

LAW REFORM COMMITTEE

Inquiry into warrant powers and procedures

Melbourne — 19 October 2004

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Mr M. Wighton, manager, regional offices division; and
Ms L. Prain, senior policy and research officer, Victoria Legal Aid.

The CHAIR — Welcome, Michael and Llewellyn, to this hearing of the Victorian Law Reform Committee in relation to warrant powers and procedures. Our hearings and our work are governed by the Parliamentary Committees Act, which means that anything you say is subject to parliamentary privilege. As part of that process we will make available through Hansard a transcript of your evidence today. If at any point you wish to give evidence in camera, please let us know. Otherwise we will treat it all as being on the public record. You will have an opportunity to review the evidence you have given and to make any corrections to the transcript. After that we will put it on our web site. It will be generally available to the public, and we will obviously draw on it in reaching our recommendations and conclusions.

To start off, if you could talk to the key issues you have raised in your submission in relation to this reference on warrant powers and procedures and then we might get into questions and discussion.

Mr WIGHTON — Firstly, Victoria Legal Aid thanks the committee for its invitation to attend and give evidence today. We see this inquiry as involving critical areas of civil liberties. Parliament is of course the primary creator and protector of rights and responsibilities, and given that the regime for warrants is the main intersection between personal liberty and privacy, and the public need for enforcement of the law, we see the committee's work as being essential to creating the necessary balances in the system.

VLA's interest in these issues is informed by the fact that we operate the state's largest criminal law legal practice. We have 130 lawyers in the field conducting criminal work every day. Last year that amounted to around 40 000 duty lawyer appearances at the Magistrates and County courts and before VCAT, the Children's Court and the various courts exercising federal jurisdiction. VLA made around 22 000 grants of legal assistance to Victorians for complex criminal case work.

We have a civil law practice covering mental health, guardianship and administration and the administration of the PERIN system. Our PERIN duty lawyers last year conducted around 10 000 advice sessions and dealt with over 3000 minor work files assisting clients struggling through the PERIN system. We also provide youth legal services at the various locations of the Children's Court around the state. VLA believes the main problem currently 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.

The major themes in VLA's submission are fivefold: a lack of knowledge about their rights among defendants and persons affected by warrant procedures; inadequate checks and balances in the warrant system; occasional — and in some contexts frequent — inappropriate use of power by officials exercising power under warrants; structural flaws in the PERIN system, which have a significant impact on a very large number of Victorian lives; and a need for additional protection for vulnerable people in the system.

I will make some particular comments about each of those themes. In relation to the lack of knowledge by defendants about their rights, we believe 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. I read with interest that the New South Wales Search Warrants Act requires officers to provide an occupier with a Notice each time a warrant is executed. That notice sets out the name of the court or officer who issued the warrant, the name of the officer in whose name the

warrant is issued, the person against whom it is directed, the premises against which it is directed and any property that has been named in the warrants, and it also sets out some basic information about the complaints procedure. That seems to us to be a fairly attractive way of dealing with the issue of communication at the point of entry. We also believe there should be some community education about people's rights under the general warrants system.

In the area of inadequate checks and balances in the warrant system, our view is that in applying for warrants the power should be limited to criminal matters and matters where the state has a responsibility for the health and welfare of the subject or the community, and we believe civil matters should be dealt with by way of the law of contract and the rules of civil procedure. We are concerned about occasions we have heard about where officers of utilities have entered premises without the consent of the occupier to do simple things like meter readings. That is probably an inappropriate use of power without warrant, but there is not a lot of understanding in the community about those basic issues.

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. The court issuing the warrant should be satisfied that there is a practical need for the warrant and that the objectives of the warrant cannot be achieved by some other less intrusive method. I will mention a brief case study drawn from a radio news report I heard yesterday about a Department of Sustainability and Environment raid on a person's home.

It was believed the person had a large collection of wildlife in their custody at their home. It turned out after a raid by DSE officers that the person had just about all the necessary permits and licences to hold the wildlife. They found two or three newts that were not the subject of such a permit, and these were removed. This example is only taken from a news report, but it is a good example of where sufficient background investigation has possibly not taken place and where the owner or occupier of the premises would possibly have allowed entry without the need for a warrant and a physical raid by officers of the department. It is an example of where an alternative approach could have been taken.

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. There should be a specific sanction for the provision of 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.

We would oppose the routine issuing of phone warrants. These should be limited to urgent situations where it is impractical to get a faxed warrant. In this day and age we would think those circumstances would be very narrow in their occurrence, given the widespread availability of faxing equipment throughout the community.

The basis for issuing warrants should include reasonable grounds, an objective basis for the belief of the officer seeking the warrant, reasons why informed consent could not be obtained from the householder or occupier of premises and reasons why notice of intended search should not be given, and the power to issue such warrants should be limited to magistrates and judges. We believe warrants, once issued, should include time limits for execution and should specify the powers granted in the warrant, the items to be sought and the time limits for retention of seized goods.

The execution of warrants is a critical issue. This is the area that most impacts on VLA's clients. Items listed on the warrant should not be seized unless they clearly relate to the charges. There is a clear need for standing rules about the way warrants are executed. There are of course police

standing orders that touch on this issue, but they are not broadly known and they are not rigorously enforced. There has been a suggestion that there could be video-recording of searches of premises, but we recognise that that would be a significant cost to the state, and in any event such a video should not be admissible against a defendant in criminal proceedings. There is a need, though, for clarification of the requirements for unlawful arrest and the consequences of unlawful arrest. There is a need for improved police training that is designed with input from stakeholders such as Victoria Legal Aid, the Federation of Community Legal Centres and Multicultural Affairs Victoria. Such training should be independently accredited and monitored.

We think there should be improved reporting requirements for warrants. The courts that issue such warrants should record the place where the warrant is to be executed and the items and persons subject to the warrant. The court should record the outcome of the search, including when it was executed, what property was seized and any incidents during the execution. This last issue is particularly important. Incidents that arise during the execution of warrants are routinely reported to our staff by our clients, yet there is no particular facility for those issues to be raised, apart from general complaints to the Ombudsman. There is no standard regulatory framework for monitoring of police action when warrants have been executed.

Mr LUPTON — Can you give us an illustration of the major problems that seem to come up?

Mr WIGHTON — Typically it is unnecessary 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 also hear about unnecessarily rude and threatening behaviour by police and officers in communication with the subject of the warrant. There is often insufficient communication of the issues. Often they are given an unsigned file copy of the warrant, sometimes leading the person to think this warrant might not actually be valid, which sometimes unnecessarily causes a complication on its own. The problems are things such as that, and they are usually things that occur right at that point of contact. 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.

In the area of auditing and compliance, the VLA is of the view that legislation should require review of surveillance warrants by the court to consider whether continuing surveillance is justified. A formalised independent audit compliance system is needed for all warrants, as the Ombudsman's role is reactive and has only limited powers. As we referred to in our written submission, we generally support the proposal put by barrister Greg Connellan for a system of ongoing random audits of warrants and of the reporting process. But I note the committee's request for some more information about that, which I will get to in a moment.

We would recommend that the Crimes Act be amended to include a number of key provisions such as that warrants must be executed by a specified date and that warrants must be executed during particular hours of the day. This is particularly to avoid the situation where warrants are routinely executed at night when there is no real reason for that, particularly where the occupier of the premises could be a vulnerable person and where the search could result in the person being remanded in custody overnight without access to legal advice and without access to appropriate housing.

Mr LUPTON — That issue has been raised previously. We are interested in what kind of hard evidence you have to substantiate the anecdotal material that has been provided to us. Are you in a position to give us a bit more detail about how those sorts of allegations are made?

Mr WIGHTON — It is usually anecdotal. It comes through to us from our clients in the course of their giving instructions in proceedings. We would certainly have records on our case files that we could trawl through and provide some identified information for the committee if that would be of assistance in terms of some developed case studies. But of course we could not identify the clients involved, for obvious reasons.

Mr LUPTON — No.

Mr WIGHTON — But I note again that the New South Wales legislation has a specific provision that a warrant shall not be executed at night unless the issuing court or authority authorises it. So there must be a reason provided for that approach. 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.

Mr LUPTON — Would you support the sorts of provisions that are in the New South Wales legislation?

Mr WIGHTON — Yes, broadly. We have had a look at the New South Wales act in the last 24 hours or so, and we think that approach is broadly very good and very commendable. There are some issues about the procedures for applying for and issuing warrants not being consistent with Victorian standards — they do not require evidence on oath, for example — but on the other hand they have some very good protections for people, such as the offence of providing false information in support of a warrant.

There are also protections providing for complaint mechanisms and mandating the way that warrants should be executed. It actually goes into some detail. It looks as if the New South Wales Parliament has looked at the key areas where people are at risk, such as the day-night issue, and made it a mandated issue in the legislation itself, not even requiring regulations — they have put it in the main act — which is interesting. So in general, yes, we would support that.

The next area generally for VLA is inappropriate use of power by officials. Again this is mainly anecdotal evidence, but it suggests there are often instances of premature and unnecessary use of force, assaults, unnecessary property damage, unjustified delay in returning property seized, and, as I mentioned earlier, police sometimes relying on unsigned file copies of warrants. VLA's position is that police should use force only as a last resort and that when force is used it should be reasonable and proportionate.

Mr DALLA-RIVA — You have raised that a number of times.

Mr WIGHTON — Sure.

Mr DALLA-RIVA — How many police have been charged for assault? How many police have been charged with criminal damage as a result of warrants?

Mr WIGHTON — Not many,

Mr DALLA-RIVA — You are making statements about police using unnecessary force in your document and unnecessary property damage. If those allegations are put on the record, there needs to be some counter to say, 'Well, there were five police charged with related assaults

or criminal damage as a result of warrants', but I do not see that. You are saying it in a sort of vague way, but there is no evidence to support it.

Mr WIGHTON — I think there is evidence that there is a perception in the community that it occurs relatively frequently. There are certainly a large number of complaints to the Ombudsman's office about those incidents. There is a very low rate, though, of charging of police and certainly of successful prosecutions of police. I have acted for clients who have successfully raised complaints against police in exactly these circumstances. I have had clients who have had legs and arms and limbs broken by police in the course of interviewing and in the course of being arrested. I think it is probably common knowledge that the standard of evidence for a complaint against police is very high. Certainly the standard required to lay and successfully prosecute charges is also very high.

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. The point is taken, obviously. 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.

The CHAIR — But you are saying that a number of your clients do complain — —

Mr WIGHTON — Yes.

The CHAIR — About excessive use of police force in searches or in arrests, and perhaps even undertaking searches without giving proper notice. It would be useful if out of your files you did have any statistics about that, because that would certainly be useful to the committee. Case studies are useful to a certain extent, but they go to a qualitative element rather than to the actual number. This is an area which is riddled with lack of statistics and a lot of impressionistic data, but if you do have anything, that would be really helpful to the committee.

Mr WIGHTON — I certainly agree it is often anecdotal. It is very impressionistic, and it arises from our dealings with our clients. They are very extensive dealings, of course. We have the largest practice in Victoria.

Mr DALLA-RIVA — Clients who are trying to get off the charge.

Mr WIGHTON — Sure.

Mr DALLA-RIVA — You have to be realistic — there will be some issues raised to try and defer the charge. I am not saying that that does not occur. You have raised it a number of times, and just for the record I think there needs to be some evidence produced without just saying that there is this unnecessary use of force and unnecessary property damage. That is all — just countering.

Mr WIGHTON — That is understandable. The position obviously is that most police searches that take place are conducted entirely appropriately, with appropriate authority and with sometimes a quite appropriately sensitive approach to the occupier. We, on reflecting on our experiences broadly and because it is such a large legal practice with such a large number of

contacts with clients each year, see probably a disproportionately high number of those incidents, but it is fair to say on the other hand — —

Mr DALLA-RIVA — That may well be.

Mr WIGHTON — But on the other hand, most police searches and most police conduct are carried out completely appropriately.

Mr DALLA-RIVA — Thank you.

The CHAIR — Just on that, you have talked quite a bit about the use of force by police. You also referred to some of the other areas of practice. Are you able to talk at all about the use of warrant powers in relation to, say, young people, child protection or cases of mental illness?

Mr WIGHTON — Our youth legal service conducts both a criminal and a welfare practice. It does have some concerns, but again, like with the police, these are not routine complaints. These are complaints that come up in the course of our practice. 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. But again it is very general and anecdotal. It is very difficult to bring to any sort of inquiry particular case studies that identify clients in particular circumstances, particularly the matters that are still before the court.

They have also commented that they oppose the use of police to transport children and young persons to and from the scene where a warrant is executed. The Department of Human Services should provide its own transport in unidentified vehicles that do not quite have the same stigma as police transport. They have also made the comment that criminal prosecution of young persons who resist police in circumstances where a warrant is executed should be limited, taking into account their age. I asked what that comment was in relation to, and they said they had observed an increasing number of prosecutions for very young people seeking to resist police when they are being removed or when they are arrested.

There were also comments about our guardianship and administration practice. We believe the disability requirements in section 27 of the Guardianship and Administration Act should be maintained as they are appropriate. I believe there is some discussion in the paper about the possibility of removing that requirement. Our concern is that warrants may be issued and executed where the only evidence of a disability is on corroborated or unreliable evidence by family or neighbours. That is the only comment we have about those particular areas.

Mr LUPTON — Can I take you back to the broader principles. Reading your submission, is it fair to say that on the type of standard to be required of a warrant and the type of material to be included in a warrant, you would broadly accept the commonwealth Crimes Act as a reasonable standard?

Mr WIGHTON — Do you mean the criminal code?

Mr LUPTON — Section 3E of the commonwealth Crimes Act.

Mr WIGHTON — I could not speak to it without having it to hand, I'm afraid. I have not reviewed that in preparation for this appearance today.

Our view is that the current contents of the Magistrates' Court Act are broadly appropriate in terms of the content of the application, particularly that it should be sworn evidence setting out the particulars of the offence, the reasons for the search and the objectives of the search particularly. Certainly some improvements would be appropriate, but unfortunately I cannot comment about the commonwealth act.

Mr LUPTON — The other thing I wanted to ask was in relation to these difficulties that arise, bearing in mind that people in your office are likely to come up against some of the harder cases — the ones that are likely to involve allegations on one side or the other — are you able to offer us any advice about how the system can be improved, bearing in mind the difficulties that police would have in, say, knowing before the event whether a warrant is going to be needed or whether someone is going to consent to a search, for instance, to try to minimise those difficulties, and how we are able to deal with the issue of whether excessive or inappropriate force is used in circumstances where often the police may not know precisely what kind of reception they are going to receive?

Mr WIGHTON — Obviously a critical issue is that police members be protected from violence and from threats to their own safety. It is often difficult for them to assess what will occur when they get to a scene. Our position is simply that where there is no reason to believe they will be met with hostility or resistance, then a warrant might not even be required, and certainly when it is required that their approach to the occupier or to the person be based on seeking consent, even with a warrant, just as a matter of course. It is usually a matter for police operationally to assess those issues based on their own information and knowledge. There probably is not going to ever be a statutory formula that they can refer to. Police standing orders could probably have a more developed analysis of the sorts of issues they need to be aware of when they do consider taking out a warrant and approaching a person or approaching property, but obviously the approach they adopt needs to be adjusted in accordance with the level of risk.

As I say, we would accept that police are in the best position to rate the level of risk, but if they have never had any dealings with the person before and it is medium or low-grade-type offending behaviours that they are concerned about, the approach should not be at the top level every time. That is our main position on that, if that answers the query.

Mr LUPTON — Yes.

Mr WIGHTON — I will go back slightly just in relation to the comment that people raise these to get off charges. The reality of the Australian law — certainly the Victorian common law — is that it is not much of a defence to a substantive offence to complain about the way police entered your property and the way they treated you at that stage. The American system has a completely different approach to ours in terms of evidence. Tainted evidence in US courts is inadmissible, without question. That is not the case here. Illegality does not necessarily result in inadmissibility, so it does not usually promote a client's case before the court to complain about the way they were treated. This is the only comment I make about that.

Mr DALLA-RIVA — Linking into that, we asked a question about video or audio tape. You say:

It would be desirable to videorecord all instances of entry and search to ensure that proper procedures are followed.

I think most witnesses have agreed with that, and interstate evidence seems to support that. Then you go on:

However, the admissibility of these tapes as evidence against the defendant is a separate issue.

Can you elaborate on that?

Mr WIGHTON — We are not suggesting that it should not be admissible. It is just that is a separate matter to be considered — the circumstances in which it would be admissible against the person. For example, 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.

Mr DALLA-RIVA — Interesting. Following through, that would mean on what you are saying that if the police arrived with the videotape, executed the warrant according to what is required, did not smash down the door, did not assault the defendant, then read them their rights, you would suggest that it may not be appropriate to use that evidence?

Mr WIGHTON — It might not be relevant to the prosecution.

Mr DALLA-RIVA — It might be relevant if they have raised a bodgie complaint against the coppers?

Mr WIGHTON — It could be. The police might seek to tender that evidence to respond to a complaint by the defendant.

The CHAIR — In your submission you deal specifically with the question of codifying the requirements for lawful arrest and indicate that that would be a desirable development. Do you have any particular models in mind from other jurisdictions where that has occurred that you think would be worth us considering here in Victoria?

Mr WIGHTON — I am not aware of particular codification. I am not sure even if the commonwealth criminal code involves that level of detail.

The CHAIR — I think the New South Wales government has been going through the process of putting together its law enforcement powers and responsibilities act, which I think goes to some of those questions. It certainly codifies a lot of what would be currently in the police standing orders. You have not had an opportunity to look at that?

Mr WIGHTON — No.

The CHAIR — I do not know whether VLA has any experience in relation to covert search warrants, but if you have, do you have any views about how those warrants should either be regulated or audited?

Mr WIGHTON — In recent years we have seen a very large increase in the number of covert surveillance warrants. A lot of our complex criminal cases involve many hundreds of hours of surveillance tapes to be listened to, and that is a huge resource issue for us. But beyond that — we touch on that briefly in our submission — we simply believe those warrants should be refreshed at regular intervals by the court that issued them to ensure they are still required. It is to prevent the situation arising where people obtain a surveillance warrant for legitimate purposes and that purpose eventually drifts away but the warrant stays in place and there is continuing surveillance of the subject that might not have any particular investigative purpose. It is just to make sure there is appropriate supervision of those very intrusive powers.

Mr MAUGHAN — What would you regard as being suitable intervals?

Mr WIGHTON — I guess it would depend on the circumstance of the particular case, but if a surveillance warrant was obtained that provided for ongoing surveillance, then probably intervals of weeks rather than months would be appropriate.

The CHAIR — Do you have any knowledge of the operations of the public interest monitor in Queensland where in a sense there is a front-end auditing process, where a public interest monitor is arguing the case before the judge where the police are seeking such a warrant in order to argue whether or not the granting of such a warrant would be in the public interest? Are you aware of that?

Mr WIGHTON — No, I am not. As a standing procedure?

The CHAIR — Yes.

Mr WIGHTON — A third party appears amicus curiae and argues the public — —

The CHAIR — In relation to covert search warrants.

Mr WIGHTON — No, but it is an interesting issue. It sounds like a very good way to ensure that there is an alternative view put to a court.

The CHAIR — I think in relationship to surveillance devices as well.

Mr WIGHTON — In the absence of a defendant or a suspect being party for appropriate reasons to that kind of proceeding, that would be a good way for the public interest to be protected, sure.

The CHAIR — We have asked you a series of questions. Did you want to keep going?

Mr WIGHTON — I have covered the basic scheme of our material. There were a number of questions the committee put to us yesterday that I wished to touch upon. The proposal for a formalised order compliance system to monitor reporting on issuing and execution of search warrants has been broadly referred to in a number of previous inquiries and in our submissions to the last Parliament's inquiry on this subject matter, and we have referred only briefly to Greg Connellan of Counsel's proposal that such a body be set up.

We broadly support that. We have not spent a lot of time thinking about the details of it and how it would actually operate, but we would have thought that the continuing demands of the Ombudsman's office mean that it probably would not be the best placed to play such a role and that perhaps an independent monitor of some type should be established to have 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.

Obviously with all the different demands on the public purse, establishing another oversight body might be seen as problematic, but given the likely increase in surveillance in the use of those kinds of warrants in the future, given current issues, it seems to be an appropriate balancing mechanism.

The next question the committee asked was whether we could elaborate on any differences between rural and metropolitan courts and police conduct in relation to warrant powers. My main duty at Legal Aid is as the manager of our regional legal practice — our 12 regional offices around metropolitan and country Victoria. I asked the solicitors in charge to comment on that question for me. It is interesting to note that they 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 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. In

fact, as I say, the solicitors in charge of those offices in Bendigo, Bairnsdale, Morwell, Geelong, Horsham and Shepparton all said unanimously that they did not see any difference between the way metropolitan systems and country systems work, which is fairly encouraging. They did, of course, point out broad issues which are problematic, but they did not draw any distinction between country and city.

The last question was whether we had any view about consolidating warrant powers and provisions into one or more pieces of legislation modelled, for example, on the New South Wales act. As I have said, we do broadly support that. It is an interesting piece of legislation: it contains a schedule which draws into that act all of the 100 or so acts that contain warrant powers.

The virtue of that seems to us to be 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 — I think there are over 140 pieces of legislation in Victoria that contain some form of warrant power, with varying standards and various approaches to obtaining them.

Mr LUPTON — Do you see any reason there should be differing standards for the execution of a warrant, whether it be by the police or Department of Sustainability and Environment officers or any of the other authorities which are involved in this process?

Mr WIGHTON — We would expect that police would face the risk of violence and threat to their safety more than other officers in the public sector and government, so I presume police standing orders need to be more carefully detailed to ensure they have the right skills to assess that. However, broadly no. The rights of the citizen should be the same in all circumstances, depending on the level and type of offence that is suspected of having been committed.

One single act of Parliament that sets up a regime for applying for and the issuing of warrants sounds about right. That is how the New South Wales act is set up. As I understand it, there is one part that deals with police warrants and another part that deals with all other warrants. It draws in all that legislation to a central point. However, it has one key standard for all warrants, whether they be police or other authorities, and that seems to be appropriate.

The CHAIR — In the area of legal professional privilege and the extent to which documents seized in the course of a search might be subject to privilege, from your point of view are the current provisions or protocols in place with the police that govern that here in Victoria adequate, or do you believe there should be statutory provisions to deal with that question?

Mr WIGHTON — There seems to be a fair degree of uncertainty on both the police and legal profession's sides about exactly what the extent of legal professional privilege is. VLA's position is it probably would be a useful codification of those issues. I know a lot of our lawyers at VLA are very uncertain about the extent of protection their professional capacity affords them and their clients. When police want to obtain material from our files, we have a corporate solicitor, one of whose roles is to appear for VLA when VLA materials are requested by courts, but, like all legal practices, we are fairly exposed when it comes to police investigative powers. I have read other comments that suggest there is that uncertainty. A central rule or a codification of the rules would be very useful; particularly as legal professional privilege is one of those areas which is constantly being chipped away at as time goes by, whether it be through royal commissions or standing investigation bodies.

The CHAIR — You made some comments in your submission in relation to PERIN warrants. You have recommended a comprehensive review of that system, the increased use of alternatives to court appearances and the enforcement review program, withdrawal of infringements in certain cases, increased options to pay fines and streamlining of administration to avoid multiple notices being sent to the same debtor. Could you elaborate on some of the changes you would like to see in that area?

Mr WIGHTON — The impact of PERIN procedures on our clients is a very current topic in VLA; we spend a lot of time discussing it at all different levels. We have seen in the last year or so a complete reversal of the number of clients who are processed by the sheriff's office without court proceedings, without warrants of imprisonment, and the clients who are being managed by the Magistrates Court. Previously around three-quarters of PERIN warrants were managed by the sheriff's office — people were offered instalment orders or community custodial permits, the work permits. In the last year or so that has reversed and three-quarters are now being processed through the courts, where the options are much more limited and where the court has less discretion than even the sheriff's office does, with the result that an increased number of clients are being imprisoned merely for fine default for very minor offences, although significant numbers of them.

We are unsure as to the reason for that. We have been looking into a number of law reform issues we have been putting to government of late. We are looking at a major strategy to try to influence the way the sheriff's office is operating currently and its relationship with the Magistrates Court.

One of the problems is the complexity. The PERIN system has been addressed a number of times by different governments, but each time there seem to be a great number of problems left untouched, particularly the overall structural complexity of the system. For example, an individual who has, say, 15 or 20 parking fines will have 15 or 20 separate warrants and separate proceedings being issued by the PERIN court and the sheriff's office — they do not consolidate these things into one proceeding, meaning people have literally hundreds of pieces of correspondence every year from either the sheriff's office or PERIN asking for attention.

They then come in for legal advice, and you get a large shopping bag or suitcase full of unopened mail, documentation that does not seem to make sense in terms of date chronologies, making it very difficult to assist people. Of course magistrates have the same problem with limited court time to try to sort these things out. The establishment of the special circumstances list at the Melbourne Magistrates Court has been a very interesting development and a very useful one, but it only applies at the Melbourne Magistrates Court and it is only for people with special circumstances such as mental illness or intellectual disability.

VLA's position is that the entire PERIN scheme needs to be reviewed and reviewed fairly quickly to avoid this increasing complexity, logjams in the Magistrates Court — our duty lawyers are spending more and more of their time assisting people with effectively parking fines instead of people facing serious criminal offences and people who are in custody. There are all sorts of pressures throughout the system — at the sheriff's office, at the PERIN court, at the Magistrates Court, at Legal Aid and other legal practices caused by this fairly unwieldy system.

The warrant system for PERIN is in some ways hard to take seriously for some clients, because when you have 10 or 12 or 15 warrants being issued every single day covering hundreds of separate CityLink or parking fine offences, it is very hard to track them and people do not take them as seriously as if there was a notice by the sheriff's office or by the PERIN authorities detailing every single outstanding fine in the system. That would give people better information about their responsibilities and probably allow courts and other officers to better manage the overall system. The worst result of course is when a person winds up in jail serving time for unpaid fines, not only because of the system's complexities but because they were not able to navigate that system.

Mr MAUGHAN — How frequently does that happen?

Mr WIGHTON — We are glad to see that the imprisonment rate is not anywhere near as high as the number of warrants in the system. Of some 880 000 PERIN infringements issued in the last 12 months, only a few dozen people wound up in prison. However, that is still a significant number. According to the statistics we saw just last week there has been a threefold increase in the past two years of the number of people being imprisoned. These are people with substantial fines

to pay. There is a huge increase in the number of people being arrested, but in terms of the imprisonment rate I think I saw a figure that says 11 people were imprisoned in 2001 and some 30-odd in the past 12 months. These are small numbers in the total system, but it is very significant for the people affected.

The CHAIR — You referred to the withdrawal of infringement notices in certain circumstances. In what circumstances would you envisage that happening?

Mr WIGHTON — One of the problems with the system is you cannot convince an issuing council or agency to withdraw a fine without legal proceedings. It is very difficult to do that. There are not very many powers for the issuing body to actually withdraw. Say, for example, a child borrows a parent's car, uses it and incurs a parking fine. The parking fine is issued in the parent's name, the parent might not be paying much attention to the letters they receive from the sheriff's office but they come to us with a warrant they have received from the sheriff. It has not been enforced yet, but they have the warrant and know it is an outstanding issue. We then communicate with the council and explain the circumstances. The council says, 'Very sorry, can't help. It is now in the system, you have to go to court'.

That seems to be an unnecessarily complex way of resolving a very basic matter. It is simply a structural issue. I do not think there is any intention here to make it difficult for people, but the reality is that the current regulations do not provide much discretion to councils and agencies issuing fines to simply withdraw them if they are satisfied on the production of necessary proof that the infringement was issued wrongly or against the wrong person.

The CHAIR — I think we have probably covered most of the issues we wanted to cover with you today. Are there any other things you would like to say in conclusion?

Mr WIGHTON — No, I think we have covered all of our material. I again thank the committee for its invitation to attend today. This is a very important area of Legal Aid's operations and the interests of its clients, and we wish the committee well in its final report.

The CHAIR — Thank you very much for giving us your time and expertise here today.

Witnesses withdrew.