect on their progress towards rehabilitation.<sup>1511</sup>

In its submission, the PILCH Homeless Persons' Legal Clinic provided a compelling case study of many of the impacts described above. Over a five year period, one of its clients accumulated more than 500 fines, totalling more than \$100 000:

Between 1996 and 2001, [our client, who has an acquired brain injury and suffers from chronic alcoholism] had no fixed address. For some periods, he stayed in crisis accommodation facilities... Throughout this period, he was unable to consistently receive mail. John's primary income source was a Disability Support Pension of just over \$200 per week. This is barely sufficient to pay for food, transport, clothing, medication and crisis accommodation. It is grossly inadequate to pay almost \$500 per week in fines. According to John's caseworker, 'John accumulated significant unpaid fines, but faced with the more urgent demands of finding food, support and a roof overhead, he didn't see them as a priority. However, the resulting debt triggered a downward spiral. His substance abuse escalated. Fines raised anxiety and were quite destabilising.'<sup>1512</sup>

Ultimately, the unpaid penalties were listed together and dismissed at the Special Circumstances List, on condition that the client complied with a case management plan that was reportedly designed to address the underlying causes of his homelessness by assisting him with accommodation and support.<sup>1513</sup> PILCH described that outcome as "excellent". However, "what was essentially a referral to a caseworker only came after":

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<sup>1510</sup> Anne Condon and Annie Merinakis, *The Enforcement Review Program*, Journal of Judicial Administration (2003) 12 224 (Condon and Merinakis, *ERP*), 226.

<sup>1511</sup> Fitzroy Legal Service, *Submission no. 35*, 7.

<sup>1512</sup> Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 17-18.

<sup>1513</sup> *Ibid*, 39.

- Victoria Police and the Department of Infrastructure expended considerable time and resources issuing over 500 infringement notices and 500 courtesy letters;
- At the expiration of 28 days after the issue of the courtesy letters, Victoria Police and the Department of Infrastructure sent over 500 Certificates of Registration to the PERIN Court;
- The PERIN Court expended significant time and resources issuing over 500 PERIN enforcement orders and 500 PERIN penalty enforcement warrants;
- The PILCH Homeless Persons' Legal Clinic applied for the revocation of all outstanding enforcement orders and warrants;
- The PERIN Court considered and granted the applications for revocation and then issued over 500 notices of revocation to the Clinic and 500 notices of revocation to Victoria Police and the Department of Infrastructure;
- Victoria Police and the Department of Infrastructure sent over 500 letters to the PERIN Court declining to withdraw the fines;
- The PERIN Court sent over 500 notices of hearing to PILCH and 500 notices of hearing to Victoria Police and the Department of Infrastructure;
- The case was heard in the Melbourne Magistrates' Court with a magistrate, an associate, five lawyers, two prosecutors, a caseworker and the Disability Coordinator; and
- [The client] experienced profound anxiety and distress.

Clearly, the current PERIN system is not the best way. Despite over 500 contacts between police, public transport officers and John, 500 letters, and the expenditure of considerable police, Court and defence time, the ultimate referral to a community agency and appropriate social supports to address [the client's] offending behaviours came after five years. On the PERIN Court's own calculations, the costs accrued by the issuing agencies, PERIN Court and Sheriff's Office but subsequently dismissed by the Court exceeded \$40 000. This does not include the costs accrued by the prosecution, the defence or the Court itself. \$40 000 would have been more than sufficient funds to provide [the client] with a devoted carer.<sup>1514</sup>

The Victorian Council of Social Service argued that:

[u]nder the current infringement system the offenders do not have the option of paying off the fine instalments or articulating special circumstances until the matter has reached the PERIN court and further costs and penalties have been accrued. VCOSS believes that the automation of cases preventing the individualisation of sanctions, and the limited scope of the 'special services' provisions results in a disproportionate and discriminatory incidence of warrants and

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<sup>1514</sup> Ibid, 46.

arrests targeting people experiencing homelessness, disability, disorder or severe financial hardship.<sup>1515</sup>

Penalty enforcement warrants also result in particular consequences for disadvantaged individuals. After a warrant is issued, its execution is suspended until seven days after Sheriff's Office officials have served a notice of rights on the subject of the warrant.<sup>1516</sup> Service of the notice can and frequently does constitute the first occasion that individuals with outstanding penalties seek or receive assistance. This can cause hardship for individuals who are subject to the warrant: the Victorian Aboriginal Legal Service argued that the seven day period between service of the notice and the execution of the warrant by seizure of goods or arrest of the subject does not allow sufficient time to raise funds to pay the penalty, and that many indigenous people are not aware of the options for paying penalties by instalments or converting them into CCPs.<sup>1517</sup> Other advocates for disadvantaged individuals reported similar experiences.<sup>1518</sup>

Conversely, the contact with the Sheriff also provides the opportunity for individualised consideration of a person's circumstances, an approach that is presently not a prominent feature of the other parts of the PERIN system. Officials from one enforcement agency told the Committee that, as a consequence of individuals not responding to the infringement notice and courtesy letter, the agency is frequently unaware of mitigating circumstances in individual cases until Sheriff's Office staff make contact with the persons concerned.<sup>1519</sup>

The Committee was also told of efforts by the Sheriff's Office to ensure appropriate treatment of cases. Indeed, as the Committee discusses below, it was as a result of concerns on the part of the Sheriff's Office about the number of cases that its officials encountered that were inappropriate for custody or CCPs that the Enforcement Review Program and the Special Circumstances List of the Magistrates' Court were established to deal with certain cases. The Committee was also told that Sheriff's Office personnel explain to individuals the options contained in the notice of rights delivered after a penalty enforcement warrant is issued<sup>1520</sup> and endeavour to divert cases out of the warrant execution process wherever possible.<sup>1521</sup> Further, the pre-arrest report used by the Sheriff's Office includes a requirement to ask individuals

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<sup>1515</sup> Victorian Council of Social Services, *Submission no. 30*, 4.

<sup>1516</sup> *Magistrates' Court Act 1989 Schedule 7*, cl 3(2).

<sup>1517</sup> Victorian Aboriginal Legal Service, *Preliminary submission*.

<sup>1518</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence, 20 October 2004*, 203-204; Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence, 20 October 2004*, 232-233; Gary Sullivan, West Heidelberg Community Legal Service, *Minutes of Evidence, 20 October 2004*, 248-249, 253.

<sup>1519</sup> Conversation, agency officials and Committee Research Officer, 22 February 2005.

<sup>1520</sup> The notice states that individuals may apply to the PERIN Registrar for an extension of time to pay or an instalment payment plan or revocation of the enforcement order: *Magistrates' Court Act 1989 Schedule 7*, cl 8(2).

<sup>1521</sup> Robert Cahir, Department of Justice, *Minutes of Evidence, 5 November 2004*, 315-316.

about their eligibility for a CCP, although one official noted that some individuals don't understand the relevant questions.<sup>1522</sup>

In any event, the Committee understands that there is agreement among Government and other stakeholders that the number of cases that are discovered only when the Sheriff serves the warrant is too high.<sup>1523</sup>

Similarly, the other impacts described above are widely acknowledged. On behalf of the Magistrates' Court, which administers the PERIN scheme, Magistrate Hannan told the Committee that:

[i]t is our experience that it is a difficult piece of legislation that has practical impacts that perhaps were not anticipated at the time of its introduction. It is fairly unwieldy in terms of its day-to-day operation in the sense of the processes that have to be gone through in order to get to particular points. It is certainly an area where it would appear appropriate for there to be some review.<sup>1524</sup>

Magistrate Bowles added that:

[a] lot of people have difficulties, whether it be intellectual difficulties or psychological difficulties, a whole host, and they come before you in relation to huge amounts that are outstanding as a result of these infringement notices that have not been paid. While the legislation makes provision for them, there are a lot of people who may not fall within that category but run the risk of being imprisoned in relation to not paying parking fines and matters of that nature.<sup>1525</sup>

The Government, Victoria Police and local councils also accept that there are problems,<sup>1526</sup> the consequences of which ultimately affect them. The further a case proceeds, the more expensive it becomes for the individuals concerned and for issuing agencies and the Government, which funds the Magistrates' Court and the legal aid and other support services that individuals often utilise during the process of resolving their cases. As the PILCH case study that the Committee referred to above indicates, expending funds on enforcement rather than attempts to understand and address broader issues underlying the behaviours that result in infringing behaviour is ultimately of questionable benefit both to the individuals on whom the penalties have been imposed and on issuing agencies and the State.

A related, longer-term, impact is arguably more important: the successful operation of the infringement system depends on a high number of the individuals who receive penalties paying them voluntarily. This compliance in turn depends on those individuals believing that the process is sufficiently efficient to effectively pursue non-

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<sup>1522</sup> PERIN Forum.

<sup>1523</sup> PERIN Forum.

<sup>1524</sup> Magistrates' Court of Victoria, *Minutes of Evidence, 20 October 2004*, 280.

<sup>1525</sup> Ibid.

<sup>1526</sup> Various speakers, PERIN Forum.

payers and sufficiently fair to minimise the chance that individuals who come into contact with the system will be treated unjustly.<sup>1527</sup>

The Government, issuing agencies, the judiciary and community groups are working at various levels to address the experiences of disadvantaged people in the infringement system, and other issues such as improving compliance among other groups of people who do not pay the penalty in the infringement notice issued to them. The Committee summarises these efforts below and then examines the evidence it received about reforms to the infringement system.

## ***Efforts to address the impact of infringement notices***

### **Enforcement Review Program and Special Circumstances List**

Perhaps the most significant program is the Enforcement Review Program of the Magistrates' Court (ERP). This joint initiative with the Sheriff's Office is an attempt to address the needs of a particular group of disadvantaged people, by diverting them from the automated enforcement that is the defining feature of the PERIN system into a forum where their individual circumstances can be considered on their merits.<sup>1528</sup>

The ERP arose:

out of the problem created by a large number of disabled offenders accumulating significant numbers of PERIN Court enforcements, and who clearly did not have the capacity to meet their financial commitments.<sup>1529</sup>

A review of the infringements database revealed 124 individuals who were subject to more than 20 outstanding penalty enforcement warrants each, worth a total of just over \$1 million. All of the infringement notices had been issued for "behavioural type offences committed on the public transport system" and the individuals all had special needs.<sup>1530</sup>

Only a small number of those individuals were eligible for or capable of performing community work under a CCP. As a result, many would potentially be held in custody and taken before the Magistrates' Court. The Sheriff's Office asked the Magistrates' Court whether these cases could be dealt with more appropriately to their needs. In response, the ERP was created, to provide:

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<sup>1527</sup> Attorney-General's *Justice Statement*, 32; *PAEC Outstanding Fines*, 51.

<sup>1528</sup> *Condon and Merinakis, ERP*, 230-231.

<sup>1529</sup> *Ibid*, 225.

<sup>1530</sup> *Ibid*, 225.

assistance and intervention at an earlier stage in the enforcement cycle....The aim was to prevent these people being processed and reprocessed through the system, where they would continue to incur further costs to the system, and fail to provide any meaningful resolution to the problem.<sup>1531</sup>

The ERP commenced in June 2002 at the Melbourne Magistrates' Court with a number of aims:

- identification of members of the community with special circumstances who are incurring multiple infringement notices that are progressing to warrant stage, who may not understand the consequences of their actions, have no capacity to pay their fines and do not have assets that can be seized or sold;
- development of a process to bring special needs to the attention of the Magistrates' Court;
- promotion of its existence within the community and provision of assistance and advice as appropriate, including by linking individuals without sufficient support to services that can address their special needs.<sup>1532</sup>

A longer term goal is to “demonstrate the economic and social futility of processing [certain] repeat offenders through the enforcement corridor, and will hopefully lead to a review of the present system”.<sup>1533</sup> The progressive, creative approach that this reflects, and which has been practised by the ERP and the members of the Special Circumstances List who ultimately determine many of the cases processed by the ERP, was widely praised by stakeholders to this inquiry. The following comment from Gary Sullivan, principal solicitor at the West Heidelberg Community Legal Centre, was typical:

[It] is an example where people are able to think laterally within a judicial context about problem cases...[The special circumstances list] is working wonderfully well in what I think everybody agrees are difficult circumstances.<sup>1534</sup>

The special circumstances that individuals must establish to be eligible for the ERP are not specifically defined but can include a diagnosed mental illness, neurological disorders and severe physical disabilities. Homelessness, drug or alcohol addiction are not considered to constitute special circumstances on their own.

If a person experiences an eligible condition and their judgement was impaired at the time of the behaviour that resulted in the issue of the infringement notice, they or a third party such as a lawyer, counsellor or social worker can request the PERIN

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<sup>1531</sup> Ibid, 226.

<sup>1532</sup> Ibid, 226-227.

<sup>1533</sup> Ibid, 227.

<sup>1534</sup> Gary Sullivan, West Heidelberg Community Legal Centre, *Minutes of Evidence*, 20 October 2004, 247, 252.

Registrar to exercise discretion to revoke the enforcement order under clause 10A of Schedule 7 of the *Magistrates' Court Act 1989*. Requests must be supported by sufficient evidence to establish that the applicant has exceptional circumstances that justify the discharge of the penalty and any costs. They are sent to the ERP, which forwards them and data about outstanding penalties to the PERIN Registrar.<sup>1535</sup> If the Registrar revokes the enforcement order, the matter is sent to the issuing agency for it to decide whether to withdraw the penalty. Cases in which the agency declines to withdraw are heard in the Special Circumstances List of the Magistrates' Court (SCL), which currently sits only in Melbourne.<sup>1536</sup> The usual outcome of cases heard in the SCL is the imposition of an undertaking to be of good behaviour or a finding of guilt but dismissal of the charges.

Court officials told the Committee that agencies refer approximately 90% of revoked matters to the Court for determination in this manner. This reflects a belief that bringing the matters before a judicial officer maximises deterrence. Similarly, it is felt that dismissal or discharge of a penalty is a function more appropriately performed by the judiciary rather than the executive.<sup>1537</sup>

In the ERP's first year, there were 261 applications to revoke fines on the grounds of special circumstances. This increased by 92%, to 502 applications, in 2003 - 2004. The Magistrates' Court attributes the rise to ongoing community education and training carried out by the ERP.<sup>1538</sup> On average, each applicant in 2003 - 2004 had 12 outstanding matters. A total of 6889 matters were revoked.<sup>1539</sup> In the first two years of operation, orders and warrants worth \$2.2 million were revoked and heard in the SCL.<sup>1540</sup>

One of the striking features of the SCL is its philosophy; one of its officials described it as a "consensual court". The cooperation of enforcement agencies is essential to the SCL's success, and in general the parties work constructively together with the court to ascertain the best interests of the individuals who appear before it and to ensure appropriate outcomes for them. Similarly, Court staff engage in intensive interventions with some individuals to facilitate their appearance before the SCL and, in some cases, to address potential recidivist behaviour. The Committee was told of one individual who committed multiple public transport ticket offences because he did not have sufficient daily funds to purchase a ticket and food and because he misplaced tickets that he did purchase. The Court worked with him to facilitate the purchase of a

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<sup>1535</sup> Magistrates' Court of Victoria, *Enforcement Review Program*, 2-3.

<sup>1536</sup> If the agency withdraws the penalty, the matter is closed.

<sup>1537</sup> Magistrates' Court Special Circumstances List oral briefing, 24 January 2005.

<sup>1538</sup> Magistrates' Court of Victoria, *Annual Report 2003 - 2004*, 49. The Report incorrectly states that the increase in applications between the two years was 52%. That figure is the 2002 - 2003 applications as a proportion of the 2003 - 2004 applications.

<sup>1539</sup> Magistrates' Court of Victoria, *Annual Report 2003 - 2004*, 19, 49.

<sup>1540</sup> Magistrates' Court of Victoria, *Annual Report 2003 - 2004*, 49.

monthly ticket and a way of securely retaining it, as a result of which he reportedly ceased infringing behaviour.<sup>1541</sup>

The Court is attempting to derive broader benefits from the SCL's experience. One of the ERP's roles is to mediate and negotiate with enforcement agencies and the Sheriff's Office to improve the efficiency and effectiveness of the Program.<sup>1542</sup> The Court's Disability Coordinator is also working with enforcement agencies to improve their capacity to identify and deal with offenders who have mental health difficulties.<sup>1543</sup>

### **Other efforts to address problems in the PERIN system**

Other reform efforts were in progress concurrently with this inquiry. Perhaps the most significant is the Government's infringement review project, which was reportedly prompted by the growth in the infringement notice system and its dependence on voluntary compliance.

[I]t is timely for the Government to review both the fairness of the system – to ensure that the high levels of voluntary compliance are maintained – and also its effectiveness – to identify opportunities for improved collection of unpaid fines.<sup>1544</sup>

The Attorney-General stated that the project would focus on:

- ways of resolving cases early, to prevent their movement into the expensive warrant enforcement stage; and
- ways of more effectively dealing with repeat offenders, "who are responsible for a disproportionate amount of unpaid fines".<sup>1545</sup>

In its submission to the Committee, the Department of Justice listed five goals for the review: the development of common principles; the protection of disadvantaged people; improved enforcement; appropriate expansion of the system; and the establishment of overarching legislation.<sup>1546</sup>

In conducting the review, which involves the whole of Government, the Department has undertaken extensive consultations with a wide range of stakeholders across the community. The Department established and coordinated an Infringements Framework Reference Group, which has representatives from a wide range of agencies including the Department of Infrastructure (DoI) (public transport offences),

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<sup>1541</sup> Magistrates' Court Special Circumstances List oral briefing, 24 January 2005.

<sup>1542</sup> Magistrates' Court of Victoria, *Annual Report 2003 - 2004*, 49.

<sup>1543</sup> Magistrates' Court Special Circumstances List oral briefing, 24 January 2005.

<sup>1544</sup> *Attorney-General's Justice Statement*, 32.

<sup>1545</sup> *Ibid.*

<sup>1546</sup> Department of Justice, *Submission no. 38*, 6.

Victoria Police, the Municipal Association of Victoria (MAV) (representing local councils) and VicRoads (which manages vehicle databases that are essential to the issuing and enforcement of infringement notices).

The MAV has its own PERIN Reference Group of senior managers from local government that provides strategic advice on matters relating to the enforcement of outstanding infringement notices.<sup>1547</sup> The MAV is particularly concerned about the amount of penalties and costs owing to local governments.<sup>1548</sup>

Another important project is underway in the DoI, which enforces infringement notices issued on the public transport system. The DoI established a Public Transport Enforcement Forum in 2004 to hear disadvantaged groups' perspectives about enforcement activities. The Forum has assessed and tried to address problems certain people have in using public transport and is exploring educational, diversionary and educational initiatives relevant to homeless people and young people who receive infringements. The Forum has consulted Victoria Police, the Magistrates' Court, transport franchisees and community groups and their advocates. While the fundamental premise of the Forum is to protect the integrity of the public transport system, its activities reflect a recognition of the inappropriateness of pursuing particular cases through enforcement mechanisms, and the inefficiencies inherent in using resources for that purpose.<sup>1549</sup>

Groups outside state and local government also pursue reform of the infringement system. The Federation of Community Legal Centres runs a PERIN Working Group comprising lawyers, barristers and financial counsellors. Its aims include "systemic changes to the PERIN system to make it more accessible, equitable and just".<sup>1550</sup>

The impact of PERIN is also monitored by the Debt Recovery Working Group (DRWG) of the Financial and Consumer Rights Council. The Council promotes the interests of financially vulnerable consumers by lobbying for reform of legislation and changes in both government and commercial practices, by monitoring inequities and by ensuring input into government on a wide range of issues. The DRWG has looked at various aspects of the debt recovery process.<sup>1551</sup>

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<sup>1547</sup> Municipal Association of Victoria, *PERIN Reference Group*, at [www.mav.asn.au](http://www.mav.asn.au).

<sup>1548</sup> Municipal Association of Victoria, *MAV Bulletin 519*, 4 February 2005; Municipal Association of Victoria, Submission to the 2004 - 2005 State Budget, January 2004, 10; Attorney-General, Media Release - *Councils reap \$15.6 million profit from PERIN Court*, 20 June 2003.

<sup>1549</sup> Conversation, Public Transport Enforcement Forum official and Committee Research Officer, 17 February 2005.

<sup>1550</sup> Email, Fitzroy Legal Service Legal Projects Officer Peter Noble to Committee Research Officer, 20 January 2005.

<sup>1551</sup> Financial and Consumer Rights Council, *Submission no. 42*, 1; Financial and Consumer Rights Council, [home.vicnet.net.au/~fcrc/](http://home.vicnet.net.au/~fcrc/).

## Improving fairness, consistency and efficiency

The PILCH Homeless Persons' Legal Clinic (PILCH HPLC) argued that:

financially and socially disadvantaged people are more likely to comply with summary laws and enforcement procedures if: they are informed and appraised of their rights; the law and law enforcement officers take account of any 'special circumstances' they may have; and they are treated with dignity and respect.<sup>1552</sup>

Although the study that these conclusions are based on was limited to homeless people, the factors that it found would increase compliance with laws and procedures allude to basic principles of any justice system: all individuals should be informed of their rights; their circumstances should be considered before a sanction is imposed or enforced; and all should be equal before the law. The outcome of that study and the earlier Monash University/Department of Justice report on perceptions of the infringement system and civic compliance<sup>1553</sup> therefore suggest that reforms to the infringement notice system to improve the experiences of disadvantaged people who come into contact with it should focus on:

- earlier and more comprehensive intervention;
- increasing the opportunities for individualised treatment in certain circumstances; and
- enhancing automated parts of the system to improve available options and information provided.

Stakeholders put forward various proposals that offer some practical options for achieving these goals. The Committee grouped their suggestions for reform into two themes that are consistent with the focus on warrants in the terms of reference and with the principle that cases should be resolved as early as possible to minimise financial and other impacts on all concerned parties. The Committee therefore first examines proposals that could reduce the number of penalty enforcement warrants that are issued, by increasing opportunities to resolve matters earlier in the infringement cycle, and then considers reforms to the warrants themselves and the parts of the infringement notice system that they trigger. The Committee also considers broader questions of consolidation and consistency, in the last part of the chapter.

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<sup>1552</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 20, referring to a 2004 survey of homeless people in Victoria: Thomson Goodall Associates, *Consumer Consultations for the Development by the Department of Human Services of a Charter of Rights for Homeless People* (2004).

<sup>1553</sup> The study concluded that perceptions of unfairness in existing infringement system procedures indicated "the need for flexible repayment or fine discharge options at the issuing agencies rather than the PERIN Court (when additional costs are added)": Fox, *On the Spot Fines*, 1, 115.

## **Ways to reduce the volume of cases that proceed to warrant**

### **Diversion at the point of the infringement**

As the Committee has noted, individuals with certain characteristics and experiences are more likely to attract infringement penalties. There is also widespread agreement that the infringement system does not presently meet the special needs of such people, in particular that pursuing them through the system complicates rather than addresses those underlying needs, as well as being wasteful of resources.

### **Evidence received by the Committee**

Stakeholders argued that reform of the system should begin at its 'front end', at or even before the point of contact between these individuals and agencies that issue infringement notices. A coalition of PILCH HPLC, Western Suburbs Legal Service, West Heidelberg Community Legal Service and Fitzroy Legal Service urged the Government and issuing agencies to collaborate with social service providers and disadvantaged people to:

- develop and implement a policy for effective and coordinated engagement with disadvantaged people;
- develop and implement a training program for law enforcement officers for effective, holistic and empathetic engagement with disadvantaged people;
- develop and implement a range of early intervention, diversionary, referral and cautionary alternatives to arresting, summoning or issuing an infringement notice to a disadvantaged person; and
- develop and implement efficient and integrated referral relationships, protocols and procedures as between law enforcement officers and social service providers.<sup>1554</sup>

The group argued that agencies should subject the issuing of infringement notices to a discretion. It was suggested that in appropriate cases, agency officers could instead issue a warning that the behaviour constitutes an offence, or attempt to divert individuals to appropriate support services that could assist in addressing underlying behaviours.<sup>1555</sup>

This idea has significant implications. The effective use of a discretion to issue infringement notices would require training of agency issuing officers, resourcing of

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<sup>1554</sup> PILCH Homeless Persons' Legal Clinic, West Heidelberg Legal Service, Fitzroy Legal Service, *Making PERIN Fairer*, 1; *PERIN Forum*.

<sup>1555</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 21 – 24.; *WHCLS PERIN Discussion Paper*, 15.

support services and clear support for the approach by agencies. A fundamental question is whether, and in what circumstances, individuals who commit infringing acts should avoid the consequential penalty. The PERIN system already recognises exceptions to the strict liability character of infringement offences, through the ERP and SCL. However, as the Committee observed in its discussion of these mechanisms, agencies overwhelmingly prefer to remit eligible matters to the SCL for determination by the judiciary, because, while agencies accept the economic futility of enforcing special circumstances infringements, they are fundamentally concerned to protect the integrity of the systems for which they are responsible. As this is the underlying goal of the infringement system, a critical aspect of its effectiveness is its ability to deter potential offenders.

The Committee understands that issuing officers of the Department of Infrastructure's public transport section undergo extensive training, which is currently being enhanced. Those personnel have discretion to issue a notice or to warn people, although decisions not to issue infringements are reportedly made only in exceptional cases. The officers operate under the premise that anyone who commits infringing behaviour should be reported for non-compliance.<sup>1556</sup>

The importance of preserving the general efficacy of the infringement system was recognised by the PILCH HPLC,<sup>1557</sup> in particular in its recommendation of a model for a diversion procedure:

where an individual who commits infringing behaviour discloses, or where an issuing officer believes, that they have special circumstances, the officer should:

issue a verbal and then a written warning to the individual to cease the behaviour; and

if that fails, contact an outreach team or make a referral to an appropriate social service.

A law enforcement official should only issue an infringement notice [if those steps do not halt] the offending conduct.<sup>1558</sup>

Interestingly, the Public Accounts and Estimates Committee made a very similar recommendation in its 1997 review of the infringement system. That Committee believed that "warnings and cautions, especially those actually issued on-the-spot, have the advantages of immediacy, informality and simplicity, and have a role in softening the apparent inflexibility of the fixed penalty infringement notice system".<sup>1559</sup> For those reasons, the Committee recommended:

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<sup>1556</sup> *PERIN Forum*.

<sup>1557</sup> This and other PILCH HPLC recommendations were supported by the Western Suburbs Legal Service, West Heidelberg Community Legal Centre and Fitzroy Legal Service.

<sup>1558</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 24.

<sup>1559</sup> *PAEC, Outstanding Fines*, 72.

All agencies issuing infringement notices should develop written guidelines on the use of warning notices instead of issuing on-the-spot fines. A warning notice should inform the offender that a record will be kept and that further infringements will result in liability to pay a fine. Agencies should keep records of warning notices issued, so that checks can be made regarding whether a particular person, or the owner of a particular vehicle, has been subject to a recent warning. In such a case, a standard infringement notice would then be issued.<sup>1560</sup>

In its response to the PAEC report, the Government stated that the proposal could be difficult to implement because of its financial and administrative impact. The Government was concerned that it would require a formal system of warnings for all offence types and the electronic recording of all warnings issued.<sup>1561</sup>

The PILCH HPLC proposed conditional cautions as another alternative to infringement notices. According to this model, the issuing agency would issue:

a cautionary letter which provides the [individual who committed the infringing behaviour] with 28 days - if they have been identified by police as a repeat offender but a relatively low level offender - to demonstrate some form of proactive engagement with a social service. If in that instance the social service is Odyssey House - and the issue is in relation to drug and alcohol issues - and it writes a letter saying that this person is engaged with the service, the matter is then withdrawn. At the moment there is no mechanism to do that kind of thing. That is the kind of mechanism which could be used in other than crisis situations.

[If there is no engagement in the time allowed,] then an infringement notice would be issued and enforced in the ordinary way. Presumably one would hope that the person would be picked up at the back end through the special circumstances list.<sup>1562</sup>

The Committee also learned about initiatives focused on changing behaviour before the point of infringement, in particular in relation to repeat offenders.<sup>1563</sup> As an example of holistic engagement, the PILCH HPLC supported the development of an outreach team to seek out homeless people who repeatedly receive infringement notices and to refer them to appropriate social services to address the underlying causes of their behaviour. It was suggested that such an outreach approach would build on existing programs that have sensitised police to issues associated with homelessness and enabled them to make appropriate referrals and other decisions about follow-up action.<sup>1564</sup>

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<sup>1560</sup> Ibid, 73.

<sup>1561</sup> Victorian Government, *Government Response to the Public Accounts and Estimate Committee Report on Outstanding Fines and Unexecuted Warrants*, 8 April 1998 (Victorian Government, *PAEC Outstanding Fines Response*), 3.

<sup>1562</sup> Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence, 20 October 2004*, 238-239.

<sup>1563</sup> *PERIN Forum*.

<sup>1564</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 23-24; *PILCH et al, Disadvantage and Fines*, 16-17.

Another example of early intervention that the Committee was made aware of is the work by the Department of Infrastructure's Public Transport Enforcement Forum to assess the value of an educational approach to reducing infringing behaviour. Such an approach could:

- provide appropriately tailored information to certain groups that receive a disproportionate number of infringement notices, such as young people and those from a non-English speaking background;
- lead to the development of diversionary programs that could be used as a substitute for infringement notice penalties in appropriate circumstances; and
- equip issuing officers to more appropriately deal with such groups at the point of contact, for example by assisting individuals to understand their obligations and the consequences of non-compliance.

### ***Discussion and conclusions***

The Committee agrees with stakeholders that it is futile to pursue certain cases through the infringement system. It is in the interests of fairness and financial efficiency for agencies to adopt a flexible approach to issuing infringement notices in cases where the individual concerned has special circumstances. The funds required for the enforcement of such cases can be more productively devoted to addressing underlying behaviours.

The Committee believes that when an individual commits infringing behaviour, if an issuing officer is aware of special circumstances that are relevant to the behaviour, the officer should in the first instance issue the individual with warnings, cautions or referrals to appropriate social services in place of an infringement notice. It is however often very difficult to identify a person with a disability and it would be appropriate for issuing officers to be expected to adopt these alternative measures only in a limited range of circumstances and in readily identifiable cases. The Committee considers that the criteria for determining that special circumstances exist should, for reasons of consistency and fairness, be based on those which are already used by the Special Circumstances List of the Enforcement Review Program (ERP). The criteria for eligibility for the list are discussed in more detail later in this chapter.<sup>1565</sup> Briefly however, the criteria focus on mental and/or psychological disabilities which have affected an individual's ability to understand the consequences of their actions, or which have significantly affected their judgement at the time of the infringing behaviour.

Issuing officers would need to receive training to sensitise them to the issues associated with particular groups, to enable them to recognise genuine cases of special circumstances and to refer them appropriately. The Committee urges the

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<sup>1565</sup> The Committee's discussion of eligibility criteria for the Special Circumstances List begins on p 426 below.

Government, issuing agencies, social and legal services and community groups to develop appropriate training programs and referral guidelines, and to ensure that referral services are adequately resourced.

In reaching this conclusion, this Committee endorses the Public Accounts and Estimates Committee's 1997 recommendation for the development of a system of warnings and cautions to be used in place of infringement notices in certain cases. While the Government suggested that such a scheme could be impractical, and the Committee agrees that such a scheme could potentially assist only a small number of individuals, it notes that technological developments in the intervening years - including the use of mobile computer equipment by many issuing officers - should reduce the difficulties of recording warnings and subsequently accessing that information. The Committee also notes that details of all infringement notices are recorded and considers that a decision to issue a warning instead of a notice can be logged in the same way: both events are outcomes of a contact between an issuing officer and an individual who has committed an infringement.

The Committee acknowledges the legitimate concerns of issuing agencies that the infringement system should retain its deterrence value but believes that that objective can be achieved by enunciating clear criteria for what constitutes special circumstances. In its discussion of the criteria applying to the ERP the Committee will conclude that cases of financial hardship as the sole special circumstance should not be eligible for the ERP. Similarly, the Committee does not believe that issuing agencies should be required to exercise their discretion not to issue an infringement notice in cases where financial hardship is the sole special circumstance affecting the individual concerned. Rather, such cases can be more appropriately dealt with through other approaches that the Committee discusses in this chapter, such as diversion to open court, instalment payments, reduced penalty amounts and conversion of the penalty to alternative sanctions.

The Committee was particularly impressed by the pioneering work being done by the Department of Infrastructure's Public Transport Enforcement Forum to identify ways of reducing the number of inappropriate cases that go through the infringement system, and encourages the Government and issuing agencies to continue and expand this work across the full range of infringement offences. In particular, the Committee supports education about the infringement system and ongoing dialogue between agencies and groups that are known to be disproportionately affected by the infringement system as a means of preventing infringing behaviour occurring.

Recommendation 89. That all agencies that issue infringement notices develop procedures to ensure that:

- (a) when an individual commits infringing behaviour, if an issuing officer is aware of special circumstances that are consistent with those applied by the Enforcement Review Program to their special circumstances list, the officer will in the first instance issue the individual with a warning, caution or referral to appropriate social services in place of an infringement notice; and
- (b) if the infringing behaviour is repeated, an infringement notice will be issued.

Recommendation 90. That all issuing officers receive training to sensitise them to the issues associated with particular groups, to enable them to recognise genuine cases of special circumstances and to refer them appropriately. The Government, issuing agencies, social and legal services and community groups work together to develop appropriate training programs and referral guidelines, and to ensure that referral services are adequately resourced.

Recommendation 91. That the Government supports and expands initiatives such as those being developed by the Public Transport Enforcement Forum and other stakeholders, with the aim of encouraging earlier intervention to focus on underlying behaviours as a way of reducing the volume of people who come into contact with the infringement system.

While these proposals are likely to reduce the number of individuals with special circumstances who go through the infringement system, many such cases will not be diverted. Some will not be detected by issuing officers, particularly as special circumstances are not always apparent at the point of contact. Others may be detected but may not be suitable for diversion, either because they have breached the conditions of any warning or caution or because they have committed further infringements. The discretion would therefore appear to be of little use in relation to many private transport-related infringement offences. The issuing of infringement notices in response to parking, speeding and other offences typically occurs without any real-time contact between the issuing agency personnel who detect the offence and the individual who commits it.<sup>1566</sup>

Discretionary diversion through referrals, warnings or cautions is therefore properly viewed as one of a range of overlapping measures that together offer the potential to

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<sup>1566</sup> Obvious exceptions include cases where Victoria Police members on patrol detect infringements and consequently engage with offenders, and interactions between local government parking monitors and individuals who have committed parking offences.

improve outcomes for people with special circumstances who come into contact with the infringement system.

The Committee now examines ways of resolving such cases as early as possible after individuals have been issued with an infringement notice.

### **Improving options once an infringement notice is issued**

The infringement system includes a range of options that provide flexibility for appropriate cases. These include: review of the infringement penalty by the agency; delayed payment and payment by instalment; diversion to open court for hearing and determination; application to the ERP for revocation of enforcement orders and withdrawal of penalties/diversion to the special circumstances list; and discharge of penalties and costs through a CCP or CBO. Most of these options are available at different stages in the system, rather than from the time that an infringement notice is issued:

- issuing agencies are not required to accept extended payment periods or payments by instalment until an order authorising such payments is made by the PERIN Court in response to an application from an individual following their receipt of a penalty enforcement order;
- the ERP can only consider requests for revocation and withdrawal/diversion to the Special Circumstances List after a penalty enforcement order has been issued;
- CCPs and CBOs are only available respectively after the execution of a penalty enforcement warrant and when a person is considered unsuitable for a CCP and is brought before a magistrate for sentencing.

Moreover, the Committee received evidence that the two mechanisms that are available at the time an infringement notice is issued - agency review and diversion to open court - are applied inconsistently.

As the Committee has noted, these characteristics of the infringement system cause hardship and stress for many members of the community and questionable expense for issuing agencies and the Government. The Committee considers them in the following order, which roughly approximates to the chronological order in which they occur in the infringement system:

- agency review;
- conversion of penalties and costs to community work;
- payment options;
- diversion to open court; and
- improvements to the Special Circumstances List.

## Agency review of the infringement notice

### *Evidence received by the Committee*

The Committee was told that all agencies have a process to review infringement notices.<sup>1567</sup> However, these are not standardised and vary considerably in their transparency and outcomes: available evidence indicates that they are inconsistent and there is no accurate data recorded about which matters are withdrawn and why.<sup>1568</sup> The PILCH HPLC stated that, in its experience with 235 cases involving homeless persons between July 2001 and June 2004:

- issuing agencies rarely cancel or withdraw infringement notices, regardless of an individual's means or circumstances; and
- local governments tend to take account of means and circumstances "more flexibly and favourably" than state government departments and statutory authorities when assessing requests for withdrawal of infringement notices.<sup>1569</sup>

The Committee was also told that many agencies do not inform individuals who receive infringement notices that they may apply for review of the penalty.

The PILCH HPLC proposed that issuing agencies should be required to inform recipients of infringement notices and courtesy letters that they could seek to have penalties withdrawn, and that agencies should withdraw the penalties where individuals can demonstrate special circumstances or that they did not commit the infringement offence or had a reasonable excuse for doing so.<sup>1570</sup> VLA made a similar proposal, emphasising that penalties should be withdrawn at the earliest opportunity.<sup>1571</sup>

This essentially mirrors a recommendation of the PAEC in its Report on Outstanding Fines and Unexecuted Warrants:

A just system must recognise genuine and legitimate excuses and mitigating factors when they exist...Accordingly, the Committee is of the view that infringement notices should contain wording to the effect that if the offender believes there are special circumstances or reasons why the penalty should not be enforced, they should contact a specific officer of the issuing agency

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<sup>1567</sup> *PERIN Forum*.

<sup>1568</sup> *Ibid*.

<sup>1569</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 29.

<sup>1570</sup> *Ibid*.

<sup>1571</sup> Victoria Legal Aid, *Submission no.21*, 9.

[who] should be able to review the medical or other evidence, and waive the penalty, if this is justified.<sup>1572</sup>

### ***Discussion and conclusions***

The Committee believes that issuing agencies should adopt and implement consistent policies concerning the review of infringement penalties. The goal of such policies should be to provide a further opportunity to remove inappropriate cases from the infringement system.

The Committee notes that current practice indicates that issuing agencies prefer that the court determines the appropriate circumstances in which penalties should be withdrawn and what, if any, obligations should replace them. Under current legislation, if an agency refuses to withdraw a penalty and it remains unpaid, the matter would be registered with the PERIN Court and an enforcement order issued. An individual subject to the order would then apply for revocation of the order, which may lead to referral of the matter to open court, withdrawal of the penalty, or referral to the Special Circumstances List. While it can be argued that this approach by agencies preserves the role of the court in the process and reinforces the deterrent value of the infringement system, it also results in the imposition of additional costs, at the two or three<sup>1573</sup> stages that occur between agencies' initial refusal to withdraw a penalty and an application to the ERP or for revocation to open court. The Committee considers that this situation is potentially unfair to individuals who do not have the means to pay the penalty or did not have an intention to offend.

Accordingly, the Committee believes that agencies should withdraw penalties and costs at the earliest opportunity where evidence is provided of special circumstances and where the individual has not previously been issued with a warning or caution. One way of discouraging recidivism could be for agencies to make the withdrawal conditional on the individual concerned undertaking an obligation related to the infringement, for example attendance at an educational program. In essence, the sanction would be transformed from punitive into remedial. The Committee acknowledges the potential difficulties of regulating such alternatives to financial penalties and therefore considers that any substitute sanctions should be minor in nature, such as the example of attending an educational program which the Committee understands is being considered by the Department of Infrastructure's Public Transport Enforcement Forum.<sup>1574</sup>

Again, the Committee believes that to improve the consistency and therefore the coherence of the infringement system, definitions of special circumstances and the material required to establish their existence should be consistent with those that

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<sup>1572</sup> PAEC, *Outstanding Fines*, 55.

<sup>1573</sup> These steps are: courtesy letter and fee; registration and fee; and enforcement order and fee.

<sup>1574</sup> The Committee referred to these initiatives at pp 403-403 above.

make a case eligible for the Enforcement Review Program (ERP).<sup>1575</sup> As noted in the preceding section on diversion before an infringement notice is issued, the Committee will conclude that cases of financial hardship as an individual's sole special circumstance should not be eligible for the ERP. Similarly, the Committee does not believe that issuing agencies should be required to withdraw penalties in cases of financial hardship. Rather, such cases can be more appropriately dealt with through other approaches that the Committee discusses in this chapter, such as diversion to open court, instalment payments, reduced penalty amounts and conversion of the penalty to alternative sanctions.

The question of financial hardship as a valid excuse for discharging penalties was raised during PAEC's inquiry into Outstanding Fines and Unexecuted Warrants. PAEC received evidence about the implications of writing off fines where there is "no serious prospect" of the penalties and costs being paid. Two stakeholders in that inquiry expressed serious concerns about the impact of such a policy on both the infringement scheme and the justice system as a whole. The Department of Justice argued that discharging or cancelling penalties for people on low incomes "would relieve impecunious offenders of the consequences of breaking the law. The impact would be particularly undesirable where speeding and moving traffic offences are concerned".<sup>1576</sup>

Similarly, Stonnington City Council suggested that such a policy:

will have a negative impact on the total process and send a message that there is a law for the rich and a law for the poor...to remove the incentive for a group of people to comply with set standards is not an option. An alternative is a well-supervised system of community based orders. It is still an option for people of limited means.<sup>1577</sup>

Clearly, these arguments are equally relevant today and thus the Committee has considered how to preserve the integrity of the system while improving its fairness to people who suffer financial hardship. The Committee believes that where that is the sole component of special circumstances being claimed, a better approach is for agencies to consent to the conversion of penalties into unpaid community work or reduce the amount of the penalty and any costs to take account of the individual's financial situation. Stakeholders raised these options in this inquiry and the Committee discusses them in more detail in the following two sections of this chapter.

**Recommendation 92.** That issuing agencies adopt consistent policies on the review, withdrawal and variation of infringement penalties and costs.

<sup>1575</sup> The Committee's discussion of eligibility for the ERP begins at p 426 below.

<sup>1576</sup> Department of Justice, *Additional submission, PAEC, Outstanding Fines and Unexecuted Warrants*, 83.

<sup>1577</sup> Stonnington City Council, *Additional submission, PAEC, Outstanding Fines and Unexecuted Warrants*, 84.

Recommendation 93. That issuing agencies withdraw penalties and costs at the earliest possible opportunity where evidence is provided of special circumstances excluding financial hardship as a sole special circumstance, and where the individual has not previously been issued with a warning or caution in accordance with Recommendation 89.

Recommendation 94. That issuing agencies consider imposing minor remedial conditions on the withdrawal of penalties.

### **Converting penalties to community work**

As already noted, there are legitimate reasons for not waiving penalties imposed on individuals experiencing financial hardship.<sup>1578</sup> It is recognised, however, that pursuing such cases through the infringement system may not be an efficient use of resources and that instalment payment plans are not appropriate in all situations.

During the PAEC's inquiry into Outstanding Fines and Unexecuted Warrants, Stonnington City Council argued that community based orders are a viable alternative to payment for people with limited means.<sup>1579</sup> The PAEC concluded that "an obvious method of dealing with offenders without means is to give better access to the community service option at the earliest stage in the infringement penalty enforcement process".<sup>1580</sup> This option is also a viable means of discharging penalties for other disadvantaged individuals, for example people with illnesses who are able to control them through a treatment program.

Under the present infringement system, penalties can be converted to unpaid community work either by:

- taking the matter to open court at any stage in the infringement system and being sentenced to a fine, then converting it into a community-based order (CBO) under the *Sentencing Act 1991*; or
- submitting to a custodial community permit after arrest following the execution of a penalty enforcement warrant; or
- establishing exceptional circumstances to justify the making of a CBO after arrest under a penalty enforcement warrant and being brought before the court for sentence.<sup>1581</sup>

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<sup>1578</sup> These reasons are discussed at p 409.

<sup>1579</sup> Stonnington City Council, *Additional submission, PAEC, Outstanding Fines and Unexecuted Warrants*, 84, outlined by this Committee at p 409.

<sup>1580</sup> *PAEC, Outstanding Fines and Unexecuted Warrants*, 52.

<sup>1581</sup> These mechanisms are explained by the Committee at pp 378-378.

While this is consistent with PAEC's suggestion that conversion should be available as early as possible, the coalition of PILCH HPLC, Western Suburbs Legal Service, West Heidelberg Community Legal Service and Fitzroy Legal Service argued that these options restrict the ability of socially and/or financially disadvantaged individuals who accept their guilt and are prepared to pay the penalty by converting it to community work to do so. The PILCH HPLC stated that the procedure for converting penalties under the first option is complex:

Where the matter is at infringement notice or courtesy letter stage, the person must:

decline to be dealt with under the PERIN system pursuant to Clause 3(6) of Schedule 7 of the *Magistrates' Court Act 1989*; and

then seek to have the matter dealt with by way of a court-imposed fine under the *Sentencing Act 1991* when the matter is heard in the Magistrates' Court; and

then apply to the Registrar of the Magistrates' Court for conversion of that court-imposed fine to unpaid community work at the rate of \$20 per hour; and

then carry out work as directed and supervised by Corrections Victoria.<sup>1582</sup>

Similarly, the second and third options for obtaining community work are only available after the matter has proceeded through the infringement system,<sup>1583</sup> incurring additional costs and potential stresses for the individuals involved.

The PILCH HPLC suggested that it should be possible to apply to the PERIN Registrar for conversion of the fine to community work, in the same way as it is presently possible to apply for revocation, extension or payment by instalments:

That would again provide another flexible option which would enable people who take responsibility for their actions to work off their fines and contribute to the community.<sup>1584</sup>

The availability of an accessible and practicable method for the conversion of unpaid infringement notice penalties to unpaid community work, particularly for people experiencing financial or social disadvantage with no prospect of paying the penalty, would result in increased perceptions of fairness, improved outcomes and substantially decreased enforcement costs.<sup>1585</sup>

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<sup>1582</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 42; Magistrates' Court, *Open Court Fines: How do I convert my fine to Community Work?* at [www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au).

<sup>1583</sup> In the context of the infringement system, a CCP may only be issued in relation to individuals who are in prison for non-payment of penalties and/or costs: *Corrections Act 1986* s 57C.

<sup>1584</sup> Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Submission no. 4; Minutes of Evidence, 20 October 2004*, 236.

<sup>1585</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 43.

The Committee believes that this proposal has considerable merit. Simplifying the process for converting fines to community work at the earliest opportunity has the potential to lead to fairer and more expeditious disposal of cases and significant cost savings throughout the infringement system. On the other hand, it can be anticipated that increasing the number of cases that are dealt with through community work will cause a parallel rise in the cost to Government of supervising such work. The Committee nevertheless believes that streamlining existing procedures will promote the possibility of converting fines to community work, thereby making the option more available and improving both the fairness and the efficiency of the infringement system.

Recommendation 95.	That clause 7 of Schedule 7 of the <i>Magistrates' Court Act 1989</i> be amended to permit applications to the PERIN Court for the conversion of penalties and costs to community work.
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### **Improving options for paying penalties and costs**

A common complaint about the infringement system in respect of individuals who accept that they have committed an offence and should consequently pay a penalty is that it fails to take into account people's financial circumstances. Because penalties are set at flat rates, a millionaire who commits an infringement offence pays the same penalty as someone with negligible assets or income. Infringement penalties therefore have an unequal objective impact on individuals.<sup>1586</sup> A recent report argued that "those who can afford the least owe the most, simply because they cannot afford to pay the infringement notice and end up owing more in costs and penalties".<sup>1587</sup>

The Victorian Council of Social Service (VCOSS) therefore asserted that "the current 'one size fits all' infringement model denies the substantive impact of fines on disadvantaged and marginalised members of the community".<sup>1588</sup> The Western Suburbs Legal Service told the Committee that many such people are:

on social security benefits and without the disposable income of many other commuters, which means the fine is likely to have a profound impact on their day-to-day livelihood...

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<sup>1586</sup> In contrast, subjective impacts tend (by definition) to be unequal because individual characteristics are a major determinant.

<sup>1587</sup> *WHCLS PERIN Discussion Paper*, 12. Stakeholders made the same point: William Crawford, Fitzroy Legal Service, *Minutes of Evidence 5 November 2004*, 299; Victorian Council of Social Service, *Submission no. 30*; various speakers, *PERIN Forum*.

<sup>1588</sup> Victorian Council of Social Service, *Submission no. 30*, 2.

if you get a public transport fine and you are on a benefit, that is so much of your weekly income that generally you will not be able to pay it off straightaway,<sup>1589</sup>

One way that the infringement system addresses this disparity while preserving its integrity as a remedy for unlawful behaviour is the use of flexible payment options. Stakeholders argued that these should be reformed to:

- facilitate the use of penalties that take account of individuals' financial circumstances; and
- allow greater scope for payment in instalments and/or deferral of payment.

### **Varying penalties to take account of individual circumstances**

The submission of the Victorian Council of Social Services (VCOSS), was principally concerned with this issue. It argued, correctly in the Committee's view, that while fine levels are set to create a deterrence for the majority in the community, they are self-evidently not designed to cause ongoing financial hardship. However, in practice they do so, because:

the degree of deterrence that a fine [actually] represents is relative to an individual's income. A fine of fixed amount represents a vastly different level of punishment for a family struggling to make ends meet as compared to a wealthy executive.<sup>1590</sup>

It is a fundamental principle of the rule of law that everyone should be treated equally. Indeed, it is a philosophical basis for having fixed penalties. However, the variation in the effects of the penalty means that equal treatment results in unequal impacts. The Monash University/Department of Justice 2003 study reported that this is one of the most significant contributors to perceptions of unfairness about the infringement system. It also has a practical impact on the efficiency of the infringement system:

finances which are set at levels that offenders cannot meet, or which cannot be paid over a reasonable period of time are less likely to be paid than those which are set at levels that are within the means of the offender.<sup>1591</sup>

The reality for many people is that, if they are going to make a choice between paying a parking fine and paying their electricity bill or the water rates, they are going to pay utilities. They are going to pay what is going to keep them going.<sup>1592</sup>

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<sup>1589</sup> Godfrey Moase, Western Suburbs Legal Service, *Minutes of Evidence*, 20 October 2004, 227.

<sup>1590</sup> Victorian Council of Social Services, *Submission no. 30*, 5.

<sup>1591</sup> Bruce Chapman, Arie Freiberg, John Quiggin and David Tait, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines*, Centre for Economic Policy Research, ANU Discussion paper No. 461 (March 2003) (*Chapman et al, Rejuvenating Financial Penalties*), 7.

<sup>1592</sup> Joe Calleja, Department of Justice, Western Australia, *Minutes of Evidence*, 2 September 2004, 96.

One approach to this problem is to allow payment over a longer period than the current scheme, so that the effect of the penalty is reduced to a level that is manageable on an ongoing basis. As noted, the infringement system already provides such an option, through instalment payments and extensions of time to pay, and the Committee examines these in the following section. Nevertheless, the unequal effect of penalties is preserved by deferred payments or payment by instalment because the individual is required to pay the full amount of the fixed penalty and the underlying disparities in means and incomes persist.

Another remedy is to attempt to ensure that penalties have a more even deterrent effect. As VCOSS recognises, in order to effectively achieve that outcome, fines would need to be more tailored to individual circumstances.<sup>1593</sup> The PILCH HPLC also felt very strongly that:

the government should develop some form of more equitable and proportional method of calculating infringement notice penalty amounts and take into account an offender's circumstances and means.<sup>1594</sup>

Many countries have adopted such an approach, through a fine units system.<sup>1595</sup> In those justice systems, fines are calculated on the basis of a formula:

- the offence is valued at a certain number of units according to its seriousness;
- the means of each individual are assessed, generally from income adjusted to take account of living, dependant and other costs;
- the fine is computed by multiplying the number of units by the individual's means.

Typically, these fines are known as day fines because the income part of the calculation is expressed as an individual's daily income.<sup>1596</sup>

The Committee was told that the day fine system has led to substantial reductions in rates of non-payment in the countries in which it operates, leading to increased revenue collection, and that day fine systems have met with significant community

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<sup>1593</sup> Victorian Council of Social Services, *Submission no. 30*, 5.

<sup>1594</sup> Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence, 20 October 2004*, 234.

<sup>1595</sup> According to a New Zealand study, such fines have been used in nine European countries and the U.S.A.: Ministry of Justice of New Zealand, Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand*, (2000), 99 (*NZ Review of Monetary Penalties*). The PILCH HPLC stated that they are also used in Canada and Latin America: PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 27.

<sup>1596</sup> Victorian Council of Social Services, *Submission no. 30*, 6; *NZ Review of Monetary Penalties*, 99; PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 27. As the Committee's focus in this discussion is on making it easier for individuals to pay penalties, it has not considered the other consequence of calibrated fines for people whose income might be argued to justify a penalty higher than the current fixed amount. The English and Welsh legal system attempted such a scheme in the 1990s: *NZ Review of Monetary Penalties*, 100-104.

support “and are generally regarded to operate with a high degree of fairness and legitimacy”.<sup>1597</sup>

The PILCH HPLC explained how such outcomes could result from the introduction of day fines to the infringement system:

Presented with a fine of \$200 for travelling without a valid ticket, a person on a disability support pension will generally or often, in our experience, have no option but to ignore it. If they were presented with a \$50 fine, on the other hand, and there was some opportunity to pay that fine by instalment before it went to the PERIN court, they may well enter into and maintain an instalment plan.<sup>1598</sup>

However, day fines are used in cases where courts impose them as a sanction, rather than as part of an automated infringement system. VCROSS argued that “while worthy in principle, a ‘day fines’ system would be costly to implement for general infringements”.<sup>1599</sup> Considering the number of notices issued, the Committee agrees. Another serious difficulty with the proposal is the difficulty of verifying individuals’ financial means. Australian jurisdictions have struggled to obtain access to potential income validation sources, such as taxation records, for the purpose of seeking more effective compliance tools for use against persistent penalty defaulters. Indeed, this is cited as a primary reason why day fines have not been adopted in Australia, despite “often being considered by law reform bodies and academic commentators” here<sup>1600</sup>, or New Zealand.<sup>1601</sup>

As an alternative, VCROSS proposed that individuals who receive a penalty could apply for it to be reduced to “a sum proportional to their income if the payment of the full amount would cause them hardship”.<sup>1602</sup> The Western Suburbs Legal Service proposed a similar remedy:

[We propose] a system where each particular offence is tied to a unit and that unit is consistent across the board. That unit is not a fixed dollar amount - the lowest base unit could be one working day for one particular person. That way you would have an offence that was tied to the

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<sup>1597</sup> Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford University Press, New York, 1990), 154; Jen Kiko Begasse, *Oregonians Support Alternatives for Non-Violent Offenders* (1995) 6(4) *Overcrowded Times* 1, 14, both cited in PILCH Homeless Persons’ Legal Clinic, *Submission no. 4*, 27; Tamara Walsh, *From Park Bench to Court Bench*, Faculty of Law Queensland University of Technology in association with the Homeless Person’s Legal Clinic (2004), 29, cited in Victorian Council of Social Services, *Submission no. 30*, 6-7.

<sup>1598</sup> Phil Lynch, PILCH Homeless Persons’ Legal Clinic, *Minutes of Evidence, 20 October 2004*, 234.

<sup>1599</sup> Victorian Council of Social Services, *Submission no. 30*, 7.

<sup>1600</sup> *Chapman et al, Rejuvenating Financial Penalties*, 5.

<sup>1601</sup> *NZ Review of Monetary Penalties*, 105.

<sup>1602</sup> Victorian Council of Social Services, *Submission no. 30*, 7.

seriousness for that person. If you are on benefits and you receive a public transport fine, that fine would be tied to one day of benefits.<sup>1603</sup>

However, even if the mechanism was only to apply to the 10-15% of penalties that are not paid in the early stages of the infringement cycle, the Committee is not satisfied that the costs of the sorts of individualised case management that are implicit in a day fines system can be justified without significantly affecting the automation that defines the infringement system: unlike other reforms that the Committee proposes in this chapter, individualising fines to the extent of the day fines model requires the calculation of many thousands of specific penalties. While the computation of fine units and the multiplication by the income value could be accomplished with relative ease, validating many thousands of individuals' incomes is, as the Committee noted above, considerably more problematic.

Nevertheless, given the benefits of penalties that are more variable than those in the present Victorian system, the Committee does believe that some form of calibrated penalty should be available to certain individuals. It agrees with VCOSS and other stakeholders that "a compromise must be reached that reconciles operational efficiency with the reality of social inequality".<sup>1604</sup>

An alternative to the day fines model that has the potential to achieve this goal is a concession penalty amount scheme, similar to the concession rates that are offered by utility and other companies to individuals with eligible social security cards. Such a model would make lower penalties available to people suffering from financial hardship without the need to calculate specific amounts for each individual. Reliance on existing social security eligibility criteria to determine suitability for such reduced fines would also obviate the need for the onerous income validation process. To some degree, such a scheme may replicate the structural unfairness of existing fixed penalties, because concession penalties would themselves be fixed, albeit at a lower level than existing penalties. The effects of such an outcome could be reduced by offering two or three different levels of reduced penalties, based on different types of social security benefit. Thus an individual on relatively low-level benefits would be eligible for the smallest reduction in penalty amount, while an individual on relatively high benefits would have access to the largest reduction. This proposal, illustrated in the following table, is similar to a suggestion from VCOSS for a schedule of reduced penalties derived from income levels.

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<sup>1603</sup> Godfrey Moase, Western Suburbs Legal Service, *Minutes of Evidence*, 20 October 2004, 230.

<sup>1604</sup> Victorian Council of Social Services, *Submission no. 30*, 7.

Social security benefit level	Penalty amount (example)	Penalty reduction (example)	New penalty amount (example)
No benefit	150	0	150
Minimum benefit	150	- 30	120
Median benefit	150	- 60	90
Maximum benefit	150	- 100	50

**Table 10. Variable penalty amounts (example figures)**

However, the Committee considers that this model would be complex and onerous to administer because of the range of social security benefits and qualifying conditions.

A third approach is to restrict eligibility for lower penalty rates to very disadvantaged individuals, for example those who possess a Centrelink Health Care Card.<sup>1605</sup> This type of scheme would be relatively simple to administer, is already used to obtain concessions, for example for utility bills and public transport fares, and is consistent with the idea that lower penalties should be restricted to those most in need. The Committee therefore believes that it provides an appropriate balance between fairness to individuals suffering financial hardship and the efficiency and integrity of the infringement notice system.

On the question of verifying eligibility for reduced penalties, the PILCH HPLC argued that a range of documents should be acceptable and listed: a statutory declaration or sworn statement from a legal practitioner; a current Centrelink Health Care Card; a current Centrelink Income Statement or evidence that the person's sole source of income is a payment under the *Social Security Act 1991* (Cth); a letter or report from an agency funded under the *Supported Accommodation Assistance Act 1994* (Cth); a letter or report from a financial counsellor; or a payslip, tax statement or other documentation evidencing fortnightly income of \$500 or less.<sup>1606</sup> Such documents would contain a multiplicity of means assessments, including specific income amounts and social security status. The Committee believes that the suggestion has merit in relation to determining eligibility for an expanded Enforcement Review Program, which the Committee discusses later in this chapter. However, as the Committee has already indicated its belief that specific income based penalty assessments are not a viable way of reducing infringement penalty amounts, it believes that only specific social security documentation should be used to support

<sup>1605</sup> As of June 2005, 390 026 Health Care Cards had been issued in Victoria: Department of Human Services Concessions Unit, 30 September 2005.

<sup>1606</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 9.

applications for reduced penalties. The Committee's preference, as indicated above, is a Centrelink Health Care Card, a certified copy of which should be sufficient to establish eligibility for a lower penalty rate.

The Committee has noted above that the efficiency of fine collection would be improved by offering reduced penalties to those individuals whose income significantly reduced their capacity to pay. This would not only result in more revenue being collected but also in less being expended on enforcement processes. The aim is to establish a system which identifies appropriate individuals and which sets an appropriate level of reduction. The availability of fine reduction would also reflect the reality of what happens in open court where a magistrate would consider the ability of the individual to pay before setting penalties, albeit with considerably more freedom to consider evidence of capacity to pay.

The Committee believes that access to lower penalties should be by application to the issuing agency, or PERIN Court if an enforcement order or penalty enforcement warrant has been issued. Again, this is consistent with the objective of providing fair and efficient outcomes at the earliest possible stage in the infringement system.

Recommendation 96. That legislation be amended to require issuing agencies or, if an enforcement order has been issued, the PERIN Court, to reduce penalty infringement amounts on application by individuals experiencing financial hardship at or after the time that an infringement penalty was incurred, supported by documentation verifying their eligibility for a Centrelink Health Care Card.

Given the range of Centrelink Health Care Card holders, the Committee considers that the Government and issuing agencies should collaborate with people who have experienced financial hardship and with legal services, financial counsellors and other social service providers to develop an appropriate reduced penalty rate and guidelines for application procedures and acceptable documentation. The Committee invites these stakeholders to consider whether the system of reduced penalties should differentiate between those holding full and part pensions.

Recommendation 97. That issuing agencies work with financially disadvantaged people and legal, financial and other social service providers to develop a lower penalty rate and guidelines for application procedures and acceptable documentation.

## Instalment and extension payment plans

Many stakeholders recommended that instalment payment plans should be available as early as possible in the infringement cycle, before the penalty proceeds through the system and incurs additional costs.<sup>1607</sup>

Until the passage of the *Magistrates' Court (Infringements) Act 2000*, it was not considered possible for agencies to register partly paid penalties. Thus, if individuals defaulted on penalty payment instalment plans, agencies could not proceed to enforce the fine through the PERIN Court. In its Report on Outstanding Fines and Unexecuted Warrants, PAEC observed that this situation discouraged issuing agencies from helping people to pay their infringement penalties by offering instalment plans. PAEC recommended that all agencies should be prepared to allow part payments "in deserving circumstances".<sup>1608</sup>

Following the PAEC Report, section 8 of the *Magistrates' Court (Infringements) Act 2000* remedied the underlying flaw by allowing registration of part payments. In introducing the legislation, the Attorney-General encouraged issuing agencies to offer instalment plans to infringement defaulters.<sup>1609</sup>

Although the legislation came into force on 1 July 2001, agencies generally have not changed their practices to facilitate instalment payments:

payment by instalments direct to the issuing agency of infringement penalties imposed by police or local government authorities is not available....In practice, non-payment of the penalty has to be registered at the PERIN Court (with additional costs to the issuer and the offender) before an application can be made to the Registrar for permission to make payments by instalments.[<sup>1610</sup>]  
To date there is no evidence of any government or non-government issuing agencies (including the police) formally utilising the alternative instalment payment capacity.<sup>1611</sup>

These findings of the 2003 Monash University/Department of Justice study matched the experiences of the Fitzroy Legal Service<sup>1612</sup> and the PILCH HPLC, which noted that:

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<sup>1607</sup> Victoria Legal Aid, *Submission no. 21*, 9; Victorian Council of Social Service, *Submission no. 30*; Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence, 20 October 2004*, 234-235; Will Crawford, Fitzroy Legal Service, *Minutes of Evidence, 5 November 2004*, 299; PILCH Homeless Persons' Legal Clinic, West Heidelberg Legal Service, Fitzroy Legal Service, *Making PERIN Fairer*, 2.

<sup>1608</sup> PAEC, *Outstanding Fines and Unexecuted Warrants*, 59-60; Victorian Government, *PAEC Outstanding Fines Response*, 4.

<sup>1609</sup> Rob Hulls, Attorney-General, *Magistrates' Court (Infringements) Bill, Second Reading Speech*, 26 October 2000, 1210.

<sup>1610</sup> *Magistrates' Court Act 1989* Schedule 7, cl 7.

<sup>1611</sup> Fox, *On the Spot Fines, I*, 119-120.

<sup>1612</sup> Will Crawford, Fitzroy Legal Service, *Minutes of Evidence, 5 November 2004*, 299.

It is extremely problematic ... that there is no opportunity for a person to pay fines by instalment, regardless of their income, circumstances or means, until such time as that fine has been registered with the PERIN court and accrued significantly greater enforcement costs.<sup>1613</sup>

The Department of Justice told the Committee that while individuals are informed about instalment and extension options when they are sent the PERIN enforcement order, agencies “do not tend to offer such arrangements. While they can, they are not legally obliged to do so”.<sup>1614</sup>

During the PERIN Forum it was suggested that this was due to lack of capacity rather than a lack of will on the part of the agencies. However, one agency argued that its experience of offering instalment plans directly (rather than referring the case on to the PERIN Court) indicated that they are not effective. The agency noted that in all 88 cases in which instalment agreements had been established, debtors had failed to pay, and that its experience had been that the plans had been very resource intensive to manage, particularly the need to follow-up on non-payments.

Others at the Forum argued that given the status of individuals who will be the most frequent users of instalment plans, it was critical to examine the affordability of plans and the relevant individual’s financial status. It was noted that many individuals enter agreements in good faith, intend to pay and want to pay but are eventually unable to do so because they misjudge their priorities and capacity.

It was also suggested that there was some confusion about the content of instalment plans: Victoria Legal Aid (VLA) stated that it had dealt with cases in which Sheriff’s Office personnel had rejected plans that were subsequently approved by magistrates. VLA proposed guidelines about acceptable amounts and length of instalment plans as one way of preventing such confusing occurrences.<sup>1615</sup>

The Committee believes that instalment payment plans are an important mechanism to enable people to pay penalties at a rate that will allow them to comply with their legal obligations without unreasonably exacerbating any hardship that they suffer, thereby protecting the integrity of the infringement system and preserving its deterrent effect. Extending the payment period to beyond 28 days (56 days if a courtesy letter is issued) may be more appropriate for some individuals, for example those who have experienced short term financial hardship or present complex circumstances that require intensive intervention that is unlikely to produce a viable payment plan within 28/56 days.

The Committee therefore supports the use of instalment or deferral agreements as a means of payment as early as possible in the infringement process, and accordingly urges agencies to develop and implement consistent policies to facilitate them. The

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<sup>1613</sup> Phil Lynch, PILCH Homeless Persons’ Legal Clinic, *Minutes of Evidence, 20 October 2004*, 234 - 235.

<sup>1614</sup> Department of Justice, *Submission no. 38*, 6.

<sup>1615</sup> Victoria Legal Aid, *Submission no. 21*, 9.

Committee believes that infringement notices and courtesy letters should inform recipients of the possibility of paying penalties and costs in instalments, or of deferring payment, and that agencies should offer such options to individuals who can demonstrate financial hardship.

While the Committee recognises that instalment and deferral plans are potentially resource intensive, it notes that such payments are offered for a wide range of other debts, such as utility bills and local council rates. Some of the agencies that issue those bills have dedicated hardship programs to work with debtors to devise and manage appropriate payment schemes.<sup>1616</sup>

The Committee suggests that agencies should consult with disadvantaged people, legal groups, financial counsellors, community advocates and organisations that currently operate or manage instalment or deferral schemes to determine appropriate guidelines and procedures for the establishment and management of instalment and deferral plans. Developing methods for assessing and varying amounts payable, and determining the material sufficient to establish financial hardship, should be a particular focus of such guidelines and procedures. In relation to the latter point, the Committee notes that acceptable evidence could include information from a financial counsellor, a certified copy of a health care card, a statutory declaration or evidence of social security income and support.<sup>1617</sup>

Recommendation 98. That issuing agencies develop policies to accept payment of penalties, including penalties reduced in accordance with Recommendation 96, and costs in instalments or grant extensions of time to pay in cases where individuals can demonstrate financial hardship.

Recommendation 99. That issuing agencies consult with financially disadvantaged people, relevant advocates and support services to determine appropriate guidelines and procedures for the establishment and management of instalment and extension plans, in particular methods for assessing and varying amounts payable and the types of evidence that could establish financial hardship.

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<sup>1616</sup> For example, Yarra Valley Water's Hardship Policy, which echoes some of the goals of the Special Circumstances List (as observed by the Committee during its attendance at a list hearing in January 2005). A partnership between the utility and Kildonan Child and Family Services "has demonstrated how to change the utility and financial counselling relationship from adversarial in nature to one based on collaboration with open and respectful dialogue focusing on addressing the customer's individual needs...we will negotiate agreements based on what customers can reasonably afford to pay. With our individual case management approach, we will ensure that each customer's needs are appropriately and sensitively addressed": Yarra Valley Water, *Hardship Policy*, at [www.yvw.com.au](http://www.yvw.com.au).

<sup>1617</sup> Stakeholders proposed these and other forms of evidence: *PERIN Forum*; PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 29-30.

As the Committee noted in its outline of the infringement system, individuals who receive enforcement orders can apply to the PERIN Registrar for an extension of time to pay penalties and costs or to pay them in instalments.<sup>1618</sup> The PILCH HPLC raised an additional concern about the way in which such applications are handled:

The PERIN Court has adopted an internal policy in relation to the payment of penalties by instalment. That policy provides that, for an application for payment by instalment to be granted, it must meet the following guidelines: [a] minimum fortnightly payment of \$20; and no more than three defaults on payment in the last five years; and [the] total outstanding amount must be paid off within a maximum of four years.

In the experience of the PILCH Homeless Persons' Legal Clinic, this policy is applied strictly and inflexibly and often without regard to the merits of an application or the means and circumstances of the applicant.<sup>1619</sup>

In the Clinic's view, the ... policy ... has no legislative basis and is arguably unlawful in so far as it precludes consideration of factors relevant to the exercise of the discretion, prevents a proper consideration of the merits of a particular case, and regularly results in the manifestly unreasonable exercise of the discretion.

What that has meant for clients of ours is that where they have accepted responsibility for offences, have sought to enter into an instalment arrangement and have ascertained that on a disability support pension, for example, they could pay \$20 a fortnight - that would cause hardship but may be sustainable - they then make that kind of offer to the PERIN court, which may make a calculation that repayment of \$20 a fortnight will not result in full payment of the fines within two or four years, whichever is the case; and will write back saying, 'Sorry, we object to the instalment plan. Either pay \$120-\$200 a fortnight', or whatever it is that will result in repayment within the two or four year-period or alternatively pay off the \$10 000, \$15 000 or \$20 000 within 28 days.

That is a manifestly unreasonable system. People who are making a real effort to pay their fines should be provided with that opportunity, and the PERIN court should be required to have regard to peoples' circumstances and accept reasonable offers of instalment.<sup>1620</sup>

Regardless of the veracity of those claims, which has not been determined, the Committee notes that Schedule 7 does not contain any guidance about the amount or period of repayments under instalment plans. Clause 7 provides in relevant part that the Registrar may direct payment of the fine in instalments, at specified times. There is, therefore, clearly a discretion to set payment amounts and periods.

The PILCH HPLC recommends that the PERIN Court's policy should be amended to require consideration of the circumstances and means of the applicant, and to prohibit

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<sup>1618</sup> *Magistrates' Court 1989 Act Schedule 7, cl 7.*

<sup>1619</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 33.

<sup>1620</sup> PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence, 20 October 2004*, 235.

the Registrar from rejecting any reasonable offer of instalment amount or from imposing an unreasonable instalment payment plan, which it defines as one that “would cause severe financial or social hardship”.<sup>1621</sup>

The Committee reiterates the importance of ensuring that instalment plans are specifically tailored to individuals’ circumstances and believes that the PERIN Registrar’s discretion should be exercised in a manner consistent with that principle. Quite apart from questions of fairness, unmanageable payment schedules are more likely to lead to defaults, which require further resources to address and ultimately reduce the likelihood of payment of outstanding amounts. The Committee therefore believes that the PERIN Court should collaborate with financial counsellors and other relevant stakeholders to ensure the fairness and efficiency of its instalment payments framework, and to amend its policies as consequently appropriate.

<p>Recommendation 100. That the PERIN Court collaborates with financial counsellors and other relevant stakeholders to ensure the fairness and efficiency of its systems for establishing and managing instalment payment plans under clause 7 of schedule 7 of the <i>Magistrates’ Court Act 1989</i>, and amends its policies as appropriate.</p>
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### **Diversion to open court**

The possibility of diverting an infringement matter to open court provides greater options for some individuals. Under the *Sentencing Act 1991*, courts may impose a wide range of sentences and must have regard to several factors that are not generally considered in the infringement system.<sup>1622</sup> Of most relevance to the present discussion are: current sentencing practices; the nature and gravity of the offence; the offender’s culpability and degree of responsibility for the offence; the impact of the offence on any victim of the offence; the personal circumstances of any victim of the offence; any injury, loss or damage resulting directly from the offence; whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; the offender’s previous character; the presence of any aggravating or mitigating factor concerning the offender or any other circumstances.<sup>1623</sup>

The Department of Justice highlighted the benefits of diverting infringement cases to open court:

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<sup>1621</sup> PILCH Homeless Persons’ Legal Clinic, *Submission no. 4*, 33.

<sup>1622</sup> An exception is where eligibility for the ERP can be established, although as the Committee has noted, that option is only available after the matter has proceeded to the PERIN court, incurring further costs and potential stress for the individual concerned.

<sup>1623</sup> *Sentencing Act 1991* s 5(2).

You certainly are getting individualised service when talking to people about whatever grounds they may have and the circumstances in which you may have committed the offence and you are able to raise [a] defence to it. You can then explain your current circumstances, which the automated system is not designed to do.<sup>1624</sup>

On the other hand, the system:

was designed to get matters out of open court and to free up the resources of magistrates. There is a balance between those two; to get more matters back into the Magistrates' Court may go against the general philosophy of the system.<sup>1625</sup>

Currently, if an individual notifies an issuing agency that s/he wishes an infringement to be dealt with in open court rather than through the infringement system, the agency is unable to register that infringement at the PERIN Court.<sup>1626</sup> The *Magistrates' Court Act* imposes that restriction only in relation to deferral notifications made in response to courtesy letters sent out by agencies in cases where penalties are not paid in the 28 day period after the issue of the infringement notice.

The PILCH HPLC told the Committee the Department of Infrastructure (DoI) has "on several occasions unlawfully ignored written statements made pursuant to [the relevant provisions] of the *Magistrates' Court Act 1989* in which a person has declined to be dealt with under the PERIN system".<sup>1627</sup> If these claims are true, the Department would appear to have acted unlawfully. As the Committee has not been able to verify them, it invites the PILCH HPLC to refer the matters to the Ombudsman for investigation and appropriate follow-up with the Department.<sup>1628</sup>

In practice, some agencies offer individuals the opportunity to take the matter to open court earlier than the courtesy letter stage of proceedings. For example, infringement notices issued by Victoria Police and the DoI include information about how to do so. The Committee believes that this practice should be codified and made consistent so that all individuals who commit infringing behaviour have the same opportunity to seek to have the matters heard in open court.

The Committee recalls the Department of Justice's observation about the resource and philosophical implications of facilitating the diversion of more infringement cases to open court. However, as Victoria Police and the DoI issue most infringement notices and already offer this option, the Committee does not believe that extending it to other agencies would have a significant impact on the resources of the court

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<sup>1624</sup> Andrew Crawshaw, Department of Justice, *Minutes of Evidence*, 5 November 2004, 318.

<sup>1625</sup> *Ibid.*

<sup>1626</sup> *Magistrates' Court Act 1989* Schedule 7, clause 4(2)(e).

<sup>1627</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 27-28.

<sup>1628</sup> The Ombudsman regularly deals with complaints about infringement notices: for examples, see Ombudsman Victoria, *Annual Report 2001 - 2002*; *Annual Report 2002 - 2003*; *Annual Report 2003 - 2004*.

system. Philosophically, the inconsistency between agencies in relation to this practice is untenable.

Recommendation 101. That all issuing agencies be required to offer individuals who receive infringement notices the opportunity at the time of receipt of the notice to elect in writing to divert the matter from the infringement system to open court for hearing and determination.

In cases where an enforcement order has been issued, the PERIN Registrar may revoke an enforcement order, if satisfied that there are sufficient grounds to do so, and refer the matter to court for hearing and determination. The legislation does not provide any guidance as to what constitutes significant grounds. The Committee was told by the Fitzroy Legal Service that revocations are not granted where the individual does not dispute their guilt. The effect of such a practice is that individuals who wish to plead guilty, but seek a variation in sentence because of circumstances that do not fit within the parameters for the Special Circumstances List,<sup>1629</sup> have no opportunity to have those circumstances considered before a penalty enforcement warrant is issued.<sup>1630</sup>

The advantage for a socially disadvantaged individual in going to open court is that the court is obliged to take your financial circumstances into account. That unfortunately doesn't occur in the PERIN system and hence this is the reason why people on social security can end up with \$10,000 in fines if they have multiple fines. The fines can double if you don't have the money to deal with them and a warrant is executed. In the case of a fine that is worth \$100 it will certainly double. They are reasons why we would contend that the ability to revoke to open court to plead guilty is something that should be introduced. I think that would give greater flexibility. Obviously if someone wants to deal with it in open court and have their circumstances heard, it manages to tailor justice according to people's needs.<sup>1631</sup>

The Committee believes that it is a basic requirement of a justice system that individuals should be treated fairly, with due regard for their circumstances. While individuals who commit infringing behaviour should be cognisant of the consequences of doing so, the Committee does not accept that this precludes an opportunity to obtain a more appropriate sentence than is provided for under the infringement system for cases that are not eligible for the Special Circumstances List. In particular, a court can consider the extent to which the individual's knowledge of the

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<sup>1629</sup> The Committee outlines the Special Circumstances List and the Enforcement Review Program of which it is the central component at p 394 above and discusses reforming it at p 426 below.

<sup>1630</sup> Further, as the Committee discusses later in this chapter, the sentencing options in relation to individuals who do not fit within the SCL but remain in the infringement enforcement system are considerably more limited than those under the *Sentencing Act 1991*.

<sup>1631</sup> William Crawford, Fitzroy Legal Service, *Minutes of Evidence, 5 November 2004*, 299.

consequences of infringing behaviour should have an impact on a sentence under the *Sentencing Act 1991*.

Accordingly, the Committee considers that grounds for revocation of an enforcement order should include an intention to take the case before a court to allow the individual concerned to plead guilty and seek an appropriate sentence under the *Sentencing Act 1991*. The Committee notes that individuals may appeal refusals to revoke enforcement orders but considers that this additional step is a less efficient remedy than its suggestion to expand the permissible grounds for revocation.

The Committee believes that clause 10(4) of Schedule 7 of the *Magistrates' Court Act 1989* should be clarified to reflect its conclusions.

Recommendation 102. That clause 10(4) of Schedule 7 of the *Magistrates' Court Act 1989* be amended to specify that enforcement orders may be revoked to enable the individual subject to them to plead guilty to the offence in open court and be sentenced in accordance with the *Sentencing Act 1991*.

### **Special circumstances**

During the inquiry, there was universal praise for the Enforcement Review Program (ERP)/Special Circumstances List (SCL) and extensive support for expanding the range of circumstances that are eligible for consideration under it.

#### ***Special circumstances process and definition***

The Committee recalls its earlier outline of the ERP process, whereby an individual against whom a notice of enforcement order has been issued makes an application for revocation of the order under clause 10A of Schedule 7 of the *Magistrates' Court Act 1989*. Clause 10A states that the registrar may revoke an order and refer the matter to the Court "if the registrar is satisfied that the matter would be more appropriately dealt with by the Court". It was inserted into Schedule 7 by the *Magistrates' Court (Infringements) Act 2000* to ensure that appropriate cases were referred to open court despite the individual concerned not seeking a revocation.<sup>1632</sup>

Currently, the registrar revokes cases where an individual can establish that they have special circumstances. That concept is not legislatively defined. The Court's internal policy generally restricts the exercise of the discretion under clause 10A to physical or intellectual disability or a diagnosed mental illness, where the individual's judgement was impaired at the time of the infringing behaviour. Homelessness, drug or alcohol dependencies on their own do not establish special circumstances.

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<sup>1632</sup> Rob Hulls, Attorney-General, *Magistrates' Court (Infringements) Bill, Second Reading Speech*, 26 October 2000, 1209.

Revocations can be made on the registrar's own motion or in response to an application, which must be accompanied by evidence of circumstances provided by the applicant's doctor or psychiatrist, unless the applicant is eligible for certain state or federal Government benefits.

Where an order is revoked and the issuing agency declines to withdraw the linked infringement penalty, the matter is referred to the Special Circumstances List (SCL), and is generally dismissed, subject to a good behaviour bond. At the SCL hearing that the Committee attended, the sitting magistrate stressed that the hearing was:

not an imprimatur to break the law. It is really just an opportunity to clean up your [penalties] so that you can rebuild your life with a clean slate.<sup>1633</sup>

### ***Evidence received by the Committee about the definition***

The Committee heard that in practice, the Court's internal policy definition of special circumstances excludes "plenty of people on the cusp of special circumstances".<sup>1634</sup> Stakeholders proposed a broader application of the clause 10A discretion. On the basis of its experience challenging 2082 matters for 235 clients under clause 10A in the four years from July 2001, the PILCH HPLC argued that the policy has been applied "rigidly to all applications". The organisation stated that in particular, the registrar has "repeatedly refused to consider evidence" relating to issues not contained in the policy, such as homelessness, drug dependency, severe financial hardship or other severe financial or social disadvantage.<sup>1635</sup>

The coalition of PILCH HPLC, FLS and West Heidelberg Legal Service advocated a list of factors that should be considered by the PERIN Registrar in determining whether to grant revocation: mental illness; intellectual or physical disability; homelessness; drug dependency; assets and income; language barriers; number of fines; whether the person has indicated a wish to have the enforcement orders revoked and the matter dealt with in court; and any other special circumstances.<sup>1636</sup>

The PILCH HPLC explained the rationale for such an expansion:

Revocation of fines should occur in a way that takes into account the merits of an applicant's case. Given the automated nature of the PERIN system and its general inability to account for a person's 'special circumstances', together with the harsh and inflexible nature of sentencing dispositions available to the Court following the execution of a PERIN penalty enforcement warrant, it is crucial that the interpretation and application of the provisions enabling the

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<sup>1633</sup> Magistrate Jelena Popovic, Magistrates' Court Special Circumstances List hearing, 24 January 2005.

<sup>1634</sup> William Crawford, Fitzroy Legal Service, *Minutes of Evidence*, 5 November 2004, 300.

<sup>1635</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 33-35.

<sup>1636</sup> PILCH Homeless Persons' Legal Clinic, West Heidelberg Legal Service, Fitzroy Legal Service, *Making PERIN Fairer*, 4.

revocation of PERIN enforcement orders and penalty enforcement warrants be such as to ensure that cases pertaining to people experiencing financial or social disadvantage be heard and determined on their merits. In this respect, Clause 10A ... establishes an important and flexible discretion for the PERIN Court to revoke a PERIN enforcement order or penalty enforcement warrant where the matter would be 'more appropriately dealt with by the Court.'<sup>1637</sup>

The organisation also highlighted a fundamental point about the handling of cases such as the ones that it deals with:

courts are, broadly speaking, much better equipped to deal with issues of financial and social disadvantage, homelessness and poverty than an automated system which does not individualise sanctions...

there is very significant evidence from both Australia and overseas that problem-solving court approaches, therapeutic approaches for the administration of justice while requiring some up-front investment come out very positively on a cost-benefit analysis, and certainly our clients who have gone before that list have a reduced propensity to reoffend, and there are reduced rates of recidivism.

Often, coming before that list results in a sentencing disposition in the form of either a dismissal or an adjournment on an undertaking of good behaviour, and the magistrates who preside on that list are particularly sensitive and equipped to make appropriate social service recommendations or referrals or interventions that should be supported.<sup>1638</sup>

Court staff agreed that the recidivism rate for individuals heard in the SCL is relatively low.<sup>1639</sup>

Gary Sullivan also highlighted the importance of the individualised treatment made possible by judicial intervention in cases where disadvantaged people come into contact with the legal system:

the difficulty here is that the purpose of PERIN is to go outside the judicial system. ...with these people unfortunately I cannot see how you can get away from using the judicial system. There is some acceptance as a result of the 2000 amendments [to Schedule 7 of the *Magistrates' Court Act 1989*, contained in the *Magistrates' Court (Infringements) Act 2000*, which introduced clause 10A and the possibility of discharging penalties after the execution of a penalty enforcement warrant], but it did not go far enough in my view.<sup>1640</sup>

The Mental Illness Fellowship of Victoria (MIFV) made a related point about the limited relationship between diagnosis and the existence of a medical condition:

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<sup>1637</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 34.

<sup>1638</sup> Phil Lynch, PILHC Homeless Persons' Legal Clinic, *Minutes of Evidence, 20 October 2004*, 235-236.

<sup>1639</sup> Magistrates' Court Special Circumstances List hearing, 24 January 2005.

<sup>1640</sup> Gary Sullivan, West Heidelberg Community Legal Service, *Minutes of Evidence, 20 October 2004*, 248-249, 252.

The ERP offers a process specific to people with a diagnosed mental illness, it fails to cover those whose illness is undiagnosed. Given that an estimated 50% of people with psychotic disorders do not recognise that they have an illness and that 62% of people with psychiatric disorders do not utilise mental health services ... the ERP fails to meet the needs of the majority of people with psychiatric disorder.<sup>1641</sup>

The organisation accordingly recommended that the ERP should be expanded to include individuals who do not have a diagnosed mental illness.

Another reported disadvantage of the Court's definition of special circumstances is the limited range of forms of evidence that are admissible in support of an application for revocation:

[A]t the moment you need a medical certificate from a doctor stating that you are suffering from a diagnosed mental illness. That can present difficulties. A lot of [the Fitzroy Legal Service's] clients might potentially fit into that if they saw doctors regularly enough and were actually diagnosed. I think they are disadvantaged there.<sup>1642</sup>

...accessing a doctor can be very difficult for anyone, far less for people who are experiencing poverty. It is very difficult for [legal and other advocates] to obtain free or low cost medical reports in support of a revocation application.<sup>1643</sup>

The coalition of PILCH HPLC, FLS and West Heidelberg Legal Service proposed to expand admissible supporting evidence. They argued that material in support of a special circumstances application should be accepted if it is in the form of a statutory declaration or evidence that the individual is under the jurisdiction of mental health, guardianship, intellectual disability or supported accommodation legislation; acceptable material in support of a financial hardship application should include a statutory declaration, proof of social security status, evidence from a financial counsellor or evidence of income below a certain level.<sup>1644</sup>

### ***The basis of the scope of the definition***

The Court stated that the eligibility criteria were considered by the magistracy and registrars as a consequence of extensive consultation and input from enforcement agencies and community services.<sup>1645</sup> Further, the Committee was told that the

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<sup>1641</sup> Mental Illness Fellowship of Victoria, *Submission no. 18*, 3 (reference omitted).

<sup>1642</sup> William Crawford, Fitzroy Legal Service, *Minutes of Evidence*, 5 November 2004, 300.

<sup>1643</sup> Phil Lynch, PILHC Homeless Persons' Legal Clinic, *Minutes of Evidence*, 20 October 2004, 240.

<sup>1644</sup> PILCH Homeless Persons' Legal Clinic, West Heidelberg Legal Service, Fitzroy Legal Service, *Making PERIN Fairer*, 4-5.

<sup>1645</sup> Letter, Magistrates' Court of Victoria Diversion Coordinator Simon Walker to Committee Research Officer, 18 February 2005.

program's funding has been uncertain since its inception and is only sufficient to run the SCL at the Melbourne CBD venue of the Magistrates' Court.

The limited scope of the exercise of the registrar's discretion in practice, as reflected in the definition of special circumstances and need for certain types of evidence to support the application, would appear to be the product of three related concerns:

- ensuring that applications are made in good faith;
- that the discretion should relate to people who could not understand the nature of their infringing behaviour; and
- the financial implications of expanding the scope of the ERP and SCL.

The PILCH HPLC questioned the legitimacy of the Court's definition. It argued that restricting the exercise of the discretion to mental or physical disability or intellectual impairment was inconsistent with the scope of clause 10A, which allows the registrar to revoke an order if satisfied that the matter is more appropriately dealt with by the Court. The organisation also referred the Committee to a Victorian Supreme Court decision in which it was held that the range of factors to take into account when considering whether a matter is better dealt with in a court under clause 10(6) of schedule 7 include: the number of fines accrued; a person's psychological state; disability; lack of English; and means and financial state.<sup>1646</sup>

Finally, the PILCH HPLC referred to legal advice it had obtained that:

[T]he Supreme Court of Victoria would be likely to find the internal policy invalid because it places mandatory limitations on the exercise of the broad discretion conferred by cl 10A of Sch 7, and there is no apparent legislative basis upon which such limitations ought to be inferred. Further, the Supreme Court would be likely to hold that any decision made by the registrar as if bound by the internal policy is made in jurisdictional error.<sup>1647</sup>

### ***Is reform of the ERP/SCL eligibility criteria appropriate?***

The Committee recalls that one of the aims of the ERP is to demonstrate the "economic and social futility of processing ... repeat offenders [with diagnosed mental illness, intellectual or physical disability] through the enforcement corridor and hopefully lead to a review of the present system".<sup>1648</sup> Those sentiments are equally valid in respect of a broader group of conditions. The Committee is satisfied on the basis of the evidence it has heard that the threshold qualification for eligibility to the ERP - whether the applicant's judgement was impaired at the time of the infringing behaviour - is appropriate and therefore should be retained, and that it can be

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<sup>1646</sup> *Zaffiro v Springvale City Council* (Unreported Supreme Court of Victoria, Byrne J, 28 March 1996).

<sup>1647</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 37.

<sup>1648</sup> Magistrates' Court of Victoria, *Enforcement Review Program*, 2.

satisfied by individuals who have an undiagnosed mental or physical disability or addiction. Such circumstances can and do affect people's capacity for rational thought and interaction.

The Committee does not believe that financial hardship on its own would meet the threshold for eligibility for the SCL. The Committee acknowledges that such hardship limits the choices of affected individuals, independently of any other special circumstances that they may have. It may therefore be argued that it is artificial to characterise infringing behaviour on the grounds of poverty alone as the product of an informed choice. However, the Committee considers that individuals in such cases do nevertheless elect to carry out the actions that result in them incurring a penalty. The Committee believes that its previous recommendations on diversion, increased penalty payment and conversion options provide sufficient opportunities for dealing appropriately with cases where financial hardship is the sole special circumstance. In particular, the Committee notes that, in relation to non-PERIN matters, courts take account of offenders' financial circumstances when determining an appropriate sentence.

The Committee notes the consensus that the approach taken by the SCL is innovative and relatively effective, "an example where people are able to think laterally within a judicial context about the problem cases".<sup>1649</sup> Officials involved in the running of the list told the Committee that all parties participate constructively, and that as a result of the SCL's outreach work and holistic approach, service providers had become actively involved in the process and in addressing some of the underlying issues that arise in hearings. At the same time, the SCL has reportedly facilitated an improved understanding of the different perspectives represented in the infringement system and effective collaboration to undertake earlier intervention, and problem-solving in place of repeated issuing of infringement notices.

The Committee is not aware of any reason why the SCL's focus on rehabilitation would not replicate such outcomes in relation to other special circumstances that are currently excluded from its scope. Indeed, as the FLS stated in relation to individuals with drug addictions:

we should be trying as much as possible to help people rehabilitate and imposing fines that people can't pay and potentially sending people to gaol will not achieve that.<sup>1650</sup>

For these reasons, the Committee commends the work of the SCL and its staff and strongly believes that it should be expanded in scope and presence. The PERIN Registrar should adopt and publish a policy to govern the consideration of a range of factors in determining whether a matter may be more appropriately dealt with by the Court. Beyond excluding financial hardship as a sole special circumstance, the

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<sup>1649</sup> Gary Sullivan, West Heidelberg Community Legal Service, *Minutes of Evidence*, 20 October 2004, 248-249, 252.

<sup>1650</sup> William Crawford, Fitzroy Legal Service, *Minutes of Evidence*, 5 November 2004, 300.

Committee does not believe that the terms of clause 10A require a prescriptive set of criteria. Rather, the Court should work with issuing agencies, medical, legal and other social service providers to develop a set of non-exhaustive guidelines to facilitate the processing of applications. The Committee notes that the Government has indicated that one of the areas under investigation by its infringement review project is how to broaden the ERP to include people experiencing homelessness and drug addiction.<sup>1651</sup>

The Government should also provide secure funding for the ERP and enable the SCL to sit for a trial period outside Melbourne as appropriate.

Finally, the Committee believes that the ERP/SCL should accept more forms of evidence than is its current practice. This is necessary both because of the expanded range of conditions that the Committee believes should qualify for the ERP and because it believes that the current exclusion of individuals with undiagnosed mental illnesses is untenable. The Committee believes that the PERIN Court should consult with stakeholders about what forms of evidence are acceptable and practicable, and suggests that this could include statutory declarations and reports from social services.

Recommendation 103. That the Enforcement Review Program/Special Circumstances List be expanded in scope and presence. The PERIN Registrar should, in consultation with medical, legal and other social service providers develop, adopt and publish a policy to govern the consideration of a limited range of factors in determining whether a matter may be more appropriately dealt with by the Court.

Recommendation 104. That the Government provides secure funding for the Enforcement Review Program.

Recommendation 105. That the Government provides funding to enable the Special Circumstances List to sit for a trial period outside Melbourne.

Recommendation 106. That the PERIN Court amends its procedures, in consultation with stakeholders, to accept an agreed range of materials in support of applications for revocation of enforcement orders under clause 10A of Schedule 7 of the *Magistrates' Court Act 1989*.

### **Information provided to individuals who receive infringement penalties**

The Committee received evidence about two aspects of the information provided to people who receive infringement penalties. Stakeholders argued that the quality of the information should be improved and that more effective communication methods should be developed for certain groups of people.

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<sup>1651</sup> Department of Justice, *Annual Report 2003 - 2004*, 48.

### **Quality of information**

It is a fundamental principle of due process that people should be able to understand their rights and the consequences of their situation at the earliest possible opportunity. It is self-evident that sufficient information must be available to facilitate such knowledge and understanding. A lack of information about an individual's involvement with the legal system, and their options in relation to it, can therefore cause unfairness and inefficiency if misinformed decisions lead to what would otherwise be unnecessary further legal action:

ensuring that consumers are provided with very comprehensive information about their rights and options ... is required in the interests of fairness, transparency and accountability [and], presented with options, people can avail themselves of those options.<sup>1652</sup>

The Committee was told that infringement notices and PERIN Court documentation are "not user-friendly and do not contain sufficient information about a recipient's rights or options".<sup>1653</sup> VLA stated that it had experienced individual's unable to comprehend from documentation that they may be imprisoned for failure to pay their penalties.<sup>1654</sup> Some officials felt that documentation is very unclear and needs to be improved. The Victorian Supreme Court recently reached a similar conclusion:

Our community contains a large number of people whose first language is not English or whose level of education is not high or both. The traffic infringement notice that forms the subject of this case is, in my opinion, far from satisfactory in a number of respects.

Although it does comply with the statutory requirements, it barely does so, and it does not do so in a way which should be acceptable to a modern law enforcement system sensitive to the needs of those members of our community who do not enjoy easy facility with the written English language.<sup>1655</sup>

The Court continued:

The form should be seriously revised to ensure that there can be no doubt or confusion whatsoever as to what rights a citizen who receives a traffic infringement notice has and steps s/he must take to protect those rights.<sup>1656</sup>

Stakeholders echoed that recommendation. The Western Suburbs Legal Service argued that agencies should be required to inform recipients of their options and the

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<sup>1652</sup> Phil Lynch, PILHC Homeless Persons' Legal Clinic, *Minutes of Evidence*, 20 October 2004, 233.

<sup>1653</sup> PILHC Homeless Persons' Legal Clinic, West Heidelberg Legal Service, Fitzroy Legal Service, *Making PERIN Fairer*, 1.

<sup>1654</sup> Victoria Legal Aid, *Submission no. 21*, 9.

<sup>1655</sup> *DPP v Korybutiak* [2004] VSCA 29 (Unreported, Winneke P, Chernov JA and Bongiorno AJA, 16 March 2004), paragraphs 19-20 (Bongiorno AJA).

<sup>1656</sup> *Ibid.*

costs incurred by each option. Similarly, VLA recommended that “debtors should be clearly advised of their rights, options and potential consequences at each stage of the process”.

In its 1997 Report on Outstanding Fines and Unexecuted Warrants, PAEC discussed this issue, although it limited its conclusions to the courtesy letter. It recommended amendment of the letter to include information on alternative penalties and the consequences of non-payment and contacts for people experiencing financial hardship.<sup>1657</sup> In response, the Government agreed to consider “the need to provide all relevant information in a manner which can be clearly understood. The needs of non-English speaking members of the community will also be taken into account”.<sup>1658</sup>

Because of the potential role of unclear infringement notice documentation in the pursuit of unnecessary or inappropriate enforcement action, the Committee examined sample and prescribed documents, which it has included in Appendix Ten of this report. Notice of Enforcement Orders, Penalty Enforcement Warrants and related forms are dealt with in the section on warrant procedures later in this chapter.<sup>1659</sup>

Infringement notices The Committee examined infringement notices issued in early 2005 by DoI, Victoria Police and the City of Melbourne for offences concerning, respectively, public transport ticketing, speeding and parking. All provide details of the alleged offences.

The DoI notice is the clearest of the three, setting out “action required within 28 days” and providing under that heading information about how to settle the notice, have it reviewed, take the matter to Court or nominate another person as the offender. The notice sets out clearly the consequences of not taking any of those actions and informs recipients of what will happen at each subsequent enforcement stage, possible additional fees at each stage and total costs. The notice also advises recipients who do not understand the document to have it interpreted and explained and provides details of where to obtain legal advice. That information is provided in 12 additional languages. The Committee commends the DoI for the clarity of the material in the form. However, it does not inform recipients that they may write to the agency seeking an extension of time to pay or an agreement to pay by instalments and, in the Committee’s view, it is not clear from the notice that electing to take the matter to court will result in the cancellation of the notice.

The Victoria Police notice states that “You must do one of the following by the due date” and then lists: pay in full; nominate another driver; or “have the matter dealt with in a Court” by completing the application included in the notice. The only information

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<sup>1657</sup> PAEC, *Outstanding Fines*, 56 -57.

<sup>1658</sup> *Victorian Government, PAEC Outstanding Fines Response*, 3.

<sup>1659</sup> Because the Notice of Enforcement Order template is almost identical to the template setting out the statement of rights that is delivered before a warrant can be executed, the Committee has reviewed them together, in its examination of warrant forms later in this chapter.

provided about alternative action is a statement in large block capitals that “FURTHER COSTS WILL BE INCURRED IF NO ACTION IS TAKEN BY THE DUE DATE”. There is no mention of subsequent enforcement stages or costs. There is no suggestion that recipients may seek review, extension or instalment options, and it is unclear that diverting to court will result in the cancellation of the notice.

The City of Melbourne notice states that “Failure to pay in 28 days will incur additional costs” and then lists five payment options under a heading in bold text “HOW TO PAY”. Another heading states in bold text “HOW TO CONTEST THIS NOTICE” and lists the relevant Council address below the phrase “In writing to”. There is no mention of subsequent enforcement options, stages or costs. Again, there is no suggestion that recipients may seek review, extension or instalment options. It is unclear that it is even possible to take the matter to court.

Courtesy letter The Committee examined one courtesy letter, issued by the DoI in late 2003. The letter states that the recipient must within 28 days pay the penalty and costs, nominate another individual as the alleged offender or take the matter to court. Like the above notices, the letter does not provide information about review of the penalty, extension or instalment payments and, in the Committee’s view, the consequences of electing to take the matter to court are not clearly set out.

### ***Discussion and conclusions***

The Committee acknowledges that agencies responsible for issuing these and other forms must ensure that in relation to the vast majority of infringements, recipients who have committed the offences pay their penalties, and that in many cases, the tone of the forms is important in encouraging prompt payment. However, the Committee is concerned that the lack of clear information about recipients’ options in the documents that it has examined can affect the outcomes of the infringement process for the large number of people who do not have the capacity to fully understand the infringement system and their rights within it. Once again, the PILCH HPLC explained the problem through its experience:

[The form and content of documentation] does not present financially or socially disadvantaged people with viable options. The reality, as you will see from the courtesy letter which I will hand up, provides that you can either pay or if you do not want to pay, you can go to court. Many of our clients have had previous experience with the court system often it is adverse experience, and confronted with that kind of option to pay in full on a disability support pension pegged below the Henderson poverty line or go to court, they do nothing, they cannot do anything.

If, however, that kind of correspondence or documentation presented other options such as detailing that if you have special circumstances such as mental illness or you are experiencing financial poverty, contact the officer in charge of enforcement or prosecutions at our issuing agency and we can talk about an instalment plan or we can talk about conversion to unpaid community work or extension of time to pay or withdrawal of the matter then it is far more likely that people would perceive the system to be fair and of course the people would act to resolve

their matters rather than throw the fine away as is the case for many of our clients and cop another fine for littering because they have no other option in the circumstances.<sup>1660</sup>

To some degree, the lack of information about options such as those proposed by the PILCH HPLC is a consequence of agencies not offering them. The Committee has recommended that agencies adopt and offer consistent policies on the withdrawal of penalties and the availability of reduced penalties, extensions of time to pay and instalment agreements. The Committee believes that infringement notices and courtesy letters should explain these alternatives in plain language, together with details of how to apply for them and potential outcomes. The Committee also considers that forms should include more comprehensive information about subsequent enforcement stages, such as opportunities to apply for community based orders or Community Custodial Permits.

As the Supreme Court noted, individuals from non-English speaking backgrounds would also be challenged by the quality of the forms. The Committee therefore commends the DoI for including multilingual information and recommends that this practice be made consistent across all issuing agencies and PERIN Court forms.

Finally, the Committee believes that all forms should include the DoI form's encouragement to recipients to obtain advice, and should supplement it with contact details for peak organisations of financial counsellors and other relevant services.

Where the format of forms makes it difficult to include additional information, for example because of the printing machines used by parking inspectors, the Committee believes that issuing agencies should develop small information sheets that should form part of the infringement notice and that authorised officers can carry and serve with the part of the infringement notice that they print.

Recommendation 107. That infringement system forms be amended to ensure that they inform recipients, in plain language, of their rights to seek:

- (a) a review of the penalty;
- (b) a lower penalty if eligible;
- (c) an instalment agreement or extension of time to pay;
- (d) transfer of the matter to open Court; and
- (e) that the forms include information about how to make such applications, what supporting material is required and the possible consequences of successful and unsuccessful applications.

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<sup>1660</sup> Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence*, 20 October 2004, 234.

Recommendation 108. That infringement system forms include the following:

- (a) more detailed information on the enforcement stages and options after the expiry of the period provided for in each form, including revocation under Clauses 10 and 10A of Schedule 7 of the *Magistrates' Court Act 1989*;
- (b) information about the availability of community based orders and community custodial permits; and
- (c) a statement advising recipients to seek independent advice and listing contact details for Victoria Legal Aid and peak organisations for financial counsellors and other appropriate services.

Recommendation 109. That infringement system forms include as much of the above information as practicable in appropriate languages other than English.

Recommendation 110. That where the format of notices makes it difficult to include additional information, it be included on a separate form developed by issuing agencies and that authorised officers can carry and serve with the part of the infringement notice that they print.

Finally on the matter of quality of infringement system information, PAEC also recommended that courtesy letters should be called "reminder letters" to ensure consistency with similar practice elsewhere and in light of a submission that referred to recipients being "irritated" by the term "courtesy letter" because the letter imposed additional costs.<sup>1661</sup> The Government agreed to consider the change but evidently decided it was unnecessary. This Committee observes that while the letters are a courtesy, in that they provide additional time to pay at relatively low cost before further action commences, their primary function is as a reminder to recipients to pay the penalty. The Committee believes that it would be more accurate for the title of the letters to reflect this.

Recommendation 111. That the title of courtesy letters be changed to "reminder notice".

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<sup>1661</sup> PAEC, *Outstanding Fines*, 55.

### ***The effectiveness of delivery of information***

Stakeholders specifically questioned the effectiveness of postal delivery of infringement documentation. The Committee was told that the mobility of groups such as young people and individuals who are experiencing homelessness means that some people, who in many cases might be more likely to commit infringements because of their circumstances, do not receive documents at any stage in the enforcement cycle.<sup>1662</sup> The Committee considers that agencies should consult with stakeholders about ways of addressing this situation, which manifestly involves more than alternative ways of addressing documentation. The Committee notes that education (about the infringement system), technology (such as the possible use of mobile phone and email to communicate with individuals where appropriate, which the Committee was told was being trialled by Centrelink), greater use of discretion by issuing agencies and enhanced coordination and collaboration between issuing agencies and social services may all have a role to play.

Even when documents are received by the person who incurred the infringement, the recipient's condition may prevent him or her reading, comprehending or acting on the documents. The Mental Illness Fellowship of Victoria argued that:

in our experience, people with psychotic illness, given the nature of disordered thinking, are often living in chaos. Being served a written infringement notice is an ineffective facilitative process. Mail is unlikely to be opened for fear of its content, and it is not uncommon to find bills and other mail unopened and binned. Even the validity of the serving of the infringement notice in these circumstances must be doubtful....

[a]ny processes involving legal consequences for people with a mental illness need to be face-to-face. Any expectation that this group can and will respond to written summonses is ill-founded. It would be better if, once a person is identified as having a mental illness, the PERIN process be replaced. This is, of course, the intention of the enforcement review program.<sup>1663</sup>

The challenge in such cases is identifying the individuals, given that they are frequently unlikely to attempt to resolve the infringement penalties themselves. The Committee has therefore considered how the infringement system itself might better identify these and other cases of potential concern.

### **Improving the infringement system's capacity to identify cases of potential concern**

All of the Committee's proposals for reforms to the infringement notice system presuppose that individuals are able to respond to documentation issued to them, or are able to seek and obtain advice and representation to do so. Evidence received by

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<sup>1662</sup> Youth Affairs Council of Victoria, *Preliminary Submission*.

<sup>1663</sup> Mental Illness Fellowship of Victoria, *Submission no. 18*, 2-3.

the Committee indicates that a number of people do not have the capacity to do either. As noted, stakeholders reported that some individuals do not deal with their infringement matters until they are visited by Sheriff's Office staff after the issue of a penalty enforcement warrant. People ignore documentation, through ignorance or fear or incapacity to understand the need to respond. In such cases, matters proceed, incurring costs and requiring more intensive intervention when they are eventually discovered. It is therefore necessary to improve the ability of the infringement system to automatically identify cases of potential concern.

One option is provided by the database underpinning much of the infringement system, the Victorian Infringement Management System (VIMS). The Committee understands that it has significant data analysis capabilities that could enable identification of certain cases of potential concern but that such analysis does not currently occur. The VIMS reportedly records all infringement and offender data from the point of contact with Victoria Police, and from registration at the PERIN Court for other issuing agencies. The database could be used to identify individuals who incur multiple infringement penalties in a short period of time.<sup>1664</sup>

The Committee believes that the data in VIMS makes it a significant potential tool for detecting cases that merit or require intervention. One option suggested during the PERIN Forum was the development of a trigger mechanism, whereby the cases of individuals who receive a certain number of infringement penalties, perhaps within a fixed period, would be referred to open court, or possibly the Enforcement Review Program if the individuals concerned were known to have special circumstances, where they could be dealt with more appropriately. The Committee supports this proposed approach and believes that VIMS could facilitate it through programming to identify multiple infringement cases, possibly cross-matching them with individuals known to have special circumstances.

The Committee notes that the VIMS, which is run by TENIX Solutions, an independent commercial contractor, was reviewed in 2003 to analyse the functions required of it by the Sheriff's Office, PERIN Court and Victoria Police Traffic Camera Office. The results of that analysis will inform negotiations for the new VIMS contract when the current one expires in 2007.<sup>1665</sup> Until then, the Committee considers that the Government should work with TENIX Solutions and infringement system stakeholders to develop and implement the enhanced data analysis proposal discussed above. When the new contract is negotiated, it should include that analysis capacity.

The above approach would not capture cases of concern arising from infringement notices issued by non-police agencies that have not been registered with the PERIN Court. While it can be presumed that those agencies record infringement data, individual agencies may not identify cases of concern because of the fact that some

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<sup>1664</sup> PERIN Forum.

<sup>1665</sup> Victorian Auditor-General's Office, *Auditor-General's Report—Results of financial statement audits for agencies with other than 30 June 2004 balance dates, and other audits*, May 2005, 3.5.1.

multiple infringements are incurred across different agencies. The Committee believes that the Government should explore ways of consolidating all data generated from the time that infringement notices are issued to improve both the efficiency of trigger mechanisms and the efficiency of infringement statistics generation: the Committee notes that the figures for the amount of infringement notices issued in 1990 - 1991 and 2001 - 2002 were obtained by writing to all infringement agencies, a practice that should be obviated by current technology.<sup>1666</sup>

Recommendation 112. That the Victorian Infringement Management System be modified to enable the automatic identification of individuals incurring multiple infringement notices and that procedures be developed to enable the referral of such cases to open court or the Enforcement Review Program as appropriate.

Recommendation 113. That the Government explores ways of consolidating all data generated from the time that infringement notices are issued by agencies other than Victoria Police.

Recommendation 114. That the Government consults with stakeholders about approaches in addition to improved data collection to deal with cases of individuals with multiple infringement notices.

### ***Reforms to processes following the issue of a penalty enforcement warrant***

As the Committee outlined earlier in this chapter,<sup>1667</sup> if an individual to whom an enforcement order is posted does not pay the penalty or an instalment, the PERIN Court issues a penalty enforcement warrant.<sup>1668</sup> Before the warrant can be executed, authorised officials (usually Sheriff's Office personnel) must demand payment and deliver a statement containing information about the possibility of applying for extensions of time to pay, instalment payment plans and revocation of enforcement orders. When an individual makes a successful application, the PERIN Court recalls the warrant (which is then no longer executed).<sup>1669</sup>

Seven days after the delivery of the statement, any step may be taken to execute the warrant if the penalty or a relevant instalment remains unpaid. If no property is available for sale to discharge the penalty, the individual concerned is arrested, and assessed for a Custodial Community Permit. Individuals who are not eligible for a CCP are taken before the Magistrates' Court.

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<sup>1666</sup> The figures and sources are listed in Table 8 at p 381 above.

<sup>1667</sup> The Committee's summary of infringement system procedures begins at p 377 above.

<sup>1668</sup> *Magistrates' Court Act 1989* Schedule 7, cl 8.

<sup>1669</sup> Robert Cahir, Department of Justice, *Minutes of Evidence*, 5 November 2004, 316.

Stakeholders praised the role of Sheriff's Office personnel, who in sometimes making the first contact with an individual since the relevant infringement notice was issued are able to refer them to relevant services and to raise any special circumstances with the PERIN Court. However, the Committee heard anecdotal evidence that, in such cases, the options of applying for an extension, instalments or revocation were not explained to the individuals in an adequate or accessible manner,<sup>1670</sup> and that offers to pay by instalment were rejected but later approved by magistrates.<sup>1671</sup> It was also suggested by one official that some individuals do not understand the CCP assessment.<sup>1672</sup>

The Committee recalls that the Sheriff's Office stated that its personnel explain to individuals the options contained in the statement of rights and endeavour to divert cases out of the warrant execution process wherever possible.<sup>1673</sup>

### **Should the seven day period be extended?**

Stakeholders also argued that the seven day period was too short for individuals to seek advice and obtain the necessary evidence to support applications for extension, instalments or revocation.<sup>1674</sup> The Committee has not received sufficient evidence to satisfy it that the period should be extended as a rule in all cases. Rather, the Committee believes that the seven day period should be suspended on a case-by-case basis, when a notice of intention to apply for extension of time to pay or instalment payments or revocation is received by the PERIN Court. A period of seven days from the date of receipt of the notice would then be allowed to bring an application. If no application is received within this seven days, then a further seven days would be allowed before action could be taken to execute the warrant. This would enable individuals who receive a demand for payment to seek advice and obtain additional time to gather documentary evidence to support any application.

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<sup>1670</sup> Victorian Aboriginal Legal Service, *Preliminary submission*; Michael Wighton, Victoria Legal Aid, *Minutes of Evidence, 20 October 2004*, 203-204; Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence, 20 October 2004*, 232-233; Gary Sullivan, West Heidelberg Community Legal Service, *Minutes of Evidence, 20 October 2004*, 248-249, 253.

<sup>1671</sup> Victoria Legal Aid, *Submission no. 21*, 9.

<sup>1672</sup> *PERIN Forum*.

<sup>1673</sup> Robert Cahir, Department of Justice, *Minutes of Evidence, 5 November 2004*, 315-316. The Committee first referred to this evidence at p 392 above when discussing the impact of penalty enforcement warrants.

<sup>1674</sup> Victorian Aboriginal Legal Service, *Preliminary submission*; Gary Sullivan, West Heidelberg Community Legal Service, *Minutes of Evidence, 20 October 2004*, 253.

Recommendation 115. That the *Magistrates' Court Act 1989* be amended to:

- (a) suspend the running of the seven day period under clause 8 of schedule 7, upon receipt by the PERIN Court of an application for an extension of time to pay, or an instalment payment plan or revocation of an enforcement order, and
- (b) provide seven days from the date of receiving such a notice for an application to be made, and
- (c) if no application is received within that time, to allow a further seven days before attempts are made to execute the warrant.

### **Warrants and related documentation**

The Committee has reviewed the notice of enforcement order, statement of rights (two forms that are very similar and therefore examined together), penalty enforcement warrant and the associated statement setting out the effect of giving consent to the seizure or taking of protected property used as a means of transport. Their contents are prescribed by legislation, and found in, respectively, Forms 4, 5, 7 and 8 of the *Magistrates' Court (General Regulations) 2000*. The Committee understands that the forms must balance informing individuals of their rights, encouraging them to pay outstanding penalties and costs and informing executing officials of their rights and obligations. Nevertheless, the Committee considers that the information provided to debtors in each of the forms could be improved.

Notice of Enforcement Order (Form 4) and (Form 5). The statement of rights is headed "WARNING NOTICE". Both forms emphasise that recipients should not ignore them and state that doing so may result in, respectively the issue of a warrant and further costs, and the seizure and sale of property (possibly incurring additional costs to the recipient), or imprisonment. The Committee commends the inclusion of a statement encouraging recipients to seek advice if they do not understand the forms, the provision of contact details for Victoria Legal Aid and the fact that the form is available in 13 languages. The Committee considers, however, that the way that some of the information is presented could be intimidating and confusing to individuals who are not aware of their rights.

The forms state that recipients who are unable to pay the full amount within seven days may apply to the PERIN Registrar for orders (extension, instalment, revocation) and advises what supporting documentation is required for revocation applications. The Committee believes that the forms should also include, in plain English, information about:

- supporting material required for extension and instalment plan applications;

- the potential reasons that recipients may wish to apply for revocation, such as that they did not commit the alleged offence;
- the possibility and purpose of an application for revocation and referral under clause 10A of Schedule 7;
- the consequences of successful and unsuccessful applications, including the right under clause 10(6) of Schedule 7 to object to a refusal to grant revocation;
- the consequences of non-payment, in more detail, including the possibility of and eligibility for CCP and the options available to the Court if the recipient is arrested and sent for sentencing under Part 4 of Schedule 7;
- additional sources of advice, such as peak organisations for financial counsellors and other appropriate services.

Recommendation 116. That Forms 4 and 5 of *Magistrates' Court (General Regulations) 2000* be amended to include information about:

- (a) supporting material required for extension and instalment plan applications;
- (b) the potential reasons that recipients may wish to apply for revocation, such as that they did not commit the alleged offence;
- (c) the possibility and purpose of an application for revocation and referral under clause 10A of Schedule 7;
- (d) the consequences of successful and unsuccessful applications, including the right under clause 10(6) of Schedule 7 to object to a refusal to grant revocation;
- (e) the consequences of non-payment, in more detail, including the possibility of and eligibility for CCP and the options available to the Court if the recipient is arrested and sent for sentencing under Part 4 of Schedule 7; and
- (f) additional sources of advice, such as peak organisations for financial counsellors and other appropriate services.

Penalty Enforcement Warrant (Form 7). The warrant is addressed to executing officials and to any person into whose custody debtors are transferred. The Committee is concerned that while the warrant sets out the rights and obligations of those officials, there does not appear to be any requirement to provide such information to individuals subject to the warrant, despite the fact that the warrant authorises forcible entry, arrest and imprisonment.

The Committee recalls its discussion about the information that it believes should be provided to an occupier of premises that are the target of a search warrant,<sup>1675</sup> and reiterates its conclusions in the context of penalty enforcement warrants: a requirement to give individuals subject to a warrant information about what it authorises and which provides affected persons with a reasoned basis for the infringement of their rights that the warrant authorises. That safeguard is designed to provide a certain level of accountability and transparency in the use of the powers. It is, therefore, important that individuals affected by a warrant understand their rights and obligations under it.

The Committee therefore believes that the valid execution of a penalty enforcement warrant should be subject to a requirement to provide an equivalent of the occupier's notice that it recommended in relation to search warrants. As in that situation, the Committee concludes that providing the information in an occupier's notice is more appropriate than including it in a warrant, because the former is specifically addressed to the individuals whose rights are curtailed by the warrant. Further, the resulting administrative burden can be greatly reduced by developing a template form as outlined in the search warrants discussion, and by computerising the issue of warrants and occupier's notices: data could thus be keyed in once by the PERIN Court and be automatically inserted into both documents.

<p>Recommendation 117.                      That the <i>Magistrates' Court (General Regulations) 2000</i> be amended to require the service of a debtor's notice of rights and obligations to render the execution of a penalty enforcement warrant valid. The notice should be consistent with relevant parts of Recommendation 47 to Recommendation 1.</p>
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Statement setting out the effect of giving consent to the seizure or taking of personal property used primarily as a means of transport (Form 8). This is addressed to individuals subject to the relevant penalty enforcement warrant and is written in a way that the Committee again considers could be intimidating and confusing to individuals unaware of their rights. In particular, it states that if proceeds of the sale of property taken with consent are insufficient to discharge the penalty and costs, further demand will be made, non payment of which may result in imprisonment. There is no mention of the right to apply for extension, instalment payment or revocation. The form also does not explain the consequences of consenting to seizure beyond sale of property, or contain advice that a person should seek legal or other advice before consenting to seizure if they do not understand the form. The Committee notes that Form 6 from the same regulations advises recipients to seek advice if they do not understand it, and provides contact information for Victoria Legal Aid. The Committee considers that this advice should also be included on Form 8.

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<sup>1675</sup> The discussion begins at p 157 above.

Recommendation 118. That Form 8 of the *Magistrates' Court General Regulations 2000* be amended to:

- (a) be consistent with Recommendation 116;
- (b) include advice that an individual should seek legal advice if they do not understand the form; and
- (c) provide contact details for Victoria Legal Aid.

### **Options available in respect of a person brought before a court after the execution of a penalty enforcement warrant**

Part 4 of Schedule 7 of the *Magistrates' Court Act 1989* prescribes the process for individuals appearing before the Court after they have been arrested under a penalty enforcement warrant and assessed as being unsuitable for a CCP.

After giving individuals an opportunity to be heard, if the Court is satisfied that “the main reason the person committed the offence for which the infringement notice was issued, or the main reason why the person failed to pay the fine or comply with an instalment agreement” is that the person has a mental disorder, an intellectual impairment, a brain injury or dementia, it may discharge all or part of the fine or adjourn the hearing for up to six months (and then discharge the fine in whole or in part if the above conditions are present).<sup>1676</sup>

If these conditions are not met, or if a fine is only partly discharged under them, the Court is bound by clause 24 of Schedule 7 to: imprison the individual for 1 day for each \$100 owing; or for a period of time up to two thirds less than the total due at a rate of \$100 a day; or, if satisfied that exceptional circumstances exist, make a community based order (CBO) under the *Sentencing Act 1991*.

These provisions were introduced by the *Magistrates' Court (Infringements) Act 2000*. Prior to these amendments, terms of imprisonment for infringement debt were set automatically: there was no opportunity for a court to determine either the appropriateness or the term of incarceration. The Government introduced the legislation to correct the anomaly that this created: individuals who defaulted on open court fines (as opposed to infringement penalties) had to be brought before a magistrate for a hearing to determine whether imprisonment in default is appropriate. There was also a fundamental issue of fairness and justice involved, that “a case should be heard before a sentence of last resort - that is, imprisonment - is imposed”.<sup>1677</sup> The legislation followed a recommendation to that effect by the Public

<sup>1676</sup> *Magistrates' Court Act 1989* Schedule 7, cl 23.

<sup>1677</sup> Richard Wynne, MLA (Richmond), *Magistrates' Court (Infringements) Bill, Second Reading Debate*, 23 November 2000, 1952.

Accounts and Estimates Committee in its Report on Outstanding Fines and Unexecuted Warrants.<sup>1678</sup>

During the Bill's Second Reading Speech, the Attorney-General noted that the new sentencing options are more restrictive than those generally available to the court. This was justified as being important "to ensure that defaulters are encouraged to go to open court at the outset if they wish to seek alternative sanctions".<sup>1679</sup>

In this inquiry, a number of stakeholders advocated strongly for an expansion of those sentencing options. The basis of their argument was that the rationale for the restrictive approach had led to the inappropriate imprisonment of individuals experiencing financial or other hardships that did not come within the scope of the mental illness, medical conditions or exceptional circumstances exceptions in clauses 23 and 24 of Part 4. Such cases are subject to a mandatory term of imprisonment under clause 24.

The coalition of PILCH HPLC, Western Suburbs Legal Service, West Heidelberg Community Legal Service and Fitzroy Legal Service argued that the only people who can be brought before the Court for mandatory minimum sentencing in respect of unpaid penalties are people experiencing financial hardship or poverty, because an individual is only arrested and taken before the Court under Part 4 if they have no property to seize to offset the outstanding penalty and costs.<sup>1680</sup> It was pointed out that the threshold for exceptional circumstances excludes poverty or financial hardship.

Basil Stafford, a lawyer who has prosecuted and defended infringement cases submitted that in his experience the two most common reasons that people appear in court under Part 4 are ignorance and lack of understanding of the system.<sup>1681</sup>

He argued that there are two structural problems with Part 4. First, he criticised a lack of opportunity to hear a matter on the merits, which he described as a fundamental flaw because it could lead to imprisonment for administratively imposed penalties and because of the inability of the Court to acquit even where a prima facie defence is proffered. Second, he stated that the prosecution had no input in Part 4 proceedings:

The prosecution has the important role of ensuring a fair trial and assisting the court in arriving at the truth. It is unable to fulfil this function under Part 4. It is not heard; it is not a party. It should not be assumed that the prosecution necessarily is of the view that imprisonment according to

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<sup>1678</sup> PAEC, *Outstanding Fines and Unexecuted Warrants*, 82-83.

<sup>1679</sup> Rob Hulls, Attorney-General, *Magistrates' Court (Infringements) Bill, Second Reading Speech*, 26 October 2000, 1209.

<sup>1680</sup> PILCH Homeless Persons' Legal Clinic, West Heidelberg Legal Service, Fitzroy Legal Service, *Making PERIN Fairer*, 4; *PERIN Forum*.

<sup>1681</sup> Basil Stafford, *Submission no. 40*, 1-2. He cited recalcitrance/manipulating the system and mental or other disability as the next two most common reasons.

the schedule is the appropriate outcome. In my experience the cases where this is true will be uncommon.<sup>1682</sup>

As the PILCH HPLC implied, these limited options have created a new inconsistency to replace the pre-2000 anomaly:

[Not only is it] only the poor and impecunious [that] can be, and are, imprisoned. Further, it is a matter of great concern that a person can, and in many cases must, be imprisoned for non-payment of fines for such minor offences as overstaying a parking meter, while dispositions of good behaviour, monetary penalties, community based orders and suspended sentences are regularly granted for offences ranging from assault to rape.<sup>1683</sup>

In that context, the West Heidelberg Community Legal Service explained the importance of allowing a broad judicial discretion in infringement penalty cases:

judges and magistrates should be permitted to decide on all the facts available to them to make their decisions; and the politicians should get out of the courts. Do not say to magistrates and judges, 'You must find exceptional circumstances'. Leave it to those people to decide.

In some situations I will still be representing people who will still go to jail, but I sense from the magistrates that I have appeared before that they sometimes feel their hands are a bit tied by legislation.<sup>1684</sup>

Indeed, Court officials supported the proposal for increasing magistrates' sentencing discretion under Part 4.<sup>1685</sup>

The coalition of stakeholders considered that it was "imperative" to amend Part 4 to the effect that matters are heard and determined in open court and that individuals found guilty are sentenced under the *Sentencing Act 1991*:

[under which] the Court has a wide range of sentencing dispositions, ranging from imprisonment to dismissal, and for a just and equitable sentencing outcome, must take account of relevant factors including the offender's previous character and record, the stage at which s/he pleaded guilty, any remorse or lack thereof, and any other aggravating or mitigating factors.<sup>1686</sup>

It was suggested that such an approach would:

substantially improve outcomes and perceptions of fairness without removing the ultimate sanction of imprisonment for non-payment of fines. This is because, under the *Sentencing Act*

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<sup>1682</sup> Ibid, 2.

<sup>1683</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 44.

<sup>1684</sup> Gary Sullivan, *Minutes of Evidence, 20 October 2004*, 247.

<sup>1685</sup> *PERIN Forum*.

<sup>1686</sup> PILCH Homeless Persons' Legal Clinic, West Heidelberg Legal Service, Fitzroy Legal Service, *Making PERIN Fairer*, 5; *PERIN Forum*.

1991, the Court has a wide range of sentencing dispositions, ranging from imprisonment to dismissal, and for a just and equitable sentencing outcome, must take account of relevant factors including the offender's previous character and record, the stage at which s/he pleaded guilty, any remorse or lack thereof, and any other aggravating or mitigating factors.<sup>1687</sup>

Basil Stafford favoured a similar reform of Part 4. He suggested that no-one should be imprisoned unless as a consequence of a full hearing on the merits and with the opportunity for the prosecution to play its usual role. He argued that the hearing should take place following an application of the person brought before the court.<sup>1688</sup>

### ***Discussion and conclusions***

Few people are imprisoned as a result of non-payment of infringement penalties. At the time the legislation was introduced into Parliament, 700 people had been arrested, of whom 120 were imprisoned and 580 were released on CCPs.<sup>1689</sup> More recently, three people were imprisoned in the financial year 2003 - 2004.<sup>1690</sup>

The Committee is nevertheless concerned by the potential for individuals who, because of the complexity of their needs or of the infringement system, may not have paid penalties and costs and therefore be brought before court, where, if they do not meet the clause 23 thresholds or the clause 24 exceptional circumstances guidelines, they will be imprisoned for at least one third of the maximum period based on their outstanding debt. Indeed, the West Heidelberg Community Legal Centre stated that some of its clients who suffer financial hardship had been imprisoned. The Committee believes that such an outcome is not consistent with Parliament's stated intent when it passed the legislation containing Part 4 and that it should not be possible in a progressive community that values social justice and the principle of equality before the law.

The Committee agrees that the judiciary is best placed to decide the merits of a particular case, taking into account evidence relevant to an individual's circumstances. For this reason, the Committee supports the expansion of hearing and sentencing options under Part 4. The *Sentencing Act 1991* provides an efficient (magistrates have experience applying it), fair (it allows consideration of an individual's unique situation) and consistent (it is already applied in other cases) set of sentencing choices, while open court hearings will allow individuals who have not had an opportunity to challenge the penalty, or who have not been identified as a case of potential concern by the infringement system, to put their case.

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<sup>1687</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 44-45.

<sup>1688</sup> Basil Stafford, *Submission no. 40*, 3.

<sup>1689</sup> C. A. Furletti, MLC (Templestow), *Magistrates' Court (Infringements) Bill, Second Reading Debate*, 30 November 2000, 1841.

<sup>1690</sup> Email, Department of Justice Infringements Framework Project manager Mick Bourke to Committee Research Officer, 28 September 2005.

However, the Committee recognises the importance of preserving the additional deterrent value that Part 4 provides in respect of recalcitrant or manipulative debtors. Accordingly, the Committee believes that the increased hearing and sentencing options should be available only where an individual brought before the Court satisfies the Court that both are, or either is, appropriate in the circumstances.

Recommendation 119. That Part 4 of Schedule 7 of the *Magistrates' Court Act 1989* be amended to the effect that, where an individual is taken before the Court following the execution of a penalty enforcement warrant:

- (a) a person is sentenced under the *Sentencing Act 1991*; or
- (b) the matter is heard and determined in open court and that, on a finding of guilt, the person is sentenced under the *Sentencing Act 1991*.

Finally on this matter, the Committee also believes that the title of Part 4 should be modified from "IMPRISONMENT" to something more reflective of the options available under its provisions, as amended by Recommendation 119.

Recommendation 120. That the title of Part 4 of Schedule 7 of the *Magistrates' Court Act 1989* be modified to more accurately reflect the contents of its provisions.

## ***Coordination and consistency***

It is widely acknowledged that there is a need for coordination and oversight of the infringement notice system to improve its efficiency, consistency and fairness.<sup>1691</sup> Previous studies have highlighted the fragmented nature of the system and a lack of consistency between agencies, and recommended a "gatekeeper" for the system and overarching legislation.<sup>1692</sup> These conclusions were echoed in submissions to this inquiry.

### **Coordination**

In 2003, the Monash University/Department of Justice study concluded that the lack of a "single central agency that accepts responsibility" for the infringement system, its parameters, penalty levels, alternative sanctions, appeals, the impact of special

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<sup>1691</sup> *PERIN Forum*.

<sup>1692</sup> *Fox, On the Sport Fines I*, 122; *PAEC, Outstanding Fines*, 53.

circumstances, the provision of information and education about the system's benefits and processes was one of the weaknesses of the system.<sup>1693</sup>

PILCH HPLC told the Committee about the practical effect of the lack of a body that coordinates the infringement system or provides a consolidated public access point. Individuals who have received infringement notices instead have four contact points, depending on what stage enforcement has reached:

[Debtors] have contact with issuing agencies, they have contact with the PERIN court, they have contact with Civic Compliance [described below], they have contact with the Sheriff's Office, and there is a real lack of coordination between those departments.<sup>1694</sup>

[This] is of particular concern to people experiencing financial or social disadvantage. [It] is inefficient and a major source of consumer dissatisfaction.<sup>1695</sup>

Multiple points of contact cause confusion and increase the time and cost of resolving matters for individuals and their representatives.

Further, it is reportedly necessary for individuals, rather than actors within the infringement system, to coordinate infringement agencies' responses to applications to vary the enforcement process:

[A] consumer who makes an application for revocation, variation of costs, extension of time to pay or an instalment plan with the PERIN Court must then liaise with the Sheriff's Office to obtain a stay on the enforcement of warrants pending the determination of those applications.<sup>1696</sup>

These experiences led the PILCH HPLC to argue that:

Consumers should have one point of contact and one point of contact only. If there are various divisions or units within that point of contact, then it is imperative that that body itself be responsible for the effective coordination of those units, not that consumers be forced to navigate their way around the system.<sup>1697</sup>

Gary Sullivan echoed these comments and agreed with the PILCH HPLC that the responsible body should be the PERIN Court itself, consistent with the location of the infringement system rules and procedures in the *Magistrates' Court Act 1989* and the recent ruling that the PERIN Court is a court exercising judicial functions, even though many of its processes are administrative in character.<sup>1698</sup>

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<sup>1693</sup> Fox, *On the Sport Fines I*, 122.

<sup>1694</sup> Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence*, 20 October 2004, 242.

<sup>1695</sup> PILCH Homeless Persons' Legal Clinic, *Submission no. 4*, 31.

<sup>1696</sup> *Ibid.*

<sup>1697</sup> Phil Lynch, PILCH Homeless Persons' Legal Clinic, *Minutes of Evidence*, 20 October 2004, 242.

<sup>1698</sup> *State of Victoria v Mansfield* [2003] FCAFC 154 (18 July 2003).

The Committee was also told that there was a need for a common information platform across the institutions involved in the infringement system - issuing agencies, the PERIN Court (including the Special Circumstances List), the Sheriff's Office - to ensure that all had and could share the same material about cases proceeding through the system.<sup>1699</sup>

There have been some efforts to better coordinate the infringement system. In 1994, the Government amalgamated the Sheriff's Office and the PERIN Court into the Enforcement Management Unit to create an "integrated fine management system" that was designed to:

implement policy and procedures for the efficient and cost-effective management of fine enforcement and to ensure the integrity of the judicial process; improve revenue collection rates and reduce the level of outstanding court orders and warrants; and ensure compliance with legislation and minimise the burden of work falling on the courts, while still protecting the individual's rights at law.<sup>1700</sup>

The Committee noted earlier that the Government contracts some of the administration of the infringement system to a private entity, TENIX Solutions Pty Ltd. Its work is carried out under the name Civic Compliance Victoria,<sup>1701</sup> which appears on some infringement documentation as the entity to which recipients should send payment of penalties and costs.<sup>1702</sup>

The Committee believes that there are two aspects to the coordination of the infringement system: a unified point of contact for the whole system; and the monitoring and refinement of system rules and procedures. While these are related, they are substantially separate, indeed the latter function would include the power to review the effectiveness of the former. For those reasons separate entities should be responsible for each aspect of coordination.

### ***A central point of contact***

The Committee considers that a central point of contact would improve the efficiency of the infringement system. However, although there is merit in vesting responsibility for this aspect of the coordination role in the PERIN Court itself, the Committee

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<sup>1699</sup> *PERIN Forum*.

<sup>1700</sup> Victorian Auditor-General, *Report on Ministerial Portfolios, May 1998*, 3.4.40-3.4.42.

<sup>1701</sup> "Civic Compliance Victoria (CCV) is the name used to describe the work done by TENIX Solutions Pty Ltd for Sheriff's Operations, the PERIN Court and the Traffic Camera Office. This includes answering phones, operating the public counter area, sending out letters and receiving payments": Department of Justice, *Sheriff's Office, FAQs*, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>1702</sup> Of the samples that the Committee reviewed, the infringement notice issued by Victoria Police required payment to Civic Compliance Victoria, while the ones issued by the Department of Infrastructure and the City of Melbourne were to be paid directly to those issuing agencies.

concludes that it would not be appropriate to do so. On the one hand, the Committee agrees that while the infringement system is intended to keep most cases from proceeding to contested hearings, the system's core remains an entity called a court, which adds particular legitimacy to the system's claims of protecting individual rights. On the other hand, it is impractical and therefore unrealistic to expect the Court to provide information about infringement matters that have not progressed to the PERIN registration stage. The Committee recalls that it understands that infringements issued by most agencies are not recorded on the Victorian Infringements Management System (VIMS) until the PERIN registration point. Even if the VIMS was improved to create a central database that provides information on every infringement notice from the point of issue to the point of resolution, which the Committee has recommended, the Court, or for that matter any other central contact service, would need to refer many queries about specific unregistered penalties to the issuing agencies for resolution, resulting in extra administrative work for both the Court and those making enquiries of it.

In the Committee's view, the major difficulty in attempting to establish a single point of contact that can efficiently resolve queries from individuals who have incurred infringement penalties (or their representatives) is the need for individual agencies to make decisions (withdrawal, extension, instalment) relating to the penalties that they issue before they are registered with the PERIN Court. This situation is exacerbated in cases where a person has received infringement penalties from multiple agencies, as each agency's penalties must be dealt with separately with the agency concerned.

The Committee observes that the current situation could be improved by upgrading the VIMS, developing consistent, standardised forms and procedures, increasing public education about the infringement system and training staff to provide detailed advice and assistance to callers. These measures could allow a central contact point to assist with queries about how to challenge or otherwise respond to infringement notices.

The infringement system becomes more unified after the registration of penalties at the PERIN Court and therefore the Committee believes that once that occurs, the Court should become responsible for coordinating the administration of all aspects of the infringement matter, including staying the execution of orders following applications for revocation or extensions of time to pay or instalment payments.

<p>Recommendation 121. That the PERIN Court be responsible for coordinating the administration of all aspects of an infringement matter once it is registered under clause 4 of schedule 7 of the <i>Magistrates' Court Act 1989</i>, including staying the execution of orders following applications for revocation or extensions of time to pay or instalment payments.</p>
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### ***Monitoring and refining infringement system procedures***

Monitoring and modification of infringement system procedures is currently carried out on an ad hoc and fragmented basis, through, respectively, periodic reviews and various working groups. Based on the evidence it has heard, the Committee believes that there is a need for a permanent monitor to fulfil the following functions:

- ensure that the infringement system is fair, efficient and consistent;
- development of consistent policies and guidelines with respect to education, outreach, agency discretion, withdrawal of penalties, instalment payment plans, payment extensions, conversion of penalties into community work and other non-monetary sanctions, design and content of infringement documentation, special circumstances categories and applications, training and sensitisation of authorised officers, other issuing agency staff and Sheriff's Office personnel;
- address ongoing systemic issues, such as how to effectively consolidate all outstanding fines against individuals to facilitate their resolution in one hearing or procedure;<sup>1703</sup>
- collect and analyse empirical data, including complaints (submitted for reform, rather than review) from the community, in particular from infringement system agencies, individuals who receive infringement notices and their representatives, prosecutors, the PERIN Court, the Sheriff's Office, the Ombudsman and other relevant entities;
- monitor and apply best practices and innovations from other jurisdictions.

The Committee recommends the establishment of an entity to carry out these functions and believes that it should include an advisory board that includes issuing agencies, the PERIN Court, Sheriff's Office, Department of Justice, peak social and legal service organisations and the Ombudsman.

The Committee notes that the Government recently created an Infringements System Oversight Unit (ISOU) within the Department of Justice with monitoring, reviewing and regulatory functions in relation to the infringements system. The Unit is also responsible for: coordinating legislative application and systems compliance; establishing consistent standards, codes and procedures; advising the Government on infringement policy and operation; and promoting the objectives of the proposed Infringements Act 2005 through community information and education.<sup>1704</sup> The

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<sup>1703</sup> Michael Wighton, Victoria Legal Aid, *Minutes of Evidence, 20 October 2004*, 203; Gary Sullivan, West Heidelberg Community Legal Service, *Minutes of Evidence, 20 October 2004*, 252; Andrew Crawshaw, Department of Justice, *Minutes of Evidence, 5 November 2004*, 317.

<sup>1704</sup> Department of Justice, *Position Description: Manager, Infringement System Oversight Unit, VG/DJ5196*, accessed online 19 September 2005.

Committee considers that ISOU may form a basis for implementing its conclusions and recommendation in this section.

Recommendation 122. That a body be established with an advisory board that includes issuing agencies, the PERIN Court, Sheriff's Office, Department of Justice, peak social and legal service organisations and the Ombudsman to ensure that the infringement system is fair, efficient and consistent, in particular by:

- (a) developing consistent policies and guidelines with respect to:
  - (i) education;
  - (ii) outreach;
  - (iii) agency discretion;
  - (iv) withdrawal of penalties, instalment payment plans, payment extensions, conversion of penalties into community work and other non-monetary sanctions;
  - (v) design and content of infringement documentation;
  - (vi) special circumstances categories and applications;
  - (vii) training and sensitisation of authorised officers, other issuing agency staff and Sheriff's Office personnel;

and further by:

- (b) addressing ongoing systemic issues;
- (c) collecting and analysing empirical data from the community, in particular from infringement system agencies, individuals who receive infringement notices and their representatives, prosecutors, the PERIN Court, the Sheriff's Office, the Ombudsman and other relevant entities; and
- (d) monitoring and applying best practices and innovations from other jurisdictions.

## Legislation

The adoption of uniform legislation to govern the infringement system has been a matter of public debate in Victoria since at least 1995.<sup>1705</sup> In 1997, PAEC recommended an Act dealing with a range of matters, including eligible offences, form and content of infringement notices, costs, management of the enforcement process,

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<sup>1705</sup> Fox, *Infringement Penalties*, 292-294.

available measures to enforce fines, procedures for developing and implementing guidelines on various issues and powers of the Sheriff.<sup>1706</sup>

In its 1998 response to the PAEC Report, the Government indicated that it anticipated that its review of the infringement notice system would result in a Fines Act.<sup>1707</sup> The Committee believes that the Government should enact such legislation at the earliest opportunity and welcomes recent indications that an *Infringements Act* will be introduced into Parliament, with the aim of providing consistent infringements law and procedures.

As with search warrants, a consolidated Act will promote greater consistency, transparency and certainty, and consequently improved fairness and efficiency, across a varied and complex part of the State's justice system. In particular, such an Act can provide a mechanism for ensuring that issuing agencies offer consistent and flexible options in appropriate cases. The Committee notes that other Australian jurisdictions have passed infringements legislation.<sup>1708</sup>

The Committee believes that consolidated legislation should include provisions governing:

- agencies' eligibility to use the infringement system - the Committee believes that the registration process currently provides an opportunity to require agencies to comply with minimum standards in the remainder of the legislation;
- training standards for issuing agency and Sheriff's office personnel;
- offences, levels of penalties and costs;
- form and content of infringement notices, courtesy reminder letters and PERIN Court documents;
- special circumstances categories and applications;
- principles and procedures for the development and implementation of standards for record keeping and data management, waiving and varying penalties, converting penalties into community work and other non-monetary sanctions, granting instalment agreements and extensions of time to pay, revoking enforcement orders, diverting matters to court;
- execution of penalty enforcement warrants, seizure of goods, arrest and subsequent court hearings; and

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<sup>1706</sup> PAEC, *Outstanding Fines*, 53-54.

<sup>1707</sup> Victorian Government, *PAEC Response*, 2.

<sup>1708</sup> For example, *Fines Act 1996* (NSW), *Expiation of Offences Act 1996* (SA), *State Penalties Enforcement Act 1999* (Qld).

- oversight of the infringement system.

Recommendation 123. That the Government introduces legislation that includes provisions addressing the following matters:

- (a) agencies' eligibility to use the infringement system;
- (b) training standards for issuing agencies and Sheriff's office personnel;
- (c) offences, levels of penalties and costs;
- (d) form and content of infringement notices, courtesy reminder letters and PERIN Court documents;
- (e) special circumstances categories and applications;
- (f) principles and procedures for the development and implementation of standards for record keeping and data management, waiving and varying penalties, converting penalties into community work and other non-monetary sanctions, granting instalment agreements and extensions of time to pay, revoking enforcement orders, diverting matters to court;
- (g) execution of penalty enforcement warrants, seizure of goods, arrest and subsequent court hearings; and
- (h) oversight of the infringement system.

## **Conclusion**

In closing this chapter, the Committee recognises that many of the reforms that it has proposed to the infringement system have potentially far reaching implications, in terms both of resources and the philosophy underpinning such an automated system. In particular, the Committee notes the concerns expressed during the PERIN Forum that experience indicates that some people will exploit any increased flexibility in the infringements system, although it understands that the number of such individuals is statistically small and that they are generally well-known to issuing agencies and the PERIN Court.<sup>1709</sup>

The Committee's foregoing proposals are intended to increase the opportunities to divert appropriate cases out of the enforcement cycle, thereby making the system more flexible and responsive, and reducing the trauma, time and money that such cases currently involve. It believes that its recommendations are justified by the experiences of stakeholders and are consistent with the desire of all sectors of the

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<sup>1709</sup> PERIN Forum.

Victorian community to enhance safeguards in the system for those individuals who suffer from disadvantage.



## CHAPTER TEN - WARRANTS OF APPREHENSION

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The common law of Australia knows no...executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer...who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate.<sup>1710</sup>

Arrest and the power to arrest are fundamental concepts in our society, as liberty is the cornerstone of a free and democratic society.<sup>1711</sup>

The mere interference with the plaintiff's person and liberty constituted prima facie a grave infringement of the most elementary and important of all common law rights.<sup>1712</sup>

### Introduction

In this chapter, the Committee considers the law relating to arrest warrants<sup>1713</sup> and its impact on indigenous people. The chapter begins with a discussion of the origins of arrest warrants and an outline of relevant common law and Victorian and Commonwealth legislation.

Arrest warrants may be issued under a range of Acts, including the *Magistrates' Court Act 1989*. While the *Magistrates' Court Act 1989* generally provides the powers and procedures that apply to arrest warrants, a number of the other Acts under which arrest warrants may be issued also provide relevant powers and procedures, to a greater or lesser degree. The Committee concludes that the legislation should be consolidated by the removal of arrest warrant provisions from the various authorising Acts and from the *Magistrates' Court Act 1989* into the same consolidating piece of legislation recommended for search warrants in Chapter Seven.

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<sup>1710</sup> *Bolton v Beazley; Ex parte Beane* (1987) HCA 12, paragraph 1 (Deane J).

<sup>1711</sup> Tony Trood, in Ian Freckleton, *Criminal Procedure*, (2004), (Trood; Freckleton, *Criminal Procedure*), 2-2029.

<sup>1712</sup> *Troobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar, J).

<sup>1713</sup> For reasons discussed below, the focus of the Committee's discussion in this chapter is on arrest warrants rather than on warrants of apprehension. For ease of reference, the terms "warrant to arrest" and the less precise, "arrest warrant" are used interchangeably throughout the chapter

The Committee received significantly less evidence from stakeholders regarding arrest warrants than it did for other types of warrants, in particular search warrants and PERIN warrants, and the evidence that the Committee did receive was essentially limited to the impact of arrest warrants on indigenous people. The final part of the chapter therefore considers stakeholders' claims regarding the impact of arrest warrants on indigenous people and concludes that there is a need for enhanced record keeping to better measure that impact.

### **The law of arrest**

Most arrests today do not occur under a warrant, due to the legislative expansion of the power to arrest without a warrant.<sup>1714</sup> According to Bishop, there are two main scenarios in which arrest under a warrant occurs: where there is an alert for an identified and major offender; and where a police officer who may be uncertain about the grounds for an arrest that is not required immediately, obtains a warrant to ensure that the arrest will be lawful. While arrest under a state or Federal warrant is executed identically to an arrest without warrant (both forms of arrest also allow the use of force)<sup>1715</sup> any general recommendations in relation to arrest law are beyond the scope of the current inquiry. However, the law of arrest is relevant to each of the chronological stages of a warrant to arrest and, as noted in the Committee's Discussion Paper, has been the subject of stakeholder proposals for codification. For these reasons, the Committee outlines the law of arrest and considers the question of codification here.

Prior to the *Crimes (Powers of Arrest) Act 1972*, both police officers and citizens retained a common law power of arrest.<sup>1716</sup> However, with the passage of that Act, the power to make an arrest was placed on an entirely legislative basis.<sup>1717</sup> Section 457 of the *Crimes Act 1958* now prohibits the arrest of any person without a warrant, except as allowed under that Act (see sections 458, 459 and 463A) or another Act which expressly provides the power to arrest without warrant.<sup>1718</sup>

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<sup>1714</sup> John Bishop, *Criminal Procedure* (1998) (Bishop, *Criminal Procedure*), 116.

<sup>1715</sup> Ibid.

<sup>1716</sup> G. Nash, M. Bagaric, Butterworths Annotated Acts, *Criminal Legislation Victoria 2003* (2003) (Nash; Bagaric, *Criminal Procedure Victoria*), 715. Bishop describes the arrest power retained by private citizens as a legacy of the community's involvement in the enforcement of the criminal law during the period which preceded the use of arrest warrants outlined below: *Bishop, Criminal Procedure*, 109.

<sup>1717</sup> Trood; Freckleton, *Criminal Procedure*, 2.2.210.

<sup>1718</sup> Nash; Bagaric, *Criminal Procedure Victoria*, 715.

Section 458 provides that any person, whether a member of the police force or not, may arrest without warrant a person who s/he "finds committing any offence" where such apprehension is necessary for one of a number of defined reasons. Section 459 provides police with additional powers of arrest without warrant where the person is

As outlined in the Committee's Discussion Paper, the method of executing an arrest remains largely the subject of common law. The method is the same whether the arrest occurs with or without a warrant, or is made by a private citizen or police officer:

There is no fixed formula. The words or conduct must convey to the person arrested that s/he is no longer free to leave and must continue to submit to such restrictions on his or her liberty.<sup>1719</sup> The arrested person is entitled to know the charge or suspicion that justifies the arrest, unless s/he "must know" the general nature of the alleged offence.<sup>1720</sup> An arrest that is unlawful because of failure to communicate its basis can become lawful as soon as the justification is provided.<sup>1721</sup>

Reasonable force may be used to execute an arrest, although "all necessary and reasonable force" can be used to prevent an unlawful arrest.<sup>1722</sup> A person who resists arrest does not commit an offence if s/he reasonably believes that the person executing the arrest is not a police officer.<sup>1723</sup>

If the legal requirements of arrest are not complied with, the person arresting is generally civilly liable for false imprisonment.<sup>1724</sup>

### Proposals for codification of the law of arrest

The Discussion Paper for the current inquiry noted stakeholder comments regarding the codification of the requirements for lawful arrest.<sup>1725</sup> Senior law lecturer Dr Chris Corns has observed that common law principles are the sole source of authority for the conditions that must be satisfied for a valid arrest. Dr Corns recommended that these conditions should be codified to "provide greater certainty and uniformity in approach".<sup>1726</sup> On the other hand, Victoria Police does not support further codification of arrest powers:

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believed to have committed an indictable offence in Victoria or elsewhere. Section 459A provides a police officer with the power to enter and search any place for the purpose of effecting an arrest under sections 458 or 459 or under any other act.

<sup>1719</sup> *R v Inwood* (1973) 1 WLR 647.

<sup>1720</sup> *Crimes Act (Cth) 1914* ss 3ZD(1)-3ZD(2).

<sup>1721</sup> *R v Kulynycz* (1971) 1 QB 367.

<sup>1722</sup> *Ibid.*

<sup>1723</sup> *R v Reynhoudt* (1962) 107 CLR 381; *Kenlin v Gardiner* (1967) 2 QB 510.

<sup>1724</sup> *Christie v Leachinsky* (1947) AC 573; *Myer Stores Ltd. v Soo* (1991) VR 597.

<sup>1725</sup> Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures, Discussion Paper* (July 2004) (*Warrant Powers and Procedures Discussion Paper*), 52, question 54.

<sup>1726</sup> Dr. Chris Corns, *Preliminary submission no. 18.* See also Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand* (1996) (Tronc *et al*, *Search and Seizure in Australia and New Zealand*), 101-108.

The powers of arrest and entry are adequate, well defined and easily understood. Their interpretation by the courts is consistent and the common law position has evolved without confusion.<sup>1727</sup>

As noted above, the circumstances in which arrest without a warrant may occur have been expanded by legislation such that arrest under a warrant is now the exception rather than the rule in Victoria and throughout Australia.<sup>1728</sup> Moreover, according to Tronc, Crawford and Smith, police in Australia exercise warrantless powers of arrest at either extreme of the spectrum of offences, that is, for very minor and for very serious offences.<sup>1729</sup>

The situation in relation to young offenders was described in evidence received by the Committee from Jane Sanders, a solicitor with the Shopfront Youth Legal Centre in NSW,

Given that I do work for a youth legal service I do see a lot of young people coming into contact with the police all of the time. Most of that is completely outside the warrant system. Most searches of young people and arrests and police contacts are done without warrant, based on reasonable suspicion generally.

It is beyond the scope of the current inquiry to comprehensively consider arrest law given that most arrests now occur without a warrant. The breadth of any inquiry into arrest law is also indicated by a number of other distinctions: between the arrest powers of all citizens and the additional arrest powers of police and other public officials; between arrest under state and Federal law; and between the power to arrest and the obligation to take a person before a bail justice, magistrate, or court within a reasonable time.<sup>1730</sup> Moreover, while the Victorian Aboriginal Legal Service (VALS) also supported the codification of arrest powers, the Committee did not receive any detailed arguments from stakeholders on this issue.

The Committee therefore believes that while proposals for further codification of arrest law may have merit, they would need to be assessed in the context of an inquiry dealing more squarely with arrest powers, including the variety of situations in which arrest may occur and existing police powers and procedures. The Committee notes for example that the partial consolidation and codification of arrest powers has been the subject of more general legislative reform in other states, for example

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<sup>1727</sup> Victoria Police, *Submission no. 25*, 17

<sup>1728</sup> Bishop, *Criminal Procedure*, 116; Fitzroy Legal Service, *The Law Handbook* (2005) (*Fitzroy, Law Handbook*), 72.

<sup>1729</sup> Tronc *et al*, *Search and Seizure in Australia and New Zealand*, 107. The authors argue that it is a common legislative requirement for police to obtain an arrest warrant for the “huge range of mid-level offences” but it follows from the above that such offences are responsible only for a minority of the actual number of arrests.

<sup>1730</sup> Richard Fox, *Victorian Criminal Procedure 2005* (2005) (*Fox, Victorian Civil Procedure*), 103.

Queensland's *Police Powers and Responsibilities Act 2000* (Qld) and New South Wales' *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

## Origins and outline of warrants of apprehension in Victoria

### Origins

The current practice of issuing a warrant to authorise a person's arrest or apprehension originated in England and developed gradually between the fourteenth and seventeenth centuries.<sup>1731</sup> During this period, warrants of apprehension and summonses gradually replaced the "hue and cry", a system in which the entire community was responsible for the apprehension of criminal offenders.<sup>1732</sup> Over time, warrants of apprehension increasingly became the subject of legislation, with a range of statutes providing for their issue in specific circumstances.<sup>1733</sup> The legislative basis of warrants of apprehension culminated in the *Indictable Offences Act 1848* (UK), which provided for the issue of a warrant or a summons where a complaint was made to a justice that a person had committed an indictable offence.<sup>1734</sup> The *Indictable Offences Act 1848* (UK) was adopted in Australia and throughout the British colonies in the nineteenth century.<sup>1735</sup>

Essentially the same legislative model regulates arrest warrants in Victoria today. The *Magistrates' Court Act 1989* contains detailed provisions dealing with the application, issue, execution and post-execution of arrest warrants, while a range of other Acts, such as the *Crimes Act 1958*,<sup>1736</sup> define the circumstances in which an arrest warrant may be issued.<sup>1737</sup>

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<sup>1731</sup> *Bishop, Criminal Procedure*, 114-115. Bishop also cites the establishment of Justices of the Peace in 1326 as a factor in the gradual development of warrants of apprehension.

<sup>1732</sup> The "hue and cry" was raised by local officials if a person committed a felony and involved the pursuit of the person through the town, and from town to town if necessary. Every person was obliged to keep a weapon so they could follow the "cry" when required. By the seventeenth century, the phrase "grant a hue and cry" was commonly used to refer to the granting of a warrant: *Bishop, Criminal Procedure*, 114-115.

<sup>1733</sup> *Ibid.*

<sup>1734</sup> *Ibid.*

<sup>1735</sup> *Ibid.*

<sup>1736</sup> See for example, sections 464T(1) and 464X which provide for the issue of a warrant where a person refuses to undergo a forensic procedure after being requested to do so or is incapable of giving informed consent by reason of mental impairment.

<sup>1737</sup> However, as discussed below, many of those other acts also deal to a greater or lesser degree with the application, issue, execution and post-execution of warrants of apprehension.

Notably, the legislative conditions which govern the issue of an arrest warrant are interpreted strictly by a court so that the validity of the warrant will depend on whether those conditions are satisfied.<sup>1738</sup> However, the existence of an illegality or irregularity in the warrant does not affect the court's jurisdiction to hear the information, complaint or charge.<sup>1739</sup>

### **Types of warrant of apprehension**

Warrants providing for the apprehension of a person are essentially governed by state law. In Victoria, sections 57-59 of the *Magistrates' Court Act 1989* apply to warrants generally and sections 61-67 apply to warrants to arrest specifically. The term "warrant of apprehension" is no longer extensively used in Victoria, having been replaced in the *Magistrates' Court Act 1989* by "warrant to arrest".<sup>1740</sup> The term "bench warrant"<sup>1741</sup> is also rarely used as it is effectively a warrant to arrest issued under the *Magistrates' Court Act 1989*.<sup>1742</sup> A number of other warrants which may be issued under the *Magistrates' Court Act 1989* provide for a person's apprehension: a remand warrant, a warrant to imprison and a warrant to detain in a youth training centre.<sup>1743</sup> However, those warrants are issued in relation to people who have generally already been apprehended. Moreover, as the evidence received by the Committee focused almost exclusively on arrest warrants, these are the focus of this chapter.

Warrants to arrest are issued primarily by the Magistrates' Court due to the extent of its criminal jurisdiction. The criminal jurisdiction of the Magistrates' Court includes all summary offences<sup>1744</sup> and some indictable offences.<sup>1745</sup> The Magistrates' Court also

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<sup>1738</sup> *George v Rockett* (1990), A Crim R 246.

<sup>1739</sup> *R v Jiri Fiala: Ex parte G J Coles & Co Ltd* (1986) 46 SASR 47, 57 (Jacobs J).

<sup>1740</sup> *Magistrates' Court Act 1989* Schedule 8, cl. 11.

<sup>1741</sup> A "bench warrant" is defined as a warrant issued by a court in criminal proceedings for the apprehension of a person accused of a criminal offence or a person summoned to the proceedings: *Butterworths Concise Australian Legal Dictionary*, (1998), 49.

<sup>1742</sup> The term remains in use in Western Australia, where it refers to an arrest warrant issued following the failure of a defendant to appear in court: Mark Cuomo, Aboriginal Legal Service of Western Australia, *Minutes of Evidence*, 2 September 2004, 102.

<sup>1743</sup> *Magistrates' Court Act 1989* s 57.

<sup>1744</sup> Summary offences are of a less serious nature and are heard by a Magistrate. They include traffic offences, minor assaults, property damage and offensive behaviour. Some summary matters can be determined in the defendant's absence (an ex-parte hearing) if the Magistrate decides it is appropriate to do so: *Magistrates' Court of Victoria, Police Cases and Other Prosecutions*, at [www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au).

<sup>1745</sup> Indictable matters are of a more serious nature and may be heard by a Judge and jury of the County or Supreme Courts. These charges cannot be heard in the absence of the defendant. Failure to attend a hearing by a defendant may result in the issue of a warrant for the defendant's arrest. Some indictable offences may be heard

conducts committal hearings for more serious indictable offences that must be finally determined in the County or Supreme Courts.<sup>1746</sup> The Court's criminal jurisdiction mainly involves prosecutions by police, but also includes prosecutions by various other prosecuting agencies including local councils, VicRoads, Corrections Victoria and the Department of Primary Industry.<sup>1747</sup>

## **Warrants to arrest**

### **Issue**

Warrants to arrest, which may be issued under the *Magistrates' Court Act 1989* or other specific legislation,<sup>1748</sup> authorise the deprivation of the liberty of the person named in the warrant (usually the defendant but in some cases, a witness) and contain the power to compel the person's attendance at court.<sup>1749</sup>

Warrants to arrest may be issued by High Court judges;<sup>1750</sup> judges of the Supreme and County Courts;<sup>1751</sup> the Prothonotary of the Supreme Court and Registrar of the County Court;<sup>1752</sup> magistrates and registrars of the Magistrates' Court and the Children's Court;<sup>1753</sup> and members of the Defence Force Discipline Appeal Tribunal.<sup>1754</sup>

Warrants to arrest, other than in the first instance, may be issued where the defendant has failed: to respond to a summons; to answer bail; or where otherwise authorised by law.<sup>1755</sup> Warrants to arrest issued in these circumstances must include a statement of the reason for issuing the warrant.<sup>1756</sup> Warrants to arrest may also be

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and determined by a Magistrate with the defendant's consent, including burglary and theft. Some indictable offences must be heard in a higher jurisdiction regardless of the defendant's wishes (eg. murder, rape): *ibid.*

<sup>1746</sup> *Ibid.*

<sup>1747</sup> *Ibid.*

<sup>1748</sup> Some examples include the: *Major Crime (Investigative Powers) Act 2004*; *Serious Sex Offenders Monitoring Act 2005*; *Whistleblowers Protection Act 2001*; *Crimes (Family Violence) Act 1987*; *Summary Offences Act 1996*; and the *Maintenance Act 1965*.

<sup>1749</sup> *Trood; Freckleton, Criminal Procedure*, 2.2.800.

<sup>1750</sup> *Judiciary Act 1903* (Cth) s 81; *Fox, Victorian Criminal Procedure*, 109.

<sup>1751</sup> *Magistrates' Court Act 1989* s 57(7); *Fox, Victorian Criminal Procedure*, 109.

<sup>1752</sup> *Magistrates' Court Act 1989* s 66, but only following indictment or presentment; *Fox, Victorian Criminal Procedure*, 109.

<sup>1753</sup> *Magistrates' Court Act 1989* s 57; *Children and Young Person's Act 1989* s 24; *Fox, Victorian Criminal Procedure*, 109.

<sup>1754</sup> *Defence Force Discipline Appeals Act 1955* (Cth) s 32; *Fox, Victorian Criminal Procedure*, 109.

<sup>1755</sup> *Magistrates' Court Act 1989* s 61(5); *Fox, Victorian Criminal Procedure*, 110.

<sup>1756</sup> *Magistrates' Court Act 1989* s 61(6); *Fox, Victorian Criminal Procedure*, 110.

issued against a witness, for example where it appears probable that s/he will not answer a witness summons, has absconded or is likely to abscond.<sup>1757</sup>

## Application

In most cases, a warrant to arrest in the first instance is issued by a registrar of the Magistrates' Court when a charge is filed,<sup>1758</sup> or prior to the date that a case is first listed for court (the mention date).<sup>1759</sup> The application must be supported by evidence on oath or by affidavit (which may include a copy of an affidavit sent by fax). The warrant must include a copy of the charge against the defendant and may be issued for the arrest of a person whose name is unknown but whose description is endorsed on the warrant.<sup>1760</sup> Registrars have the discretion to issue a summons for the defendant to answer the charge instead of a warrant to arrest,<sup>1761</sup> though they must issue one or the other.<sup>1762</sup> However, a warrant to arrest must not be issued unless the registrar is satisfied, by evidence on oath or by affidavit, that: it is probable that the defendant will not answer a summons; the defendant has absconded or is likely to abscond or is avoiding service of a summons that has been issued; or that a warrant is authorised by another Act for "other good cause".<sup>1763</sup> A warrant to arrest may also direct that the arrestee be released on bail, the amount of bail and any conditions.<sup>1764</sup> Victorian law also applies to the issue of Federal arrest warrants in Victoria,<sup>1765</sup> although those warrants are subject to the general procedural requirements in section 3ZA of the *Crimes Act 1914* (Cth) or other federal legislation governing specific types of warrants of apprehension.<sup>1766</sup>

## Who may execute a warrant to arrest

A warrant to arrest may be directed to a named member of the police force; to all members of the police force; or to any other person authorised by law to execute a warrant to arrest.<sup>1767</sup> Where a warrant to arrest is directed to a named member of the

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<sup>1757</sup> *Magistrates' Court Act 1989* ss 61(1)(b) and 61(5)(b).

<sup>1758</sup> *Magistrates' Court Act 1989* s 26; Fox, *Victorian Criminal Procedure*, 110.

<sup>1759</sup> *Magistrates' Court Act 1989* s 61; Fox, *Victorian Criminal Procedure*, 110.

<sup>1760</sup> *Magistrates' Court Act 1989* s 57(3); Fox, *Victorian Criminal Procedure*, 110.

<sup>1761</sup> *Magistrates' Court Act 1989* s 28; Fox, *Victorian Criminal Procedure*, 110.

<sup>1762</sup> See *Mortimore v. Stecher* (1971) V.R. 866; Fox, *Victorian Criminal Procedure*, 110.

<sup>1763</sup> *Magistrates' Court Act 1989* s 28(5); Fox, *Victorian Criminal Procedure*, 110.

<sup>1764</sup> *Magistrates' Court Act 1989* s 62(1).

<sup>1765</sup> *The Judiciary Act 1903* (Cth) s 68; Fox, *Victorian Criminal Procedure*, 109-110.

<sup>1766</sup> Fox, *Victorian Criminal Procedure*, 109-110. For example, section 3ZA requires that information be provided on oath, whereas the *Magistrates' Court Act 1989* allows for information to be provided on oath or on affidavit.

<sup>1767</sup> *Magistrates' Court Act 1989* s 63(1).

police force, it may be executed by any member of the police force.<sup>1768</sup> The execution copy of an arrest warrant must generally be carried by the person executing the arrest and shown to the arrestee if requested.<sup>1769</sup> However, where a warrant to arrest a defendant to a charge has been issued, any member of the police force may arrest the person, even if the execution copy is not in their possession at that time. The police officer must then bring the arrestee before a bail justice or the Court within a reasonable time.<sup>1770</sup>

### After execution

Following a person's arrest under warrant, the arrestee must be taken before a bail justice or the Magistrates' Court within a reasonable time and the bail justice or magistrate must decide whether to release the person without conditions, or on bail, or to remand the person in custody in prison or in a youth training centre under a remand warrant.<sup>1771</sup> Where a person has been brought before a magistrate, the charges may be disposed of without further process.<sup>1772</sup>

## Consolidation of arrest warrant powers and procedures

While the *Magistrates' Court Act 1989* provides specifically for the issue of arrest warrants in the circumstances outlined above, a number of other Acts also authorise the issue of a warrant to arrest or apprehend.<sup>1773</sup> These Acts also deal, to varying degrees, with the various chronological stages of the warrant: application; issue; execution; and post-execution. Accordingly, questions as to who may execute a warrant to arrest or apprehend, the authority it confers, whether a copy can be used for execution, etc. must be answered by the specific provisions concerned.<sup>1774</sup> The Committee found that Acts which authorise the issue of a warrant to arrest or apprehend fall into 3 categories:

- first, where the Act sets out the circumstances, without more, in which the issue of a warrant is authorised;

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<sup>1768</sup> *Ibid*, s 63(2).

<sup>1769</sup> *Nolan v Clifford* (1904) 1 CLR 429; *Fox, Victorian Criminal Procedure*, 111.

<sup>1770</sup> *Magistrates' Court Act 1989* ss 65(1) & (2).

<sup>1771</sup> *Magistrates' Court Act 1989* s 79; *Fox, Victorian Criminal Procedure*, 111.

<sup>1772</sup> *Magistrates' Court Act 1989* s 65(2); *Fox, Victorian Criminal Procedure*, 111.

<sup>1773</sup> The term "apprehension" rather than "arrest" is used in a number of Acts, see for example the *Judgment Debt Recovery Act 1984*.

<sup>1774</sup> *Trood; Freckleton, Criminal Procedure*, 2.2.810.

- second, where the Act includes provisions dealing with one or more aspects of the application, issue or execution of a warrant but does not refer to the requirements contained in the *Magistrates' Court Act 1989*;
- third, where the Act includes provisions dealing with one or more aspects of the application, issue or execution of a warrant as well as a cross-reference to the *Magistrates' Court Act 1989*.

Examples of the first category include:

- section 26 of the *Summary Offences Act 1996*, which provides for the arrest, with or without warrant, of any person in possession of personal property that is reasonably suspected of having been stolen or unlawfully obtained; and,
- section 9 of the *Crimes (Family Violence) Act 1987*, which provides for an arrest warrant where a complaint has been made for an intervention order in situations of serious threat to a person's safety or property.

Examples of the second category include:

- section 33(2) of the *Maintenance Act 1965*, which authorises the issue of a warrant to arrest by a registrar "if satisfied by oath that the whereabouts of the defendant are unknown to the complainant, or that the defendant has moved or is about to move out of the State"; and,
- sub-section 14(2) of the *Judgment Debt Recovery Act 1984*, which provides for the issue of a "warrant for the apprehension of the judgment debtor" if s/he fails to attend as required by a summons.

Examples of the third category include:

- the *Whistleblowers Protection Act 2001*, which provides a detailed scheme for the regulation of arrest warrants issued under that Act, as well as the following provision:

The authority given by, and the rules to be observed with respect to, warrants to arrest under Subdivision 2 of Division 3 of Part 4 of the *Magistrates' Court Act 1989* (other than section 62 or 64(2), (3) or (4)) extend and apply to warrants under this section,<sup>1775</sup>

and,

- the *Police Regulation Act 1958*, which also contains a detailed scheme for the regulation of arrest warrants and an identical provision to the above.<sup>1776</sup>

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<sup>1775</sup> *Whistleblowers Protection Act 2001* s 61K(3).

<sup>1776</sup> *Police Regulation Act 1958* s 86PD(3).

The legal position in relation to the first two scenarios may be apparent to a legal practitioner, that is, that aspects of the application, issue, execution and post-execution of an arrest warrant that are not addressed in the authorising Act are generally governed by the *Magistrates' Court Act 1989*. However, the Committee is strongly of the view that this should be clear in the authorising legislation and that this would significantly enhance the clarity, consistency and accessibility of the relevant law.

The Committee has detailed a range of inconsistencies and gaps across and between legislation and the common law regarding search warrants in Chapters Three to Seven. The Committee notes that the legislation governing arrest and apprehension warrants is not fragmented to the same degree as that governing search warrants.<sup>1777</sup> However, the Committee believes that the existence of three separate categories of authorising provision demonstrates a similar need for consolidation.

The Committee notes here that it has recommended in Chapter Seven that search warrants procedures should be removed from the *Magistrates' Court Act 1989*, and the various acts which authorise the issue of search warrants, and consolidated in a separate piece of legislation. The Committee suggests that if this recommendation is implemented, consideration should also be given to the desirability of removing provisions relating to arrest warrant procedures to the same consolidating legislation. Under this approach, arrest warrant procedures would be consolidated into the central warrants statute but the power to use arrest warrants would remain within existing specific purpose and thematic Acts. If the Government does not consider this to be an appropriate mechanism for reforming arrest warrant procedures, the Committee believes that consolidation of arrest warrant procedures into the *Magistrates' Court Act 1989* would provide the most suitable alternative approach.

As with search warrants, the Committee believes that it should be possible to opt out of the standard procedures in limited circumstances, for example where agencies could show that the standard procedures would undermine the purpose of their

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<sup>1777</sup> Firstly, the powers and procedures of warrants to arrest are regulated by the *Magistrates' Court Act 1989* to a greater extent than search warrants. Notably, the *Magistrates' Court Act 1989* does not detail the circumstances in which a search warrant may be issued—section 75(1) provides that a search warrant may be issued as authorised by “any Act other than this Act”. In contrast, section 61 details the circumstances in which a warrant to arrest, whether in the first instance or otherwise, may be issued, including circumstances authorised by any other Act. Further, while the act sets out the authority conferred by the issue of both search warrants and arrest warrants and the people to whom both warrants may be directed, post-execution procedures for arrest warrants are set out in much greater detail than for search warrants. Secondly, stakeholders who argued for the consolidation of arrest warrant powers focused on the desirability of codifying the common law of arrest but, as noted above, arrests under warrant represent only a small subset of all arrests. Accordingly, questions such as the rank of the police applicant are less significant, given the legislative power to arrest without warrant.

powers.<sup>1778</sup> The Committee suggests that agencies should be required to establish a case for exemption from each standard provision, rather than being able to seek a comprehensive exemption from all standard procedures.

Recommendation 124. That the Government institute a regime to consolidate Victorian arrest warrant powers and procedures by:

- (a) the removal of existing arrest warrant procedures from the various authorising Acts and from the *Magistrates' Court Act 1989* into the same consolidated Warrants Act as has been recommended for search warrants;
- (b) the retention of existing Acts conferring arrest warrant powers, which will continue to authorise relevant officials to use arrest warrants;
- (c) the presumption that all other aspects of arrest warrant powers conferred by existing Acts will be governed by the standard procedures in the new Act;
- (d) the provision in existing Acts conferring arrest warrant powers of such special conditions and exemptions from the standard procedures as are justified and consistent as far as possible with the purpose and effect of the standard procedures in the new Act.

## Arrest warrants and the over-representation of indigenous people in the criminal justice system

### Introduction

In the first of its written submissions to the Committee, VALS argued that existing warrant powers and procedures contribute to the “over-policing” of indigenous people.<sup>1779</sup> The Committee notes that there are two parts to the argument: that indigenous people are over-policed; and that warrants are a “vehicle” for their over-policing.

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<sup>1778</sup> Possible examples may include the *Whistleblowers Protection Act 2001* and the *Police Regulation Act 1958*, cited above.

<sup>1779</sup> Victorian Aboriginal Legal Service, *Submission no. 23*, 2. VALS argues that indigenous people are over-policed and that this is both a result of and a contributor to, “poor relations” between indigenous people and Victoria Police.

While the first point is a matter of some debate,<sup>1780</sup> it is beyond the scope of the current inquiry. However, there is ample evidence that indigenous Victorians are over-represented in the criminal justice system. The arrest rate for indigenous people exceeds that of non-indigenous people in Victoria by a factor of approximately seven.<sup>1781</sup> A recent study also found that the rate of alleged offenders processed for all offences was 330 per 1000 for indigenous adult males, compared with 52 per 1000 for non-indigenous male adults.<sup>1782</sup> The Committee notes that policing practices have been cited as one cause among a range of factors for such over-representation.<sup>1783</sup> The distinction between over-representation and over-policing is an important one,

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<sup>1780</sup> “Over-policing” has been described by one commentator as the policing of indigenous people and communities in a way that is different from, and more extensive than, non-indigenous communities: Chris Cunneen and David McDonald, *Keeping Aboriginal and Torres Strati Islander People Out of Custody, an evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (August 1996), (Cunneen; McDonald, *Keeping Aboriginal and Torres Strati Islander People Out of Custody*), 45. The authors note that the Human Rights and Equal Opportunity Commission’s *Racist Violence Report of the National Inquiry Into Racist Violence in Australia* (1991) developed a similar definition. Factors cited by the authors include police discretion in: the decision to intervene; the use of custody; the decision to proceed by arrest rather than by court attendance notice or by summons; and the decision as to the number of charges laid, 45-47. VALS also argued that there is a “pro-arrest culture” within Victorian Police, i.e. that there is pressure on officers to reach an arrest quota, and questioned whether this is a cause of the greater likelihood of indigenous people being arrested than non-indigenous people. The Committee notes that while the allegation of a “pro-arrest culture” is a serious one, it is really an aspect of the “over-policing” argument and for the reasons cited above, it is beyond the Committee’s current terms of reference.

<sup>1781</sup> Harry Blagg, Neil Morgan, Chris Cunneen, Anna Ferrante, *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System*, Draft Final Report, (2004) (Blagg et al, *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System*), 82.

<sup>1782</sup> Greg Gardiner, Centre for Australian indigenous Studies (CAIS) Monash University, *Indigenous People and Criminal Justice in Victoria: Alleged Offenders, rates of arrest and over-representation in the 1990s*, Criminal Justice Monograph (2001) (Gardiner, *Indigenous People and Criminal Justice in Victoria*), 65, 79. VALS notes that indigenous people are twelve times more likely to be incarcerated than non-indigenous people: Victorian Aboriginal Legal Service Co-operative Ltd, *Submission no. 23*, 3.

<sup>1783</sup> See for example, Cunneen; McDonald, *Keeping Aboriginal and Torres Strati Islander People Out of Custody*, 42-43. The authors also cite the impact of colonial policy, noting the National Aboriginal and Torres Strait Islander Survey (ABS, 1995), which found that 21.8% of those taken from their family as children reported having been arrested at least once during the previous five years, compared with 10.6% for those who had not been removed from their families as children. Moreover, of the 99 deaths in custody reported upon by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), 43 were of people who had been separated from their families at an early age due to welfare policies: The Hon. Justice Geoffrey Eames, Convenor, Judicial Officers Aboriginal Cultural Awareness Committee, *Aboriginal People and the Justice System*, Speech Kooronga Conference Centre, Marysville (22 October 2004), 8. See also Blagg et al, *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System*, 107-116.

however, given the absence of data to support such claims, the Committee did not form a view on the allegations made.

Victoria Police rejected VALS' allegation of a "pro-arrest culture" towards indigenous people and stated its commitment to maintaining, through its Aboriginal Advisory Unit, a "true partnership" with VALS.<sup>1784</sup> Victoria Police also cited the positive impact of "generational change" and both initial and ongoing training of police officers.<sup>1785</sup> The Office of Police Integrity (OPI) agreed with Victoria Police that there is no evidence of the use of warrants to over-police indigenous people. The OPI provided figures that showed it had received only eight complaints from indigenous people during the preceding three years for "seeking [a] warrant without sound / adequately test[ed] grounds".<sup>1786</sup>

Unfortunately, the Committee was not able to obtain precise data showing the proportion of arrests under warrant of indigenous people in Victoria compared to arrests without warrant. However, arrests under warrant are apparently only a fraction of all arrests: somewhat less than 8% for indigenous adults and somewhat less than 15% for indigenous juveniles.<sup>1787</sup> The Committee was advised by the Magistrates' Court that it does not maintain statistics in relation to the ethnicity of the subject of a warrant to arrest and that such information is not required in the application for a warrant to arrest.<sup>1788</sup> The Committee makes a number of recommendations in relation to improved record keeping below.

Despite the limited empirical evidence on this question, the Committee notes that there are a number of apparent reasons why arrests of indigenous people without warrant account for the greater proportion of arrests. For example, offences relating to public drunkenness account for nearly one quarter of all processed offences for

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<sup>1784</sup> Letter, Jenny Peachey, Director of Corporate Strategy and Performance, Victoria Police, to Committee Research Officer, 12 September 2005, 11. The Committee notes that the Aboriginal Advisory Unit's stated aims include: the coordination of the Statewide Aboriginal Community Justice Panel Program; liaison between police and indigenous representative organisations; implementation of the Aboriginal Community Liaison Officers (ACLOs) Program; and co-ordination of the roles and functions of the Police Aboriginal Liaison Officers. Victoria Police, at [www.police.vic.gov.au](http://www.police.vic.gov.au).

<sup>1785</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence*, 20 October 2004, 219-220.

<sup>1786</sup> Office of Police Integrity Victoria, *Submission no. 37S2*, 1.

<sup>1787</sup> These figures are derived from *Blagg et al, Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System*, 86-88. The precise proportions are not available and may be significantly lower. Figures for arrest under warrant are not separately identified but are counted together with police processing of under-age offenders, the mentally unfit, people subsequently deceased or where the complaint is later withdrawn.

<sup>1788</sup> Emails, Magistrate Jennifer Bowles to Committee Research Officer, 10 December 2004.

indigenous people in Victoria<sup>1789</sup> and arrest rates for other “public order” offences such as swearing have been historically high for indigenous people throughout Australia.<sup>1790</sup>

Regardless of the exact proportion of indigenous arrests that occur under a warrant in Victoria, the over-representation of indigenous people in the criminal justice system is a matter of concern to both the Government and the community. The Committee notes that the process of addressing the causes of indigenous over-representation in the criminal justice system is a high priority for the Victorian Government and an ongoing process. This is a particular focus of the Victorian Aboriginal Justice Agreement (VAJA).<sup>1791</sup> VAJA, jointly developed by the Government, the Victorian Aboriginal Justice Advisory Committee, the Aboriginal and Torres Strait Islander Commission and the Aboriginal community, noted in 2000 that an integrated Government response to the 339 recommendations of the 1991 Royal Commission into Aboriginal Deaths (RCIADIC) in Custody had yet to be achieved.<sup>1792</sup> The final report of VAJA’s Implementation Review of the 1991 RCIADIC is expected to be tabled in Parliament on 15 November 2005.<sup>1793</sup>

The Committee concludes that while it is possible that aspects of arrest warrant powers and procedures may be contributing to the over-representation of indigenous people in the Victorian criminal justice system, there is insufficient data to determine the question at the current time. The Committee also believes it is likely that more significant contributors to such overrepresentation would be the powers inherent in the law of arrest without a warrant (leading to higher rates of arrests of indigenous people for public drunkenness and other public order offences) and the socio-economic and cultural factors identified by RCIADIC, which are currently the subject of VAJA.

### ***Notifying VALS that an indigenous person has been arrested***

Under an agreement between Victoria Police and VALS, contained in the Victorian Police Manual (VPM), Victoria Police sends an automatic email and makes an out-of-

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<sup>1789</sup> Gardiner, *Indigenous People and Criminal Justice in Victoria*, 93.

<sup>1790</sup> For example, indigenous people in New South Wales account for 15 times as many offensive language offences as the rest of the population: *Bureau of Crime Statistics and Research Brief* (August 1999) in Christine Feerick, *Alternative Law Journal*, Vol 29 No 4 (August 2004), 191.

<sup>1791</sup> See Aboriginal Justice Forum Implementation Review Steering Committee, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody, Discussion Paper* (March 2004) (*Implementation Review Discussion Paper*).

<sup>1792</sup> Victorian Aboriginal Advisory Committee; Department of Justice, *Victorian Aboriginal Justice Agreement* (2000), 19. The report of the RCIADIC included a number of recommendations relating to underlying issues such as employment, health, education, community services, housing and economic development.

<sup>1793</sup> For further information see *Implementation Review Discussion Paper*.

hours telephone call to VALS within one hour of the arrest of an indigenous person.<sup>1794</sup> VALS argued that Victoria Police does not consistently comply with the agreement<sup>1795</sup> and that the issue is relevant to the post-execution stage of a warrant to arrest. While the Committee agrees with the latter proposition, it notes that the issue also has wider significance in relation to the arrest of indigenous people without a warrant. VALS noted a number of potential disadvantages when Victoria Police fails to notify it of the arrest of indigenous people within a reasonable time:

- the person's access to legal advice and awareness of rights may be limited;
- the person is placed at a disadvantage if an interview occurs without the presence of a lawyer;
- the person is denied the support and peace of mind of knowing that a third party is aware of their whereabouts and wellbeing;
- the person is unable to benefit from the explanation of the arrest and interview procedures that VALS can provide;
- in worst case scenarios, the absence of VALS' support may increase the risk of deaths in custody.<sup>1796</sup>

Both VALS and Victoria Police provided empirical evidence that supported VALS' claim that Victoria Police's compliance with the agreement has not been consistent.<sup>1797</sup> Victoria Police noted that the one hour time-frame in the agreement was exceeded in nearly 30% of notifications during a six month period in 2004.<sup>1798</sup> Victoria Police acknowledged the need to address and improve this result and advised the Committee that it is drafting a report with recommendations for this purpose.<sup>1799</sup> The Committee notes VALS' recommendation that the practice be investigated and considers that the measures outlined by Victoria Police are appropriate in this regard. The Committee also notes VALS' recommendation that the existing agreement be

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<sup>1794</sup> Letter, Jenny Peachey, Director of Corporate Strategy and Performance, Victoria Police, to Committee Research Officer, 12 September 2005, 8-9.

<sup>1795</sup> Victorian Aboriginal Legal Service, *Submission no. 23*, 7-8. See also recommendation 224 of RCIADIC.

<sup>1796</sup> Victorian Aboriginal Legal Service, *Submission No. 23S2*, 9 December 2004, 1-2.

<sup>1797</sup> Victorian Aboriginal Legal Service, *Submission no. 23S*, 10 November 2004, 4-5; Letter, Jenny Peachey, Director of Corporate Strategy and Performance, Victoria Police, to Committee Research Officer, 12 September 2005, 8-9.

<sup>1798</sup> Letter, Jenny Peachey, Director of Corporate Strategy and Performance, Victoria Police, to Committee Research Officer, 12 September 2005, 9. The figures provided stated that during the period from 1 March to 1 August 2004, 390 out of a total of 1310 notifications exceeded one hour and 174 exceeded 90 minutes.

<sup>1799</sup> *Ibid.*

enshrined in legislation<sup>1800</sup> but considers that any decision regarding the further formalisation of the agreement should await the outcome of Victoria Police's report.

### ***Informing VALS of the existence of a warrant to arrest***

VALS stated that while there is a practice of Victoria Police notifying VALS of the existence of outstanding warrants for the arrest of indigenous people, it is not followed consistently and should be made the subject of a formal process.<sup>1801</sup>

While this claim is relevant to the pre-execution stage of a warrant to arrest, according to VALS, its effects become apparent at the execution stage. VALS described two scenarios in which warrants to arrest are executed. In the first scenario, an indigenous person attends a police station of their own accord, either after being informed that there is a warrant for their arrest by VALS (after VALS has been informed by Victoria Police) or after becoming aware of the warrant by other means.<sup>1802</sup> In the second scenario, an indigenous person is stopped by the police in public on a "routine" matter and a check of police records reveals that the person is the subject of an outstanding warrant to arrest.<sup>1803</sup>

VALS noted the following disadvantages with the second scenario:

- the potential for the situation to become confrontational, resulting in additional charges (e.g. resisting arrest, assaulting police), particularly where the person is intoxicated;
- it often thwarts plans that have been made for a person to attend a police station of their own accord in relation to an outstanding arrest warrant (or removes their option of doing so).<sup>1804</sup>

VALS also argued that the first scenario is less traumatic for the accused and that a person's attendance at a police station of their own accord can be used as plea material so that the person is more likely to be re-bailed.<sup>1805</sup> For these reasons, VALS recommended that scenario one should be promoted in preference to scenario two

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<sup>1800</sup> Victorian Aboriginal Legal Service, *Submission no. 23*, 8.

<sup>1801</sup> *Ibid.*, 5.

<sup>1802</sup> *Ibid.*

<sup>1803</sup> *Ibid.*, 6.

<sup>1804</sup> *Ibid.*, 6.

<sup>1805</sup> *Ibid.*

and that this should occur by the adoption of a formal process of Victoria Police notifying VALS and the accused of the existence of a warrant to arrest.<sup>1806</sup>

VALS also made a number of practical and general arguments in favour of a formal notification process:

- there is already a practice of Victoria Police informing VALS of the existence of warrants to arrest prior to execution in country areas;
- it would be a logical extension of the existing agreement in the Victoria Police Manual (VPM) that Victoria Police inform VALS when an indigenous person is taken into custody;
- it has the potential to improve relations between Victoria Police and indigenous people; and,
- it would reduce the amount of time that Police spend searching for indigenous people who are subject to a warrant to arrest, given the greater capacity of VALS to contact people who are homeless or who move regularly and therefore do not receive notification of a warrant from police.<sup>1807</sup>

Victoria Police responded to this recommendation by noting that many police stations currently work with Police Aboriginal Liaison Officers (PALOs) and Aboriginal Community Justice Panels (which are staffed by indigenous people) to encourage people who are the subject of a warrant to attend a police station.<sup>1808</sup> The Committee also notes Victoria Police's response that it "would be pleased to work towards developing such an agreement" with VALS.<sup>1809</sup> The Committee believes that it would be appropriate for such an agreement to be formalised in the VPM in the same way as the existing agreement in relation to the notification of VALS when an indigenous person is arrested. The Committee considers that such an agreement should be subject to similar performance monitoring by Victoria Police as the agreement regarding arrest notification and should be designed with regard to the recommendations of Victoria Police's forthcoming report into the timeliness of arrest notification.

**Recommendation 125.** That Victoria Police work with VALS to formalise an agreement for the notification of VALS of any outstanding arrest warrants for indigenous people, in cases where it is practicable and reasonable to do so.

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<sup>1806</sup> Ibid, 7. VALS recommended that the formal process of notifying a person who is the subject of a warrant to arrest should be adopted in relation to both indigenous and non-indigenous people.

<sup>1807</sup> Ibid.

<sup>1808</sup> Letter, Jenny Peachey, Director of Corporate Strategy and Performance, Victoria Police, to Committee Research Officer, 12 September 2005, 8.

<sup>1809</sup> Ibid.

Recommendation 126. That the agreement be subject to similar performance monitoring by Victoria Police as the agreement with VALS regarding arrest notification and take account of the recommendations of Victoria Police's forthcoming report into the timeliness of arrest notification.

### ***Allegations of delaying the execution of warrants to arrest***

VALS also claimed that police wait until the end of the day or until "late Friday afternoon" to execute arrest warrants against indigenous people.<sup>1810</sup> According to VALS, this results in the detention of indigenous people in police cells overnight, or over the weekend, until a court can deal with the matter.<sup>1811</sup> VALS also stated that there is anecdotal evidence that the practice occurs even when police have encountered the person during the day and know that there is an outstanding warrant for their arrest.<sup>1812</sup> VALS was unable to provide any data or case studies in support of this claim but stated that it planned to undertake further research.<sup>1813</sup>

Victoria Police rejected VALS' suggestion that indigenous people are "deliberately targeted" under warrant provisions.<sup>1814</sup> Victoria Police noted the absence of specific evidence to support such a claim and emphasised its commitment to the recommendations of the 1991 RCIADIC; recommendations 87 and 92 provide, respectively, that arrest and imprisonment of indigenous people should be a last resort.<sup>1815</sup> While the Committee agrees that VALS' claims in this regard were made without empirical basis, it also notes that Victoria Police are currently unable to provide statistics as to the times or days of the week when indigenous people are more or less likely to be arrested under a warrant. The Committee considers that this is a separate question to whether there is a practice of targeting indigenous people in this regard. It is also a question that would need to be answered before the identification of any possible causes.

The absence of such data reflects the limitations of Victoria Police's existing computer database, the Law Enforcement Assistance Program (LEAP) database.<sup>1816</sup> The LEAP database contains information relating only to unexecuted arrest warrants. For example, where police are unable to locate the subject of an arrest warrant, the

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<sup>1810</sup> Victorian Aboriginal Legal Service Co-operative Ltd, *Submission no. 23*, 8.

<sup>1811</sup> *Ibid.*

<sup>1812</sup> *Ibid.*, 8-9.

<sup>1813</sup> Victorian Aboriginal Legal Service Co-operative Ltd, *Submission no. 23S*, 2-3.

<sup>1814</sup> *Victorian Police, Submission no. 25*, 17.

<sup>1815</sup> Report of the Royal Commission into Aboriginal Deaths in Custody (1991), Volume 5.

<sup>1816</sup> Letter, Jenny Peachey, Director of Corporate Strategy and Performance, Victoria Police, to Committee Research Officer, 12 September 2005, 3.

information is retained on the system as an outstanding warrant to arrest<sup>1817</sup>. The Committee considers that the collection of statistics by Victoria Police in relation to executed arrest warrants would be of value. Such figures, particularly if they included the time and date of arrest, which is currently only recorded on the execution copy of the warrant,<sup>1818</sup> could establish whether or not indigenous people are more likely to be arrested at the end of the day or working week and if so, any factors as to why this might be the case. The Committee notes that the LEAP database is soon to be replaced<sup>1819</sup> and considers that this may provide an opportunity for the collection of enhanced arrest warrant statistics. This is the subject of a related recommendation in the context of enhanced record keeping below.

Despite the absence of empirical evidence and the difficulty of accounting for differing perceptions, the allegation that arrest warrants are more likely to result in the arrest of indigenous people overnight or over the weekend, is a matter of serious concern. The Committee considers that improved data collection would establish whether this is the case and may also determine any possible causes.

<p>Recommendation 127. That Victoria Police ensure the collection of arrest warrant statistics, as part of the new database that replaces LEAP, at all stages of its involvement in arrest warrant processing. The statistics should record the date and time of day of execution and whether the arrestee is an indigenous person.</p>
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### ***Magistrates' discretion to issue arrest warrants***

VALS argued that there is inconsistency among magistrates in issuing arrest warrants and that this adversely affects indigenous people.<sup>1820</sup> VALS noted that while some magistrates issue a warrant if a defendant is not present in court at the appointed time (for example, in response to a summons) others wait until the end of the sitting to allow the defendant a chance to arrive before issuing a warrant.<sup>1821</sup> VALS also stated that the greater incidence of indigenous people failing to appear at court on time is due to socio-economic factors, including a lack of transport and unawareness of court dates due to the absence of a fixed address.<sup>1822</sup>

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<sup>1817</sup> Ibid.

<sup>1818</sup> Ibid.

<sup>1819</sup> Premier Steve Bracks announced in August 2005 that Victoria Police's Law Enforcement Assistance Program (LEAP) would be replaced at a cost of around \$50 million.

<sup>1820</sup> Victorian Aboriginal Legal Service, *Submission no. 23*, 10-11.

<sup>1821</sup> Ibid.

<sup>1822</sup> Ibid.

While it is possible that arrest warrants issued by a magistrate at the beginning of a sitting would be recalled or cancelled<sup>1823</sup> where an indigenous person attends court later during the sitting, the Committee has not received sufficient evidence to determine the consistency of such a practice. The Committee concludes that the issue would be addressed by improved recordkeeping in line with the recommendations below.

### ***Improved record keeping***

Due to the limitations of current arrest warrant data, the Committee is unable to conclude with any certainty whether arrest warrants are used unfairly or in a discriminating way against indigenous people.

The absence of such data is also relevant to two further claims made by VALS. Firstly, VALS claimed that there is a lack of consistent scrutiny, or “rubber stamping”, of warrant applications by magistrates.<sup>1824</sup> This was a claim that the Magistrates’ Court strongly denied.<sup>1825</sup> The issue was discussed above in Chapter Four and the Committee reiterates its conclusion that there is insufficient evidence to support such a claim. Secondly, VALS advised the Committee that multiple warrants may be issued against the same person and become “lost in the system”.<sup>1826</sup> The Committee believes that the extension of its search warrant recommendations regarding record keeping to arrest warrants may help to identify whether there are any difficulties in locating arrest warrants<sup>1827</sup> and may also address any negative perceptions regarding magistrates’ scrutiny of arrest warrants.

Apart from the claims raised by VALS, the Committee considers that its discussion and detailed recommendations regarding enhanced search warrant record keeping by agencies, the Magistrates’ Court and Victoria Police above,<sup>1828</sup> are equally applicable to arrest warrants, especially given their impact on a person’s liberty. Moreover, as noted by Tronc, Smith and Crawford, arrest and search are closely linked. Some arrest warrants include search powers,<sup>1829</sup> and some search warrants include powers

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<sup>1823</sup> *Magistrates’ Court Act 1989* s 58.

<sup>1824</sup> *Warrant Powers and Procedures Discussion Paper*, 36, 37; Victorian Aboriginal Legal Service, *Submission no. 23*, 12-13.

<sup>1825</sup> Magistrate Jennifer Bowles, Magistrates’ Court of Victoria, *Minutes of Evidence*, 20 October 2004, 274.

<sup>1826</sup> Victorian Aboriginal Legal Service, *Submission no. 23*, 12.

<sup>1827</sup> An issue that was also discussed in Chapter Four, under the heading “Additional comments on the management of warrants”, was the advice provided by Fitzroy Legal Service that it often experiences difficulties locating warrants, including arrest warrants, as part of its criminal law practice: William Crawford, Fitzroy Legal Service, *Minutes of Evidence*, 5 November 2004, 297.

<sup>1828</sup> The discussion begins at p 121.

<sup>1829</sup> *Tronc et al, Search and Seizure in Australia and New Zealand*, 100.

of arrest, see for example section 78(1) the *Magistrates' Court Act 1989* and section 81(3) of the *Drugs, Poisons and Controlled Substances Act 1981*.

### **Agency specific arrest warrant registers**

Recommendation 18 to Recommendation 22 above refer to the desirability of each agency with warrant powers creating and maintaining a search warrants register to record specified information and procedures for the publication and review of such data. The Committee considers that those recommendations have equal relevance to arrest warrants. The Committee also considers that it would be desirable for arrest warrant registers maintained by agencies to include whether the subject of the warrant is an indigenous person if such information is available or can be practicably obtained.

Recommendation 128. That the terms of Recommendation 18 to Recommendation 22 be adopted in relation to the creation of an arrest warrants register by each agency with arrest warrant powers, with the additional requirement that the register record whether the subject of the warrant is an indigenous person, wherever such information is available or can be practicably obtained.

### **An arrest warrants register for the Magistrates' Court**

The limitations of the warrants register currently maintained by the Magistrates' Court were outlined in the *Inspectors' Powers Report*<sup>1830</sup> and in Chapter Five above. As noted in Chapter Five, while section 57(2) of the *Magistrates' Court Act 1989* requires that the person issuing a warrant must cause the "prescribed particulars" to be entered in the register, the register does not state whether a warrant has been executed. Consequently, statistical data compiled from the register does not give any indication of the proportion of warrants that have been executed. Moreover, as the ethnicity of the subject of a warrant is not required in the application for a warrant to arrest, the register does not record whether the subject of a warrant is an indigenous person.

Recommendation 23 to Recommendation 32 above relate to the expansion of the details recorded in the search warrants registers of the Magistrates', County and Supreme Courts, together with provision for public reporting and monitoring of the register by the Ombudsman and the Office of Police Integrity. The Committee considers that those recommendations are equally applicable to arrest warrants.

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<sup>1830</sup> Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons* (30 May 2002) (*Inspectors' Powers Report*), available on the Committee's website, at [www.parliament.vic.gov.au](http://www.parliament.vic.gov.au).

Moreover, the Committee considers that the inclusion of a requirement that the register record whether the subject of the warrant is an indigenous person, where such information is available or can be readily obtained, may facilitate any future determination of the impact of arrest warrants on indigenous people.

Recommendation 129. That the terms of Recommendation 23 to Recommendation 32 be adopted in relation to the establishment, reporting and monitoring of arrest warrants registers for the Magistrates', County and Supreme Courts, with the additional requirement that the register record whether the subject of the warrant is an indigenous person, wherever such information is available or can be practicably obtained.

### **Victoria Police arrest warrants data and a centralised arrest warrants register**

Recommendation 33 above recommended that the replacement for the LEAP database should include the capability to record data about the application and execution of all warrants by Victoria Police. The Committee considers that such information would also significantly enhance arrest warrant data.

Recommendation 34 and Recommendation 35 above refer to the creation of a central electronic database, accessible to the subject of a warrant or their representative, for information about all warrants issued in Victoria. The Committee considers that the supporting arguments for those recommendations apply equally in relation to arrest warrants.

The Committee concludes that it would be desirable and should be fairly straightforward for both the replacement of the LEAP database and the central Victorian warrants database to include information, where available, as to whether or not the subject of the warrant is an indigenous person.

Recommendation 130. That in implementing Recommendation 34 and Recommendation 35, the Government require the inclusion of information, wherever it is available or can be practicably obtained, as to whether the subject of an arrest warrant is an indigenous person.

### **Other issues raised by VALS**

VALS' submissions to the Committee contained a number of other proposals which did not relate directly to arrest warrant powers and procedures. These included:

- amending the Police Aboriginal Liaison Officer (PALO) scheme;

- promoting the use of cautions in preference to arrest;
- decriminalisation of public drunkenness;
- the use of Intervention Orders as an indirect form of warrant to arrest;
- the establishment of a Police Code governing interaction with indigenous people;
- increasing Victoria Police's recruitment of indigenous people;
- training, including cultural sensitivity training, of police officers; and
- measures to reduce the incidence of public order arrests.

These issues are clearly beyond the Committee's current terms of reference and unfortunately cannot be considered here. The Committee notes however, that such issues are central to the development of a whole of government strategic framework for addressing the social and economic disadvantage of indigenous people, which is the goal of the current Victorian Aboriginal Justice Agreement.<sup>1831</sup>

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<sup>1831</sup> See also, Victorian Parliament Law Reform Committee, *Review of Legal Services in Rural and Regional Victoria*, (May 2001): recommendations 31 to 33 concerned the operation of PALOs and Community Justice Panels.

# CHAPTER ELEVEN - WARRANTS FOR THE ENFORCEMENT OF CIVIL PROCEEDINGS

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## Introduction

In this chapter, the Committee discusses warrants for the enforcement of civil judgements in Victoria. The Committee focuses on warrants which authorise the seizure and sale of a person's property for the enforcement of a judgement debt.<sup>1832</sup> The Chapter commences with a discussion of the distinction between civil and criminal warrants, the role of the Sheriff's Office and the relevant law in each of the Magistrates', County and Supreme Courts. The Committee also discusses the trend towards uniform civil procedure in other Australian states and the potential that similar standardisation may have for rationalising the law and procedure of civil warrants in Victoria.

The Committee then addresses the submissions of stakeholders and the arguments for and against the major issue raised, namely, providing the Sheriff with a power of forced entry to a person's home to execute a warrant to seize property. The Committee finds that there is merit in the proposals for the introduction of a power of forced entry. However, the Committee also finds that such a power would be most effective, and the civil liberties of judgement debtors would be best protected, if introduced as part of an extensive rationalisation of the civil judgement enforcement system. The Committee concludes with a discussion of some options for rationalisation, including the promotion of alternative enforcement methods and the greater legislative and administrative centralisation of the enforcement of civil judgements.

The Committee received submissions and comments addressing various other aspects of the law and procedure of civil warrants (in addition to the issue of a power of forced entry) and these are set out at the end of this chapter.

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<sup>1832</sup> Judgement debts are defined below at p 485.

## Background

### ***The distinction between civil and criminal warrants***

A defining difference between criminal and civil warrants is that the former generally allow the use of force but the latter do not. While it is an obvious point, this distinction arises from the separation of the civil and criminal legal systems. The nature of the distinction between civil and criminal law is therefore relevant to any consideration of a power of forced entry under a civil warrant.<sup>1833</sup>

Civil law may be understood in contemporary terms as “the body of law which regulates the conduct of persons in ordinary relations with one another”,<sup>1834</sup> as distinct from criminal law (e.g. offences against the state) and administrative law (the law which governs the functions and powers of government agencies).<sup>1835</sup> However, the Committee is also mindful that:

The line between criminal and civil disputes is not always clear. For example, some may think matters are ‘criminal’ because of the damage or potential damage certain acts inflict on the broader community and that this results in prosecution of these acts by the State.... Ultimately, it is only how the law treats a dispute which determines what is recognised as a criminal [or civil] dispute.<sup>1836</sup>

Indeed, the existing division between civil and criminal justice in some Australian jurisdictions has been the subject of ongoing criticism, particularly in relation to matters which are seen to sit uneasily in either category.<sup>1837</sup> It may also be argued that the content of the criminal law is determined by the community, through the legislature, to a greater degree than other areas of the law.<sup>1838</sup> Consequently, conduct which at one time may have been regulated according to civil law may later more sensibly become the subject of criminal law (or vice versa) in response to community views.<sup>1839</sup>

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<sup>1833</sup> For a discussion of the use of force under a criminal warrant, see Chapter Six, from p 175.

<sup>1834</sup> David M Walker, *The Oxford Companion to Law* (1980) (Walker, *The Oxford Companion to Law*), 222.

<sup>1835</sup> *Ibid*, 27, 313. The term has a range of other meanings which are less relevant in the current context. For example, the law that applied to citizens of ancient Rome and its Empire, as distinct from the law that applied to non-citizens: *ibid* 222.

<sup>1836</sup> Western Australian Law Reform Commission, *Final Report of the Review of the Criminal and Civil Justice System* (September 1999), 14–15.

<sup>1837</sup> *Ibid*, 35.

<sup>1838</sup> Walker, *The Oxford Companion to Law*, 316.

<sup>1839</sup> *Ibid*.

## ***Debt collection and the enforcement of judgement debts in Victoria***

Approximately 12,000 civil warrants are processed by the Sheriffs' Office in Victoria each year.<sup>1840</sup> The Victorian Auditor-General has estimated that civil warrants account for approximately 10% of all warrants.<sup>1841</sup> The majority of civil warrants are issued by the Magistrates' Court: 9,268 were issued in 2002-03 and 7,797 in 2003-04.<sup>1842</sup>

The Magistrates' Court may issue a warrant authorising the seizure and sale of a judgement debtor's personal property. The County and Supreme Courts may issue a warrant authorising the seizure and sale of a judgement debtor's personal property and/or real estate.<sup>1843</sup> In the Magistrates' Court the warrant is known as a "warrant to seize property". In the County and Supreme Courts, the warrant is known as a "warrant for seizure and sale".<sup>1844</sup> All civil warrants in Victoria are enforced by the Sheriff's Office.<sup>1845</sup> There is a preference for the use of warrants in enforcing judgement debts throughout Australia.<sup>1846</sup>

A warrant to seize property is one of the means available to a judgement creditor for the enforcement of a judgement debt. A judgement debt is a monetary sum which a Court

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<sup>1840</sup> Victorian Department of Justice website, *Sheriff's Operations*, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

Penalty enforcement warrants and PERIN distress warrants (penalty enforcement warrants used against a company) have been estimated as representing 85-90% of all criminal warrants actioned by the Sheriff's Office: Department of Justice Victoria, *Submission No. 38*, 4-5.

The total number of civil warrants actioned by the Sheriff's Office in 2003 - 20004 was 11,172 compared with 478,550 criminal warrants: Department of Justice Victoria, *Submission no. 38*, 4.

<sup>1841</sup> Victorian Auditor-General's Office, *Auditor-General's Report, Results of financial statement audits for agencies with other than 30 June 2004 balance dates, and other audits* (May 2005), 4.

<sup>1842</sup> *Magistrates' Court of Victoria 2003, Annual Report*, 24.

<sup>1843</sup> The Magistrates' Court has jurisdiction in relation to civil claims of up to \$100,000. The County Court has jurisdiction in relation to civil claims of up to \$200,000. In the Supreme Court, the Trial Division has jurisdiction to deal with civil claims of over \$200,000 while the Court of Appeal Division deals with matters that have been heard by Judges of the Supreme Court and the County Court (as well as proceedings which have come before the Victorian Civil and Administrative Tribunal (VCAT) and other Tribunals): websites of the Magistrates', County and Supreme Courts as at 26 August 2005.

<sup>1844</sup> For the sake of consistency, the Committee uses the term, a "warrant to seize property" to refer generally to civil warrants issued by either of the Magistrates', County or Supreme Courts.

<sup>1845</sup> While the Sheriff's Office is responsible for executing warrants received from all Victorian Courts and the Federal Courts, as a matter of practice it enforces civil warrants (in addition to penalty enforcement warrants under the PERIN system) while the Police enforce most non-PERIN criminal warrants: Conversation, Department of Justice Senior Policy Officer Andrew Crawshaw with Committee Legal Research Officer and Committee Executive Officer, 7 April 2004.

<sup>1846</sup> A writ for the sale of a judgement debtor's property remains the most common means of enforcing money judgements throughout the country: *Halsbury's Laws of Australia*, LexisNexis Online (1 January 2005) (*Halsbury's Laws of Australia*), 325-9940.

has decided that a defendant owes a plaintiff. The defendant then becomes a judgement debtor and the plaintiff becomes a judgement creditor. The judgement creditor can apply to a Court for a warrant to seize the judgement debtor's property and any proceeds from the sale are paid towards satisfying the judgement debt.<sup>1847</sup> The other methods of recovery are:

- an attachment of earnings order (under section 11 of the *Magistrates' Court Act 1989*);
- an attachment of debts order (also under section 11 of the *Magistrates' Court Act 1989*);
- an instalment agreement (under the *Judgment Debt Recovery Act 1984*); and
- an instalment order (also under the *Judgment Debt Recovery Act 1984*).<sup>1848</sup>

A recent discussion paper found that debt collection through the Magistrates' Court is a "major area of activity" with claims of less than \$5,000 representing 84% of complaints issued in 1997 - 1998 and the defending rate in that category at under 10%.<sup>1849</sup> While the authors considered that not all of these civil complaints would necessarily have resulted in judgement debts for enforcement, they concluded that "most" would and that, on the Magistrates' Court figures alone, "the enforcement process is a significant exercise within the justice process".<sup>1850</sup>

The same discussion paper found that the enforcement of civil judgements is "close to oppressive" for those with limited resources but often "treated with contempt" by the well-off.<sup>1851</sup> Although the authors found that plaintiffs regularly find the enforcement of favourable judgements "confusing in the extreme",<sup>1852</sup> they nevertheless found that the seizure and sale of property remains one of the most important remedies for the enforcement of unpaid judgement debts in Victoria.<sup>1853</sup> The Magistrates' Court has previously expressed concern that a large component of its civil business is small debt

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<sup>1847</sup> The sale is supervised by the Sheriff and is by public auction. For a good general outline of the process see: Fitzroy Legal Service, *The Law Handbook* (2005), (*Fitzroy, Law Handbook*), 302.

<sup>1848</sup> The *Imprisonment of Fraudulent Debtors Act 1958* also allows for the imprisonment of judgement debtors in certain circumstances.

<sup>1849</sup> Peter Sallmann, Richard Wright, *Going to Court, A Discussion Paper on Civil Justice in Victoria*, Civil Justice Review Project, Melbourne, (April 2000) (*Sallmann and Wright, Civil Justice in Victoria*), 177, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>1850</sup> *Ibid.*

<sup>1851</sup> *Ibid.*, 175.

<sup>1852</sup> *Ibid.*

<sup>1853</sup> *Ibid.*

recovery, where the costs of enforcement are often larger than the quantum of the debt being pursued.<sup>1854</sup>

While the literature on debt collection outside of the Court system in Australia is extensive, it is beyond the scope of the inquiry to review this material in detail. However, it is clear that a significant volume of debt collection in Victoria does occur outside of the courts. The Committee is aware that some debt collection practices, in Victoria and throughout Australia, have been the subject of criticism by a number of commentators.<sup>1855</sup> The Committee shares the Government's concern about the harm suffered by consumers (especially vulnerable, disadvantaged and low income consumers) in relation to credit.<sup>1856</sup>

According to a 2002 paper of the Victorian Consumer Credit Legal Service Inc (CCLS), consumer advisers working for the service have found that:

...most consumers being pursued for payment of a debt have little understanding of legal processes, are fearful of court procedures and haven't obtained legal advice. Often legal advice is unaffordable or inaccessible, or the consumer does not know where to find appropriate advice.<sup>1857</sup>

According to CCLS, this leaves consumers vulnerable to aggressive (and potentially illegal) conduct by collection agents, including persistent telephone calls, failing to address consumers' questions or requests for debt details, and misleading information about legal processes or the consequences of non-payment.<sup>1858</sup>

### ***The role of the Sheriff***

Historically, the Sheriff's Office was responsible solely for the enforcement of civil warrants issued by the Supreme, County and Magistrates' Courts. Responsibility for criminal warrants issued in those courts and for criminal warrants in relation to the non-payment of fines (i.e. Penalty Enforcement Warrants issued by the PERIN court) was

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<sup>1854</sup> Ibid, 176.

<sup>1855</sup> See the discussion of debtor harassment in Bruce Kercher, Richard Brading and Betty Weule, *Consumer Debt Recovery Law (2002)* (Kercher et al, *Consumer Debt Recovery Law*) at Chapter 2. An example cited by the authors is the reported use of debt collection letters designed to resemble court process: ibid, 9. See also: Consumer Credit Legal Service, *Submission to James Merlino MP Member for Monbulk, Consumer Credit Review Issues Paper* (August 2005); Australian Competition and Consumer Commission (ACCC), *Undue Harassment and Coercion in Debt Collection* (May 1999); Australian Competition and Consumer Commission (ACCC) *Debt Collection and the Trade Practices Act* (June 1999).

<sup>1856</sup> See for example, Consumer Affairs Victoria, *Consumer Credit Review, Issues Paper*, (June 2005), i-ii.

<sup>1857</sup> Consumer Credit Legal Service Inc. (Victoria), *Selling Their Customers Out: Consumer Problems with Debt Collection Outsourcing in Australia* (2002), 7.

<sup>1858</sup> Ibid.

also given to the Sheriff from April 1984 and 1989 - 1990 respectively.<sup>1859</sup> Victoria was the first state in Australia to merge the responsibility for civil and criminal warrants (and other court orders) into the same agency, which was a significant change in the “traditional role” of the Sheriff at that time.<sup>1860</sup> It was also during the late 1980s that the previously separate Sheriffs for each of the Magistrates’, County and Supreme Courts were amalgamated into the current Sheriff’s Office.<sup>1861</sup>

The process followed by Sheriff’s Officers for the execution of a warrant to seize property is as follows. The Sheriff calls at the address on the warrant and, on finding the defendant, makes a demand for payment. If the judgement debtor does not make payment, the Officer then has the authority to seize the person’s assets for sale at auction in order to recover as much of the outstanding amount as possible. While a range of items classed as necessities are exempt from seizure, the Officer is entitled to seize personal property such as furniture, cars, boats and in certain circumstances, the defendant’s interest in real estate<sup>1862</sup> (those circumstances are discussed later in this chapter). However, the Committee has received evidence from stakeholders that the Sheriff is often unable to seize a debtor’s property because of the absence of a power of forced entry. In practice, the Sheriff will often allow the person time to obtain the money, negotiate with the creditor or enter into an instalment order.<sup>1863</sup>

## Victorian law on the enforcement of civil judgements

### *Introduction*

As noted above, any court in Victoria may issue a warrant to seize property. Notably, the power to issue the warrant is not centralised but is located in separate legislation for each of the Magistrates’, County and Supreme Courts. Moreover, while the power to issue in the Magistrates’ Court is located in primary legislation, in the County and Supreme Courts it is located in subordinate legislation. The name of the warrant also varies between the Magistrates’ Court on the one hand and the County and Supreme Courts on the other. Finally, a warrant to seize property does not include a power of forced entry, regardless of the Court in which it is issued.

Historically, the power of sale and seizure of a judgement debtor’s property was provided by the common law, in the form of a court order called a writ of fieri facias, or ‘fi

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<sup>1859</sup> Victorian Department of Justice website, Sheriff’s Operations at, [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>1860</sup> Ibid.

<sup>1861</sup> Rob White, Law Institute of Victoria, *Minutes of Evidence*, 20 October 2004, 285.

<sup>1862</sup> Victorian Department of Justice website, *Sheriff’s Operations* website, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>1863</sup> Fitzroy, *Law Handbook*, 302.

*fa*<sup>1864</sup> (simply, “that you cause to be done”).<sup>1865</sup> The writ was directed to the Sheriff and authorised the seizure and sale of the debtor’s personal property.<sup>1866</sup> However, as long ago as 1604, the case of *Semayne v Gresham*<sup>1867</sup> (*Semayne’s case*) established the principle that the Sheriff was not authorised to enter by force (e.g. by breaking an outer door) to execute the warrant.<sup>1868</sup> While the common law writ has been superseded in all three Victorian jurisdictions by the legislative provisions discussed below, the powers of the Sheriff have not changed in relation to forced entry.<sup>1869</sup>

The Sheriff cannot seize any property which could not be taken from the person if they were bankrupt. Goods protected under sub-section 116(2) of the *Bankruptcy Act 1966* (Cth) include: property up to a limited value that is used by the bankrupt in earning income; household property (including recreational and sports equipment) that is reasonably necessary for domestic use, having regard to current social standards; and property used by the bankrupt primarily as a means of transport, also up to a limited value.<sup>1870</sup>

## Supreme Court

Interestingly, the power of the Supreme Court to issue a “warrant of seizure and sale”<sup>1871</sup> for the enforcement of a money judgement does not reside in primary legislation but in the *Supreme Court (General Civil Procedure) Rules 1996*.<sup>1872</sup> The Rules set out the evidence required in a warrant application, including the order, time, place and advertisement of sale.<sup>1873</sup> The Rules also regulate the execution of the warrant.<sup>1874</sup>

<sup>1864</sup> *Halsbury’s Laws of Australia*, 325-9940.

<sup>1865</sup> *Walker, The Oxford Companion to Law*, 470.

<sup>1866</sup> The writ did not allow the seizure and sale of land or an interest in land but this is now authorised by legislation in all Australian jurisdictions: *Halsbury’s Laws of Australia*, 325-9945.

<sup>1867</sup> *Semayne v Gresham* (1604) 77 ER 194.

<sup>1868</sup> *William’s Civil Procedure Victoria*, LexisNexis Online (30 May 2005) (*Williams Civil Procedure Victoria*), 169.01.135. As discussed in Chapter 4, *Semayne’s case* established the broader common law principle that the privacy, security and integrity of a person’s home are fundamental rights.

<sup>1869</sup> *Halsbury’s Laws of Australia*, 325-9940. The common law remedy of a writ of fieri facias has also been superseded by legislation in the other Australian states and territories, although the name of the legislative remedy varies across the jurisdictions: *ibid*.

<sup>1870</sup> *Supreme Court Act 1986* s 42(1).

<sup>1871</sup> A warrant of seizure and sale is defined as one form of a “warrant of execution” in rule 68.01; there are two other types of warrants of execution defined in rule 68.01; warrants of possession and warrants of delivery.

<sup>1872</sup> See rule 66.02 and paragraph 25(1)(g) of the *Supreme Court Act 1986*. The other remedies for the enforcement of a judgement debt, set out in rule 66.02, are: an attachment of debts order; an attachment of earnings order; a charging order; the appointment of a receiver; or, where a person has failed to do an act within a time fixed by a judgement or by subsequent order, committal and sequestration: rule 66.02(1).

<sup>1873</sup> Sub-rule 68.04(2).

Notably, the Rules provide a process for enforcement which is to be used in place of the writ of fieri facias.<sup>1875</sup> Execution can occur by service on the person or by leaving it at the place of execution.<sup>1876</sup> Although the Sheriff may have left land on which goods have been seized under a warrant, the officer is taken to remain in possession of the goods (e.g. for collection at a later date) if s/he leaves a notice that lists the items seized (see the discussion of “distraining” and “walking possession” below).<sup>1877</sup> Unlike the corresponding warrant issued in the Magistrates’ Court, a warrant of seizure and sale may apply in relation to both personal property and real estate.<sup>1878</sup> Notably, the Rules do not contain a power of forced entry when executing a warrant of seizure and sale, nor does the primary legislation to which the Committee now turns.

The *Supreme Court Act 1986* contains some important powers in relation to the execution of civil warrants. Division 3 of Part 7 sets out the functions, duties and powers of the Sheriff. Section 121 provides the Sheriff with a power to arrest a person who resists in the execution of a warrant or other process. Such a person is also subject to 25 penalty units or 6 months imprisonment or both. However, neither section 121 nor any other provision in the *Supreme Court Act 1986* or the Rules contain a power of forced entry to effect seizure.

## **County Court**

A “warrant of seizure and sale” issued by the County Court is subject to the same provisions as in the Supreme Court. Section 53 of the *County Court Act 1958* provides the court with “the same power and authority for compelling obedience to and for punishing disobedience of any judgment or order made by the court as the Supreme Court...”.

## **Magistrates’ Court**

A “warrant to seize property” is one of the means available for enforcing a civil debt in the Magistrates’ Court.<sup>1879</sup> A warrant to seize property can only be executed against

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<sup>1874</sup> Order 69.

<sup>1875</sup> Rule 69.02. The process is set out in Order 69.

<sup>1876</sup> Sub-rule 68.04(4).

<sup>1877</sup> Rule 69.07. However, rule 69.07 would only be effective in relation to goods inside a person’s house if the Sheriff had been able to gain entry to “seize” the goods in question.

<sup>1878</sup> Rule 69.04. However, sub-rule 69.04(3) provides that land cannot be sold under the warrant until all other available property liable under the warrant has been sold, unless the debtor so requests.

<sup>1879</sup> As noted above, the other methods of enforcement are attachment of earnings orders, attachment of debts orders, Instalment Agreements and Instalment Orders.

personal property (i.e. it cannot be executed against real estate).<sup>1880</sup> However, if the warrant is returned unsatisfied, in whole or in part, section 112 provides a mechanism for transferring the enforcement process to the Supreme Court where a warrant of seizure and sale can be enforced against personal property.<sup>1881</sup> The power to issue a warrant to seize property resides in primary legislation, in section 111 of the *Magistrates' Court Act 1989*. Section 111(2) provides that the warrant may be directed to the Sheriff, a named member of the police force, or generally to all members of the police force. Additional procedures are provided by the *Magistrates' Court Civil Procedure Rules 1999*.<sup>1882</sup>

Unlike the *Supreme Court Act 1986*, the *Magistrates' Court Act 1989* does not contain a power of arrest for resisting the execution of a warrant. However, if a person who has been served with a warrant to seize property (or a person who knows that such property has been seized) interferes with, disposes of, removes or detaches any mark that indicates the property has been seized (without first obtaining the written consent of the person executing the warrant) s/he is subject to 25 penalty units or 6 months imprisonment or both.<sup>1883</sup> Unlike the situation in the Supreme Court, neither the legislation nor the rules contain any penalty for resisting the execution of a warrant to seize property, for example by refusing entry. As with a Supreme Court warrant for seizure and sale, there is no power of forced entry under a warrant to seize property issued by the Magistrates' Court.

Finally, the Committee notes that the contempt procedures in each of the Magistrates', County and Supreme Courts<sup>1884</sup> may indirectly help to achieve enforcement in some cases. However, the Committee does not consider that those procedures can be regarded as an effective means of recovering civil judgement debts.

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<sup>1880</sup> *Magistrates' Court Act 1989* s 111(3).

<sup>1881</sup> This issue is discussed below in the section headed, "Other Aspects of Law and Procedure Relating to Civil Warrants".

<sup>1882</sup> For example, the form of the warrant is provided by rule 27.10 and Form 27B.

<sup>1883</sup> Sub-section 111(7B). While the penalty is significant, the Committee notes that the same problems associated with "walking possession", which were noted in the discussion of the case law, arise here. For example, even if property is treated as "seized" without the Sheriff having gained entry to a person's home, there is an obvious practical difficulty if such property has not been identified.

<sup>1884</sup> Contempt of court refers both to the physical disturbance of proceedings in a court as well as any interference with its authority that undermines confidence and respect in its judgements. Civil contempt includes deliberate disobedience of an order of the court and is punishable by imprisonment: *Butterworths Concise Australian Legal Dictionary*, 2<sup>nd</sup> edition, (1998) (*Butterworths Legal Dictionary*), 71 & 91; *Walker, The Oxford Companion to Law*, 282.

## ***A single warrant for the enforcement of civil debt***

The Committee considers that the existence of separate provisions authorising the issue of warrants for the sale and seizure of property in the legislation of each of the Magistrates', County and Supreme Courts, is anachronistic and reflects the origin of the remedy within the common law (the writ of *fi fa*) rather than any policy of which the Committee is aware. The Committee considers that consolidating the separate authorising provisions which currently exist across the three Victorian jurisdictions has the potential to address the following:

- the current inability of the Sheriff, noted by a number of stakeholders, to seize real estate under a Magistrates' Court warrant (see the discussion below under the heading "Seizure and Sale of Land");
- the potential for confusion to arise from the use of different names for the same type of warrant in the Magistrates' Court on the one hand and in the Supreme and County Courts on the other hand;
- the confusion experienced by plaintiffs in using civil warrants for the enforcement of unpaid judgement debts in Victoria;<sup>1885</sup> and,
- confusion among debtors as to the difference between civil and criminal fines warrants and the not uncommon belief that imprisonment is a real possibility in the enforcement of civil debt.<sup>1886</sup>

The Committee notes that a number of other states have moved to standardise civil warrants by legislating uniform civil procedures. Under Queensland's *Uniform Civil Procedure Rules 1999* (Qld), New South Wales' *Civil Procedure Act 2005* (NSW) (assented to on 1 June 2005), Western Australia's *Civil Judgements Enforcement Act 2004* (WA), and South Australia's *Enforcement of Judgements Act 1991* (SA), there is now a single provision for the issue of a warrant authorising the seizure and sale of a debtor's property, regardless of the court from which it issues. Such uniform civil procedures have also had the effect of standardising the name of the relevant warrant, for example in Queensland it is known as an "enforcement warrant" regardless of the issuing court. In his Second Reading Speech introducing the *Civil Procedure Bill*, New South Wales Attorney-General Bob Debus stated:

The bill will streamline and simplify procedures and remove unnecessary differences between the courts. It will lead to time and costs savings for the courts, the legal profession and the public. The bill will also create a platform upon which courts will, in the future, be able to avail themselves of

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<sup>1885</sup> See the discussion at p 486 above, regarding the conclusions in *Sallmann and Wright, Civil Justice in Victoria*.

<sup>1886</sup> *Kercher et al, Consumer Debt Recovery Law*, 132.

new technologies such as electronic lodgement of documents by clients and more efficient court management practices.<sup>1887</sup>

The legislation of each of the Australian jurisdictions cited above also centralises the different court orders available for the enforcement of judgement debts, that is, those acts contain the provisions for a warrant to seize property as well as all other enforcement options, such as instalment orders, garnishee orders etc. The Committee discusses this issue in the following section.

In contrast to the above jurisdictions, the current situation in Victoria imposes two sets of procedures on a single Sheriff's Office (based on three separate sources of legislation). While this may have been suitable when each of the courts had their own Sheriff, the Committee is not aware of any basis for continuing such duplication. The Committee considers that the introduction of uniform civil procedure rules would harmonise the application, issue and execution of civil warrants in Victoria.

**Recommendation 131.** That the Government introduces uniform civil procedures legislation, to provide for a single warrant to seize property under a single Act, regardless of the issuing court.

The Committee also considers that civil warrant powers should be rationalised by moving the Supreme and County Court powers to issue a warrant from subordinate legislation into primary legislation, given that primary legislation is generally subject to a greater degree of parliamentary scrutiny.

**Recommendation 132.** That the Government introduces legislation, whether as part of the introduction of uniform civil procedure rules or otherwise, which locates the authority to issue a warrant to seize property within primary legislation.

## Forced entry under a warrant to seize property

### ***Introduction***

One of the key issues raised by stakeholders at the beginning of the inquiry was whether it is desirable or possible for the Sheriff to have a power of entry when executing a

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<sup>1887</sup> Bob Debus, NSW Attorney-General, *Civil Procedure Bill (NSW)*, *Second Reading Speech*, 6 April 2005, 10.37 am, at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au).

warrant to seize property.<sup>1888</sup> Currently, the Sheriff's powers under a warrant to seize property are significantly limited compared to the powers available under a criminal warrant. Notably, while the Sheriff can use force to enter a person's home when executing a Penalty Enforcement Warrant, the Sheriff has no such power when enforcing civil warrants.

## **Victorian Law**

Victorian legislation does not address the question of forced entry to a person's home under a civil warrant. Instead, the question is determined by the common law, starting with the 400 year old English decision in *Semayne's case*.<sup>1889</sup> As noted above in the introduction to search warrants in Chapter Three, *Semayne's case* established a person's right to deny anyone entry to their house and while that right has limited application in relation to criminal matters, it remains largely intact in relation to civil enforcement. The legacy of *Semayne's case* is that the Sheriff cannot use force to enter a person's dwelling (although force is permitted to enter any "outbuilding" such as a shed or garage in order to seize goods).<sup>1890</sup> The right of a person to deny the Sheriff entry to their house has, however, been qualified so that entry without consent is lawful where: a person has left a means of entry available that does not require the use of force,<sup>1891</sup> entry occurs through a doorway using a key, latch bolt or handle<sup>1892</sup> or where entry occurs through a window but only where the window is unlocked and at least partially open.<sup>1893</sup>

The Sheriff can seize goods for later removal and it is an offence for the debtor to remove those goods in the meantime. This is known as "distraining" and involves the Sheriff leaving a notice which lists the items seized. A person's goods can also be seized by "walking possession", which occurs when the Sheriff and the debtor (or another responsible person at the premises) agree as to which goods are seized for later removal. In either case, the Sheriff is entitled to re-enter the person's house at a later time to remove the goods and to use force to re-enter the person's house if necessary.<sup>1894</sup>

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<sup>1888</sup> Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures, Discussion Paper* (July 2004) (*Warrant Powers and Procedures Discussion Paper*), 62.

<sup>1889</sup> See footnote 1867 above.

<sup>1890</sup> *Hodder v Williams* [1895] 2 QB 663.

<sup>1891</sup> *Vaughn v McKenzie* [1969] 1 QB 557; [1968] 1 All ER 1154.

<sup>1892</sup> *Southan v Smout* [1964] 1 QB 308; [1963] 3 All ER 104; [1963] 3 WLR 606, CA.

<sup>1893</sup> *Hancock v Austin* (1863) 14 CBNS 634; 143 ER 593, *Nash v Lucas* (1867) LR 2 QB 590; 16 LT 610, *Crabtree v Robinson* (1885) 15 QBD 312.

<sup>1894</sup> *William's, Civil Procedure Victoria*, I69.01.135, I69.01.150; *Halsbury's Laws of Australia*, 325-9950. The authority for the Sheriff's power to use force when re-entering a house to collect goods previously seized is *Bannister v Hyde*

In summary, the combined effect of existing legislation and the common law is that the Sheriff in Victoria is not authorised to use force to enter a person's house, for example by breaking a lock, when executing a warrant to seize property. Judgement debtors can legally deny the Sheriff entry. The Committee understands that the Government is currently reviewing this situation as part of its consideration of a proposed Sheriff's Bill, and that it is awaiting the results of this inquiry before finalising its proposals.<sup>1895</sup>

The Committee also notes the following observations from a recent discussion paper, which considered the problems of civil enforcement in Victoria:

A bewildering array of writs, Sheriffs' and administrative and judicial functions surround the process.  
...

An astute judgement debtor has ample opportunity under this regime to frustrate the collection process.<sup>1896</sup>

but,

Curiously, consultations with the Sheriff revealed no great enthusiasm for more powers to be bestowed on the office by the Parliament...

The almost universal opinion, shared by the legal profession and the Sheriff, is that the enforcement arm of the civil justice system is basically ineffective in practice. This ineffectiveness, it is said, could only be overcome if fundamental tenets of fairness between debtors and creditors were realigned.<sup>1897</sup>

### ***Freedom from interference with privacy, family or home***

Any consideration of a power of forced entry under a warrant to seize property demands consideration of a person's right to privacy or freedom from interference with their family or home. The Committee has discussed this right, its applicability in Victoria and the relevant international and domestic law in Chapter Two.<sup>1898</sup> The Committee reiterates here that the effective protection of civil liberties, together with the effective administration of justice, is central to this inquiry. The Committee is also mindful of the

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(1860)2 E1 & E1 627;121 ER 235, see also *Khazanchi v Faircharm Investments Ltd* [1998] 2 All ER 901 and *McLeod v Butterwick* [1998] 2 All ER 901.

<sup>1895</sup> Email, Department of Justice Senior Policy Officer Andrew Crawshaw to Committee Legal Research Officer, 6 July 2004; Conversation, Department of Justice Senior Policy Officer Andrew Crawshaw with Committee Legal Research Officer and Committee Executive Officer, 7 April 2004.

<sup>1896</sup> *Sallmann and Wright, Civil Justice in Victoria*, 179-180.

<sup>1897</sup> *Ibid.*, 180-181.

<sup>1898</sup> See the discussion of a right to freedom from interference with privacy, family or home under Article 17 of the *International Covenant on Civil and Political Rights* and its applicability in Victoria above at p 28 above.

requirement in the terms of reference that it have “particular regard to the need to promote fairness, consistency and efficiency” when considering any reform of warrant provisions. While acknowledging that these principles are fundamentally linked,<sup>1899</sup> the Committee is particularly aware of the centrality of fairness to the current discussion. The Committee considers that, as with warrant powers in general, civil warrant provisions may be best described as “fair” when they achieve a balance between civil liberties and the rule of law.<sup>1900</sup>

Walker notes that privacy or freedom from interference is a civil right that has always been “imperfectly recognized and protected”.<sup>1901</sup> Walker suggests that this may be because the abuse of a particular civil liberty will create a demand for its limitation or abolition and because a right to freedom from interference may be more open to abuse than some others.<sup>1902</sup>

The tension between a right to freedom from interference in the home and the limitation of that right in the interests of society is well recognised in various charters of civil liberties and human rights. For example, article six of the preamble to the ACT’s *Human Rights Act 2004* (ACT) states:<sup>1903</sup>

Few rights are absolute. Human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. One individual’s rights may also need to be weighed against another individual’s rights.

The qualified nature of a right to privacy and freedom from interference in the home is also apparent in the *Canadian Charter of Human Rights and Freedoms 1982*<sup>1904</sup> and in the United States’ *Bill of Rights*.<sup>1905</sup>

The United Kingdom and New Zealand have also legislated to protect human rights<sup>1906</sup> and the Committee is aware that the Government is currently exploring the possible

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<sup>1899</sup> See p 26 above.

<sup>1900</sup> See p 33 above. One definition of the principle known as “the rule of law” is that every person and organisation, including the government, is subject to the same laws: *Butterworths Legal Dictionary*, 387.

<sup>1901</sup> Walker, *The Oxford Companion to Law*, 225. While Walker recognises that no civil liberty can be absolute without leading to anarchy, he notes that there are a range of other civil liberties, such as freedom from subjection, freedom of speech and freedom of belief that have historically been more fully protected.

<sup>1902</sup> Ibid.

<sup>1903</sup> The ACT was the first, and to date remains the only, Australian jurisdiction to have introduced a Bill of Rights. Australia is unusual among western nations in not having a Bill or Rights, although as the Committee discusses below, the issue is currently under consideration in Victoria.

<sup>1904</sup> See Articles 1 and 8. The Charter is contained in Canada’s *Constitution Act 1982*.

<sup>1905</sup> The Fourth Amendment to the US Bill of Rights provides security from “unreasonable searches and seizures” and that no warrants shall issue without “probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”.

introduction of a Bill of Rights for Victoria.<sup>1907</sup> The Committee understands that the Government is interested in a model similar to the one adopted in the United Kingdom, New Zealand and the ACT, in which rights are contained in an Act of Parliament.<sup>1908</sup>

The Committee considers that it may be appropriate to consider the inclusion of a person's right to freedom from unreasonable search or seizure in their home (and from the application of unreasonable force during such search or seizure) in a Bill of Rights. The Committee considers that such a right could have a normative effect on the exercise of civil warrant powers and could serve both to safeguard and complement the exercise of such powers.

### **Other Australian Jurisdictions**

Before turning to the submissions and evidence, the Committee discusses the Australian jurisdictions that have introduced a power of forced entry under a warrant to seize property: Western Australia, South Australia and the Northern Territory.

#### **Western Australia**

The power of forced entry was most recently introduced in Western Australia. Under a "property (seizure and sale) order",<sup>1909</sup> the Sheriff in Western Australia may now use force to enter a person's residence in defined circumstances. The change was introduced by section 75 of the *Civil Judgements Enforcement Act 2004* (WA), which commenced from 1 May 2005.<sup>1910</sup> As the Explanatory Memorandum notes, section 75 of that Act "reverses" the common law principle that officers of the state may not enter a person's home without the permission of the occupant.<sup>1911</sup> Under sections 75 and 76, the Sheriff in Western Australia now has a right of entry to seize personal property when

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<sup>1906</sup> In relation to the United Kingdom, see Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, agreed by the Council of Europe at Rome on 4 November 1950, which was among the articles adopted by the United Kingdom's *Human Rights Act 1998*. In relation to New Zealand, see the *Bill of Rights Act 1990*.

<sup>1907</sup> The Committee notes that the report of the Human Rights Consultation Committee, commissioned by the government, is due by 30 November 2005.

<sup>1908</sup> Human Rights Consultative Committee of Victoria, *Human Rights Consultation Community Discussion Paper* (2005), 40, 50. See also the Department of Justice webpage: *Human Rights Consultation Project*, at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

<sup>1909</sup> The order is equivalent to a warrant to seize property in Victoria.

<sup>1910</sup> See: *Table 9—Assent and commencement information for Acts* (as at 12 August 2005) on the website of the Department of the Premier and Cabinet of Western Australia, State Law Publisher, at [www.slp.wa.gov.au](http://www.slp.wa.gov.au).

<sup>1911</sup> *Civil Judgements Enforcement Bill, Explanatory Memorandum*, 24.

enforcing a civil judgement and can use “any force and assistance that is reasonably necessary in the circumstances”.<sup>1912</sup>

The Sheriff’s power of entry is subject to a number of safeguards. The Sheriff can only exercise the power of forced entry after requesting the owner’s consent at the time of entry (or the occupier if there is no owner) and if consent has been “unreasonably withheld” or where the Sheriff has been unable to contact the owner or occupier after making “reasonable attempts”.<sup>1913</sup> The power of entry without consent can be exercised only between the hours of 9 am and 5 pm in respect of a “dwelling” but at any time of the day or night in respect of a place that is not a dwelling.<sup>1914</sup> The power is also subject to a belief “on reasonable grounds” that there is or may be personal property capable of seizure located at the place that is the subject of the order.<sup>1915</sup> The order may be made by the Supreme Court, District Court or Magistrates’ Court.<sup>1916</sup>

The Committee notes that the *Civil Judgements Enforcement Act 2004* (WA) also provides for a “means inquiry”,<sup>1917</sup> similar to the oral examination process under Victoria’s *Judgment Debt Recovery Act 1984*, which may occur on the application of the judgement creditor<sup>1918</sup> or judgement debtor.<sup>1919</sup>

The introduction of a power of forced entry under a warrant to seize property was the subject of some debate during the passage of the Bill through the Parliament of Western Australia.<sup>1920</sup> However, there appears to have been limited discussion of the change prior to the introduction of the Bill, apparently because its main focus was the introduction of

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<sup>1912</sup> *Civil Judgements Enforcement Act 2004* (WA) s 75(1). There is also a power of forced entry for the seizure of real estate in relation to judgement debts under section 81.

<sup>1913</sup> *Civil Judgements Enforcement Act 2004* (WA) ss 75(3)(a), (b).

<sup>1914</sup> *Civil Judgements Enforcement Act 2004* (WA) s 75(3). Notably, the power of entry without consent may be exercised at any time of the day or night in respect of a place that is not a dwelling (s 75(2)(a)). Examples cited in the Explanatory Memorandum include commercial properties, factories and garages.

<sup>1915</sup> *Civil Judgements Enforcement Act 2004* (WA) s 75(1)(a).

<sup>1916</sup> *Ibid*, ss 5, 59(2).

<sup>1917</sup> See ss 26 to 31. A means inquiry under section 26 in respect of a judgement debtor is an inquiry conducted by a court to determine: the judgement debtor’s means to pay the judgement debt having regard to the judgement debtor’s income, assets and liabilities and, if applicable, of his or her spouse or de facto partner and any of their dependents; whether there are or will be any earnings of the judgement debtor, or any available debt owing, that might be appropriated to satisfy the judgement debt; as well as the existence, location and value of any property of the judgement debtor that might be seized and sold to satisfy the judgement debt.

<sup>1918</sup> *Civil Judgements Enforcement Act 2004* (WA) s 27.

<sup>1919</sup> *Ibid*, s 28.

<sup>1920</sup> See, Parliament of Western Australia Legislative Council, *Civil Judgments Enforcement Bill 2003, Second Reading* (17 August 2004), 4900b - 4912a / 1, at [www.parliament.wa.gov.au](http://www.parliament.wa.gov.au).

new civil judgement enforcement procedures, reform of the lower courts system and amendment of a range of civil and criminal processes.<sup>1921</sup>

## South Australia

A power of forced entry also exists in South Australia. Under a “warrant of sale”<sup>1922</sup> the Sheriff may enter land or premises (including residential premises) to seize and sell a judgement debtor's personal property or land (or both),<sup>1923</sup> using “such force as may be necessary for the purpose”.<sup>1924</sup> The South Australian power of forced entry significantly predates the introduction of the power in Western Australia; forced entry was previously available under section 168 of the *Local and District Criminal Courts Act 1926 (SA)*.<sup>1925</sup>

The South Australian forced entry provisions contain fewer safeguards than the Western Australian provisions. For example, the *Enforcement of Judgements Act 1991 (SA)* contains no requirement that the Sheriff seek the owner or occupant's consent prior to entry, it does not restrict the hours of entry and it does not differentiate between a “dwelling” and other premises. The South Australian Act does, however, provide the court with the power to investigate the judgement debtor's means of satisfying the judgement debt and is discussed in detail below.<sup>1926</sup> One other important safeguard in the SA Act is the prohibition against the seizure and sale of personal property that could not be taken in bankruptcy proceedings.<sup>1927</sup>

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<sup>1921</sup> The *Civil Judgements Enforcement Bill 2003* was introduced as part of a legislative package which included the *Magistrates' Court Bill 2003*; *Magistrates' Court (Civil Proceedings) Bill 2003*; and *Courts Legislation Amendment and Repeals Bill 2003*. A number of the recommendations contained in four reports of the Law Reform Commission of Western Australia (LRCWA) were implemented in those Acts. See: *Report on the Jurisdiction, Procedures and Administration of Local Courts, Project No. 16 (Part I)* (June 1988); *Reports on Enforcement of Judgements of Local Courts, Project No. 16 (Part II)* (December 1995); *Review of the Criminal and Civil Justice System in Western Australia: Final Report, Project No. 92*, September 1999; and *Report on Writs and Warrants of Execution, Project No. 67* (June 2001) (LRCWA Project No. 67).

<sup>1922</sup> A warrant of sale is equivalent to a warrant to seize property in Victoria.

<sup>1923</sup> Paragraph 7(5)(b) provides that if there is a reasonable possibility of satisfying the judgement debt out of personal property, the sheriff should sell personal property before proceeding to sell real property.

<sup>1924</sup> *Enforcement of Judgements Act 1991 (SA)*, section 7.

<sup>1925</sup> The Committee notes the unique history of the Office of Sheriff in South Australia. As the only State that was not founded as a convict colony, the Office of Sheriff was unusual for its creation from within the colony rather than by a transfer of the position from England under a Colonial Office appointment. The “English legacy” was therefore weaker in the South Australian Office of Sheriff: Courts Administration Authority of South Australia, *Sheriff's Office History*, (October 2005), at [www.courts.sa.gov.au](http://www.courts.sa.gov.au).

<sup>1926</sup> *Enforcement of Judgements Act 1991 (SA)* s 4.

<sup>1927</sup> *Enforcement of Judgements Act 1991 (SA)* s 7 (2).

## The Northern Territory

The power of forced entry in the Northern Territory,<sup>1928</sup> also significantly predates the Western Australian provision.<sup>1929</sup> The Northern Territory power differs from the Western Australian and South Australian powers in that it may be exercised only by a police member.<sup>1930</sup> Although a “warrant of seizure and sale”<sup>1931</sup> may be directed to a bailiff or a police member,<sup>1932</sup> where the warrant is directed to a bailiff, s/he must seek the assistance of a police member to carry out any forced entry that may be required.<sup>1933</sup>

The police member to whom the warrant is directed, or who is assisting the bailiff, can enter premises using any “force that is necessary and reasonable”, providing that they “believe[s] on reasonable grounds” that the premises are owned or occupied by the person named or described in the warrant.<sup>1934</sup> Unlike the Western Australian power of forced entry, there is no requirement to seek the consent of the owner or occupier of residential premises prior to making a forced entry, nor is there any restriction on the time of day that forced entry may occur. The Northern Territory power mirrors the South Australian power in these respects.

The power of forced entry in the Northern Territory apparently originated in South Australia. The earlier legislative provision which contained the Northern Territory power was identical to the former South Australian provision and included a power of forced entry for bailiffs.<sup>1935</sup> The existence, until recently, of an identically framed power of forced entry in South Australia and in the Northern Territory, and the continuing similarities

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<sup>1928</sup> The power currently resides in the *Local Court Act 1989* (NT) s 22B.

<sup>1929</sup> The power to enter a person’s home by force under a warrant to seize property previously resided in section 150 of the *Local Courts Act 1941* (NT).

<sup>1930</sup> *Local Court Act 1989* (NT) ss 22A, 22B.

<sup>1931</sup> The equivalent of a warrant to seize property in Victoria.

<sup>1932</sup> *Local Court Act 1989* (NT) ss 22A, 22B; *Local Court Rules* (NT) rule 42.01, Part 44 and Form 14A of Schedule 1. The legislation also provides generally for a member of the Police Force to exercise the powers and perform the functions of a bailiff: *Local Court Act 1989* (NT) s 10A.

<sup>1933</sup> *Local Court Act 1989* (NT) s 22A.

<sup>1934</sup> *Local Court Act 1989* (NT) s 22B. Interestingly, section 22A(4) defines “premises” as including “land”, in addition to “a building or part of a building”, and apparently overrides the common law power of bailiffs in the Northern Territory to use force to break into a garage, shed etc.

<sup>1935</sup> Former section 150 of the Northern Territory’s *Local Courts Act 1941* (NT) and former section 168 of South Australia’s *Local and District Criminal Courts Act 1926* (SA), both provided the bailiff with the power to break open “any house, shop, warehouse, trunk, chest or other receptacle” of the debtor where the debtor’s property was suspected to be. See: Australian Law Reform Commission *Report No. 36 Debt Recovery and Insolvency* (1987) (ALRC Report No. 36), 51.

between the two, is due to the Northern Territory's early history as a part of South Australia.<sup>1936</sup>

### ***International Jurisdictions***

A power of forced entry for the seizure and sale of a judgement debtor's property has also been introduced, or recommended, in a number of Canadian provinces. In each case, the power has been part of legal reforms to establish unified and coordinated systems of civil enforcement.<sup>1937</sup> The power has been introduced in Alberta,<sup>1938</sup> Newfoundland and Labrador,<sup>1939</sup> and has recently been recommended in British Columbia<sup>1940</sup> and Saskatchewan.<sup>1941</sup>

Forced entry for the seizure and sale of property to enforce judgement debts has also recently been recommended in the United Kingdom.<sup>1942</sup> The recommendation is notable both because it relates to the jurisdiction in which the current prohibition against forced entry originated and because, as in the other jurisdictions discussed, it has been proposed as part of reforms to introduce a "reformed and regulated" system of civil enforcement. As the recent White Paper that proposed the changes stated,

Society wants those who owe money judgements to pay their dues but also wants to protect the vulnerable. We all want to prevent unacceptable behaviour from those with the difficult task of making debtors pay but we also want to ensure that creditors, many of whom may be in financial difficulties themselves, receive the money to which they are properly entitled. It is important that individuals have the right to manage their own financial affairs, but we are all concerned to address issues of overindebtedness. We must protect individuals' rights to privacy while recognising that controlled access to information about debtors' circumstances is essential, since there will always be those who deliberately seek to avoid payment.

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<sup>1936</sup> The land which later became the Northern Territory was annexed to the colony of South Australia in 1863.

Although the land was transferred to the Commonwealth in 1911, the laws of South Australia remained in force unless altered or repealed by Commonwealth law. The Territory gained limited state-type powers of self-government in 1978: Legislative Assembly of the Northern Territory, *Information Paper No. 2: A Brief History of Administration in the Northern Territory*, (November 2003), at [www.nt.gov.au](http://www.nt.gov.au).

<sup>1937</sup> British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgements Act*, (March 2005) (*BCLI Report No. 37*), 15.

<sup>1938</sup> *Civil Enforcement Act R.S.A 2000 c C-15 s 13(2)*.

<sup>1939</sup> *Judgement Enforcement Act, S.N.L. 1996 c J-1.1 s 76*.

<sup>1940</sup> *BCLI Report No. 37*, see Appendix A: Uniform Civil Enforcement of Money Judgements Act s 53(c).

<sup>1941</sup> *BCLI Report No. 37*, 15; Tamara M. Buckwold & Ronald C.C. Cuming, *Final Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (January 2005). Extensive review of the civil enforcement system has also been recommended in Ontario: Ministry of the Attorney General, *Ontario Civil Justice Review, Supplemental and Final Report* (November 1996), at [www.attorneygeneral.jus.gov](http://www.attorneygeneral.jus.gov).

<sup>1942</sup> Lord Chancellor's Department of the United Kingdom, *Effective Enforcement White Paper* (2003), 39.

The courts and those who bear the responsibility of enforcing the courts' judgements have to find a way to balance these competing demands and achieve the fair balance between rights and responsibilities, for both debtors and creditors, which we all expect in a modern and democratic society.<sup>1943</sup>

### ***Evidence Received by the Committee***

Rob White, Chair of the Litigation Section of the Law Institute of Victoria, argued that warrants remain the “preferred” form of enforcement of civil judgements among creditors in Victoria (other forms of enforcement include attachment earnings, bankruptcy and winding up of companies).<sup>1944</sup> Mr White stated:

In relation also to the forms of execution which are available we are concerned that if the procedures become cumbersome or become delayed judgement creditors may then turn to other forms or processes for enforcing judgements, such as bankruptcy, which ideally I think should be a last resort rather than a first resort. One of the issues in relation to civil warrants is to have established a regime which does not push judgement creditors to use bankruptcy as a first method of enforcing their judgements. Of course, at a worse extreme, possibly if people become frustrated by the system, they may use methods totally outside the system from that point of view.

Mr White proposed that the Sheriff should have a power of forced entry in limited circumstances, such as where it is known that there are valuable assets within the house of a judgement creditor, for example where an art dealer has not been paid for a valuable painting that is known to be hanging on the debtor’s wall.<sup>1945</sup> Mr White stated on behalf of the Law Institute of Victoria that situations justifying a warrant authorising forced entry would be “unusual” and would not “...be happening every day of the week”.<sup>1946</sup>

The Law Institute of Victoria proposed that a Court should be able, in limited circumstances and on terms that the Court considers appropriate, to direct a judgement debtor to allow the Sheriff a right of entry to their home for the seizure of non-exempt property. The Law Institute of Victoria submitted that this could occur by way of application by or on behalf of the judgement creditor to the Court, with the Court then considering the application on the strength of the evidence. The judgement debtor would then be served with the application and given an opportunity of reply.<sup>1947</sup>

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<sup>1943</sup> Ibid.

<sup>1944</sup> Rob White, Law Institute of Victoria, *Minutes of Evidence*, 20 October 2004, 283.

<sup>1945</sup> Ibid, 286.

<sup>1946</sup> Ibid.

<sup>1947</sup> Law Institute Victoria, *Submission no. 5*, 5-6.

Mr Andrew Crawshaw, Senior Legal Policy Officer with the Enforcement Management Unit (EMU) of the Department of Justice, confirmed that the law in relation to civil warrants differs from that applying to criminal warrants:

So far as the forced entry into premises is concerned, under a penalty enforcement warrant for instance, there is a legislative power for the Sheriff to knock the door down if s/he is refused. No such power exists for civil warrants. That law comes from *Semayne's* case which was decided in 1604 and talks about a private suit and a suit on behalf of the King.<sup>1948</sup>

Mr Crawshaw went on to describe the way in which the existing law impinges on the Sheriff's operations:

I might just go through some of the effects that that would have. Firstly, the law means that the Sheriff can be prevented from carrying out his or her primary function, which is to enforce a court order by a person who simply refuses entry to a Sheriff's Officer who knocks on the door. We have certain anecdotal evidence that a defendant may simply close the door in the Sheriff's face and therefore make the warrant unexecutable. This does lead to certain difficulties whereby we often have to tell plaintiffs that while we have tried to execute their warrant, we have been unable to do so because of this. It does put us in a situation where you have to say that if you had a \$50 littering fine we would be able to knock down your door, but if you had a judgement in your favour then we could not go to the defendant's house and knock down the door- they can close the door in our face.<sup>1949</sup>

Mr Crawshaw provided a recent example where the EMU was unable to recover \$11,000 in unpaid wages owed by a judgement creditor's previous employer. The Sheriff was unable to execute the warrant to seize property because the judgement debtor refused the Sheriff entry to her home.<sup>1950</sup>

Mr Crawshaw noted that the current law can also create confusion when the Sheriff attempts to execute a "mixed bag of warrants" against the same person who has both civil and criminal warrants outstanding. Mr Crawshaw explained that the powers attached to warrants are applied strictly so that even when the Sheriff gains entry to a house using force under a criminal warrant, s/he remains unable to execute the civil warrant (i.e. because the power which authorised entry to the house related only to the criminal warrant).<sup>1951</sup>

Mr Crawshaw also suggested that the language used in *Semayne's* case, specifically, its references to "the King", creates problems because,

...it is difficult, we believe, in a modern context to determine exactly what the King means. In times of privatised and semi-privatised government organisations, it is difficult to say whether they are the

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<sup>1948</sup> Andrew Crawshaw, Department of Justice, *Minutes of Evidence*, 5 November 2004, 319.

<sup>1949</sup> *Ibid*, 319.

<sup>1950</sup> *Ibid*, 319-320.

<sup>1951</sup> *Ibid*, 320.

King....whereby obviously if it is a criminal matter then it is the King because they represent the state.<sup>1952</sup>

Although the written submission from the Department of Justice did not include specific recommendations in relation to a power of forced entry under a civil warrant, the Department referred to correspondence it had received, which suggested,

...a public perception that the system in which it is easy to avoid a civil judgement, that is, be in contempt of it, but difficult to avoid a criminal judgement, is not fair."<sup>1953</sup>

In its submission to the Inquiry, Victoria Legal Aid (VLA) proposed that warrant powers should be limited to agencies dealing with criminal matters, welfare matters and emergencies.<sup>1954</sup> VLA suggested that all civil matters should be dealt with according to contract law and the rules of civil procedure rather than warrants.<sup>1955</sup>

The Committee notes that VLA has a substantial civil law practice, which includes duty lawyer services for judgement debt matters at the Magistrates' Court. Therefore, while the Committee has not received any empirical evidence from VLA on the matter, it appreciates that VLA has a well-developed understanding of the ways in which civil warrants may impact on judgement debtors.<sup>1956</sup>

While the submission of the Victorian Civil and Administrative Tribunal (VCAT) did not address the enforcement of a warrant to seize property, it did provide information about warrants of possession under sub-section 355(2) of the *Residential Tenancies Act 1997* (RTA). VCAT's submission states that a person who obtains a possession order from the tribunal may also apply for a warrant of possession (most warrants of possession are applied for by real estate agents who appear at VCAT on behalf of landlords). There is a prescribed form for the application pursuant to the rules made under the *Victorian Civil and Administrative Tribunal Act 1989* and warrants are sent by VCAT to the local police station. The police then notify the tenants of the proposed date of eviction (generally within 14 days) and when executing the warrant, the police and real estate agent generally arrange a fixed time to attend the premises, often with a locksmith. On some occasions, the community policing squad also attends.<sup>1957</sup>

The submission of the Consumer Law Centre Victoria Inc. (CLCV) focused solely on the Sheriff's right of entry in executing civil warrants. CLCV expressed its preference for the Law Institute of Victoria's proposed power of forced entry in contrast to the Western

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<sup>1952</sup> Ibid.

<sup>1953</sup> Department of Justice Victoria, *Submission no. 38*, 2.

<sup>1954</sup> Victoria Legal Aid, *Submission no. 215*, 4.

<sup>1955</sup> Ibid.

<sup>1956</sup> Ibid, 2. The Committee has noted above, a similar absence of empirical evidence regarding allegations of abuses of search warrant provisions in Chapter Three.

<sup>1957</sup> Victorian Civil and Administrative Tribunal, *Submission no. 7*, 2-3.

Australian and South Australian powers. CLCV agreed with the Law Institute of Victoria that if the Sheriff's powers are extended to include forced entry, the power should only be available following a separate application to the Court, for consideration on the evidence presented. CLCV also agreed with the Law Institute of Victoria that following a decision to allow forced entry, the judgement debtor should be served and provided with a reasonable opportunity of reply prior to entry.<sup>1958</sup>

CLCV stated in its submission that,

[its] major concern in relation to any extension of the Sheriff's power of entry to enforce civil debts is to ensure that due process and respect for individual's rights—proprietary and otherwise—are upheld. We do not consider that allowing forced entry into another's property, without notice, to satisfy a debt, justifies the erosion of these rights.<sup>1959</sup>

The submission of the Financial and Consumer Rights Council (FCRC) included a number of detailed recommendations in relation to civil warrants. FCRC expressed concern that any expansion of the Sheriff's powers should not serve the interests of "unscrupulous creditors" or be used to "intimidate disadvantaged and vulnerable consumers".<sup>1960</sup> FCRC also argued that the sequestration provisions in the *Bankruptcy Act 1966* (Cth) regarding the seizure and sale of real and personal property were designed to ensure minimum protections for low income and vulnerable consumers.<sup>1961</sup>

FCRC made the following additional recommendations in relation to civil warrants:

- that the Sheriff (rather than the plaintiff or the judgement creditor) should be responsible for applying to the Court for a warrant to seize property and that the warrant should only issue from a Magistrates' Court closest to the usual residence of the judgement debtor (partly in response to the trend towards the commencement of an increasing number of civil debt recovery actions outside of Victoria);
- that the existence of non-exempt assets of at least 30% of the outstanding judgement debt be verified by means of an oral examination prior to the issue of a warrant (FCRC expressed concern that "vexatious litigants" should not be able to use the Sheriff's Office as an "instrument of harassment");
- that the plaintiff be required to give "reasonable details" of assets that are not protected by section 116 of the *Bankruptcy Act 1966* (Cth);

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<sup>1958</sup> Consumer Law Centre Vic Ltd, *Submission no. 41*, 2-3.

<sup>1959</sup> *Ibid*, 2.

<sup>1960</sup> Financial and Consumer Rights Council, *Submission no. 42*, 1.

<sup>1961</sup> *Ibid*, 2. Sequestration is the process of transferring control of a debtors' property to a trustee on bankruptcy. As noted above, essential items of property are protected from seizure under section 116 of the *Bankruptcy Act 1966* (Cth).

- a penalty for a “vexatious application” of 5 penalty units (i.e. where plaintiffs who have already initiated an oral examination under the *Judgment Debt Recovery Act 1984* proceed immediately to an application for a warrant);
- that only one application for a warrant to seize property be allowed in relation to each judgement debt;
- that any non-exempt assets which are seized for sale should be deemed to realise a minimum of 30% of the judgement debt as at the time of the application for the warrant.

The Committee agrees with the recommendation of FCRC that a warrant to seize property should only issue from a Magistrates’ Court closest to the usual residence of the judgement debtor. However, the Committee considers that such a requirement would not necessarily impact upon the trend towards the commencement of civil debt recovery actions outside of Victoria. The Committee is concerned by such a trend and considers that debt recovery actions against debtors residing in Victoria should be commenced in Victoria and, wherever possible, in a court which is closest to the person’s usual residence. The Committee considers that such a principle is consistent with procedural fairness, particularly the importance of providing debtors with an opportunity to contest proceedings.

Recommendation 133.                      That there be a legislative requirement that civil debt recovery actions against persons residing in Victoria be commenced in Victoria and in a court which is closest to the usual residence of the debtor. A warrant to seize property should also only issue from the same court, that is, the court closest to the usual residence of the judgement debtor.
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## Discussion and conclusions

### ***Sheriffs’ power of forced entry***

The Committee found merit in the arguments of stakeholders’ both for and against the introduction of a power of forced entry. On balance, the Committee found the arguments for the introduction of a power of forced entry more persuasive. The Committee’s own research also supported this conclusion.

The Committee shares Mr White’s concern that frustration among judgement creditors could lead to the use of enforcement methods “outside the system”. In the Committee’s view, such frustration may partly explain the aggressive (and in some cases fraudulent) debt collection practices referred to above. The Committee considers that any amendment which leads to more effective enforcement, while ensuring fairness between debtors and creditors, has the potential to reduce such practices. Concern about the

increasing use of enforcement methods which are “outside the system” is therefore an important basis for the Committee’s conclusion that there should be further research and consultation into the introduction of a power of forced entry as part of the rationalisation of the civil judgement enforcement system. The Committee also considers that if the Sheriff did have a power of forced entry, it is likely that an awareness of that power among judgement debtors would in most cases result in consensual entry.

The Committee believes that if a power of forced entry were to be introduced, it would be preferable that it occur as part of an extensive rationalisation of the system of civil judgement enforcement, as in the Australian and international jurisdictions discussed above. In view of the scale of such a project and the fact that it would reverse a common law principle which has lasted 400 years, the Committee considers that such reform should be the subject of further consultation and research.

Having reached the conclusion that a power of forced entry has merit the Committee has next considered what safeguards and restrictions should regulate its use. While the Committee has recommended further consultation and research upon which a rationalisation of the existing system of civil debt enforcement should be based, it believes that the introduction of a power of forced entry is a likely outcome of any such exercise and therefore sets out below its views on how warrant provisions allowing forced entry should be framed.

### ***Existence of seizable assets***

The Committee agrees with the Law Institute of Victoria and CLCV that forced entry should generally be available only where it has been established that a judgement debtor has valuable assets in their home. In the Committee’s view, this should be established through an examination process modelled on the provisions in the *Judgment Debt Recovery Act 1984* and with consideration of the relevant provisions in Western Australia’s *Civil Judgements Enforcement Act 2004* (WA) and South Australia’s *Enforcement of Judgements Act 1991* (SA).

The Committee notes that a judgement creditor who is the original owner of an unpaid-for asset which is the source of a judgement debt, may already have evidence that there is valuable personal property in the home of the judgement debtor (as in the example of the painting hanging on a judgement debtor’s wall). However, an important role of examination in such cases would be to confirm that such property has not since been disposed of. In many other cases, such as where the judgement creditor is a credit provider, examination may be the only means of obtaining such evidence. The Committee is also mindful that relying on evidence obtained outside of an examination process may increase the potential for harassment of debtors. The Committee concludes that, wherever practicable, the existence of valuable assets in the home of the judgement debtor should be determined through an examination process.

Examination would serve three additional and equally important purposes; assessment of the judgement debtor's financial circumstances (as well as of the debtor's spouse or de facto or any dependants); identification of the judgement debtor's assets; and determination of the most appropriate means of enforcing the judgement debt. The Committee concludes that examination, modelled on Part 3 of the *Judgment Debt Recovery Act 1984* and on Part 4A of Order 27 of the *Magistrates' Court Civil Procedure Rules 1999*, should be central to the enforcement process, particularly in the event of legislation to introduce a power of forced entry. The Committee recognises that in some cases, examination may fail to reveal the existence of valuable assets and that in such cases, forced entry may be the only realistic means of determining the existence of such assets. However, the Committee considers that even in such circumstances, the inherently intrusive nature of forced entry is such that it should not occur without investigation of alternative enforcement methods by means of examination.

The Committee notes FCRC's recommendation for verification of assets which are not protected under the *Bankruptcy Act 1966* (Cth) of at least 30% of the outstanding judgement debt prior to the issue of a warrant. On the other hand, the Committee appreciates the Law Institute of Victoria's concern that bankruptcy should not become a "first resort" as a result of creditor frustration with the enforcement of civil judgements. The Committee is concerned that the introduction of a limitation to recovery of the kind suggested by FCRC might increase judgement creditors' resort to bankruptcy proceedings for the reason identified by the Law Institute of Victoria. The Committee considers that a more effective safeguard may be to introduce a threshold monetary value for the debt, below which recovery should be by means other than a warrant to seize property. The Committee notes the examples of a valuable painting and \$11,000 in unpaid wages cited by the Law Institute of Victoria and the Department of Justice respectively and considers that this matter should be the subject of further consultation and research.

Recommendation 134. That any new legislation to introduce a power of forced entry require that:

- (a) the exercise of the power be preceded by an examination of the judgement debtor's assets and financial circumstances;
- (b) such examination be a three-fold process:
  - (i) assessment of the judgement debtor's financial circumstances (focusing on income and expenditure);
  - (ii) identification of the judgement debtor's assets;
  - (iii) determination of the most appropriate means of enforcing the judgement debt;

- (c) a warrant to seize property only be issued where examination has established the existence of assets, other than “protected assets” under the *Bankruptcy Act 1966* (Cth);
- (d) a court may issue a warrant to seize property where:
  - (i) it determines that such examination is not practicable; or
  - (ii) the judgement debtor fails to participate in the examination process; or
  - (iii) it is satisfied on the balance of the available evidence that, despite having participated in the examination process, the judgement debtor has failed to reveal the existence of non-exempt assets; and
  - (iv) it has considered alternative means of enforcement.

The Government should consider the introduction of a monetary threshold below which recovery of a judgement debt should be by means other than a warrant to seize property.

### ***Compulsory examination hearing***

The question of giving judgement debtors prior notice of the date and time of execution of a warrant to seize property is problematic. On the one hand, the infringement of civil liberties involved in the exercise of a power of forced entry suggests the desirability of a reasonable period of notice. On the other hand, what is reasonable is often a matter of the particular circumstances and any period of notice sufficient to provide some debtors with an opportunity to remove assets from their home would defeat the purpose of the warrant.

Although CLCV argued against the introduction of a power of forced entry, it also stated that if such a power were to be introduced, it should not be exercised “without sufficient notice of entry being provided to the owner or occupant”.<sup>1962</sup> CLCV argued that the warrant should be personally served on the judgement debtor and that the date of service and the date of entry should not be the same.<sup>1963</sup> The Law Institute of Victoria also argued that the judgement debtor should be served and provided with “an opportunity of reply”.<sup>1964</sup>

The Committee notes that the Australian Law Reform Commission (ALRC) has previously recommended a power of forced entry, effectively subject to notice of entry

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<sup>1962</sup> Consumer Law Centre Vic Ltd, *Submission no. 41*, 3.

<sup>1963</sup> *Ibid.*

<sup>1964</sup> Law Institute Victoria, *Submission no. 5*, 6.

before the date of execution. In 1987, the ALRC recommended a two-stage process in which the Sheriff should be able to obtain a court order authorising forced entry where consent to entry under a warrant had been denied or where the judgement debtor could not be contacted.<sup>1965</sup>

The Committee has already noted that a problem with the provision of notice prior to the day of execution is the risk that some judgement debtors may remove or conceal their property in the interim.<sup>1966</sup> Moreover, the Committee notes that those Australian jurisdictions that have introduced a power of forced entry do not require the Sheriff to give the judgement debtor prior notice of the date and time of execution.

Some degree of notice is effectively provided where there is a mandatory requirement for examination of the judgement debtors' financial circumstances as the first step in the enforcement process, particularly if coupled with advice to debtors that forced entry under a warrant to seize property is available where the parties cannot reach a repayment agreement. For example, in South Australia, an "investigation hearing"<sup>1967</sup> to determine the judgement debtor's financial circumstances, assets and capacity to pay precedes any other enforcement action where the debt is less than \$6,000.<sup>1968</sup> In Victoria, an oral examination of the debtor's circumstances following judgement is generally at the discretion of the judgement creditor,<sup>1969</sup> although oral examination may also occur following the application of either party for an Instalment Order under the *Judgment Debt Recovery Act 1984*.<sup>1970</sup> The Committee recalls here that claims below a similar value apparently account for the majority of civil debt recovery actions in the Magistrates' Court of Victoria.<sup>1971</sup>

The Committee also notes that historically there has been a much greater examination of judgement debtors by way of investigation hearings in South Australia. Indeed, despite the availability of a power of forced entry under a warrant of sale, the examination process in South Australia has been described as the "central mode of

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<sup>1965</sup> ALRC Report No. 36, 141.

<sup>1966</sup> This was an issue that the ALRC also acknowledged: *ibid*, 141.

<sup>1967</sup> An investigation hearing is similar to an oral examination in Victoria under the *Judgment Debt Recovery Act 1984* and is a process for determining the judgement debtor's financial circumstances, assets and capacity to pay.

<sup>1968</sup> The requirement is subject to the right of the judgement creditor to seek a court order to proceed without an investigation hearing. Rule 123 of the South Australian *Magistrates' Court (Civil) Rules 1992* (SA) provides, "subject to an order of the Court the first enforcement process in respect of a judgement debt in a minor civil action must be an Investigation Hearing". At the time of writing, a minor civil claim in the Magistrates' Court of South Australia included the recovery of debts of up to \$6,000: website of the Courts Administration Authority of South Australia (2005), at [www.courts.sa.gov.au/courts/magistrates](http://www.courts.sa.gov.au/courts/magistrates).

<sup>1969</sup> *Magistrates' Court Civil Procedure Rules 1999* sub-r 27.12.1(1).

<sup>1970</sup> While section 13 provides for an oral examination, subsection 6(3) provides the Court with the discretion to make an Instalment Order without an oral examination.

<sup>1971</sup> As noted above, claims of less than \$5,000 accounted for 84 per of civil debt recovery actions in the Magistrates' Court of Victoria in 1997 - 1998: *Sallmann and Wright, Civil Justice in Victoria*, 177.

judgement enforcement".<sup>1972</sup> For example, as long ago as 1977, more than twice as many examination hearings were conducted in South Australia as in New South Wales, even though South Australia's population was only one quarter that of New South Wales.<sup>1973</sup>

The South Australian Magistrates' Court also resolves civil disputes significantly more by mediation than by judgement, with less than 5% resolved by trial.<sup>1974</sup> Comparisons with the Magistrates' Court of Victoria are difficult due to differences in processes between the two courts. However, although South Australia's population is under one third that of Victoria's,<sup>1975</sup> it appears that there were significantly more investigation hearings in the South Australian Magistrates' Court than there were oral examinations in the Magistrates' Court of Victoria during 2003-04.<sup>1976</sup> Although the Magistrates' Court of Victoria must refer complaints of under \$10,000 to arbitration,<sup>1977</sup> this applies at the initial hearing stage rather than at the enforcement stage. The requirement of an investigation hearing in South Australia for the enforcement of matters under \$6,000 would therefore appear to be a significant factor in the comparatively high rate of investigation hearings in that state. The enforcement of judgement debts outside of the formal court system also creates cost savings for both parties.

The Committee considers that any system in which forced entry is available should include safeguards to ensure that the power is used as infrequently as possible.<sup>1978</sup> As the South Australian experience suggests, this is most likely to be achieved by promoting other means of enforcement and by ensuring that an examination hearing occurs at the outset. The Committee considers that an enforcement system containing such safeguards would be more effective than one which required the provision of notice one or more days before execution. Indeed, the Committee notes that in such a system,

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<sup>1972</sup> David St L. Kelly, *Australian Government Commission of Inquiry into Poverty* (1977), 4.

<sup>1973</sup> *Ibid.*

<sup>1974</sup> Courts Administration Authority of South Australia, *Annual Report 2003-04*, 12. The high rate of civil matters resolved otherwise than by trial is apparently partly explained by the enforcement of minor civil claims by investigation hearing because the number of cases resolved by mediation at the trial stage is significantly lower: *ibid.*, 26.

<sup>1975</sup> As at 30 June 2003, the populations of Victoria and South Australia were 4,917.3 and 1,527.1, respectively: Australian Bureau of Statistics, *Year Book Australia* (2005), Table 5.4: Population by states and territories etc., at [www.abs.gov.au](http://www.abs.gov.au).

<sup>1976</sup> The difficulty of comparison is reflected in the available statistics; while there were 16,603 summonses for oral examination issued by the Victorian Magistrates' Court in 2003-04, the South Australian figure of 47,786 "civil enforcement lodgments" for the same period is a total of all summonses for investigation hearings, warrants of sale, garnishee orders etc. However, given the requirement that an investigation hearing occur as the first stage of the enforcement process for small claims in South Australia, it seems likely that a significant proportion of the "civil enforcement lodgments" would have been summonses for investigation hearings: Courts Administration Authority of South Australia, *Annual Report 2003-04*, 26; Magistrates' Court of Victoria, *2003-04 Annual Report*, 24-25.

<sup>1977</sup> *Magistrates' Court Act 1989* s 102(1).

<sup>1978</sup> That is, in addition to safeguards governing the exercise of the power of forced entry itself.

forced entry need not be a common occurrence and may serve as an incentive for the parties to reach agreement.

Recommendation 135. That in any new legislation to introduce a power of forced entry an examination process be a compulsory first stage in the enforcement process for claims below a certain dollar value, for example \$10,000.

The Committee now turns to those safeguards which might apply at the time of entry.

### ***Time of entry safeguards***

The forced entry provisions in Western Australia contain a number of additional safeguards which apply at the time of entry. The Committee considers that these safeguards, outlined above, should represent a minimum standard for incorporation into any new legislation to introduce a power of forced entry in Victoria. The safeguards include: the requirement that the Sheriff first seek the owner or occupier's consent to entry; the distinction between a person's home and other premises; restricting the time of day that entry may occur to between the hours of 9 am and 5 pm; and the requirement that the Sheriff have a belief on "reasonable grounds" as to the existence of seizable property.

Recommendation 136. That any new legislation to introduce a power of forced entry:

- (a) contain a requirement that the Sheriff seek the owner or occupier's consent to entry at the time of execution;
- (b) in cases where the owner or occupier does not give their consent, permit the Sheriff to proceed only where consent has been unreasonably withheld or where s/he has been unable to contact the owner or occupier after making reasonable attempts;
- (c) include as minimum safeguards the restrictions on the power of forced entry contained in section 75 of the *Civil Judgements Enforcement Act 2004* (WA), including restrictions on the times when entry may occur, the distinction between a person's home and other premises and a belief on "reasonable grounds" as to the existence of seizable assets.

## **Protection of Sheriff's Officers**

The Committee appreciates that a power of forced entry may involve some risk for Sheriff's Officers. However, the Committee considers that effective training of Sheriff's Officers would largely address these concerns, especially if coupled with a requirement that all exercises of force comply with applicable provisions of the Victoria Police Manual (as recommended in relation to the use of force under a search warrant in Chapter 6).<sup>1979</sup> The Committee considers that such training should have both a practical and a legal focus so as to promote the exercise of the power in a way that is reasonable in the circumstances. The Committee suggests that the training should include procedures for dealing with vulnerable persons where identified.<sup>1980</sup> As the Committee also concluded in relation to search warrants, a mandatory requirement that the Sheriff seek police assistance would be inappropriate for operational and resource reasons.<sup>1981</sup>

The Committee notes that evidence taken by the subcommittee of the standing committee on legislation of the Western Australian Legislative Council<sup>1982</sup> revealed some concern about the need for appropriate consultation and training of bailiffs in relation to the new power of break and entry. Mr Peter Smith, a bailiff appearing as a witness at a meeting of the subcommittee, stated that despite the passage of the *Civil Judgements Enforcement Bill 2003*, the Western Australian Department of Justice had not addressed the issue of training or preparation with bailiffs in anticipation of the commencement of the legislation.<sup>1983</sup>

The Committee considers that in the event of a decision to introduce a power of forced entry for Victorian Sheriffs under a warrant to seize property, all practicable steps should be taken to provide adequate training and ensure the appropriate use of the power.

**Recommendation 137.** That any new legislation to introduce a power of forced entry under a warrant to seize property address the question of Sheriffs' training.

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<sup>1979</sup> See p 175 above.

<sup>1980</sup> As noted in Chapter 12, where the Committee discusses warrants for the protection of vulnerable people, the Committee defined vulnerable individuals in its *Warrant Powers and Procedures Discussion Paper* as persons who lack or may lack the capacity to care for themselves and suggested that children, young people and people with a mental or intellectual disability would fit within this definition.

<sup>1981</sup> See p 175 above.

<sup>1982</sup> That evidence was taken during the subcommittee's inquiry into the *Magistrates' Court Bill 2003*, *Magistrates' Court (Civil Proceedings) Bill 2003* and the *Courts Legislation Amendment and Repeal Bill 2003*, see: Standing Committee on Legislation of the Western Australia Legislative Council, *Report No 22*, (September 2004).

<sup>1983</sup> Standing Committee on Legislation of the Western Australia Legislative Council, Transcript of evidence taken at Perth Monday, 30 August 2004, 2, 4.

Recommendation 138. That any new legislation to introduce a power of forced entry contain a requirement that all exercises of force by the Sheriff comply with applicable provisions of the Victoria Police Manual.

The Committee believes that individual Sheriff's Officers, due to their training and experience (including any future training regarding a power of forced entry) would be best-placed to determine the appropriateness of making a forced entry in the circumstances of a particular case. The Western Australian legislative provision which authorises forced entry states that Sheriffs "may" exercise the power and therefore preserves a discretion for Sheriffs in that state not to make a forced entry where, in their judgement, it would be unsafe or unreasonable to do so. The Committee has also noted above that the power of forced entry is limited to police members in the Northern Territory. On balance, the Committee believes that an appropriate additional safeguard may be to ensure that Sheriffs in Victoria have a similar discretion as in Western Australia, subject to the requirement that they request police assistance in such cases.

Recommendation 139. That any new legislation to introduce a power of forced entry permit the Sheriff's Officer(s) responsible for effecting seizure to retain a discretion not to force entry if, in their judgement of the particular circumstances, it would be unsafe or unreasonable to do so. In such cases, the Sheriff should request police assistance.

### ***Mixed bag warrants***

A "mixed bag of warrants" was described by the Department of Justice as a situation where the Sheriff possesses both criminal and civil warrants for execution against the same person or at the same premises. As explained by the Department, where the Sheriff gains entry to a person's home under a criminal warrant, including by a forced entry, s/he remains unable to execute the civil warrant.

The issue of the execution of a "mixed bag of warrants" does present some difficulties and the Committee acknowledges the seeming inconsistency which it produces. However, the Committee considers that this is really a separate problem to the issue of whether there should be a power of forced entry under a warrant to seize property. It is the view of the Committee that the terms of a warrant must be applied strictly and that different execution regimes must be based on sound principles of fairness and proportionality. The Committee considers that while a power of forced entry under a warrant to seize property might remove the basis of this seeming inconsistency, it would not remove the need for the strict application of a mixed bag of civil and criminal warrants according to their individual terms.

## Rationalising the system for the enforcement of civil judgements

### *A single Act for the enforcement of civil judgements*

The Committee considers that perhaps the most significant safeguard associated with a power of forced entry is the centralisation of the civil judgement enforcement provisions in a single Act. Notably, this is a feature of the Australian and overseas jurisdictions in which the power has been introduced. The Committee considers that the location of all enforcement options in a single Act, together with a compulsory examination process, would enhance the effectiveness of the system and increase the choices available to both parties.

The Committee is concerned by reports of the treatment of judgement debtors, who are often unrepresented, "...as something of an afterthought to the efficient administration of enforcement applications".<sup>1984</sup> Moreover, the Committee does not consider that such concerns are likely to be significantly improved by the introduction of a power of forced entry alone. The Committee is also concerned by FCRC's claim that judgement creditors often use a warrant to seize property as an "instrument of harassment", rather than relying on an examination of the debtor's financial situation.<sup>1985</sup>

On the other hand, the Committee agrees with the observation of Mr Crawshaw (of the Department of Justice) that the law should not allow judgement debtors to prevent the Sheriff's Office from carrying out its "primary function" of enforcing a court order. The Committee also notes that the enforcement of civil judgements is ultimately a function of the court and that there are a range of court orders available for this purpose, which may be more or less suitable or effective in a given case. As noted above, those alternatives currently have two sources: the *Magistrates' Court Act 1989* (and the corresponding acts of the County and Supreme Courts) and the *Judgment Debt Recovery Act 1984*.

The Committee accepts the Law Institute of Victoria's argument that warrants remain the "preferred" means of enforcing civil judgements among creditors. However, the Committee notes that this is the preference of only one of the parties and that it is often unsatisfactory both for creditors and debtors in Victoria. The Committee is not convinced that a warrant to seize property would be the most effective means of enforcing a judgement debt in all cases, particularly where a judgement debtor lacks sufficient assets to realise even a small portion of the outstanding debt. The Committee considers that the *Judgment Debt Recovery Act 1984* was introduced in recognition of this.

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<sup>1984</sup> James Wilson, *Class Acts: Court 'Efficiency' Hits the Battlers*, Consumer Rights Journal, Vol. 3 No. 5 (July / August 1999), 1.

<sup>1985</sup> The potential for a warrant to seize property to be used as a tool of harassment is heightened by the capacity of judgement creditors to seek multiple warrants in relation to the same debt with additional legal costs for each application: *Fitzroy, Law Handbook*, 299.

However, the Committee also considers that the example provided by jurisdictions such as South Australia is a preferable model. In that state, there is a single piece of enforcement legislation, examination is central to enforcement and outcomes otherwise than by court judgement are significantly higher than in other states.

The Committee believes that the rationalisation of the system of civil judgement enforcement should therefore begin with the location of all court orders for the enforcement of judgement debts in a single Act, that is, by merging the remedies in the *Judgment Debt Recovery Act 1984* and the *Magistrates' Court Act 1989* into a new Act. The procedures for an examination of the judgement debtor of the kind recommended above should also be contained in such an Act.

Such legislation might best be introduced in the form of uniform civil procedures of the kind adopted in Queensland and NSW. For example, Chapter 19 of Queensland's *Uniform Civil Procedure Rules 1999* provides a single legislative source for that state's civil enforcement provisions, which includes "enforcement hearings" (similar to Victoria's oral examination under the *Judgment Debt Recovery Act 1984*) and the available enforcement methods, including instalment orders and warrants. Alternatively, the Committee considers that an Act dedicated to the enforcement of civil judgements, as in Western Australia's *Civil Judgements Enforcement Act 2004*, or South Australia's *Enforcement of Judgements Act 1991*, would also significantly rationalise the existing enforcement system.

Given the intrusive nature of warrants which authorise the sale and seizure of a judgement debtor's property, the Committee considers that if a power of forced entry is introduced it should occur as part of a scheme that promotes other enforcement options, particularly instalment orders and agreements, in preference to warrants. The Committee believes that the civil justice system should also place a strong emphasis on the use of arbitration and mediation, perhaps by expanding upon the existing provisions in Divisions 2 and 3A of Part 5 of the *Magistrates' Court Act 1989*.

Recommendation 140. That a power of forced entry in any new legislation only be introduced as part of a legislative scheme which rationalises the system of civil judgement enforcement by locating all existing court orders for enforcement in a single Act.

Recommendation 141. That the mechanism for the examination of judgement debtors in Recommendation 134 above also be located in the same Act.

Recommendation 142. That the Government consider introducing such a scheme as part of uniform civil procedures legislation, as adopted in Queensland and NSW.

Recommendation 143. That such a scheme include:

- (a) legislative provision for the increased use of existing enforcement alternatives to warrants to seize property: instalment orders, instalment agreements, attachment of earnings orders and attachment of debts orders;
- (b) legislative provision for the promotion of arbitration and mediation wherever possible and appropriate; and,
- (c) a legislative prohibition against judgement creditors being able to unreasonably seek multiple warrants in relation to the same debt.

### ***Issues relating to address details***

The Committee also received evidence in favour of rationalising the procedures relating to address details maintained by the Sheriff's Office. The Department of Justice provided evidence to the Committee that the Sheriff is often unable to execute a civil warrant because the address details are no longer current, even where the Sheriff Office's database records the subject's new address, for example because of the existence of a criminal warrant. This problem could be solved by adopting the first of the recommendations made by the FCRC, that is, making the Sheriff (rather than the plaintiff or judgement creditor) the party responsible for applying to the Court for a warrant to seize property. However, the Committee considers that allowing judgement creditors to request that the Sheriff make an application to the Court for amendment of the warrant on their behalf may be preferable. Such a procedure would largely preserve the existing roles of the judgement creditor and of the Sheriff while maintaining the privacy of judgement debtors.

Recommendation 144. That, where a warrant to seize property is returned unexecuted because the judgement creditor has been unable to determine the most recent address of the judgement debtor, the judgement creditor be empowered to request that the Sheriff reapply to the Court on their behalf if the Sheriff has a more recent address. Such a procedure should include provision for preserving the privacy of the judgement debtor's current address from the judgement creditor.

### ***A central enforcement body***

The Committee has also considered the system of civil judgement enforcement in Northern Ireland. Unlike most common law systems, judgements in Northern Ireland are enforced by a central body, the Enforcement of Judgements Office, which exercises

both administrative and judicial functions.<sup>1986</sup> The Enforcement of Judgements Office can make a range of enforcement orders, including instalment orders, attachment of earnings orders, seizure orders,<sup>1987</sup> orders charging land and attachment of debts orders. However, a crucial difference between the Northern Irish and common law systems of enforcement is that the former is non-adversarial, the Enforcement of Judgements Office determines the most appropriate means of enforcement, rather than the judgement creditor. An important feature of the enforcement process in Northern Ireland is the discovery of information about the debtor's financial and other circumstances prior to deciding the most appropriate means of recovery. Unlike common law systems, choosing the means of enforcement is not left to the discretion of the judgement creditor.

The adoption of the Northern Ireland model would allow consideration of the circumstances of the individual debtor when determining the most appropriate enforcement method and would remove the potential for warrants to seize property to be used punitively.<sup>1988</sup> For example, it might be decided in particular cases (such as in the examples provided by the Department of Justice and the Law Institute of Victoria) to deal with more affluent judgement debtors by means of a charging order over any shares, while judgement debtors of lesser means might be more appropriately dealt with by means of instalment orders or agreements.

The Committee considers that the creation of a centralised body for the enforcement of judgement debts, with judicial and administrative powers, may be a further option for improving Victoria's system of civil judgement enforcement. While the Enforcement of Judgements Office in Northern Ireland represents one model for the Government's consideration, other options might include expanded powers for the Enforcement Management Unit of the Victorian Department of Justice or the adoption of some of the features of the Northern Ireland Enforcement of Judgements Office "within a court supervised environment".<sup>1989</sup>

As Dr Andrew Cannon has noted, such a system would also ensure that only one set of recovery procedures is in force at any one time, resulting in savings for both debtors and creditors.<sup>1990</sup> Moreover,

The idea of managing a debtor so that more information about his or her position is available to potential claimants and judgement creditors has obvious advantages and no obvious disadvantages, except to the debtor's credit rating which is not an unfair inference. The idea of

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<sup>1986</sup> The Enforcement of Judgements Office was established in 1971 and has been administered by the Northern Ireland Court Service since 1979: website of the European Commission, at <http://europa.eu>.

<sup>1987</sup> The equivalent of a warrant to seize property in the Victorian Magistrates' Court.

<sup>1988</sup> For a more detailed discussion of the argument that the law and the courts effectively allow the punishment of debtors by treating them differently to other defendants, see *Wilson, Class Acts*, 7.

<sup>1989</sup> Dr Andrew Cannon, *Enforcing Civil Obligations in Lower Courts*, *AJJA Magistrates Conference* (September 2002), 12.

<sup>1990</sup> *Ibid.*

refusing to accept processes where existing information indicates they will be a waste of time would be controversial to creditors, but much wasted effort might be achieved by making the results of an investigation hearing available to all later creditors. Processes with no prospect of success could be discouraged by not allowing cost shifting against the debtor where it was obvious that the debtor had no prospect of payment.<sup>1991</sup>

The Committee concludes that the Government may wish to consider the utility of creating a central enforcement body along the lines of the agency that operates in the jurisdiction of Northern Ireland.

### ***Alternative methods of enforcement***

The Committee notes that there is some variety in the enforcement methods available in various jurisdictions. While this is a matter which is to some extent beyond the scope of the current terms of reference, the Committee believes that such alternatives should be the subject of future consultation and research regarding any new legislation to introduce a power of forced entry.

One example of an alternative enforcement measure that came to light during the Committee's research was the provision of creditworthiness information by the court to potential creditors. In South Australia, a record of court judgements is sold to a private credit referencing agency. A similar system operates in the United Kingdom.<sup>1992</sup> The Committee notes the need for such a procedure to be accompanied by appropriate privacy safeguards. However, since a significant volume of potentially defamatory credit reporting currently occurs outside the court system,<sup>1993</sup> a court-regulated system may promote higher privacy standards.

The Committee considers that such a measure has significant potential for increasing the effectiveness of civil enforcement, while simultaneously reducing the unnecessary use of warrants to seize property,

...once a proper measure of creditworthiness is established experience in the South Australian Magistrates' Court is that the threat of publishing a court judgement is a substantial sanction which could be used to the benefit of both creditors and debtors.

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<sup>1991</sup> Ibid, 12-13.

<sup>1992</sup> Ibid, 14.

<sup>1993</sup> Ibid.

With many defendants the threat of a judgement which will affect their credit rating is a greater threat than traditional enforcement procedures. This is especially the case with debtors who have no substantial assets against which the court can execute its processes.<sup>1994</sup>

The Committee is of the view that the Government should consider the enforcement options available in other jurisdictions in any new legislation to introduce a power of forced entry.

## Other aspects of law and procedure relating to civil warrants

The Committee received submissions and comments addressing various other aspects of the law and procedure of civil warrants. The Committee does not consider that it has received sufficient evidence to justify any specific recommendations in this area. The Committee invites the Government to consider these comments in the course of future reviews.

### ***Seizure and sale of land***

The submissions of both Andrew P. Melville, legal practitioner, and the Law Institute of Victoria recommended that section 111 of the *Magistrates' Court Act 1989* be amended to remove the restriction against a warrant to seize property being executed against real estate.<sup>1995</sup> This was also recommended by Mr White of the Law Institute of Victoria during the public hearings, who argued that the process of transferring an action to the Supreme Court to obtain a warrant against a judgement debtor's real estate was "cumbersome and unnecessary."<sup>1996</sup> On the other hand, the submission of the Department of Justice did not describe this process as problematic and did not recommend such amendment.<sup>1997</sup> The Committee considers that its recommendations for the creation of a single warrant to seize property and for a single Act for the enforcement of civil judgements would largely address this issue. It is the Committee's view, however,

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<sup>1994</sup> Ibid, 14-15.

<sup>1995</sup> Andrew P. Melville, Legal Practitioners, *Submission no. 1*, 1-2; Law Institute of Victoria, *Submission no.5*, 2-4.

<sup>1996</sup> Rob White, Law Institute of Victoria, *Minutes of Evidence, 20 October 2004*, 284.

The process for obtaining a warrant against real estate following a Magistrates' Court decision was outlined by Mr White as follows: a warrant issued by the Magistrates' Court must be returned to the Court following an unsuccessful attempt by the Sheriff to enforce the warrant against personal property (incurring Court filing fees and Sheriff's fees). The judgement creditor must then apply for a certificate under section 112 of the *Magistrates' Court Act 1989* (incurring further filing fees) before applying for a warrant for seizure and sale in the Supreme Court, for which there is a further fee. The judgement creditor is then at the same point as if s/he had obtained the original judgement in the Supreme Court.

<sup>1997</sup> Department of Justice Victoria, *Submission no. 38*, 6-7.

that any change would need to occur in a way which, as noted by Mr Sullivan of the West Heidelberg Community Legal Centre, would prevent a creditor with a “\$600 judgement debt in the Magistrates’ Court immediately going after somebody’s real estate”.<sup>1998</sup>

### **Seizure and sale of shares**

The submission from Aitken Walker and Strachan, solicitors, noted that while a warrant to seize property issued in the Magistrates’ Court includes the power to seize shares and other types of securities, the use of technology to transfer share ownership has effectively left the Sheriff powerless to seize such forms of property.<sup>1999</sup> The submission also argues that a similarly complicated and time-consuming process to that for obtaining a warrant to seize real estate applies in relation to creating a charge over the judgement debtor’s interest in shares (i.e. by means of a Supreme Court Certificate following the return of an unsatisfied warrant issued in the Magistrates’ Court).<sup>2000</sup> While the Committee is unable to address this issue in detail, it notes that its recommendations regarding the creation of a single warrant and the rationalisation of the civil judgement enforcement system would go some way towards addressing this problem.

### **Property exempt from seizure under the bankruptcy provisions and disputes about the value of the debtor’s property**

The Law Institute of Victoria noted in its written submission that there is currently no mechanism for either the judgement creditor or judgement debtor to challenge the Sheriff’s decision that property is or is not exempt under section 42 of the *Supreme Court Act 1986*.<sup>2001</sup>

Mr White of the Law Institute of Victoria, stated that the Sheriff can be sued in trespass if s/he seizes property which a court later determines was exempt under the bankruptcy provisions. Mr White suggested that such proceedings were not the best way to determine what household property should be exempt from seizure and proposed that an aggrieved debtor should instead be able to bring a court action similar to an interpleader summons for the court to determine whether a particular item should be exempt.<sup>2002</sup>

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<sup>1998</sup> Gary Sullivan, West Heidelberg Community Legal Centre, *Minutes of Evidence, 20 October 2004*, 254.

<sup>1999</sup> Aitken Walker and Strachan, solicitors, *Submission no. 22*, 2.

<sup>2000</sup> *Ibid.*

<sup>2001</sup> Law Institute Victoria, *Submission no. 5*, 4-5.

<sup>2002</sup> Rob White, Law Institute of Victoria, *Minutes of Evidence, 20 October 2004*, 285-286.

Mr Sullivan of the West Heidelberg Community Legal Centre responded to the suggested introduction of “quasi-interpleader proceedings” where there is a dispute between the creditor and the Sheriff about the value of a debtor’s property.<sup>2003</sup> Mr Sullivan stated that such proceedings would be of little use to debtors who, he argued, should also not have to bear the cost of such proceedings. Mr Sullivan argued that any inquiry into the value of the debtor’s property should take place between the Sheriff and the creditor.<sup>2004</sup> The Committee agrees with that proposition and notes the greater potential for the Sheriff to undertake such inquiries within a centralised judgement enforcement body or by expanding the powers of the Enforcement Management Unit of the Department of Justice.

### ***Duration of warrant and information provided to the debtor***

Victoria Legal Aid’s written submission also proposed that in order to better inform debtors about the powers of the Sheriff:

- civil warrants should specify a return date of three to six months;
- legislation should specify the priority and time frame for the execution of warrants; and
- Sheriffs should be required to give debtors appropriate information about their rights, options and potential consequences at each stage of the process.<sup>2005</sup>

The Committee suggests that the Government consider these matters during consultation and research into any new legislation to introduce a power of forced entry.

### ***Definitions and the rules of priority where there are multiple debtors***

Mr Crawshaw of the Department of Justice stated during the public hearings that there is no legislative definition of the execution of a warrant, despite the existence of provisions which extinguish the rights of certain people after a warrant has been executed.<sup>2006</sup> Mr Crawshaw noted that there is no definition of the lodgement of a warrant with the Sheriff’s Office and that this poses problems when someone lodges a warrant but does not pay the fee prior to the lodgement of a warrant by another party against the same judgement debtor. In this case, it is not clear as to who has priority.<sup>2007</sup>

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<sup>2003</sup> Gary Sullivan, West Heidelberg Community Legal Centre, *Minutes of Evidence*, 20 October 2004, 254.

<sup>2004</sup> Ibid.

<sup>2005</sup> Victoria Legal Aid, *Submission no. 215*, 8.

<sup>2006</sup> Andrew Crawshaw, Department of Justice Victoria, *Minutes of Evidence*, 5 November 2004, 321.

<sup>2007</sup> Ibid.

The Law Institute of Victoria highlighted a further concern that where several warrants are issued against a single judgement debtor, the Sheriff must apply any amounts recovered in the same priority in which the warrants were lodged. The Law Institute of Victoria noted that the same priority applies even when a creditor with an earlier warrant decides not to challenge a claim by a third party and the costs of successfully doing so are borne by a creditor with a later warrant. The Law Institute of Victoria recommended that in such circumstances, the judgement creditor who accepts the risk of challenging the third party claim should be entitled to priority.<sup>2008</sup> This recommendation was also made by Mr White during the public hearing.<sup>2009</sup>

Mr Crawshaw also expressed concern that the priority rules are disrupted in favour of the Crown so that if the Crown obtains a later warrant, it is placed at the top of the queue which can result in non-Crown warrants having to be repeatedly executed.<sup>2010</sup>

The Committee suggests that the Government consider these matters during consultation and research into any new legislation to introduce a power of forced entry.

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<sup>2008</sup> Law Institute Victoria, *Submission no. 5*, 6-7.

<sup>2009</sup> Rob White, Law Institute of Victoria, *Minutes of Evidence*, 20 October 2004, 286.

<sup>2010</sup> Andrew Crawshaw, Department of Justice Victoria, *Minutes of Evidence*, 5 November 2004, 320.



# CHAPTER TWELVE - WARRANTS FOR THE PROTECTION OF VULNERABLE PEOPLE

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## Introduction

In the early stages of the inquiry, the Committee received evidence about warrants and warrant-like orders issued under three pieces of legislation whose purpose is to protect the welfare of vulnerable members of the community: the *Mental Health Act 1986*; the *Children and Young Persons Act 1989*; and the *Guardianship and Administration Act 1986*. In its Discussion Paper, the Committee defined vulnerable individuals as being any person who lacks or may lack the capacity to care for themselves, and suggested that children, young people and people with a mental or intellectual disability would fit within its definition. The Committee invited comments on the three pieces of legislation it had been referred to and on any other relevant matters.

In this chapter, the Committee considers:

- warrant and warrant-like powers contained in the *Mental Health Act 1986* and the execution of warrants against individuals with mental illness;
- warrants issued under the safe custody provisions of the *Children and Young Persons Act 1989*;
- warrant-like provisions of the *Guardianship and Administration Act 1986*;
- warrants issued under the *Alcoholics and Drug-dependent Persons Act 1968*, which the Department of Human Services brought to the Committee's attention.

## Warrants and mental health

The Committee received submissions about the way in which warrants and warrant-like powers were exercised in relation to people apparently or actually suffering from mental illness. Stakeholders' comments related both to general warrant powers that the Committee has reviewed throughout this report and to specific provisions in the *Mental Health Act 1986* that authorise entry by force and apprehension of eligible individuals. After outlining the latter powers, the Committee examines the evidence it received.

## **Special warrants**

The *Mental Health Act 1986* contains one warrant power, known as a special warrant. If a police member or any other person believes on reasonable grounds that a person who appears to be mentally ill is because of mental illness incapable of caring for herself or himself, a magistrate may direct police and a medical practitioner to visit and examine such a person. The warrant authorises entry into premises and the use of such force as is reasonably necessary to enable the practitioner to conduct the examination.<sup>2011</sup>

The Department of Human Services (DHS) told the Committee that:

This power is rarely used, but it provides a useful option when mental health staff are unable to contact a person in their home and have fears for their safety. Section 11 includes a significant safeguard in that it requires the police to be accompanied by a registered medical practitioner. The purpose of the provision is to enable the medical practitioner to examine the person with a view to making a recommendation for involuntary admission under section 9 of the Act.<sup>2012</sup>

As these warrants authorise entry to premises and the use of force, the Committee believes that they should conform to relevant recommendations in Chapters Three to Seven of this report. The Committee did not receive any evidence on this aspect of these warrant powers. It notes, however, that as their purpose is to protect individuals who are subject to them, rather than to investigate any illegal activity,<sup>2013</sup> they may be appropriately regarded as the sorts of exceptions to its recommendations that the Committee contemplates in Chapters Three to Seven.

## **Warrant-like powers**

Three warrant-like powers under the Act are relevant to this inquiry. Section 9B authorises prescribed persons, who include police members, to transport certain individuals to an approved mental health service. To do so, prescribed persons may enter any premises in which they have reasonable grounds for believing that the individual may be found and, if necessary to enable the individual to be taken safely, to use such restraint as may be reasonably necessary.

During the Inspector's Powers Inquiry, DHS stated that in practice it is "extremely rare" to resort to forced entry and that all other options for access (such as negotiation and contacting family) are pursued first.<sup>2014</sup>

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<sup>2011</sup> *Mental Health Act 1986* s 11.

<sup>2012</sup> Department of Human Services, *Submission no. 19*, 14.

<sup>2013</sup> Department of Human Services, *Submission no. 33 to the Inspectors' Powers Inquiry*, 9.

<sup>2014</sup> Department of Human Services, *Submission no. 33 to the Inspectors' Powers Inquiry*, 74.

The second warrant-like power concerns the treatment of individuals with mental illness. The Act provides for case management of some such individuals as outpatients, via a community treatment order (CTO).<sup>2015</sup> A CTO may be revoked if the authorised psychiatrist is satisfied on reasonable grounds that: treatment cannot be obtained under it, or that it has not been complied with, reasonable steps have been taken unsuccessfully to ensure compliance and the non-compliance will result in a significant risk of deterioration in the person's mental or physical condition.<sup>2016</sup> Patients who are subject to a revoked CTO are deemed to be absent without leave and must return to the approved mental health service as an inpatient. The authorised psychiatrist must make reasonable efforts to contact the person and inform them about the revocation.<sup>2017</sup> If the person does not return voluntarily, they may be apprehended by a prescribed person under section 43 of the Act.

DHS explained some of the procedures for apprehension under section 43:

decisions about the apprehension and return of [such] patients who are absent without leave will depend on the circumstances and will take into account the clinical needs of the person and an assessment of any risk the person might pose. Crisis Assessment and Treatment (CAT) services are usually involved in providing treatment and care in urgent situations. Police assistance may be required where entry to premises is necessary and where family, friends, mental health staff or ambulance officers cannot provide transport alone, due to the risk of harm to the client or others.<sup>2018</sup>

The third relevant power under the *Mental Health Act 1986* may only be exercised by police members. Section 10 of the Act authorises them to apprehend a person who appears to be mentally ill if the member of the police force has reasonable grounds for believing that the person has harmed him or herself or others, or that the person is likely to do so. The police member is not required to exercise any clinical judgement as to whether a person is mentally ill. The power of apprehension may be exercised if the person appears to the police member to be mentally ill, based on the behaviour and appearance of the person. In apprehending a person, the police member may enter any premises and use reasonably necessary force.

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<sup>2015</sup> *Mental Health Act 1986* s 14.

<sup>2016</sup> *Mental Health Act 1986* s 14D.

<sup>2017</sup> *Mental Health Act 1986* s 14D(3).

<sup>2018</sup> Department of Human Services, *Submission no. 19*, 13-14. CAT teams “operate 24 hours a day and provide urgent community-based assessment and short-term treatment interventions to people in psychiatric crisis. CAT services have a key role in deciding the most appropriate treatment option and in screening all potential inpatient admissions. CAT services provide intensive community treatment and support, often in the person’s own home, during the acute phase of illness as an alternative to hospitalisation. CAT services also provide a service to designated hospital emergency departments through an onsite presence”: Department of Human Services, *Victoria’s Mental Health Services, Adult specialist mental health services (16 - 64 years)*, at [www.health.vic.gov.au](http://www.health.vic.gov.au).

## Evidence received by the Committee

The Mental Illness Fellowship of Victoria (MIFV)<sup>2019</sup> stressed the importance of appropriately modifying relevant processes in cases of mental illness. It argued that the exercise of warrant and warrant-like powers should reflect an understanding of the consequences of mental illness and the needs of sufferers and suggested that three conditions should be satisfied when dealing with people with mental illness:

- the person must have the capacity to understand the meaning of the warrant or procedure and the consequences that follow;
- if no such capacity exists, a health authority and an independent third person ought to be part of the execution process to safeguard the rights and safety of the person;
- the consequences imposed as a result of the procedure ought to take account of the person's capacity to understand.<sup>2020</sup>

Stakeholders' specific comments focused on the procedures used by the CAT teams and Victoria Police to exercise powers under sections 9, 10, 11 and 43 of the *Mental Health Act 1986*. MIFV praised the work of personnel from both agencies:

We get calls from family members saying that the best thing that happened in their lives is coming in contact with the CAT team, that it has been a marvellous experience and had that not happened they do not know where they might be.<sup>2021</sup>

[T]he police's role...is often spoken of positively...<sup>2022</sup>

[Our clients] say the police were absolutely marvellous; they were truly fantastic.<sup>2023</sup>

However, other evidence highlighted concerns about the presence of appropriate personnel, specifically CAT teams, during the exercise of the powers referred to above and police interaction with people with mental illness.<sup>2024</sup>

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<sup>2019</sup> The Fellowship is one of the State's leading mental illness organisations. It works with people with mental illnesses, their families and communities to complement treatments delivered by health professionals, conducts research into the impact of mental illness and advocates for reform: Mental Illness Fellowship Victoria, *About us*, at [www.mifellowship.org](http://www.mifellowship.org).

<sup>2020</sup> Mental Illness Fellowship Victoria, *Submission no. 18*, 1.

<sup>2021</sup> Elizabeth Crowther, Mental Illness Fellowship of Victoria, *Minutes of Evidence*, 19 October 2004, 206.

<sup>2022</sup> Mental Illness Fellowship Victoria, *Submission no. 18*, 4.

<sup>2023</sup> Elizabeth Crowther, Mental Illness Fellowship of Victoria, *Minutes of Evidence*, 19 October 2004, 207.

<sup>2024</sup> Mental Health Legal Centre, *Preliminary submission*.

## **Evidence about the presence of appropriate personnel**

### **Procedures and principles**

DHS stated that decisions about the apprehension and return of individuals subject to a revoked CTO “will take into account the clinical needs of the person and an assessment of any risk the person might pose. CAT services are usually involved in providing treatment and care in urgent situations”.<sup>2025</sup>

In general, where there is a need for forced entry, or a risk of harm, police assistance may be required, including to provide transport. The Department’s Mental Health Branch and Victoria Police have agreed to a protocol that provides that transport for people with mental illness should be by “the least restrictive means possible and in a manner that ensures the safety of the person and others, and minimises interference with the person’s privacy, dignity and self-respect”.<sup>2026</sup>

The protocol governs other aspects of the interaction of Victoria Police and mental health services in relation to individuals with mental illness, based on the principle that:

people with a mental illness should receive the best possible care in the least restrictive and least intrusive manner, and in providing for their care, and the protection of members of the public, any restrictions on their rights, privacy and dignity are kept to the minimum necessary in the circumstance.<sup>2027</sup>

The protocol recognises the complementary roles of Victoria Police and mental health professionals:

mental health services are responsible for providing treatment and care of people with a mental illness and providing consultation and advice about matters relating to mental illness, and police are responsible for the protection of the community and have responsibility for managing situations which involve a threat to public safety.<sup>2028</sup>

It also establishes that:

The primary responsibility for the assessment and treatment of people with a known or suspected mental illness ultimately rests with health and mental health professionals. However, police personnel are often involved in situations where they come into contact with a person they suspect

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<sup>2025</sup> Department of Human Services, *Submission no. 19*, 13-14.

<sup>2026</sup> Mental Health Branch, State of Victoria, Department of Human Services, *Protocol between Victoria Police and the Department of Human Services Mental Health Branch (2004) (DHS - Victoria Police protocol)*, Part 4: Transport of people requiring admission to a psychiatric inpatient service.

<sup>2027</sup> *DHS - Victoria Police protocol*, Introduction.

<sup>2028</sup> *Ibid.*

or know has a mental illness, and where they may require assistance from mental health services.<sup>2029</sup>

CAT teams are not required to be present during the exercise of the powers at issue here. In particular, in relation to urgent requests from Victoria Police for assistance from a CAT team:

although CAT/ Triage services will always give top priority to urgent referrals from police, they are not an emergency service and can only provide assistance as soon as practicable.<sup>2030</sup>

In cases where mental health service staff decide that a mental health response is inappropriate:

the service is responsible for providing advice to the police on the most appropriate course of action, or for directly linking the person with a more appropriate service.<sup>2031</sup>

## Stakeholder comments

Commenting in general on the relationship between Victoria Police and CAT Teams and their roles under the Act, MIFV stated that:

Clients of our service consistently report inconsistencies in processes. When someone rings the CAT Team because another is in need of mental health treatment, if there is any suggestion of potential violence (and there are very few instances where there is not, because these calls are made in crisis times where issues have come to a head) then often CAT Teams will insist on police presence.<sup>2032</sup>

MFIV argued that its consultations, including with CAT team staff, indicated that:

where somebody has a mental illness and needs to be contained under the act or assessed, that it is the responsibility of the police to bring that person in. There is a developing response that police do that front-line work rather than the skilled CAT team personnel.<sup>2033</sup>

The Victorian Mental Illness Awareness Council (VMIAC) echoed those comments. It referred to anecdotal evidence from police members that “in many instances they are unnecessarily called and that they are doing the jobs of the CAT team”.<sup>2034</sup> Similarly

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<sup>2029</sup> DHS - Victoria Police protocol, Part 2: Interactions between police and mental health.

<sup>2030</sup> Ibid.

<sup>2031</sup> Ibid.

<sup>2032</sup> Mental Illness Fellowship Victoria, *Submission no. 18*, 4.

<sup>2033</sup> Elizabeth Crowther, Mental Illness Fellowship of Victoria, *Minutes of Evidence*, 19 October 2004, 207.

<sup>2034</sup> Isabel Collins, Victorian Mental Illness Awareness Council, *Minutes of Evidence*, 19 October 2004, 208.

anecdotal information from CAT team members was said to indicate that staff shortages contributed to this situation.<sup>2035</sup>

The Mental Health Legal Centre (MHLC) was also concerned about practices relating to police involvement in mental health issues. In its preliminary submission, it argued that the CAT team relies on the police too often, without a considered and realistic evaluation of the potential threat that the individual poses.<sup>2036</sup>

MHLC and MIFV argued that people trained in managing mental illness should be present when these powers are being exercised, both to enhance the police's efforts to minimise the potential for conflict and to reduce the perceived stigmatisation that is said to be a consequence of police apprehending individuals with mental illness.<sup>2037</sup>

The potential importance of such a presence was underlined by evidence presented to the Committee about a crisis situation involving Victoria Police and an individual with mental illness. Mark Kaufman was shot and killed by Victoria Police in an incident at which a CAT team was not present. While it is unclear whether this incident involved powers that are a part of this inquiry,<sup>2038</sup> the Committee believes that it is relevant because of the interaction between Victoria Police and the CAT team.

In August 2005, the State Coroner published the report of his investigation into the death.<sup>2039</sup> In it he noted that:

- the CAT team designated to cover the geographical area in which the incident occurred was unavailable to attend;
- other CAT teams were not contacted; and
- health professionals felt that the attendance of a CAT team would not have made any substantial contribution to resolving the incident differently.<sup>2040</sup> Some police who attended the incident felt that a CAT team would have been of assistance.<sup>2041</sup> The

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<sup>2035</sup> Ibid.

<sup>2036</sup> Mental Health Legal Centre, *Preliminary submission*.

<sup>2037</sup> Mental Health Legal Centre, *Preliminary submission*; Elizabeth Crowther, Mental Illness Fellowship of Victoria, *Minutes of Evidence, 19 October 2004*, 206.

<sup>2038</sup> Victoria Police could have acted under section 10 of the *Mental Health Act 1986* to apprehend Mr. Kaufman given his history of mental illness and his appearance and behaviour during the incident. Mr. Kaufman's assaults on his parents and threatening behaviour appear to provide an alternative basis for the police action.

<sup>2039</sup> Mark Kaufman (Coroner's Case No. 201/02), 25-27.

<sup>2040</sup> This view was proffered by Professor Nicholas Keks, director of psychiatry at the hospital where Mr. Kaufman had been treated. During the incident, Victoria Police was advised that a CAT team would attend a hospital or police cell after Mr. Kaufman had been taken into custody: Mark Kaufman (Coroner's Case No. 201/02), 8.

<sup>2041</sup> Mark Kaufman (Coroner's Case No. 201/02), 25-27, 32.

Coroner concluded that it was “speculation as to whether or not attendance of a mental health professional would have assisted or altered the outcome”.<sup>2042</sup>

The Coroner also received evidence that there is no research on the benefits or otherwise of CAT team attendance at incidents where police are managing individuals with mental illness. In his report, he suggested that that may need to be addressed.<sup>2043</sup> He recommended that Victoria Police, assisted by the Chief Psychiatrist and an appropriate medical school, “consider research into the benefits and/or barriers of CAT Team attendance at incident scenes involving mentally ill individuals, in order to help police with management”.<sup>2044</sup> Victoria Police had not responded substantively to the Coroner’s recommendations at the time the present report was completed.

Victoria Police also commented on its involvement in mental health cases. It stated that it would prefer not to be involved “at all” in the execution of warrants under the *Mental Health Act 1986* but that it remained the most appropriate agency in certain circumstances:

Essentially we are called on to do so because our members have certain skills, and we do that on the basis of giving assistance. We give any assistance we can to the CAT teams and to any other medical professional who requires police assistance. ...

The reality of the community in Victoria and around Australia and in other Western countries is that medical professionals need police assistance.<sup>2045</sup>

Similarly, in places where there is no CAT team, such as rural areas, the police reportedly take on the role.<sup>2046</sup>

Victoria Police acknowledged that its involvement with mental health and people who are mentally ill has had negative consequences:

[it] has caused a lot of grief in recent times for every member of the community, including the police and their families, neighbours and passers-by. It is a difficult issue that the community has to come to terms with.<sup>2047</sup>

## Reforms proposed by stakeholders

Stakeholders felt that people with professional experience and training in dealing with mental illness should be present when warrant and warrant like powers are exercised.

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<sup>2042</sup> Mark Kaufman (Coroner’s Case No. 201/02), 29.

<sup>2043</sup> Mark Kaufman (Coroner’s Case No. 201/02), 35.

<sup>2044</sup> Mark Kaufman (Coroner’s Case No. 201/02), 36.

<sup>2045</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence, 20 October 2004*, 220-221.

<sup>2046</sup> Isabel Collins, Victorian Mental Illness Awareness Council, *Minutes of Evidence, 19 October 2004*, 211.

<sup>2047</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence, 20 October 2004*, 221.

MIFV made a number of suggestions to the Committee about how to improve coordination between the CAT teams and Victoria Police. It argued that:

- police procedures relating to powers under sections 9B, 11 and 43 of the Act should be modified to require the presence of a CAT team as a precondition for the exercise of the powers;<sup>2048</sup>
- in situations where a CAT team has requested police assistance, a CAT team must also attend the incident; and
- where a team does not attend, Victoria Police is required to produce a report considering whether it was necessary for it to attend the incident and whether the situation could have been better dealt with by a CAT team.<sup>2049</sup>

VMIAC agreed with these suggestions. MHLC also argued that mental health specialists should attend incidents with police.<sup>2050</sup>

Also relevant is the Coroner's conclusion in his report on the death of Mark Kaufman that:

attendance by a CAT team at these type of incidents (provided the teams' occupational health and safety issues are managed) has potential to assist by providing a degree of expert back-up or alternative advice for Police. Whilst Police are expected to respond to a range of incidents involving the mentally ill and manage a variety of difficult and challenging situations, they are not experts in dealing with the mentally ill...<sup>2051</sup>

The Coroner recommended that efforts should continue to improve:

emergency communication, advice, timely response and other assistance by professionals within the mental health sector (especially CAT teams) in order to assist police in managing an incident involving an individual who may have mental health or behavioural issues.<sup>2052</sup>

The Coroner also recommended that emergency response by CAT teams should specifically be examined.

In its evidence to the Committee, Victoria Police stated that:

we are working very hard and have worked very hard trying to reduce the detrimental effects of police involvement in health issues as well as trying to complement the good work that the CAT teams do, and Victoria Police is very supportive of the role they play.<sup>2053</sup>

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<sup>2048</sup> Mental Illness Fellowship Victoria, *Submission no. 18*, 4.

<sup>2049</sup> Elizabeth Crowther, Mental Illness Fellowship of Victoria, *Minutes of Evidence*, 19 October 2004, 206.

<sup>2050</sup> Mental Health Legal Centre, *Preliminary submission*.

<sup>2051</sup> Mark Kaufman (Coroner's Case No. 201/02), 35.

<sup>2052</sup> Mark Kaufman (Coroner's Case No. 201/02), 36.

One example of such efforts is the establishment of local area committees by Victoria Police and mental health services. As a result, the agencies meet regularly to discuss and attempt to resolve issues of concern.<sup>2054</sup>

## Discussion and conclusions

The Committee recognises that the conduct of apprehension, search and other coercive actions in the context of mental illness is particularly challenging because of the intersection of imperatives of health and law enforcement and the limited resources available in both fields. Clearly a police presence is essential in certain cases to protect the safety of an individual with mental illness and to support personnel and the community as a whole. The question is whether a CAT team should also attend such incidents. The Committee believes that in principle it should, because of team members' relatively greater expertise and experience in dealing with mental health issues. However, such an outcome appears to be financially unrealistic.<sup>2055</sup> The Committee considers that a more detailed assessment of the context in which CAT teams operate and their capabilities was beyond the scope of this inquiry and therefore makes no further comment on that aspect of the exercise of warrant and warrant-like powers in relation to people with mental illness.

## **Evidence about police interaction with individuals with mental illness**

The second theme of the evidence received by the Committee concerned the way in which Victoria Police personnel interact with individuals with mental illness. In its preliminary submission, MHLC suggested that police involvement in the exercise of warrant and warrant-like powers against individuals with mental illness can increase tension and trauma for them due to police practices that are felt to place insufficient emphasis on conflict avoidance.<sup>2056</sup>

MIFV echoed these comments, arguing that Victoria Police's approach to mental health issues appeared to be inconsistent. While, as noted, some clients were very satisfied with police involvement:

[a]t times, the ... requirement under the Victoria Police ethical guidelines to prioritise conflict avoidance is not adhered to. Resistance by the subject of the warrant is too easily interpreted as

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<sup>2053</sup> Acting Superintendent Stephen Leane, Victoria Police, *Minutes of Evidence, 20 October 2004*, 221.

<sup>2054</sup> Department of Human Services, *Submission no. 19*, 15.

<sup>2055</sup> The Federal Government and New South Wales have made various efforts and proposals to make appropriately skilled mental health professionals available 24 hours a day 365 days a year. The policies, programs and results are explored in Springvale Monash Legal Service, *Police training and mental illness – a time for change (Springvale, Police Training)*, 22-26.

<sup>2056</sup> Mental Health Legal Centre, *Preliminary submission*.

aggressive and violence-threatening behavior rather than behavior symptomatic of mental illness. Inappropriate response to this by police too often escalates the situation, heightening the fear of the person and provoking further resistance.<sup>2057</sup>

In its submission, Victoria Police rejected the suggestion “that the role police play in assisting the CAT teams is counterproductive”.<sup>2058</sup> Interestingly, that comment appeared to be limited to interactions with CAT teams. However, the submission also stated the general point, which the Committee has already noted, that Victoria Police would be happy not to be involved in mental health issues:

Unfortunately, until another 24 hour, 7 day a week, 365 day a year response service can be established it appears that Victoria Police will continue to be required to perform this community service.<sup>2059</sup>

The underlying issue here is the quality of the training provided to police members. The Committee first outlines information it received about such training and then considers stakeholder’ comments.

## Training

DHS told the Committee that its Mental Health Branch supports training of Victoria Police members. The current training program is provided by Northwestern Mental Health Program and comprises five components: pre-operational training for all trainee recruits, undertaken at the Police Academy; further training for all new constables after commencing operational duties; Operational Safety Tactics Training (OSTT); mental health aspects of sexual offences and child abuse training course; and specific sessions for protective services officers.<sup>2060</sup>

“In broad terms” that training covers: the *Mental Health Act 1986* and other legislation; the mental health service system and how to access it; responding to self harm; manifestations of mental illness and how to respond; and communication skills.<sup>2061</sup>

OSTT was developed in the mid-1990s as the main component of Project Beacon, Victoria Police’s reform of its approach to operational safety. Reform occurred in response to a number of reviews of the relatively high incidence of police shootings in Victoria. The Assistant Commissioner responsible for Project Beacon described the key features of OSTT as being to provide options for non-violent resolution of incidents. Specifically, training balances communication and conflict resolution with firearms and defensive tactics and provides police with “a much greater awareness of other

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<sup>2057</sup> Mental Illness Fellowship Victoria, *Submission no. 18*, 4.

<sup>2058</sup> Victoria Police, *Submission no. 25*, 19.

<sup>2059</sup> *Ibid.*

<sup>2060</sup> Department of Human Services, *Submission no. 19*, 15.

<sup>2061</sup> *Ibid.*

organisations whose activities can assist police in successfully resolving incidents involving the mentally ill".<sup>2062</sup> DHS' predecessor and a consultant psychologist were involved in developing aspects of the training.

During the inquiry, the Springvale Monash Legal Service (SMLS) released its report *Police Training and Mental Illness* and submitted it to the Committee. Based on conversations with Victoria Police trainers, SMLS stated that OSTT is mandatory every six months for all operational police and covers issues that include negotiation and communications skills. It includes the following specific elements on dealing with individuals with mental illness:

140 minutes of instructional contact per recruit regarding the Mental Health Act... [including] dealing with intellectual disability, the requirements to call independent third persons, involuntary admissions to treatment facilities and transport and certification of individuals suffering from a mental illness.

This theory training is supplemented by 80 minutes of additional interaction with a worker from Midwest Area Mental Health Services, which covers dealing with persons suffering mental illness and is primarily designed to provide constables with an appreciation of, and dispel myths about, schizophrenia, bipolar disorders and other mental illnesses.<sup>2063</sup>

The report noted that similar ongoing training is provided for probationary constables.

MIFV is also involved in delivering training to improve police members' awareness of mental health issues and their impact.<sup>2064</sup>

Additional guidance for police is provided in the Victoria Police Manual and the protocol between Victoria Police and DHS. The Manual includes an instruction titled "Mentally ill persons", which begins with the following policy statement:

Police have a responsibility to ensure the safety and welfare of any person in their custody or whom they may come in contact with during their duty. This includes obtaining appropriate advice and treatment for persons whom they believe may be suffering from a mental illness.<sup>2065</sup>

Other relevant parts of the instruction provide indicators of mental illness and outline procedures for initiating CAT team assessments, complying with obligations and exercising powers under the *Mental Health Act 1986*.

The Committee has already discussed the joint agency protocol. DHS told the Committee that the protocol is distributed widely.<sup>2066</sup>

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<sup>2062</sup> Ray Shuey, *Victoria police project beacon*, *Mental Health in Australia* (July and December 1995), 13, 14.

<sup>2063</sup> *Springvale, Police Training*, 20, reporting a conversation with a Victoria Police training instructor, 21 June 2004.

<sup>2064</sup> Mental Illness Fellowship Victoria, *Submission no. 18*, 4; Elizabeth Crowther, *Mental Illness Fellowship of Victoria, Minutes of Evidence*, 19 October 2004, 207.

<sup>2065</sup> Victoria Police Manual, *VPM Instruction 103-8, Mentally ill persons*, updated 8 June 2004.

## Stakeholder comments

MFIV considered that police training on mental health issues was inadequate, specifically that it was focused more on containment than understanding how mental illness might impact on a sufferer's actions towards the police:

The ability both to recognise and to understand the consequences of symptoms of psychosis are necessary to deal appropriately with people with mental illness. The mere presence of uniformed police will often trigger fear and panic in a person experiencing mental illness.<sup>2067</sup>

[S]ome of the training needs to be focused on understanding. What that means for somebody who is unwell and who has a psychotic illness ... is if somebody has voices in their head, that person's response is perfectly understandable if you understand what is in their head, and with just that small amount of knowledge it actually changes the police approach to that person, which often has a much better result than straight containment.<sup>2068</sup>

As noted, the training provided by MIFV sought to address this concern. MIFV indicated that the training had been valued by police members.<sup>2069</sup>

The SMLS report also argued that training has a limited purpose:

[o]verall, it becomes evident that although some minimal training is provided in regard to working with individuals suffering from a mental illness, its focus is on making police officers conscious that mental illnesses exist in the community, that they are prevalent and that they might encounter them in their duties. However, it does not provide police with any specific training to adequately negotiate with individuals suffering from a mental illness or to assist them by any other behavioural means.<sup>2070</sup>

In his report on the death of Mark Kaufman, the State Coroner similarly noted that police training in this area is limited.<sup>2071</sup> His comment that the protocol between DHS and Victoria Police pertains to complex issues that many police members would face regularly implicitly emphasises the importance of ensuring that training provides police with appropriate techniques to deal with individuals with mental illness. It has also been suggested that some operational police may not be aware of the contents of the protocol.<sup>2072</sup>

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<sup>2066</sup> Department of Human Services, *Submission no. 19*, 15.

<sup>2067</sup> Mental Illness Fellowship Victoria, *Submission no. 18*, 4.

<sup>2068</sup> Elizabeth Crowther, Mental Illness Fellowship of Victoria, *Minutes of Evidence, 19 October 2004*, 207.

<sup>2069</sup> Elizabeth Crowther, Mental Illness Fellowship of Victoria, *Minutes of Evidence, 19 October 2004*, 207; Mental Illness Fellowship of Victoria, *Submission no. 18*, 4.

<sup>2070</sup> *Springvale, Police Training*, 20.

<sup>2071</sup> Mark Kaufman (Coroner's Case No. 201/02), 35.

<sup>2072</sup> David Kaufman, *Minutes of Evidence, 28 January 2005*, 342; Mark Kaufman (Coroner's Case No. 201/02), 33.

Finally, the Committee heard of anecdotal evidence that individual police members consider that the training that they undertake does not provide them with sufficient skills to deal appropriately with individuals with mental illness:

those police members that we have seen say to us, 'We just do not understand mental illness. We do not have enough information about it. We want some very practical knowledge of how to deal with mental illness.'<sup>2073</sup>

The Committee understands that other serving and former police members have expressed similar views.

### **Proposals for reform**

MIFV and the SMLS report argued that training should focus more on equipping police members with tools to understand mental illness and develop strategies to cope with its consequences that may manifest during police contact with individuals with an illness.<sup>2074</sup>

SMLS also referred the Committee to the approach pioneered by the Memphis police force's Crisis Intervention Team (CIT) in the USA. The CIT was formed in 1988 from volunteer police officers who undergo specialised instruction in communication skills, interacting with individuals with mental illness, diagnosing mental illness and defusing crisis situations. Trainers draw on mental health, legal and other experiences. They accompany police on patrol to promote mutual awareness of relevant risks and difficulties and ensure that teaching content remains appropriate. CIT personnel are embedded within non-specialist police units and, with those units, attend incidents involving individuals with mental illness, where they deploy their specialist skills in attempting to "de-escalat[e] the crisis".<sup>2075</sup>

A study of the CIT's performance indicated several benefits, the most relevant of which for present purposes are:

- immediate appropriate crisis response;
- reduced incidences of arrest and use of force;
- improved education and training of police in verbal crisis de-escalation techniques;
- reduced incidence of police injuries during crisis incidents;
- increased community recognition and appreciation of police; and

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<sup>2073</sup> Elizabeth Crowther, Mental Illness Fellowship of Victoria, *Minutes of Evidence*, 19 October 2004, 207.

<sup>2074</sup> *Ibid*; *Springvale, Police Training*, 33.

<sup>2075</sup> *Springvale, Police Training*, 27-28, referring to Memphis Police, *Program Outline – Memphis Police Crisis Intervention Team*.

- reduced stigma and perception of danger attached to individuals with mental illness.<sup>2076</sup>

MIFV supported the CIT approach, arguing that “we need the Memphis Model here”.<sup>2077</sup>

The Committee notes that literature on the CIT model indicates that the situation in Memphis prior to introduction of the CIT was different in a number of respects from the current Victorian environment:

the police were not prepared to deal with individuals suffering from mental illness, family members of individuals suffering from mental illness distrusted the police, the criminal justice and mental health systems were adversaries and the police response often resulted in arrest and injury.<sup>2078</sup>

The State Coroner made a related proposal following the death of Mark Kaufman. He recommended that Victoria Police consider a general review of the level of training for operational police on issues associated with dealing with individuals who may be mentally ill, possibly with input from appropriate medical professionals.<sup>2079</sup>

## Discussion and conclusions

The Committee is satisfied that consideration should be given to enhancing the training provided to Victoria Police personnel to focus more on understanding mental illness, its consequences and additional strategies for ensuring appropriate interaction between police and individuals with mental illness during the exercise of warrant and warrant-like powers under the *Mental Health Act 1986*. The Committee believes that improving general police skills in these areas can make an important contribution to better outcomes by increasing police knowledge and options available to members who attend such incidents. The Committee considers that the sort of training provided to police by MIFV is a useful model that should be explored with a view to expanding it.

Given the pressures on CAT teams and their consequent limited availability, a specialised approach of the sort practised by the CIT may also be justified. It could be a more realistic and effective way for police to deal with individuals with mental illness than the current reliance on CAT teams. Such a suggestion is intended to provide police with additional capacity to manage mental health incidents rather than reduce the role of CAT teams.

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<sup>2076</sup> Memphis Police Department, *Crisis Intervention*, at [www.memphispolice.org](http://www.memphispolice.org); B. Vickers, *Memphis Tennessee, Police Department's Crisis Intervention Team*, Bureau of Justice Assistance, July 2000, quoted in *Springvale, Police Training*, 28.

<sup>2077</sup> Elizabeth Crowther, *Perspective*, *ABC Radio National*, 13 October 2005, transcript at [www.abc.net.au](http://www.abc.net.au).

<sup>2078</sup> S. Cochran, *Crisis Intervention Team Presentation*, Policing & Mental Illness - Best Practice Conference, Gold Coast, 10 November 2003, quoted in *Springvale, Police Training*, 32.

<sup>2079</sup> Mark Kaufman (Coroner's Case No. 201/02), 36.

One approach to specialisation would be to create a dedicated mental health unit within Victoria Police that could exercise warrant and warrant-like powers (and attend other incidents) in relation to individuals with mental illness. The Committee notes that Victoria Police already relies on the specialised training and experience of units such as the Special Operations Group for particular types of incident, such as Level 3 search warrant executions.<sup>2080</sup> An alternative is to adopt the CIT model of embedding specialised personnel in ordinary police stations and patrols. This may make such intensively-skilled personnel more available because only one would initially attend each incident. It may also be less expensive than establishing and supporting a dedicated unit. The Committee invites the Government to examine these and other options, and their financial implications.

In doing so, the Committee recognises that its proposals, like much of the discussion that preceded them, involve much broader issues than warrant powers and procedures, such as the relative roles of police and mental health services and approaches to the treatment of mental illness. As these are beyond the scope of this inquiry, the Committee does not consider it appropriate to make further comment on this topic.

## Safe custody warrants

The Committee was advised of issues that were said to arise regularly in respect of warrants issued in relation to children who are the subject of protective interventions pursuant to the *Children and Young Persons Act 1989*.

The Children’s Court<sup>2081</sup> is empowered by the Act to issue safe custody warrants for the apprehension of a child in the following 11 circumstances:<sup>2082</sup>

Children and Young Persons Act 1989		Pre-conditions for Issue of a Warrant
1	Protection: s 69(1)(B)	A child is in need of protection and it is inappropriate to proceed by notice.
2	Protection by notice: s 70(3)	Proceedings have been taken by notice in respect of a child said to be in need of protection and the child does not appear before the

<sup>2080</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 5.5.

<sup>2081</sup> The Children’s Court of Victoria is established by section 8 of the *Children and Young Persons Act 1989* and has authority to hear cases involving children and young people. The Family Division of the Court has the power to hear a range of applications and make a variety of orders upon finding that a child is in need of protection, or that there are irreconcilable differences between a child and his or her parents. The Criminal Division of the Court has jurisdiction to hear and determine summarily all offences (other than murder, attempted murder, manslaughter, culpable driving causing death and arson causing death) where the alleged offender was between 10 and 18: Children’s Court of Victoria, *Annual Report 2003 - 2004*, 7.

<sup>2082</sup> This table is taken from Children’s Court of Victoria, *Research materials - Child Protection*, Part 5.23, (August 2005), at [www.childrenscourt.vic.gov.au](http://www.childrenscourt.vic.gov.au).

		Court in compliance with the notice.
3	Irreconcilable Differences application (IRD): s 72(7)	The child does not appear before the Court for the hearing of an IRD application.
4	Variation of Interim Accommodation Order (IAO): s 79(5)	An application has been made by notice for the variation of an interim accommodation order and the child does not appear before the Court in compliance with the notice.
5	Breach of IAO: ss 80(3)-(4)	80(3): Proceedings have been taken by notice alleging breach of an IAO or a condition thereof and the child does not appear before the Court in compliance with the notice.
		80(4): A protective intervener is satisfied there has been a breach of an IAO or a condition thereof and it is inappropriate to proceed by notice.
6	Application for new IAO: ss 80A(5)-(6)	80A(5): Application has been made by notice for a new IAO and the child does not appear before the Court in compliance with the notice.
		80A(6): On an application for a new IAO, a protective intervener is satisfied it is inappropriate to proceed by notice.
7	Breach of supervision order ss 95(3)-(4)	95(3): Proceedings have been taken by notice alleging breach of a supervision order and the child does not appear before the Court in compliance with the notice.
		95(4): The Secretary is satisfied there has been a breach of an supervision order and it is inappropriate to proceed by notice.
8	Breach of supervised custody order: s 98(4)	98(4)+95(3): Proceedings have been taken by notice alleging breach of a supervised custody order and the child does not appear before the Court in compliance with the notice.
		98(4)+95(5): The Secretary is satisfied there has been a breach of a supervised custody order and it is inappropriate to proceed by notice.
9	Failure to appear Interim Protection Order (IPO): s 110(2A)	A child does not appear before the Court at the time specified in the IPO or at any time specified in a notice caused by the Court to be served on the parent/carer and the child (if aged 12 or more).
10	Breach of IPO: s 111(3)-(4)	111(3): Proceedings have been taken by notice alleging breach of IPO and child does not appear before Court in compliance with the notice.
		111(4): The Secretary is satisfied there has been a breach of an

		IPO and it is inappropriate to proceed by notice.
11	Failure to comply: s 265(1)	<p>A judicial officer is satisfied that:</p> <p>(aa) an undertaking under s.25(1A) has not been complied with; or</p> <p>(a) a child is absent without lawful authority or excuse from the place in which s/he was placed under an IAO, a custody to third party order, a supervised custody order or by the Secretary under s.124 or from the lawful custody of a member of the police force; or</p> <p>(b) a child or parent/carer is refusing to comply with a lawful direction of the Secretary under s.124 as to the placement of the child.</p>

**Table 11. Safe custody warrant provisions of the *Children and Young Persons Act 1989***

These warrants authorise the police to break, enter and search any place where the child who is the subject of the intervention is suspected to be and to take him or her into safe custody. The following table details warrant applications in recent years.

Year	Number of warrant applications	Number of applications refused
2000 – 2001	735	No data available <sup>2083</sup>
2001 – 2002	868	No data available
2002 – 2003	1065 <sup>2084</sup>	No data available
2003 – 2004	1259 <sup>2085</sup>	19 - 1.5% <sup>2086</sup>

**Table 12. Safe custody warrant applications and refusals: 2000 – 2004**

The Court records the following details about warrants on its computer system:

- the person subject to the warrant;

<sup>2083</sup> The lack of such data for 2000 – 2002 is due to previous limitations of the Court’s Family Division computer system, now upgraded to facilitate production of the data for later years: email, Court Liaison Officer Janet Matthew to Committee Research Officer, 4 February 2005.

<sup>2084</sup> Children’s Court of Victoria, *Annual Report 2002 – 2003*, 22.

<sup>2085</sup> Email, Court Liaison Officer Janet Matthew to Committee Research Officer, 4 February 2005.

<sup>2086</sup> *Ibid.*

- the person who made the application;
- the section under which the application was made;
- execution of the warrant, on receipt of written advice to that effect from Victoria Police.

The Court, Victoria Police and DHS have agreed procedures for the transmission and registering of safe custody warrants. Warrants that remain unexecuted for one month are returned to the Court for cancellation.<sup>2087</sup>

These warrants authorise search for the young person who is subject to them. The Committee believes that safeguards that they contain and which are consistent with search warrants that were examined earlier in this report should, in principle, be consistent with its recommendations on such search warrants in Chapters Three to Seven of this report. The Committee recognises, however, that the basis for the powers that are exercised under safe custody warrants is “vastly different from searching premises and seizing goods”. DHS, which is responsible for the Child Protection System and Child Protection Service that provides the framework in which the powers are exercised, explained this in a submission to the Law Reform Committee of the 54<sup>th</sup> Parliament in its Inspectors’ Powers Inquiry. DHS argued that:

[These powers are used in the context of] protecting children and young people from abuse or harm as a result of significant neglect within the family and to ensure that children and young people receive services to deal with the impact of abuse and neglect on their well being and development.

These...are not entry and seizure powers in the sense of other powers addressed by...[the inspectors’ Powers Inquiry] Discussion Paper. Protective interveners are concerned with the protection of children, not the investigation of compliance with the law. ...<sup>2088</sup>

Accordingly, safe custody warrants may constitute exceptions that the present Committee envisaged may not be appropriate to subject to its recommendations in Chapters Three to Seven. The Committee believes that, in light of this report, DHS should, in consultation with stakeholders, review the warrant powers in the *Children and Young Persons Act 1989*, or when appropriate, the *Children, Youth and Families Bill* which is intended to replace it, in this context.

Stakeholders raised four issues in preliminary comments to the Committee:

- the repeated issuing of warrants for children who constantly abscond from protective placements,<sup>2089</sup>

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<sup>2087</sup> Children’s Court of Victoria, *Research materials - Child Protection*, Part 5.23, (August 2005), at [www.childrenscourt.vic.gov.au](http://www.childrenscourt.vic.gov.au).

<sup>2088</sup> Department of Human Services, *Submission no. 33 to the Inspectors’ Powers Inquiry*, 68, 69.

- a lack of understanding among child protection workers concerning the scope and use of the warrants;
- the effectiveness of police procedures for the execution of these warrants; and
- the use of Victoria Police to transport children under the warrants where there is no other transport available.<sup>2090</sup>

In its Discussion Paper, the Committee sought more detailed information and responses on each of these issues, and asked stakeholders to comment on:

- whether there is a need to reform legislation governing warrants in this area, and if so, what reforms would be appropriate;
- the training that is provided to child protection workers concerning the availability and use of warrant powers under the Act and whether it should be improved;
- the existence of agreed procedures between child protection agencies and the Children's Court; and
- whether there is a need to reform police procedures in this area and, if so, what reforms would be appropriate.<sup>2091</sup>

The Committee outlines the evidence it received concerning each of the four themes raised in preliminary submissions.

### ***Repeated issuing of warrants***

DHS was the only stakeholder to comment on this claim. In its submission, it stated that only a very small minority of children in care outside their homes repeatedly run away and that such behaviour is "very resistant to change, especially in the short term". DHS argued that safe custody warrants are:

essential to empower the police to search for, locate and return to placement those young people [who abscond repeatedly]. The use of alternatives, such as a missing person report, is often ineffective in that it entails no power to return the young person to a safe placement if they decline to return voluntarily.<sup>2092</sup>

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<sup>2089</sup> Youthlaw, *Preliminary submission*.

<sup>2090</sup> Email, President JJ Coate Children's Court of Victoria, to Committee Research Officer, 11 June 2004.

<sup>2091</sup> Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures, Discussion Paper* (July 2004) (*Warrant Powers and Procedures Discussion Paper*), 70.

<sup>2092</sup> Department of Human Services, *Submission no. 19*, 10.

It noted that while child protection workers had power to detain without a warrant young persons who are absent from care without authority, they do not have a power to enter premises to search for them.<sup>2093</sup> It is therefore often necessary to obtain a warrant to ensure the safe custody of the person.

### ***Level of understanding among child support workers***

VLA echoed Judge Coate's comments when it told the Committee that:

DHS workers sometimes lack understanding about the warrant system and do not adjust their procedures to suit the circumstances of a particular family. That again comes back to the idea of unnecessary use of a warrant and unnecessarily intrusive force in carrying out their duties.

Our youth legal service people have stated that they think DHS workers need adequate initial and ongoing training in some of the legal issues that underpin their work and supervision by appropriately experienced and qualified managers and probably a practice manual setting out the protocols to be followed in particular circumstances, particularly with vulnerable clients. I am not sure it is fair to say that there is a one-size-suits-all approach by DHS staff in the field, but we sometimes see cases where there seems to be a fairly routine approach, irrespective of the vulnerabilities of a particular family or the members of the family.<sup>2094</sup>

Often they do not differentiate between the families where there has been a history of cooperation and families where there is a high risk of serious conflict or violence.<sup>2095</sup>

Victoria Legal Aid (VLA) qualified those comments by stating that such matters do not arise routinely: "it is very general and anecdotal".<sup>2096</sup>

DHS stated that it did not accept that there was a lack of understanding. It provided the Committee with details of the training that child protection workers undergo and information about other controls on the use of warrant powers.

All child protection workers participate in a "comprehensive training and induction program" provided by the Department's Child Protection & Juvenile Justice Branch (CP&JJ), which includes information about the availability, scope and use of warrants.<sup>2097</sup> The Department uses a three volume training manual that covers policies and

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<sup>2093</sup> Department of Human Services, *Submission no. 19*, 10.

<sup>2094</sup> Victoria Legal Aid, *Minutes of Evidence, 20 October 2004*, 198.

<sup>2095</sup> Victoria Legal Aid, *Submission no. 21*, 10.

<sup>2096</sup> Victoria Legal Aid, *Minutes of Evidence, 20 October 2004*, 198.

<sup>2097</sup> Department of Human Services, *Submission no. 19*, 12.

procedures, advice and practice guidelines and the various protocols between DHS and other agencies involved in child protection.<sup>2098</sup>

CP&JJ has also produced a Court Kit for use by all child protection workers that provides information about the use of warrants.<sup>2099</sup>

Other controls include the requirement for experienced child protection workers who have undergone additional training to be involved in all decisions to seek a warrant. Additional advice is available from DHS' Court Advocacy Unit, staffed by highly experienced child protection workers and qualified lawyers.<sup>2100</sup>

The CP&JJ issues practice instructions "if systemic issues in relation to the use of warrants come to light". DHS advised that no such issue has been notified to CP&JJ recently.<sup>2101</sup>

Finally, the Committee notes that during the Inspectors' Powers Inquiry, DHS advised of the following safeguards on the use of powers of entry: a computer record system designed to prompt staff to ensure compliance with legislative requirements; an internal complaints system; an internal mechanism to review case management decisions; and review of case management decisions by VCAT on application of the young person or a parent.<sup>2102</sup>

### **Effectiveness of Victoria Police procedures**

The Victoria Police Manual contains provisions relating to the execution of safe custody search warrants. The Manual explains the purpose of such warrants and procedures for their execution and where they cannot be executed or are no longer required.<sup>2103</sup>

More detailed information about the warrants and procedures for their execution are contained in a protocol between Victoria Police and DHS. The Committee quotes relevant parts below.

A Family Division Children's Court Search Warrant authorises all members of the Police Force: to break, enter and search any place where the person named or described in the warrant is suspected to be; and to take into safe custody the person; and (i) bring the person before a bail

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<sup>2098</sup> Department of Human Services, *Protecting Children: Volume 1 - Standards and Procedures for Protective Workers; Protecting Children: Volume 2 - Protocols; Protecting Children: Volume 3 - Policy Advice and Practice Guidelines*, at [www.office-for-children.vic.gov.au](http://www.office-for-children.vic.gov.au).

<sup>2099</sup> Department of Human Services, *Submission no. 19*, 12.

<sup>2100</sup> *Ibid.*, 11.

<sup>2101</sup> *Ibid.*

<sup>2102</sup> Department of Human Services, *Submission no. 33 to the Inspectors' Powers Inquiry*, 71.

<sup>2103</sup> Victoria Police Manual, *VPM Instruction 105-2, Searches of properties*, updated 2 August 2004, section 12.5.

justice or the Court as soon as practicable to be dealt with according to the law; or (ii) release the person on an interim accommodation order in accordance with the endorsement on the warrant.

In most instances, the child or young person taken into safe custody via a warrant will be taken for a hearing before a bail justice or magistrate. Section 265 warrants require the executing member of the Police to take the child to the place specified in the warrant or, if no place is specified, to the place nominated by Child Protection.

[...]

The priority in the planning and execution of warrants will always be the safety and best interests of the child.

Every entry into premises using a search warrant must be thoroughly planned. To facilitate planning, the protective worker will contact the local CPS. If the CPS is not available, the protective worker should contact the Police Station nearest the location where the warrant is to be executed.

The protective worker will discuss with the respective Police member the execution of the warrant including: procedures to be followed in executing the warrant, including who will be present when the warrant is executed; the most appropriate time to execute the warrant (with a view to minimising resistance); location to meet with the protective worker after execution of the warrant; arrangements for Court hearing or out of sessions Court (Bail Justice) hearing; any special requirements regarding placement (s. 265 warrants).

Where possible, the protective worker and Police member are to reach agreement in relation to the aspects outlined above.

Responsibility for execution of the warrant lies with Victoria Police. All searches conducted by police must be approved by an officer, and must be documented, planned and recorded.

When the whereabouts of a child is unknown (usually in the case of s. 265 warrants) and during the course of their duties Police come into contact with or apprehend the child, they must contact Child Protection to arrange for placement of the child.

The executed warrant will be endorsed by the Police member who will be responsible for returning the warrant to the court of issue.

Where there is a threat of physical violence, or other circumstances that dictate the need for Police presence, Child Protection may request the assistance of the Police to accompany the protective worker. The timing and level of assistance required will be assessed by Police and provided where appropriate.<sup>2104</sup>

The protocol also:

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<sup>2104</sup> Department of Human Services and Victoria Police, *Protecting Children Protocol (Protecting Children Protocol)*, 37-41.

- contains an agreement between Victoria Police and Child Protection to “cooperate in relation to training so that both services gain a mutual understanding of philosophies, policies and methods of operation”;
- established bi-monthly liaison meetings between Regional Child Protection and District Police to review issues with specific cases, general work practices and other issues that present problems for either organisation.<sup>2105</sup>

DHS told the Committee that it was satisfied with Victoria Police procedures for the execution of safe custody warrants and that the relationship between the two organisations, while existing within necessarily different “operational priorities and organisational cultures”, was “at historically high levels”<sup>2106</sup> due to the committed efforts of both:

The execution of any of the warrants provided for under the Act requires cooperation and coordination between the police, who are the only agency empowered to execute these warrants, and the Department, whose staff receive children taken into custody under these warrants and either bring them before the court or receive them into placement. In common with other aspects of the joint working relationship between Victoria Police and Child Protection the effectiveness of the procedures depend for their success on the quality of relationships established at the local level between operational staff and managers of the two agencies, both of which act as ‘protective interveners’ for the purposes of the Act.<sup>2107</sup>

DHS did not believe that any reform of police procedures was necessary.

In contrast, the Victorian Aboriginal Legal Service (VALS) argued that it was necessary to adjust procedures governing the execution of warrants by Victoria Police against indigenous young persons. VALS told the Committee that the Victorian Aboriginal Child Care Agency (VACCA)<sup>2108</sup> attends child protection notifications with DHS but does not attend where Victoria Police are involved. It suggested that “children who are involved in the child protection system, and [their] parents..., are not linked into appropriate services”.<sup>2109</sup>

VALS recommended that: the warrant process “should ensure a culturally sensitive response to Indigenous Australian children involved in the child protection system”; that an agreement should be put in place whereby the VACCA attend with Victoria Police

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<sup>2105</sup> *Protecting Children Protocol*, 43.

<sup>2106</sup> Department of Human Services, *Submission no. 19*, 11.

<sup>2107</sup> *Ibid.*

<sup>2108</sup> VACCA is the statewide, Aboriginal controlled and operated body which is the lead agency in Aboriginal child and family services. It seeks to preserve, strengthen and protect the cultural and spiritual identity of Indigenous children and to provide culturally appropriate and quality services that are responsive to the needs of the Indigenous community: Victorian Aboriginal Child Care Agency, *About us*, at [www.vacca.org](http://www.vacca.org).

<sup>2109</sup> Victorian Aboriginal Legal Service, *Submission no. 23*, 15.

when they execute a warrant; and that additional funding should be provided to enable VACCA to carry out such a role.<sup>2110</sup>

The Committee agrees that any warrant process should operate as far as practicable in a manner that is appropriate to the circumstances of the situation in which the warrant is executed and that is sensitive to individuals who are the subjects of the warrant.

In this regard, the Committee notes that the role of indigenous communities in the child protection system is under review as part of the comprehensive *Protecting Children – Review and Reform* examination of the system being conducted by DHS.<sup>2111</sup> One goal of the review is to enhance the involvement of indigenous agencies in appropriate child protection cases. The recently introduced *Children, Youth and Families Bill* contains a provision for self-management by Aboriginal communities of Children’s Court orders. Clause 18 of the Bill empowers the DHS Secretary to vest responsibility for management of court orders applying to an Aboriginal child in an approved Aboriginal agency. It is anticipated that such obligations may include full custody or guardianship responsibilities and liabilities.<sup>2112</sup>

### ***The use of Victoria Police to transport children***

According to VLA, its Youth Legal Service opposes the “use of police to transport children and young persons to and from the scene where a warrant is executed”,<sup>2113</sup> because of the perceived stigma of being carried in a police vehicle and a belief that the practice escalates an already delicate situation unnecessarily. VLA suggested that this may have more serious consequences:

Fear of secure welfare may lead the young person to resist police. There have been instances when this has led to criminal prosecution of the young person. In many cases, it damages the relationship between police and disadvantaged young people.<sup>2114</sup>

VLA argued that “DHS should provide its own transport in unidentified vehicles”,<sup>2115</sup> that police should receive “adequate initial and on-going training” to deal with these

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<sup>2110</sup> Ibid.

<sup>2111</sup> More information on the review is at [www.office-for-children.vic.gov.au](http://www.office-for-children.vic.gov.au), in particular: Department of Human Services, *Protecting Children - the next steps*, July 2005; Department of Human Services, *Pathways to reform*.

<sup>2112</sup> *Children, Youth and Families Bill*, cl 18; Department of Human Services, *Protecting children... a guide to the Children’s Bill*, 16 (the exposure draft of the legislation was called the *Children’s Bill*).

<sup>2113</sup> Victoria Legal Aid, *Minutes of Evidence, 20 October 2004*, 198.

<sup>2114</sup> Victoria Legal Aid, *Submission no. 21*, 11.

<sup>2115</sup> Victoria Legal Aid, *Minutes of Evidence, 20 October 2004*, 198.

situations and that prosecution of young people who resist police in these situations should be limited.<sup>2116</sup>

Victoria Police stated that its vehicles and personnel are used to transport children and young persons under the Act “as there are no other options available to ensure the safety and security of the young person at risk”.<sup>2117</sup>

Victoria Police also told the Committee that it “looks forward” to exploring alternative transport options that minimise its involvement.<sup>2118</sup>

DHS stated that the use of police transport is a consequence of the relevant provisions in the Act and the Regulations. Specifically Schedule 5 of the *Children and Young Persons (Children's Court) Regulations 2001* contains a prescribed search warrant form. It authorises all members of Victoria Police or other named person to break, enter and search any place where the child named or described in the warrant is suspected to be, take the child into safe custody and either bring him or her before the Court for the hearing of an application or return them to their placement. If the warrant is issued under section 265 of the Act, the police member who executes it must take the child to a place specified in the warrant or provided for in the Act. In other words, the effect of the warrant is that the child who is subject to it remains in the legal custody of the police member who executes it.

DHS advised that where police members and child protection workers are present at the execution of a warrant, “it is sometimes arranged that the child travels in transport provided by Child Protection”.<sup>2119</sup>

The Committee recognises that, as a practical matter, it is sometimes necessary for police to transport young persons, for example where a young person has been or is believed to be likely to be violent, in particular towards individuals involved in the execution of the safe custody warrant.

## ***Discussion and conclusions***

Given the complexity and sensitivity of the issues that arise in relation to the child protection system, the Committee is not satisfied that it has received sufficient evidence to make conclusions or recommendations in relation to the various matters that were brought to its attention in the early stages of the inquiry and which are outlined above. In addition, as the Committee has indicated, the Government in partnership with

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<sup>2116</sup> Victoria Legal Aid, *Submission no. 21*, 11.

<sup>2117</sup> Victoria Police, *Submission no. 25*, 25.

<sup>2118</sup> *Ibid.*

<sup>2119</sup> Department of Human Services, *Submission no. 19*, 11.

stakeholders has been reviewing Victoria's child protection system in recent years and has developed various significant legislative and policy reforms as a result.<sup>2120</sup>

In particular, the recently introduced *Children, Youth and Families Bill* is intended to replace the *Children and Young Persons Act 1989*. The Bill contains various proposals for reform to Children's Court orders, including safe custody warrants.<sup>2121</sup>

The Committee believes that the consultation process for the Bill and the review process of which it is a part provide a more appropriate forum for stakeholders to raise and address issues of concern that have been identified in the course of the present inquiry.

For those reasons, the Committee makes no further comment on warrants under the *Children and Young Persons Act 1989*.

## **Warrant-like powers under the guardianship system**

The *Guardianship and Administration Act 1986* enables persons with a disability to have a guardian or administrator appointed. Part three of the Act created the Office of the Public Advocate (OPA), whose powers include to investigate problems and use special authority to make enquiries on behalf of people with a disability where there are fears for their safety or concerns about their interests.<sup>2122</sup>

OPA deals with two warrant-like powers under the Act, under sections 26 and 27 and made a preliminary submission to the Committee concerning these powers. Although the provisions are infrequently used, the Committee considered that they are significant because of their function in relation to the welfare and protection of vulnerable people. The Committee therefore decided to consider OPA's submission and raised it in the Discussion Paper.

Before doing so, however, the Committee notes that sections 26 and 27, authorise the issuing of orders that permit entry of premises and search for persons subject to the orders, in effect identical to a search warrant (although section 26 is much broader in scope, authorising measures specified in the order to enforce a guardianship order). As with safe custody warrants, the Committee believes therefore that in principle the provisions governing them should be consistent with its recommendations about search warrants contained in Chapters Three to Seven of this report. In this respect, the Committee notes that search warrants issued under the *Guardianship Act 1987* (NSW) are required to be consistent with the common search warrants procedural code

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<sup>2120</sup> The Committee referred to the review at p 549 above.

<sup>2121</sup> *Children, Youth and Families Bill*, Chapter 4, particularly Parts 4.8-4.9; Department of Human Services, *Protecting children... a guide to the Children's Bill*, especially 23-29.

<sup>2122</sup> Office of the Public Advocate, *What is the Office of the Public Advocate*, at [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au); *Guardianship and Public Administration Act 1986* Part 3.

contained in the *Search Warrants Act 1985* (NSW).<sup>2123</sup> The Committee believes that the guardianship system may merit potential exceptions to the Committee's recommendations for similar reasons as the safe custody warrants regime. In that context, the Committee believes that the Government, in consultation with OPA, VCAT and other stakeholders, should review the warrant powers in the *Guardianship and Administration Act 1986* in accordance with the Committee's recommendations in Chapters Three to Seven.

## **Section 26 orders**

Section 26 of the Act permits the Victorian Administrative and Civil Tribunal (VCAT) to issue an order authorising any nominated person to take specified measures or actions to ensure that the individual represented by the guardian complies with the guardian's decisions in the exercise of the powers and duties conferred by the guardianship order.

There were 77 applications for such orders in the year to 30 June 2004,<sup>2124</sup> of which 48 were granted.

The enforcement of guardianship orders usually involves the police and ambulance services, and is regulated by two instruments.<sup>2125</sup>

A protocol between OPA and the Melbourne Ambulance Service (MAS) facilitates cooperation between those organisations. It covers the sighting of the order by the ambulance officer; procedures for informing the MAS about the order and organising an ambulance; transportation; the use of restraint; and police liaison.

The Victoria Police Manual contains instructions for police involved in guardianship matters. It states that police should only assist in enforcing a guardianship decision "when the situation is life threatening or an order has been made" under sections 26 or 27 of the Act. The Manual also contemplates situations where it may be inappropriate for police to assist. If a member believes a request is inappropriate, they are required to seek advice from a "Sub-officer". If the Sub-officer agrees with the belief, the member is to "refuse assistance and notify OPA and the guardian. VCAT will pursue any further action".<sup>2126</sup>

OPA raised two concerns about the execution of enforcement orders. Despite the existence of the protocol, its experience was that difficulties had arisen when trying to synchronise the presence of the police, the ambulance and the represented person to

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<sup>2123</sup> *Guardianship Act 1987* (NSW) s 12(3).

<sup>2124</sup> Victorian Civil and Administrative Tribunal, *Submission no. 7*, 2.

<sup>2125</sup> Department of Human Services, *Submission no. 19*, 16.

<sup>2126</sup> Victoria Police Manual, *VPM Instruction 103-9, Persons with an intellectual disability*, issued 11 July 2003, section 5.

execute the warrant. A second problem was said to be that paramedics are occasionally reluctant to transport clients against their wishes.<sup>2127</sup>

One other stakeholder commented on section 26 orders. DHS suggested that, in general, given the small number of the orders that are issued, the most appropriate way of addressing problems concerning their execution would be to bring particular issues to the attention of senior management in the ambulance service for resolution, and recommended that contact lists be provided to the Guardianship Board for this purpose. One exception to this proposal related to the reported reluctance of paramedics to transport clients against their wishes. DHS advised the Committee that this practice is consistent with operational guidelines:

[paramedics] are not generally expected to exercise force when treating or transporting a patient. If the patient refuses treatment or transport and some degree of force is required and lawfully permitted in the circumstances, then accepted operational procedure is to call the police for assistance.<sup>2128</sup>

Based on this evidence, the Committee believes that OPA should work with Victoria Police and ambulance services to ensure that procedures for enforcing section 26 orders are effective. The Committee does not support any change to paramedics' operating procedures pertaining to the use of force as they have arisen in this context.

### **Section 27 orders**

Section 27 of the Act enables VCAT to issue two orders. The first empowers OPA, or another nominated person, accompanied by a member of the police force, to enter premises to prepare a report to VCAT on a person therein with a disability. Before issuing such an order, VCAT must receive information on oath that a person to be visited under it is the subject of an application for guardianship under section 19 of the Act and is either being unlawfully detained against her or his will, or is likely to suffer serious damage to her or his physical, emotional or mental health or well-being unless immediate action is taken.

If the VCAT is satisfied by the report prepared pursuant to the first order that these conditions exist, it may issue a second order to move a person for assessment and placement prior to a hearing on the application for the appointment of a guardian.<sup>2129</sup>

OPA told the Committee that four such section 27 orders were issued in the year to May 2004. The VCAT stated that three applications were made in the year to 30 June 2004.<sup>2130</sup>

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<sup>2127</sup> Office of the Public Advocate, *Preliminary submission*.

<sup>2128</sup> Department of Human Services, *Submission no. 19*, 16.

<sup>2129</sup> Office of the Public Advocate, *Preliminary submission*; *Guardianship and Administration Act 1986* s 27.

In its preliminary submission, OPA raised two concerns. It argued that the standard of knowledge required to be demonstrated to the VCAT before it could issue an order was onerous and that it has experienced practical difficulties in enforcing the orders.

### **Burden of proof**

The applicant for a section 27 order is required to provide information on oath that the person who is subject to the application has a disability. OPA argued that the applicant must know that the person is disabled, rather than merely believe or suspect it. This standard was said to be problematic because:

[i]t is often difficult to meet this requirement as the person is refusing any involvement with any service to establish their needs. It would be better if it were only necessary to establish that the applicant for the order has a reasonable belief that the person has a disability.<sup>2131</sup>

VLA was concerned about the impact of that proposal, which it felt could lead to warrants being issued in situations “where the only evidence of disability is uncorroborated family or neighbour evidence that may be tainted or unreliable”. It argued that the warrant authorised “significant violation of privacy” and was therefore not justified in such circumstances. VLA therefore felt that the character of the disability requirement should not be modified.<sup>2132</sup>

OPA responded to VLA’s concerns. It argued that the current requirement for the applicant to have actual knowledge of the disability can only be met in practice on the basis of a reasonable belief,<sup>2133</sup> and that it understood that that test was in fact being used “in the majority of cases”.<sup>2134</sup> Reasons for this include the impossibility of obtaining access to the person; and because the concerns for the person’s welfare have been expressed by “social workers or carers or family or friends”, unsupported by clinical evidence that could more persuasively establish the threshold requirements under section 27.<sup>2135</sup> Indeed, OPA argued that it is the purpose of the order to determine the existence of such circumstances, in cases where it has not been possible to do so through other means. Thus to:

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<sup>2130</sup> Office of the Public Advocate, *Preliminary submission*; Victorian Civil and Administrative Tribunal, *Submission no. 7, 2*.

<sup>2131</sup> Office of the Public Advocate, *Preliminary submission*.

<sup>2132</sup> Victoria Legal Aid, *Submission no. 21, 11*; *Minutes of Evidence, 20 October 2004, 198*.

<sup>2133</sup> Office of the Public Advocate, *Submission no. 39, 3 - 5*.

<sup>2134</sup> Email, Office of the Public Advocate Legal Officer Philip Grano to Committee Research Officer, 15 February 2005.

<sup>2135</sup> OPA states that as it is VCAT that establishes the existence of a disability through a finding of fact, clinical evidence of a disability is considered as expert opinion, or “a belief based on professional expertise”: Office of the Public Advocate, *Submission no. 39, 3*.

impose the stricture of establishing disability definitively on members of the public who raise concerns for fellow members of their community in the context of applying for a visiting order under section 27 order is unrealistic.<sup>2136</sup>

OPA also responded to VLA's concerns about the invasion of privacy occasioned by the enforcement of a section 27 order. It did not consider that a reasonable belief test would tip the balance between privacy and protection too heavily against the rights of the individual subject to the order.<sup>2137</sup> While acknowledging the risk of uncorroborated evidence, it noted that an applicant would have to take account of that possibility when forming a reasonable belief about the existence of the threshold criteria. It also pointed out that "rigour is required in assessing the grounds for belief to ensure that they are reasonable", in particular because of the authority in the order for police to force entry. Finally, it argued that a section 27 order authorising a visit is subject to a number of additional safeguards contained in the section:

- VCAT must be satisfied that the applicant possesses a reasonable belief that the threshold criteria for an application for an order exist;
- the report by the visitor is required to recommend placement;
- VCAT must accept the report;
- the individual's condition is then comprehensively assessed;
- VCAT must hear the application for guardianship and consider the assessment report.<sup>2138</sup>

VCAT also commented on this issue in its submission. It felt that making it necessary for the applicant to establish a reasonable belief that a person has a disability:

is sensible in that it may be difficult to establish that a disability exists where the person refuses medical treatment which may prevent the making of an assessment.<sup>2139</sup>

### ***The law in other jurisdictions***

The Committee considered the law in other jurisdictions on this issue. Under Queensland's *Guardianship and Administration Act 2000* (Qld), if a guardian considers that there are reasonable grounds for suspecting there is an immediate risk of harm,

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<sup>2136</sup> Office of the Public Advocate, *Submission no. 39*, 3.

<sup>2137</sup> "[S]ection 27 orders differ in intent from orders made pursuant to the criminal law or laws regarding civil debts in that they are protective of the person rather than instruments of law enforcement. Therefore section 27 orders are a more acceptable derogation of the person's privacy rights because the interference operates to ensure that person's safety": Office of the Public Advocate, *Submission no. 39*, 6.

<sup>2138</sup> Office of the Public Advocate, *Submission no. 39*, 6.

<sup>2139</sup> Victorian Civil and Administrative Tribunal, *Submission no. 7*, 4.

because of neglect, exploitation or abuse, to an adult person with impaired capacity, the guardian may apply to the Guardianship and Administration Tribunal for a warrant to enter a place and remove the person.<sup>2140</sup>

In Tasmania, the *Guardianship and Administration Act 1995* (Tas) allows a police officer to enter, if necessary by force, any premises in which a person with a disability who appears to be in need of a guardian is believed to be, and, if thought fit, remove that person from those premises. It must appear to the police officer that there is reasonable cause to suspect that the person has been, or is being, ill-treated, neglected or unlawfully detained against his or her will, or is likely to suffer serious damage to his or her health or well-being unless immediate action is taken.

In exercising those powers, the police officer must be accompanied by a person nominated by the Public Guardian. That person must: as soon as practicable convey the person to a place of safety; ensure that an application for guardianship or other appropriate arrangements are made; and provide the Guardianship and Administration Board with a written report giving details of the action taken.<sup>2141</sup>

New South Wales has a similar legislative provision to Victoria. Although the relevant order contains greater authority than the Victorian Act, it uses a reasonable belief standard of proof. Under section 12 of the *Guardianship Act 1987* (NSW), a defined official or a member of the police force may apply to an authorised justice for the issue of a search warrant if the applicant has reasonable grounds for believing that there is in any premises a person who appears to be a person in need of a guardian and who is being unlawfully detained against their will, or is likely to suffer serious damage to his or her health or well-being unless immediate action is taken.

If the authorised justice to whom such an application is made is satisfied that there are reasonable grounds for doing so, s/he may issue a search warrant authorising a member of the police force or other defined official nominated in the warrant to enter any premises specified in the warrant, search there for the person subject to the warrant and remove him or her.

Western Australia has no equivalent of Victoria's section 27 orders. The State's guardianship legislation is currently under review and the Public Advocate there informed the Committee that a section 27 power was one of the matters being considered. She supported the Victorian Public Advocate's recommendation to make the standard of proof one of reasonable belief.<sup>2142</sup>

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<sup>2140</sup> *Guardianship and Administration Act 2000* (Qld) s 197.

<sup>2141</sup> *Guardianship and Administration Act 1995* (Tas) s 30.

<sup>2142</sup> Michelle Scott, Public Advocate of Western Australia, *Minutes of Evidence*, 2 September 2004, 78.

### **Discussion and conclusions**

After considering these submissions, the Committee believes that a number of issues are particularly significant to the question of whether the standard of proof should be made one of reasonable belief. First, the Committee observes that the Act does not explicitly enumerate a standard for the state of mind about the existence of the threshold conditions under section 27 that VCAT must be satisfied that an applicant possesses. Nevertheless, the evidence that the Committee heard indicates that in practice, a reasonable belief standard is currently in use. The Committee believes that the law could be clarified in this respect, to promote its accessibility and efficiency.

The Committee was concerned about the impact of current law and practice on the guardianship system. OPA told the Committee that it anticipated that a shift to reasonable belief would not result in an increase in the number of applications it makes under section 27 of the Act.<sup>2143</sup> This suggests to the Committee that the current wording of section 27 is not a significant impediment to the operation of the guardianship system.

The Committee is also satisfied that the five additional safeguards provide sufficient opportunity for an individual subject to a section 27 visitation order, or their representative, to challenge action that flows from the enforcement of the order.

For the above reasons, the Committee is satisfied that section 27 should be amended to require that an applicant must have a reasonable belief that the threshold criteria for the issuing of a visitation order exist.

Recommendation 145. That section 27 of the *Guardianship and Administration Act* 1986 be amended to require an applicant for a visitation order to establish that they have a reasonable belief that a person has a disability and is being unlawfully detained against his or her will or is likely to suffer serious damage to health or well-being.

### **Practical difficulties in enforcing orders**

OPA told the Committee that the procedure for issuing section 27 orders and their relative rarity caused additional difficulties. Assessment reports prepared after the visit pursuant to the order are usually provided to VCAT by telephone. OPA stated that where the report evidences a need for placement and assessment of the client, VCAT issues an oral order (the second type of order contemplated in section 27). The lack of written authorisation was said to delay implementation of the order because of the consequent necessity of explaining the existence and scope of authority to ambulance and police personnel.<sup>2144</sup>

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<sup>2143</sup> Email, Office of the Public Advocate Legal Officer Philip Grano to Committee Research Officer, 15 February 2005.

<sup>2144</sup> Office of the Public Advocate, *Preliminary submission*.

However, VCAT stated that all orders are issued in writing:

In every case VCAT produces written orders and dispatches them immediately. ...The member [of VCAT] who makes the order verbally confirms that the order has been made but a written copy is subsequently typed and produced. In urgent cases arising out of hours, including applications for temporary guardianship orders, section 26 orders and section 27 orders, the member completes a proforma order and faxes it to the public advocate or police or ambulance service. The order is later entered on the order entry system and the typed version sent to the parties, usually on the next business day. Orders made during business hours are immediately entered on the order entry system and sent by fax. There is no "lack of written authorisation [which] can delay implementation".<sup>2145</sup>

The Committee suggests that the inconsistency of views between OPA and the VCAT, to the extent that their submissions are evidence that one exists, can best be resolved through consultation between the two institutions. The Committee therefore invites OPA, as the stakeholder who suggested that written orders are not issued, to work with VCAT, DHS, Victoria Police and ambulance services to ensure that appropriate procedures are in place for the transmission of written orders under section 27.

Recommendation 146. That the Office of the Public Advocate consult with the Victorian Civil and Administrative Tribunal, Department of Human Services, Victoria Police and ambulance services to ensure that effective and appropriate procedures exist for the transmission of written orders under section 27 of the *Guardianship and Administration Act 1986*.

In relation to OPA's submission that the necessity of explaining the orders to police and ambulance officials delayed enforcement of the same, it was argued that Public Advocate staff are required to educate those personnel "about the orders, why the orders are made and what is hoped to be achieved by making of the orders".<sup>2146</sup>

VCAT noted that it may be necessary for OPA to provide training to such officials.<sup>2147</sup> However, as noted above, DHS argued that the low number of orders issued pursuant to section 26 of the Act did not justify a dedicated training program for ambulance personnel. Although DHS restricted its comments to section 26 orders, they would appear to apply equally, if not more so, to section 27 orders, given that in the financial year 2003 - 2004, section 26 orders were issued much more frequently than orders under section 27. DHS felt that a written order would provide ambulance service staff

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<sup>2145</sup> Victorian Civil and Administrative Tribunal, *Submission no. 7*, 4.

<sup>2146</sup> Office of the Public Advocate, *Preliminary submission*.

<sup>2147</sup> Victorian Civil and Administrative Tribunal, *Submission no. 7*, 4.

with “greater confidence and clarity as to their role and powers in the execution of such orders”.<sup>2148</sup>

The Committee notes that the concerns expressed by OPA about section 26 orders were confined to organising attendance of the police and ambulance services and the transport of individuals against their will. In contrast, alleged problems with the enforcement of section 27 orders are said to relate to their scope and purpose, issues that the Committee believes are central to the order and its effective enforcement. In the Committee’s view, ambiguity about the enforcement of such orders should be minimised, particularly as they include an explicit power to enter a place by force.<sup>2149</sup> The Committee believes that OPA, DHS, Victoria Police and ambulance services should work together to ensure that relevant personnel in all agencies are aware of the existence and purpose of section 27 orders, and relevant obligations in respect of enforcing them. The Committee suggests that it may be possible to achieve this outcome through the drafting of an agreed information sheet for relevant personnel, which could then be referred to in police and ambulance training materials and procedure manuals.

Recommendation 147. That the Office of the Public Advocate consult with the Department of Human Services, Victoria Police and ambulance services to ensure that relevant personnel in all agencies are aware of the existence and purpose of section 27 orders, and relevant obligations in respect of enforcing them.

## **Warrants to facilitate assessment of alcoholics and drug-dependent individuals**

The Department of Human Services (DHS) argued that the Committee should include individuals with a drug or alcohol dependency under the *Alcoholics and Drug-dependent Persons Act 1968* in its consideration of warrants relating to vulnerable groups.<sup>2150</sup>

Warrants may be issued under section 11 of that the Act, which permits a court to order that a person who appears to be alcoholic or drug-dependent attends and be admitted to an assessment centre. Where the subject of such an order does not comply, section 11(3) authorises a court to issue a warrant “commanding” a member of the police force to convey them to an assessment centre named and deliver them to the officer in charge of the centre for the purposes of the examination.

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<sup>2148</sup> Department of Human Services, *Submission no. 19*, 16.

<sup>2149</sup> *Guardianship and Administration Act 1986* s 27(3).

<sup>2150</sup> Department of Human Services, *Submission no. 19*, 8.

DHS also drew the Committee's attention to section 18(1) of the Act, which provides authority for a warrantless apprehension of any person who escapes from detention in an assessment or a treatment centre, or from the lawful custody or control of certain persons. Escapees may be apprehended by any member of the police force and returned to the place of detention, custody or control.

In its submission, DHS referred to anecdotal evidence that "absconding clients are generally not being apprehended by police or other authorised persons for return to treatment", with the result that the Act is considered by some stakeholders to be "toothless":

Some stakeholders felt that a lack of police follow-up meant that some clients absconded without consequence or sanction. This lack of follow-up of warrant powers can make orders under section 11 of the Act futile, rendering the Act ineffective for not only alcoholic and drug-dependent people but their families and the community.<sup>2151</sup>

DHS argued that for the Act to be effective, it was necessary to engage with individuals for the full length of their treatment plans. This in turn was said to necessitate a swift police response in cases where individuals prematurely terminated those treatment plans by absconding.

It was suggested that police response patterns were a result of a lack of resources and training and a perceived low priority accorded to such cases. DHS felt that additional education and training of police may be required to address the problem and that information developed for that purpose could be part of a broader education package concerning warrants relating to the protection of vulnerable groups.

Finally, DHS stated that the Act was under review at the time of its submission, and that it was anticipated that new legislation would be passed in 2005.<sup>2152</sup>

The Committee received no additional evidence on the issues raised by DHS. For that reason it limits its comments to reiterating the importance of adequate training for all officials involved in the application, use and monitoring of warrants, in particular those relating to the protection of, and otherwise affecting, vulnerable groups.

## **Adopted by the Committee**

**25 October 2005**

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<sup>2151</sup> Department of Human Services, *Submission no. 19*, 8.

<sup>2152</sup> Department of Human Services, *Submission no. 19*, 8.

## APPENDIX ONE - SUBMISSIONS

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No.	Date of Submission	Name	Affiliation
1	6 April 2004	Andrew P. Melville Barrister and Solicitor	Legal Practitioners Victoria and NSW
2	9 August 2004	Bill Greenland Chief Electrical Inspector	Office of the Chief Electrical Inspector
3	13 August 2004	Vic Bernie Craddock AAEI Secretary	Australian Adult Entertainment Industry
4	20 August 2004	Philip Lynch Co-ordinator	Public Interest Law Clearing House
4s	20 October 2004		Public Interest Law Clearing House
5	23 September 2004	Jayde Richmond Research Solicitor	Law Institute of Victoria
6	24 September 2004	Ella Lowe President	Nurses Board of Victoria
7	23 September 2004	Stuart Morris QC President	Victorian Civil and Administrative Tribunal
8	24 September 2004	Michelle Middleton	
9	27 September 2004	Paul Mullett Secretary	The Police Association
9s	20 October 2004	Greg Davies Manager (Discipline/Legal)	The Police Association
10	1 October 2004	Wilton P. Wells	
11	1 October 2004	Peter Harris Secretary	Department of Primary Industries
12	1 October 2004	Stephen Shirrefs SC Vice-Chairman	Criminal Bar Association
12s	19 October 2004	Stephen Shirrefs SC Vice-Chairman	Criminal Bar Association

13	29 September 2004	Confidential	
14	1 October 2004	Graeme Johnstone State Coroner	State Coroner of Victoria
15	4 October 2004	Peter Batchelor Minister for Transport	Minister for Transport
16	1 October 2004	Debra Gillick Registrar	Chinese Medical Registration Board
17	5 October 2004	Paul Chadwick Victorian Privacy Commissioner	Privacy Victorian
18	11 October 2004	Elizabeth Crowther Chief Executive	Mental Illness Fellowship Victoria
19	11 October 2004	David Watts Director, Legal Services	Department of Human Services (DHS)
20	11 October 2004	Paul Broderick Commissioner of State Revenue	State Revenue Office
21	11 October 2004	Tony Parsons Managing Director	Victoria Legal Aid
22	13 October 2004	Angela Costin Solicitor	Aitken Walker & Strachan
23	15 October 2004	Greta Jubb Research Officer	Victorian Aboriginal Legal Service Co-operative Ltd.
24	15 October 2004	Jo Benvenuti Executive Manager Corporate Affairs	RSPCA
25	19 October 2004	Christine Nixon Chief Commissioner	Victoria Police
26	19 October 2004	Adam Trumble JP Adviser to the Board	Royal Victorian Association of Honorary Justice
27	Numbering Error		
28	19 October 2004	Mick Bourke Chairman	Environmental Protection Authority
29	20 October 2004	Jennifer Bowles Magistrate	Magistrates' Court of Victoria
29s	20 October 2004	Jennifer Bowles Magistrate	Magistrates' Court of Victoria

30	22 October 2004	Kate Colvin Policy and Research Officer	Victorian Council for Social Services
31	27 October 2004	Anna Hall Director	Springvale Community Aid & Advice Bureau
32	27 October 2004	Dave Taylor Community Development Officer	Springvale Monash Legal Service Inc.
32s	27 October 2004	Dave Taylor Community Development Officer	Springvale Monash Legal Service Inc.
33	3 November 2004	Vanessa Lesnie Senior Policy Officer	Human Rights and Equal Opportunity Commission
34	5 November 2004	Dr. Steven Tudor Lecturer	La Trobe University
35	5 November 2004	William Crawford Drug Outreach Lawyer	Fitzroy Legal Service
36	17 November 2004	Brian Walters SC President	Liberty Victoria
37	14 December 2004	Brian Hardiman Deputy Director, Police Integrity	Office of Public Integrity Victoria
38	5 January 2005	Penny Armytage Secretary	Department of Justice
39	10 February 2005	Philip Grano Legal Officer	Office of the Public Advocate
40	3 May 2005	Basil Stafford Solicitor	
41	6 July 2005	Anna Stewart Principal Solicitor	Consumer Law Centre of Victoria
42	27 July 2005	Pam Mutton Convenor	Financial and Consumer Rights Council, Debt Recovery Working Group



## APPENDIX TWO –LIST OF WITNESSES

No.	Date of Meeting	Witness	Affiliation
1	31 August 2004 Sydney	Mr T. Lynch Senior Solicitor	Legal Aid Commission New South Wales
2		Ms J. Sanders Solicitor	Shopfront Youth Legal Centre
3		Mr R. Hulme Deputy Senior Public Defender	Public Defenders Office, New South Wales
4		Mr R. Button Public Defender	
5	1 September 2004 Sydney	Mr D. Noll Principal Policy Officer Criminal Law Review Division	New South Wales Attorney- General's Department
5		Ms P. Wright Vice-President	New South Wales Council for Civil Liberties
6	2 September 2004 Perth	Ms M. Scott Public Advocate	Office of the Public Advocate Western Australia
7		Ms G. Lawson Deputy Public Advocate	Supreme Court of Western Australia
8		Mr J. Calleja Director, Court Support Services	Magistrates Courts and Tribunals, Department of Justice, Western Australia
9		Mr P. Mitchell Sheriff	
10		Mr G. Ferguson Executive Officer	
11		Mr D. McCormack Manager, Sentence Information Unit	
12		Mr A. McKeown, Manager, Justice of the Peace Branch	

13		Mr J. Klarich Director	
14		Mr M. Cuomo Legal Director	Aboriginal Legal Service of Western Australia
15		Mr K. Hammond Commissioner	Legal Services, Corruption and Crime Commission of Western Australia
16		Mr M. Cashman Director	
17		Mr D. McKenzie	Legal Aid Commission of Western Australia
18	3 September 2004 Perth	Mr S. Heath Chief Magistrate	Magistrates Court of Western Australia
19	19 October 2004 Melbourne	Ms G. Jubb Research Officer	Victorian Aboriginal Legal Service
20		Mr S. Shirrefs, SC Vice-chair	Criminal Bar Association of Victoria
21		Mr P. Chadwick Privacy commissioner	Office of the Victorian Privacy Commissioner
22		Ms M. Fisher Manager, Policy	
23		Mr B. Walters SC President	Liberty Victoria
24		Ms Katrina Richter Assistant to President	
25		Mr M. Wighton Manager, Regional Offices Division	Victoria Legal Aid
26		Ms L. Prain Senior Policy and Research Officer	
27		Ms I. Collins Director	Victorian Mental Illness Awareness Council
28		Ms E. Crowther Chief Executive	Mental Illness Fellowship Victoria
29	20 October 2004 Melbourne	A/Superintendent S. Leane Manager, Legal and Corporate Policy	Victoria Police

30		A/Inspector T. O'Connor Legal Policy, Legal and Corporate Policy	
31		Ms P. Maroulis Senior Legal Policy Officer	
32		Mr N. Jepson Major Fraud Investigation Division	
33		Mr G. Moase	Western Suburbs Legal Service
34		Mr P. Lynch Coordinator	PILCH Homeless Persons Legal Clinic
35		Ms G. Hedges	
36		Ms A. O'Connell	
37		Mr G. Sullivan Principal Solicitor	West Heidelberg Community Legal Centre
38		Mr G. Davies Manager, Discipline and Legal	Police Association
39		Ms J. Bowles Magistrate	Magistrates Court Victoria.
40		Ms L. Hannan Magistrate	
41		Mr R. White Chair, Litigation Section	Law Institute of Victoria.
42		Ms J. Richmond Research Officer	
43	5 November 2004 Melbourne	Dr Steven Tudor Lecturer	La Trobe University
44		Mr William Crawford Drug Outreach Lawyer	Fitzroy Legal Service
45		Mr Brian Hardiman Deputy Ombudsman	Ombudsman Victoria
46		Ms J. Griffith Executive Director, Community Operations and Strategy	Department of Justice

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47		Mr A. Crawshaw Senior Legal Policy Officer, Enforcement Management Unit	
48		Mr R. Cahir Regional Operations Manager	
49		Mr Darren Palmer Lecturer	Deakin University
50		Mr J. Chol African Settlement Worker	Springvale Community Aid and Advice Bureau
51	28January 2005 Melbourne	Mr D. Taylor Community Development Officer	Springvale Monash Legal Service
52		Ms F. Calvert	
53		Mr D. Vukovic	
54		Mr D. Kaufmann	
55		Mrs M. Kaufmann	

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## APPENDIX THREE – PERIN FORUM PARTICIPANTS

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### PERIN FORUM - 9 MAY 2005

No	Participant	Affiliation
1	Jelena Popovic, Deputy Chief Magistrate	Magistrates' Court of Victoria
2	Reg Marron, Magistrate	Magistrates' Court of Victoria
3	Caitlin English, Magistrate	Magistrates' Court of Victoria
4	Joseph Shields, Senior Diversion Co-ordinator	Magistrates' Court of Victoria
5	Trevor Ripper, PERIN Registrar	Magistrates' Court of Victoria
6	Annie Mereos, Special Circumstances List Co-ordinator	Magistrates' Court of Victoria
7	Anne Condon, Disability Co-ordinator	Magistrates' Court of Victoria
8	Margot Powell, Legal Compliance	Department of Infrastructure
9	Ann Woods, Senior Prosecutor	Department of Infrastructure
10	Bill Jepperson, Chair	Public Transport Enforcement Forum
11	Owen Harvey-Beavis	Municipal Association of Victoria
12	Dennis Gazelle	Moreland City Council
13	Emmett Dunne, Superintendent	Victoria Police Prosecutions Division
14	Ron Ritchie	Police Traffic Camera Office
15	Chris Gilsenan, Acting Senior Sergeant	Police Traffic Camera Office
16	Gary Sullivan, Solicitor	West Heidelberg Community Legal Centre
17	Anne Grant	Western Suburbs Legal Service, Solicitor
18	Godfrey Moase	Western Suburbs Legal Service, Solicitor

19	William Crawford, Drug Outreach Lawyer	Fitzroy Community Legal Centre
20	Phil Lynch, Co-ordinator	PILCH Homeless Persons Legal Clinic
21	Jan Alter, Financial Counsellor	Financial Counsellors Working Group
22	Kate Colvin, Policy Officer	VCOSS
23	Basil Stafford	Defence counsel
24	Julia Griffiths, Executive Director, Community Operations and Strategy	Department of Justice
25	Jennifer Chamberlin, Co-ordinator, Infringements Review Project	Department of Justice
26	Steve Mitchell	TENIX Solutions

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# APPENDIX FOUR – SEARCH WARRANT PROVISIONS COMMON TO ALL VICTORIAN LEGISLATION

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## **Sections 57 -82, Magistrates Court Act 1989 (Vic)**

[Effective Date 1/08/2005. Version 111]

*Please note endnote references to this legislation have been omitted*

### **Division 3—Warrants**

#### **Subdivision 1—General**

#### **57. Warrants**

s. 57

(1) The following warrants may be issued—

- (a) warrant to arrest;
- (b) remand warrant;
- (c) search warrant;
- (d) warrant to seize property;
- (e) warrant to imprison;
- (f) warrant to detain in a youth training centre;
- (g) penalty enforcement warrant.

S. 57(1)(g)  
inserted by No.  
33/1994 s. 9(1).

(2) The person issuing a warrant must cause the prescribed particulars of the warrant to be entered in the register.

(3) A warrant must name or otherwise describe the person or property against whom or which it is issued.

(4) All warrants, other than a search warrant, may be issued by a registrar or a magistrate.

(5) A search warrant may only be issued by a magistrate.

(6) Remand warrants may be issued by a bail justice.

(7) A judge of the Supreme Court or judge of the County Court may exercise any power conferred on a magistrate by or under this Act with respect to the issue, recall or cancellation of a warrant or duplicate copy of a warrant.

(8) A warrant must be executed by the use of a copy of the warrant, known as the execution copy, or by the use of a copy of the

execution copy, including a copy transmitted by facsimile machine.

- (9) The execution copy of a warrant must be in writing and must be signed or otherwise authenticated by the person issuing it.
- (10) An execution copy of a warrant must be returned, when executed, to the Court.

**58. Recall and cancellation of warrant**

s. 58

- (1) A warrant issued by a registrar, magistrate or bail justice may be recalled and cancelled by—

- (a) that registrar, magistrate or bail justice; or
- (b) if issued by a registrar, the registrar for the time being at the venue of the Court at which it was issued or except in the case of a warrant issued under clause 8(1) of Schedule 7, any other registrar; or
- (c) a magistrate.

S. 58(1)(b)  
amended by No.  
44/1997 s. 29.

- (1A) If a warrant has been recalled and cancelled under sub-section (1), a fresh warrant may be issued for the same purpose as that for which the recalled warrant was issued.

S. 58(1A)  
inserted by No.  
70/1996 s. 4.

- (2) A warrant to imprison or detain in a youth training centre for non-payment of a fine (whether issued before or after the commencement of this section) or a penalty enforcement warrant is null and void if it has not been executed within the period of 5 years after a warrant of that type was first issued against the person named in the warrant for the purpose specified in the warrant.

S. 58(2) amended  
by Nos 33/1994  
s. 9(2), 70/1996  
s. 5(1).

- (2A) If a warrant referred to in sub-section (2) becomes null and void under that sub-section, the fine in respect of which it was issued, together with any associated fees and costs, ceases to be enforceable or recoverable if no part of the fine had been paid before the date on which the warrant became null and void.

S. 58(2A)  
inserted by No.  
70/1996 s. 5(2).

- (3) Nothing in sub-section (2) or (2A) prevents the issue, with the leave of the Court, of a fresh warrant for the same purpose as that for which a warrant that has become null and void under sub-section (2) was issued

S. 58(3) amended  
by No. 70/1996  
s. 5(3).

- (4) Despite sub-section (2), if under sub-section (3) a fresh warrant is issued, the fine in respect of which it was issued, together with any associated fees and costs, again becomes enforceable or recoverable as if there had been no cessation.

S. 58(4) inserted  
by No. 70/1996  
s. 5(4).

**59. Duplicate warrants**

s. 59

- (1) If the execution copy of a warrant issued by a registrar, magistrate or bail justice is lost or destroyed before it is executed, a registrar or magistrate may issue a duplicate execution copy if satisfied by evidence on oath or by affidavit of the loss or destruction of the

execution copy of the warrant.

- (2) A duplicate execution copy must bear on its face the word "Duplicate" and may be executed in all respects as if it were the execution copy of the warrant.
- (3) When a duplicate execution copy of a warrant is issued, the execution copy of the warrant becomes null and void and must, if located, be returned to the principal registrar.
- (4) If a person is in a prison, a police gaol or a youth training centre in accordance with a warrant which has been executed and the execution copy of the warrant is lost or destroyed, a registrar or magistrate may issue a duplicate execution copy if satisfied by evidence on oath or by affidavit of the loss or destruction of the execution copy.
- (5) A duplicate execution copy issued under sub-section (4) is sufficient authority for the person in whose legal custody the person is to keep the person in the prison, police gaol or youth training centre until the end of the term specified in the warrant.

S. 59(5) amended  
by No. 45/2001  
s. 43(a)(i)(ii).

#### 60. Effect of defect or error in certain warrants

s. 60

- (1) A warrant to imprison, a warrant to detain in a youth training centre, a remand warrant, a warrant to seize property or a penalty enforcement warrant is not void only because of a defect or error in it if there is a valid order supporting it.
- (2) A person acting under a warrant to seize property or a penalty enforcement warrant is not to be taken to be a trespasser from the beginning only because of a defect or error in it.

S. 60(1) amended  
by No. 33/1994  
s. 9(3)

S. 60(2) amended  
by No. 33/1994  
s. 9(4).

### ***Subdivision 2—Warrant to Arrest***

#### 61. Issue of warrant to arrest

s. 61

- (1) A warrant to arrest in the first instance may be issued—
  - (a) against a defendant at the time of filing a charge or at any time before the mention date; or
  - (b) against a witness if the person issuing it is satisfied—
    - (i) that it is probable that the witness will not answer a witness summons; or
    - (ii) that the witness has absconded, is likely to abscond or is avoiding service of a witness summons that has been issued; or
  - (c) as authorised by any other Act.
- (2) An application for a warrant to arrest in the first instance must be supported by evidence on oath or by affidavit.

- (3) An affidavit supporting an application for a warrant to arrest in the first instance may be a copy of an affidavit transmitted by facsimile machine.
- (4) A warrant to arrest in the first instance issued under sub-section (1)(a) must include a copy of the charge against the defendant.
- (5) A warrant to arrest other than in the first instance may be issued—
  - (1) when the defendant fails to appear before the Court in answer to a summons; or
  - (2) when a person has been duly served with a witness summons and fails to attend before the Court in answer to the witness summons; or
  - (3) when a defendant fails to attend before the Court in accordance with his or her bail; or
  - (4) as authorised by this or any other Act.
- (6) A warrant to arrest other than in the first instance must include a statement of the reason for issuing the warrant.

**62. Endorsing a warrant for bail**

s. 62

- (1) The person issuing a warrant to arrest against any person may endorse the warrant with a direction that that person must on arrest be released on bail as specified in the endorsement.
- (2) An endorsement under sub-section (1) must fix the amounts in which the principal and the sureties, if any, are to be bound and the amount of any money or the value of any security to be deposited.

**63. Persons to whom warrant to arrest may be directed**

s. 63

- (1) A warrant to arrest may be directed to—
  - (a) a named member of the police force; or
  - (b) generally all members of the police force; or
  - (c) any other person authorised by law to execute a warrant to arrest.
- (2) A warrant to arrest directed to a named member of the police force may be executed by any member of the police force.

**64. Authority conferred by warrant to arrest**

s. 64

- (1) A warrant to arrest authorises the person to whom it is directed—
  - (a) to break, enter and search any place where the person named or described in the warrant is suspected to be; and
  - (b) to arrest the person named or described in the warrant.
- (2) The person to whom a warrant to arrest is directed must cause the

person named or described in the warrant when arrested—

(a) to be brought before a bail justice or the Court within a reasonable time of being arrested to be dealt with according to law; or

S. 64(2)(a)  
amended by No.  
49/1990 s. 5(a).

(b) to be released on bail in accordance with the endorsement on the warrant.

(3) A person arrested on a warrant to arrest may be discharged from custody on bail under section 10 of the **Bail Act 1977**.

(4) In determining what constitutes a reasonable time for the purposes of sub-section (2)(a) the matters specified in section 464A(4) of the **Crimes Act 1958** may be considered.

S. 64(4) inserted  
by No. 49/1990  
s. 5(b).

### 65. Arrest of person against whom warrant to arrest is issued

s. 65

(1) If a warrant to arrest a person who is a defendant to a charge has been issued, any member of the police force may arrest the person although the execution copy of the warrant is not at the time in the member's possession.

(2) On the arrest of a person under sub-section (1), the member of the police force must bring the person arrested before a bail justice or the Court within a reasonable time of being arrested and the bail justice or the Court may—

S. 65(2) amended  
by No. 49/1990  
s. 5(c).

(a) if a fresh charge is filed to the effect of the offence or matter alleged in the warrant—

(i) permit the person to go at large; or

(ii) admit the person to bail; or

(iii) in the case of the Court, hear and determine the proceeding for the offence; or

(b) if a fresh charge is not filed to the effect of the offence or matter alleged in the warrant—

(i) permit the person to go at large; or

(ii) admit the person to bail; or

(iii) remand the person in custody for a reasonable time pending execution of the warrant.

(3) If a person has been arrested under sub-section (1) and has been remanded in custody pending execution of the warrant and the warrant is not executed within a reasonable time, the Court must discharge the person from custody.

(4) If a warrant is executed by use of a copy other than the execution copy, the Court must—

(a) if satisfied that the copy is a true copy of the execution copy—

(i) proceed as if the person had been arrested on the execution copy; and

- (ii) order that the execution copy be returned to the principal registrar; or
- (b) if not so satisfied, discharge the person from custody.
- (5) If a warrant is not executed and a fresh charge for the offence alleged in the warrant is filed, the warrant is deemed to be void and of no effect and the Court must order its return to the principal registrar.
- (6) In determining what constitutes a reasonable time for the purposes of sub-section (2) the matters specified in section 464A(4) of the **Crimes Act 1958** may be considered.

S. 65(6) amended  
by No. 49/1990  
s. 5(d).

**66. Warrant to arrest following indictment or presentment**

s. 66

- (1) If—
  - (a) an indictment is laid or a presentment is preferred against a person who is at large; and
  - (b) the person has not already appeared and pleaded to the indictment or presentment—

the Prothonotary of the Supreme Court or the registrar of the County Court (as the case requires) must—
  - (c) at any time after the indictment is laid or the presentment is preferred; and
  - (d) on the application of the prosecutor or any other person on behalf of the prosecutor—

grant to the prosecutor or person on his or her behalf a certificate of the indictment having been laid or presentment having been preferred.
- (2) If a certificate is granted under sub-section (1), it may be produced to a magistrate or a judge of the Supreme Court or of the County Court who must issue a warrant to arrest the person against whom the indictment has been laid or the presentment has been preferred and to bring that person, when arrested, before the person who issued the warrant or any other magistrate or judge or the Court.

**67. Person arrested to be committed for trial or bailed**

s. 67

- (1) If a person is arrested on a warrant under section 66 and brought before a magistrate or judge or the Court, the magistrate or judge or the Court must, subject to sub-section (2), on it being proved on oath that the person arrested is the same person who is charged and named in the indictment or presentment, order that the person be remanded in custody for trial or admit the person to bail for trial.
- (2) If the person against whom the indictment is laid or the presentment is preferred is, at the time of the application and

production of the certificate referred to in section 66(1), imprisoned or detained in a youth training centre in respect of an offence or matter other than that charged in the indictment or presentment, the magistrate or judge must, on it being proved on oath that the person against whom the indictment is laid or presentment is preferred is the same person as the person imprisoned or detained in the youth training centre, issue a warrant in accordance with sub-section (3).

- (3) A warrant issued under sub-section (2) must—
- (a) be directed to the person in whose legal custody the person indicted or presented then is; and
  - (b) direct that person to detain the person in custody until by writ of habeas corpus or other proper order the person is removed from the prison or youth training centre for the purpose of trial or discharged by due course of law.

S. 67(3)(a)  
amended by No.  
45/2001 s. 43(b).

### ***Subdivision 3—Warrant to Imprison***

#### **68. Issue of warrant to imprison**

s. 68

A warrant to imprison may be issued if—

- (a) the Court orders that a person be sentenced to a term of imprisonment; or
- (b) the Court orders that a person be sentenced to a term of imprisonment in default of payment of a fine or of any instalment under an instalment order; or
- (c) authorised by any other Act.

#### **69. Persons to whom warrant to imprison may be directed**

s. 69

(1) A warrant to imprison may be directed to—

- (a) a named member of the police force; or
- (b) generally all members of the police force; or
- (ba) the sheriff; or

S. 69(1)(ba)  
inserted by No.  
34/1990 s. 4(Sch.  
3 item 5).

(bb) generally all prison officers; or

S. 69(1)(bb)  
inserted by No.  
34/1990 s. 4(Sch.  
3 item 5).

(c) any other person authorised by law to execute a warrant to imprison.

(2) A warrant to imprison directed to a named member of the police

force may be executed by any member of the police force.

S. 69(3) inserted  
by No. 34/1990  
s. 4(Sch. 3 item  
6).

- (3) A warrant to imprison directed to a named member of the police force or to generally all members of the police force may be executed by any prison officer.

- (3A) A warrant to imprison under section 68(b) to be directed to the sheriff may be issued, not in paper form, but by a magistrate or registrar signing a document containing the following particulars in relation to persons against whom a warrant is to be issued under that section and causing those particulars to be transferred electronically to the sheriff in accordance with the regulations, if any—

S. 69(3A)  
inserted by No.  
69/1997 s. 28(1).

- (a) the name of the person in default;
- (b) the type of warrant;
- (c) the amount of the fine or instalment remaining unpaid;
- (d) the period for which, or the circumstances in which, the person in default is to be kept in custody under the warrant;
- (e) the date of issue of the warrant;
- (f) the name of the magistrate or registrar signing the document;
- (g) any other particulars that are prescribed.

S. 69(3B)  
inserted by No.  
69/1997 s. 28(1).

- (3B) A warrant issued in accordance with sub-section (3A)—

- (a) directs and authorises the sheriff to do all things that he or she would have been directed and authorised to do if a warrant containing the particulars referred to in sub-section (3A) and directed to the sheriff had been issued in paper form under section 68(b) by the magistrate or registrar;
- (b) must not be amended, altered or varied after its issue, unless the amendment, alteration or variation is authorised by or under this or any other Act.

S. 69(4) inserted  
by No. 34/1990  
s. 4(Sch. 3 item  
6).

- (4) Sub-sections (4) to (7) of section 111 apply to a warrant to imprison directed to the sheriff under this Subdivision in the same manner as they apply to a warrant to seize property directed to the sheriff in a civil proceeding.

## 70. Directions in, and authority of, warrant to imprison

s. 70

A warrant to imprison—

- (a) authorises the person to whom it is directed to break, enter and search any place where the person named in the warrant is suspected to be; and
- (b) directs and authorises the person to whom it is directed to take and safely convey the person named in the warrant—
  - (i) to a prison; or

- (ii) if the warrant is issued under section 68(b), either to a prison or a police gaol;
- S. 70(b)(ii)  
amended by No.  
74/2000 s. 3(Sch.  
1 item 75).

\* \* \* \* \*

and there to deliver the person to the officer in charge of the prison or police gaol; and

S. 70(b)(iii)  
repealed by No.  
33/1994 s. 9(5).

- (c) directs and authorises the Secretary to the Department of Justice or the Chief Commissioner of Police (as the case requires) or any other person into whose custody the person named in the warrant is transferred to receive that person into custody and safely keep that person—
- S. 70(c) amended  
by No. 45/1996  
s. 18(Sch. 2 item  
9.1).
- (i) for the period specified, or in the circumstances described, in the warrant; or
- (ii) until that person is otherwise removed or discharged from custody by due course of law.

**71. Reduction of imprisonment by payment of portion of fine** s. 71

- (1) If before the issue of a warrant to imprison for non-payment of a fine, it appears to the person issuing the warrant that part of the fine has been paid—
- (a) the reduction in the amount of the fine payable must be stated in the warrant to imprison; and
- (b) the term for which the person fined may be imprisoned must be reduced by the number of days bearing as nearly as possible the same proportion to the total number of days in the term as the amount paid bears to the whole amount of the fine.
- (2) Sub-section (1) applies despite any provision (except section 26) of the **Imprisonment of Fraudulent Debtors Act 1958** to the contrary.
- (3) If after the issue but before the execution of a warrant to imprison for non-payment of a fine, it appears to the Court that part of the fine has been paid, the Court must—
- (a) amend the warrant; and
- (b) recall the execution copy of the warrant and amend it—  
in accordance with sub-section (1).
- (4) Despite any provision (except section 26) of the **Imprisonment of Fraudulent Debtors Act 1958** to the contrary or anything in any warrant to imprison, if a person is imprisoned for non-payment of a fine—
- (a) the whole or any part of the fine may be paid by or on behalf of

- that person to the officer in charge of the prison or police gaol in which that person is detained; and
- (b) the officer in charge must receive the payment and forward it without delay to the principal registrar.
- (5) If—
- (a) the whole amount of the fine; or
- (b) the amount remaining to be paid—
- is paid to the officer in charge of the prison or police gaol by or on behalf of the person imprisoned, the person imprisoned must be discharged if he or she is in custody for no other matter.
- (6) If part of the fine is paid to the officer in charge of the prison or police gaol by or on behalf of the person imprisoned—
- (a) the term of imprisonment for non-payment of the fine must be reduced having regard to the formula set out in sub-section (1)(b); and
- (b) the officer in charge must—
- (i) amend the execution copy of the warrant; and
- (ii) receive the payment and forward it without delay to the principal registrar; and
- (c) at the end of the reduced term, the person imprisoned must be discharged if he or she is in custody for no other matter.

## 72. Provisions extend to detention in youth training centre

If a person is directed under Subdivision (4) of Division 2 of Part 3 of the **Sentencing Act 1991** or under the **Children and Young Persons Act 1989** to be detained in a youth training centre or a youth residential centre, the provisions of this Subdivision and of any regulations with respect to warrants to imprison extend and apply, with any necessary modifications, with respect to the issue and execution of a warrant to detain in a youth training centre or a youth residential centre and with respect to any matter arising out of any such detention.

S. 72 amended  
by Nos 49/1991  
s. 119(7)  
(Sch. 4 item 13.2),  
69/1992  
s. 35(a)(b).

### *Subdivision 4—Warrant to Seize Property*

## 73. Warrant to seize property

s. 73

- (1) A warrant to seize property may be issued—
- (a) if the defendant in a criminal proceeding in the Court fails to comply with an order for the payment of a fine or of any instalment under an instalment order; or

- (b) as authorised by any other Act.
- (2) A warrant to seize property may be directed to—
- (a) a named member of the police force; or
  - (b) generally all members of the police force; or
  - (ba) the sheriff; or
  - (c) any other person authorised by law to execute a warrant to seize property.
- (3) A warrant to seize property directed to a named member of the police force may be executed by any member of the police force.
- (3AA) A warrant to seize property under sub-section (1)(a) or section 98(7)(b) to be directed to the sheriff (other than a warrant referred to in sub-section (3A)) may be issued, not in paper form, but by a magistrate or registrar signing a document containing the following particulars in relation to persons against whom a warrant is to be issued under sub-section (1)(a) or section 98(7)(b) and causing those particulars to be transferred electronically to the sheriff in accordance with the regulations, if any:
- (a) the name of the person in default;
  - (b) the type of warrant;
  - (c) the amount of the fine or instalment remaining unpaid;
  - (d) the date of issue of the warrant;
  - (e) the name of the magistrate or registrar signing the document;
  - (f) any other particulars that are prescribed.
- (3AB) A warrant issued in accordance with sub-section (3AA)—
- (a) directs and authorises the sheriff to do all things that he or she would have been directed and authorised to do if a warrant containing the particulars referred to in sub-section (3AA) and directed to the sheriff had been issued in paper form under sub-section (1)(a) or section 98(7)(b) by the magistrate or registrar;
  - (b) must not be amended, altered or varied after its issue, unless the amendment, alteration or variation is authorised by or under this or any other Act.
- (3A) For the purposes of clause 8 of Schedule 7, a warrant to seize property to be directed to the sheriff may be issued, not in paper form, but by the registrar within the meaning of Schedule 7 entering in the computer system used by the Court—
- (a) the type of warrant and the prescribed particulars; and
  - (b) his or her name and the date of issue of the warrant.
- (3B) A warrant issued in accordance with sub-section (3A) must not be amended, altered or varied after its issue, unless the amendment, alteration or variation is authorised by or under this or any other

S. 73(2)(ba)  
inserted by No.  
34/1990 s. 4(Sch.  
3 item 7).

S. 73(3AA)  
inserted by No.  
69/1997 s. 28(2).

S. 73(3AB)  
inserted by No.  
69/1997 s. 28(2).

S. 73(3A)  
inserted by No.  
70/1996 s. 6.

S. 73(3B)  
inserted by No.  
70/1996 s. 6.

Act.

- (4) Sub-sections (4) to (7) of section 111 apply to a warrant to seize property directed to the sheriff under this Subdivision in the same manner as they apply to a warrant to seize property directed to the sheriff in a civil proceeding.
- S. 73(4) inserted by No. 34/1990 s. 4(Sch. 3 item 8).

**74. Authority conferred by warrant to seize property**

s. 74

A warrant to seize property directs and authorises the person to whom it is directed—

- (a) to seize the personal property of the person named or described in the warrant; and
- (b) if the sums named in the warrant together with all lawful costs of execution are not paid, to sell the personal property seized.

***Subdivision 5—Search Warrants***

**75. Search warrants**

s. 75

- (1) search warrant may be issued as authorised by any Act other than this Act.
- (2) An application for a search warrant must be supported by evidence on oath or by affidavit.
- (3) An affidavit supporting an application for a search warrant may be a copy of an affidavit transmitted by facsimile machine.

**76. Persons to whom search warrant may be directed**

s. 76

- (1) A search warrant may be directed to—
- (a) a named member of the police force; or
- (b) generally all members of the police force; or
- (c) any other person authorised by law to execute a search warrant.
- (2) A search warrant directed to a named member of the police force may be executed by any member of the police force.

**77. Endorsing a warrant for bail**

s. 77

- (1) The person issuing a search warrant may endorse the warrant with a direction that any person arrested must be released on bail as specified in the endorsement.
- (2) An endorsement under sub-section (1) must fix the amounts in which the principal and the sureties, if any, are to be bound and the amount of any money or the value of any security to be deposited.

**78. Authority conferred by search warrant**

s. 78

- (1) A search warrant authorises the person to whom it is directed—
- (a) if the warrant is to search for a person—
    - (i) to break, enter and search any place where the person named or described in the warrant is suspected to be; and
    - (iii) to arrest the person named or described in the warrant; and
  - (b) if the warrant is to search for any thing—
    - (i) to break, enter and search any place named or described in the warrant for any article, thing or material of any kind named or described in the warrant; and
    - (ii) to bring the article, thing or material before the Court so that the matter may be dealt with according to law; and
    - (iii) to arrest any person apparently having possession, custody or control of the article, thing or material.
- (2) The person to whom a search warrant is directed must cause the person named or described in the warrant, or apparently having possession, custody or control of any article, thing or material named or described in the warrant, when arrested—
- (a) to be brought before a bail justice or the Court within a reasonable time of being arrested to be dealt with according to law; or
  - (b) to be released on bail in accordance with the endorsement on the warrant.
- (3) A person arrested on a search warrant may be discharged from custody on bail under section 10 of the **Bail Act 1977**.
- (4) In determining what constitutes a reasonable time for the purposes of sub-section (2)(a) the matters specified in section 464A(4) of the **Crimes Act 1958** may be considered.
- (5) For the purposes of sub-section (1)(b)(ii) an article, thing or material that is bulky or cumbersome may be brought before the Court by giving evidence on oath to the Court as to the present whereabouts of the article, thing or material and by producing a photograph of it.
- (6) The Court may direct that any article, thing or material seized under a search warrant be returned to its owner, subject to any condition that the Court thinks fit, if in the opinion of the Court it can be returned consistently with the interests of justice.

78(2)(a) amended  
by No. 49/1990  
s. 5(e).

S. 78(4) inserted  
by No. 49/1990  
s. 5(f).

S. 78(5) inserted  
by No. 71/1993  
s. 5.

S. 78(6) inserted  
by No. 71/1993  
s. 5.

**Subdivision 6—Remand Warrants**

**79. Remand warrants**

s. 79

- (1) A remand warrant may be issued—

- (a) if a defendant who has been charged with an offence has been arrested under a warrant or otherwise and—
    - (i) is refused bail; or
    - (iii) has been granted bail but is unable to meet any bail condition imposed; or
  - (b) if a witness is arrested under a warrant and the Court orders that the witness be remanded in custody until the giving of the evidence; or
  - (c) if the Court orders a defendant to be remanded in custody during the adjournment of any criminal proceeding; or
  - (d) if a defendant has been committed to stand trial and—
    - (i) is refused bail; or
    - (ii) has been granted bail but is unable to meet any bail condition imposed; or
    - (iii) is returned to the custody of the Secretary to the Department of Human Services under section 49(1)(c); or
  - (e) as authorised by any other Act.
- (2) If a defendant is remanded in custody on two or more charges to be heard by the same court at the same time and place, the Court may issue one remand warrant in respect of all the charges.

S. 79(1)(d)(iii) amended by No. 46/1998 s. 7(Sch. 1) (as amended by No. 12/1999 s. 3(Sch. 1 item 19)).

**80. Persons to whom remand warrant may be directed**

s. 80

- (1) A remand warrant may be directed to—
  - (a) a named member of the police force; or
  - (b) generally all members of the police force; or
  - (ba) generally all prison officers; or
  - (c) any other person authorised by law to execute a remand warrant.
- (2) A remand warrant directed to a named member of the police force may be executed by any member of the police force.
- (3) A remand warrant directed to a named member of the police force or to generally all members of the police force may be executed by any prison officer.

S. 80(1)(ba) inserted by No. 34/1990 s. 4(Sch. 3 item 9).

S. 80(3) inserted by No. 34/1990 s. 4(Sch. 3 item 10).\

**81. Directions in, and authority of, remand warrant**

A remand warrant—

- (a) directs and authorises the person to whom it is directed to take and

S. 81(a) amended by Nos 33/1994

- safely convey the person named in the warrant—
- (i) to a prison; or
  - (ii) to a police gaol; or
  - (iii) if the Court has given a direction under section 49(1)(c), to a youth training centre—
- and there to deliver the person to the officer in charge of the prison or police gaol or into the custody of the Secretary to the Department of Human Services (as the case requires); and
- (b) directs and authorises the Secretary to the Department of Justice or the Chief Commissioner of Police or the Secretary to the Department of Human Services (as the case requires) or any other person into whose custody the person named in the warrant is transferred to receive that person into custody and safely keep that person—
    - (i) for the period specified, or in the circumstances described, in the warrant; or
    - (ii) until that person is otherwise removed or discharged from custody by due course by law.

s. 10(1)(a)(ii),  
46/1998  
s. 7(Sch. 1).

S. 81(a)(ii)  
amended by No.  
33/1994  
s. 10(1)(a)(i).

S. 81(a)(iii)  
inserted by No.  
33/1994  
s. 10(1)(a)(i).

S. 81(b) amended  
by Nos 33/1994  
s. 10(1)(b),  
45/1996  
s. 18(Sch. 2 item  
9.2), 46/1998  
s. 7(Sch. 1).

**82. Remand of more than 8 clear days**

s. 82

- (1) The Court must not remand a defendant in custody for a period of more than 8 clear days unless both the defendant and the informant consent.
- (2) If a defendant—
  - (a) has been granted bail; and
  - (b) has consented to an adjournment of the proceeding for a period of more than 8 clear days; and
  - (c) has not yet been released on bail—

S. 82(2) amended  
by Nos 33/1994  
s. 10(2), 45/1996  
s. 18(Sch. 2 item  
9.3), 4/1997  
s. 8(1), 46/1998  
s. 7(Sch. 1).

the remand warrant must direct the Secretary to the Department of Justice or the Chief Commissioner of Police or the Secretary to the Department of Human Services (as the case requires) or any other person into whose custody the defendant is transferred to bring the defendant at the end of 8 clear days (unless in the meantime he or she is released on bail) before the venue of the Court prescribed for the purposes of this section or, if the defendant consents to appear before the Court by audio visual link within the meaning of Part IIA of the **Evidence Act 1958**, to another place specified in the warrant where facilities exist to enable the defendant to so appear.

**Subdivision 7—Penalty Enforcement Warrant**

Pt 4 Div. 3  
Subdiv. 7  
(Heading and  
ss 82A–82F)  
inserted by No.  
33/1994 s. 11(1).

**82A. Definitions**

Words and expressions used in this Subdivision have the same meanings as in Schedule 7.

S. 82A inserted  
by No. 33/1994  
s. 11(1).

**82B. Issue of penalty enforcement warrant**

A penalty enforcement warrant may be issued—

- (a) if for a period of more than 28 days a natural person to whom a notice of enforcement order is posted under clause 6 of Schedule 7 defaults in the payment of the fine or of any instalment under an instalment order; or
- (b) if a declaration is made under clause 8A(2) or (5) of Schedule 7 in respect of a director.

S. 82B inserted  
by No. 33/1994  
s. 11(1).

**82C. Persons to whom penalty enforcement warrant may be directed**

(1) A penalty enforcement warrant may be directed to—

- (a) a named member of the police force; or
- (b) generally all members of the police force; or
- (c) the sheriff; or
- (d) any other person authorised by law to execute a penalty enforcement warrant.

S. 82C inserted  
by No. 33/1994  
s. 11(1).

(2) A penalty enforcement warrant directed to a named member of the police force may be executed by any member of the police force.

(2A) A penalty enforcement warrant to be directed to the sheriff may be issued, not in paper form, but by the registrar entering in the computer system used by the Court—

- (a) the type of warrant and the prescribed particulars; and
- (b) his or her name and the date of issue of the warrant.

S. 82C(2A)  
inserted by No.  
70/1996 s. 7.

(2B) A warrant issued in accordance with sub-section (2A) must not be amended, altered or varied after its issue, unless the amendment, alteration or variation is authorised by or under this or any other Act.

S. 82C(2B)  
inserted by No.  
70/1996 s. 7.

(3) A penalty enforcement warrant directed to the sheriff may, if the sheriff so directs, be executed by—

- (a) a named person who is a bailiff for the purposes of the **Supreme Court Act 1986**; or
  - (b) generally all persons who are bailiffs for the purposes of the **Supreme Court Act 1986**; or
  - (c) a named member of the police force; or
  - (d) generally all members of the police force; or
  - (e) generally all prison officers.
- (4) A direction may be given by the sheriff under sub-section (3) by—
- (a) endorsing the execution copy of the warrant with the direction; or
  - (b) issuing a warrant to the same effect as the penalty enforcement warrant but directed in accordance with sub-section (3).
- (5) A warrant endorsed or issued by the sheriff in accordance with sub-section (4) directs and authorises the person to whom it is directed to do all things that he or she would have been directed and authorised to do by the original warrant if it had been directed to him or her.
- (6) A penalty enforcement warrant directed to a named bailiff or member of the police force may be executed by any bailiff or member of the police force, as the case requires.

**82D. Directions in, and authority of, penalty enforcement warrant**

S. 82D inserted  
by No. 33/1994  
s. 11(1).

- (1) A penalty enforcement warrant—
- (a) authorises the person to whom it is directed to break, enter and search any residential or business property occupied by the person named in the warrant for any personal property of that person;
  - (b) directs and authorises the person to whom it is directed—
    - (i) to seize the personal property of the person named in the warrant; and
    - (ii) if the sums named in the warrant together with all lawful costs of execution are not paid, to sell the personal property seized;
  - (c) if the person executing the warrant cannot find sufficient personal property of the person named in the warrant on which to levy the sums named in the warrant together with all lawful costs of execution—
    - (i) authorises the person to whom it is directed to break, enter and search for the person named in the warrant any place where that person is suspected to be; and

- (ii) directs and authorises the person to whom it is directed to take and safely convey the person named in the warrant to a prison or a police gaol and there to deliver the person to the officer in charge of the prison or police gaol; and
  - (iii) directs and authorises the Secretary to the Department of Justice or the Chief Commissioner of Police (as the case requires) or any other person into whose custody the person named in the warrant is transferred to receive that person into custody and safely keep that person—
    - (a) for a period of 1 day in respect of each penalty unit or part of a penalty unit of the amount then remaining unpaid of the sums named in the warrant; or
    - (b) until that person is otherwise removed or discharged from custody by due course of law.
- (2) sub-sections (7A) to (7C) of section 111 apply with respect to a penalty enforcement warrant in the same manner as they apply with respect to a warrant to seize property issued in a civil proceeding.
- (3) Nothing in this section requires a person to whom a penalty enforcement warrant is directed—
  - (a) to break and enter a property for the purpose of finding and seizing personal property;
  - (b) to break and enter a property for the purpose of finding and seizing personal property before arresting the person named in the warrant.
- (4) Despite sub-section (3)(b), a person to whom a penalty enforcement warrant is directed must not arrest the person named in the warrant unless the person executing the warrant reasonably believes that there is not sufficient personal property of the person named in the warrant on which to levy the sums named in the warrant together with all lawful costs of execution.
- (5) On the imprisonment of a person for any reason, if there are any unsatisfied penalty enforcement warrants outstanding against the person, any person to whom such a warrant is directed is not required, in executing the warrant, to serve any notice or to search for, or seize, any personal property of the imprisoned person.

S. 82D(1)(c)(iii)  
amended by No.  
45/1996  
s. 18(Sch. 2 item  
9.4).

S. 82D(1)  
(c)(iii)(A)  
amended by No.  
3/2005 s. 26.

S. 82D(3)  
inserted by No.  
99/2000 s. 3.

S. 82D(4)  
inserted by No.  
99/2000 s. 3.

S. 82D(5)  
inserted by No.  
99/2000 s. 3.

**82E. Reduction of imprisonment by payment of portion of fine**

S. 82E inserted  
by No. 33/1994  
s. 11(1).

- (1) If before the issue of a penalty enforcement warrant, it appears to the person issuing the warrant that part of the fine has been paid—
  - (a) the sums named in the warrant must be reduced by the amount of the fine paid; and

- (b) the term for which the person fined may be imprisoned in accordance with section 82D(1)(c) must be reduced by the number of days bearing as nearly as possible the same proportion to the total number of days in the term as the amount paid bears to the whole amount of the fine.
- (2) Sub-section (1) applies despite any provision (except section 26) of the **Imprisonment of Fraudulent Debtors Act 1958** to the contrary.
- (3) If after the issue but before the execution in accordance with section 82D(1)(c) of a penalty enforcement warrant, part of the sums named in the warrant is paid or levied on personal property of the person named in the warrant—
  - (a) the sums named in the warrant must be reduced by the amount paid or levied and the term for which the person fined may be imprisoned in accordance with section 82D(1)(c) must be reduced having regard to the formula set out in sub-section (1)(b);
  - (b) the person executing the warrant must—
    - (i) amend the execution copy of the warrant; and
    - (ii) forward the amount paid or levied without delay to the principal registrar.
- (4) Despite any provision (except section 26) of the **Imprisonment of Fraudulent Debtors Act 1958** to the contrary or anything in any penalty enforcement warrant, if a person is imprisoned under a penalty enforcement warrant for non-payment of a fine—
  - (a) the whole or any part of the fine may be paid by or on behalf of that person to the officer in charge of the prison or police gaol in which that person is detained; and
  - (b) the officer in charge must receive the payment and forward it without delay to the principal registrar.
- (5) If—
  - (a) the whole amount of the fine; or
  - (b) the amount remaining to be paid—is paid to the officer in charge of the prison or police gaol by or on behalf of the person imprisoned, the person imprisoned must be discharged if he or she is in custody for no other matter.
- (6) If part of the fine is paid to the officer in charge of the prison or police gaol by or on behalf of the person imprisoned—
  - (a) the term of imprisonment for non-payment of the fine must be reduced having regard to the formula set out in sub-section (1)(b); and
  - (b) the officer in charge must—
    - (i) amend the execution copy of the warrant; and

- (ii) receive the payment and forward it without delay to the principal registrar; and
- (c) at the end of the reduced term, the person imprisoned must be discharged if he or she is in custody for no other matter.

**82F. Rules etc. with respect to execution of penalty enforcement warrant**

S. 82F inserted by No. 33/1994 s. 11(1), amended by No. 84/1997 s. 52 (ILA s. 39B(1)).

- (1) Subject to this Act—
  - (a) the rules, practice and procedure which apply to or are adopted by the sheriff in the execution of a warrant to seize property issued by the Court in enforcement of an order made by the Court in a civil proceeding for the payment of money apply (with any necessary modifications) to the execution of a penalty enforcement warrant in accordance with section 82D(1)(b); and
  - (b) the interests of any persons in any property seized under a penalty enforcement warrant must be dealt with in the same manner as they would be if the property had been seized under a warrant to seize property issued by the Court in enforcement of an order made by the Court in a civil proceeding for the payment of money.
- (2) Despite anything to the contrary in section 42 of the **Supreme Court Act 1986**, the person executing in accordance with section 82D(1)(b) a penalty enforcement warrant or warrants in respect of which the period referred to in clause 8(3) of Schedule 7 has expired may, with the signed written consent of the person against whom the warrant is or warrants are issued, seize or take in the execution of it or them personal property that is used by that person primarily as a means of transport and that could not, but for this sub-section, be seized or taken because of section 42 of the **Supreme Court Act 1986**.
- (3) A consent given by a person under sub-section (2) is only effective if—
  - (a) it is given after the delivery to the person by a person authorised to execute the warrant or warrants of a statement in writing in the prescribed form setting out the effect of giving the consent; and
  - (b) a copy of the signed written consent has been delivered to the person giving the consent.
- (4) If personal property referred to in sub-section (2) is seized or taken in execution of a penalty enforcement warrant or warrants in accordance with that sub-section, the proceeds of sale of the property must be applied towards the sums named in the warrant or warrants together with all lawful costs of execution and any amount remaining after those sums and costs have been paid

S. 82F(2) inserted by No. 84/1997 s. 52.

S. 82F(3) inserted by No. 84/1997 s. 52.

S. 82F(4) inserted by No. 84/1997 s. 52.

must be paid to the person against whom the warrant was, or warrants were, issued and not applied to satisfy any other unexecuted warrant issued against that person irrespective of when, and of the purpose for which, it was issued.

**Subdivision 8—Special Powers of the Sheriff in Executing Warrants**

Pt 4 Div. 3  
Subdiv. 8  
(Heading and  
ss 82G–82I)  
inserted by No.  
99/2000 s. 4.

**82G. Requirement to give name and address**

S. 82G  
inserted by No.  
99/2000 s. 4.

- (1) In this section "**sheriff**" means the sheriff or a person directed by the sheriff to execute a warrant.
- (2) This section applies if the sheriff believes on reasonable grounds that a person may be the defendant named in a warrant being executed by the sheriff.
- (3) The sheriff may request the person to state his or her name and ordinary place of residence or business.
- (4) In making the request, the sheriff must inform the person of the grounds for his or her belief in relation to the person's identity.
- (5) A person who, in response to the request—
  - (a) refuses or fails to comply with the request without a reasonable excuse for not doing so; or
  - (b) states a name that is false in a material particular; or
  - (c) states an address other than the full and correct address of his or her ordinary place of residence or business—  
is guilty of an offence.  
Penalty: 5 penalty units.
- (6) A person who is requested to state his or her name and address may request the person who made the request to state, orally or in writing, his or her name, position and place of business.
- (7) A person who, in response to such a request—
  - (a) refuses or fails to comply with the request; or
  - (b) states a name or position that is false in a material particular; or
  - (c) states an address other than the full and correct address of his or her ordinary place of business—  
is guilty of an offence.  
Penalty: 5 penalty units.
- (8) If a person states a name and address in response to a request made under sub-section (3) and the sheriff suspects on

reasonable grounds that the stated name or address may be false, the sheriff may request the person to produce evidence of the correctness of the name and address.

- (9) The person must comply with the request, unless he or she has a reasonable excuse for not doing so.

Penalty: 5 penalty units.

- (10) It is not an offence for a person to fail to comply with a request made under sub-section (3) or (8) if the sheriff did not inform the person, at the time the request was made, that it is an offence to fail to comply with the request.

### **82H. Power to temporarily restrain**

- (1) The sheriff, a person directed by the sheriff to execute a warrant and any person assisting in the execution of a warrant may restrain a person who is hindering the execution of the warrant.
- (2) A person restrained under this section must be released as soon as the activity that the person was hindering has been completed.

**S. 82H**  
inserted by No.  
99/2000 s. 4.

### **82I. Power to assist police at road checks**

- (1) This section applies if a member of the police force exercising a power conferred (whether directly or by implication) by the Road Safety Act 1986 requests or signals the driver of a motor vehicle to stop the vehicle.
- (2) Once the vehicle has stopped, the member of the police force, the sheriff or any person who is a bailiff for the purposes of the Supreme Court Act 1986 may direct the driver of the vehicle—
- (a) to keep the vehicle stationary;
  - (b) to drive the vehicle to a designated spot;
  - (c) to produce his or her driver licence document or permit document;
  - (d) to comply with any other reasonable direction—
- to enable a determination of whether the driver, or any person accompanying the driver, is named in any warrant.
- (3) A person who is given a direction under sub-section (2) must comply with the direction unless he or she has a reasonable excuse for not doing so.

**s. 82I**  
  
**S. 82I**  
inserted by No.  
99/2000 s. 4.

Penalty: 5 penalty units.

# APPENDIX FIVE – PRINCIPLE VICTORIAN SEARCH WARRANT PROVISIONS

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## **Section 465 of the Crimes Act 1958 (Vic)**

**[Effective Date 14/09/2005. Version 181]**

*Please note endnote references to this legislation have been omitted*

### **Search Warrants for and Seizure of Things**

#### **465. Issue of search warrant by magistrate**

No. 6103 s. 465.

(1) Any magistrate who is satisfied by the evidence on oath or by affidavit of any member of the police force of or above the rank of senior sergeant that there is reasonable ground for believing that there is, or will be within the next 72 hours, in any building, receptacle or place—

S. 465(1)  
amended by Nos  
7184 s. 7, 8179  
s. 4, 16/1986  
s. 30, 57/1989  
s. 3(Sch. item  
42.56(a)-(d)),  
22/1996  
s. 6(1)(a).

(a) anything upon or in respect of which any indictable offence has been or is suspected to have been committed or is being or is likely to be committed within the next 72 hours; or

S. 465(1)(a)  
amended by No.  
22/1996

(b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or

s. 6(1)(b).

(c) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any indictable offence against the person for which the offender may be arrested without warrant—

may at any time issue a warrant authorizing some member of the police force or other person named therein to search such building receptacle or place for any such thing and to seize and carry it before the Magistrates' Court to be dealt with according to law.

S. 465(1A)  
inserted by No.

(1A) This section applies to and in respect of an offence against section 68 or 70 as if it were an indictable offence.

22/1996  
s. 6(2).

(1B) A magistrate who issues a warrant under sub-section (1), if

S. 465(1B)

satisfied on reasonable grounds by the evidence given under that sub-section that the thing to which the warrant relates is also tainted property within the meaning of the **Confiscation Act 1997**, may, in that warrant, direct that the applicant hold or retain that thing as if it were tainted property seized under a warrant under section 79 of that Act as and from the date when that thing is no longer required for evidentiary purposes under this Act.

inserted by No. 63/2003 s. 43.

(2) Subject to this section the rules to be observed with regard to search warrants mentioned in the **Magistrates' Court Act 1989** shall extend and apply to warrants under this section.

S. 465(2) amended by Nos 9427 s. 6(1)(Sch. 5 item 40), 57/1989 s. 3(Sch. item 42.57(a)(b)).

(3) The provisions of this section shall be read and construed as in aid of and not in derogation of the provisions with regard to warrants to search contained in this or any other Act.

S. 4

(4) The Governor in Council may make regulations prescribing the form of any warrant to be issued under this section and any such regulations shall be published in the Government Gazette and shall be laid before both Houses of Parliament within fourteen days after the making thereof if Parliament is then sitting, and if not then within fourteen days after the next meeting of Parliament.

465(5) inserted by No. 22/1996 s. 6(3), repealed by No. 48/1997 s. 61.

\* \* \* \* \*

S. 465A inserted by No. 63/2003 s. 44.

**465A. Notice that seized thing is being held for purposes of Confiscation Act 1997**

(1) If a thing seized under a warrant issued under section 465 to which a direction under section 465(1B) applies is no longer required for evidentiary purposes under this Act, the person to whom that warrant was issued must give notice to all persons known to have an interest in that thing that the thing is being held or retained as if it were tainted property seized under a warrant under section 79 of the **Confiscation Act 1997**.

(2) A notice under sub-section (1) must be—

(a) given within 7 days after the thing is no longer required for evidentiary purposes under this Act; and

(b) in the prescribed form.

S. 465B inserted by No. 63/2003 s. 44.

**465B. Application for tainted property to be held or retained—return of warrant to court**

(1) When a thing is brought before the Magistrates' Court to be dealt with according to law in accordance with the warrant issued under section 465 under which that thing was seized, the member of the police force named in the warrant or another member of the police force may apply to the Court for a direction that the thing so seized be held or retained as if it were tainted property seized under a warrant under section 79 of the **Confiscation Act 1997**.

- (2) An application may only be made under sub-section (1) if a direction under section 465(1B) was not made in relation to the warrant when it was issued.

**465C. Court may make direction**

S. 465C  
inserted by No.  
63/2003 s. 44.

- (1) On an application under section 465B, if the Court is satisfied on reasonable grounds that the thing seized under the warrant issued under section 465 is tainted property within the meaning of the **Confiscation Act 1997**, the Court may direct that the thing be held or retained by the member of the police force or other person named in the warrant as if it were tainted property seized under a warrant under section 79 of that Act.
- (2) A direction under this section takes effect on and from the date that the thing is no longer required for evidentiary purposes under this Act.
- (3) In determining whether the thing which is the subject of the application is in fact tainted property within the meaning of the **Confiscation Act 1997**, the Court may require the applicant to provide any information that the Court considers necessary.
- (4) The power of the Court under this section is in addition to its powers under section 78 of the **Magistrates' Court Act 1989** in relation to seized property.

S. 465D  
inserted by No.  
63/2003 s. 44.

**465D. Notice of direction under section 465C**

- (1) If the Magistrates' Court makes a direction under section 465C, the applicant for the direction must give notice to all persons known to have an interest in the thing to which the direction applies that the thing is being held or retained as if it were tainted property seized under a warrant under section 79 of the **Confiscation Act 1997** by virtue of a direction made under section 465C.
- (2) A notice under sub-section (1) must be—
  - (a) given within 7 days after the thing is no longer required for evidentiary purposes under this Act; and
  - (b) in the prescribed form.

S. 465E  
inserted by No.  
63/2003 s. 44.

**465E. Effect of directions under sections 465(1B) and 465C**

If a direction has been made under section 465(1B) or 465C, the thing to which the direction applies—

- (a) is deemed, on and from the date on which the thing is no longer required for evidentiary purposes under this Act, to have been seized as tainted property under a warrant under section 79 of the **Confiscation Act 1997**; and
- (b) is to be dealt with under that Act accordingly.

**Warrant form: Schedule 5 of the Crimes (Search Warrant) Regulations  
2004 (Vic)**

**[Effective Date 22/11/2004. Version 001]**

*Please note endnote references to this legislation have been omitted*

**SCHEDULE**

Regulation 4

**SEARCH WARRANT**

**Crimes Act 1958—section 465**

Court ref:

Name and description of article, thing, or material:

*(Insert relevant details)*

Place where search will be conducted for article, thing or material:

*(Set out full address of premises to be searched)*

Reasons for search or description of suspected offence:

*(Insert reasons or description)*

This warrant authorises:

*(Name, Rank and No.)*

of

*(Agency and Address)*

**Or all members of the police force:**

- to break, enter and search any place named or described in this warrant for any article, thing or material of any kind described in this warrant;

AND

- to bring the article, thing or material before the Court so that the matter may be dealt with according to law;

AND

- to arrest any person apparently having possession, custody or control of the article, thing or material.
- \* I am satisfied that there are reasonable grounds that certain articles, things or material namely:

(hereinafter referred to as "the said property") is tainted property within the meaning of the **Confiscation Act 1997** and I direct that the applicant hold or retain the said property as if it were tainted property seized under section 79 of the **Confiscation Act 1997** as and from the date when the property is no longer required for evidentiary purposes under the **Crimes Act 1958**.

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#### **If a person is arrested**

You must cause any person apparently having possession, custody or control of any article, thing or material described in this warrant when arrested:

- to be brought before a bail justice or the Court within a reasonable time of being arrested to be dealt with according to law; OR
  - to be released on bail in accordance with the endorsement on this warrant.
- 

#### **CERTIFICATE OF BAIL**

Any person arrested under this warrant may be released upon entering an undertaking of bail to appear at the Magistrates' Court at \_\_\_\_\_ on the following conditions:

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This warrant is authorised by section 465 of the **Crimes Act 1958**.

Given under my hand at: *(place)* at *(time)* \*am/pm on *(date)*

Signature: \_\_\_\_\_ Magistrate: *(name)*

\*Strike out if not applicable

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## Section 81 of the Drugs, Poisons and Controlled Substances Act 1981(Vic)

[Effective Date 01/07/2005. Version 74]

Please note endnote references to this legislation have been omitted

### PART VI—SEARCH SEIZURE AND FORFEITURE

#### 81. Warrant to search premises

S. 81 substituted  
by No. 10002  
s. 7(1).

- (1) Any magistrate who is satisfied by evidence on oath or by affidavit of any member of the police force of or above the rank of sergeant or for the time being in charge of a police station that there is reasonable ground for believing that there is, or will be within the next 72 hours, on or in any land or premises—
- (a) any thing in respect of which an offence under this Act or the regulations has been or is reasonably suspected to have been committed or is being or is likely to be committed within the next 72 hours;
- (b) any thing which there is reasonable ground to believe will afford evidence of the commission of an offence under this Act or the regulations; or
- (c) any document directly or indirectly relating to or concerning a transaction or dealing which is or would be, if carried out, an offence under this Act or the regulations or under a provision of a law in force in a place outside Victoria corresponding to Part V of this Act—

S. 81(1) amended  
by Nos 16/1986  
s. 30, 101/1986  
s. 58(1)(c),  
57/1989 s. 3(Sch.  
item 59.8(a)–(c)),  
48/1997  
s. 44(1)(a).  
  
S. 81(1)(a)  
amended by No.  
48/1997  
s. 44(1)(b).

may at any time issue a warrant under his hand authorizing a member of the police force named in the warrant to enter and search the land or premises for any such thing or document and to seize and carry it before the Court so that the matter may be dealt with according to law.

- (1A) A magistrate who issues a warrant under sub-section (1), if satisfied on reasonable grounds by the evidence given under that sub-section that the thing or document to which the warrant relates is also tainted property within the meaning of the **Confiscation Act 1997**, may, in that warrant, direct that the applicant hold or retain that thing or document as if it were tainted property seized under a warrant under section 79 of that Act as and from the date when that thing or document is no longer required for evidentiary purposes under this Act.
- (1B) A direction under sub-section (1A)—
- (a) may only be made in relation to an offence under this Act which is a Schedule 1 offence within the meaning of the **Confiscation**

S. 81(1A)  
inserted by No.  
63/2003 s. 46(1).

S. 81(1B)  
inserted by No.  
63/2003 s. 46(1).

**Act 1997**; and

(b) does not apply to a thing which may be destroyed or disposed of under sub-section (3)(e).

(2) Every warrant under sub-section (1) shall be in or to the effect of the form of Schedule Ten.

(3) A member of the police force to whom a warrant under sub-section (1) is addressed may at any time or times by day or night but within one month from the date of the warrant and with such assistance as may be necessary—

(a) enter, if need be by force, the land or premises named in the warrant;

(b) arrest all persons on or in that land or those premises who are found offending against a provision of this Act or the regulations;

(c) search the land or premises or any vehicle boat or aircraft or any person found on or in that land or those premises or in any vehicle boat or aircraft thereon or therein; and

(d) seize and carry away or, unless a direction under sub-section (1A) applies, deal with as mentioned in paragraph (e)—

S. 81(3)(d)  
amended by Nos  
48/1997  
s. 44(2)(a)(b),  
63/2003 s. 46(2).

(i) any thing in respect of which an offence under this Act or the regulations has been or is reasonably suspected to have been committed;

(ii) any thing which there is reasonable ground to believe will afford evidence of the commission of an offence under this Act or the regulations; and

(iii) any document directly or indirectly relating to or concerning a transaction or dealing which is or would be, if carried out, an offence against this Act or the regulations or under a provision of a law in force in a place outside Victoria corresponding to a provision of Part V of this Act; and

(e) if—

S. 81(3)(e)  
inserted by No.  
48/1997  
s. 44(2)(b).

(i) the thing is—

(a) a drug of dependence or a substance that contains a drug of dependence; or

(b) a poison or controlled substance; or

(c) an instrument, device or substance that is or has been used or is capable of being used for or in the cultivation, manufacture, sale or use or in the preparation for cultivation, manufacture, sale or use of a drug of dependence; and

(ii) an analyst or botanist within the meaning of section 120 certifies in writing to the member of the police force executing the warrant that destruction or disposal of the

thing is required in the interests of health or safety—

destroy or dispose of the thing after taking, where practicable, any samples of it as are required for the purposes of this Act.

- (4) Where a member of the police force to whom a warrant is addressed executes the warrant he shall as soon as practicable after executing the warrant—
- (a) endorse the warrant to that effect; and
  - (b) cause to be lodged with the registrar of the Magistrates' Court at the venue nearest to the land or premises where the warrant was executed a report signed by the member and containing particulars of—
    - (i) all searches undertaken;
    - (ii) all persons arrested; and
    - (iii) all things and documents seized and carried away; and
    - (iv) all samples taken; and
    - (v) all things destroyed or disposed of—
- in execution of the warrant.
- (4A) If a direction under sub-section (1A) was made, a report referred to in sub-section (4)(b) must also include particulars of whether a seized thing or document is being held or retained as if it were tainted property within the meaning of the **Confiscation Act 1997** seized under a warrant under section 79 of that Act.
- (5) On application in that behalf by a person made to the Magistrates' Court at the venue at which a report has been lodged pursuant to sub-section (4), the Court may make an order authorizing the person to inspect the report if the person satisfies the Court that he is—
- (a) a person who was arrested in the course of the execution of the warrant;
  - (b) the owner or occupier of premises upon which the warrant was executed; or
  - (c) the owner of the property seized and carried away in the execution of the warrant; or
  - (d) the owner of property destroyed or disposed of in execution of the warrant.
- (6) If a sample of a thing referred to in sub-section (3)(e) taken in execution of a warrant is sufficient to enable an analysis or examination to be made both in the investigation of an offence and

S. 81(4)(b)  
amended by No.  
57/1989 s. 3(Sch.  
item 59.9).

S. 81(4)(b)(iii)  
amended by No.  
48/1997 s. 44(3).

S. 81(4)(b)(iv)  
inserted by No.  
48/1997 s. 44(3).

S. 81(4)(b)(v)  
inserted by No.  
48/1997 s. 44(3).

S. 81(4A)  
inserted by No.  
63/2003 s. 46(3).

S. 81(5) amended  
by No. 57/1989  
s. 3(Sch. item  
59.10(a)(b)).

S. 81(5)(c)  
amended by No.  
48/1997 s. 44(4).

S. 81(5)(d)  
inserted by No.  
48/1997 s. 44(4).

S. 81(6) inserted  
by No. 48/1997  
s. 44(5).

on behalf of a person arrested in the course of the execution of the warrant, a part of the sample taken sufficient for analysis or examination must, on request by the person arrested, be delivered to an analyst or botanist within the meaning of section 120 nominated by that person.

**81A. Notice that seized thing or document is being held for purposes of Confiscation Act 1997**

S. 81A  
inserted by No.  
63/2003 s. 47.

- (1) If a thing or document seized under a warrant issued under section 81 to which a direction under section 81(1A) applies is no longer required for evidentiary purposes under this Act, the person to whom that warrant was issued must give notice to all persons known to have an interest in that thing or document that the thing or document is being held or retained as if it were tainted property seized under a warrant under section 79 of the **Confiscation Act 1997**.
- (2) A notice under sub-section (1) must be—
  - (a) given within 7 days after the thing or document is no longer required for evidentiary purposes under this Act; and
  - (b) in the prescribed form.

**81B. Application for tainted property to be held or retained—return of warrant to court**

S. 81B  
inserted by No.  
63/2003 s. 47.

- (1) When a thing or document is brought before the Magistrates' Court to be dealt with according to law in accordance with the warrant issued under section 81 under which that thing or document was seized, the member of the police force to whom the warrant was addressed or another member of the police force may apply to the Court for a direction that the thing or document so seized be held or retained as if it were tainted property seized under a warrant under section 79 of the **Confiscation Act 1997**.
- (2) An application may only be made under sub-section (1) if a direction under section 81(1A) was not made in relation to the warrant when it was issued.

**81C. Court may make direction**

S. 81C  
inserted by No.  
63/2003 s. 47.

- (1) On an application under section 81B, if the Court is satisfied on reasonable grounds that the thing or document seized under the warrant issued under section 81 is tainted property within the meaning of the **Confiscation Act 1997**, the Court may direct that the thing or document be held or retained by the member of the police force as if it were tainted property seized under a warrant under section 79 of that Act.
- (2) A direction under this section takes effect on and from the date that the thing or document is no longer required for evidentiary purposes under this Act.
- (3) In determining whether the thing or document which is the subject of the application is in fact tainted property within the meaning of

the **Confiscation Act 1997**, the Court may require the applicant to provide any information that the Court considers necessary.

**81D. Notice of direction under section 81C**

S. 81D  
inserted by No.  
63/2003 s. 47.

- (1) If the Magistrates' Court makes a direction under section 81C, the applicant for the direction must give notice to all persons known to have an interest in the thing or document to which the direction applies that the thing or document is being held or retained as if it were tainted property seized under a warrant under section 79 of the **Confiscation Act 1997** by virtue of a direction made under section 81C.
- (2) A notice under sub-section (1) must be—
  - (a) given within 7 days after the thing or document is no longer required for evidentiary purposes under this Act; and
  - (b) in the prescribed form.

**81E. Effect of directions under sections 81(1A) and 81C**

S. 81E  
inserted by No.  
63/2003 s. 47.

- If a direction has been made under section 81(1A) or 81C, the thing or document to which the direction applies—
- (a) is deemed, on and from the date on which the thing or document is no longer required for evidentiary purposes under this Act, to have been seized as tainted property under a warrant under section 79 of the **Confiscation Act 1997**; and
  - (b) is to be dealt with under that Act accordingly.

**Warrant form: Drugs, Poisons and Controlled Substances Act 1981  
(Vic)**

[Effective Date 01/07/2005. Version 74]

Please note endnote references to this legislation have been omitted

**SCHEDULE TEN**

(Section 81)

**Drugs, Poisons and Controlled Substances Act 1981**

**SEARCH WARRANT**

To \_\_\_\_\_ a member of the Police  
Force

WHEREAS I, the undersigned, a \*Magistrate \_\_\_\_\_ in the  
State of Victoria, am satisfied by the \*evidence on oath or \*by affidavit  
of:

\_\_\_\_\_ a member of the  
Police Force of or above the rank of Sergeant or for the time being in  
charge of a police station, that there is reasonable ground for believing  
that there \*is \_\_\_\_\_ in a certain

\*are

\*will be within the next 72 hours

land or

premises situate at \_\_\_\_\_ \*certain things  
\*or documents

to wit:

- \* (1) upon or in respect of which an offence under the **Drugs Poisons and Controlled Substances Act 1981** or the Regulations under that Act, has been or is reasonably suspected to have been committed or is being or is likely to be committed within the next 72 hours;
- \* (2) which there is reasonable ground to believe is intended to be used for the purpose of committing an offence under the **Drugs Poisons and Controlled Substances Act 1981** or the Regulations under that Act;
- \* (3) which is a document directly or indirectly relating to or

Sch. 10  
substituted by  
No. 10002 s. 8(1),  
amended by Nos  
16/1986 s. 30,  
101/1986  
s. 58(1)(g),  
57/1989 s. 3(Sch.  
item 59.15(a)-(c)),  
48/1997  
s. 44(7)(a)-(c),  
63/2003  
s. 48(1)(2).



## Section 92 of the Crimes Act 1958 (Vic)

[Effective Date 22/11/2004. Version 001]

*Please note endnote references to this legislation have been omitted*

### 92. Search for stolen goods

- (1) If a magistrate is satisfied by evidence on oath or by affidavit that there is reasonable cause to believe that any person has in his custody or possession or on his premises any stolen goods, the magistrate may grant a warrant to search for and seize the same; but no warrant to search for stolen goods shall be addressed to a person other than a constable except under the authority of an enactment expressly so providing.
- (2) An officer of police not below the rank of inspector may give a constable written authority to search any premises for stolen goods—
  - (a) if the person in occupation of the premises has been convicted within the preceding five years of handling stolen goods or of any offence involving dishonesty and punishable with imprisonment; or
  - (b) if a person who has been convicted within the preceding five years of handling stolen goods has within the preceding twelve months been in occupation of the premises.
- (3) Where under this section a person is authorized to search premises for stolen goods, he may enter and search the premises accordingly, and may seize any goods he believes to be stolen goods.
- (4) This section is to be construed in accordance with section 90 and in sub-section (2) the references to handling stolen goods shall include any corresponding offence committed before the commencement of the **Crimes (Theft) Act 1973**.

S. 92 amended  
by No. 7876  
s. 2(3),  
substituted by  
No. 8425  
s. 2(1)(b),  
amended by No.  
64/1990  
s. 20(Sch. item  
3(a)(b)).

**Warrant form: Schedule 5 of the Magistrates' Court Regulations 2000  
(Vic)**

[Effective Date 16/08/2005. Version 021]

Please note endnote references to this legislation have been omitted

**FORM 15  
SEARCH WARRANT**

Court Ref.

Name and/or description of person or article, thing or material

Place where search will be conducted for article, thing or material

Number and name of street  
Suburb

Reason for search/Suspected offence

This Warrant authorises

Name, Rank, No.

Agency and  
Address

Or all members of the police force:

- 
- Search for a person  
to break, enter and search any place where the person named or described in this warrant is suspected to be;  
and  
to arrest the person named or described in this warrant.

- 
- Search for any article, thing or material of any kind  
to break, enter and search any place named or described in this warrant for any article, thing or material of any kind named or described in this warrant;  
and  
to bring the article, thing or material before the Court so that the matter may be dealt with according to law;  
and  
to arrest any person apparently having possession, custody or control of the article, thing or material.

---

**If person arrested**

You must also cause the person named or described in the warrant, or apparently having possession, custody or control of any article, thing or material named or described in the warrant, when arrested—

- to be brought before a bail justice or the Court as soon as practicable to be dealt with according to law;  
or  
 to be released on bail in accordance with the endorsement on this warrant.

---

This warrant is authorised by section \_\_\_\_\_ of the \_\_\_\_\_ Act  
Issued at \_\_\_\_\_ am/pm on \_\_\_\_\_ by \_\_\_\_\_ Magistrate

# APPENDIX SIX – RECENT SEARCH WARRANT PROVISIONS

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## **Sections 86VA-86Z of the Police Regulation Act 1958 (Vic)**

[Effective Date 1/06/2005. Version 102]

*Please note endnote references to this legislation have been omitted*

### **Division 3—Powers of Entry, Search and Seizure**

Pt 4A Div. 3  
(Heading and  
ss 86W–86Z)  
inserted by No.  
32/2004 s. 18.

#### **86VA. Definitions**

(1) In this Division—

"authorised officer" means—

- (a) the Director; or
- (b) a member of staff of the Office of Police Integrity who is authorised under sub-section (2); or
- (c) a person who has taken an oath or made an affirmation under section 102D(3) and who is authorised under sub-section (2);

S. 86VA  
inserted by No.  
79/2004 s. 87.

"chief executive", of a public authority, means—

- (a) in relation to the force—the Chief Commissioner; or
- (b) in relation to a public service body within the meaning of the **Public Administration Act 2004**—the public service body Head within the meaning of that Act; or
- (c) in relation to any other body, whether or not incorporated, established by or under an Act for a public purpose—the chief executive officer, by whatever name called, of the body;

S. 86VA(1) def. of  
"chief executive"  
amended by No.  
108/2004 s. 117(1)  
(Sch. 3  
item 158.4(a)).

"court day" means a day on which the registry of the Magistrates' Court is open for business;

"public authority" means—

- (a) the force; or
- (b) a public service body within the meaning of the **Public**

S. 86VA(1) def. of  
"public authority"  
amended by No.  
108/2004 s. 117(1)  
(Sch. 3  
item 158.4(b))

**Administration Act 2004; or**

- (c) any other body, whether or not incorporated, established by or under an Act for a public purpose.
- (2) The Director may authorise a member of staff of the Office of Police Integrity or a person who has taken an oath or made an affirmation under section 102D(3) to exercise the powers of an authorised officer under this Division.

**86VB. Power to enter public authority premises**

S. 86VB  
inserted by No.  
79/2004 s. 87.

- (1) An authorised officer may—
  - (a) enter at any time premises occupied by a public authority at which the authorised officer reasonably believes there are documents or other things that are relevant to an investigation under this Part; and
  - (b) inspect or copy any document or other thing found at any premises entered under paragraph (a); and
  - (c) do anything that it is necessary or convenient to do to enable an inspection to be carried out under this section.
- (2) On exercising a power of entry under this section, the authorised officer must—
  - (a) identify himself or herself to a person at the premises; and
  - (b) announce that he or she is authorised to enter the premises.
- (3) An authorised officer must not inspect or copy a document or thing under sub-section (1)(b) if—
  - (a) a person at the premises claims that the document or thing is the subject of legal professional privilege; or
  - (b) no claim is made that the document or thing is the subject of legal professional privilege but—
    - (i) it appears to the authorised officer that the document or thing may be the subject of legal professional privilege; and
    - (ii) it does not appear to the authorised officer that the person entitled to the benefit of that privilege has consented to the inspection or production.

Note: Section 86VE sets out the procedure to be followed if the authorised officer wants to inspect or copy a document or thing that may be the subject of legal professional privilege.

- (4) An authorised officer does not have authority under this section to enter any part of premises that is used for

residential purposes.

**86VC. Power to seize documents or things at public authority premises**

S. 86VC  
inserted by No.  
79/2004 s. 87.

- (1) An authorised officer who exercises a power of entry under section 86VB may seize a document or thing at the premises if the authorised officer reasonably suspects that—
  - (a) the document or other thing is relevant to an investigation under this Part; and
  - (b) if the document or other thing is not immediately seized—
    - (i) it may be concealed or destroyed; or
    - (ii) its forensic value may be diminished.
- (2) An authorised officer must not seize a document or thing under sub-section (1) if—
  - (a) a person at the premises claims that the document or thing is the subject of legal professional privilege; or
  - (b) no claim is made that the document or thing is the subject of legal professional privilege but—
    - (i) it appears to the authorised officer that the document or thing may be the subject of legal professional privilege; and
    - (ii) it does not appear to the authorised officer that the person entitled to the benefit of that privilege has consented to the seizure.

Note: Section 86VE sets out the procedure to be followed if the authorised officer wants to seize a document or thing that may be the subject of legal professional privilege.

- (3) A document or other thing seized under this section cannot be used for the purposes of any investigation under this Part until—
  - (a) the period for making an application under section 86VG for return of the document or thing has expired; or
  - (b) if an application is made within that period—the application and any appeal in relation to it have been finally determined.

**86VD. Copying of, access to or receipt for things seized**

S. 86VD  
inserted by No.  
79/2004 s. 87.

- (1) If an authorised officer seizes—
  - (a) a document, disk or tape or other thing that can be readily

copied; or

- (b) a storage device the information in which can be readily copied—

under section 86VC, the authorised officer, on request by a person at the premises, must give a copy of the thing or information to the person as soon as practicable after the seizure.

- (2) The authorised officer may refuse a request under sub-section (1) if—

- (a) the Director is satisfied that the work involved in copying the thing or information would substantially and unreasonably—

- (i) divert the resources of the Office of Police Integrity from its other operations; or

- (ii) interfere with the performance of the Director's functions; or

- (b) the Director is of the opinion that it is not in the public interest to give a copy of the thing or information to the person.

- (3) An authorised officer must not refuse a request under sub-section (1), unless the authorised officer has—

- (a) given the person who made the request a written notice stating an intention to refuse the request; and

- (b) given the person a reasonable opportunity to make a further request for a copy of the thing or information in a form that would remove the ground for refusal; and

- (c) as far as is reasonably practicable, provided the person with any information that would assist the making of the further request in such a form.

- (4) An authorised officer is not required to provide any information under sub-section (3)(c) if the Director is of the opinion that it is not in the public interest for the information to be provided.

- (5) If an authorised officer refuses a request under sub-section (1)—

- (a) the authorised officer must provide a receipt for the thing seized; and

- (b) the Director, on request by the chief executive of the public authority at whose premises the thing was seized, must permit the chief executive to have access to the thing or information unless the Director is of the opinion that it is not in the public interest for the chief executive to

have access.

- (6) The Director must not refuse a request for access under sub-section (5)(b), unless the Director has—
  - (a) given the chief executive a written notice stating an intention to refuse to give access; and
  - (b) given the chief executive a reasonable opportunity to make a further request for access in a form that that would remove the ground for refusal; and
  - (c) as far as is reasonably practicable, provided the chief executive with any information that would assist the making of the further request in such a form.
- (7) The Director is not required to provide any information under sub-section (6)(c) if the Director is of the opinion that it is not in the public interest for the information to be provided.
- (8) For the avoidance of doubt, an authorised officer or the Director is not required to give reasons for refusing a request under this section.

**86VE. Procedure for documents that may be subject to legal professional privilege**

S. 86VE  
inserted by No.  
79/2004 s. 87.

- (1) This section applies if—
  - (a) any of the circumstances referred to in section 86VB(3) or 86VC(2) apply; and
  - (b) the authorised officer still wants to inspect, copy or seize the document or thing (as the case requires).
- (2) In the circumstances referred to in section 86VB(3)(a) or 86VC(2)(a), the authorised officer must require the person claiming that the document or thing is the subject of legal professional privilege (the "**claimant**") to seal the document or thing immediately, or arrange for it to be sealed immediately, and give it, or arrange for it to be given, to the authorised officer.
- (3) The claimant must immediately seal the document or thing, or arrange for it to be sealed, under the authorised officer's supervision and give it, or arrange for it to be given, to the authorised officer.  
  
Penalty: 120 penalty units or imprisonment for 12 months or both.
- (4) In the circumstances referred to in section 86VB(3)(b) or 86VC(2)(b), the authorised officer may take possession of the document or thing and must seal the document or thing immediately.

- (5) The authorised officer must immediately give the sealed document or thing to a registrar of the Magistrates' Court to be held in safe custody.
- (6) The registrar must keep the sealed document or thing in safe custody until—
  - (a) an application is made to the Magistrates' Court under section 86VF to decide whether or not the document or thing is the subject of legal professional privilege; or
  - (b) the end of 3 court days after the day on which the sealed document or thing is given to the registrar, if an application has not been made under section 86VF; or
  - (c) the registrar is told by a person who appears to be entitled to the benefit of legal professional privilege and the authorised officer that agreement has been reached on the disposal of the sealed document or thing.
- (7) The registrar must—
  - (a) if an application is made to the Magistrates' Court under section 86VF—dispose of the sealed document or thing in the way ordered by the court; or
  - (b) if an application is not made by the end of 3 court days after the day on which the sealed document or thing is given to the registrar—give the sealed document or thing to a person who appears to be entitled to the benefit of legal professional privilege; or
  - (c) if a person who appears to be entitled to the benefit of legal professional privilege and the authorised officer give the registrar notice that an agreement on the disposal of the sealed document or thing has been reached—dispose of the sealed document or thing in the way agreed.
- (8) The registrar is entitled to open and inspect the sealed document or thing solely for the purpose of performing a function under sub-section (6)(c) or (7)(b) or (c).
- (9) A person must not open a sealed document or thing unless authorised to open it under this Act or a court order.

Penalty: 120 penalty units or imprisonment for 12 months or both.

**86VF. Application to Magistrates' Court to decide on legal professional privilege**

S. 86VF  
inserted by No.  
79/2004 s. 87.

- (1) Within 3 court days after an authorised officer gives a sealed document or thing to a registrar of the Magistrates' Court under section 86VE, the Director must apply to the Magistrates' Court to determine whether or not the document

or thing is the subject of legal professional privilege.

- (2) The Magistrates' Court must decide whether or not the sealed document or thing is the subject of legal professional privilege and for that purpose the magistrate and any other person authorised by the Court may open and inspect the sealed document or thing.
- (3) If the Magistrates' Court decides that the sealed document or thing is the subject of legal professional privilege, the Court may order that the document or thing be given to a person entitled to the benefit of the privilege.
- (4) If the Magistrates' Court decides that the sealed document or thing is not the subject of legal professional privilege, the Court may order that the document or thing be released to an authorised officer for the purpose of the exercise of the authorised officer's powers under this Division.

**86VG. Application for return of things seized**

S. 86VG  
inserted by No.  
79/2004 s. 87.

- (1) Within 7 days after a document or thing is seized by an authorised officer under section 86VC, an interested person may apply to the Magistrates' Court for an order setting aside the seizure and requiring the Director to deliver the document or thing to the interested person.
- (2) On an application under sub-section (1), the Magistrates' Court may make an order setting aside the seizure and requiring the Director to deliver the document or thing to the interested person if the Court is satisfied that the grounds for the seizure did not, or no longer, exist.
- (3) The interested person has the burden of proving that the grounds for the seizure did not, or no longer, exist.
- (4) In this section—  
**"interested person"** in relation to a document or thing, means—
  - (a) the chief executive of the public authority at whose premises the document or thing was seized; or
  - (b) a person authorised by the chief executive to apply under this section on the chief executive's behalf; or
  - (c) any other person who claims to have a legal or equitable interest in the document or thing.

**86VH. Return of things seized**

S. 86VH  
inserted by No.  
79/2004 s. 87.

- (1) The Director must return a document or thing seized under section 86VC to the chief executive of the public authority at

whose premises it was seized—

- (a) if the thing is required as evidence relating to a prosecution or an appeal from a prosecution; or
- (b) immediately the Director stops being satisfied that its retention is necessary for the purposes of—
  - (i) an investigation under this Part; or
  - (ii) a report on an investigation under this Part.

- (2) This section is subject to any order of the Magistrates' Court under section 86VG.

### 86W. Powers with search warrant

S. 86W

inserted by No.  
32/2004 s. 18.

- (1) The Director may apply to a magistrate for the issue of a search warrant in relation to particular premises if the Director believes, on reasonable grounds that entry to the premises is necessary for the purpose of an investigation under this Part.
- (2) If a magistrate is satisfied by evidence on oath, whether oral or by affidavit, that there are reasonable grounds for the belief under sub-section (1), the magistrate may issue a search warrant authorising any person named in the warrant—
  - (a) to enter and search the premises named or described in the warrant and inspect any document or thing at those premises; and
  - (b) to make a copy of any document relevant, or that the person reasonably considers may be relevant, to the investigation; and
  - (c) to take possession of any document or thing that the person considers relevant to the investigation.
- (3) A search warrant issued under this section must state—
  - (a) the purpose for which the search is required; and
  - (b) any conditions to which the warrant is subject; and
  - (c) whether entry is authorised to be made at any time of the day or night or during stated hours of the day or night; and
  - (d) a day, not later than 28 days after the issue of the warrant, on which the warrant ceases to have effect.
- (4) Except as provided by this Act, the rules to be observed with respect to search warrants under the **Magistrates' Court Act 1989** (other than section 78 of that Act) extend and apply to warrants under this section.

S. 86W(1)

amended by No.  
63/2004 s. 4(7)(f).

### 86X. Procedure for executing warrant

s. 86X

- (1) On executing a search warrant, the person executing the warrant—
  - (a) must announce that he or she is authorised by the warrant to enter the premises; and
  - (b) if the person has been unable to obtain unforced entry, must give any person at the premises an opportunity to allow entry to the premises.
- (2) A person executing a warrant need not comply with subsection (1) if he or she believes, on reasonable grounds that immediate entry to the premises is required to ensure—
  - (a) the safety of any person; or
  - (b) that the effective execution of the search warrant is not frustrated.
- (3) If the occupier is present at premises where a search warrant is being executed, the person executing the warrant must—
  - (a) identify himself or herself to the occupier; and
  - (b) give the occupier a copy of the warrant.
- (4) If the occupier is not present at premises where a search warrant is being executed, the person executing the warrant must—
  - (a) identify himself or herself to a person at the premises; and
  - (b) give that person a copy of the warrant.

S. 86X  
inserted by No.  
32/2004 s. 18.

**86Y. Copies or receipts to be given**

- (1) If a person takes possession of—
  - (a) a document, disk or tape or other thing that can be readily copied; or
  - (b) a storage device the information in which can be readily copied—

under a warrant the person, on request by the occupier, must give a copy of the thing or information to the occupier as soon as practicable after taking possession of it.
- (2) If a person takes possession of a thing under a warrant and has not provided a copy of the thing or information under subsection (1) the person must provide a receipt for that thing as soon as practicable after taking possession of it.

S. 86Y  
inserted by No.  
32/2004 s. 18.

**86Z. Return of documents and other things**

The Director must take all reasonable steps to return a document or thing seized under a warrant to the person from whom it was

S. 86Z  
inserted by No.  
32/2004 s. 18,  
amended by No.

seized—

- (a) if the thing is required as evidence relating to a prosecution or an appeal from a prosecution; or
- (b) immediately the Director stops being satisfied that its retention is necessary for the purposes of—
  - (i) an investigation under this Part; or
  - (ii) a report on an investigation under this Part.

63/2004 s. 4(7)(f),  
substituted by  
No. 79/2004 s. 88  
(as amended by  
No. 97/2004  
s. 9(5)).

## **Sections 79-97W of the Confiscation Act 1997 (Vic)**

**[Effective Date 26/05/2005. Version 042]**

*Please note endnote references to this legislation have been omitted*

### **PART 11—SEARCH WARRANTS**

#### **79. Search warrants**

S. 79

- (1) A member of the police force may apply to a magistrate or to a judge of the Supreme Court or County Court for a search warrant to be issued under this Part in respect of any premises.
- (2) A magistrate or judge to whom an application is made under sub-section (1) may, if satisfied that there are reasonable grounds for believing that there is, or may be within the next 72 hours, any tainted property or any property forfeited under this Act in or on the premises, issue a search warrant authorising any member of the police force to break and enter the premises and do either or both of the following—
  - (a) search the premises for the tainted property or the forfeited property;
  - (b) search any person found in or on the premises in accordance with section 94.
- (3) A warrant may be issued under this Part in reliance on the commission of a Schedule 1 offence even if no person has been charged with that offence if the magistrate or judge is satisfied that it is likely that a person will be so charged within 48 hours.
- (4) There must be stated in a warrant—
  - (a) the purpose for which the warrant is issued; and
  - (b) the nature of the offence in reliance on which the warrant is issued; and
  - (c) a description of the kind of property authorised to be seized.
- (5) Every warrant issued under sub-section (2) must be in the prescribed form.
- (6) Nothing in this Part limits any of the provisions of any other Act relating to search warrants.

S. 79(3)  
amended by No.  
87/2004  
s. 22(2)(c).

#### **79A. Seizure warrants—public places**

S. 79A  
inserted by

- (1) A member of the police force may apply to a magistrate or to a judge of the Supreme Court or County Court for a seizure warrant to be issued under this Part in respect of—
- (a) tainted property which is at a public place; or
  - (b) property forfeited under this Act which is at a public place.
- (2) A magistrate or judge to whom an application is made under sub-section (1), if satisfied that there are reasonable grounds for believing that there is, or may be within the next 72 hours, any tainted property at a public place or any property forfeited under this Act at a public place, may issue a seizure warrant authorising any member of the police force to seize—
- (a) the tainted property specified in the warrant from a public place; or
  - (b) the forfeited property specified in the warrant from a public place.
- (3) A seizure warrant may be issued under this Part in reliance on the commission of a Schedule 1 offence even if no person has been charged with that offence if the magistrate or judge is satisfied that it is likely that a person will be so charged within 48 hours.
- (4) There must be stated in a seizure warrant—
- (a) the purpose for which the warrant is issued; and
  - (b) the nature of the offence in reliance on which the warrant is issued; and
  - (c) a description of the property authorised to be seized.
- (5) Nothing in a seizure warrant authorises—
- (a) the seizure of property other than the property specified in the warrant; or
  - (b) the arrest of a person; or
  - (c) the entry of any premises to seize property.
- (6) Every seizure warrant issued under sub-section (2) must be in the prescribed form.

No. 63/2003 s. 19.

S. 79A(3)  
amended by No.  
87/2004

s. 22(2)(d).

### 80. Application for warrant

- (1) An application for a search warrant or a seizure warrant must be made in writing.
- (2) A magistrate or judge must not issue a search warrant or a seizure warrant unless—
- (a) the application for the warrant sets out the grounds on

S. 80(1)  
amended by  
No. 63/2003  
s. 20(1).

S. 80(2)  
amended by  
No. 63/2003

- which the warrant is being sought; and s. 20(1).
- (b) the applicant has given the magistrate or judge, either orally or in writing, any further information that he or she requires concerning the grounds on which the warrant is being sought; and
- (c) the information given by the applicant is verified before the magistrate or judge on oath or affirmation or by affidavit. S. 80(3)
- (3) A magistrate or judge may administer an oath or affirmation or take an affidavit for the purposes of an application for a search warrant or a seizure warrant. amended by  
No. 63/2003  
s. 20(1).

**81. Warrant may be granted by telephone**

- (1) If, by reason of circumstances of urgency, a member of the police force considers it necessary to do so, the member may apply for a search warrant under section 79 or a seizure warrant under section 79A to a magistrate or judge, by telephone, in accordance with this section. S. 81 (Heading)  
inserted by  
No. 63/2003  
s. 20(2).
- (2) Before making the application, the member must prepare an affidavit setting out the grounds on which the warrant is sought, but may, if necessary, make the application before the affidavit has been sworn. S. 81(1)  
amended by  
No. 63/2003  
s. 20(3)(a).
- (3) If transmission by facsimile machine is available, the member must transmit a copy of the affidavit, whether sworn or unsworn, to the magistrate or judge who is to hear the application by telephone. S. 81(4)
- (4) If— amended by  
No. 63/2003  
s. 20(3)(b).
  - (a) after having considered the terms of the affidavit; and
  - (b) after having received any further information that the magistrate or judge requires concerning the grounds on which the warrant is being sought—

the magistrate or judge is satisfied as required by section 79(2) or section 79A(2) (as the case requires), he or she may issue a search warrant.
- (5) If a magistrate or judge issues a search warrant or a seizure warrant on an application made by telephone, he or she must— S. 81(5)  
amended by  
No. 63/2003  
s. 20(3)(c).
  - (a) inform the applicant of the terms of the warrant and the date on which and the time at which it was issued, and record on the warrant the reasons for issuing the warrant; and
  - (b) if transmission by facsimile machine is available, transmit a copy of the warrant to the applicant.

- (6) If a copy of the search warrant or the seizure warrant has not been transmitted by facsimile machine, the applicant must—
- (a) complete a form of search warrant or a seizure warrant (as the case requires) in the terms furnished to the applicant by the magistrate or judge and must write on it the name of the magistrate or judge and the date on which and the time at which the warrant was issued; and
  - (b) not later than the day following the date of the execution of the search warrant or the seizure warrant (as the case requires) or the expiry of the warrant, whichever is earlier, send the form of warrant completed by the applicant to the magistrate or judge who issued the warrant.
- (7) If an application is made by telephone, whether or not a search warrant or a seizure warrant is issued, the applicant must, not later than the day following the making of the application, send the original affidavit duly sworn to the magistrate or judge who heard the application.
- (8) In any proceeding, if it is material for a court to be satisfied that an entry, search or seizure was authorised in accordance with this section, and the warrant signed by a magistrate or judge in accordance with this section authorising the entry, search or seizure is not produced in evidence, the court must assume, unless the contrary is proved, that the entry, search or seizure was not authorised by such a warrant.

S. 81(6)  
amended by  
No. 63/2003  
s. 20(3)(d)(i).  
  
S. 81(6)(a)  
amended by  
No. 63/2003  
s. 20(3)(d)(ii).  
  
S. 81(6)(b)  
amended by  
No. 63/2003  
s. 20(3)(d)(iii).  
  
S. 81(7)  
amended by  
No. 63/2003  
s. 20(3)(e).

**82. Record of proceedings for warrant**

- (1) A magistrate or judge who issues a search warrant or a seizure warrant must cause a record to be made of all relevant particulars of the grounds he or she has relied on to justify the issue of the warrant.
- (2) The magistrate or judge may decline to record any matter that might disclose the identity of a person if the magistrate or judge believes on reasonable grounds that to do so might jeopardise the safety of any person.

S. 82(1)  
amended by  
No. 63/2003  
s. 20(4).

**83. Notice to occupier of premises entered under search warrant**

- (1) A magistrate or judge must prepare and give an occupier's notice to the person to whom the magistrate or judge issues a search warrant.
- (2) An occupier's notice—
- (a) must specify—
    - (i) the name of the person who applied for the warrant; and

S. 83

- (ii) the name of the magistrate or judge who issued the warrant; and
  - (iii) the date and the time when the warrant was issued; and
  - (iv) the address or other description of the premises which are the subject of the warrant; and
- (b) must contain a summary of the nature of the warrant and the powers conferred by the warrant.
- (3) A member of the police force executing a search warrant must—
- (a) on entry into or onto the premises or as soon as practicable thereafter, serve the occupier's notice on a person who appears to be an occupier of, or to be in charge of, the premises and to be aged 18 or more; or
  - (b) if no such person is then present in or on the premises, serve the occupier's notice on the occupier of, or person in charge of, the premises, either personally or in such other manner as the magistrate or judge who issued the warrant may direct, as soon as practicable after executing the warrant.
- (4) Service of an occupier's notice under sub-section (3)(b) may be postponed by the magistrate or judge who issued the search warrant if he or she is satisfied that there are reasonable grounds for the postponement.
- (5) Service of an occupier's notice under sub-section (3)(b) may be postponed on more than one occasion, but must not be postponed on any one occasion for a period exceeding 6 months.

**84. Duty to show search warrant**

A member of the police force executing a search warrant must produce the warrant for inspection by an occupier of, or a person who is in charge of, the premises if requested to do so.

S. 84 (Heading)  
inserted by  
No. 63/2003  
s. 20(5).

**84A. Duty to show seizure warrant**

A member of the police force executing a seizure warrant must produce the warrant for inspection by any person present during the execution of the seizure warrant, if that person—

- (a) has an interest in the property being seized; or
- (b) is in charge of the property being seized.

S. 84A  
inserted by  
No. 63/2003 s. 21.

**85. Use of force**

A person authorised to search premises under a search warrant may, if it is reasonably necessary to do so, break open any receptacle in or on the premises for the purposes of that search.

**86. Use of assistants to execute warrant**

A member of the police force may execute a search warrant or a seizure warrant with the aid of any assistants that the member considers necessary.

S. 86  
amended by  
No. 63/2003  
s. 22(1).

**87. Application of Magistrates' Court Act 1989**

Except to the extent that a contrary intention appears in this Part, the rules to be observed with respect to search warrants mentioned in the **Magistrates' Court Act 1989** extend and apply to warrants under this Part.

**88. Expiry of warrant**

A search warrant or a seizure warrant ceases to have effect—

- (a) at the end of the period of 1 month after its issue; or
- (b) if it is recalled and cancelled by the magistrate or judge who issued it; or
- (c) when it is executed—  
whichever occurs first.

S. 88  
amended by  
No. 63/2003  
s. 22(2).

**88A. Notice of execution of seizure warrant**

- (1) The applicant for a seizure warrant must give notice of the execution of that warrant to all persons known to have an interest in the property seized under the warrant.
- (2) A notice under sub-section (1) must be—
  - (a) given as soon as practicable, but not more than 7 days after the execution of the seizure warrant; and
  - (b) in the prescribed form.

S. 88A  
inserted by  
No. 63/2003 s. 23.

**89. Report on execution of warrant etc.**

- (1) The person to whom a search warrant or a seizure warrant is issued must give a report in writing to the magistrate or judge who issued the warrant—
  - (a) stating whether or not the warrant was executed; and

S. 89(1)  
amended by  
No. 63/2003  
s. 24(1).

- (b) if the warrant was executed—setting out briefly the result of the execution of the warrant (including a brief description of anything seized); and
  - (c) if the warrant was not executed—setting out briefly the reasons why the warrant was not executed; and S. 89(1)(d)  
amended by  
No. 63/2003  
s. 24(2).
  - (d) in the case of a search warrant, stating whether or not an occupier's notice has been served in connection with the execution of the warrant; and
  - (da) in the case of a seizure warrant, stating whether or not a notice of the execution of a seizure warrant has been given in accordance with section 88A; and S. 89(1)(da)  
inserted by  
No. 63/2003  
s. 24(3).
  - (e) stating whether or not an embargo notice has been issued under section 93 in connection with the execution of the search warrant and describing briefly the property subject to the notice. S. 89(1)(e)  
amended by  
No. 63/2003  
s. 24(4).
- (2) A report must be made within 10 days after the expiry of the warrant.
- (3) A person may apply to the magistrate or judge to whom a report has been given under sub-section (1) for an order authorising the person to inspect the report if the person satisfies the magistrate or judge that he or she is—
- (a) the owner or occupier of premises upon which the warrant was executed; or
  - (b) a person who has an interest in property seized in the execution of the warrant; or
  - (c) a person who has an interest in property subject to an embargo notice issued under section 93 in connection with the execution of the warrant.

**90. Absence etc. of magistrate or judge who issued warrant**

- If the magistrate or judge who issued a search warrant or a seizure warrant has ceased to hold office or is absent—
- (a) a report required to be given to him or her under section 89; or S. 90  
amended by  
No. 63/2003  
s. 24(5)(a).
  - (b) in the case of a search warrant, a power exercisable by him or her under section 83(3)(b) or (4)— S. 90(b)  
amended by  
No. 63/2003  
s. 24(5)(b).
- must be given to, or may be exercised by, as the case requires, any other magistrate or judge.

**91. Defects in warrants**

A search warrant or a seizure warrant is not invalidated by any defect, other than a defect which affects the substance of the

S. 91  
amended by  
No. 63/2003

warrant in a material particular.

s. 24(6).

**92. Seizure of property under search warrant**

S. 92

- (1) A member of the police force executing a search warrant may seize property of the kind described in the warrant.
- (2) A member of the police force executing a search warrant may also seize property which is not of the kind described in the warrant if—
  - (a) the member of the police force believes on reasonable grounds that the property—
    - (i) is of a kind which could have been included in a search warrant issued under this Part; or
    - (ii) will afford evidence about the commission of another Schedule 1 offence; and
  - (b) the member believes on reasonable grounds that it is necessary to seize that property in order to prevent its concealment, loss or destruction or its use in committing or continuing a Schedule 1 offence.
- (3) The power conferred by this section to seize property includes power—
  - (a) to remove the property from the premises where it is found; and
  - (b) to guard the property in or on those premises; and
  - (c) to make copies of the whole or any part of the property; and
  - (d) to issue an embargo notice under section 93 in respect of the property.

S. 92(2)(a)(ii)  
amended by No.  
87/2004

s. 22(2)(e).

S. 92(2)(b)  
amended by No.  
87/2004

s. 22(2)(e).

**93. Embargo notice**

S. 93

- (1) In this section, "**property**" does not include real property.
- (2) A member of the police force executing a search warrant who is authorised by that warrant or section 92 to seize property may, if the property cannot, or cannot readily, be physically seized and removed, issue an embargo notice in the prescribed form—
  - (a) by causing a copy of the notice to be served on the person in possession of the property; or
  - (b) if that person cannot be located after all reasonable steps have been taken to do so, by affixing the copy to the property in a prominent position.
- (3) A person who knows that an embargo notice relates to

S. 93(3) amended  
by No. 43/1998  
s. 26(1).

property and who—

(a) sells; or

S. 93(3)(a)  
inserted by No.  
43/1998  
s. 26(1).

(b) leases; or

S. 93(3)(b)  
inserted by No.  
43/1998  
s. 26(1).

(c) without the written consent of the member of the police force who issued the embargo notice, moves; or

S. 93(3)(c)  
inserted by No.  
43/1998  
s. 26(1).

(d) transfers; or

(e) otherwise deals with—

S. 93(3)(d)  
inserted by No.  
43/1998  
s. 26(1).

the property, or any part of the property, while the embargo notice is in force is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum) or a level 5 fine (1200 penalty units maximum) or both.

S. 93(3)(e)  
inserted by No.  
43/1998  
s. 26(1).

(4) It is a defence to a prosecution for an offence against subsection (3) to prove that the defendant moved the property or the part of the property for the purpose of protecting and preserving it.

S. 93(5) amended  
by No. 43/1998  
s. 26(2).

(5) Despite anything in any other Act, a sale, lease, transfer or other dealing with property in contravention of this section is void.

(6) If an application for a restraining order in respect of tainted property to which an embargo notice relates is not made within 21 days after the issue of an embargo notice, the embargo notice ceases to be in force at the end of that period but, if such an application is made, it continues in operation until that application is determined.

**94. Search of persons under search warrant**

S. 94

(1) A member of the police force executing a search warrant may, if the search warrant authorises him or her to do so, search any person found in or on the premises whom the member suspects on reasonable grounds of having on his or her person property of the kind described in the warrant.

(2) A person must not be searched under this section except by a

person of the same sex.

**95. Obstruction or hindrance of person executing search warrant**

S. 95  
amended by  
No. 63/2003  
s. 24(7).

A person must not, without reasonable excuse, obstruct or hinder a person executing a search warrant or a seizure warrant.

Penalty: Level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both.

**95A. Application for property seized under search warrants under other Acts to be held or retained under this Act**

S. 95A  
inserted by  
No. 63/2003 s. 25.

(1) A member of the police force may apply to the Magistrates' Court for a declaration that property seized under a warrant under—

- (a) section 465 of the **Crimes Act 1958**; or
- (b) section 81 of the **Drugs, Poisons and Controlled Substances Act 1981**—

is to be held or retained as if it were tainted property seized under a warrant under section 79 of this Act.

- (2) An application under sub-section (1) may only be made if—
- (a) the property is no longer required for evidentiary purposes under the **Crimes Act 1958** or the **Drugs, Poisons and Controlled Substances Act 1981** (as the case requires); and
  - (b) no direction has previously been made under section 465(1B) or 465C of the **Crimes Act 1958** or section 81(1A) or 81C of the **Drugs, Poisons and Controlled Substances Act 1981** (as the case requires).
- (3) An application may be made within 7 days after the property is no longer required for evidentiary purposes under the **Crimes Act 1958** or the **Drugs, Poisons and Controlled Substances Act 1981** (as the case requires).

**95B. What must be in the application?**

S. 95B  
inserted by  
No. 63/2003 s. 25.

- (1) An application under section 95A must be supported by evidence on oath or by affidavit of the applicant.
- (2) An application under section 95A must specify—
- (a) whether the warrant was issued under the **Crimes Act 1958** or the **Drugs, Poisons and Controlled Substances Act 1981**; and
  - (b) when the warrant was issued; and

- (c) the property seized under the warrant which is the subject of the application; and
- (d) the grounds on which the applicant believes that the property seized under the warrant is tainted property; and
- (e) whether any directions have been made in relation to the property and, if so, whether those directions have been complied with; and
- (f) the offence or offences with which the defendant has been charged; and
- (g) that the property which is the subject of the application is no longer required for evidentiary purposes under the **Crimes Act 1958** or the **Drugs, Poisons and Controlled Substances Act 1981** (as the case requires).

#### 95C. Court may make declaration

S. 95C  
inserted by  
No. 63/2003 s. 25.

- (1) If the Magistrates' Court is satisfied that it is appropriate to do so, the Court may make a declaration that property seized under a warrant under—

- (a) section 465 of the **Crimes Act 1958**; or
- (b) section 81 of the **Drugs, Poisons and Controlled Substances Act 1981**—

is to be held or retained as if it were tainted property seized under a warrant under section 79 of this Act.

- (2) A declaration must—

- (a) specify the property to which the declaration applies; and
- (b) state that the specified property to which the declaration applies is to be held or retained as if it were tainted property seized under a warrant under section 79 of this Act.

#### 95D. Notice of declaration

S. 95D  
inserted by  
No. 63/2003 s. 25.

- (1) If the Magistrates' Court makes a declaration under section 95C, the applicant for the declaration must give notice that the declaration has been made to all persons known to have an interest in the property to which the declaration applies that the property is being held or retained as if it were tainted property seized under a warrant under section 79 of this Act by virtue of a declaration made under section 95C.

- (2) A notice under sub-section (1) must be—

- (a) given within 7 days after the Magistrates' Court has made the declaration under section 95C; and

(b) in the prescribed form.

**95E. Effect of declaration**

S. 95E  
inserted by  
No. 63/2003 s. 25.

If a declaration is made under section 95C, the property to which the declaration applies—

- (a) is deemed, on and from the date on which the property is no longer required for evidentiary purposes under the **Crimes Act 1958** or the **Drugs, Poisons and Controlled Substances Act 1981** (as the case requires), to have been seized as tainted property under a warrant under section 79 of this Act; and
- (b) is to be dealt with under this Act accordingly.

**96. Disposal of livestock or perishable property**

S. 96

- (1) If property seized under a warrant is livestock or property of a perishable nature, a prescribed person authorised by the Minister for the purposes of this section may sell the property at any time after it has been seized without notice to the person from whose possession it was seized or any person who has an interest in the property if in the opinion of the prescribed person it is necessary to sell the property to realise its value.
- (2) The prescribed person must give written notice of the sale, in the prescribed manner, to—
  - (a) the person from whose possession the property was seized; and
  - (b) any person whom the prescribed person has reason to believe has an interest in the property—  
within 14 days after that sale.
- (3) The proceeds of sale must be paid into the Consolidated Fund.
- (4) Section 97 applies to the proceeds of sale as if they were the property seized under the warrant.

**97. Return of seized property**

- (1) If property has been seized under a warrant and—
  - (a) by the end of the period of 7 days after the property was seized, no person has been charged with the Schedule 1 offence in reliance on the commission of which the warrant was issued, and an application for a restraining order or a forfeiture order has not been made in respect of

S. 97(1)(a)  
amended by No.  
87/2004  
s. 22(2)(f).

the property; or

(b) a person has been charged with and convicted of such an offence but by the end of the period of 6 months after the date of conviction or the end of the appeal period (if any) an application for a restraining order or a forfeiture order has not been made in respect of the property or such an application has been made but a forfeiture order has not been made or the property has been excluded from the restraining order or the forfeiture order or has been discharged or excluded on appeal under section 142; or

S. 97(1)(c)  
amended by No.  
87/2004  
s. 22(2)(g).

(c) a person has been charged with such an offence and acquitted and by the end of the period of 7 days after the acquittal the property is not restrained for a purpose referred to in section 15(1)(c) or (d) in relation to a Schedule 2 offence; or

(d) a person has been charged with and convicted of such an offence but the conviction is quashed and a retrial has not been ordered at the time of the quashing of the conviction and by the end of the period of 7 days after the quashing of the conviction the property is not restrained for a purpose referred to in section 15(1)(c) or (d) in relation to a Schedule 2 offence—

S. 97(1)(d)  
amended by No.  
87/2004  
s. 22(2)(g).

then the Chief Commissioner of Police must arrange for the property to be returned to the person from whose possession it was seized or to such other person as the Minister or a prescribed person authorised by the Minister for the purposes of this sub-section directs.

(2) If—

(a) property has been seized under a search warrant or a seizure warrant; and

S. 97(2)(a)  
amended by  
No. 63/2003  
s. 26(1).

(b) an application has been made under this Act to a court for a forfeiture order or civil forfeiture order in respect of the property; and

(c) the court refuses to make the order being sought—

the court must make an order directing that the property be returned to the person from whose possession it was seized or to such other person as the Minister or a prescribed person authorised by the Minister for the purposes of this sub-section directs forthwith or, if the refusal was a refusal to make a civil forfeiture order, at the time and in the circumstances specified in the order if the court considers that an application may yet be made for a forfeiture order.

S. 97(3)  
amended by  
No. 63/2003  
s. 26(2).

(3) If property has been seized under a search warrant or a seizure warrant other than property seized under a warrant

referred to in sub-section (11) or sold under section 96, the person from whose possession the property was seized or any other person who claims an interest in the property may apply to the Magistrates' Court for an order—

- (a) directing that the property be returned to that person; or
- (b) directing that the person be allowed access to the property—

and the Court may, if it considers it appropriate, make such an order on such terms and conditions (if any) as it thinks fit.

(3A) If property has been seized under a search warrant or a seizure warrant (other than property seized under a warrant referred to in sub-section (11) or sold under section 96), a prescribed person may apply to the Magistrates' Court for an order—

**S. 97(3A)**  
inserted by  
**No. 63/2003**  
**s. 26(3).**

- (a) directing that the property be returned to—
  - (i) the person from whose possession the property was seized; or
  - (ii) any other person who claims an interest in the property; or
- (b) directing that access to the property be given to—
  - (i) the person from whose possession the property was seized; or
  - (ii) any other person who claims an interest in the property—

and the Court may, if it considers it appropriate, make such an order on such terms and conditions (if any) as it thinks fit.

(4) The applicant for an order under sub-section (3) or (3A) must give written notice of the application and of the date, time and place fixed for the hearing of it—

**S. 97(4)**  
amended by  
**No. 63/2003**  
**s. 26(4)(a).**

- (a) to the DPP, to a prescribed person or a person belonging to a prescribed class of persons or to the appropriate officer, as the case requires; and
- (b) to any other person whom the applicant has reason to believe has an interest in the property.

(5) Any person notified under sub-section (4) is entitled to appear and to give evidence at the hearing of the application but the absence of that person does not prevent the court from making an order under sub-section (3) or (3A).

**S. 97(5)**  
amended by  
**No. 63/2003**  
**s. 26(4)(a).**

(6) If the Magistrates' Court makes an order under sub-section (3) or (3A), an application for a variation, or the revocation, of the order may at any time be made to the Magistrates' Court by—

**S. 97(6)**  
amended by  
**No. 63/2003**  
**s. 26(4)(a).**

- (a) the person referred to in sub-section (4)(a); or
  - (b) the person from whose possession the property was seized; or
  - (c) any other person who claims an interest in the property.
- (7) An applicant under sub-section (6) must give written notice of the application and of the date, time and place fixed for the hearing of it—
- (a) if the person referred to in sub-section (4)(a) is the applicant, to the person from whose possession the property was seized and any other person whom the applicant has reason to believe has an interest in the property; and
  - (b) in any other case, to the person referred to in sub-section (4)(a).
- (8) Any person notified under sub-section (7) is entitled to appear and to give evidence at the hearing of the application but the absence of that person does not prevent the court from making an order under sub-section (9).
- (9) On an application under sub-section (6) the Magistrates' Court may, if it considers it appropriate—
- (a) if the application is for a variation of the order, vary the order on any terms and conditions that it thinks fit; or
  - (b) if the application is for the revocation of the order, revoke the order on any terms and conditions that it thinks fit.
- (10) A person must not knowingly contravene an order made under sub-section (3) or (3A).

Penalty: Level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both.

- (11) This section (except sub-sections (3) and (3A)) applies to a search warrant or a seizure warrant issued in reliance on the commission of an interstate offence as if the references in it to a forfeiture order included references to an interstate forfeiture order.

S. 97(10)  
amended by  
No. 63/2003  
s. 26(4)(a).

S. 97(11)  
amended by  
No. 63/2003  
s. 26(4)(b)(i)(ii).



# APPENDIX SEVEN – MAJOR SEARCH WARRANT PROVISIONS FROM OTHER JURISDICTIONS

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## ***Search Warrants Act 1985 (NSW)***

[Effective Date 6/092005]

*Please note endnote references to this legislation have been omitted*

### **PART 1 - PRELIMINARY**

#### **1. Name of Act**

This Act may be cited as the Search Warrants Act 1985 .

#### **2. Commencement**

- (1) Sections 1 and 2 shall commence on the date of assent to this Act.
- (2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

#### **3. Definitions**

In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

"authorised justice" means:

- (a) a Magistrate, or
- (b) a registrar of a Local Court or the registrar of the Drug Court, or
- (c) a person who is employed in the Attorney General's Department and who is declared (whether by name or by reference to the holder of a particular office), by the Minister administering this Act by instrument in writing or by order published in the Gazette, to be an authorised justice for the purposes of this Act.

"occupier", in relation to any premises, includes a person in charge of the premises.

"premises" includes any structure, building, aircraft, vehicle, vessel and place (whether built upon or not), and any part thereof.

**PART 2 - SEARCH WARRANTS IN RESPECT OF INDICTABLE, FIREARMS  
AND NARCOTICS OFFENCES, STOLEN PROPERTY ETC**

**4. Definitions—things connected with offence etc**

- (1) For the purposes of this Part, a thing is connected with a particular offence if it is:
  - (i) a thing with respect to which the offence has been committed,
  - (ii) a thing that will afford evidence of the commission of the offence, or
  - (iii) a thing that was used, or is intended to be used, for the purpose of committing the offence.
- (2) A reference in this Part to an offence includes a reference to an offence that there are reasonable grounds for believing has been, or is to be, committed.

**5. Application for warrant in respect of certain offences, stolen property etc**

- (1) A member of the police force may apply to an authorised justice for a search warrant if the member of the police force has reasonable grounds for believing that there is or, within 72 hours, will be in or on any premises:
  - (a) a thing connected with a particular indictable offence,
  - (b) a thing connected with a particular firearms offence,
  - (b1) a thing connected with a prohibited weapons offence,
  - (c) a thing connected with a particular narcotics offence, or
  - (d) a thing stolen or otherwise unlawfully obtained.
- (2) In subsection (1):

"firearms offence" means an offence under the *Firearms Act 1996* or the regulations under that Act, being an offence committed in respect of a firearm within the meaning of that Act.

"indictable offence" includes:

  - (a) any act or omission which if done, or omitted to be done, in New South Wales would constitute an offence punishable on indictment, and
  - (b) an offence punishable on indictment but which may be heard and determined in a summary manner.

"narcotics offence" means:

  - (a) an offence under the *Poisons Act 1966* , or the regulations thereunder, being an offence committed in respect of:
    - (i) a restricted substance prescribed for the purposes of section 16 of that Act, or
    - (ii) a drug of addiction within the meaning of that Act, or

- (b) an offence under the *Drug Misuse and Trafficking Act 1985*, or the regulations thereunder.

"prohibited weapons offence" means an offence under the *Weapons Prohibition Act 1998* or the regulations under that Act, being an offence committed in respect of a prohibited weapon within the meaning of that Act.

- (3) To avoid doubt, an application may be made under subsection (1) with respect to an act or omission that is an indictable offence (within the meaning of subsection (2)) even though the act or omission occurred outside New South Wales and was not an offence against the law of New South Wales.

## **6. Issue of warrant**

An authorised justice to whom an application is made under section 5 (1) may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the police force:

- (a) to enter the premises, and
- (b) to search the premises for things of the kind referred to in section 5 (1).

## **7. Seizure of things pursuant to warrant**

(1) A member of the police force executing a search warrant issued under this Part:

- (a) may seize a thing mentioned in the warrant, and
- (b) may, in addition, seize any other thing:
  - (i) that the member of the police force finds in the course of executing the warrant, and
  - (ii) that the member of the police force has reasonable grounds for believing is connected with any offence.

(2) The power conferred by subsection (1) to seize a thing includes:

- (a) a power to remove the thing from the premises where it is found, and
- (b) a power to guard the thing in or on those premises.

(3) After it has been produced in evidence, or when it is not required as evidence, a thing seized pursuant to this section shall be disposed of as a court or Magistrate may direct.

## **8. Search and arrest of persons pursuant to warrant**

A member of the police force executing a search warrant issued under this Part:

- (a) may search a person found in or on the premises whom the member of the police force reasonably suspects of having a thing mentioned in the warrant, and
- (b) may arrest and bring before an authorised officer within the meaning of the

*Criminal Procedure Act 1986* any person found in or on the premises whom the member of the police force reasonably suspects of having committed an offence in respect of a thing seized pursuant to section 7.

### **9. Obstruction etc of person executing warrant**

A person shall not, without reasonable excuse, obstruct or hinder a person executing a search warrant issued under this Part.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

## **PART 3 - PROVISIONS RELATING TO SEARCH WARRANTS UNDER PART 2 AND CERTAIN OTHER ACTS**

### **10. Definitions**

In this Part:

"occupier's notice" means an occupier's notice referred to in section 15.

"search warrant" means a search warrant issued under any of the following provisions:

Part 2 of this Act,

- section 41 of the *Agricultural Industry Services Act 1998* ,
- section 51 of the *Animal Research Act 1985* ,
- section 68 of the *Apprenticeship and Traineeship Act 2001* ,
- section 22 of the *Canned Fruits Marketing Act 1979* ,
- section 29 of the *Charitable Fundraising Act 1991* ,
- section 233 of the *Children and Young Persons (Care and Protection) Act 1998* ,
- section 16 of the *Children (Interstate Transfer of Offenders) Act 1988* ,
- section 128 of the *Chiropractors Act 2001* ,
- section 63 of the *Chiropractors and Osteopaths Act 1991* ,
- section 55 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* ,
- section 18 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* ,
- section 36 of the *Confiscation of Proceeds of Crime Act 1989* ,
- section 10 of the *Consumer Credit Administration Act 1995* ,
- section 84 of the *Contaminated Land Management Act 1997* ,
- section 381 of the *Co-operatives Act 1992* ,
- sections 357EA and 578D of the *Crimes Act 1900* ,
- section 154 of the *Dental Practice Act 2001* ,

- section 25 of the *Dental Technicians Registration Act 1975* ,
- section 13 of the *Restricted Premises Act 1943* ,
- section 38 of the *Drug Trafficking (Civil Proceedings) Act 1990* ,
- section 52 or 53 of the *Egg Industry Act 1983* ,
- section 69 of the *Egg Industry (Repeal and Deregulation) Act 1989* ,
- sections 21I and 27I of the *Electricity Act 1945* ,
- section 63 of the *Electricity Supply Act 1995* ,
- section 58 of the *Entertainment Industry Act 1989* ,
- section 46 of the *Environmentally Hazardous Chemicals Act 1985* ,
- section 42 of the *Exhibited Animals Protection Act 1986* ,
- section 48 of the *Exotic Diseases of Animals Act 1991* ,
- section 19A of the *Fair Trading Act 1987* ,
- section 76 of the *Fines Act 1996* ,
- section 260 of the *Fisheries Management Act 1994* ,
- section 12 of the *Fitness Services (Pre-paid Fees) Act 2000* ,
- section 39 of the *Food Act 2003* ,
- section 42 of the *Game and Feral Animal Control Act 2002* ,
- section 184 of the *Gaming Machines Act 2001* ,
- section 64 of the *Gas Supply Act 1996* ,
- section 29 of the *Gene Technology (GM Crop Moratorium) Act 2003* ,
- section 87 of the *Grain Marketing Act 1991* ,
- sections 12 and 102 of the *Guardianship Act 1987* ,
- section 34 of the *Health Care Complaints Act 1993* ,
- section 126 of the *Home Building Act 1989* ,
- section 33G of the *Human Tissue Act 1983* ,
- section 388 of the *Industrial Relations Act 1996* ,
- section 151 of the *Liquor Act 1982* ,
- section 201 of the *Local Government Act 1993* ,
- section 21E of the *Lotteries and Art Unions Act 1901* ,
- section 138 of the *Marketing of Primary Products Act 1983* ,
- section 125 of the *Medical Practice Act 1992* ,
- section 164 of the *National Parks and Wildlife Act 1974* ,
- section 11 of the *New South Wales Crime Commission Act 1985* ,
- section 24 of the *Non-Indigenous Animals Act 1987* ,

- section 52 of the *Noxious Weeds Act 1993* ,
- section 77B of the *Nurses and Midwives Act 1991* ,
- section 58 of the *Occupational Health and Safety Act 2000* ,
- section 132 of the *Optometrists Act 2002* ,
- section 128 of the *Osteopaths Act 2001* ,
- section 19 of the *Ozone Protection Act 1989* ,
- section 46V of the *Passenger Transport Act 1990*
- section 104 of the *Petroleum (Onshore) Act 1991* ,
- section 129 of the *Physiotherapists Act 2001* ,
- section 45 of the *Police Integrity Commission Act 1996* ,
- section 8 of the *Police Powers (Drug Detection Dogs) Act 2001*
- section 5 of the *Police Powers (Drug Premises) Act 2001* ,
- section 16 of the *Poultry Meat Industry Act 1986* ,
- section 27 of the *Prevention of Cruelty to Animals Act 1979* ,
- section 128 of the *Psychologists Act 2001* ,
- section 73 of the *Public Health Act 1991* ,
- section 72 of the *Public Lotteries Act 1996* ,
- section 16 of the *Radiation Control Act 1990* ,
- section 90 of the *Rail Safety Act 2002* ,
- section 24 of the *Road and Rail Transport (Dangerous Goods) Act 1997* ,
- section 41 of the *Road Transport (General) Act 1999* ,
- section 174 of the *Roads Act 1993* ,
- section 196 of the *Rural Lands Protection Act 1998* ,
- section 16 of the *Smoke-free Environment Act 2000* ,
- section 33 of the *Stock (Artificial Breeding) Act 1985* ,
- section 51 of the *Stock Medicines Act 1989* ,
- section 21 of the *Summary Offences Act 1988* ,
- section 29 of the *Swimming Pools Act 1992* ,
- section 95 of the *Totalizator Act 1997* ,
- section 22 of the *Trade Measurement Administration Act 1989* ,
- section 39 of the *Unclaimed Money Act 1995* ,
- section 36 of the *Valuers Act 2003* ,
- section 34 of the *Wool, Hide and Skin Dealers Act 2004* ,
- section 238A of the *Workplace Injury Management and Workers Compensation Act 1998* ,

any other provision of, or made under, an Act, being a provision which provides that this Part applies to a search warrant issued under that provision. "telephone search warrant" means a search warrant referred to in section 12.

### **11. Application for warrant in person**

- (1) An application for a search warrant must be in writing in the form prescribed by the regulations and must be made by the applicant in person.
- (2) An authorised justice must not issue a search warrant unless the information given by the applicant in or in connection with the application is verified before the authorised justice on oath or affirmation or by affidavit.
- (3) An authorised justice may administer an oath or affirmation or take an affidavit for the purposes of an application for a search warrant.
- (4) This section does not apply to a telephone search warrant.

### **12. Telephone search warrant**

- (1) In this section, "telephone" includes radio, facsimile and any other communication device.
- (2) A person may make an application by telephone for a search warrant.
- (3) An authorised justice must not issue a search warrant on an application made by telephone unless the authorised justice is satisfied that the warrant is required urgently and that it is not practicable for the application to be made in person.
- (4) An application under this section must be made by facsimile if the facilities to do so are readily available for that purpose.
- (5) If it is not practicable for an application for a search warrant to be made by telephone directly to an authorised justice, the application may be transmitted to the authorised justice by another person on behalf of the applicant.
- (6) An authorised justice who issues a search warrant upon an application made by telephone is to:
  - (a) complete and sign the warrant,
  - (b) furnish the warrant to the person who made the application or inform that person of the terms of the warrant and of the date and time when it was signed, and
  - (c) prepare and furnish an occupier's notice to the person who made the application or inform that person of the terms of an occupier's notice.
- (7) If a search warrant is issued on an application made by telephone, the applicant:
  - (a) in a case where the applicant was not furnished with the search warrant—is to complete a form of search warrant in the terms indicated by the authorised justice under subsection (6) and write on it the name of that authorised justice and the date and time when the warrant was

signed, and

- (b) in a case where the applicant was not furnished with an occupier's notice—is to complete a form of occupier's notice in the terms indicated by the authorised justice under subsection (6).
- (8) A form of search warrant and a form of occupier's notice so completed is taken to be a search warrant issued, and an occupier's notice prepared and furnished, in accordance with this Act.
- (9) A search warrant or occupier's notice is to be furnished by an authorised justice by transmitting it by facsimile, if the facilities to do so are readily available, and the copy produced by that transmission is taken to be the original document.
- (10) In this section, a reference to facsimile includes a reference to any electronic communication device which transmits information in a form from which written material is capable of being reproduced with or without the aid of any other device or article.

#### **12A. Information in application for warrant**

- (1) An authorised justice must not issue a search warrant unless the application for the warrant includes the following information:
  - (a) details of the authority of the applicant to make the application for the search warrant,
  - (b) the grounds on which the warrant is being sought,
  - (c) the address or other description of the premises the subject of the application,
  - (d) if the warrant is required to search for a particular thing, a full description of that thing and, if known, its location,
  - (e) if a previous application for the same warrant was refused—details of the refusal and any additional information required by section 12C,
  - (f) any other information required by the regulations.
- (2) An authorised justice when determining whether there are reasonable grounds to issue a search warrant is to consider (but is not limited to considering) the following matters:
  - (a) the reliability of the information on which the application is based, including the nature of the source of the information,
  - (b) if the warrant is required to search for a thing in relation to an alleged offence—whether there is sufficient connection between the thing sought and the offence.
- (3) The applicant must provide (either orally or in writing) such further information as the authorised justice requires concerning the grounds on which the warrant is being sought.
- (4) Nothing in this section requires an applicant for a search warrant to disclose

the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of any person.

#### **12B. False or misleading information in applications**

- (1) A person must not, in or in connection with an application for a search warrant, give information to an authorised justice that the person knows to be false or misleading in a material particular.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (2) This section applies to an application by telephone as well as in person.
- (3) This section applies whether or not the information given is also verified on oath or affirmation or by affidavit.

#### **12C. Further application for warrant after refusal**

- (1) If an application by a person for a search warrant is refused by an authorised justice, that person (or any other person who is aware of the application) may not make a further application for the same warrant to that or any other authorised justice unless the further application provides additional information that justifies the making of the further application.
- (2) However, a further application may be made to a Magistrate following a refusal to issue the warrant by an authorised justice who is not a Magistrate whether or not additional information is provided in the further application. Only one such further application may be made in any particular case.

#### **13. Record of proceedings before authorised justice**

- (1) An authorised justice who issues a search warrant shall cause a record to be made of all relevant particulars of the grounds the authorised justice has relied on to justify the issue of the warrant.
- (2) The regulations may make provision for or with respect to:
  - (a) the keeping of records in connection with the issue and execution of search warrants,
  - (b) the inspection of any such records, and
  - (c) any other matter in connection with any such records.
- (3) Any matter that might disclose the identity of a person shall not be recorded pursuant to this section if the authorised justice is satisfied that the safety of any person might thereby be jeopardised.

#### **14. Form of warrant**

A search warrant shall be in or to the effect of the prescribed form.

#### **15. Notice to occupier of premises entered pursuant to warrant**

- (1) An authorised justice shall prepare and furnish an occupier's notice to the person to whom the authorised justice issues a search warrant.
- (2) An occupier's notice furnished in relation to a search warrant:
  - (a) shall be in or to the effect of the prescribed form,
  - (b) shall specify:
    - (i) the name of the person who applied for the warrant,
    - (ii) the name of the authorised justice who issued the warrant,
    - (iii) the date and the time when the warrant was issued, and
    - (iv) the address or other description of the premises the subject of the warrant, and
  - (c) shall contain a summary of the nature of the warrant and the powers conferred by the warrant.
- (3) A person executing a search warrant shall:
  - (a) upon entry into or onto the premises or as soon as practicable thereafter, serve the occupier's notice on a person who appears to be an occupier of the premises and to be of or above the age of 18 years, or
  - (b) if no such person is then present in or on the premises, serve the occupier's notice on the occupier of the premises, either personally or in such other manner as the authorised justice who issued the warrant may direct, as soon as practicable after executing the warrant.
- (4) Service of an occupier's notice pursuant to subsection (3) (b) may be postponed by the authorised justice who issued the search warrant if that authorised justice is satisfied that there are reasonable grounds for the postponement.
- (5) Service of an occupier's notice pursuant to subsection (3) (b) may be postponed on more than one occasion, but shall not be postponed on any one occasion for a period exceeding 6 months.

#### **15A. Announcement prior to entry**

- (1) One of the persons executing a search warrant must, before any of the persons executing the warrant enters the premises:
  - (a) announce that the person is authorised by the search warrant to enter the premises, and
  - (b) give any person then on the premises an opportunity to allow entry into or onto the premises.
- (2) A person executing a search warrant is not required to comply with this section if the person believes on reasonable grounds that immediate entry is required to ensure the safety of any person or to ensure that the effective execution of the search warrant is not frustrated.

## **16. Duty to show warrant**

A person executing a search warrant shall produce the warrant for inspection by an occupier of the premises if requested to do so by that occupier.

## **17. Use of force to enter premises etc**

- (1) A person authorised to enter premises pursuant to a search warrant may use such force as is reasonably necessary for the purpose of entering the premises.
- (2) A person authorised to search premises pursuant to a search warrant may, if it is reasonably necessary to do so, break open any receptacle in or on the premises for the purposes of that search.

## **18. Use of assistants to execute warrant**

A person may execute a search warrant with the aid of such assistants as the person considers necessary.

## **19. Execution of warrant by day or night**

- (1) A search warrant may be executed by day, but shall not be executed by night unless the authorised justice, by the warrant, authorises its execution by night.
  - (1A) An authorised justice is not to authorise the execution of a search warrant by night unless satisfied that there are reasonable grounds for doing so. Those grounds include (but are not limited to) the following:
    - (a) the execution of the warrant by day is unlikely to be successful because, for example, it is issued to search for a thing which is likely to be on the premises only at night or other relevant circumstances will only exist at night,
    - (b) there is likely to be less risk to the safety of any person if it is executed at night,
    - (c) an occupier is likely to be on the premises only at night to allow entry without the use of force.
- (2) In subsection (1):
  - "by day" means during the period between 6 am and 9 pm on any day.
  - "by night" means during the period between 9 pm on any day and 6 am on the following day.

## **20. Expiry of warrant**

- (1) A search warrant ceases to have effect:
  - (a) except in the case of a telephone search warrant—at the time specified in the warrant for its expiry,

- (b) in the case of a telephone search warrant—on the expiration of the period of 24 hours after its issue,
  - (c) if it is withdrawn by the authorised justice who issued the warrant, or
  - (d) when it is executed,
- whichever first occurs.
- (2) An authorised justice who issues a search warrant (other than a telephone search warrant) must specify the time when the warrant is to expire.
  - (3) The time so specified is to be 72 hours after the issue of the search warrant or, if the authorised justice is satisfied that the warrant cannot be executed within 72 hours, any time within a further period not exceeding 72 hours.
  - (4) A search warrant which expires 72 hours after its issue may be extended by the authorised justice who issued the warrant if the authorised justice is satisfied that the warrant cannot be executed within 72 hours.
  - (5) The time for expiry of a search warrant may only be extended once.
  - (6) Any such extension:
    - (a) may not extend the period for which the warrant has effect beyond 144 hours after its issue, and
    - (b) may be made on the application of the person to whom the warrant was issued or any other person who is authorised to execute the warrant, and
    - (c) is to be made before the expiry of the warrant, and
    - (d) is to be made by issuing a replacement search warrant and occupier's notice.
  - (7) If no time of expiry is specified in a search warrant, the warrant expires 72 hours after its issue.

## **21. Report to authorised justice on execution of warrant etc**

- (1) The person to whom a search warrant is issued shall furnish a report in writing to the authorised justice who issued the warrant:
  - (a) stating whether or not the warrant was executed,
  - (b) if the warrant was executed—setting out briefly the result of the execution of the warrant (including a brief description of anything seized),
  - (c) if the warrant was not executed—setting out briefly the reasons why the warrant was not executed,
  - (d) stating whether or not an occupier's notice has been served in connection with the execution of the warrant,
  - (e) in the case of a telephone search warrant—containing a copy of the form of search warrant and the form of occupier's notice if those documents were not furnished to the person, and

- (f) containing such other particulars as may be prescribed.
- (2) A report with respect to a search warrant shall be made within 10 days after the execution of the warrant or the expiry of the warrant, whichever first occurs.

## **22. Death, absence etc of authorised justice who issued warrant**

Where the authorised justice who issued a search warrant has died, has ceased to be an authorised justice or is absent:

- (a) a report required to be furnished to that authorised justice pursuant to section 21, or
- (b) a power exercisable by that authorised justice under section 15 (3) (b) or (4), shall be furnished to, or may be exercised by, as the case may be, any other authorised justice.

## **23. Defects in warrants**

A search warrant is not invalidated by any defect, other than a defect which affects the substance of the warrant in a material particular.

# **PART 4 - MISCELLANEOUS**

## **24 Abolition of common law search warrants**

Any common law power conferred on a justice of the peace or any other person to issue a warrant authorising a person to enter premises for the purpose of searching for stolen goods or any other thing is abolished

## **24A. Ministerial arrangements for things seized in connection with extra-territorial offences**

- (1) In this section:  
"appropriate authority" means:
  - (a) in relation to another State or a Territory of the Commonwealth (other than the Australian Capital Territory)—an authority exercising, in relation to the Police Force of that State or Territory, functions corresponding to those of the Commissioner of Police in relation to the police force of New South Wales, or
  - (b) in relation to the Australian Capital Territory—the Commissioner of the Australian Federal Police.
- (2) The Minister may enter into arrangements with a Minister of another State or a Territory of the Commonwealth under which:
  - (a) things seized under this Act that may be relevant to the investigation of an offence against the law of that State or Territory:
    - (i) are to be transmitted to the appropriate authority in that State or

Territory for the purposes of the investigation of, or proceedings in respect of, that offence, and

(ii) when no longer required for the purposes of any such investigation or proceedings, are (unless disposed of by order or direction of a court or Magistrate) to be returned to the Commissioner of Police, and

(b) things seized under the law of that other State or Territory that may be relevant to the investigation of an offence against the law of this State:

(a) are to be transmitted to the Commissioner of Police, and

(b) when no longer required for the purposes of the investigation of an offence, or proceedings in respect of an offence, are (unless disposed of by order or direction of a court or Magistrate) to be returned to the appropriate authority in the State or Territory in which they were seized.

(3) This section has effect notwithstanding section 7 (3).

#### **24B. References in other Acts to “authorised justice”**

A reference in any other Act to an authorised justice in relation to a search warrant to which Part 3 of this Act applies is to be read as a reference to an authorised justice within the meaning of this Act.

#### **25. Proceedings for offences**

Proceedings for an offence against this Act or the regulations shall be dealt with summarily before a Local Court.

#### **26. Regulations**

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A regulation may impose a penalty not exceeding 5 penalty units for any contravention thereof.

(3) A provision of a regulation may:

(a) apply generally or be limited in its application by reference to specified exceptions or factors,

(b) apply differently according to different factors of a specified kind, or

(c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,

or may do any combination of those things.

(4) A regulation may apply, to and in respect of search warrants issued under

the *National Electricity (NSW) Law* , such of the provisions of this Act as are not inconsistent with that Law.

- (5) A regulation may apply, to and in respect of search warrants issued under the *Gas Pipelines Access (New South Wales) Law* , such of the provisions of this Act as are not inconsistent with that Law.

## **Sections 3C–3S, 3ZR-3ZX of the Crimes Act 1914 (Cth)**

*Please note endnote references to this legislation have been omitted*

### **3C. Interpretation**

Sect 3 C

(1) In this Part, unless the contrary intention appears:

"constable assisting", in relation to a warrant, means:

- (a) a person who is a constable and who is assisting in executing the warrant; or
- (b) a person who is not a constable and who has been authorised by the relevant executing officer to assist in executing the warrant.

"data" includes:

- (a) information in any form; or
- (b) any program (or part of a program).

"data held in a computer" includes:

- (a) data held in any removable data storage device for the time being held in a computer; or
- (b) data held in a data storage device on a computer network of which the computer forms a part.

"data storage device" means a thing containing, or designed to contain, data for use by a computer.

"evidential material" means a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form.

"executing officer", in relation to a warrant, means:

- (a) the constable named in the warrant by the issuing officer as being responsible for executing the warrant; or
- (b) if that constable does not intend to be present at the execution of the warrant—another constable whose name has been written in the warrant by the constable so named; or
- (c) another constable whose name has been written in the warrant by the constable last named in the warrant.

"frisk search" means:

- (a) a search of a person conducted by quickly running the hands over the person's outer garments; and
- (b) an examination of anything worn or carried by the person that

is conveniently and voluntarily removed by the person.

"issuing officer", in relation to a warrant to search premises or a person or a warrant for arrest under this Part, means:

- (a) a magistrate; or
- (b) a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants or warrants for arrest, as the case may be.

*magistrate*, in sections 3ZI, 3ZJ, 3ZK, 3ZN and 3ZW, has a meaning affected by section 3CA.

"offence" means:

- (a) an offence against a law of the Commonwealth (other than the *Defence Force Discipline Act 1982*); or
- (b) an offence against a law of a Territory; or
- (c) a State offence that has a federal aspect.

"ordinary search" means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and
- (b) an examination of those items.

"police station" includes:

- (a) a police station of a State or Territory; and
- (b) a building occupied by the Australian Federal Police.

"premises" includes a place and a conveyance.

"recently used conveyance", in relation to a search of a person, means a conveyance that the person had operated or occupied at any time within 24 hours before the search commenced.

"seizable item" means anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody.

"strip search" means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove all of his or her garments; and
- (b) an examination of the person's body (but not of the person's body cavities) and of those garments.

"warrant" means a warrant under this Part.

"warrant premises" means premises in relation to which a warrant is in force.

- (2) A person referred to in paragraph (b) of the definition of *constable assisting* in subsection (1) must not take part in searching or arresting a person.

### 3CA. Nature of functions of magistrate

Sect 3 CA

- (1) A function of making an order conferred on a magistrate by section 3ZI, 3ZJ, 3ZK, 3ZN or 3ZW is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
- (2) Without limiting the generality of subsection (1), an order made by a magistrate under section 3ZI, 3ZJ, 3ZK, 3ZN or 3ZW has effect only by virtue of this Act and is not to be taken by implication to be made by a court.
- (3) A magistrate performing a function of, or connected with, making an order under section 3ZI, 3ZJ, 3ZK, 3ZN or 3ZW has the same protection and immunity as if he or she were performing that function as, or as a member of, a court (being the court of which the magistrate is a member).
- (4) The Governor-General may make arrangements with the Governor of a State, the Chief Minister of the Australian Capital Territory, the Administrator of the Northern Territory or the Administrator of Norfolk Island for the performance, by all or any of the persons who from time to time hold office as magistrates in that State or Territory, of the function of making orders under sections 3ZI, 3ZJ, 3ZK, 3ZN and 3ZW.

### 3D. Application of Part

Sect 3 D

- (1) This Part is not intended to limit or exclude the operation of another law of the Commonwealth relating to:
  - (a) the search of persons or premises; or
  - (b) arrest and related matters; or
  - (c) the stopping, detaining or searching of conveyances; or
  - (d) the seizure of things.
- (2) to avoid any doubt, it is declared that even though another law of the Commonwealth provides power to do one or more of the things referred to in subsection (1), a similar power conferred by this Part may be used despite the existence of the power under the other law.
- (3) This Part is not intended to limit or exclude the operation of a law of a Territory relating to:
  - (a) the search of persons or premises; or
  - (b) arrest and related matters; or
  - (c) the stopping, detaining or searching of conveyances; or
  - (d) the seizure of things;in relation to offences against a law of that Territory.
- (4) This Part does not apply to the exercise by a constable of powers under the *Defence Force Discipline Act 1982* .

- (5) The application of this Part in relation to State offences that have a federal aspect is not intended to limit or exclude the concurrent operation of any law of a State or of the Australian Capital Territory.

Note 1: Subsection 3(1) defines *State* to include the Northern Territory.

Note 2: Section 3AA has the effect that an offence against the law of the Australian Capital Territory is a State offence that has a federal aspect.

## Division 2--Search warrants

### 3E. When search warrants can be issued

Sect 3 E

- (1) An issuing officer may issue a warrant to search premises if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises.
- (2) An issuing officer may issue a warrant authorising an ordinary search or a frisk search of a person if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that the person has in his or her possession, or will within the next 72 hours have in his or her possession, any evidential material.
- (3) If the person applying for the warrant suspects that, in executing the warrant, it will be necessary to use firearms, the person must state that suspicion, and the grounds for that suspicion, in the information.
- (4) If the person applying for the warrant is a member or special member of the Australian Federal Police and has, at any time previously, applied for a warrant relating to the same person or premises the person must state particulars of those applications and their outcome in the information.
- (5) If an issuing officer issues a warrant, the officer is to state in the warrant:
- (a) the offence to which the warrant relates; and
  - (b) a description of the premises to which the warrant relates or the name or description of the person to whom it relates; and
  - (c) the kinds of evidential material that are to be searched for under the warrant; and
  - (d) the name of the constable who, unless he or she inserts the name of another constable in the warrant, is to be responsible for executing the warrant; and
  - (e) the time at which the warrant expires (see subsection (5A));

and

- (f) whether the warrant may be executed at any time or only during particular hours.
- (5A) The time stated in the warrant under paragraph 3E(5)(e) as the time at which the warrant expires must be a time that is not later than the end of the seventh day after the day on which the warrant is issued.

*Example: If a warrant is issued at 3 pm on a Monday, the expiry time specified must not be later than midnight on Monday in the following week.*

- (6) The issuing officer is also to state, in a warrant in relation to premises:
- (a) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in paragraph (5)(c)) found at the premises in the course of the search that the executing officer or a constable assisting believes on reasonable grounds to be:
    - (i) evidential material in relation to an offence to which the warrant relates; or
    - (ii) a thing relevant to another offence that is an indictable offence; or
    - (iii) evidential material (within the meaning of the *Proceeds of Crime Act 2002*) or tainted property (within the meaning of that Act);  
if the executing officer or a constable assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence; and
  - (b) whether the warrant authorises an ordinary search or a frisk search of a person who is at or near the premises when the warrant is executed if the executing officer or a constable assisting suspects on reasonable grounds that the person has any evidential material or seizable items in his or her possession.
- (7) The issuing officer is also to state, in a warrant in relation to a person:
- (a) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in paragraph (5)(c)) found, in the course of the search, on or in the possession of the person or in a recently used conveyance, being a thing that the executing officer or a constable assisting believes on reasonable grounds to be:

- (i) evidential material in relation to an offence to which the warrant relates; or
  - (ii) a thing relevant to another offence that is an indictable offence; or
  - (iii) evidential material (within the meaning of the *Proceeds of Crime Act 2002*) or tainted property (within the meaning of that Act);
  - (iv) if the executing officer or a constable assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence; and
- (b) the kind of search of a person that the warrant authorises.
- (8) Paragraph (5)(e) and subsection (5A) do not prevent the issue of successive warrants in relation to the same premises or person.
- (9) If the application for the warrant is made under section 3R, this section (other than subsection (5A)) applies as if:
- (c) subsections (1) and (2) referred to 48 hours rather than 72 hours; and
  - (d) paragraph (5)(e) required the issuing officer to state in the warrant the period for which the warrant is to remain in force, which must not be more than 48 hours.
- (10) An issuing officer in New South Wales or the Australian Capital Territory may issue a warrant in relation to premises or a person in the Jervis Bay Territory.
- (11) An issuing officer in a State or internal Territory may:
- (a) issue a warrant in relation to premises or a person in that State or Territory; or
  - (b) issue a warrant in relation to premises or a person in an external Territory; or
  - (c) issue a warrant in relation to premises or a person in another State or internal Territory (including the Jervis Bay Territory) if he or she is satisfied that there are special circumstances that make the issue of the warrant appropriate; or
  - (d) issue a warrant in relation to a person wherever the person is in Australia or in an external Territory if he or she is satisfied that it is not possible to predict where the person may be

### **3F. The things that are authorised by a search warrant**

Sect 3 F

- (1) A warrant that is in force in relation to premises authorises the executing officer or a constable assisting:
  - (a) to enter the warrant premises and, if the premises are a

- conveyance, to enter the conveyance, wherever it is; and
  - (b) to search for and record fingerprints found at the premises and to take samples of things found at the premises for forensic purposes; and
  - (c) to search the premises for the kinds of evidential material specified in the warrant, and to seize things of that kind found at the premises; and
  - (d) to seize other things found at the premises in the course of the search that the executing officer or a constable assisting believes on reasonable grounds to be:
    - (i) evidential material in relation to an offence to which the warrant relates; or
    - (ii) evidential material in relation to another offence that is an indictable offence; or
    - (iii) evidential material (within the meaning of the *Proceeds of Crime Act 2002* ) or tainted property (within the meaning of that Act);  
if the executing officer or a constable assisting believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence; and
  - (e) to seize other things found at the premises in the course of the search that the executing officer or a constable assisting believes on reasonable grounds to be seizable items; and
  - (f) if the warrant so allows—to conduct an ordinary search or a frisk search of a person at or near the premises if the executing officer or a constable assisting suspects on reasonable grounds that the person has any evidential material or seizable items in his or her possession.
- (2) A warrant that is in force in relation to a person authorises the executing officer or a constable assisting:
- (a) to search the person as specified in the warrant and things found in the possession of the person and any recently used conveyance for things of the kind specified in the warrant; and
  - (b) to:
    - (i) seize things of that kind; or
    - (ii) record fingerprints from things; or
    - (iii) to take forensic samples from things;found in the course of the search; and
  - (c) to seize other things found on or in the possession of the person or in the conveyance in the course of the search that the executing officer or a constable assisting believes on

reasonable grounds to be:

- (i) evidential material in relation to an offence to which the warrant relates; or
  - (ii) a thing relevant to another offence that is an indictable offence; or
  - (iii) evidential material (within the meaning of the *Proceeds of Crime Act 2002* ) or tainted property (within the meaning of that Act);
  - (iv) if the executing officer or a constable assisting believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence; and
- (d) to seize other things found in the course of the search that the executing officer or a constable assisting believes on reasonable grounds to be seizable items.
- (3) If the warrant states that it may be executed only during particular hours, the warrant must not be executed outside those hours.
- (4) If the warrant authorises an ordinary search or a frisk search of a person, a search of the person different to that so authorised must not be done under the warrant.
- (5) If things are seized under a warrant, the warrant authorises the executing officer to make the things available to officers of other agencies if it is necessary to do so for the purpose of investigating or prosecuting an offence to which the things relate.

**3G. Availability of assistance and use of force in executing a warrant In executing a warrant:**

Sect 3 G

- (a) the executing officer may obtain such assistance; and
  - (b) the executing officer, or a person who is a constable and who is assisting in executing the warrant may use such force against persons and things; and
  - (c) a person who is not a constable and who has been authorised to assist in executing the warrant may use such force against things;
- as is necessary and reasonable in the circumstances.

**3H. Details of warrant to be given to occupier etc.**

Sect 3 H

- (1) If a warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the premises, the executing officer or a constable assisting must make available to that person a copy of the warrant.

- (2) If a warrant in relation to a person is being executed, the executing officer or a constable assisting must make available to that person a copy of the warrant.
- (3) If a person is searched under a warrant in relation to premises, the executing officer or a constable assisting must show the person a copy of the warrant.
- (4) The executing officer must identify himself or herself to the person at the premises or the person being searched, as the case may be.
- (5) The copy of the warrant referred to in subsections (1) and (2) need not include the signature of the issuing officer or the seal of the relevant court.

### **3J. Specific powers available to constables executing warrant**

Sect 3 J

- (1) In executing a warrant in relation to premises, the executing officer or a constable assisting may:
  - (a) for a purpose incidental to the execution of the warrant; or
  - (b) if the occupier of the premises consents in writing;  
take photographs (including video recordings) of the premises or of things at the premises.
- (2) If a warrant in relation to premises is being executed, the executing officer and the constables assisting may, if the warrant is still in force, complete the execution of the warrant after all of them temporarily cease its execution and leave the premises:
  - (a) for not more than one hour; or
  - (b) for a longer period if the occupier of the premises consents in writing.
- (3) If:
  - (a) the execution of a warrant is stopped by an order of a court;  
and
  - (b) the order is later revoked or reversed on appeal; and
  - (c) the warrant is still in force;the execution of the warrant may be completed.

### **3K. Use of equipment to examine or process things**

Sect 3 K

- (1) The executing officer or constable assisting may bring to the warrant premises any equipment reasonably necessary for the examination or processing of a thing found at the premises in order to determine whether it is a thing that may be seized under the warrant.

- (2) A thing found at the premises may be moved to another place for examination or processing in order to determine whether it may be seized under a warrant if:
- (a) both of the following apply:
    - (a) it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance;
    - (b) there are reasonable grounds to believe that the thing contains or constitutes evidential material; or
    - (c) the occupier of the premises consents in writing.
  - (3) If a thing is moved to another place for the purpose of examination or processing under subsection (2), the executing officer must, if it is practicable to do so:
    - (a) inform the occupier of the address of the place and the time at which the examination or processing will be carried out; and
    - (b) allow the occupier or his or her representative to be present during the examination or processing.
  - (3A) The thing may be moved to another place for examination or processing for no longer than 72 hours.
  - (3B) An executing officer may apply to an issuing officer for one or more extensions of that time if the executing officer believes on reasonable grounds that the thing cannot be examined or processed within 72 hours or that time as previously extended.
  - (3C) The executing officer must give notice of the application to the occupier of the premises, and the occupier is entitled to be heard in relation to the application.
  - (4) The executing officer or a constable assisting may operate equipment already at the warrant premises to carry out the examination or processing of a thing found at the premises in order to determine whether it is a thing that may be seized under the warrant if the executing officer or constable believes on reasonable grounds that:
    - (a) the equipment is suitable for the examination or processing; and
    - (b) the examination or processing can be carried out without damage to the equipment or the thing.

### **3L. Use of electronic equipment at premises**

Sect 3 L

- (1) The executing officer or a constable assisting may operate electronic equipment at the warrant premises to access data (including data not held at the premises) if he or she believes on reasonable grounds that:

- (a) the data might constitute evidential material; and
- (b) the equipment can be operated without damaging it.

Note: An executing officer can obtain an order requiring a person with knowledge of a computer or computer system to provide assistance: see section 3LA.

(1A.) If the executing officer or constable assisting believes on reasonable grounds that any data accessed by operating the electronic equipment might constitute evidential material, he or she may:

- (a) copy the data to a disk, tape or other associated device brought to the premises; or
- (b) if the occupier of the premises agrees in writing—copy the data to a disk, tape or other associated device at the premises;

and take the device from the premises.

(1B.) If:

- (a) the executing officer or constable assisting takes the device from the premises; and
- (b) the Commissioner is satisfied that the data is not required (or is no longer required) for:
  - (i) investigating an offence against the law of the Commonwealth, a State or a Territory; or
  - (ii) judicial proceedings or administrative review proceedings; or
  - (iii) investigating or resolving a complaint under the *Complaints (Australian Federal Police) Act 1981* or the *Privacy Act 1988* ;

the Commissioner must arrange for:

- (c) the removal of the data from any device in the control of the Australian Federal Police; and
- (d) the destruction of any other reproduction of the data in the control of the Australian Federal Police.

(2) If the executing officer or a constable assisting, after operating the equipment, finds that evidential material is accessible by doing so, he or she may:

- (a) seize the equipment and any disk, tape or other associated device; or
- (b) if the material can, by using facilities at the premises, be put in documentary form—operate the facilities to put the material in that form and seize the documents so produced.

(3) A constable may seize equipment under paragraph (2)(a) only if:

- (a) it is not practicable to copy the data as mentioned in subsection (1A) or to put the material in documentary form as mentioned in paragraph (2)(b); or
  - (b) possession by the occupier of the equipment could constitute an offence.
- (4) If the executing officer or a constable assisting believes on reasonable grounds that:
- (a) evidential material may be accessible by operating electronic equipment at the premises; and
  - (b) expert assistance is required to operate the equipment; and
  - (c) if he or she does not take action under this subsection, the material may be destroyed, altered or otherwise interfered with;
- he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard or otherwise.
- (5) The executing officer or a constable assisting must give notice to the occupier of the premises of his or her intention to secure equipment and of the fact that the equipment may be secured for up to 24 hours.
- (6) The equipment may be secured:
- (a) for a period not exceeding 24 hours; or
  - (b) until the equipment has been operated by the expert;
- whichever happens first.
- (7) If the executing officer or a constable assisting believes on reasonable grounds that the expert assistance will not be available within 24 hours, he or she may apply to the issuing officer for an extension of that period.
- (8) The executing officer or a constable assisting must give notice to the occupier of the premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.
- (9) The provisions of this Division relating to the issue of warrants apply, with such modifications as are necessary, to the issuing of an extension.

**3LA. Person with knowledge of a computer or a computer system to assist access etc.** Sect 3 LA

- (1) The executing officer may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow the officer to do one or more of the following:

- (a) access data held in, or accessible from, a computer that is on warrant premises;
  - (b) copy the data to a data storage device;
  - (c) convert the data into documentary form.
- (2) The magistrate may grant the order if the magistrate is satisfied that:
- (a) there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer; and
  - (b) the specified person is:
    - (i) reasonably suspected of having committed the offence stated in the relevant warrant; or
    - (ii) the owner or lessee of the computer; or
    - (iii) an employee of the owner or lessee of the computer; and
  - (c) the specified person has relevant knowledge of:
    - (i) the computer or a computer network of which the computer forms a part; or
    - (ii) measures applied to protect data held in, or accessible from, the computer.
- (3) A person commits an offence if the person fails to comply with the order.

Penalty: 6 months imprisonment.

**3LB. Accessing data held on other premises—notification to occupier of that premises**

Sect 3 LB

- (1) If:
- (a) data that is held on premises other than the warrant premises is accessed under subsection 3L(1); and
  - (b) it is practicable to notify the occupier of the other premises that the data has been accessed under a warrant;
- the executing officer must:
- (c) do so as soon as practicable; and
  - (d) if the executing officer has arranged, or intends to arrange, for continued access to the data under subsection 3L(1A) or (2)—include that information in the notification.
- (2) A notification under subsection (1) must include sufficient information to allow the occupier of the other premises to contact the executing officer.

**3M. Compensation for damage to electronic equipment**

Sect 3 M

- (1) If:
- (a) damage is caused to equipment as a result of it being operated as mentioned in section 3K or 3L; and
  - (b) the damage was caused as a result of:
    - (i) insufficient care being exercised in selecting the person who was to operate the equipment; or
    - (ii) insufficient care being exercised by the person operating the equipment;
- compensation for the damage is payable to the owner of the equipment.
- (2) Compensation is payable out of money appropriated by the Parliament for the purpose.
- (3) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises and his or her employees and agents, if they were available at the time, had provided any warning or guidance as to the operation of the equipment that was appropriate in the circumstances.

**3N. Copies of seized things to be provided**

Sect 3 N

- (1) Subject to subsection (2), if a constable seizes, under a warrant relating to premises:
- (a) a document, film, computer file or other thing that can be readily copied; or
  - (b) a storage device the information in which can be readily copied;
- the constable must, if requested to do so by the occupier of the premises or another person who apparently represents the occupier and who is present when the warrant is executed, give a copy of the thing or the information to that person as soon as practicable after the seizure.
- (2) Subsection (1) does not apply if:
- (a) the thing that has been seized was seized under subsection 3L(1A) or paragraph 3L(2)(b); or
  - (b) possession by the occupier of the document, film, computer file, thing or information could constitute an offence.

**3P. Occupier entitled to be present during search**

Sect 3 P

- (1) If a warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the premises, the person is,

subject to Part IC, entitled to observe the search being conducted.

- (2) The right to observe the search being conducted ceases if the person impedes the search.
- (3) This section does not prevent 2 or more areas of the premises being searched at the same time.

### **3Q. Receipts for things seized under warrant**

Sect 3 Q

- (1) If a thing is seized under a warrant or moved under subsection 3K(2), the executing officer or a constable assisting must provide a receipt for the thing.
- (2) If 2 or more things are seized or moved, they may be covered in the one receipt.

### **3R. Warrants by telephone or other electronic means**

Sect 3 R

- (1) A constable may make an application to an issuing officer for a warrant by telephone, telex, facsimile or other electronic means:
  - (a) in an urgent case; or
  - (b) if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.
- (2) The issuing officer:
  - (1) may require communication by voice to the extent that it is practicable in the circumstances; and
  - (2) may make a recording of the whole or any part of any such communication by voice.
- (3) An application under this section must include all information required to be provided in an ordinary application for a warrant, but the application may, if necessary, be made before the information is sworn.
- (4) If an application is made to an issuing officer under this section and the issuing officer, after considering the information and having received and considered such further information (if any) as the issuing officer required, is satisfied that:
  - (a) a warrant in the terms of the application should be issued urgently; or
  - (b) the delay that would occur if an application were made in person would frustrate the effective execution of the warrant;the issuing officer may complete and sign the same form of warrant that would be issued under section 3E.
- (5) If the issuing officer decides to issue the warrant, the issuing

officer is to inform the applicant, by telephone, telex, facsimile or other electronic means, of the terms of the warrant and the day on which and the time at which it was signed.

- (6) The applicant must then complete a form of warrant in terms substantially corresponding to those given by the issuing officer, stating on the form the name of the issuing officer and the day on which and the time at which the warrant was signed.
- (7) The applicant must, not later than the day after the day of expiry of the warrant or the day after the day on which the warrant was executed, whichever is the earlier, give or transmit to the issuing officer the form of warrant completed by the applicant and, if the information referred to in subsection (3) was not sworn, that information duly sworn.
- (8) The issuing officer is to attach to the documents provided under subsection (7) the form of warrant completed by the issuing officer.
- (9) If:
  - (a) it is material, in any proceedings, for a court to be satisfied that the exercise of a power under a warrant issued under this section was duly authorised; and
  - (b) the form of warrant signed by the issuing officer is not produced in evidence;the court is to assume, unless the contrary is proved, that the exercise of the power was not duly authorised.

### **3S. Restrictions on personal searches**

Sect 3 S

A warrant can not authorise a strip search or a search of a person's body cavities.

## **Division 5--General**

### **3ZR. Conduct of ordinary searches and frisk searches**

Sect 3 ZR

An ordinary search or a frisk search of a person under this Part must, if practicable, be conducted by a person of the same sex as the person being searched.

### **3ZS. Announcement before entry**

Sect 3 ZS

- (1) A constable must, before any person enters premises under a warrant or to arrest a person:
  - (a) announce that he or she is authorised to enter the premises; and
  - (b) give any person at the premises an opportunity to allow entry

to the premises.

- (2) A constable is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure:
- (c) the safety of a person (including a constable); or
  - (d) that the effective execution of the warrant or the arrest is not frustrated.

**3ZT. Offence for making false statements in warrants**

Sect 3 ZT

A person must not make, in an application for a warrant, a statement that the person knows to be false or misleading in a material particular.

Penalty: Imprisonment for 2 years.

**3ZU. Offences relating to telephone warrants**

Sect 3 ZU

**A person must not:**

- (a) state in a document that purports to be a form of warrant under section 3R the name of an issuing officer unless that officer issued the warrant; or
- (b) state on a form of warrant under that section a matter that, to the person's knowledge, departs in a material particular from the form authorised by the issuing officer; or
- (c) purport to execute, or present to a person, a document that purports to be a form of warrant under that section that the person knows:
  - (i) has not been approved by an issuing officer under that section; or
  - (ii) to depart in a material particular from the terms authorised by an issuing officer under that section; or
- (d) give to an issuing officer a form of warrant under that section that is not the form of warrant that the person purported to execute.

Penalty: Imprisonment for 2 years.

**3ZV. Retention of things which are seized**

Sect 3 ZV

- (1) Subject to any contrary order of a court, if a constable seizes a thing under this Part, the constable must return it if:
- (a) the reason for its seizure no longer exists or it is decided that it is not to be used in evidence; or
  - (b) if the thing was seized under section 3T:
    - (1) the reason for its seizure no longer exists or it is decided that it is not to be used in evidence; or

- (2) the period of 60 days after its seizure ends;  
whichever first occurs;

unless the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

- (2) If a thing is seized under section 3T, at the end of the 60 days specified in subsection (1) the constable must take reasonable steps to return the thing to the person from whom it was seized or to the owner if that person is not entitled to possess it unless:
  - (a) proceedings in respect of which the thing may afford evidence were instituted before the end of the 60 days and have not been completed (including an appeal to a court in relation to those proceedings); or
  - (b) the constable may retain the thing because of an order under section 3ZW; or
  - (c) the constable is otherwise authorised (by a law, or an order of a court, of the Commonwealth or of a State or Territory) to retain, destroy or dispose of the thing.

### **3ZW. Magistrate may permit a thing to be retained**

Sect 3 ZW

- (1) If a thing is seized under section 3T, and:
  - (a) before the end of 60 days after the seizure; or
  - (b) before the end of a period previously specified in an order of a magistrate under this section;

proceedings in respect of which the thing may afford evidence have not commenced, the constable may apply to a magistrate for an order that he or she may retain the thing for a further period.

- (2) If the magistrate is satisfied that it is necessary for the constable to continue to retain the thing:
  - (a) for the purposes of an investigation as to whether an offence has been committed; or
  - (b) to enable evidence of an offence to be secured for the purposes of a prosecution;

the magistrate may order that the constable may retain the thing for a period specified in the order.

- (3) Before making the application, the constable must:
  - (a) take reasonable steps to discover who has an interest in the retention of the thing; and
  - (b) if it is practicable to do so, notify each person who the constable believes to have such an interest of the proposed application.

**3ZX. Law relating to legal professional privilege not affected**

Sect 3 ZX

This Part does not affect the law relating to legal professional privilege.

## **Sections 68-75, 113-114, 148-162 of the Police Powers and Responsibilities Act 2000 (Qld)**

*Please note endnote references to this legislation have been omitted*

### **Chapter 3--Search Warrants, Obtaining Documents, And Crime Scenes**

#### **Part 1--Searching places with warrants**

#### **68. Search warrant application**

s. 68

- (1) A police officer may apply for a warrant to enter and search a place (search warrant) to obtain--
  - (c) evidence of the commission of an offence; or
  - (d) evidence that may be confiscation related evidence in relation to a confiscation related activity.
- (2) The application may be made to any justice, unless the application must be made to a magistrate or Supreme Court judge under subsection (3) or (4).
- (3) Unless the application must be made to a Supreme Court judge under subsection (4), the application must be made to a magistrate if the thing to be sought under the proposed warrant is--
  - (c) evidence of the commission of an offence only because—
    - (i) it is a thing that may be liable to forfeiture or is forfeited; or
    - (ii) it may be used in evidence for a forfeiture proceeding; or
    - (iii) it is a property-tracking document; or
  - (d) evidence of the commission of an indictable offence committed in another State that, if it were committed in Queensland, would be an indictable offence in Queensland; or
  - (e) confiscation related evidence.

*Example for paragraph (a)(ii)--*

*The search may be for evidence for which an application for a restraining order may be made under chapter 2 or chapter 3 of the Confiscation Act.*

- (4) The application must be made to a Supreme Court judge if, when entering and searching the place, it is intended to do anything that may cause structural damage to a building.
- (5) An application under this section must--

- (a) be sworn and state the grounds on which the warrant is sought; and
  - (b) include information required under the responsibilities code about any search warrants issued within the previous year in relation to--
    - (i) the place or a person suspected of being involved in the commission of the offence or suspected offence to which the application relates; or
    - (ii) the confiscation related activity to which the application relates.
- (6) Subsection (5)(b) applies only to—
- (a) information kept in a register that the police officer may inspect; and
  - (b) information the officer otherwise actually knows.
- (7) The justice, magistrate or judge (the issuer) may refuse to consider the application until the police officer gives the issuer all the information the issuer requires about the application in the way the issuer requires.

*Example--*

*The issuer may require additional information supporting the application to be given by statutory declaration.*

**69. Issue of search warrant**

s. 69

The issuer may issue a search warrant only if satisfied there are reasonable grounds for suspecting evidence of the commission of an offence or confiscation related evidence--

- (a) is at the place; or
- (b) is likely to be taken to the place within the next 72 hours.

**70. If justice refuses application for search warrant**

s. 70

- (1) If a justice refuses to issue a warrant, the police officer may apply to a magistrate or a judge for the issue of the warrant.
- (2) However, the police officer must tell the magistrate or judge that the application is made because a justice refused to issue a warrant.
- (3) Subsection (1) does not apply if the justice who refuses the warrant is or has been a Supreme Court judge, a District Court judge or a magistrate.

**71. Order in search warrants about documents**

s. 71

If the issuer is a magistrate, the issuer may, in a search warrant, order the person in possession of documents at the place to give to the police officer all documents of a type stated in the warrant.

## **72. When search warrant ends**

s. 72

- (1) A search warrant issued because there are reasonable grounds for suspecting there is evidence of the commission of an offence or confiscation related evidence at a place ends 7 days after it is issued.
- (2) A search warrant issued because there are reasonable grounds for suspecting evidence of the commission of an offence or confiscation related evidence is likely to be taken to a place within the next 72 hours ends 72 hours after it is issued.

## **73. What search warrant must state**

s. 73

- (1) A search warrant must state--
  - (a) that a police officer may enter the place and exercise search warrant powers at the place; and
  - (b) if the warrant is issued in relation to--
    - (i) an offence--brief particulars of the offence for which the warrant is issued; or
    - (ii) a forfeiture proceeding--the Act under which the forfeiture proceeding is authorised; or
    - (iii) a confiscation related activity--brief particulars of the activity; and
  - (c) any evidence that may be seized under the warrant; and
  - (d) if the warrant is to be executed at night, the hours when the place may be entered; and
  - (e) the day and time the warrant ends.
- (2) If the warrant relates to an offence and the offence has been, is being, or may be committed in, on or in relation to a transport vehicle and involves the safety of the vehicle or anyone who may be in or on it, the warrant may also state that a police officer may search anyone or anything in or on or about to board, or to be put in or on, the vehicle.
- (3) If a magistrate makes an order under section 71, the warrant must also state that failure, without reasonable excuse, to comply with the order may be dealt with under the Criminal Code, section 205.41

#### 74. Powers under search warrant

s. 74

- (1) A police officer has the following powers under a search warrant (search warrant powers)--
  - (a) power to enter the place stated in the warrant (the relevant place) and to stay on it for the time reasonably necessary to exercise powers authorised under the warrant and this section;
  - (b) power to pass over, through, along or under another place to enter the relevant place;
  - (c) power to search the relevant place for anything sought under the warrant;
  - (d) power to open anything in the relevant place that is locked;
  - (e) power to detain anyone at the relevant place for the time reasonably necessary to find out if the person has anything sought under the warrant;
  - (f) if the warrant relates to an offence and the police officer reasonably suspects a person on the relevant place has been involved in the commission of the offence, power to detain the person for the time taken to search the place;
  - (g) power to dig up land;
  - (h) power to seize a thing found at the relevant place, or on a person found at the relevant place, that the police officer reasonably suspects may be evidence of the commission of an offence or confiscation related evidence to which the warrant relates;
  - (i) power to muster, hold and inspect any animal the police officer reasonably suspects may provide evidence of the commission of an offence or confiscation related evidence to which the warrant relates;
  - (j) power to photograph anything the police officer reasonably suspects may provide evidence of the commission of an offence or confiscation related evidence to which the warrant relates;
  - (k) power to remove wall or ceiling linings or floors of a building, or panels of a vehicle, to search for evidence of the commission of an offence or confiscation related evidence.
- (2) Also, a police officer has the following powers if authorised under a search warrant (also search warrant powers)--
  - (a) power to search anyone found at the relevant place for anything sought under the warrant that can be concealed on the person;

- (b) power to do whichever of the following is authorised--
  - (i) to search anyone or anything in or on or about to board, or be put in or on, a transport vehicle;
  - (ii) to take a vehicle to, and search for evidence of the commission of an offence that may be concealed in a vehicle at, a place with appropriate facilities for searching the vehicle.
- (3) Power to do anything at the relevant place that may cause structural damage to a building, may be exercised only if the warrant--
  - (a) authorises the exercise of the power; and
  - (b) is issued by a Supreme Court judge.

**75. Copy of search warrant to be given to occupier**

s. 75

- (1) If a police officer executes a search warrant for a place that is occupied, the police officer must--
  - (a) if the occupier is present at the place--give to the occupier a copy of the warrant and a statement in the approved form summarising the person's rights and obligations under the warrant; or
  - (b) if the occupier is not present--leave the copy in a conspicuous place.
- (2) If the police officer reasonably suspects giving the person the copy may frustrate or otherwise hinder the investigation or another investigation, the police officer may delay complying with subsection (1), but only for so long as--
  - (a) the police officer continues to have the reasonable suspicion; and
  - (b) that police officer or another police officer involved in the investigation remains in the vicinity of the place to keep the place under observation

**Part 6--Power to seize evidence and abandoned and illegally placed property**

**113. Power to seize evidence generally**

s. 113

- (1) This section applies if a police officer lawfully enters a place, or is at a public place, and finds at the place a thing the officer reasonably suspects is evidence of the commission of an offence.
- (2) The police officer may seize the thing, whether or not as evidence under a warrant and, if the police officer is acting under a warrant, whether or not the offence is one in relation to which the warrant

is issued.

- (3) Also, the police officer may photograph the thing seized or the place from which the thing was seized.
- (4) The police officer may stay on the place and re-enter it for the time reasonably necessary to remove the thing from the place.

**114. Power to remove property unlawfully on a place**

s. 114

- (1) This section applies if a police officer lawfully enters a place or is at a public place and finds on the place a thing the police officer reasonably suspects is on the place in contravention of an Act.
- (2) The police officer may seize the thing if the person in charge of the thing can not immediately be found.
- (3) Also, the police officer may seize the thing if the person in charge of the thing can be found and the police officer reasonably suspects the person is unwilling or unable to move the thing immediately.
- (4) The police officer may take the thing to a place where the presence of the thing does not contravene the relevant Act or another Act.
- (5) This section does not apply to a vehicle or an animal.

# APPENDIX EIGHT – COVERT SEARCH WARRANT AND PUBLIC INTEREST MONITOR PROVISIONS

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## **Sections 148-162 of the Police Powers and Responsibilities Act 2000 (Qld)**

*Please note endnote references to this legislation have been omitted*

### **148. Covert search warrant applications**

s. 148

- (1) A police officer of at least the rank of inspector may apply to a Supreme Court judge for a warrant (covert search warrant) to enter and search a place for evidence of a designated offence, organised crime or terrorism.
- (2) The application must--
  - (a) be sworn and state the grounds on which the warrant is sought; and
  - (b) include information required under the responsibilities code about any warrants issued within the previous year in relation to the place or person suspected of being involved in the designated offence, organised crime or terrorism to which the application relates.
- (3) Subsection (2)(b) applies only to--
  - (a) information kept in a register that the police officer may inspect; and
  - (b) information the police officer otherwise actually knows.
- (4) The applicant must advise the public interest monitor of the application under arrangements decided by the monitor.
- (5) The judge may refuse to consider the application until the applicant gives the judge all the information the judge requires about the application in the way the judge requires.

*Example--*

*The judge may require additional information supporting the application to be given by statutory declaration.*

**149. Who may be present at consideration of application**

s. 149

- (1) The judge must hear an application for a covert search warrant in the absence of anyone other than the following--
  - (a) the applicant;
  - (b) a monitor;
  - (c) someone the judge permits to be present;
  - (d) a lawyer representing anyone mentioned in paragraphs (a) to (c).
- (2) Also, the judge must hear the application--
  - (a) in the absence of the person who is the subject of the application (the relevant person) or anyone likely to inform the relevant person of the application; and
  - (b) without the relevant person having been informed of the application.

**150 Consideration of application**

s. 150

Before deciding the application the judge must, in particular, and being mindful of the highly intrusive nature of a covert search warrant, consider the following--

- (a) the nature and seriousness of the suspected offence or terrorism;
- (b) the extent to which issuing the warrant would help prevent, detect or provide evidence of, the offence or terrorism;
- (c) the benefits derived from any previous covert search warrants, search warrants or surveillance warrants in relation to the relevant person or place;
- (d) the extent to which police officers investigating the matter have used or can use conventional ways of investigation;
- (e) how much the use of conventional ways of investigation would be likely to help in the investigation of the matter;
- (f) how much the use of conventional ways of investigation would prejudice the investigation of the matter;
- (g) any submissions made by a monitor.

**151 Issue of covert search warrant**

s. 151

- (1) After considering the application, the judge may issue the warrant for a period of not more than 30 days if satisfied there are reasonable grounds for believing evidence of a designated offence, organised crime or terrorism--
  - (a) is at the place; or

- (b) is likely to be taken to the place within the next 72 hours.
- (2) The judge may impose any conditions on the warrant that the judge considers are necessary in the public interest.

**152 What covert search warrant must state**

s. 152

A covert search warrant must state the following--

- (a) that a police officer may exercise covert search powers under the warrant;
- (b) the designated offence or organised crime related offence for which the warrant was issued or details of the terrorism for which the warrant was issued;
- (c) any evidence or samples of evidence that may be seized under the warrant;
- (d) that the warrant may be executed at any time of the day or night;
- (e) that, if practicable, the search must be videotaped;
- (f) the day and time the warrant starts and when the warrant ends.

**153 Duration and extension of covert search warrant**

s. 153

- (1) A covert search warrant is in force until the earlier of the following--
  - (a) the day stated in the warrant;
  - (b) when the initial search is complete.
- (2) However, the warrant may be extended from time to time on application.
- (3) The provisions of this division for an application for a warrant apply to an application for an extension, with necessary changes.
- (4) Despite the ending of the warrant under subsection (1), the police officer may continue to exercise powers under the warrant, but only to the extent necessary to return a thing seized under the warrant and taken to a place for a purpose mentioned in section 155(2)(a) or (b).

**154 Restriction about records and access to covert search warrant applications**

s. 154

- (1) Despite the Recording of Evidence Act 1962, a transcript of an application for a covert search warrant and any order made on it must not be made.
- (2) A person must not publish a report of a proceeding on an application for a covert search warrant or an extension of a covert search warrant.

Maximum penalty--85 penalty units or 1 year's imprisonment.

- (3) A person is not entitled to search information in the custody of the Supreme Court in relation to an application for a covert search warrant, unless a Supreme Court judge otherwise orders in the interests of justice.

**155 Powers under covert search warrant**

s. 155

- (1) A police officer to whom a covert search warrant is directed may lawfully exercise the following powers under the warrant (covert search powers)--
  - (1) power to enter the place stated in the warrant (the relevant place), covertly or through subterfuge, as often as is reasonably necessary for the purposes of the warrant and stay on it for the time reasonably necessary;
  - (2) power to pass over, through, along or under another place to enter the relevant place;
  - (3) power to search the relevant place for anything sought under the warrant;
  - (4) power to open anything in the relevant place that is locked;
  - (5) power to seize a thing or part of a thing found on the relevant place that the police officer reasonably believes is evidence of the commission of a designated offence or an offence relating to organised crime stated in the warrant or terrorism;
  - (6) power to photograph anything the police officer reasonably believes may provide evidence of the commission of a designated offence or an offence relating to organised crime stated in the warrant or terrorism;
  - (7) power to inspect or test anything found on the place.
- (2) Also, a police officer has the following powers under a covert search warrant if authorised under the warrant--
  - (a) power to take a thing, or part of a thing, seized under the warrant, as a sample, to a place with appropriate facilities for testing the thing for evidence of the commission of the designated offence or organised crime or of terrorism to which the warrant relates;
  - (b) power to do any of the following in relation to a vehicle a police officer enters under the warrant if the police officer reasonably suspects the vehicle has evidence of the commission of the designated offence or organised crime or of terrorism to which the warrant relates in or on it--
    - (i) seize the vehicle;
    - (ii) take the vehicle to a place with appropriate facilities for searching the vehicle;

- (iii) remove walls, ceiling linings, panels or fittings of the vehicle for the purpose of searching the vehicle;
- (iv) search the vehicle for evidence of the designated offence or organised crime or of terrorism to which the warrant relates.

**156 Report on covert search**

s. 156

- (1) Within 7 days after executing a covert search warrant, a police officer must give to the Supreme Court judge who issued the warrant and the monitor a report complying with the responsibilities code on the exercise of the powers under the warrant.
- (2) The police officer must, if practicable, also take before the judge anything seized under the warrant and any photograph taken during the search.
- (3) The judge may, in relation to a thing mentioned in subsection (2), order that it--
  - (a) be held by a police officer until any proceeding in which the thing may be evidence ends; or
  - (b) be dealt with in the way the judge orders.

**157 Public interest monitor**

s. 157

- (1) The Governor in Council may appoint a person (the public interest monitor) to monitor applications for, and the use of, surveillance warrants and covert search warrants.
- (2) The Governor in Council may also appoint as many deputy public interest monitors as the Minister considers necessary.
- (3) The Governor in Council may, in the appointment, fix the terms and conditions of the appointment.
- (4) The Public Service Act 1996 does not apply to the appointment of a monitor.
- (5) A monitor must not be a person who is, or who is a member of, or who is employed in or by or to help, any of the following--
  - (a) the director of public prosecutions;
  - (b) the office of the director of public prosecutions;
  - (c) CMC;
  - (d) the police service;
  - (e) the Commissioner for Children and Young People and Child Guardian.

**158 Acting monitor**

s. 158

- (1) The Governor in Council may appoint a person, who is qualified for appointment as the public interest monitor, to act as the public interest monitor--
  - (a) during a vacancy in the office; or
  - (b) during any period, or all periods, when the public interest monitor is absent from duty or from the State or, for another reason, can not perform the duties of the office.
- (2) The Governor in Council may appoint a person, who is qualified for appointment as a deputy public interest monitor, to act as a deputy public interest monitor--
  - (a) during a vacancy in the office; or
  - (b) during any period, or all periods, when a deputy public interest monitor is absent from duty or from the State or, for another reason, can not perform the duties of the office

**159 Monitor's functions**

s. 159

- (1) The public interest monitor has the functions mentioned in subsection (2) for surveillance warrants and covert search warrants.
- (2) The functions are--
  - (a) to monitor compliance by police officers with this part in relation to matters concerning applications for surveillance warrants and covert search warrants; and
  - (b) to appear at any hearing of an application to a Supreme Court judge or magistrate for a surveillance warrant or covert search warrant to test the validity of the application, and for that purpose at the hearing--
    - (i) present questions for the applicant to answer and examine or cross-examine any witness; and
    - (ii) make submissions on the appropriateness of granting the application; and
  - (c) to gather statistical information about the use and effectiveness of surveillance warrants and covert search warrants; and
  - (d) whenever the public interest monitor considers it appropriate-- to give to the commissioner a report on noncompliance by police officers with this part.
- (3) Subject to the direction of the public interest monitor, a deputy public interest monitor has the functions mentioned in subsection (2)(a), (b) and (c).

**160 Monitor's annual report**

s. 160

- (1) As soon as practicable after the end of each financial year, but within 4 months after the end of the financial year, the public interest monitor must prepare and give to the Minister a written report on the use of surveillance warrants and covert search warrants under this Act.
- (2) The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after receiving the report.
- (3) The annual report must not contain information that--
  - (a) discloses or may lead to the disclosure of the identity of any person who has been, is being, or is to be, investigated; or
  - (b) indicates a particular investigation has been, is being, or is to be conducted.
- (4) The public interest monitor's report may form part of another annual report the monitor is required to prepare under another Act.

**161 Secrecy**

s. 161

- (1) A person who is or was a monitor must not record, use or disclose information obtained under this Act and that came to the person's knowledge because of the person's involvement in the administration of this Act.  
Maximum penalty--85 penalty units or 1 year's imprisonment.
- (2) Subsection (1) does not apply to a person's recording, use or disclosure of information in the performance of his or her functions under this Act.
- (3) A person who is or was a monitor is not in any proceeding compellable to disclose information obtained under this Act and that came to the person's knowledge because of the person's involvement in the administration of this Act.

**162 Protection from liability**

- (1) A monitor does not incur civil liability for an act done, or omission made, honestly and without negligence under this Act.
- (2) If subsection (1) prevents a civil liability attaching to a monitor, the liability attaches instead to the State.



# APPENDIX NINE – EXAMPLES OF OCCUPIER’S NOTICE PROVISIONS

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## **Sections 83, 84, 84A of the Confiscation Act 1997 (Vic)**

**[Effective Date 26/05/05, Version 042]**

*Please note endnote references to this legislation have been omitted*

### **83. Notice to occupier of premises entered under search warrant** s. 83

- (1) A magistrate or judge must prepare and give an occupier's notice to the person to whom the magistrate or judge issues a search warrant.
- (2) An occupier's notice—
  - (a) must specify—
    - (i) the name of the person who applied for the warrant; and
    - (ii) the name of the magistrate or judge who issued the warrant; and
    - (iii) the date and the time when the warrant was issued; and
    - (iv) the address or other description of the premises which are the subject of the warrant; and
  - (b) must contain a summary of the nature of the warrant and the powers conferred by the warrant.
- (3) A member of the police force executing a search warrant must—
  - (a) on entry into or onto the premises or as soon as practicable thereafter, serve the occupier's notice on a person who appears to be an occupier of, or to be in charge of, the premises and to be aged 18 or more; or
  - (b) if no such person is then present in or on the premises, serve the occupier's notice on the occupier of, or person in charge of, the premises, either personally or in such other manner as the magistrate or judge who issued the warrant may direct, as soon as practicable after executing the warrant.
- (4) Service of an occupier's notice under sub-section (3)(b) may be postponed by the magistrate or judge who issued the search warrant if he or she is satisfied that there are reasonable grounds for the postponement.
- (5) Service of an occupier's notice under sub-section (3)(b) may be postponed on more than one occasion, but must not be

postponed on any one occasion for a period exceeding 6 months.

**84. Duty to show search warrant**

s. 84

A member of the police force executing a search warrant must produce the warrant for inspection by an occupier of, or a person who is in charge of, the premises if requested to do so.

**84A. Duty to show seizure warrant**

S. 84A  
inserted by  
No. 63/2003 s. 21.

A member of the police force executing a seizure warrant must produce the warrant for inspection by any person present during the execution of the seizure warrant, if that person—

- (a) has an interest in the property being seized; or
- (b) is in charge of the property being seized.

## Occupier's notice form: Confiscation Regulations 1998 (Vic)

[Effective Date 10/03/05, Version 010]

Please note endnote references to this legislation have been omitted

### SCHEDULE 1E

Sch. 1E

### SEARCH WARRANT (Section 79)

Court Ref.

Purpose for which warrant is issued

- to search for the tainted property described below
- to search for the forfeited property described below

Description of tainted or forfeited property

Premises which may be searched for tainted or forfeited property

Number and name of street  
suburb

Nature of offence in reliance on which warrant is issued

*(insert statement of nature of offence)*

- person charged with offence
- person likely to be charged with offence within the next 48 hours
- person convicted of offence

Reasons for issue of warrant

Reasonable grounds for believing that there—

- is
- may be within the next 72 hours—

in or on the premises described above the tainted or forfeited property described above.

This warrant is issued to—

Name, Rank, No.

Address


The application for the search warrant was made \*in writing/\*by telephone.

The search warrant was \*transmitted/\*not transmitted by facsimile machine.

---

—

This warrant authorises any member of the police force, with the aid of any assistants considered necessary, to break and enter the premises described above and to—

- search the premises described above for any tainted or forfeited property described above;
- search any person found in or on the premises described above suspected on reasonable grounds of having on his or her person any tainted or forfeited property described above—

and to seize any such property.

The power to seize property includes the power to remove the property, to guard the property in or on the premises, to make copies of the whole or part of the property or to issue an embargo notice under section 93 of the **Confiscation Act 1997** in respect of the property.

A member of the police force executing this warrant may also seize other property not of the kind described above if the member believes on reasonable grounds that the property is of a kind that could have been included in this search warrant or will afford evidence about the commission of another Schedule 1 offence and the member believes on reasonable grounds that it is necessary to seize that property in order to prevent its concealment, loss or destruction or its use in committing or

continuing a Schedule 1 offence.

If reasonably necessary to do so the person authorised to search may break open any receptacle in or on the premises for the purposes of the search.

Sch. 1E

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This warrant ceases to have effect at the end of one month after its issue, or if it is recalled and cancelled by the magistrate or judge who issued it or if it is executed, whichever occurs first.

The member of the police force executing this warrant is required to produce this warrant for inspection by an occupier of, or a person who is in charge of, the premises if requested to do so, and, unless otherwise ordered by the judicial officer issuing this warrant, must serve the occupier's notice attached to the execution copy of this warrant on a person who appears to be an occupier of, or to be in charge of, the premises and to be aged 18 years or more. (If no such person is in attendance the attached occupier's notice must be served as soon as practicable after the execution of this warrant.)

---

This warrant is issued under section 79 of the **Confiscation Act 1997**.

Issued at	/ am/pm on / / at	by	*Magistrate *Judge of the County Court *Judge of the Supreme Court
--------------	-------------------------	----	--

\* Delete whichever is inapplicable

**SCHEDULE 1F**

Sch. 1F

**SEIZURE WARRANT  
(Section 79A)**

Court Ref .

Purpose for which warrant is issued

- to seize tainted property described below
- to seize forfeited property described below

Description of tainted or forfeited property

Description of public place from which tainted or forfeited property may  
be seized

Nature of offence in reliance on which warrant is issued

*(insert statement of nature of offence)*

- person charged with offence
- person likely to be charged with offence within the next 48 hours
- person convicted of offence

Reasons for issue of warrant

Reasonable grounds for believing that there—

- is
- may be within the next 72 hours—

at the public place described above the tainted or forfeited property described above

This warrant is issued to—

Name, Rank, No.

Address

The application for the seizure warrant was made \*in writing/\*by telephone.

The seizure warrant was \*transmitted/\*not transmitted by facsimile machine.

---

This warrant authorises any member of the police force, with the aid of any assistants considered necessary, to seize the tainted or forfeited property described above. Nothing in this warrant authorises the seizure of any property not specified in the warrant, the arrest of any person, or the entry of any premises to seize property.

This warrant ceases to have effect at the end of one month after its issue, or if it is recalled and cancelled by the magistrate or judge who issued it, or when it is executed, whichever occurs first.

The member of the police force executing this warrant is required to produce this warrant for inspection by any person present during the execution of the warrant, if that person has an interest in the property being seized or is in charge of the property being seized.

The applicant for this warrant must give notice of the execution of the warrant to all persons known to have an interest in the property seized under the warrant as soon as practicable, but not more than 7 days after execution.

---

This warrant is issued under section 79A of the **Confiscation Act 1997**.

Issued	am/pm on /	by	*Magistrate *Judge of the County Court *Judge of the Supreme Court
at			

*\* Delete whichever is inapplicable*

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## **Sections 15–16 of the Search Warrants Act 1985 (NSW)**

**[Effective Date 6/09/05]**

*Please note endnote references to this legislation have been omitted*

### **15. Notice to occupier of premises entered pursuant to warrant** s. 15

- (1) An authorised justice shall prepare and furnish an occupier's notice to the person to whom the authorised justice issues a search warrant.
- (2) An occupier's notice furnished in relation to a search warrant:
  - (a) shall be in or to the effect of the prescribed form,
  - (b) shall specify:
    - (i) the name of the person who applied for the warrant,
    - (ii) the name of the authorised justice who issued the warrant,
    - (iii) the date and the time when the warrant was issued, and
    - (iv) the address or other description of the premises the subject of the warrant, and
  - (c) shall contain a summary of the nature of the warrant and the powers conferred by the warrant.
- (3) A person executing a search warrant shall:
  - (a) upon entry into or onto the premises or as soon as practicable thereafter, serve the occupier's notice on a person who appears to be an occupier of the premises and to be of or above the age of 18 years, or
  - (b) if no such person is then present in or on the premises, serve the occupier's notice on the occupier of the premises, either personally or in such other manner as the authorised justice who issued the warrant may direct, as soon as practicable after executing the warrant.
- (4) Service of an occupier's notice pursuant to subsection (3) (b) may be postponed by the authorised justice who issued the search warrant if that authorised justice is satisfied that there are reasonable grounds for the postponement.
- (5) Service of an occupier's notice pursuant to subsection (3) (b) may be postponed on more than one occasion, but shall not be postponed on any one occasion for a period exceeding 6 months.

### **15A. Announcement prior to entry** s. 15A

- (1) One of the persons executing a search warrant must, before any of the persons executing the warrant enters the premises:
  - (a) announce that the person is authorised by the search warrant

to enter the premises, and

(b) give any person then on the premises an opportunity to allow entry into or onto the premises.

(2) A person executing a search warrant is not required to comply with this section if the person believes on reasonable grounds that immediate entry is required to ensure the safety of any person or to ensure that the effective execution of the search warrant is not frustrated.

**16. Duty to show warrant**

s. 16

A person executing a search warrant shall produce the warrant for inspection by an occupier of the premises if requested to do so by that occupier.

**Occupier's notice forms: Forms 5 & 6 of the Search Warrants Regulations 1999 (NSW)**

[Effective Date 6/09/05]

*Please note endnote references to this legislation have been omitted*

**Form 5            Occupier's notice for a Part 2 warrant**

(Clause 6 (a))

(Search Warrants Act 1985)

**IMPORTANT INFORMATION FOR OCCUPIERS CONCERNING THE SEARCH WARRANT**

A search warrant has been issued by an authorised justice. It gives the authority and power to the police to enter and search the premises at

.....  
.....  
.....

*(address)*

being a .....

*(description of premises, e.g. dwelling house)*

**Expiry**

The search warrant will expire at.....a.m./p.m. on

.....

*(date)*

**Force**

The police may use such force as is reasonably necessary to enter and search the premises and to gain entry to or open any receptacle.

YOU HAVE THE RIGHT TO INSPECT THE SEARCH WARRANT BUT YOU MUST NOT HINDER OR OBSTRUCT THE SEARCH, AS TO DO SO MAY BE A CRIMINAL OFFENCE. UNDER SECTION 9 OF THE SEARCH WARRANTS ACT 1985, THE MAXIMUM PENALTY FOR OBSTRUCTING OR HINDERING A SEARCH WITHOUT

REASONABLE EXCUSE IS A FINE OF \$11,000 AND 2 YEARS IMPRISONMENT.

**What can be seized**

The police can seize any of the things mentioned in the warrant and anything which they find, while executing the search warrant, which is believed on reasonable grounds to be connected with any offence.

**The powers given by the search warrant**

The things the police are empowered to search for are:<sup>(1)</sup>  
.....  
.....  
.....

The police also have the power to:

- (a) Guard or take away anything seized under the warrant.
- (b) Search any persons on the premises who are reasonably suspected of having a thing on them which is mentioned in the warrant.
- (c) Arrest any person who is reasonably suspected of committing an offence in relation to anything seized.

**Issue details**

The search warrant was granted by .....  
an authorised justice under the *Search Warrants Act 1985* on  
.....  
(date)

at .....  
(time)

The warrant was issued on the application of .....  
.....  
(name of police officer)

of .....  
(rank) (place of work)

**Basis for the issue of the warrant**

The warrant was granted on the basis that the authorised justice found that there were reasonable grounds for the issue of the warrant and, in particular, that the applicant police officer had reasonable grounds to believe that there were on the

premises the things listed above which were<sup>(2)</sup>:

(a) Things connected with the following offence of  
.....  
.....<sup>(1)</sup>

or

(b) Things stolen or otherwise unlawfully obtained.

**Challenging the issue of the warrant or the conduct of the search**

If you are dissatisfied with the issue of the warrant or the conduct of the search you should seek legal advice. This advice may assist you to decide whether your rights have been infringed and what action you can take. If your rights have been infringed you may be entitled to a legal remedy.

You should keep this notice as it will assist you if you seek advice.

You should produce this notice at the court when seeking to inspect the application.

**Limitations on the powers conferred**

- 1 The warrant must be executed before the date and time of expiry given above.
- 2 Any force used must be reasonably necessary.
- 3 The warrant authorises entry only between the hours of 6.00 a.m. and 9.00 p.m. unless other times are specified on the warrant.
- 4 The warrant must be shown to you if you ask to see it.
- 5 Nothing other than the things mentioned in the warrant can be seized unless it was found by a police officer while executing the search and the officer believes on reasonable grounds that it is connected with any offence.

**Inspection**

The application for the warrant, written reasons for the issue of the warrant and other associated documents are to be held at<sup>(3)</sup> .....

Local Court. You may seek to inspect those documents by arrangement with that Court.

Signed ..... Date .....  
*(Authorised Justice/Applicant Officer)*<sup>(4)</sup>

---

(1) If space is insufficient continue overleaf or attach separate sheet.

- (2)** Delete whichever is inapplicable.
- (3)** Insert the Local Court to which the issuing justice is attached or to which it is intended to forward the documentation.
- (4)** In the case of telephone search warrants in circumstances where facsimile facilities are not available, the notice must be signed by the applicant officer. In cases of application in person or by facsimile transmission, the authorised justice must sign the notice.

**Form 6      Occupier's notice otherwise than for a Part 2  
warrant**

(Clause 6 (b))

(Search Warrants Act 1985)

**IMPORTANT INFORMATION FOR OCCUPIERS CONCERNING THE SEARCH  
WARRANT**

A search warrant has been issued by an authorised justice. It gives the authority and power to the persons named in the search warrant to enter and search the premises at .....

.....  
(address)

being a .....  
(description of premises, e.g. dwelling house)

**Expiry**

The search warrant will expire at .. a.m./p.m. on  
.....  
(date)

**Force**

The persons granted the power to enter under the warrant may use such force as is reasonably necessary to gain entry to the premises and to carry out the purposes of the warrant.

YOU HAVE THE RIGHT TO INSPECT THE SEARCH WARRANT BUT YOU MUST NOT HINDER OR OBSTRUCT THE PERSONS EXECUTING IT, AS TO DO SO MAY BE A CRIMINAL OFFENCE. UNDER SECTION 9 OF THE SEARCH WARRANTS ACT 1985, THE MAXIMUM PENALTY FOR OBSTRUCTING OR HINDERING A SEARCH WITHOUT REASONABLE EXCUSE IS A FINE OF \$11,000 AND 2 YEARS IMPRISONMENT.

**The powers given by the search warrant**

The search warrant gives the power to the persons executing it to:

- (a) Enter the named premises.
- (b) Search for/inspect the following things:<sup>(1)</sup>

.....  
.....  
.....  
.....  
.....  
.....  
.....

(c) Perform the following functions:<sup>(2)</sup> .....

.....  
.....  
.....  
.....  
.....

(d) Exercise such other powers as are specified in the ..... Act .....,<sup>(3)</sup>  
including

.....  
.....

**Issue details**

The search warrant was granted by .....  
an authorised justice under .....<sup>(3)</sup>  
on ..... at .....  
(date) (time)

The search warrant was issued on the application of<sup>(4)</sup> ..... who is  
.....  
.....

**Basis for the issue of the warrant**

The warrant was granted on the basis that the authorised justice found that there  
were reasonable grounds for the issue of the warrant and, in particular, that the  
applicant had reasonable grounds to believe:<sup>(5)</sup>

.....  
.....  
.....  
.....  
.....

**Challenging the issue of the warrant or conduct of the search**

If you are dissatisfied with the issue of the warrant or the conduct of the people executing the warrant you should seek legal advice. This advice may assist you to decide whether your rights have been infringed and what action you can take. If your rights have been infringed you may be entitled to a legal remedy.

You should keep this notice as it will assist you if you seek advice.

You should produce this notice at the court when seeking to inspect the application.

**Limitations on the powers conferred**

- 1 The warrant must be executed before the date and time of expiry given above.
- 2 Any force used must be reasonably necessary.
- 3 The warrant authorises entry only between the hours of 6.00 a.m. and 9.00 p.m. unless other times are specified on the warrant.
- 4 The warrant must be shown to you if you ask to see it.
- 5 Only functions and powers authorised under the warrant or by the Act authorising the issue of the warrant may be performed.

**Inspection**

The application for the warrant, written reasons for the issue of the warrant and other associated documents are to be held at<sup>(6)</sup> .....

Local Court. You may seek to inspect those documents by arrangement with that Court.

Signed ..... Date .....

*(Authorised Justice/Applicant Officer)<sup>(7)</sup>*

---

- (1) List the items to be searched for.
- (2) List the powers and functions that are specified in the Act authorising the issue of a search warrant specifically required by the applicant.
- (3) Insert Act and section under which the warrant was issued.
- (4) Insert name, address, title (e.g. inspector) and the organisation to which applicant belongs.

- (5)** Insert in summary form the grounds on which the search warrant was issued.
- (6)** Insert the Local Court to which the issuing justice is attached or to which it is intended to forward the documentation.
- (7)** In the case of telephone search warrants in circumstances where facsimile facilities are not available, the notice must be signed by the applicant officer. In cases of application in person or by facsimile transmission, the authorised justice must sign the notice.

**Section 75 of the Police Powers and Responsibilities  
Act 2000 (Qld)**

**[Effective Date 1/07/00]**

*Please note endnote references to this legislation have been omitted*

**75 Copy of search warrant to be given to occupier**

- (1) If a police officer executes a search warrant for a place that is occupied, the police officer must--
  - (a) if the occupier is present at the place--give to the occupier a copy of the warrant and a statement in the approved form summarising the person's rights and obligations under the warrant; or
  - (b) if the occupier is not present--leave the copy in a conspicuous place.
- (2) If the police officer reasonably suspects giving the person the copy may frustrate or otherwise hinder the investigation or another investigation, the police officer may delay complying with subsection (1), but only for so long as--
  - (a) the police officer continues to have the reasonable suspicion; and
  - (b) that police officer or another police officer involved in the investigation remains in the vicinity of the place to keep the place under observation.

**Statement of person's rights and obligations: section 4  
of Schedule 10 of the Police Powers and  
Responsibilities Regulations 2000 (Qld)**

**[Effective Date 1/07/00]**

*Please note endnote references to this legislation have been omitted*

**4 Statement to accompany copy of search warrant**

The statement to be given to the occupier of a place with a copy of a search warrant must state the following--

- (a) the nature of the powers a police officer may exercise under the warrant;
- (b) the senior police officer present during the search must, as soon as reasonably practicable, state the officer's name, rank and station or, if not in uniform, state he or she is a police officer and produce his or her identity card for inspection;
- (c) the occupier may ask another police officer present for his or her name, rank and station and, if not in uniform, he or she, if asked, must produce an identity card for inspection;
- (d) the effect of the Act, sections 380, 381, 384, 415 and 423.21



# APPENDIX TEN - SAMPLE PENALTY INFRINGEMENT NOTICES AND COURTESY LETTER

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*These forms have been digitally edited to remove identifying information*

Penalty infringement notice – City of Melbourne (front)

\* **CITY OF MELBOURNE PARKING INFRINGEMENT NOTICE**  
State of Victoria Road Safety Act 1986, Road Safety (General) Regulations 1999

Notice No: [REDACTED]

Date: 10/06/2005  
Offence Time: 11:17AM  
Officer No: 327  
Reg: [REDACTED]  
State: VIC  
Check Digit: 4

Offence No: 702E

Road Rule: FAIL TO PAY FEE AND OBEY INSTRUCTIONS ON  
SIGN/METER/TICKET ETC. - Road Rule 207(2). (METER  
EXPIRED)

Location: CARDIGAN STREET  
Meter No: BA94



\*2353 00 08072005 302513338 50.00 95

**Pay By Due Date: 08/07/2005**

**Amount Due: \$50.00**

To the owner. It is alleged the above vehicle was so parked or stopped as indicated.  
Failure to pay in 28 days will incur additional costs. See reverse for how to pay.

\*

## Penalty infringement notice – City of Melbourne (back)



### HOW TO PAY

#### 1. At any Post Office:



In person at any Post Office throughout Australia before the due date.

#### 2. By Phone:

Call 1300 130 453 for 24 hour service  
(Credit card payments only)

#### 3. By Internet from home or office:

<http://www.maxi.com.au>

#### 4. By Mail:

Return this notice with cheque payment to City of Melbourne, Parking and Traffic Branch, GPO Box 244 Melbourne Vic 8001. Make cheques payable to "City of Melbourne".  
**Do Not Send Cash.**

#### 5. In Person:

Melbourne Town Hall, Swanston Street.  
7.30am to 5.00pm Monday - Friday.  
Enquiries: (03) 9658 9658

If the amount is not paid within 28 days as prescribed in the notice and proceedings are brought before the Magistrates' Court the person on whom the notice is served is entitled to defend any such proceedings. If the amount of the infringement penalty is paid before the 28 days as prescribed in the notice, the matter will not be brought before the Magistrates' Court.

Information Website:  
<http://www.melbourne.vic.gov.au/parking>

### TO CONTEST THIS NOTICE

#### In writing to:

City of Melbourne  
Parking and Traffic Branch  
GPO Box 780, Melbourne Vic 8001.

Penalty infringement notice – Victoria Police (front)



Automatic Detection Device  
Traffic Infringement Notice  
Road Safety Act 1986  
Road Safety (General) Regulations 1999

Penalty Enquiries  
(03) 9611 7611  
\*(see Privacy Requirement below)

VICTORIA POLICE

Infringement Notice - to the Owner

Obligation Number

-----

Notice Date 8 Jul 2005  
Notice Number  
Vehicle Number

Date of Offence

Time Of Offence

27 Jun 2005

09:24AM

Speed Zone

Alleged Speed

50km/h

64km/h

The alleged speed is 3km/h less than the detected speed or 3% less if over 100km/h.

Detected Speed

67km/h

AMOUNT DUE

DUE DATE

\$205.00

5 Aug 2005



001140

VIC

**FURTHER COSTS WILL BE INCURRED IF NO ACTION IS TAKEN BY THE DUE DATE**

**Station:** Traffic Camera Office      **Issuing Officer:** Snr Sergeant R Ritchie 18348  
**Code:** 1910      **Penalty:** \$205.00      **Demerit Points:** 3  
**Offence:** EXCEED SPEED LIMIT IN A VEHICLE OTHER THAN A LARGE VEHICLE BY 10KM/H OR MORE BUT LESS THAN 15KM/H  
**Location:** ALLENBY AVENUE, RESERVOIR BETWEEN ROSENTHAL CRESCENT AND HOBBS CRESCENT

**You must do one of the following by the due date:**

1. Pay in full by using one of the methods below.  
**OR**
2. Nominate the driver by completing the Statutory Declaration on the back of this form - **DO NOT PAY**  
**A new Notice will be issued to the driver nominated.**  
**OR**
3. Have the matter dealt with in a Court by completing the Application for Action by a court on the back of this form.

If this Infringement is paid before the due date, the matter will not be brought before the Magistrates' Court unless this notice is withdrawn within 28 days after date of service.

06/04/2005 NTC07696001140/001140/16

B001

**\* PRIVACY REQUIREMENT:**  
Proof of Identity is required for release of information.

Civic Compliance use only, not to be used by other agencies.



Payment Method

- BPAY:** Contact your participating bank, credit union or building society to make this payment from your cheque, savings or credit card account. Billers Code: 49031  
Ref: \_\_\_\_\_
- PHONE or INTERNET by credit card:** Call 13 27 23 (Easy Code 11100) or visit [www.maxi.com.au](http://www.maxi.com.au)
- AUSTRALIA POST:** Present this notice intact at any Australia Post outlet. (See reverse)
- MAIL:** Send Cheque or Money Order (do not send cash) with this payment slip to Civic Compliance Victoria, GPO Box 2041S, Melbourne, VIC 3001. Please note: In line with common practice, a receipt will not be issued for payments received through the mail.
- IN PERSON:** Present this notice intact to Civic Compliance Victoria (CCV), Ground Floor, 120 Spencer Street, Melbourne, between 8am and 6pm, Monday to Friday. Please note: Bankcard, Mastercard and Visa accepted. American Express and Diners Card are not accepted.

Payment Slip

Notice Number

Obligation Number

-----

-----

AMOUNT DUE

DUE DATE

\$205.00

5 Aug 2005

# 243... 60 #00000 20500#

Penalty infringement notice – Victoria Police (back)

**Statutory Declaration (MUST BE FULLY COMPLETED BY THE OWNER)**

You may be summonsed to Court to give evidence concerning this nomination.

I, (The Owner)  Surname  Given Name

Address  **This person is to sign the statutory declaration below** Postcode

of declare that at the time of the offence as stated in the Notice, I was not the driver of the vehicle, I further declare that

The actual driver was  
OR  
 The new owner is

Surname  Given Name

Address  Postcode

Licence Number  State  Date of Birth

Date vehicle sold  /  /

I make this declaration in the belief that it is true and correct and that a person making a false declaration is liable to the penalties of perjury.  
**This declaration must be witnessed by a member of the Police Force, Barrister or Solicitor, Pharmacist, School Principal, "Medical Practitioner (MBBS)", Bank Manager, prescribed Public Servant, Justice of the Peace or any other person authorised to witness Statutory Declarations under s.107(1) of the Evidence Act 1958 or equivalent legislation under other jurisdictions.**

Declared at  Before me

in the state of  Signature of Witness

This  day of  20  Name of Witness

Signature of Person Making Declaration (The Owner)  Title and Qualification of Witness

Address of Witness

**Application for Action by a Court**

I decline to be dealt with under these enforcement provisions, and want to have the matter dealt with by a Court.  
 I understand I may receive a summons for this offence.

Surname  Given Name

Serve Summons at Address  Postcode

Signature  Licence Number  Date of Birth

☛ Send correspondence to: PO Box 1916R, MELBOURNE, VIC 3001.

**Obtaining Image relating to the detection of the alleged offence:**

A copy of the image may be obtained by sending a cheque for \$7.50 (GST inclusive) to Civic Compliance Victoria quoting the Notice Number. Images may be viewed at no charge between 8.00am and 6.00pm Monday to Friday (except Public Holidays) at the Ground Floor, 120 Spencer Street, Melbourne.



\*370 01 0516986877 76

Penalty infringement notice – Department of Infrastructure (front)

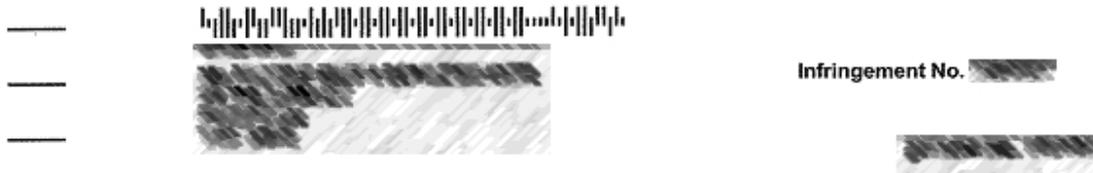
GPO Box 2797  
MELBOURNE VIC 3001

Transport (Infringements) Regulations 1999  
**Ticket Infringement Notice**



Transport Infringement Administration  
Enquiries: 1300 135 066

**Do not ignore this notice**



Infringement Details		
Infringement Date	Time	Notice Date
[REDACTED]	[REDACTED]	[REDACTED]
<b>Brief Description of Offence</b> 3106 - UNABLE TO PRODUCE VALID TICKET - See Regulations 201/202 Transport (Infringements) Regulations 1999		
<b>Place/Street</b> PARLIAMENT RLWY STN MELBOURNE		
<b>Date of Birth</b>	<b>Sex</b>	<b>Infringement No.</b>
[REDACTED]	[REDACTED]	[REDACTED]
	<b>Due Date</b>	<b>Penalty</b>
	17 Jun 2005	\$150.00

**Action Required within 28 Days**

- If you wish to settle this Infringement Notice → Pay \$150.00 by 17 Jun 2005. Paying the penalty finalises the matter (unless the Infringement Notice is withdrawn by a member of the Police Force or an Authorised Officer before 17 Jun 2005). Please note, if you finalise the matter by paying the penalty before 17 Jun 2005 you avoid enforcement action and further costs.
- If you wish to have this Infringement Notice reviewed → See options over page
- If you were not the Offender → See options over page
- If you wish to take this Matter to Court → See options over page

M Carydis  
Authorised Officer  
Transport Infringement Administration

Payment Options	Barcode	Payment Slip
Billpay Code: 2399 Ref: [REDACTED]		
Pay in person at any Post Office, by phone 13 18 16, or go to postbillpay.com.au		
<b>By Mail</b> Detach this section and send with non-negotiable cheque or money order (do not send cash) made payable to: Department of Infrastructure GPO Box 2797 MELBOURNE VIC 3001		<b>Amount Due</b> <input type="text" value="\$150.00"/>
		<b>Due Date</b> <input type="text" value="17 Jun 2005"/>
<b>In Person</b> Payments can be made in person at any Australia Post Office or Level 8, 80 Collins Street, Melbourne (8.30am to 4.30pm)		<b>Infringement No.</b> <input type="text" value="[REDACTED]"/>

Penalty infringement notice – Department of Infrastructure (back)

**Action Required within 28 Days if payment is not being made**

- If you wish to have this Infringement Notice reviewed** ➤ You must state your reasons in writing to Transport Infringement Administration, GPO Box 2797, Melbourne, Vic, 3001. Please quote the Infringement Number. The Department will suspend the Infringement Notice process while your correspondence is considered. All relevant issues, including your reasons, will be assessed and you will be advised in writing of the final decision in due course.
- If you were not the Offender** ➤ Send a Statutory Declaration to Transport Infringement Administration, GPO Box 2797, Melbourne, Vic, 3001, quoting the Infringement Number and provide the name and address of the person you allege was responsible.
- If you wish to take this Matter to Court** ➤ Complete the "Application for Action by a Court" on page 3 and send to Transport Infringement Administration, GPO Box 2797, Melbourne, Vic, 3001. You will receive a summons to attend Court in due course.

**What happens if you do not take any action**

There are 3 steps to collect overdue penalties:

- Step 1** ➤ If you do not pay the penalty within 28 days, you will be sent a reminder called a Courtesy Letter. A Courtesy Letter Fee of at least **\$18.40** will be added to the penalty at this stage. The letter will give you three options:
1. Pay the penalty and costs within 28 days; or
  2. Apply to go to the Magistrates' Court, or the Children's Court (if applicable); or
  3. If you were not the offender, send a Statutory Declaration to Transport Infringement Administration quoting the Infringement Number, and provide the name and address of the person you allege was responsible.

**Example Only:**

Penalty	\$150.00
Courtesy Letter Costs	\$18.40
<b>TOTAL</b>	<b>\$168.40</b>

- Step 2** ➤ Should you fail to respond to the Courtesy Letter within the timeframe, this infringement notice may be sent to the PERIN Court, which will issue an Enforcement Order requiring you to pay the penalty. An Enforcement Fee of at least \$39.90 and a Registration Fee of at least \$21.50 will be added to the penalty and costs. The Enforcement Order is a **Court Order**.

**Example Only:**

Penalty	\$150.00
Courtesy Letter Costs	\$18.40
Enforcement Fee	\$39.90
Registration Fee	\$21.50
<b>TOTAL</b>	<b>\$229.80</b>

If you want to object to the Enforcement Order, complete the Statutory Declaration that comes with the Enforcement Order and return it to the PERIN Court.

*The PERIN Court process does not apply to a Courtesy Letter issued to a person under the age of 17 years, where the matter will be directed to the Children's Court. You will receive a summons to attend court.*

- Step 3** ➤ If you do not respond to the Enforcement Order within 28 days, the PERIN Court will issue a warrant. A Warrant Issue Fee of at least **\$45.00** will be added to the penalty and costs. The warrant authorises the Sheriff to demand payment of the penalty plus costs, or, to seize your goods as security. If you have not paid within 7 days:
- Your property can be sold, or
  - If you have no goods to seize, you can be imprisoned.

**Please note that should you commit any further infringement in the future, an increased penalty may apply to that infringement.**

Penalty infringement notice – Department of Infrastructure (page 3)

**IMPORTANT: DO NOT IGNORE THIS DOCUMENT**

If you do not understand it, you should immediately have it interpreted and explained to you. You may then get advice from:

- Your local Court Registrar
- Your local Solicitor
- Victoria Legal Aid  
350 Queen Street  
Melbourne VIC 3000  
Tel: 9269 0234

Arabic  
 هام: لا تتجاهلوا هذه الوثيقة  
 إذا لم تفهموها، يجب عليكم أن تطلبوا ترجمتها وشرحها لكم جازلاً. بعد ذلك، يمكنك الحصول  
 على النصح من:  
 - كاتب المحاكم المحلي في منطقتك  
 - محاميكم المحلي  
 - مؤسسة المساعدة القانونية لكتوريا  
 Victoria Legal Aid, 350 Queen Street, Melbourne 3000. Tel: 9269 0234.

Chinese  
**重要事項請特別留意：切勿忽視此文件**  
 如果你有不明白之處，閣下應立刻找人向你翻譯及解釋，你可向以下  
 人士或地方索取意見  
 • 你所居住地區的地方法院秘書(Local Court Registrar)  
 • 你所居住地區的律師(Local Solicitor)  
 • 維州法律援助署 Victoria Legal Aid, 350 Queen Street,  
 Melbourne 3000. 電話 9269 0234

Greek  
**ΠΡΟΣΟΧΗ: ΜΗΝ ΠΑΡΑΒΛΕΨΕΤΕ ΤΟ  
 ΕΠΙΣΥΝΑΓΓΟΜΕΝΟ ΕΓΓΡΑΦΟ**  
 Αν δεν το καταλαβαίνετε, θα πρέπει να ζητήσετε αμέσως να σας το  
 εξηγήσει ή να σας το μεταφράσει κάποιος προφορικά. Μετά μπορείτε να  
 πάρετε συμβουλές από:  
 • Τον Γραμματέα του Δικαστηρίου της περιοχής σας (Court Register)  
 • Δικηγόρο της περιοχής σας  
 • Την Υπηρεσία Νομικής Βοήθειας Βικτόριας -Victoria Legal Aid, 350  
 Queen Street, Melbourne 3000. Τηλ: 9269 0234

Macedonian  
**ВАЖНО: ОБРНЕТЕ ВНИМАНИЕ НА ОВОЈ ДОКУМЕНТ**  
 Ако не го разбирате овој документ, треба веднаш да ви се  
 преведе и објасни. Тогаш може да добиете совети од:  
 • Вашиот локален службеник на судот  
 • Вашиот локален адвокат  
 • Victoria Legal Aid (Служба за правна помош во Викторија)  
 350 Queen Street, Melbourne 3000. Телефон: 9269 0234

Serbian  
**OVO JE VAŽAN DOKUMENT**  
 Ако нисте разумели садржај овог документа, одмах замолите  
 некога да вам га преведе и објасни. После тога можете да  
 добијете савет од:  
 • Чиновника у локалном суду  
 • Локалног адвоката  
 • Victoria Legal Aid, 350 Queen Street, Melbourne 3000.  
 Тел. 9269 0234

Turkish  
**DIKKAT: BU BELGEYİ İHMAL ETMEYİNİZ**  
 Eğer bu belgeyi anlayamazsanız, hemen tercüme edilip size  
 açıklanmasını sağlamanız gerekmektedir. Daha sonra tavsiye  
 alabileceğiniz yerler:  
 • Bölgenizdeki Mahkeme Katibiniz  
 • Bölgenizdeki Avukatınız  
 • Victoria Legal Aid (Yasal Yardım Victoria),  
 350 Queen Street, Melbourne 3000. Tel: 9269 0234

Cambodian  
**សារៈសំខាន់៖ សូមលោកអ្នកយកចិត្តទុកដាក់ចំពោះឯកសារនេះ**  
 ប្រសិនបើលោកអ្នកមិនយល់ឯកសារនេះទេ លោកអ្នកគួរតែឲ្យគេបកប្រែ  
 ហើយពន្យល់ ឯកសារនេះជូនលោកអ្នកឲ្យបានច្បាស់។  
 បន្ទាប់មកលោកអ្នកអាចស្នើសុំនិក្ខិតលោកអ្នក:  
 • គ្រូឧប្បត្តិសាលាកម្រិតបឋមរបស់លោកអ្នក  
 • មេធាវីប្រចាំតំបន់របស់លោកអ្នក  
 • ជំនួយទោសដ៏ឡឡប់ពីមន្ទីរយុត្តិធម៌  
 Victoria Legal Aid, 350 Queen Street Melbourne 3000, Tel: 9269 0234

Croatian  
**VAŽNO: NE ZANEMARUJTE OVAJ DOKUMENT**  
 Ako ne razumijete sadržaj, netko bi vam to odmah morao prevesti ili  
 objasniti. Potom savjet možete dobiti od:  
 • službenika u vašemu mjesnom sudu  
 • vašega mjesnoga odvjetnika  
 • Victorijskoga ureda za pravnu pomoć  
 (Victoria Legal Aid), 350 Queen Street, Melbourne 3000. Tel: 9269 0234.

Italian  
**IMPORTANTE: NON IGNORATE QUESTO DOCUMENTO**  
 Se non capite il documento, fatevelo immediatamente tradurre e  
 spiegare. Per aver consigli, rivolgetevi a uno dei seguenti:  
 • Cancelliere del Tribunale locale  
 • Il vostro avvocato  
 • Presso la Victoria Legal Aid, 350 Queen Street, Melbourne 3000.  
 Tel: 9269 0234.

Polish  
**UWAGA! PROSIMY NIE IGNOROWAĆ TEGO DOKUMENTU**  
 W przypadku trudności w zrozumieniu powyższego dokumentu, proszę  
 się natychmiast postarać o uzyskanie tłumaczenia i objaśnienia.  
 Dalszych porad udzielają:  
 • Lokalny kancelista sądu  
 • Lokalny doradca prawny (Solicitor)  
 • Victoria Legal Aid, pod adresem: 350 Queen Street, Melbourne 3000.  
 Numer telefonu: 9269 0234

Spanish  
**IMPORTANTE: ¡NO IGNORE ESTE DOCUMENTO!**  
 Si Ud. no lo comprende, pída inmediatamente que se lo traduzcan y  
 expliquen. Luego podrá obtener asesoramiento de:  
 • El Secretario del Juzgado de su zona  
 • Un abogado de su zona  
 • Victoria Legal Aid, 350 Queen Street Melbourne 3000 – Tel: 9269 0234

Vietnamese  
**QUAN TRỌNG: ĐỪNG LÀM NGỜ THÔNG-BÁO NÀY**  
 Nếu quý-vị không hiểu thông báo này, quý-vị lập tức nhờ người dịch và giải thích  
 cho quý-vị hiểu. Sau đó quý-vị có thể đến các nơi sau đây để nhờ chỉ dẫn:  
 • Thủ Kỳ Tòa tại địa phương của quý-vị  
 • Luật sư tại địa phương của quý-vị  
 • Ủy Ban Trợ Giúp Luật Pháp (Victoria Legal Aid), 350 Queen Street,  
 Melbourne 3000. Điện thoại: 9269 0234

**Application For Action By a Court**

I decline to be dealt with under this infringement process and want to have the matter dealt with by a court. I also understand that I may receive a summons for this offence.

Name (please print)	Infringement No.
<input type="text"/>	<input type="text"/>
My address for the service of the Summons is:	Signature
<input type="text"/>	<input type="text"/>
Postcode	Date
<input type="text"/>	<input type="text"/>

Send to Transport Infringement Administration, GPO Box 2797 MELBOURNE VIC 3001

Courtesy letter – Department of Infrastructure (public transport infringement)

*Magistrates' Court Act 1989 - Schedule 7*

**COURTESY LETTER**

<p><b>Enforcement Agency:</b> Department of Infrastructure</p> <p><b>Location:</b> Level 6, 80 Collins St Melbourne, Vic 3000 OR G.P.O. Box 2797Y Melbourne, Vic 3001</p> <p><b>Postal Address:</b> G.P.O. Box 2797Y Melbourne, Vic 3001</p> <p><b>Hours of Business:</b> 8.30am to 4.30pm Monday to Friday</p> <p><b>Telephone:</b> 1300 135066</p>	<p><b>Infringement No.:</b> [REDACTED]</p> <p><b>Date:</b> 12-NOV-03</p> <p><b>Time:</b> 2028</p> <p><b>Code:</b> 3106</p>
--	--

<p><b>To:</b> [REDACTED]</p>	<p><b>Date of Birth:</b> 03/02/83</p> <p><b>Licence No.:</b> [REDACTED]</p> <p><b>Vehicle No.:</b> [REDACTED]</p>
------------------------------	---

You recently received an Infringement notice and our records show that you have not paid the penalty. Payment is overdue and you now have to pay our costs as well.

**Within 28 days you must:**

- (1) Pay the penalty and the costs to us. (If posting - send a "not negotiable" cheque or money order made out to DEPARTMENT OF INFRASTRUCTURE with this letter. Do not send cash).
- OR
- (2) Ask to have the matter dealt with by a Court. To do this fill in and return the form on the other side of the page.
- OR
- (3) If you were not the driver of the vehicle at the time, send a statement to us giving the name and address of the person who was. You must sign the statement in front of a J.P., a Commissioner for Affidavits or a Court Registrar.

**IF YOU TAKE NO ACTION YOU MAY BE PROSECUTED. YOU WILL THEN HAVE TO PAY MORE COSTS**

**Infringement Details:**

**Description:** UNABLE TO PRODUCE VALID TICKET ON REQUEST

**Place;Street:** FLINDERS ST RLWY STN MELBOURNE

<b>PENALTY:</b>	\$ 100.00	<b>AMOUNT DUE:</b>	\$ 118.00
<b>AGENCY COSTS:</b>	\$ 18.00	<b>DATE DUE:</b>	25-FEB-04

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✂

Department of Infrastructure G.P.O. Box 2797Y Melbourne, Vic 3001	[REDACTED]
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INFRINGEMENT No.	VEHICLE No.	PENALTY	AGENCY COSTS	AMOUNT DUE	DATE DUE
[REDACTED]	[REDACTED]	\$ 100.00	\$ 18.00	\$ 118.00	25-FEB-04

# APPENDIX ELEVEN – SAMPLE PENALTY ENFORCEMENT WARRANTS AND RELATED DOCUMENTS

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## **Penalty enforcement warrant notice: *Magistrates' Court (General Regulations) 2000 (Vic)***

**[Effective Date 10/03/05, Version 010]**

*Please note endnote references to this legislation have been omitted*

### **SCHEDULE 6**

#### **FORM 5**

Regulation 1207(5)

#### **WARNING NOTICE**

A penalty enforcement warrant has been issued against you for the non-payment of a fine. Details of the fine are set out in the attached document.

You have 7 days from the date of this demand to pay the fine before the warrant will be executed. Payment should be made to the Sheriff's Office [*insert address*].

#### **WARNING:**

**IF YOU IGNORE THIS NOTICE IT MAY RESULT IN THE SEIZURE AND SALE OF YOUR PROPERTY TO RECOVER THE AMOUNTS DUE, OR YOU BEING IMPRISONED.**

NOTE: The seizure and removal of goods by the sheriff usually means that you will have to pay additional costs.

If you are unable to pay the full amount within 7 days, you may apply to the registrar of the PERIN venue of the Magistrates' Court at [*venue*] for—

- (a) an order that the time within which the fine is to be paid be extended;

- (b) an order that the fine be paid by instalments;
- (c) revocation of the enforcement order (unless the warrant has been executed) and the referral of the alleged offence to the Magistrates' Court for hearing and determination.

An application under paragraph (c) must be filed with the registrar and be accompanied by a sworn statement in writing or by a statutory declaration setting out the grounds on which the revocation is sought.

<b>WARNING:</b>
<b>IF YOU IGNORE THIS NOTICE IT MAY RESULT IN THE SEIZURE AND SALE OF YOUR PROPERTY TO RECOVER THE AMOUNTS DUE, OR YOU BEING IMPRISONED.</b>

If you do not understand this document, you should immediately have it interpreted and explained to you. You may get advice from:

A registrar of the Magistrates' Court  
Your local solicitor  
Victoria Legal Aid [*insert address and telephone number*]

(Information to this effect to be printed in the English, Arabic, Cambodian, Chinese, Croatian, Greek, Italian, Macedonian, Polish, Serbian, Spanish, Turkish and Vietnamese languages.)

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**Penalty enforcement warrant: *Magistrates' Court (General Regulations) 2000 (Vic)***

**SCHEDULE 6**

**FORM 7**

**SCH. 6 FORM 7 AMENDED BY S.R. NO. 99/2005 REG. 3(2)(B).**

Regulation 1002

**PENALTY ENFORCEMENT WARRANT**

**Magistrates' Court Act 1989**

Defendant's Name		Court Ref.
	M	F
Address		Date of Birth
		Driver licence No.
		State:
		Registration No.
		State:
Enforcement Agency		

On \_\_\_\_\_ an enforcement order was made against the defendant at the PERIN venue of the Magistrates' Court at [venue] in respect of an infringement penalty, pursuant to clause 5 of Schedule 7 of the **Magistrates' Court Act 1989**.

<b>AMOUNT DUE AND PAYABLE</b>	
Fine: \$	Court Costs and Fees [including warrant issue fee(s)]: \$
Agency Costs: \$	Amount paid to date: \$
	<b>TOTAL AMOUNT UNPAID: \$</b>
Offence Date:	
Time:	
Offence details:	
Place of offence:	

**AUTHORITY AND DIRECTIONS**

**To the Sheriff, all members of the police force, all prison officers, or**  
You are to demand payment of the amount unpaid from the person named in this warrant. If this amount is paid you must send it immediately to the Principal Registrar.

**If the amount is not paid:**

You are authorised to break, enter and search any residential or business property occupied by the person named in the warrant for any personal property of that person;

You are further directed and authorised—

- (i) to seize the personal property of the person named in the warrant; and
- (ii) if the sum named in the warrant together with all lawful costs of execution are not paid, to sell the personal property seized;

**If you cannot find sufficient personal property of the person named in the warrant on which to levy the sums named in the warrant together with all lawful costs of execution**

You are further authorised to break, enter and search any place where the person named in this warrant is suspected to be and to take and safely convey the person named in this warrant to a prison or police gaol and to deliver the person to the officer in charge of the prison, police gaol.

**To the Secretary to the Department of Justice or the Chief Commissioner of Police (as the case requires) or any other person into whose custody the person named in the warrant is transferred—**

You are directed and authorised to receive that person into custody and safely keep that person—for the period of one day in respect of each penalty unit or part of a penalty unit of the amount then remaining unpaid of the sums named in the warrant; or

until that person is otherwise removed or discharged from custody by due course of law.

If the amount unpaid is paid you are to release the person named in this warrant and immediately send the amount to the Principal Registrar.

If the amount is partly paid you must reduce the term of imprisonment using the formula set out in section 82E(1)(b) of the **Magistrates' Court Act 1989**, amend the execution copy of the warrant, receive the payment and forward it without delay to the Principal Registrar.

Issued at \_\_\_\_\_ by \_\_\_\_\_ Date \_\_\_\_\_  
Registrar.

\_\_\_\_\_

**Penalty enforcement warrant statement on consent:  
Magistrates' Court (General Regulations) 2000 (Vic)**

**SCHEDULE 6**

**FORM 8**

Regulation 1003

**STATEMENT SETTING OUT THE EFFECT OF GIVING CONSENT TO THE  
SEIZURE OR TAKING OF PERSONAL PROPERTY USED PRIMARILY AS A  
MEANS OF TRANSPORT**

1. Penalty enforcement warrant(s) nos  
has/have been issued against you for non payment of a fine(s).
  2. Section 42 of the **Supreme Court Act 1986** prohibits the seizure or taking of personal property under the warrant(s) if the property is used primarily as a means of transport (eg. motor vehicle or motor cycle) and if it is worth less than the prescribed limit under the Bankruptcy Act 1966 of the Commonwealth.
  3. However, if you are unable to pay the amount outstanding in the warrant(s), you may **consent** to the seizure or taking of personal property you use primarily as a means of transport **despite** it being worth less than the prescribed limit under the Bankruptcy Act.
  4. If you consent to the seizure or taking of such property, it will be advertised and sold at public auction and the proceeds of sale applied to the penalty enforcement warrant(s) and any lawful costs of execution of the penalty enforcement warrant(s).
  5. If the proceeds of sale are insufficient to discharge the warrant(s), a further demand for payment may be made upon you, and if you do not pay, or do not provide additional personal property to satisfy the debt, you may be imprisoned.
  6. If the proceeds of sale exceed the amount(s) in the penalty enforcement warrant(s) and the lawful costs of execution, then the remaining amount will be paid to you.
  7. If you decide to consent to the seizure or taking of personal property you use primarily as a means of transport, a sheriff's officer will ask you to sign a consent in accordance with section 82F(2) of the **Magistrates' Court Act 1989**.
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# APPENDIX TWELVE – PRINCIPAL VICTORIAN CIVIL WARRANT PROCEDURES

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## **Rule 66.02 and Orders 68-69 of the Supreme Court (General Civil Procedures) Rules 1996**

**[Effective Date 10/10/05]**

*Please note endnote references to this legislation have been omitted*

### **66.02 Payment of money**

- (1) A judgment for the payment of money not within paragraph (2) may be enforced by one or more of the following means—
  - (a) warrant of seizure and sale;
  - (b) attachment of debts under Order 71;
  - (c) attachment of earnings under Order 72;
  - (d) charging order under Order 73;
  - (e) appointment of a receiver under Order 74; and
  - (f) where Rule 66.05 applies, and subject to Rule 66.10—
    - (i) committal; and
    - (ii) sequestration.
- (2) A judgment for the payment of money into court may be enforced by one or more of the following means—
  - (a) appointment of a receiver; and
  - (b) where Rule 66.05 applies, and subject to Rule 66.10—
    - (i) committal; and
    - (ii) sequestration.
- (2) Paragraphs (1) and (2) do not affect any other means of enforcement of a judgment for the payment of money.
- (3) The Court may authorise or direct a Master or the Prothonotary or a party to enforce a judgment for the payment of money into court by one or more of the means referred to in paragraph (1).

**ORDER 68**  
**WARRANTS OF EXECUTION GENERALLY**

**68.01 Definitions**

r. 68.01

In this Order, unless the context or subject-matter otherwise requires—

"**judgment**" includes order;

"**Sheriff**" includes a person to whom a warrant of execution is directed;

"**warrant of execution**" means a warrant of seizure and sale, a warrant of possession and a warrant of delivery.

**68.02 Leave to issue warrant**

(1) Notwithstanding Order 66, a warrant of execution to enforce a judgment shall not be issued without the leave of the Court in the following cases—

- (a) where six years have elapsed since the judgment took effect;
- (b) where any change has taken place, whether by assignment or death or otherwise, in the identity of the persons entitled or liable to execution under the judgment;
- (c) where the judgment is against the assets of a deceased person coming to the hands of his executor or administrator after the date of the judgment, and it is sought to issue execution against assets of that description;
- (d) where under the judgment a person is entitled to enforce it subject to the fulfilment of a condition;
- (e) where the warrant is against property in the hands of a receiver appointed by the Court or of a sequestrator;
- (f) where the judgment is for a sum in a currency not Australian dollars.

Rule 68.02  
(1)(g)  
inserted by S.R.  
No. 137/1996  
rule 11, revoked  
by S.R. No.  
96/1999 rule 16.

\* \* \* \* \*

- (2) Paragraph (1) does not affect any provision of or under any Act requiring the leave of the Court before a judgment may be enforced.
- (3) An application for leave under paragraph (1) may be made without notice to any person, unless the Court otherwise orders.
- (4) The application shall be supported by evidence on affidavit showing—
  - (a) where the judgment is for the payment of money, the

amount, including any interest, due on the date of the application;

- (b) where paragraph (1)(a) applies, the reasons for the delay;
- (c) where paragraph (1)(b) applies, the change which has taken place;
- (d) where paragraph (1)(b), (1)(c) or (1)(d) applies, that a demand to satisfy the judgment has been made on the person liable to satisfy it and that he has not satisfied it;
- (e) that the applicant is entitled to proceed to execution on the judgment; and
- (f) that the person against whom execution is sought is liable to execution on the judgment.

r. 68.03

### **68.03 Separate execution for costs**

A person entitled to enforce a judgment entered or given with costs may have execution to enforce the judgment and, when the costs become payable, have execution separately to enforce payment of the costs.

### **68.04 Issue of warrant of execution**

r. 68.04

- (1) A warrant of execution is issued when the warrant is sealed with the seal of the Court.
- (2) A warrant of execution shall bear the date of its issue.
- (3) A warrant of execution shall not be issued unless the person requesting it to be issued—
  - (a) produces to the Prothonotary a form of the warrant;
  - (b) files a copy;
  - (c) where the warrant is to enforce a judgment for the payment of money, files an affidavit, sworn within 14 days before the request, stating—
    - (i) the date of the judgment;
    - (ii) the amount for which judgment was entered or given;
    - (iii) the amount, including any interest accrued and any costs, due and payable in respect of the judgment at the date of swearing of the affidavit with particulars showing how that amount is calculated or made up; and
    - (iv) the daily amount of interest, if any, which, subject to any future payment under the judgment, will accrue after the date of swearing of the affidavit in respect of the judgment amount and costs.
- (4) In the case of a warrant of execution to enforce a judgment for the payment of money, the person to whom the warrant is

directed shall, when executing the warrant, serve a copy of the affidavit required under paragraph (3)(c) and of any affidavit filed under Rule 10.03 of Chapter II on the person against whom the warrant is executed or leave it at the place where the warrant is executed.

r. 68.05

**68.05 Duration**

- (1) A warrant of execution shall be valid for the purpose of execution for one year after the day it is issued.
- (2) Notwithstanding paragraph (1), the Court may from time to time by order extend the period of the validity of the warrant for the purpose of execution for not more than one year at any one time from the day on which it would otherwise expire.
- (3) An order under paragraph (2) shall not be made after the day of expiry of the warrant.
- (4) An application for an order under paragraph (2) may be made without notice to any person.
- (5) A copy of an order under paragraph (2) shall be delivered to the Sheriff by the party obtaining the order.
- (6) The priority of a warrant of execution in respect of which an order under paragraph (2) has been made shall be determined by reference to the date on which the warrant was originally delivered to the Sheriff.

**68.06 Costs of prior execution**

The amount for which a warrant of execution may be issued shall, unless the Court otherwise orders, include the costs, fees and expenses incurred in respect of any prior warrant of execution on the same judgment, whether the prior warrant was or was not productive, and money recoverable under section 107(1) of the Service and Execution of Process Act 1992 of the Commonwealth.

Rule 68.06  
amended by  
S.R. No.  
137/1996 rule 12.

r. 68.07

**68.07 Provision for enforcing payment of money**

Order 69 shall, with any necessary modification, apply to a warrant of execution which includes a provision for enforcing the payment of money required to be paid by the judgment which is to be enforced by the warrant.

r. 68.08

**68.08 Form of warrant of execution**

A warrant of execution shall be in Form 53B, 68A, 68B or 68C, whichever is appropriate.

**ORDER 69**

**WARRANT OF SEIZURE AND SALE**

**69.01 Definitions**

r. 69.01

In this Order, unless the context or subject-matter otherwise

requires—

"**creditor**" means a person for whom a warrant is issued;

"**debtor**" means a person against whose property a warrant is to be executed;

"**judgment**" includes order;

"**Sheriff**" includes a person to whom a warrant is directed;

"**warrant**" means a warrant of seizure and sale.

**69.02 New enforcement process**

r. 69.02

The process of enforcement under this Order shall be used instead of the process of enforcement by writ of fieri facias.

**69.03 Two or more warrants**

r. 69.03

Unless the Court otherwise orders, a warrant shall not be issued while another warrant issued in respect of the same judgment is in force except for the purpose of Rule 68.03.

**69.04 Order of sale**

r. 69.04

- (1) Subject to paragraphs (2) and (3), where it appears to the Sheriff that property subject to levy under a warrant is more than sufficient to satisfy the amount to be levied, he shall take or sell so much of the property as appears to him to be sufficient.
- (2) Subject to paragraph (3), the Sheriff shall take or sell property—
  - (a) in such order as seems to him best for the prompt execution of the warrant without undue expense;
  - (b) subject to paragraph (2)(a), in such order as the debtor directs; and
  - (c) subject to paragraph (2)(a) and (b), in such order as seems to the Sheriff best for minimising hardship to the debtor and other persons.
- (3) Land shall not be put up for sale under the warrant until all other property liable to sale under the warrant has been sold unless the debtor so requests.
- (4) The Court may order that property subject to levy under the warrant be taken or sold otherwise than in accordance with the preceding paragraphs.

**69.05 Time, place and mode of sale**

r. 69.05

- (1) The Sheriff shall put up for sale all property liable to sale under a warrant—
  - (a) as early as may be having regard to the interests of the parties; and
  - (b) at the place which seems to him best for a beneficial sale of the property.

- (2) In the case of property, other than land, which is liable to sale under a warrant, the Sheriff may as he thinks fit sell the property either by private contract or public auction.
- (3) Rule 69.06 shall not apply to a sale by private contract made in accordance with paragraph (2).

**69.06 Advertisement of sale**

r. 69.06

- (1) Before putting property up for sale under a warrant the Sheriff shall advertise the sale by giving notice of the time and place of sale and of particulars of the property in the manner which seems to him best to give publicity to the sale.
- (2) The Sheriff shall not advertise the sale of any land until the creditor has satisfied him by such means as he may reasonably require that—
  - (a) in the case of land under the operation of the **Transfer of Land Act 1958**, a copy of the warrant has been served on the Registrar of Titles and that a memorandum of that service has been entered in the Register Book;
  - (b) in the case of other land, a copy of the warrant has been left with the Registrar-General.
- (3) An advertisement relating to the intended sale of land by the Sheriff shall be in Form 69A and include—
  - (a) a concise description of the land, including its location, stated in terms calculated to enable interested persons to identify it;
  - (b) a statement in general terms of the improvements, if any, believed by him to be on the land;
  - (c) a statement of the last known address of the debtor; and
  - (d) in the case of land under the operation of the **Transfer of Land Act 1958**, a statement of the interest, if any, of the debtor according to the Register Book and of the entries in the Register Book which affect or may affect the land as at the date of service upon the Registrar of Titles of the warrant.
- (4) The creditor shall serve personally on the debtor a copy of the advertisement not less than 14 days before the date of the intended sale.
- (5) The Court may dispense with service under paragraph (4).
- (6) Not less than three days or such lesser period as the Sheriff may allow before the date advertised for the sale the creditor shall—
  - (a) file an affidavit of service of a copy of the advertisement or, where the Court makes an order for substituted service of the advertisement, an affidavit showing due compliance with the order;
  - (b) deliver to the Sheriff—

- (i) where a copy of the advertisement is served on the debtor, a copy of the affidavit of service;
- (ii) where the Court makes an order dispensing with service of a copy of the advertisement, a copy of the order;
- (iii) where the Court makes an order for substituted service of the advertisement, a copy of the order and of the affidavit showing due compliance.

**69.07 Notional possession of goods**

r. 69.07

Notwithstanding that the Sheriff leaves land on which goods have been seized under a warrant, the Sheriff shall be taken to remain in possession of the goods if he leaves in a prominent position on or about the land on which the goods were seized or upon the goods seized a notice of the seizure listing the items seized.

## **Section 121 of the *Supreme Court Act 1986* (Vic)**

**[Effective Date 1/9/05]**

*Please note endnote references to this legislation have been omitted*

### **121. Powers of sheriff**

- (1) A person must not resist the sheriff in the execution of a warrant or other process.

25 penalty units or 6 months imprisonment or both.

- (2) If the sheriff finds any resistance in the execution of a warrant or other process, the sheriff must take with him or her such assistants as he or she thinks desirable and must go in person to do execution and may arrest the resisters and bring them before a justice to be dealt with according to law.

S. 121(3)  
amended by No.  
57/1989

- (3) Proceedings for an offence under sub-section (1) may be brought in the Magistrates' Court.

s. 3(Sch.  
item 192.2).

## **Section 53 of the *County Court Act 1958* (Vic)**

**[Effective Date 1/9/05, Version 051]**

*Please note endnote references to this legislation have been omitted*

### **53. Mode of enforcing orders**

The court shall have and may exercise the same power and authority for compelling obedience to and for punishing disobedience of any judgment or order made by the court as the Supreme Court may exercise for compelling obedience to or punishing disobedience of any judgment or order.

S. 53 amended  
by Nos 110/1986  
s. 140(2),  
19/1989  
s. 8(u)(i)(ii).

## **Section 111-112 of the *Magistrates' Court Act 1989* (Vic)**

**[Effective Date 1/8/05,]**

*Please note endnote references to this legislation have been omitted*

### **Division 5—Enforcement**

s. 111

#### **111. Enforcement of orders**

- (1) An order made by the Court in a civil proceeding for the payment of money may, subject to and in accordance with the Rules, be enforced by one or more of the following means:

- (a) A warrant to seize property;
  - (b) An attachment of earnings order;
  - (c) An attachment of debts order.
- (2) A warrant to seize property may be directed to—
- (a) the sheriff; or
  - (b) a named member of the police force; or
  - (c) generally all members of the police force.
- (3) A warrant to seize property directs and authorises the person to whom it is directed—
- (a) to seize the personal property of the person named or described in the warrant; and
  - (b) if the sums named in the warrant together with all lawful costs of execution are not paid, to sell the personal property seized.
- (4) A warrant to seize property directed to the sheriff may, if the sheriff so directs, be executed by—
- (a) a named person who is a bailiff for the purposes of the **Supreme Court Act 1986**; or
  - (b) generally all persons who are bailiffs for the purposes of the **Supreme Court Act 1986**; or
  - (c) a named member of the police force; or
  - (d) generally all members of the police force.
- (5) A direction may be given by the sheriff under sub-section (4) by—
- (a) endorsing the execution copy of the warrant with the direction; or
  - (b) issuing a warrant to the same effect as the warrant to seize property but directed in accordance with sub-section (4).
- (6) A warrant endorsed or issued by the sheriff in accordance with sub-section (5) directs and authorises the person to whom it is directed to do all things that he or she would have been directed and authorised to do by the original warrant if it had been directed to him or her.
- (7) A warrant to seize property directed to a named bailiff or member of the police force may be executed by any bailiff or member of the police force, as the case requires.
- (7A) The person executing a warrant to seize property may serve on—
- (a) the person against whom the warrant is issued and whose

S. 111(7A)  
inserted by No.  
33/1994 s. 15.

personal property is seized under the warrant; or

- (b) a person who is in possession of any personal property of the person against whom the warrant is issued that is seized under the warrant—

a notice in the form prescribed by the Rules informing the person served with the notice that he or she is responsible for the safe-keeping of the personal property seized under the warrant that is described in the notice and also informing him or her of the provisions of sub-section (7B).

- (7B) A person who knows that the property has been seized under a warrant to seize property or is the subject of a notice served under sub-section (7A) must not, except with the written consent of the person executing the warrant to seize property—

S. 111(7B)  
inserted by No.  
33/1994 s. 15.

- (a) interfere with or dispose of that property; or
- (b) deface or remove any mark attached to that property indicating that it had been so seized; or
- (c) remove that property from the place at which it was situated when the notice was served.

Penalty applying to this sub-section: 25 penalty units or 6 months imprisonment or both.

- (7C) Nothing in sub-section (7B) affects the powers of the Court or of the Supreme Court in relation to contempt.

S. 111(7C)  
inserted by No.  
33/1994 s. 15.

- (8) The following orders may, subject to and in accordance with the Rules, be enforced by a warrant of delivery:

- (a) An order for the delivery of goods;
- (b) An order for the delivery of goods or the payment of their assessed value.
- (9) An order for the payment of the assessed value of goods may be enforced by the same means as any other order for the payment of money.

- (9A) A person to whom an attachment of earnings order is directed must not fail to comply with the order.

S. 111(9A)  
inserted by No.  
33/1994 s. 14.

Penalty: 60 penalty units or 6 months imprisonment or both.

- (9B) It is a defence to a charge under sub-section (9A) for the person charged to prove that he, she or it took all reasonable steps to comply with the order.

S. 111(9B)  
inserted by No.  
33/1994 s. 14.

- (9C) Nothing in sub-section (9A) affects the powers of the Court or of the Supreme Court in relation to contempt of court.

S. 111(9C)  
inserted by No.  
33/1994 s. 14.

- (10) A person must not dismiss an employee or injure an employee in the employee's employment or alter an

employee's position to the prejudice of the employee because an attachment of earnings order has been made in relation to the employee or the employee is required to make payments under an attachment of earnings order.

Penalty: 5 penalty units.

- (11) The Court may order a person convicted of an offence under sub-section (10) to reimburse the employee any lost wages and to cause the employee to be reinstated in the employee's former position or in a similar position. s. 112
- (12) An amount ordered to be reimbursed under sub-section (11) may be recovered from the convicted person in the same manner as the penalty to which that person is liable under sub-section (10) and may be included in the same warrant.
- (13) An attachment of earnings order may apply to earnings falling to be paid—
- (a) by the Crown; or
  - (b) by a statutory authority representing the Crown; or
  - (c) out of the Consolidated Fund.
- (14) Nothing in this section takes away from the power of the Court to make, or from the right of a person to apply for, an instalment order under the **Judgment Debt Recovery Act 1984**.

## 112. Certificate for Supreme Court

- (1) If—
- (a) an order is made by the Court in a civil proceeding for the payment of money; and
  - (b) a warrant to seize property has been returned unsatisfied in whole or in part—
- a registrar must, on the application of the person entitled to enforce the order, give that person a certificate of the order and of the amount remaining unpaid under the order and record the fact of the giving of the certificate in the register of the Court.
- (2) A person who is given a certificate under sub-section (1) may file the certificate in the Supreme Court and, on the filing of the certificate, judgment is deemed to have been entered in the Supreme Court for the sum mentioned in the certificate as being unpaid together with all fees paid for obtaining and filing the certificate and the prescribed amount for costs.
- (3) After the issue of a certificate under sub-section (1) no further proceedings (other than proceedings under the **Judgment Debt Recovery Act 1984**) must be taken in the Magistrates' Court but, on the filing of the certificate in the Supreme Court, the judgment deemed to have been entered may be enforced by the same

means as any other judgment entered in the Supreme Court,  
including enforcement under the **Foreign Judgments Act 1962**.

# APPENDIX THIRTEEN – CIVIL WARRANT PROVISIONS FROM OTHER AUSTRALIAN JURISDICTIONS

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## Sections 74-82 of the *Civil Judgements Enforcement Act 2004* (WA)

*Please note endnote references to this legislation have been omitted*

### 74. Property (seizure and sale) order, effect of

(1) In this section-

“**saleable interest**”, in personal property, means any legal or equitable interest in the property that can be disposed of according to law.

(2) A property (seizure and sale) order made in respect of a judgment debtor -

(a) applies to any saleable interest that the debtor has in any personal property at the time when the Sheriff receives the order; and

(b) entitles the Sheriff -

(i) to seize any such property in which the judgment debtor has a saleable interest and to sell that interest;

(ii) to seize any money of the judgment debtor;

(iii) to seize any cheque, bill of exchange, promissory note, bond, specialty, or other security for money, by virtue of which money is or may be payable to the judgment debtor, and to deal with it in accordance with section 79; and

(iv) to apply the proceeds of the sale, the money, and any money received or recovered under section 79, in accordance with section 72.

(3) The Sheriff's entitlement applies even if the judgment debtor's interest in any personal property is held jointly or in common with another or others.

(4) If, after the Sheriff receives the order, a person acquires an interest in any personal property to which the order applies, the

person does so subject to the Sheriff's entitlement in subsection (2) unless, at the time of acquiring the interest -

- (a) the person acquired it in good faith and for valuable consideration; and
- (b) the person had no notice of the fact that the Sheriff had received the order and that it was in effect.

#### **75. Seizing personal property, powers enabling**

(1) Under a property (seizure and sale) order the Sheriff, using any force and assistance that is reasonably necessary in the circumstances, may do any or all of the following -

- (a) enter any place where the Sheriff believes on reasonable grounds there is or may be personal property that may be seized under the order, or a record evidencing the title to such property, for the purpose of searching for and seizing it;
- (b) from time to time re-enter any such place where any such property or record is for the purpose of performing the Sheriff's functions under the order and this Act in relation to the property;
- (c) seize and remove any such property or record;
- (d) make or print out, and keep, a copy of any such record and for that purpose -
  - (i) seize and remove, for no more than 7 days, any computer or other thing on which any such record is or may be stored;
  - (ii) operate the computer or other thing;
  - (iii) direct a person who has the custody or control of any such record, computer or thing to make or print out a copy of the record or to operate the computer or thing;
- (e) take reasonable measures to secure or protect any such property, record, computer or thing against damage or unauthorised removal or interference.

(2) The powers in subsection (1)(a) and (b) -

- (a) may be exercised at any time of the day or night in respect of a place that is not a dwelling; and
- (b) must not be exercised in respect of a dwelling without the consent of the occupier of the dwelling or, if there is no occupier, the owner.

(3) Despite subsection (2)(b), if -

- (a) the consent referred to in subsection (2)(b) is unreasonably withheld; or
- (b) the Sheriff, after reasonable attempts to do so, cannot contact

the occupier or owner of the dwelling,

the Sheriff may exercise the powers in subsection (1)(a) and (b) without that consent, at any time between 9 a.m. and 5 p.m.

- (4) A person who disobeys a direction given under subsection (1)(d)(iii) commits an offence.

Penalty: Imprisonment for 12 months.

#### **76. Property that cannot be seized and sold**

The following personal property of a judgment debtor must not be seized or sold under a property (seizure and sale) order -

- (a) property that the judgment debtor holds in trust for another person and in which the judgment debtor does not have a beneficial interest;
- (b) wearing apparel and personal items that are of a kind and value prescribed by the regulations;
- (c) household property that is of a kind and value prescribed by the regulations;
- (d) property that is used by the judgment debtor to earn income by personal exertion of a value that does not exceed the amount prescribed by the regulations.

#### **77. Seizure notice to be issued**

- (1) As soon as practicable after seizing personal property under a property (seizure and sale) order the Sheriff must give a written notice of seizure to the judgment debtor and, if the person who has custody of the property when it is seized is not the judgment debtor, to that person.
- (2) The notice must -
  - (a) name the judgment debtor;
  - (b) state the judgment debt as at the date of the notice;
  - (c) describe the personal property seized;
  - (d) explain that the property has been seized and that unless the judgment debt is paid, the property will be sold to recover it; and
  - (e) contain any other information that is prescribed by the regulations.
- (3) If the Sheriff releases any personal property from seizure the Sheriff must serve any person on whom a notice of seizure was served with a notice of release.

## 78. Custody of seized property

- (1) Until it is sold, seized personal property is to be kept in such custody as the Sheriff decides.
- (2) Seized personal property may be left in the custody of the judgment debtor or another person if the debtor or person, in writing, consents and agrees -
  - (a) to be responsible for its safekeeping;
  - (b) not to move it, or allow it to be moved, without the prior consent of the Sheriff; and
  - (c) not to give custody or possession of it to another person without the prior consent of the Sheriff.
- (3) If the Sheriff leaves seized personal property in the custody of the judgment debtor or another person, the Sheriff is not to be taken as having abandoned the property.
- (4) If the Sheriff seizes any record relating to a business or undertaking of the judgment debtor or another person, it must not be retained for longer than 7 days.
- (5) Subsection (4) does not apply to any cheque, bill of exchange, promissory note, bond, specialty or other security for money.

## 79. Cheques etc., consequences of seizing

- (1) If a cheque, bill of exchange, promissory note, bond, specialty, or other security for money, is seized under a property (seizure and sale) order, the Sheriff may receive any money payable under it from the person liable to pay and may, when payment of the money is due -
  - (a) demand payment; and
  - (b) sue the person liable to pay.
- (2) For the purposes of receiving payment under any record referred to in subsection (1), the Sheriff is to be taken to be the agent of the judgment debtor.
- (3) Payment to the Sheriff by the person liable to pay under such a record discharges the person's liability to pay to the extent of the payment.

## 80. Property (seizure and sale) order, effect of

- (1) In this section -

“**saleable interest**”, in real property, means any legal or equitable estate or interest in the property that can be disposed of according to law.
- (2) A property (seizure and sale) order made in respect of a judgment debtor -

(a) applies to -

- (i) any saleable interest that is registered under the *Transfer of Land Act 1893* in respect of land under the operation of that Act and that the debtor has at the time when the order is registered under section 133 of that Act in respect of the interest;
- (ii) any saleable interest that is not registered under the *Transfer of Land Act 1893* in respect of land under the operation of that Act and that the debtor has at the time when the Sheriff receives the order;
- (iii) any saleable interest in any other real property in the State that the debtor has at the time when the Sheriff receives the order;

and

(b) entitles the Sheriff -

- (i) to seize the land;
  - (ii) to sell the saleable interest; and
  - (iii) to apply the proceeds in accordance with section 72.
- (3) The Sheriff's entitlement applies even if the judgment debtor's saleable interest is held jointly or in common with another or others.
- (4) Actual seizure of real property by physical occupation or other means before any saleable interest in it is sold under a property (seizure and sale) order is not necessary.
- (5) A monetary judgment does not create a charge over or an interest in any real property.
- (6) Irrespective of whether it is registered under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856*, a property (seizure and sale) order does not create a charge over or an interest in any real property.
- (7) Under a property (seizure and sale) order, the Sheriff must not sell any saleable interest that is registered under the *Transfer of Land Act 1893* in respect of land under the operation of that Act unless, at the time of the sale, the order is registered under section 133 of that Act in respect of the interest.
- (8) If, after the Sheriff receives a property (seizure and sale) order, a person acquires an interest in any real property to which the order applies, the person does so subject to the Sheriff's entitlement in subsection (2) unless, at the time of acquiring the interest -
- (a) the person acquired it in good faith and for valuable consideration;
  - (b) the person had no notice of the fact that the Sheriff had

received the order and that it was in effect; and

(c) the order had not been registered under the *Registration of Deeds Act 1856*.

(9) Subsection (8) does not apply to or in relation to an interest acquired in any saleable interest that is registered under the *Transfer of Land Act 1893* in respect of land under the operation of that Act.

### **81. Power of entry**

(1) Under a property (seizure and sale) order the Sheriff, using any force and assistance that is reasonably necessary in the circumstances, may enter any real property in which the judgment debtor has a saleable interest for the purposes of performing the Sheriff's functions under the order and this Act in relation to the interest.

(2) Without limiting subsection (1), the Sheriff may -

(a) enter the real property with any prospective purchaser of the judgment debtor's saleable interest;

(b) conduct any sale of the interest on the property;

(c) exercise the powers in section 100 in respect of any personal property situated on the real property.

(3) The powers in subsections (1) and (2) -

(a) may be exercised at any time of the day or night in respect of a place that is not a dwelling; and

(b) must not be exercised in respect of a dwelling without the consent of the occupier of the dwelling or, if there is no occupier, the owner.

(4) Despite subsection (3)(b), if -

(a) the consent referred to in subsection (3)(b) is unreasonably withheld; or

(b) the Sheriff, after reasonable attempts to do so, cannot contact the occupier or owner of the dwelling,

the Sheriff may exercise the powers in subsections (1) and (2) without that consent, at any time between 9 a.m. and 5 p.m.

### **82. Judgment debtor may be permitted to sell or mortgage real property**

(1) With the written consent of the judgment creditor, the Sheriff may permit the judgment debtor to sell or mortgage the judgment debtor's saleable interest in any real property to which a property (seizure and sale) order applies.

- (2) The Sheriff's permit must -
  - (a) be in writing;
  - (b) require the amount of any deposit paid in respect of any sale of the interest to be paid to the Sheriff to be held by the Sheriff as stakeholder;
  - (c) state the minimum amount (including any such deposit) that must be paid to the Sheriff out of the money realised from any sale or mortgage of the interest;
  - (d) state the date on which the permit expires; and
  - (e) contain any other information that is prescribed by the regulations.
- (3) The Sheriff's permit may include any conditions that the Sheriff considers necessary.
- (4) While the Sheriff's permit is in force, the Sheriff must not sell the saleable interest under the property (seizure and sale) order.
- (5) If while the Sheriff's permit is in force -
  - (a) the judgment debtor sells or mortgages the interest;
  - (b) in the case of a sale, the amount of any deposit paid is paid to the Sheriff in accordance with the permit; and
  - (c) in any case, either -
    - (i) an amount not less than the minimum amount stated in the permit is paid to the Sheriff; or
    - (ii) with the Sheriff's consent, an amount less than the minimum amount stated in the permit is paid to the Sheriff,then -
  - (d) any liability of the purchaser or mortgagee to pay the judgment debtor the money paid to the Sheriff is extinguished;
  - (e) the Sheriff must consent to the registration under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856* of any documents that relate to the sale or mortgage; and
  - (f) the Sheriff must apply the money received in accordance with section 72 as if they were the proceeds of a sale under the order

## **Section 7 of the *Enforcement of Judgments Act 1991 (SA)***

**[Effective Date 1/7/99]**

*Please note endnote references to this legislation have been omitted*

### **Seizure and sale of property**

s.7

- (1) The court may, on application by a judgment creditor, issue a warrant of sale authorising seizure and sale of a judgment debtor's real or personal property (or both) to satisfy a monetary judgment.
- (2) The seizure and sale of personal property that could not be taken in bankruptcy proceedings against the judgment debtor cannot be authorised.
- (3) The sheriff may, in pursuance of a warrant under this section—
  - (a) enter the land (using such force as may be necessary for the purpose) on which property to which the warrant relates, or documents evidencing title to such property, are situated;
  - (b) seize and remove any such property or documents;
  - (c) place and keep any such property or documents in safe custody until completion of the sale;
  - (d) sell any property to which the warrant relates (whether or not the sheriff has first taken steps to obtain possession of the property).
- (3a) If the warrant authorises the sale of land, the sheriff may eject from the land any person who is not lawfully entitled to be on the land.
- (4) The sheriff may, in appropriate cases, leave a judgment debtor in possession of property until it is sold in pursuance of the warrant.
- (5) Subject to any contrary direction by the court—
  - (a) the sale of real property or tangible personal property will be by public auction (but if no bid that the sheriff considers acceptable is made at auction, the sheriff may proceed to sell the property by private treaty for a price not less than the highest bid);
  - (b) if there is a reasonable possibility of satisfying the judgment debt out of personal property, the sheriff should sell personal property before proceeding to sell real property.
- (6) Where any part of the judgment debtor's property consists of intangible property, the sheriff may sign any transfer or do anything else necessary to convert that property into money.
- (7) Where property of the judgment debtor seized in pursuance of the

warrant consists of a bank note or other money, the sheriff must, unless it has a value greater than its face value, hand it over to the judgment creditor in full or partial satisfaction of the judgment.

## **Local Court Act 1989 (NT)**

**[Effective Date 1/5/03]**

*Please note endnote references to this legislation have been omitted*

### **PART V – ENFORCEMENT**

#### **Division 1 – General**

#### **22. Enforcement of orders**

- (1) An order made by the Court for the payment of money may, subject to and in accordance with the Rules, be enforced by –
  - (a) a warrant of seizure and sale;
  - (b) an attachment of earnings order;
  - (c) an attachment of debts order;
  - (d) a charging order;
  - (e) the appointment of a receiver; or
  - (f) sequestration,or any combination of those means.
- (2) A warrant of seizure and sale may direct and authorize the person to whom it is directed to take and sell any property belonging to the person named or described in the warrant.
- (3) An order for the delivery of goods and an order for the delivery of goods or the payment of their assessed value may, subject to and in accordance with the Rules, be enforced by a warrant of delivery.
- (4) A warrant of delivery may direct and authorize the person to whom it is directed to cause the goods described in the warrant to be delivered to the person specified in the warrant or to levy payment of the assessed value of the goods from other property of the person against whom the order is made.
- (5) An order for the payment of the assessed value of goods may be enforced by the same means as any other order for the payment of money.
- (6) An order for the possession of land may, subject to and in accordance with the Rules, be enforced by a warrant of possession.
- (7) A warrant of possession to enforce an order for the possession of land may direct and authorize the person to whom it is directed to turn out any person from the land described in the warrant and may include provision for enforcing the payment of money required by

the order to be paid.

- (8) A person shall not dismiss an employee or injure an employee in the employee's employment, or alter an employee's position to the prejudice of the employee, because an attachment of earnings order has been made in relation to the employee or the employee is required to make payments under an attachment of earnings order.

Penalty: \$10,000.

- (9) The Court of Summary Jurisdiction may order a person found guilty of an offence against subsection (8) to reimburse the employee any lost wages resulting from the action constituting the offence and to cause the employee to be reinstated in the employee's former position or in a similar position.

- (10) An amount ordered to be reimbursed under subsection (9) may be recovered from the person found guilty in the same manner as the penalty to which that person is liable under subsection (8) and may be included in the same warrant of distress.

- (11) An attachment of earnings order may apply to earnings falling to be paid –

- (a) by the Crown in right of the Territory or the Commonwealth;
- (b) by a statutory authority representing the Crown in right of the Territory or the Commonwealth; or
- (c) from the public moneys of the Territory.

- (12) An attachment of earnings order or an attachment of debts order shall bind the relevant earnings or debts in the hands of the person named in the order.

- (13) For the purpose of securing the payment of a judgment debt, the Court may, by order, impose a charge on the beneficial interest of the judgment debtor in a security.

- (14) An application for the appointment of a receiver by way of equitable execution may be made in accordance with the Rules and the Rules apply to the receiver who is appointed as they apply to a receiver appointed for any other purpose.

- (15) A sequestration order must appoint one or more persons as sequestrators and provide that the sequestrator or sequestrators be authorised and directed to –

- (a) enter on and take possession of the real and personal estate of the person bound;
- (b) collect, receive and get into his, her or their hands the rents and profits of the person's real and personal estate; and
- (c) keep the rents and profits under sequestration in his, her or their hands until the person bound complies with the judgment to be enforced by sequestration, or until further order.

**22A. Powers of person executing warrant of seizure and sale**

- (1) A person to whom a warrant of seizure and sale is directed is, by operation of this section, authorised for the purposes of executing the warrant to enter and remain on premises he or she believes on reasonable grounds to be owned or occupied by the person named or described in the warrant.
- (2) Subject to section 22B, the authorisation under subsection (1) does not authorise the use of force or violence.
- (3) A person referred to in subsection (1) may request a member of the Police Force to assist him or her in the execution of the warrant.
- (4) In this section, "premises" includes land (whether built on or not), a building or part of a building.

**22B. Powers of police who execute or assist in execution of warrant of seizure and sale**

- (1) A member of the Police Force who –
  - (a) is the person to whom a warrant of seizure and sale is directed;  
or
  - (b) is assisting a person in the execution of a warrant of seizure and sale,may for the purpose of the execution of the warrant enter and remain, with the force that is necessary and reasonable, on premises that he or she believes on reasonable grounds to be owned or occupied by the person named or described in the warrant.
- (2) Nothing in this section derogates from the powers a member of the Police Force has under any other law in force in the Territory.

**23. Enforcement of orders not for payment of money**

- (1) Where by or under this or any other Act a power (whether or not expressed as a power to make an order) is given to the Court to require –
  - (a) a person to do or abstain from doing an act or thing, other than to pay money; or
  - (b) an act or thing, other than the payment of money, to be done or left undone,the Court may exercise the power by an order or orders.
- (2) Where the Court makes an order under subsection (1), it may –
  - (a) attach to the order conditions as to time or mode of action which

- are authorized by or under an Act or as it thinks fit;
- (b) suspend or rescind the order on an undertaking being given or condition being performed, as it thinks fit; and
  - (c) generally make an arrangement for carrying into effect the power, as it thinks fit.
- (3) Subject to subsection (4), a person who defaults in complying with an order made under subsection (1) is, for the default, liable to –
- (a) pay a fine for every day during which the default continues; or
  - (b) be imprisoned for so long as the default continues,
- and pay damages where loss occurred as a result of the default.
- (4) A person is not liable under this section to imprisonment for a period or periods amounting in the aggregate to more than 2 months for non-compliance with the requirement of the Court (whether made by one or more orders) to do or abstain from doing an act or thing.

#### **24. Enforcement by Supreme Court**

- (1) Where an order is made by the Court and a warrant of seizure and sale has been returned unsatisfied in whole or in part, the Registrar shall, on the application of the person entitled to enforce the order, give that person a certificate of the order and of the amount remaining unpaid under the order and record the fact of the giving of the certificate in the Court records.
- (2) A person who is given a certificate under subsection (1) may file the certificate in the Supreme Court and, on the filing of the certificate, judgment shall be deemed to have been entered in the Supreme Court for the amount mentioned in the certificate as being unpaid, together with all fees paid for obtaining and filing the certificate and the prescribed amount for costs.
- (3) After the issue of a certificate under subsection (1) no further proceedings shall be taken in the Court in relation to the order but, on the filing of the certificate in the Supreme Court, the judgment that shall be deemed to have been entered may be enforced by the same means as any other judgment entered in the Supreme Court.

# APPENDIX FOURTEEN – EXAMINATION PROCESS PROVISIONS IN VICTORIA AND OTHER SELECTED AUSTRALIAN JURISDICTIONS

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## Sections 13-16 of the *Judgment Debt Recovery Act 1984 (Vic)*

[Effective Date 22/11/00, Version 12]

*Please note endnote references to this legislation have been omitted*

### PART III—EXAMINATIONS

s. 13

#### 13. Oral examination

- (1) Subject to sub-section (2), an instalment order shall not be made, confirmed, varied or cancelled by a court unless the court after the application for the making or variation or cancellation of the instalment order is made—
  - (a) has orally examined the judgment debtor; or
  - (b) is otherwise satisfied that in the circumstances an instalment order should be made, confirmed, varied or cancelled.
- (2) This Part does not apply to or in relation to the making of an instalment order under section 6(3) or 7.

#### 14. Procedure for oral examinations

- (1) Where the court is not satisfied as provided in section 13(1)(b) and the judgment debtor is not before the court, the court shall cause to be issued a summons requiring the judgment debtor to attend for an oral examination at the time and place specified in the summons.
- (2) If the judgment debtor fails to attend as required by a summons under sub-section (1), the court or the proper officer of the court may cause to be issued a warrant for the apprehension of the judgment debtor.
- (3) A warrant under sub-section (2) shall—
  - (a) be addressed to a member of the police force; and

- (b) specify a time and place for the oral examination.
- (4) A member of the police force who pursuant to a warrant under sub-section (2) apprehends a judgment debtor may release the judgment debtor upon the judgment debtor's undertaking to attend for an oral examination at the time and place specified in the warrant.
- (5) A judgment debtor may be examined on oath by the court.
- (6) The proper officer of the court shall cause the judgment creditor to be notified of the time and place of the oral examination under the summons and the warrant (if any). S. 14(7) amended  
by No. 74/2000  
s. 3(Sch. 1  
item 64).
- (7) Notwithstanding any Act or any regulation or rule made pursuant to any Act or any rule of law to the contrary, no fine shall be imposed upon a judgment debtor for failing to attend for an oral examination as required by a summons under sub-section (1).
- (8) Notwithstanding any Act or any regulation or rule made pursuant to any Act or any rule of law to the contrary, it shall not be necessary for a judgment debtor to be served with the judgment or a copy thereof before a summons is issued under sub-section (1), but if the judgment debtor has not previously been served with the judgment or a copy thereof the judgment or a copy thereof shall be served together with the summons. s. 15

### 15. Conduct of oral examinations

- (1) The court shall examine a judgment debtor as to the following matters—
  - (a) the amount and source of the income of the judgment debtor;
  - (b) the property and assets of the judgment debtor;
  - (c) the cash that is readily available to the judgment debtor or can be made so available;
  - (d) the debts liabilities and other financial obligations of the judgment debtor; and
  - (e) any prescribed matter—

and may examine a judgment debtor as to any other matter related to the financial circumstances generally of the judgment debtor and the judgment debtor's means and ability to satisfy the judgment debt.
- (2) A judgment creditor or the legal representative of a judgment creditor may by leave of the court put questions to the judgment debtor as to any of the matters referred to in sub-section (1). s. 16
- (3) The court may if it considers any question proposed to be put to the judgment debtor to be oppressive or unfair in the circumstances forbid that question.

## **16. Production of documents**

A summons under section 14 or 17 may require a judgment debtor to produce any documents relevant to the oral examination.

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## **Section 4 of the *Enforcement of Judgments Act 1991 (SA)***

**[Effective Date 1/7/99]**

*Please note endnote references to this legislation have been omitted*

### **PART 2**

#### **MONETARY JUDGMENTS**

##### **Investigation of judgment debtor's financial position**

- (1) The court may, on application by the judgment creditor, investigate the judgment debtor's means of satisfying a monetary judgment.
- (2) The court will, on application by the judgment creditor, issue a summons to require the judgment debtor or any other person who may be able to assist with the investigation to appear for examination before the court or to produce documents relevant to the investigation to the court.
- (3) A summons under subsection (2) must be served personally.
- (4) If a person fails to appear as required by the summons, the court may issue a warrant to have the person arrested and brought before the court.

## **Rule 123 of the *South Australian Magistrates Court (Civil) Rules 1992 (SA)***

**[Effective Date 6/7/92]**

*Please note endnote references to this legislation have been omitted*

- 123.** Subject to an order of the Court the first enforcement process in respect of a judgment debt in a minor civil action must be an Investigation Hearing.

## **Sections 26-31 of the *Civil Judgements Enforcement Act 2004* (WA)**

**[Effective Date 1/5/05]**

*Please note endnote references to this legislation have been omitted*

### **Part 4-Enforcing monetary judgments Division 2-Means inquiry**

#### **26. Means inquiry, nature of**

A means inquiry in respect of a judgment debtor is an inquiry conducted before a court in order to determine -

- (a) the judgment debtor's means to pay the judgment debt having regard to the income, assets and liabilities of the judgment debtor and, if applicable, his or her spouse or de facto partner and any dependents of the judgment debtor and his or her spouse or de facto partner;
- (b) whether there are or will be any earnings of the judgment debtor that might be appropriated to satisfy the judgment debt and, if there are, the net earnings for the purpose of Division 4;
- (c) whether there is or will be any available debt that might be appropriated to satisfy the judgment debt; and
- (d) the existence and whereabouts and value of any property of the judgment debtor that might be seized and sold to satisfy the judgment debt.

#### **27. Means inquiry, application for by judgment creditor**

- (1) A judgment creditor may apply for a means inquiry to be held in respect of the judgment debtor.
- (2) Such an application may be made whether or not previously a means inquiry has been held or an enforcement order has been made.
- (3) Such an application must -
  - (a) if the judgment debtor is a natural person, contain his or her name and address;
  - (b) if the judgment debtor is a partnership, contain the name and address of a partner;
  - (c) if the judgment debtor is a corporation, contain the name and address of an officer of the corporation;
  - (d) contain the name and address of any other person who the judgment creditor thinks should be summoned to the inquiry to give or produce evidence; and

- (e) for each such person indicate whether a summons under section 29(1)(a) or (b) or both is required.
- (4) On receiving such an application the court must set a date for the means inquiry and notify the judgment creditor of it.

**28. Means inquiry, application for by judgment debtor**

- (1) A judgment debtor who applies for a suspension order on the grounds that the debtor is unable to pay the judgment debt may apply for a means inquiry to be held in respect of the judgment debtor.
- (2) Such an application may be made whether or not previously a means inquiry has been held or an enforcement order has been made.
- (3) Such an application must be served on the judgment creditor.
- (4) A judgment creditor who is served with such an application may request the court to issue a summons to a person who the judgment creditor thinks should be summoned to the inquiry to give or produce evidence.
- (5) Such a request must -
  - (a) contain the name and address of each person to be summoned; and
  - (b) for each such person indicate whether a summons under section 29(1)(a) or (b) or both is required.
- (6) On receiving an application made under subsection (1) the court must set a date for the means inquiry and notify -
  - (a) the judgment debtor and judgment creditor of the date; and
  - (b) notify the judgment debtor of the duties in section 30(3).

**29. Means inquiry, summons to attend**

- (1) In respect of each person named in an application under section 27(3), or in a request under section 28(5), or in a request made under subsection (2), the court may issue either or both of the following, according to the application or request -
  - (a) a summons to attend a means inquiry to give oral evidence;
  - (b) a summons to attend and produce to the court, for use in the inquiry, any record or thing that is or may relate to the matters listed in section 26 and that is detailed in the summons.
- (2) During a means inquiry the judgment creditor or judgment debtor may request the court to summons a person to the inquiry to give or produce evidence.
- (3) A summons issued under subsection (1) must be served personally.

- (4) If a person who has been summoned under subsection (1) does not attend as ordered by the summons, the court may issue a warrant to have the person arrested and brought before the court.
- (5) A person who has been summoned under subsection (1) and who, without a reasonable excuse -
  - (a) does not obey the summons; or
  - (b) refuses to be sworn or answer any lawful question,is guilty of a contempt of court.

### **30. Means inquiry, conduct of**

- (1) In this section -

“**lawyer**” means a certificated practitioner within the meaning of the *Legal Practice Act 2003*.
- (2) At a means inquiry the court is to determine the matters listed in section 26.
- (3) At a means inquiry held on the application of a judgment debtor the judgment debtor must produce to the court all records that relate to the matters listed in section 26 and that are in the possession or under the control of the judgment debtor.
- (4) A judgment debtor who contravenes subsection (3) is guilty of a contempt of court.
- (5) A court may adjourn a means inquiry.
- (6) At a means inquiry in the Magistrates Court a person who is not a lawyer and who is an employee of, or under the control or direction of -
  - (a) the judgment creditor; or
  - (b) the judgment creditor's lawyer,may appear on behalf of the judgment creditor, despite the *Legal Practice Act 2003* section 123.

### **31. Orders at or after a means inquiry**

- (1) At a means inquiry the court, having regard to the matters listed in section 26 that it has determined, may -
  - (a) make any enforcement order that is just, whether or not the judgment creditor has applied for the order; or
  - (b) make a suspension order on the application of the judgment debtor.
- (2) After a means inquiry has been held, the judgment creditor may apply for -

- (a) a time for payment order;
  - (b) an instalment order; or
  - (c) an earnings appropriation order.
- (3) On receiving such an application the court must set a date for hearing the application, notify the judgment creditor of it and issue a summons to the judgment debtor requiring the debtor to appear before the court and to say why the order applied for should not be made.
- (4) On the hearing of the application, the court, having regard to the matters listed in section 26 that it has determined at the means inquiry, may make the order sought by the judgment creditor, or some other enforcement order, if -
- (a) the court is satisfied that there has not been a material change in those matters since the inquiry; or
  - (b) the judgment debtor, having been summoned, does not attend.

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