

LAW REFORM COMMITTEE

Inquiry into warrant powers and procedures

Melbourne — 19 October 2004

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The CHAIR — Welcome to the Victorian parliamentary Law Reform Committee hearing on warrant powers and procedures. Thank you very much for taking the time to come and talk to us. The hearing today is covered by the Parliamentary Committees Act, which means that anything you say to the committee is subject to parliamentary privilege. This means that it is not subject to judicial review or any sort of court action should you say anything that might otherwise attract such action. We would expect that all of your evidence would be on the record, but if there are things that you want to say off the record, please let us know and we can take that evidence in camera. You will be given an opportunity to review your evidence at the end, and if there is anything you would prefer not to have on the public record you can let us know at that time. Once we have corrected the transcript we put all the evidence on our web site and it will be available to the public, and obviously we will utilise that evidence in finalising our final report. Just to start off, you might like to talk in general terms about the experience of the Victorian Aboriginal Legal Service in relation to the people you work with and their experience with warrant powers and their exercise by police and other officers.

Ms JUBB — I will start off with the experience and concerns that relate to that experience. The main point I want to make about warrant powers and procedures is that they can be used to over-police or be quite coercive, and that has an impact on indigenous Australians, given that they are overrepresented within the criminal justice system. In Victoria Aboriginal people are 12 times more likely to be incarcerated, so if the warrant powers and procedures were unfair, inconsistent or inefficient it is likely that it would have a very big impact on Aboriginal people because of their involvement in the warrant process. So that is where our concern comes in.

In relation to penalty enforcement warrants, often once the sheriff becomes involved the seven days that people are given to pay is an inadequate amount of time for people of low socioeconomic background. One of the recommendations VALS made in that regard was that in broad terms some of the recommendations fit under one category, which is to create an intermediate process or step in the warrant process specifically for Aboriginal people, but if it works it could apply across the board and make the whole system efficient for non-indigenous Australians as well.

The Victorian Aboriginal Legal Service funding is quite limited. We are funded through the commonwealth and sometimes through the state government for particular positions, so with the constraints of the funding we have, we have to prioritise different areas so there are certain areas we do not act in, and VALS policy is not to act in PERIN court matters.

I understand that there is a Koori liaison officer in the PERIN court, and I do not know all that much detail about the work that person performs, but there is a concern about the gap there. That may mean receiving funding so that we can have someone there; perhaps when the sheriff is about to knock on someone's door it might be appropriate to have our client service officer attend as well to ensure that the person is aware of his or her rights. Often Aboriginal people are unaware of their rights, particularly in relation to paying by instalments or converting a fine into community work or something like that.

Continuing on with the theme of warrant powers and procedures having a harsh or coercive or intrusive impact on the lives of indigenous Australians, search warrants are sometimes carried out with excessive force. In relation to warrants to arrest, VALS has identified two scenarios that tend to happen. VALS has client service officers, and their role is basically to act as a bridge between the legal system and the Koori community. Our client service officers are all indigenous people so they also speak to the client and ensure that they understand the lawyer and the magistrate and put it in layman's terms so that people can understand.

The role of client service officer is vital for the Aboriginal community. Sometimes police will inform the client service officer that a warrant to arrest exists, the client service officer will ring the VALS client, they will make arrangements to attend the police station together in a sort of surrender situation — 'Here I am, I want to have the warrant executed in quite an easy, peaceful

manner' — and that is the way it goes. But then I am afraid that due to police culture the other situation can occur whereby perhaps institutional racism results in a policeman seeing an Aboriginal person walking down the street, perhaps not liking the look of them and stopping them on so-called routine matters. The policeman then looks at their police record, realises that a warrant to arrest exists, arrests them and takes them to the police station, but in that process often what happens is that it is quite confrontational, intrusive, coercive. People are forced, particularly if it is, say, someone picked up in a park for being intoxicated, and it can blow out into a really confrontational situation, resulting in additional charges being laid such as resisting arrest, assaulting a police officer, indecent language and things like that.

VALS identifies the first scenario as best practice, and wants to influence police culture so that police do that more often because there are a lot of advantages to scenario one, where police let VALS know. It is more likely that the person will be re-bailed, and often police will say, 'We will re-bail this person if you bring this person down to the station'. The disadvantages attached to scenario two are obvious, when it is more intrusive and coercive. So basically there are two approaches that you can take — the punitive approach and the minimalist approach. The minimalist approach is where you almost put the onus back on the person to self-correct and things like that.

The CHAIR — Can I take from what you are saying that the principal problems you identify are around the administration of warrants and the training of police in relation to how they execute those warrants?

Ms JUBB — Yes. Police do receive training about cultural issues, but VALS would argue that it is inadequate. In an ideal world police should receive training not as a one-off but as a continual process. Another example of best practice is where client service officers, particularly in regional areas because they are such small communities, can often speak to the police, and that relationship between the CSO and the police is an example of continual training. Police can ask CSOs questions and things like that.

Mr MAUGHAN — Can you give us any examples of where this unfair treatment by police takes place?

Ms JUBB — I think it is because of institutionalised racism, meaning that the police are an institution, and within it there is a culture or bias. I am not saying that every police officer does this, but stereotypical views often are the cause of, say, police acting with excessive force towards Aboriginal people or simply seeing them down the street and picking them up, whereas if it was a non-indigenous person they would let it go.

Mr MAUGHAN — I would reject that entirely. I come from a community where there is a large Aboriginal presence, and most of my constituents would argue that the reverse is true, that the Aboriginal people get very favoured treatment by police.

Ms JUBB — In a small community — whereabouts is that?

Mr MAUGHAN — Echuca, Shepparton. I live in Echuca, so I am talking about that area. I would have thought the police there go to extreme lengths to accommodate the Aboriginal community, so much so that there is a backlash the other way. I am unaware of Aboriginal people being treated in the way that you describe, and I just wonder if what you are saying is relevant to the area I know because I suggest it is not. I suggest that the other is true — that the community generally feels Aboriginal people are getting more than a fair go.

Ms JUBB — VALS conducted research into the rate at which Aboriginal people are cautioned by police and found that Aboriginal people are less likely to be cautioned by police. So cautioning is a minimalist response. It is giving people a warning rather than being punitive and arresting them. There are a lot of factors that contribute to police not cautioning Aboriginal people. Some of it is justified in a way because they look at the background and see how many times a

person has offended and they think there just cannot be another warning — this is a person who is stuck in the cycle of crime. But in relation to a new offender, there is evidence to suggest that cautioning is not used as much for Aboriginal people as non-indigenous people. Perhaps it is the police having in the back of their minds, ‘This is an Aboriginal person’ and the connotation is of the people who are looked down upon or have this stigma attached to them — and this is, for argument’s sake, 2 per cent of the population. The rest of the population has to live with that stigma, and that is basically what racism is. You lump a whole race into one category as criminals or something like that.

We have had an example of assaults by police towards Aboriginal people — and apparently it still exists — where police use excessive force and assaults occur. It surprises me that today that that sort of thing still happens. I can give you an example of a case that has taken four years to reach the stage where the person was awarded up to \$90 000 in damages. This person saw a mobile phone in a car out in the open, and he broke into the car to steal the mobile phone. It just so happened that it was an ex police officer’s car and mobile phone. I think police from up to four stations arrived on the scene, and this person was assaulted.

This went through the ethical standards department and the Ombudsman’s office before it reached VALS and became a civil law complaint, and the reason why it had to become a civil law complaint is that both the ethical standards department of the police force and the Ombudsman thought the complaint was unsubstantiated, which raises questions about accountability mechanisms for police in relation to warrant powers and procedures and the way they execute them. There is talk about police corruption at the moment and the need to have an independent body that monitors police, and VALS would support that, considering that this case did reach the courts and was found to be substantiated, but the ethical standards department found that it was not.

In relation to agreements that VALS has with the Victoria Police, in the police manual there is an agreement that says that when an Aboriginal person is taken into police custody VALS will be notified. There are flaws in the system, and it is just a technological flaw I think, because VALS has two ways of finding out about when an Aboriginal person comes into custody. One is that when the person is at the police station and the police type into the E*Justice system, there is an opportunity to tick a box that says, ‘Of Aboriginal or Torres Strait Islander descent’. So you tick that, and if that box is ticked an email is automatically sent to criminal records and automatically sent to VALS.

Then as a follow-up criminal records actually telephones VALS and our receptionist and our filing clerk take the details and we write it down, but there are people who may not identify as being of Aboriginal or Torres Strait Islander descent at the beginning of the process. The problem is that once the computer process has already started and someone has said that the entry for this particular individual is complete, the police tell us that it is not possible to go backwards and undo that. So people are falling through the system who do not immediately identify as Aboriginal or Torres Strait Islander. For some reason their computer is set up so that they cannot undo it, which seems quite an arbitrary thing, and one would think it would be possible to fix that. VALS client service officers often say that they receive a phone call from police who have conducted half an interview with an Aboriginal person, and during the interview that Aboriginal person has said, ‘I am of this origin’, so that is one of the flaws in the system. It just seems it is not practised consistently throughout, and so people do fall through the system.

Mr MAUGHAN — I would be interested in any evidence you have of that, because in my experience it is certainly not the case in the areas that I have experience with. It may well be the case in other parts of the state, but I would be very interested in any evidence you have to support that allegation.

Ms JUBB — I can get back to you on that. I am aware that our CEO, Frank Guivarra, automatically receives an email through the E*Justice system, as does our filing clerk and our

client service officer. We have rotational client services officers, but this goes to just one, so the email goes to three people within the organisation, and I know that Frank has a list of cases where we have not been notified until 24 hours afterwards, so that is a concern.

If an Aboriginal person is going through an interview without someone from VALS being present it is concerning. Once client service officers are notified of the existence of someone in custody, we are told the minimum details — name and so on — and then it is the job of the CSO to ring up, find out a detailed version of the charges, where the person lives and so on, and then often the CSO will attend the police station and sit in on the interview to ensure that there is no abuse of process, that the Aboriginal person is aware of their rights and things like that. I think this has implications for this inquiry because a proportion of those people could possibly be in custody because of a warrant to arrest.

Mr MAUGHAN — I agree it is very important to this inquiry, therefore I would like a bit more hard evidence rather than the broad-brush allegations which are contrary to my experience, but you have said you will provide that, so that is good.

Ms JUBB — I will endeavour to provide you with time lines of times that we have been notified which show gaps — that is, it is not immediate.

The CHAIR — I want to ask you about the PALOs, the police Aboriginal liaison officers, who you mention in your submission. How many of them are there throughout Victoria and what are the deficiencies in terms of their numbers? You refer to the need for more. Also, what particular role do they play and have they helped in the process of arrest or search and seizure?

Ms JUBB — I must admit I am not 100 per cent sure on the numbers. I know that they are not at every police station.

The CHAIR — Yes. What about every police station that has a substantial indigenous population — the surrounding community?

Ms JUBB — That is okay. For some reason 35 is popping into my head, and I possibly may be wrong, so I will need to get back to you on that.

The CHAIR — Sure.

Ms JUBB — I think the liaison officers have a similar role to the client services officer at VALS, but within a different institution — that is, within Victoria Police. So they endeavour to educate police within their organisation about problems, and they are an immediate vehicle, or an immediate place, for an Aboriginal person to go to if there is a problem. If they have complaints the liaison officer within the police force is probably the person who stands out the most as someone who will listen to their complaint and things like that. And there is the fact that, as I outlined in the submission, it is not a portfolio in itself, so often people who are the liaison officers have other responsibilities. It is not a full-time job, so possibly conflicts could arise in terms of priority of time and stuff like that.

Mr LUPTON — Does your experience of arrests among indigenous people correlate in any way to the overrepresentation of indigenous people in jail?

Ms JUBB — It does. Because Aboriginal people are arguably more visible to police and more likely to be picked up than non-indigenous people, that is how they enter the criminal justice system. That is the entry point.

Mr MAUGHAN — Are you saying because they are Aboriginal that they are more likely to be arrested simply because they are visible? Is that what you are saying?

Ms JUBB — There is overpolicing of Aboriginal peoples. Overpolicing occurs outside the prison system, and unfortunately it also occurs within the prison system. Arguably Aboriginal people are more likely to be placed in management units within prisons.

Mr MAUGHAN — That has got nothing to do with their actions, the things that they do? It is simply because they are black?

The CHAIR — Perhaps I could interpolate there. What I understand Greta to be saying is that the police concentrate on groups who are visible and obvious, therefore she is saying that they receive more police attention.

Mr MAUGHAN — But not because they are Aboriginal. That is what she is saying.

Mr LUPTON — Could I get you to give some more detail on this point? My question was trying to get to the issue of whether indigenous people tend to be arrested more often in circumstances where other people may not in fact be arrested. The degree of intervention may be more severe or more serious.

Ms JUBB — I think that is the case.

Mr LUPTON — Is that the kind of evidence you are giving. Can you give some detail about that?

Ms JUBB — I can give detail of the law of public drunkenness. VALS does not argue that laws that apply to everyone are directly discriminatory. Often what occurs is indirect discrimination because of the disproportionate effect that the law has on Aboriginal people. The disproportionate effect might translate into more people being arrested for this particular offence. Because of the low socioeconomic background of Aboriginal people, poor housing, often overcrowding in housing, and lack of a big space for people to congregate together, often you might see Aboriginal people drinking in a public places — in a park or something like that. In relation to this offence it is arguable that Aboriginal people are more visible to police than non-indigenous people, so VALS argues for the decriminalisation of public drunkenness.

This was a recommendation of the Royal Commission into Aboriginal Deaths in Custody. Currently there is a review of the implementation status of the royal commission, and it is due to be released quite shortly. VALS put in a submission in July, I think. It was critical of the government for hanging on to this recommendation that public drunkenness be decriminalised, but — and there was a but — if public drunkenness is to be decriminalised, more sobering-up centres need to be established. It is a concern that if public drunkenness is decriminalised, but nothing is done about the problem of public drunkenness or intoxication the situation will not be remedied, so there is a need to take people somewhere, to sobering-up centres.

It seems that because of the absence of sobering-up centres, the absence of dollars and the lack of a commitment by the government to establish more, it is saying, ‘We cannot do that right now because there are no sobering-up centres, so we will not decriminalise public drunkenness’.

The CHAIR — The advantage being rather than being subject to arrest and being taken to a police cell that they would be taken to a non-government organisation or someone who would take responsibility for that indigenous person in their intoxicated state until they were sober?

Ms JUBB — Yes.

Mr LUPTON — There is another issue I wanted to raise. In your submission you have indicated a problem with intervention orders. Could you give a little bit more detail about that issue?

Ms JUBB — There is going to be a review of the Crimes (Family Violence) Act. Family violence is a huge issue for Aboriginal people, and you may be aware of the new police code on family violence. The code has quite a pro-prosecution approach, so that if a person is considered by police to be unsafe, police can take out an intervention order on their behalf, and things like that. But what VALS likes about this code is that even if the police do take further action and take out an intervention order there is also an obligation on the police to refer the people to an appropriate service. If the police do not think the matter calls for further action on their part, they will still refer someone to a non-government organisation. So whatever the police do they are always going to refer someone to a non-government organisation. I have lost my train of thought — can you repeat the question?

Mr LUPTON — I was interested in you expanding on the issue of intervention orders. In your submission you refer to it as an indirect means of arrest?

The CHAIR — Warrant to arrest, yes.

Ms JUBB — This was a solicitor who said to me that in practically ever second person in a particular street — I think it may have been in Mildura — there is an intervention order out.

The CHAIR — On the indigenous community?

Ms JUBB — Yes. Family violence is extremely rampant in the indigenous community. I think nationwide it is 45 times more likely than non-indigenous people, so it is overpoliced for a good reason. But there are different ways of approaching it, and one example is referring people to a service rather than creating an intervention order. The main concern with the high numbers of intervention orders is the fact that — and this is if police take them out on behalf of someone — often if the male is the perpetrator of family violence and the woman is the victim, the woman will not want to take out an intervention order if she was given the choice because she is aware of deaths in custody and sometimes the way

Aboriginal people are treated in custody and does not want to subject her partner to that. Family violence is complex because you have two people who are in a relationship and who love each other. It is hard to stop loving someone even though they do that sort of thing to you. It is a worry that intervention orders are treated as an excuse to harass more people.

The CHAIR — Subsequent to the intervention order? It is when someone is in breach of the intervention order?

Ms JUBB — Yes.

The CHAIR — Let us say that a woman has requested an intervention order and has been successful in it being granted, in which case she is saying that she does not want to have the male present in the house, for example, and the male is in breach of that intervention order. It is a difficult situation because presumably she was trying to exercise some rights, notwithstanding the ambivalence you referred to, and the police have an obligation to enforce those rights, again notwithstanding the complexities of the relationship that you referred to. I am just trying to get a handle on it. We are talking about a crime against another person. I am not quite sure how that could seen as an indirect form of arrest or an easier way to conduct an arrest.

Mr LUPTON — You are saying that the police take out these orders rather than the supposed victim?

Ms JUBB — Yes.

Mr LUPTON — The police should take out an intervention on behalf of someone and then use the existence of that order to arrest people?

Mr MAUGHAN — Is it not a good thing to protect the victim in this case?

The CHAIR — So they are police initiated? I can understand that.

Ms JUBB — I think it is different in different states in Australia, so police taking out the intervention order on behalf of someone is a pro-prosecution approach. It is not a minimalist approach; it is a pro-prosecution — ‘We are going to do something about it’. This is a concern, as you were explaining before. There are complexities. If given the choice and the discretion, Aboriginal people do not do it themselves. When given the choice Aboriginal people are reluctant to take out an intervention order. It is not only because of what I was explaining about deaths in custody and police attitude within custody. Because family violence is so rampant within the indigenous community there is a concern that the police will not respond, so an intervention order is useless. There is that concern as well. There are the two extremes.

Mr MAUGHAN — Is not the problem with not responding the fact that when they do respond in the very situation that you describe, the victim then does not want to press charges and does not want to take any further action? After the police have attended that sort of incident three or four times I think it is understandable that they are not going to continue to go back unless there is some action taken against the perpetrator, but the victim does not want to take action. I do not think it is black or white; it makes no difference. The police understandably have other things to do and are not going to continue to continue to go back.

Ms JUBB — It is like imposing values on indigenous people, and that has happened throughout history. Other people know better. If you listen to the Aboriginal community they are saying no to intervention orders. Being involved in the criminal justice system is a very foreign and culturally alienating place. At the best of times going to court is traumatic for anyone, but I think it has a distinct impact on Aboriginal people, so I stick it being almost like a de facto warrant. That may be an extreme way of explaining it, but there definitely is a problem because police impose their values on the Aboriginal community and take an intervention order out on behalf of someone. That is an example of overpolicing and not listening to the indigenous voice.

Mr MAUGHAN — Are you saying that the indigenous people do not want the victims to be protected by the rest of society?

Ms JUBB — Not at all. There are people who take out intervention orders. We did a study in 1999. We did a survey and we only managed to get 13 or so women who had been through the intervention order process to respond, so it is limited in that way. They said it was horrible, basically. They were asked a question: if someone else went through a similar situation to you, would you advise them to go through it? And they said yes. They said that even though it is inadequate in many ways and it is a traumatic experience, they would do it again.

I think it depends on the particular circumstances and the individual and whether it is the second, third or fourth time — or the first time. The Aboriginal community in VALS is very intolerant of family violence. I do not want to give you the impression that family violence is something that can be just swept under the carpet. There is a need to do something about it. I actually gave a paper at the Home Truths conference, which was organised through Domestic Violence Victoria and the centres against sexual assault.

I said, ‘We are not arguing for the decriminalisation of family violence or sexual assault. We are arguing that there is a need to create a space that either works in conjunction with the criminal justice system or in a stand-alone capacity to it so that people have the choice. I am referring to community responses. There has been a family violence strategy. There was a family violence task force, and the Victorian government has just responded to it and dedicated some money to healing centres and things like that.

Mr LUPTON — It is really trying to divert people. There are other ways of resolving those issues rather than using types of arrest warrants and the standard criminal process.

Ms JUBB — Yes

The CHAIR — Greta, I think just before we finish up we probably should address one issue which you raise in your submission, which I think, if correct, from my point of view is quite disturbing. You refer in your submission to a practice of the police or evidence that police delay execution of arrest warrants until Fridays, with the result that Koori people are locked up in police cells over the weekend until the court can deal with the matter. That suggests a systematic effort by the police to in fact engineer a situation where Aboriginal people are left in cells over the weekend. Can you expand on that?

Ms JUBB — Yes. I also mentioned that is not just over the weekend, sometimes it is overnight. Pursuant to writing this submission another solicitor said to me that often if a police person does see someone walking down the street, they will not arrest them; they will not go up to them; they will know that a warrant exists but will not go up to them. They will leave it until a time in the day when it is not possible to take that person to court and get them bailed, or something like that. So it is both overnight and over the weekend.

The CHAIR — Why do they do that, in your view?

Ms JUBB — I think that it is possibly part of the power play. I think that has a lot to do with it; that police are just showing who is boss. I think that there are really bad police-Koori relations in Victoria and around Australia the relationship between police and indigenous Australians is really poor.

Mr MAUGHAN — Can you give some concrete examples so that we can check them out because you are making some pretty serious allegations that I do not think are borne out by my experience anyway? I would be very interested to get some concrete cases so that we can check out what you are asserting.

Ms JUBB — Certainly, I have two sources for that sort of thing: one is a solicitor and one is a client service officer in a regional area.

Mr MAUGHAN — So can you give us some concrete examples and numbers? I mean, one or two cases is not going to prove a thing, but you are suggesting that it is throughout the police force, that it is endemic, and so what I would look for is some concrete examples and numbers rather than simply one or two isolated cases.

The CHAIR — So the net impact is either that someone cannot be bailed or are you saying that they do not then get access to a solicitor, for example, or legal representative? Are statistics kept on that, or on the time and date of arrest for example? Has there been some analysis done?

Ms JUBB — Sure. If the agreement between Victorian Aboriginal Legal Service (VALS) and the police is enforced, even if that person is arrested at, say, 7.00 p.m., we have a 24 hour service, and the emails are automatically always sent to us. If someone can get to the police station and help someone in that situation, they will do that. I think the client service officer is aware of it because he does attend the police station at inconvenient times to talk to the person and has found out that, 'I was in this place and the police were there and the police did have an opportunity to say something but did not'.

Mr MAUGHAN — My experience would be that the police that I am aware of, in Echuca for example, would go to extraordinary lengths to ensure that Aboriginal people are not kept in custody, except in extreme conditions, they are usually discharged to the Aboriginal community to be looked after.

Ms JUBB — I think that ever since the Royal Commission into Aboriginal Deaths in Custody, which recommended arrest as a last resort and had all sorts of recommendations about

police cells being made safe for people who may be suicidal and things like that, there have been great steps forward and an awareness of the need to ask questions before you lock someone up. But I am afraid that this is an example of that not happening.

Mr LUPTON — If you are going to give us a bit more information about that, I would like to know a little more about whether or not you believe there is evidence, that you believe indigenous people are kept in custody overnight or over the weekend where ultimately they are bailed on their own undertaking.

Ms JUBB — I will endeavour to get that information as well. I would not be sure of that, I am afraid.

The CHAIR — Greta, it has been a most interesting session. We have run out of time. Is there anything else you would like to say just before we finish up.

Ms JUBB — Maybe to conclude, I have been talking about pro-prosecution approaches, intrusive approaches and coercive approaches. The current climate in Australia is to have a tough-on-crime approach. It is apparent in the media, it is apparent in victims groups, it is apparent in stories which you see in the newspaper — people complaining that the justice system is taking too lenient an approach. Possibly from what I have said today, people would say that is reverse discrimination and it is too lenient.

What VALS really argues for is a smart-on-crime approach, and there is evidence that the tough-on-crime approach does not always work. Professor Ari Freiberg has found that sentencing does not deter and since 1991 when the royal commission into Aboriginal deaths was released we have had a tougher approach on crime. Across the board we have had more people ending up in the justice system because minimum sentences have been increased and things like that, so what we are advocating is a smart approach to crime and that is being flexible rather than being tough, not asking questions and not looking at the broad context.

The CHAIR — All right, Greta, thank you very much for coming in and giving us the benefit of your background and expertise.

Witness withdrew.