

LAW REFORM COMMITTEE
Inquiry into warrant powers and procedures

Melbourne – 5 November 2004

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Mr William Crawford, Drug Outreach Lawyer, Fitzroy Legal Service

The CHAIR – Welcome to this hearing of the Parliamentary Reform Committee.

Mr CRAWFORD – Thank you for having me here today. I shall summarise the key points of my submission. I have divided our response into three key areas, those being the constraints and inefficiencies of warrants procedures, the accountability of police carrying out search warrants and, finally the PERIN system and enforcement review program.

Concerning the constraints and efficiencies of the warrants procedures, I am speaking from the experiences of practitioners at Fitzroy Legal Service. One of the great inefficiencies of conducting a criminal law practice is on occasions when our clients either don't keep records of their informants, are themselves difficult to track down and fail to attend court, hence they are issued with warrants and executing those warrants raises particular difficulties. I am a drug outreach lawyer and so my clients can have a chaotic criminal history and trying to locate all their particular outstanding warrants is very difficult. There is an internal warrants unit which makes a register of outstanding warrants that have been forwarded by informants but 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. The difficulty with that is that in 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. That summarises our issue with the current system.

Our recommendation on top of page 5, recommends that an electronic register should be developed and maintained of all police and PERIN court warrants regardless of where the hard copy is located. This should be accessible to those involved in the process of executing the warrants, including practitioners. It should also be subject to reasonably security constraints.

The other flaw in the system of warrant procedure we have identified today is on the box at the bottom of page 4 which states 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.

The second area of my submission is the accountability of police carrying out search warrants. We have had quite a few experiences where our clients, particularly of culturally and linguistically diverse backgrounds and socially disadvantaged people often in public housing, have search warrants executed on them on potentially spurious grounds. I have given a couple of real-life examples, obviously with names of our clients protected, but it illustrates very much that the impact on people can be quite severe. We have experienced that where warrants are executed that reveal no contraband that is subject to the search warrant, there appears to be a pressure to find something and lay charges.

The first example is one where our client had a significant amount of money that she had been saving for a trip to Vietnam; she was acquitted of the charges of possession of the proceeds of crime. There was no evidence on the search warrant that they were looking for proceeds of crime and I think it is also suggested in the VLA submission that some random audit of search warrants is a good way of enforcing accountability. That is something that we would strongly support because in the process of applying for search warrants, there is no capacity at the moment at the tail end of that to test the veracity of the claims made in the original application.

The CHAIR – Are you able to quantify the extent to which you believe that this happens? Does the legal service itself keep a list or a record of those cases where you believe that warrants have been issued on merely speculative grounds or for wrong or exaggerated reasons and where that person has subsequently has gone to court and been acquitted? If it is sustained and is a fairly strong allegation

that from a policy perspective we would want to consider a response, I am wondering whether you are able to quantify that at all for us and give us some indication of the extent to which you think it happens. I suppose it then raises questions of what are the safeguards and checks and balances with magistrates issuing warrants. Do you believe, for example, that they are not testing the veracity of the warrants sufficiently before they are issuing them?

Mr CRAWFORD – I will have to take that question on notice because I don't have the statistics. The only thing I can really add to that is that we do have examples where we strongly question the reasonable grounds put forward. The short answer is that I shall take that on notice and get back to you.

Mr LUPTON – There must be a difference between a warrant properly authorised and simply not finding any evidence on the premises and a warrant that was executed improperly or on the basis of speculation or exaggeration. We need to be clear about that distinction.

Mr CRAWFORD – Can you repeat that for me?

Mr LUPTON – The suggestion that is made is where warrants don't, in the end, lead to the obtaining of evidence, that they may have been authorised on the basis of exaggeration or speculation. We must be careful to differentiate between that kind of situation and a properly authorised warrant on proper grounds where you simply did not find any evidence.

Mr CRAWFORD – Absolutely. We acknowledge that. I think the fact that no evidence is found subject to a search is no justification that it is speculative. However, in the examples we have found, the first lady had no criminal history, we had no indications that there was any substantive support for this but the warrant was issued. In the second case I am informed that similar background applied and that our clients unfortunately had warrants issued and rather ineffective charges were laid as a result that flowed on from the pressure of having to get a result from a search. That is also one of the issues, not only the issuing of the warrant which we acknowledge in policing is occasionally necessary and if issued by the courts properly, we don't fundamentally oppose that. Where insufficient evidence is provided then warrants shouldn't be issued and also when they are issued and no contraband is found, then I think fishing expeditions and charges that are unsustainable, just to justify the exercise is abhorrent to the criminal justice system.

The CHAIR – The police don't necessarily have to justify it by laying charges when nothing is found and the warrant has been properly executed. I am trying to understand whether you are suggesting that the police in order to justify the warrant feel that they have to lay charges after they have conducted a search.

Mr CRAWFORD – Obviously I can't speak for the police. Judging from our experiences, occasionally when there are warrants that have been issued and potentially with little basis, in order to justify the process and also to achieve other ends, but I don't know what they are, charges are laid that are subsequently not sustainable. Essentially I am breaking down the issue into two processes. Firstly is the question of how search warrants are issued – are there reasonable grounds there and ultimately are there ways of going back and ensuring that that process has integrity. Secondly, in police practice once a warrant has been executed reasonable care should be taken when charging people. Obviously it is in no-one's interest to be making charges for the sake of numbers that can't be upheld. It is definitely a burden on the courts and it is definitely a burden on our clients' time and their anxiety. One is a police issue and one is a systemic issue with the way in which warrants are issued.

The CHAIR – Perhaps you might want to talk about the PERIN system.

Mr CRAWFORD – Moving onto the third area that we have dealt with in our submission which is that of the PERIN system and the enforcement review program. We have a number of issues with the PERIN system as it currently operates. Firstly, I will focus upon the disproportionate effect it has on disadvantaged people. Obviously we support the Victorian Aboriginal Legal Service submission that there should be an indexation on fines. If I can use my clients as an example because I think they are a vulnerable group with particularly difficult financial circumstances. I am a drug outreach lawyer, my clients typically are not employed, they are on social security and if they are in the rehabilitative stage of their illness they are paying \$35 to \$40 a week in chemist fees to get their methadone. If they

are earning roughly \$200 a week on social security and paying \$35 it doesn't leave very much for public transport fares, for food, for rent, for the necessities of life so a process which imposes significant fines upon individuals for minor transgressions of the law has a great impact on them because they can't pay the fines.

Ultimately it is a system that if you are unable to pay the fines, it leads to one of two or three options. If you happen to be in the special circumstances as accepted by the enforcement review program, you might well get a good result and be excused or placed on a good behaviour bond. Alternatively, you might be assessed and given a community custodial permit. They are limited in their eligibility and if you have previously failed a CBO you won't be eligible for them. A few of my clients have chaotic lifestyles and are struggling with rehabilitation and don't adhere to the strict requirements of the CBO and will fail those, maybe on a number of occasions, and will hence never be eligible for a CCP, leaving one result, which is gaol, unless they happen to have exceptional circumstances or high degrees of mental impairment as per schedule 7 of the Magistrates Court Act. It has a huge impact on my clients.

I think that as a system, it works reasonably for 90 per cent of Victorians, people who can afford to pay their fines, it is an incentive for them to pay their fines because there are penalties attached. When you have no money and the net result is going to gaol because of the reasons I have just explained, the impact is massive. Also if you have some money and want to deal with your fines, the reduced income of my clients means that this has a greater impact on their lives. That is played out by the example on page 6, which is an example of the increased fines.

I will deal briefly with the process of the PERIN system and where I see some of the weaknesses. At the moment, in the first two stages the responsibility is with the issuing agency. Unfortunately many of the issuing agencies don't allow for instalment plans. So if you wanted to deal with the fine but you don't have the money to pay in full, the vast majority of issuing agencies don't allow part payment installment plans and merely refer you to the PERIN system. That is where the processing costs, which are about \$78 from memory, are additional penalties from the issuing office enforced by PERIN means that that is an additional inflexibility that we would like to see removed.

Secondly, in relation to the revocation of fines, once you are in the PERIN system you have a number of options. One is to revoke to the special circumstances list; one is revoked to fight it, to contest the matter in open court. What you don't really have at that point in time is an opportunity to revoke to open court to plead guilty. You can do that in the first two steps where it is still with the issuing agency and you might prefer to have this dealt with by an open court. 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. That is one of our contentions.

Mr LUPTON – Have you come across any evidence of people getting a case into open court by pleading not guilty and then changing their plea.

Mr CRAWFORD – Generally my answer is that I can't recall one of those but the difficulty with even trying to do that is that in order to get it revoked to challenge you have to convince the PERIN court that you have reasonable grounds for acquittal. If you did do that you would have a very good case anyway. If you chose to then plead guilty that would be up to you but you have already reached a very high threshold. There are no real loopholes in that sense in the current system.

The CHAIR – You referred to the submission by PILCH. In their submission they made reference to special circumstances which may warrant something being considered on the special circumstances list and they also made reference to the document that might be presented as prima face evidence as initial circumstances, do you have any views about that, in terms of the range of categories proposed?

Mr CRAWFORD – I have that in front of me now and I strongly support increasing the scope of the special circumstances list. I point particularly to homelessness, to drug dependence, to financial hardship, to language barriers and numbers of fines. These are all highly pertinent and in my work particularly we have plenty of people on the cusp of special circumstances but at 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 my clients might potentially fit into that if they saw doctors regularly enough and were actually diagnosed. I think they are disadvantaged there. I also think that merely the fact that you're trying to overcome drug dependence and it is a pretty tough road which has been demonstrated by organizations such as Turning Point, the increased number of stress factors in your life circumstances increases the likelihood of relapse. In actual fact 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.

I think drug dependence is one thing that should be included there. I think given the vagaries of the system from issuing agencies to people such as newly arrived Australians who don't understand systems – I work in this area quite a lot. We have a strict liability system with our public transport particularly and that means that your mental intention is irrelevant. If you do the wrong thing, you do the wrong thing and you get smacked. The problem is with a lot of recently arrived people that they don't have an understanding of the system. They will learn but this is where I think people from culturally different backgrounds who don't understand the system should be included in something like the special circumstances. When I apply to DOI and other agencies giving these examples we are sometimes successful and sometimes we are not. It would be nice to have the confidence to say, for example, people from a Sudanese family or any African refugee who has come here and has no concept of public transport let alone our particular ticketing system, should be given at least one opportunity to go into special circumstances if it is not already waived beforehand. In terms of the scope of that, I fully endorse the PILCH submission.

The CHAIR – Thank you for your time. We appreciate you submitting to us.

Witness withdrew