Government Response to the Victorian Parliament Law Reform Committee's Warrant Powers and Procedures Final Report

Introduction

The Government welcomes the Final Report of the Victorian Parliament Law Reform Committee on Warrant Powers and Procedures.

In June 2003, the Committee received the Terms of Reference to inquire into, consider and report to Parliament on:

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

The Committee released a discussion paper in July 2004, held hearings interstate taking evidence from 56 witnesses and received 42 submissions. The Report was tabled on 16 November 2005.

Warrants are one of the most important and frequently used tools of the justice system. The Committee sought to balance the legitimate need for warrant powers for criminal law enforcement and some civil enforcement purposes, against individual and human rights which the community expects will be protected unless there is a good reason for overriding those rights in the public interest. In considering the appropriate balance between these competing interests, the Committee focused on the fairness of warrant powers and procedures and the related issue of creating greater consistency between numerous pieces of legislation which authorise various types of warrants.

The Report makes some 147 recommendations that cover the use of warrants in the areas of search and seizure, surveillance devices, arrest, penalty enforcement, civil debt, and guardianship issues.

In Part A below, warrants relating to the investigation of criminal offences and arrest are discussed in relation to the recommendations for a new Warrants Act and short term reforms which the Government approves in principle. In Part B, penalty enforcement issues concerning recommendations for the Penalty Enforcement by Registration of Infringement Notice scheme (PERIN) and the Fairer and Firmer Fines project, and the recovery of civil debt are discussed. Part C considers other warrants and vulnerable people and the recommendations in relation to guardianship issues and other vulnerable people including children, the mentally ill and alcoholic and drug dependant persons.

A: Warrants relating to the investigation of Criminal Offences and Arrest

1. A new Warrants Act

The Report recommends that Victoria's search warrant and arrest warrant powers and procedures be consolidated, including the creation of a new Warrants Act modelled on provisions from the former New South Wales *Search Warrants Act 1985* (now contained in the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)).*

The Report proposes that the existing individual subject specific legislation only retain the powers authorising relevant officials to use search warrants and arrest warrants, and that new provisions be inserted in this existing legislation for special conditions and exemptions from the new standard procedures where justified (Recommendations 82 and 124). The Report also recommends that the Government consider asking the Standing Committee of Attorneys-General (SCAG) to develop a set of nationally consistent guidelines for search warrant powers and procedures (Recommendation 83).

The Government supports in principle the consolidation of Victoria's search warrant and arrest warrant powers and procedures including the creation of a new Warrants Act. This would provide a consolidated code of search warrant and arrest warrant procedures and greater certainty, consistency and efficiency than the current fragmented scheme. A standard code would also be easier to amend than many different Acts containing varying degrees of procedural requirements. The Government agrees that it will consider asking SCAG to develop a set of nationally consistent guidelines for search warrant powers and procedures.

Many of the Report's recommendations are about the features of a new Warrants Act and can best be implemented through the development of this legislation. The Government is of the view that these relevant recommendations will need further consideration in the development of a new Warrants Act. These recommendations are set out in the table at **Attachment A** which also includes recommendations (marked in italics) that will not require inclusion in a Warrants Act but will be pursued as part of the development of that legislation. They will receive the detailed consideration they require when work begins on the development of a new Warrants Act.

The development of a new Warrants Act is a long term project and many of the specific recommendations would require funding. A new Warrants Act will not be enacted in the short term.

The Government is already undertaking an ambitious program of major criminal law reform flowing from the Attorney-General's Justice Statement. The Attorney-General's Justice Statement contains a number of major reforms designed to modernise the justice system and protect those who are most vulnerable. Key reforms include overhauling Victoria's laws on evidence, criminal procedure, major criminal offences, bail, police powers to take DNA and protecting victims of family violence.

Such a sweeping criminal justice reform program has never before been undertaken in this State or anywhere else in Australia. The scale of the reforms, and the need to get it right, mean the program will need to be rolled out progressively.

The success of all of these reforms will depend not only on the consultation processes used in their development and the content of the laws themselves, but on those who use the laws regularly knowing what the changes are and embracing those changes. A new Warrants Act would affect the police, other Government agencies, the courts and all those who practise criminal law. A reform of this scale cannot be undertaken while other major reforms, which will also affect these groups, are still on foot.

Matters for Further Consideration

In developing the new Warrants Act, the Government will give further consideration to several matters raised by the Report. These include:

Disclosure of Evidence

Should a person who is subject to a search warrant be allowed to see the documents that founded the application for that search warrant?

The Report recommends that individuals subject to a search warrant be able to apply to the Magistrates' Court for access to the documents relied on in the application for the warrant (Recommendation 5) and that the Government and Magistrates' Court, in consultation with other relevant stakeholders, establish a system to facilitate the implementation of Recommendation 5 with appropriate safeguards in place having regard to section 13 of the former *Search Warrants Act 1985 (NSW)* and associated regulations (Recommendation 6).

The Report also proposes that these individuals be given access to recorded information in agency and issuing officer search warrant registers (Recommendations 22 and 26) and a central warrants database (Recommendation 34), as well as access to reports on the outcome of search warrants (Recommendation 72).

These recommendations may overcome the current limitations in common law and statute in Victoria on the perusal of warrant application evidence. The Committee considers that, in principle, when an individual's privacy is curtailed by a search under warrant, that person should be entitled to know the nature of the evidence submitted in support of the warrant application, subject to exceptions in appropriate circumstances. Providing access to warrant application evidence may increase potential for transparency and accountability.

However, there is concern that these recommendations could, among other things, compromise the safety of police informants and the conduct of investigations by disclosing the identity of a person, the avenue of enquiry or investigative methods. In developing the new Warrant Act, the Government will consider the provisions of the former *Search Warrants Act 1985 (NSW)* and associated regulations in relation to appropriate safeguards on access to warrant application evidence. The Government is also aware that the implementation of these recommendations would have significant resource implications for the Magistrates' Court and other relevant stakeholders.

Record Keeping

How do you provide for comprehensive record keeping relating to the issue and execution of search and arrest warrants?

The Report recommends that detailed search warrant registers and arrest warrants registers be kept by Police, the Courts and all agencies with search warrant powers (Recommendations 18 to 35) and arrest warrant powers (Recommendations 129 and 130), respectively.

These recommendations may overcome the current inconsistency in record keeping by these agencies with warrant powers and the lack of comprehensive knowledge about the use of Victorian warrant provisions to enable the Government to monitor its effectiveness. Search and arrest warrant registers have the potential to increase transparency, accountability and efficiency in record keeping. However, each of these agencies would require significant resources in order to implement these recommendations. Efficiencies could also potentially be achieved through integration (and avoidance of duplication) of such systems. Government will further consider whether the benefits from such record keeping justify the costs of establishing these registers.

Time of Entry

Should the hours during which a search warrant can be executed be limited?

Recommendation 40 proposes that search warrants be executed during day time hours unless there are reasonable grounds for justifying night time execution. The Report also recommends that the legislation be amended to provide for the extension of the period during which the execution of a search warrant can be authorised where an issuing officer is satisfied that reasonable grounds exist (Recommendation 42). Recommendation 43 proposes that executing agencies be able to request such extensions by telephone or other appropriate means of communication.

These recommendations may provide further legal and practical safeguards against the potential impact on civil liberties of the execution of search warrants and provide more consistency with some existing legislation in Victoria and other States. However, there is concern that these recommendations would place unjustified restrictions on police operational decisions. Government will consider how best to balance these legitimate competing interests.

Covert searches

How do you regulate the availability and use of all covert search warrants?

The Report recommends amending legislation to restrict the availability and use of covert search warrants to exceptional circumstances in the most serious offences and to a narrow class of permissible applicants, with rigorous safeguards including: applicants being required to demonstrate why, and issuing judges to be satisfied that, the covert search is necessary and justified; a Supreme Court judge determining the application; reporting within a specified period on the execution or non-execution of

the covert search warrant; a rebuttable presumption that the target of the search shall be notified of its occurrence as soon as practicable; and prompt and public annual reporting and trend analysis of the use of the powers (Recommendation 76).

The proposal that covert searches should be subject to legislative regulation may provide greater clarity as current Victorian law governing covert search warrants not related to terrorism offences is ambiguous. However, again there is concern that this recommendation may place unjustified restrictions on police operational decisions. Government will consider how best to balance these issues.

Videorecording

Should the execution of search warrants be videorecorded?

The Report recommends that:

- legislation be amended to require the videorecording of the execution of all search warrants relating to drug offences (Recommendation 56);
- the Government considers requiring the videorecording of the execution of search warrants relating to other offences (Recommendation 57);
- agencies with search warrant powers develop standard operating procedures for the videorecording of searches. In doing so, agencies should work with the Office of the Victorian Privacy Commissioner to address privacy concerns arising from videorecording (Recommendation 58); and
- the Office of Police Integrity reviews the results of Victoria Police's pilot recording projects and makes appropriate recommendations (Recommendation 59).

The Report noted that videorecording has the potential for increased certainty about what occurred during a search which can increase accountability and efficiency by reducing the occurrence, complexity and expense of consequential proceedings. However, significant limitations offset these gains including the ability of the operator to create a true and accurate record of the search and the resources required for personnel, equipment and training, particularly in remote locations. Victoria Police has trialled videorecording of drug searches in some circumstances and has raised concerns that, although videorecording can act as an anti-complaint measure, these videos may not be continuous or comprehensive and the presence of a video operator may raise safety and resource issues.

The Government notes the practical difficulties in implementing the recommendations to videorecord the execution of search warrants. However, the Government agrees to further scrutinise these recommendations through monitoring developments in other States and further consultation with relevant stakeholders.

Independent observer

Should an independent observer be present during the execution of search warrants?

Recommendation 60 of the Report proposed that the Government consider the suitability of an independent observer being present during the execution of search warrants.

The presence of an independent observer during the execution of a search warrant may provide a neutral record of the search which can provide an accountability mechanism. However, it may also raise significant safety, resource, practical and confidentiality issues. The availability of an independent observer may affect the ability of agencies to execute searches and an independent observer may be restricted in their ability to observe the operations of the executing team. It would also be very difficult to take an untrained civilian into the possibly dangerous and unpredictable execution of a search warrant.

Again, the Government notes that there are practical difficulties in implementing the recommendation that an independent observer be present during the execution of a search warrant. However, the Government agrees to further scrutinise this recommendation through monitoring developments in other States and consulting with relevant stakeholders.

2. Short term reforms

Not all the recommendations need to be considered in the context of the Warrants Act. Some recommendations can be acted on in the short term. The Government supports the following recommendations and will work towards implementing them.

Search of vehicles

The Report recommends that legislation, be amended to include vehicles within the definition of premises subject to a search warrant (Recommendation 79).

The Government agrees that legislation including the *Crimes Act 1958,* should be amended to include vehicles within the definition of premises subject to a search warrant. This will assist police to search a vehicle on the premises subject to a search warrant without the need to obtain a separate warrant, consistent with other legislation in Victoria and other jurisdictions.

Search and seizure of computer hard drives and digital records

The Report proposes that legislation be amended to enable officials executing search warrants to make and retain copies of hard drives of computers found on the premises searched, and to leave the original hard drive with the owner where appropriate (Recommendation 80).

The Government supports allowing officials to copy hard drives of computers found on premises under a search warrant rather than requiring them to seize the computer.

The Report also recommended that the *Surveillance Devices Act 1999* be amended to include digital records in the definition of 'record' (Recommendation 84).

The Government agrees that consistent with modern recording practices, digital records should be included in the definition of 'record' under the *Surveillance Devices Act 1999*. This will allow police to use records where legally obtained in digital form in addition to audio and visual records.

Victorian Aboriginal Legal Service

The Report recommends that Victoria Police work with the Victorian Aboriginal Legal Service (VALS) to formalise an agreement for the notification of VALS of any outstanding arrest warrants for indigenous people, in cases where it is practicable and reasonable to do so (Recommendations 125 and 126).

The Report noted that there is a current protocol between Victoria Police and VALS that requires police to ask all persons who are taken into custody if they are of Aboriginal or Torres Strait Islander origin.
If so, the responsible police member must:

- complete the Indigenous Australian status field in the person description screen of Victoria Police's electronic records system which creates an automatic notification to VALS and Victoria Police's Records Services

Branch. VALS is required to be notified within 1 hour of the arrest. If this cannot occur electronically, then VALS must be notified directly;
- notify any local Aboriginal Community Justice Panel (ACJP) and any local Sobering Up Centre if necessary; and
- provide assistance to VALS or ACJP as necessary.

The Report noted that the current protocol had not been followed consistently by Victoria Police, and it was agreed by Victoria Police that the one hour time frame had been exceeded in 30% of cases. Victoria Police has acknowledged the need to address this and is preparing a report on the topic.

The Government supports the current protocol between Victoria Police and VALS being broadened to encompass notifications of warrants to arrest indigenous people.

This will allow VALS to assist its clients to attend a police station of their own accord to answer the warrant (a fact that can be used to support a bail application) and lessen the risk of unexpected and potentially confrontational arrests after being stopped in public as part of a routine matter, which may result in additional charges such as assault or resisting arrest.

Victoria Police has indicated it is prepared to commence discussions with VALS regarding the process for notification of outstanding warrants to arrest indigenous people. Victoria Police recommend that any formal process must necessarily be implemented after the difficulties with the current notification system have been resolved.

Victoria Police has also raised concerns that automatically notifying VALS to facilitate attendance at a police station fails to consider the possibilities of increased risk of defendant absconding and/or the destruction of evidence. The defendant might be aware of the possibility of the existence of the warrant, in particular, as many of these warrants are issued as a consequence of the defendant failing to appear at court. Victoria Police also note that any amendment to the system would require funding to implement. These matters will be considered as part of discussions with Victoria Police and VALS.

Annual Reports on use of covert search warrants

The Report recommends that section 13 of the *Terrorism (Community Protection) Act 2003* be amended to impose a requirement on the Chief Commissioner of Police to submit an annual report on the use of covert search warrants in relation to terrorism to the Attorney-General, as soon as practicable but within 3 months of the end of the financial year that forms the reporting period (Recommendation 74).

The Government supports this proposal which will enable Victoria Police to report to the Attorney-General on the use of covert search warrants in relation to terrorism in a more timely manner.

Uniform Evidence Act

The Report makes recommendations concerning legal professional privilege (LPP) and the inadmissibility of improperly or illegally obtained evidence which the Government is considering in relation to the adoption of a uniform Evidence Act.

In relation to LPP, the Report recommends that:

- the Victorian protocol on LPP be amended to formalise the existing ad hoc practice of using an independent arbitrator to hear and determine claims of privilege in the first instance (Recommendation 63);
- the LPP procedures of the *Major Crime (Investigative Powers) Act 2004* be amended to provide for agreed independent arbitration of privilege claims without resort to court, as proposed in Recommendation 63 above (Recommendation 64); and
- legislation be amended to include procedures for dealing with claims of LPP in all Victorian search warrant provisions, using as a model, section 86VE of the *Police Regulation Act 1958* and section 61BE of the *Whistleblowers Protection Act 2001* as amended in accordance with Recommendation 63 and Recommendation 64 above (Recommendation 65).

The Report also recommends that Victorian legislation includes a provision consistent with section 138 of the uniform Evidence Act in relation to the admissibility of improperly or illegally obtained evidence (Recommendation 73).

In November 2004, the Attorney-General asked the Victorian Law Reform Commission (VLRC) to review the laws of evidence in Victoria and to advise on the action required to facilitate the introduction of the uniform Evidence Act. The VLRC review was undertaken in collaboration with a review already being undertaken by the Australian and NSW Law Reform Commissions.

In February 2006, the three Commissions released the *Uniform Evidence Law Report* which recommended that client legal privilege provisions of the uniform Evidence Act should apply to any compulsory process of disclosure including search warrants [Recommendation 14-1].

In the *Implementing the Uniform Evidence Act: Report* (February 2006), the VLRC recommended an extension of the privilege provisions by:

- the relevant court considering and determining any objection by a person being required to disclose information or produce a document including by a search warrant [Recommendation 19]; and
- the *Magistrates Court Act 1989* reflecting the established protocols and practices relating to claims for privilege in relation to search warrants including: a form of warrant which advises of the right to claim privilege; the option of informal preliminary determination by an independent arbitrator; the return of disputed documents in a sealed envelope or box to the relevant court for determination; and time limits for application to be made to the court for determination of the privileged claim [Recommendation 20].

The VLRC and the three Commissions' Reports did not make specific recommendations in relation to Victoria adopting a provision on the admissibility of

improperly or illegally obtained evidence consistent with section 138 of the uniform Evidence Act. However, the VLRC Report recommends that Victoria adopt the uniform Evidence Act which encompasses section 138.

The Government is considering possible amendments to the laws in this area as part of any evidence reforms in response to these Reports.

B: Penalty Enforcement Issues

Part B of the Government's Response to the Report deals with the recommendations concerning the PERIN system and fairer and firmer fines (Recommendations 89-123) and the recovery of civil debt (Recommendations 131-144).

1. PERIN System and Fairer and Firmer Fines

Infringements Bill

The Report provides a detailed consideration of the existing penalty enforcement system and makes a number of recommendations suggesting changes to the system. The Report recommends consolidating legislation that governs the infringement system by the introduction of legislation that includes provisions addressing the following matters:

- agencies' eligibility to use the infringement system;
- training standards for issuing agencies and Sheriff's office personnel;
- offences, levels of penalties and costs;
- form and content of infringement notices, courtesy reminder letters and PERIN Court documents;
- special circumstances categories and applications;
- principles and procedures for the development and implementation of standards for record keeping and data management, waiving and varying penalties, converting penalties into community work and other non-monetary sanctions, granting instalment agreements and extensions of time to pay, revoking enforcement orders, diverting matters to court;
- execution of penalty enforcement warrants, seizure of goods, arrest and subsequent court hearings; and
- oversight of the infringement system (Recommendation 123).

The publication of the Report coincided with the introduction in Parliament of the new Infringements Bill which provides for a new Victorian infringements system. The Infringements Act and its underpinning package of guidelines and regulations reflect Recommendation 123.

The Infringements Act is due to commence operation on 1 July 2006. One of the main purposes of the proposed new legislation is to improve the community's rights and options in the infringement notice process and to better protect the vulnerable who are inappropriately caught up in the infringements system.

Changes introduced as part of the new system address a significant number of the Report's recommendations and the policy objectives underpinning the Report's recommendations and those in the Infringements Act generally coincide. In some cases, the Government has adopted a different approach from that suggested by the Report.

Broadly, the new elements of the system are:

- overarching legislation to cover infringements law and process;
- a fairer infringements process based on early intervention and improved information to the public;

- process improvements which include a right to internal review by the issuing agency;
- measures at various stages, including internal review stage, to filter people out of the system who cannot understand or control their offending behaviour (e.g. people with mental or intellectual disabilities, the homeless, people with serious addictions);
- improved administration by issuing agencies of the infringements environments they manage;
- firmer enforcement measures to improve deterrence in the system, reducing 'civil disobedience' and the undermining of the rule of law;
- arrangements to establish a gatekeeper role for the infringements system to take a system-wide view and be responsible for managing ongoing improvements to the system; and
- changing the name of the current PERIN Court to Infringements Court.

The legislation will establish a common process for issuing and enforcing infringement notices by a wide variety of state and local government agencies, as well as bodies such as universities and hospitals. The Infringements Act will replace inconsistent legislation and practice across more than 50 different Acts.

Generally, offences will still be created under the Acts assigned to individual Ministers but the infringements process will no longer be set out in individual Acts. This will achieve the consistency of practice and law long sought by the community.

Greater onus will be placed on agencies that issue infringement notices. This will require agencies to:

- have training standards and codes of conduct for their issuing staff. Many agencies have already acted on the need for improvement in this area. These improvements will continue to be supported by guidelines the Attorney General can issue under the proposed Act to improve interaction in an infringements situation;
- provide information to people about their rights and options in the infringements process, as well as about their responsibilities. For example, infringement notices will be required to include information on the right to internal agency review, the right to apply for an instalment plan and the right to elect to go to Court to contest the matter; and
- review an infringement notice once issued. This is a significant change to current arrangements, and will include the requirement to disclose the right of internal review on the notices.

Individuals with special circumstances

The Report makes a number of recommendations in relation to the penalty enforcement system dealing with individuals with special circumstances (circumstances whereby an individual cannot control or understand their offending behaviour).

The Report recommends that all agencies that issue infringement notices:

- develop procedures to ensure that if an issuing officer is aware of an individual with special circumstances committing an offence, the officer will in the first instance issue a warning, caution or referral to appropriate social services in place of an infringement notice and if the infringing behaviour is repeated, an infringement notice will be issued (Recommendation 89);
- ensure that all issuing officers receive training to enable them to recognise genuine cases of special circumstances and refer them appropriately, and to work together with the Government, social and legal services and community groups to develop appropriate training programs and referral guidelines and ensure that referral services are adequately resourced (Recommendation 90);
- adopt consistent policies on the review, withdrawal and variation of infringement penalties and costs (Recommendation 92);
- withdraw penalties and costs at the earliest opportunity where evidence is provided of special circumstances (excluding financial hardship as a sole special circumstance) and the individual has not previously been issued with a warning or caution (Recommendation 93); and
- consider imposing minor remedial conditions on the withdrawal of penalties (Recommendation 94).

The Government has taken a broader approach to the treatment of individuals with special circumstances than that proposed by the Report. As indicated, the new system will require agencies to have training standards and codes of conduct for their issuing staff. Agencies will also be required to provide information to people about their rights and options in the infringements process, as well as about their responsibilities. These guidelines will facilitate a more consistent and transparent approach across the range of enforcement agencies.

A ground for seeking a review of a notice is that the person has "special circumstances" that affected the behaviour at the time of the offence. This is a critical change to filter the vulnerable in the community out of the infringements system. People with special circumstances are disproportionately, and often irrevocably, caught up in the system. In a just society, the response to people with special circumstances should not be to issue them with an infringement notice.

The term "special circumstances" refers to circumstances whereby a person cannot understand or control his or her offending behaviour. The circumstances that are included in the definition contained in the legislation are:

- mental or intellectual disabilities or disorders,
- homelessness, or
- serious drug/alcohol/substance addictions.

Often, it will be when the Sheriff attends an address to serve a notice or execute a warrant that it is discovered that the person is in special circumstances.

Homelessness has been included to provide for those people who are sleeping on the streets or living in crisis accommodation. Often these people have no choice but to be in public places where they are more likely to be infringed. In this sense, they cannot control their offending behaviour. There will be some people who are homeless and also have either a serious addiction or a mental or intellectual disability. But some do not and the legislation provides for them also.

This problem has been in part addressed by the implementation of the special circumstances list in the Magistrates' Court. People with mental or intellectual disabilities who have infringement fines and enforcement orders are able to apply to have their matters considered by a Magistrate, and in most cases the matters are discharged. Under the proposed new system, applications for 'special circumstances' revocation will also be accepted from people who are homeless or drug or alcohol addicted. Guidelines will be developed by the Infringements Registrar in relation to these new categories and consultation with relevant stakeholders will be undertaken in developing the guidelines.

The legislation goes a step further to try to prevent special circumstances matters flowing to the Court by having notices withdrawn by the issuing agency. Where the person's circumstances are genuine, it should be possible for the person or, more likely, someone on their behalf, to provide evidence to the agency of the person's condition and seek to have the notice withdrawn. This provides benefits to all parties. Unnecessary matters are not prosecuted by the agency and, for the people involved, fines are avoided and matters do not escalate.

As an added protection, the Act provides that where a person has their application for agency review on special circumstances grounds rejected by the agency, the agency can only prosecute the matter in open Court. The default cannot be lodged at the proposed Infringements Court. This is another filter to prevent people with special circumstances being channelled into a highly automated enforcement process.

Reducing the volume of cases

The Report recommends that the Government supports and expands initiatives such as those being developed by the Public Transport Enforcement Forum and other stakeholders, with the aim of encouraging earlier intervention to focus on underlying behaviours as a way of reducing the volume of people who come into contact with the infringement system (Recommendation 91).

The Government supports the concept of the Public Transport Enforcement Forum initiative. The Infringements System Oversight Unit (ISOU) established in the Department of Justice will monitor these initiatives and will encourage other enforcement agencies to consider creative approaches to address these broader underlying enforcement issues.

The Report recommended that issuing agencies consider imposing minor remedial conditions on the withdrawal of penalties (Recommendation 94). The ISOU will be keen to ensure that any such proposals developed by issuing agencies are appropriate in the circumstances and are consistent with the legislated principle that people with 'special circumstances' should not be unfairly drawn into the infringements system.

Options once an infringement notice is issued

The Report made a number of recommendations in relation to improving options once an infringement notice is issued, including that:

- clause 7 of Schedule 7 of the *Magistrates' Court Act 1989* be amended to permit applications to the PERIN Court for the conversion of penalties and costs to community work (Recommendation 95);

- legislation be amended to require issuing agencies or, if an enforcement order has been issued, the PERIN Court, to reduce penalty infringement amounts on application by individuals experiencing financial hardship at or after the time that an infringement penalty was incurred, supported by documentation verifying their eligibility for a Centrelink Health Care Card (Recommendation 96);
- issuing agencies work with financially disadvantaged people and legal, financial and other social service providers to develop a lower penalty rate and guidelines for application procedures and acceptable documentation (Recommendation 97);
- issuing agencies develop policies to accept payment of penalties, including penalties reduced in accordance with Recommendation 96, and costs in instalments or grant extensions of time to pay in cases where individuals can demonstrate financial hardship (Recommendation 98);
- issuing agencies consult with financially disadvantaged people, relevant advocates and support services to determine appropriate guidelines and procedures for the establishment and management of instalment and extension plans (Recommendation 99); and
- the PERIN Court collaborates with financial counsellors and other relevant stakeholders to ensure the fairness and efficiency of its systems for establishing and managing instalment payment plans under clause 7 of Schedule 7 of the *Magistrates' Court Act 1989*, and amends its policies as appropriate (Recommendation 100).

The conversion of penalties and costs to community work at the PERIN stage and the reduction of penalty infringement amounts for those in financial hardship are proposals that have not been implemented under the new penalty enforcement system. Rather, new front end protections, such as instalment plans, have been introduced to reduce the financial burden on individuals with limited means.

A long-standing criticism of the infringements system has been that people cannot pay a fine by instalment when they first receive it. A requirement for all enforcement agencies to offer instalment payment plans was introduced on 1 February 2006. The Infringements Act re-states this requirement with the basic requirement on an issuing agency to offer instalment payment plans to people where there is financial hardship. It also replicates the powers and mechanisms for the Department of Justice to offer agencies a centralised facility for managing instalment plans, which agencies can choose to use. In the past, agencies have not been able to justify the cost of setting up separate information technology systems to manage instalment payment arrangements.

The eligibility criteria for instalment plans are based on financial hardship and include people on a Commonwealth benefit or who have a health care card. There will also be capacity for people in financial difficulty who are not on a benefit or have a card, to make a case to the issuing agency for inclusion. The PERIN Court is currently reviewing its guidelines on payment orders as they will be referred to under the new legislation and will consult with relevant stakeholders as part of this review process.

Changes to the system will also allow for easier access to community work via the new Community Work Permit. The legislation provides that the Sheriff can issue a Community Work Permit 'at the door' of the infringement offender. Currently, the

Sheriff is required to arrest the infringement offender and take him or her to a prison or police gaol, where consideration can then be given to whether or not the person is eligible for community work.

The changes will enable the Sheriff to arrest the offender under an infringement warrant and then authorise a Community Work Permit at the offender's home. This avoids the convoluted process of arresting the person, which in regional areas of Victoria, can mean driving the person a significant distance from their home to a police gaol. If they are then released on community work, they have to find their own way home as they are no longer technically 'in custody' and the Sheriff is not empowered to return them to the place where they were arrested.

Election to open Court

The Report recommends that all issuing agencies be required to offer individuals who receive infringement notices the opportunity at the time of receipt of the notice to elect in writing to divert the matter from the infringement system to open Court for hearing and determination (Recommendation 101).

This recommendation has been implemented under the new system and all infringement notices issued from 1 July 2006 will be required to clearly state this right to elect to go to Court.

The Report also recommends that:

- clause 10(4) of Schedule 7 of the *Magistrates' Court Act 1989* be amended to specify that enforcement orders may be revoked to enable the individual subject to them to plead guilty to the offence in open Court and be sentenced in accordance with the *Sentencing Act 1991* (Recommendation 102);
- the Enforcement Review Program/Special Circumstances List be expanded in scope and presence. The PERIN Registrar should, in consultation with medical, legal and other social service providers develop, adopt and publish a policy to govern the consideration of a limited range of factors in determining whether a matter may be more appropriately dealt with by the Court (Recommendation 103); and
- the PERIN Court amends its procedures, in consultation with stakeholders, to accept an agreed range of materials in support of applications for revocation of enforcement orders under clause 10A of Schedule 7 of the *Magistrates' Court Act 1989* (Recommendation 106).

The Government does not support Recommendation 102 as each individual has the right to elect to go to Court in the first instance to have their matter heard and determined. Under the new system, revocation applications will remain limited to cases where there are mitigating circumstances or social justice issues are raised such as those highlighted by the Special Circumstances List. It should be noted that the grounds for revocation will be extended under the new legislation to include the homeless and drug addicted and consultation with relevant stakeholders is proposed in developing the guidelines for these grounds.

Funding

The Report recommends that the Government provides:

- secure funding for the Enforcement Review Program (Recommendation 104); and

- funding to enable the Special Circumstances List to sit for a trial period outside Melbourne (recommendation 105).

The Government supports and acknowledges the success of the Enforcement Review Program and, as part of the review of the infringements system, has encouraged the Magistrates' Court to extend the Special Circumstances List to include the homeless and the drug or alcohol addicted. The Government understands that this will occur from 1 July 2006.

Infringement system forms

The Report recommends that infringement system forms:

- be amended to ensure that they inform recipients, in plain language, of their rights to seek: (a) a review of the penalty; (b) a lower penalty if eligible; (c) instalment agreement or extension of time to pay; (d) transfer of the matter to open Court; and (e) that the forms include information about how to make such applications, what supporting material is required and the possible consequences of successful and unsuccessful applications (Recommendation 107);
- include: (a) more detailed information on the enforcement stages and options after the expiry of the period provided for in each form, including revocation under Clauses 10 and 10A of Schedule 7 of the *Magistrates' Court Act 1989;* (b) information about the availability of community based orders and community custodial permits; and (c) a statement advising recipients to seek independent advice and listing contact details for Victoria Legal Aid and peak organisations for financial counsellors and other appropriate services (Recommendation 108); and
- include as much of the above information as practicable in appropriate languages other than English (Recommendation 109).

The Report also recommends that where the format of notices makes it difficult to include additional information, it be included on a separate form developed by issuing agencies and that authorised officers can carry and serve with the part of the infringement notice that they print (Recommendation 110).

Infringement notices under the new legislation will be required to include information on the right to internal agency review, the right to apply for an instalment plan and the right to elect to go to Court to contest the matter. A further review of infringement notices is to be undertaken by the ISOU and the additional matters raised in the Report will be considered as part of that review.

The title of courtesy letters will also be changed to 'penalty reminder notices' in accordance with Recommendation 111.

Multiple infringement notices

The Report in relation to multiple infringement notices recommends that the:

- Victorian Infringement Management System be modified to enable the automatic identification of individuals incurring multiple infringement notices and that procedures be developed to enable the referral of such cases to open court or the Enforcement Review Program as appropriate (Recommendation 112);

- Government explores ways of consolidating all data generated from the time that infringement notices are issued by agencies other than Victoria Police (Recommendation 113); and
- Government consults with stakeholders about approaches in addition to improved data collection to deal with cases of individuals with multiple infringement notices (Recommendation 114).

The Government will consider these recommendations when the new Victorian Infringement Management System (VIMS) contract is negotiated in 2007.

Processes following the issue of a penalty enforcement warrant

The Report recommends that the *Magistrates' Court Act 1989* be amended to: (a) suspend the running of the seven day period under clause 8 of schedule 7, upon receipt by the PERIN Court of an application for an extension of time to pay, or an instalment payment plan or revocation of an enforcement order, and (b) provide seven days from the date of receiving such a notice for an application to be made, and (c) if no application is received within that time, to allow a further seven days before attempts are made to execute the warrant (Recommendation 115).

Section 90 of the Infringements Act provides that, after the 7 day period, if a person has applied for a payment order, obtained a payment order, or applied for the revocation of an enforcement order, steps in execution cannot be taken until those applications have been determined. This is consistent with paragraphs (a) and (b) of Recommendation 115. Paragraph (c) has not been implemented as the notice is clearly stated to be a 7 day notice and the objective of the notice is to motivate the person to take immediate action. The ISOU will monitor the practice in relation to these provisions and, if necessary, report to the Attorney-General on any adverse findings.

The Report recommends amendments to the *Magistrates' Court (General Regulations) 2000* by:

- amending Forms 4 and 5 to include information about: (a) supporting material required for extension and instalment plan applications; (b) the potential reasons that recipients may wish to apply for revocation, such as that they did not commit the alleged offence; (c) the possibility and purpose of an application for revocation and referral under clause 10A of Schedule 7; (d) the consequences of successful and unsuccessful applications, including the right under clause 10(6) of Schedule 7 to object to a refusal to grant revocation; (e) the consequences of non-payment, in more detail, including the possibility of and eligibility for a Community Custodial Permit and the options available to the Court if the recipient is arrested and sent for sentencing under Part 4 of Schedule 7; and (f) additional sources of advice, such as peak organisations for financial counsellors and other appropriate services (Recommendation 116);
- amending Form 8 to: (a) be consistent with Recommendation 116; (b) include advice that an individual should seek legal advice if they do not understand the form; and (c) provide contact details for Victoria Legal Aid (Recommendation 118); and
- requiring the service of a debtor's notice of rights and obligations to render the execution of a penalty enforcement warrant valid. The notice should be consistent with relevant parts of Recommendation 47 to Recommendation 50 (Recommendation 117).

The Government is currently reviewing these forms as the Infringements Act will be supported by new Regulations setting out the prescribed details of these forms. The Report's recommendations are being considered as part of that review and there will be broad consultation with key stakeholders on the draft Regulations during this process. The new Regulations will be required to be operational from 1 July 2006.

The Government will consider Recommendation 117 concerning service of a debtor's notice of rights and obligations in relation to a new Warrants Act.

Options after the execution of a penalty enforcement warrant

The Report recommends that Part 4 of Schedule 7 of the *Magistrates' Court Act 1989* be amended to the effect that, where an individual is taken before the Court following the execution of a penalty enforcement warrant: (a) a person is sentenced under the *Sentencing Act 1991*; or (b) the matter is heard and determined in open Court and that, on a finding of guilt, the person is sentenced under the *Sentencing Act 1991* (Recommendation 119)

This recommendation has not been implemented as part of the new legislation. The new legislation gives broader options to Magistrates in open Court hearings which occur after the execution of an enforcement warrant. By this stage, other enforcement sanctions, instalment payment plans or community work will not have been successful in expiating the fines. These hearings consider whether a person should be imprisoned, and will determine whether the individual has extenuating circumstances.

Currently, Magistrates' powers include being able to discharge the matter if the person has a mental or intellectual disability. If a person has exceptional circumstances, the Court can place the person on community work. The term of imprisonment can also be reduced. The legislation proposes that Magistrates also be able to approve instalment payment plans and that where imprisonment would be "excessive, disproportionate or unduly harsh" the Magistrate can discharge the fine in whole or part, or reduce the term of imprisonment by two thirds. These changes will ensure that imprisonment is, and will remain, a sanction of last resort for the most serious fine defaulters.

The Government also notes the Report's Recommendation 120 that the title of Part 4 of Schedule 7 of the *Magistrates' Court Act 1989* be modified to more accurately reflect the options available under its provisions. However, the corresponding Division in the Infringements Bill retains the title, 'Imprisonment'.

Coordination and consistency

The Report acknowledged the need for coordination and oversight of the infringement notice system to improve its efficiency, consistency and fairness.

The Report recommends that the PERIN Court be responsible for coordinating the administration of all aspects of an infringement matter once it is registered under clause 4 of schedule 7 of the *Magistrates' Court Act 1989*, including staying the execution of orders following applications for revocation or extensions of time to pay or instalment payments (Recommendation 121).

The PERIN Court is currently responsible for co-ordinating the administration of all aspects of an infringement matter upon registration and this co-ordinated approach will be retained under the new Infringements Court system.

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

- developing consistent policies and guidelines with respect to: (i) education; (ii) outreach; (iii) agency discretion; (iv) withdrawal of penalties, instalment payment plans, payment extensions, conversion of penalties into community work and other non-monetary sanctions; (v) design and content of infringement documentation; (vi) special circumstances categories and applications; and (vii) training and sensitisation of authorised officers, other issuing agency staff and Sheriff's Office personnel; and further by:
- addressing ongoing systemic issues;
- collecting and analysing empirical data from the community, in particular from infringement system agencies, individuals who receive infringement notices and their representatives, prosecutors, the PERIN Court, the Sheriff's Office, the Ombudsman and other relevant entities; and
- monitoring and applying best practices and innovations from other jurisdictions (Recommendation 122).

Government support for this recommendation is reflected by the establishment of the ISOU in response to the ongoing concern that the infringement system involves a large number of different agencies whose focus is on their particular domain. No single agency has responsibility in relation to the system as a whole.

The ISOU has been established in the Department of Justice. The Unit will:

- support the Attorney General's responsibilities as Minister responsible for the proposed Infringements Act;
- monitor the operation of the system, including the implementation of the proposed new Act;
- provide advice to the Attorney General and Government on infringements policy;
- effect legislative instruments and develop guidelines required under the proposed Act;
- support an ongoing advisory committee comprising agencies, stakeholders and community groups; and
- undertake key system improvement projects such as a review of infringement notices and associated documentation.

The character of the unit's role will be to foster ongoing improvement across the system and to have a stronger stakeholder management role. There are many stakeholders in this area including both agencies and advocacy groups. Their support and input are critical to how the system operates, and to how it is improved.

2. Recovery of Civil Debt

The Government supports in principle the Report's recommendations concerning the recovery of civil debt (Recommendations 131-144).

Civil warrant procedures

The Report recommends that the Government introduces uniform civil procedures legislation to provide for a single warrant to seize property under a single Act, regardless of the issuing court (Recommendation 131). The Report also proposes that the Government introduces legislation, whether as part of the introduction of uniform civil procedure rules or otherwise, which locates the authority to issue a warrant to seize property within primary legislation. (Recommendation 132).

The Government supports in principle uniformity of process between the courts. The Attorney-General's Justice Statement of 2004 acknowledged the need for continued improvement in civil procedure. The Government has encouraged the courts to review their rules of procedure to take account of developments in other jurisdictions that have streamlined processes and increased the level of uniformity between different courts within the jurisdiction.

The Victorian Courts have issued the *Courts Strategic Directions* Statement, which endorses a review of the rules of civil procedure with the aim of standardising court processes and court rules. Such a review would encompass the procedures for issuing a warrant. The Government is committed to assisting the Court in reviewing the rules of civil procedure.

Recommendation 133 states that there should be a legislative requirement that civil debt recovery actions against persons residing in Victoria be commenced in Victoria and in a court which is closest to the usual residence of the debtor.

This issue was also highlighted in a review recently conducted by Victoria Legal Aid: A Report *on Debt Recovery Law and Practice*, (January 2005). The Government will explore this issue further, through research it is planning to conduct on civil disputes.

Power of forced entry

Under existing legislation and common law, the Sheriff in Victoria is not authorised to use force to enter a person's house when executing a civil warrant to seize property. The Report recommended that the Sheriff have a power of forced entry when executing a civil warrant to seize property subject to a range of safeguards including:

Pre-warrant protections: warrants to seize property should only be issued following an assessment of debtor's assets and financial circumstances through a compulsory court examination for debts below a specific value and include consideration of the appropriate means of enforcing judgment. Warrants may be issued where such an examination is not practicable or the debtor fails to participate or reveal relevant assets (Recommendations 134 and 135).

Enforcement protections: authorised Sheriff's Office personnel must seek the owner or occupier's consent to entry at the time of execution of the warrant and may proceed where consent has been unreasonably withheld or the owner/occupier has been unable to be contacted after making reasonable attempts (Recommendation 136). Authorised personnel should be appropriately trained, subject to relevant procedures consistent with those contained in the Victoria Police Manual and retain a discretion not to force entry where forced entry is permitted but unsafe or unreasonable. The restrictions on the power of forced entry contained in section 75 of the *Civil Judgements Enforcement Act 2004 (WA)* should be included in any Victorian legislation (Recommendations 136-139, 144).

Codification and consolidation: these safeguards should be enshrined in a legislative scheme which should also promote alternative means of enforcement and greater legislative and administrative centralisation of civil judgment enforcement by locating all existing court orders for enforcement and the mechanism for examination of debtors in a single Act. The Government should consider introducing such a scheme as part of the uniform civil procedures legislation (Recommendations 140-143).

The Government supports in principle the introduction of the power of forced entry when executing a warrant to seize property in conjunction with a range of safeguards. However, further consultation and research is required in developing the legislation to ensure that such a reform leads to more effective recovery of civil debt and provides procedural fairness by ensuring that:

- the rights of a debtor are not overridden in the enforcement of a judgment against him or her;
- such a warrant would be issued only in circumstances where it would be likely to be successfully executed;
- the processes do not prevent or discourage the legitimate application of a power of forced entry;
- training provided to the Sheriff's Office be expanded so that officers are familiar with the law and the limitations that would surround the use of that power;
- the Sheriff's Officer's Manual is also amended in relation to the exercise of forced entry;
- the power of forced entry is used only in appropriate circumstances in which the likelihood of successfully carrying out the court order would be increased;
- the privacy of the judgement debtor's current address is maintained from the judgment creditor where the Sheriff applies to the Court for amendment of the address on the warrant; and
- the practice and success of similar legislative schemes in other Australian jurisdictions is examined.

Part C: Other Warrants and Vulnerable People

1. Guardianship Issues

Guardianship and Administration Act 1986

The Report recommends that section 27 of the *Guardianship and Administration Act 1986* be amended to require an applicant for a visitation order to establish that they have a reasonable belief that a person has a disability and is being unlawfully detained against his or her will or is likely to suffer serious damage to health or well-being (Recommendation 145).

The Government supports the recommendation to clarify the standard of proof for the issuing of a section 27 visitation order, which will promote its accessibility and efficiency.

The Report recommends that the Office of the Public Advocate consult with:

- the Victorian Civil and Administrative Tribunal (VCAT), Department of Human Services, Victoria Police and ambulance services to ensure that effective and appropriate procedures exist for the transmission of written orders under section 27 of the *Guardianship and Administration Act 1986* (Recommendation 146); and
- the Department of Human Services, Victoria Police and ambulance services to ensure that relevant personnel in all agencies are aware of the existence and purpose of section 27 orders and relevant obligations in respect of enforcing them (Recommendation 147).

The Government supports these recommendations with the Office of the Public Advocate to take a lead role in sponsoring a meeting with the above stakeholders to discuss the implementation of these recommendations.

2. Other vulnerable people: children; mentally ill; alcoholic and drug dependant

Warrants and the Mental Health Act 1986

Interaction between police and CAT services

The Report notes that where police are involved in apprehension, search and other coercive actions involving people with mental illness, in principle, the Crisis Assessment and Treatment (CAT) service should also attend such incidents.

Since the Committee's inquiry in 2004, the Victoria Police and Mental Health Branch have released the *Protocol between Victoria Police and the Department of Human Services Mental Health Branch* (2004). This protocol specifically addresses the issue of CAT response to police requests and introduces the requirement for CAT to give top priority for urgent referrals from police. It also requires mental health services to respond as soon as practical to police requests for mental health attendance in high-risk situations. These two elements are new to the 2004 protocol.

Further, the protocol requires all area mental health services to establish Emergency Services Liaison Committees (ESLC). These committees are comprised of (at a minimum) police, ambulance and mental health service representatives. In many areas these committees were already established but the protocol mandated them. The committee's role is to act as a liaison point and proactive problem solving mechanism at the level of clinical staff and operational police. Their establishment is also consistent with the Victoria Police Local Priority Policing Policy.

Training

The Report raises concerns about police understanding of mental illness, its consequences and additional strategies for ensuring appropriate interaction between police and individuals with mental illness during the exercise of warrant and warrant-like powers under the *Mental Health Act 1986*. It also invites the government to consider whether the Crisis Intervention Team model pioneered by the Memphis (USA) police or similar options might be adopted in Victoria.

The recent Office of Police Integrity report into police shootings recommended improvements regarding police education concerning mental health. The police education unit is currently reviewing the police training in the light of this report with a view to extending the training. The Department of Human Services has indicated to the police it can assist by providing access to people and organisations who can assist with these training issues.

The 'Memphis Model' is hard to translate into an Australian situation as there are many differences between Memphis and Melbourne. For example, in Memphis there are no CAT teams or clinical outreach services. Neither the Victoria Police nor the Department of Human Services believe that this model is appropriate for Victoria because of these translation difficulties.

Warrants and the Children and Young Persons Act 1989

The Report considered warrants issued under the safe custody provisions of the *Children and Young Persons Act 1989*, which empowers the Children's Court to issue safe custody warrants for the apprehension of a child in particular circumstances. The Committee considered issues relating to: the repeated issuing of warrants; the level of understanding among child support workers; the effectiveness of Victoria Police procedures; and the use of Victoria Police to transport children.

The Committee believed that the safeguards contained in these warrants should, in principle, be consistent with the recommendations on search warrants made in the Report. However, the Committee recognised that the basis for the exercise of powers under safe custody warrants is vastly different from search warrants and therefore may constitute exceptions to these recommendations. The Committee believed that in light of this Report, the Department of Human Services should, in consultation with stakeholders, review the warrant powers in the *Children and Young Persons Act 1989*, and the (then) *Children, Youth and Families Bill.*

VALS recommended that an agreement be put in place whereby the Victorian Aboriginal Child Care Agency (VACCA) attend with Victoria Police when they

execute a warrant. The Committee agreed that any warrant process, where practicable, should operate in a manner that is appropriate to the circumstances and is sensitive to individuals who are the subject of the process. In this regard, the Committee noted that the role of Indigenous communities in the child protection system was under review.

Given the complexity and sensitivity of the issues that arise in relation to the child protection system, the Committee was not satisfied that it had received sufficient evidence to make conclusions or recommendations in relation to these matters. The Report noted that the Government in partnership with stakeholders has been reviewing Victoria's child protection system in recent years and has developed significant legislative and policy reforms as a result. The Committee believes that the consultation processes for these reforms provides a more appropriate forum for stakeholders to raise and address issues of concern.

The Government notes that the new *Children Youth and Families Act 2005* provides enhanced provisions to recognise the special circumstances of Aboriginal children and families and strengthened accountability to the Aboriginal community. The Department of Human Service's Child Protection Service currently has a protocol with VACCA to provide assistance through the Aboriginal Child Specialist Advice and Support Service (ACSASS). ACSASS is consulted about every child who is notified to the child protection service and is also funded to visit families jointly with child protection to provide advice to the workers and advocacy for the family. The role of ACSASS was extended in 2005 to allow them to assist not only during the investigation phase of a case, but throughout the family's involvement with child protection.

Warrants and the Alcoholics and Drug Dependent Persons Act 1968

The Report noted that the Department of Human Services submitted that the Committee should include individuals with drug or alcohol dependency under the *Alcoholics and Drug-dependent Persons Act 1968* in its consideration of warrants relating to vulnerable groups.

Warrants issued under section 11 of that Act permits a Court to order that a person who appears to be alcoholic or drug-dependent attends and be admitted to an assessment centre. Where there is non-compliance, section 11(3) authorises a Court to issue a warrant "commanding" a member of the police force to convey the individual to the assessment centre. Section 18(1) of the Act also provides for a warrantless apprehension of any person who escapes from detention in an assessment or treatment centre.

The Department of Human Services submitted that anecdotal evidence suggests that absconding clients are generally not being apprehended by police or other authorised persons to return for treatment. They argued that for the Act to be effective it was necessary to engage with individuals for the full length of their treatment plan. It was suggested that additional education and training of police and resources may be required to address the problem. The Report noted that the Act was under review.

The Committee concluded that as it received no additional evidence on the issues raised by the Department of Human Services, its comments are limited to reiterating

the importance of adequate training for all officials involved in the application, use and monitoring of warrants, in particular those relating to the protection of, or otherwise affecting vulnerable groups.

The Government notes that the response to the review of the *Alcoholics and Drug Dependent Persons Act 1968* is still being finalised with the nature and extent of any proposed legislative change still being considered. Submissions and views from a range of clinical, legal, and community stakeholders have been sought and analysed and are informing consideration of options for legislative change to this Act. Any adjustments to the training for all officials involved with warrants will be considered at the time of any legislative change to this Act.

Conclusion

The Government is grateful for the work the Committee has put into the inquiry. Its Report has done a great deal to advance the task of reviewing the Victorian warrant powers and procedures.

The Government will continue with that task, implementing the recommendations identified that can be implemented in the short term and conducting further research and consulting with the relevant stakeholders in relation to the recommendations concerning the new Warrants Act and those that require further consideration.

ATTACHMENT A

WARRANTS ACT RECOMMENDATIONS

Entries in *italics* are those recommendations which will not require inclusion in a Warrants Act but will be pursued as part of the development of that legislation.

	Recommendation
1- 11 SEARCH & SEIZURE WARRANTS: APPLICATIONS	
1	**standard of application evidence** That legislation be amended to ensure that application procedures for search warrants are consistently specific, using section 80 of the *Confiscation Act 1997* as a model.
2	**contents of application** That the Government develops standard search warrant application forms in consultation with the Magistrates' Court of Victoria, Victoria Police and other interested stakeholders.
3	**rank of applicant** That legislation containing warrant provisions be amended so that applications for search warrants brought by police must, as a minimum standard, be brought by a police officer of or above the rank of senior sergeant.
4	**rank of applicant** That the Government considers an appropriate rank requirement in cases where the effect of Recommendation 3 is to undermine the purpose of the powers exercisable under a search warrant.
5	**disclosure of evidence** That legislation be amended to provide that individuals subject to a search warrant are able to apply to the Magistrates' Court to view the Magistrates' Court's copy of application documents.
6	**disclosure of evidence** That the Government and Magistrates' Court, in consultation with other relevant stakeholders, establish a system to facilitate the implementation of Recommendation 5, with appropriate safeguards in place and having regard to section 13 of the *Search Warrants Act 1985 (NSW)* and associated regulations.
7	**illegitimate applications** That Victoria Police amends section 7 of the Victoria Police Manual by inserting provisions that emphasise the purpose of warrants, the necessity for accuracy of affidavits, and that they should be supported by records of observations or other information.
8	***illegitimate applications*** *That the Office of Police Integrity uses its own motion powers to investigate the prevalence of the use of false or misleading evidence in support of applications for search warrants and of unjustified night time executions, and make appropriate findings and recommendations.*

9	***illegitimate applications*** *That the Department of Justice resources a project in which, for a period of at least 12 months, Victoria Legal Aid record information about allegations of the use of false or misleading evidence in support of applications for search warrants and that an analytical report on the data be prepared and published. That the Victorian Aboriginal Legal Service and community legal centres consider joining the recording and reporting study.*
10	**sanction for improper applications** That legislation be amended to make it a criminal offence to knowingly use false or misleading information in an application for any type of warrant, and that the penalty for such an offence be a maximum of two years imprisonment.
11	**applications by telephone** That the *Magistrates' Court Act 1989* search warrant provisions be amended to include a general power to apply for search warrants by telephone, fax or other similar means if the applicant believes it is necessary because of urgency and there is no practicable alternative.
12-39 SEARCH & SEIZURE WARRANTS: ISSUE	
12	**who can issue** That section 92(2) of the *Crimes Act 1958* be repealed.
13	**determination of application: standard of review** That legislation (except that referred to in Recommendation 14) be amended to provide that the burden of proof required for the issue of a warrant be that the issuing officer is satisfied that the applicant believes on reasonable grounds that there is, or will be within 72 hours of the issuing of the warrant, evidential material on the premises to be searched.
14	**determination of application: standard of review** That legislation retain or incorporate a different burden of proof only where this departure from the standard recommended above can be justified as necessary to support the purpose of the warrant.
15	***determination of application: inappropriate issue*** *That the Office of Police Integrity uses its own motion powers to investigate the prevalence of the inappropriate issue of search warrants and make appropriate findings and recommendations.*
16	***determination of application: inappropriate issue*** *That the Department of Justice resources a project in which, for a period of at least 12 months, Victoria Legal Aid record information in cases where it appears that search warrants were issued inappropriately, and that an analytical report on the data be prepared and published. That the Victorian Aboriginal Legal Service and community legal centres consider joining the recording and reporting study.*
17	***determination of application: issues for consideration.*** *That relevant Victorian Courts include the provisions of s12A(2)(a) of the Search Warrants Act 1985 (NSW) in their Practice Directions on warrant procedures.*
18	**record keeping: agencies** That primary legislation be amended to require each agency with warrant powers to create and maintain a search warrants register and record the following information in it:

	(a) number and dates of ordinary and telephone applications made, withdrawn, granted, rejected, including reapplications; (b) details of the legislative provision authorising each warrant application; (c) basis for the reasonable belief justifying each application; (d) details of any offences relevant to each warrant; (e) date of issue and name of issuing officer; (f) date, time and duration of the execution of each warrant and name of executing officials (g) name(s), if known, of any person(s) present on the premises and any arrests; (h) details of any use of force; (i) results of the search, including description and details of any disposal of seized items; (j) statistics on proceedings initiated as a result of the use of warrant powers; (k) number of complaints received and how resolved; and that the Government consider what other information should be recorded.
19	**record keeping: agencies** To facilitate effective comparative analysis of agencies' practices, that the Government work with agencies to develop a standard template on which to base search warrant registers maintained pursuant to Recommendation 18.
20	**record keeping: agencies** That agencies prepare a de-identified version of the data contained in search warrant registers and publish it annually on their websites and report it to Parliament, preferably as part of their annual reports.
21	***record keeping: agencies*** *That the Ombudsman and the Office of Police Integrity review the data periodically and make appropriate recommendations.*
22	**record keeping: agencies - access** Without prejudice to any proceedings relating to the warrant, that individuals subject to a search recorded in a search warrant register have a right of access to the recorded information, suitably edited to remove information that would identify agencies' personnel or compromise agencies' operations.
23	**record keeping: issuing officers** That the Magistrates' Court's search warrants Register be amended to record: (a) whether a warrant application is returned to the applicant for further evidence to be provided; (b) the date of decisions to grant, reject or return applications for further evidence to be provided; (c) the number and dates of in person, fax and telephone applications made, withdrawn, granted and rejected, including reapplications.
24	**record keeping: issuing officers** That a statistical summary of the Magistrates' Court's search warrants Register be included in the Court's annual reports.

25	***record keeping: issuing officers*** *That the Ombudsman and the Office of Police Integrity review the Magistrates' Court's search warrants Register periodically and make appropriate recommendations.*
26	**record keeping: issuing officers - access** Without prejudice to any proceedings relating to the warrant, individuals subject to a search recorded in the Magistrates' Court's search warrants Register have a right of access to the recorded information, suitably edited to remove information that would inappropriately identify any person.
27	**record keeping: issuing officers** That the obligations and rights in Recommendation 23 to Recommendation 26, including the contents of the Magistrates' Court's search warrants Register be prescribed by primary legislation, rather than by Regulation or Magistrates' Court Practice Direction.
28	**record keeping: issuing officers** That, the Magistrates' Court considers amending the search warrants Register to record: (a) the basis for the reasonable belief justifying each application; (b) details of any offences relevant to each warrant; (c) name(s) of any person(s) present on the premises and any arrests; (d) details of any use of force; (e) results of the search, including description and details of any disposal of seized items
29	**record keeping: issuing officers** That the *Magistrates' Court Act 1989* be amended to require the retention by the issuing officer of all documents pertaining to ordinary and telephone applications for search warrants, copies of the information provided to the occupier/s of the target premises and the results of search report.
30	**record keeping: issuing officers** That the Government ensures that, as a matter of urgency, Magistrates' Court venues' computer systems are able to share and compile records and statistics pertaining to the issue and use of warrants. In particular, the Court's multiple search warrant registers should be computerised, centralised and networked.
31	**record keeping: issuing officers** That the Magistrates' Court ensures that all data pertaining to the issue and use of warrants generated by each venue is stored in a manner that facilitates the sharing of information in real time across different venues, while incorporating appropriate data security and redundancy protections.
32	**record keeping: issuing officers** That Recommendation 23 to Recommendation 31 apply to search warrants issued by judges of the Supreme and Country Courts under section 57(7) of the *Magistrates' Court Act 1989*
33	**record keeping: issuing officers** That the replacement for the Law Enforcement Assistance Program database includes the capability to record data about the application and execution of all warrants (excluding covert warrants) by Victoria Police.

34	**record keeping: issuing officers** That all Victorian warrants that are not covert warrants be recorded in a central warrants database that is accessible by individuals named in the warrant, or their legal representatives. That as part of its plans to improve the capacity of Victorian courts to collate and collect data, the Government considers how to develop such a database from existing warrants data recorded by the Supreme, County and Magistrates' Courts
35	**record keeping: issuing officers** That the database contain sufficient information to enable the identification and location of warrants relating to a particular individual, such as the names of individual/s subject to the warrant, applicant and issuing officer; the type and date of issue of warrant; and the legislative basis for the warrant
36	**period of validity** That legislation be amended, to apply an expiry period of seven days, with the possibility of an extension to a maximum of 30 days where this can be justified, to all warrants issued.
37	**period of validity** That Acts which currently contain warrant provisions without an expiry period be amended as a matter of urgency
38	**period of validity** That all such legislative amendment include a requirement that the expiry period is clearly marked on the warrant.
39	**telephone warrants** That legislation be amended to impose a limit on telephone warrant validity until the end of a maximum of 24 hours from the time of issue, or the time of execution, or withdrawal, or cancellation, whichever event occurs first.
40-66 SEARCH & SEIZURE WARRANTS: EXECUTION	
40	**time of entry** That legislation be amended to require the execution of search warrants during day time hours unless the applicant can demonstrate reasonable grounds justifying night time execution.
41	**time of entry** That the Government consider defining reasonable grounds to include circumstances such as those listed in section 19A(1) of the *Search Warrants Act 1985* (NSW) and section 194(9) of the *Crimes Act 1900* (ACT).
42	**time of entry: extension** That legislation be amended to provide for the extension of the period during which the execution of search warrants is authorised, where an issuing officer is satisfied that reasonable grounds exist for doing so. That the Government considers defining reasonable grounds to include circumstances such as those listed in section 19A(1) of the *Search Warrants Act 1985* (NSW) and section 194(9) of the *Crimes Act 1900* (ACT).
43	**time of entry: extension** That legislation allow executing agencies to request extensions by telephone or other appropriate means of communication.

44	**time of entry: extension** That legislation require that written reasons for the request for an extension of the authorised period be included in the report to the court on the execution, and that those reasons and the issuing officer's decision to grant or refuse the request be included in the record of warrant proceedings retained by the court.
45	**multiple entries** That legislation be amended to allow multiple entries on the same warrant only where re-entry is within a short period of time and so closely associated with the original entry that it can reasonably be regarded as part of the execution of the original warrant.
46	**multiple entries** That officials executing search warrants keep records pertaining to all re-entries, including reasons for re-entry, any agreement or opposition from occupiers of the premises and logs of departure, entry and other relevant times. That such records be included in the report to the court on the execution, and, together with the issuing officer decision to grant or refuse a request for a fresh warrant, be included in the record of warrant proceedings retained by the court.
47	**information provided to persons present at target premises** That legislation be amended to require agencies to provide information about search warrants to persons in the place to be searched, and that such information must include, in plain English and other appropriate languages the following: (a) why the warrant has been issued; (b) who issued the warrant, where and when; (c) who will execute the warrant; (d) when the warrant may be executed and when it will cease to be valid; (e) what is permitted under the warrant; (f) what persons in the place subject to the warrant must do and the consequences for not doing so; (g) the rights of persons in the place subject to the warrant; (h) what persons in the place subject to the warrant may do if they are dissatisfied with any aspect of the warrant or its execution.
48	**information provided to persons present at target premises** That agencies ensure that their officials who execute warrants are trained to assist persons at the place to be searched who do not understand the written information provided pursuant to Recommendation 47.
49	**information provided to persons present at target premises** That, if there is no one present during the execution of a search warrant who appears to be in control of the place being searched, the information pursuant to Recommendation 47 be provided to any person in the place.
50	**information provided to persons present at target premises: timing** That legislation be amended to require officials executing search warrants to serve an occupier's notice in accordance with Recommendation 47 at the time of entry or as soon as practicable thereafter, unless there are compelling reasons not to do so, and to show on request a copy of the warrant.
51	**information provided to persons present at target premises: identification**

	That legislation require officials executing search warrants to produce identification at the time of entry, or as soon as practicable thereafter, unless there are compelling reasons not to do so.
52	**use of force** That Victorian warrant provisions be amended to include a procedure that mirrors or is modelled on section 86X of the *Police Regulation Act 1958*.
53	**use of force** That agencies whose personnel are involved in the execution of search warrants require their personnel to comply with or exceed applicable provisions of the Victoria Police Manual on the use of force during searches of property.
54	***use of force*** *That the Office of Police Integrity uses its own motion powers to investigate the incidence of improperly executed search warrants and the use of unnecessary or disproportionate force during the execution of search warrants, and make appropriate findings and recommendations.*
55	***use of force*** *That the Department of Justice resources a project in which for a period of at least 12 months, Victoria Legal Aid records information about allegations of abuse of force during the execution of search warrants and that an analytical report on the data be prepared and published. That the Victorian Aboriginal Legal Service and community legal centres consider joining the recording and reporting study.*
61	**seizure of items** That legislation be amended to authorise police members who are lawfully executing a search warrant to seize things that are not specified in the warrant, if they believe on reasonable grounds that such things constitute evidential material
62	**receipt for seized items** That legislation be amended to include receipt provisions that meet the following requirements: (a) officials executing search warrants, other than covert search warrants, must give as soon as practicable to the occupier of the place being searched, or other appropriate person, a receipt for all things seized; (b) receipts must include sufficient detail to enable identification of seized items; (c) receipts must include clear information about what could happen to seized items and the rights of individuals with an interest in the seized items, including how to challenge any seizure; (d) receipts must be signed by the senior official executing the search and, where possible, by the occupier of the place being searched or other appropriate person; (e) where no such person is present during the search, receipts must be left in a prominent place or served at a later date; (f) receipt forms should be available in appropriate languages and agencies should ensure that their officials who execute warrants are trained to assist individuals at the place to be searched who do not understand the forms.
66-73 SEARCH & SEIZURE WARRANTS: POST-EXECUTION ISSUES	
66	**taking seized property before the court** That legislation be amended to require property that is seized that is not specified in a search

	warrant, to be taken before the Magistrates' Court.
67	**use of photographic evidence** That the Government consults with stakeholders about how the use of photographic evidence to comply with the requirement to take seized property before the Court could be expanded.
68	**role of occupiers and affected persons** That the Government considers whether and how to recognise a right of occupiers and other affected persons to raise issues relevant to seized items during the court's directions hearing pursuant to sections 78(b)(ii) of the *Magistrates' Court Act 1989* and 465 of the *Crimes Act 1958.*
69	**use of seized items & digital photographs** That the Magistrates' Court clarifies the Result of Search Form and procedures and guidance provided to magistrates to implement them, in particular the scope of directions for the use of seized items in police investigations and the use of digital photographs.
70	**dealing with seized property** That legislation be amended to require the return to the court of unexecuted warrants as soon as practicable after their expiry.
71	**reporting on outcome** That legislation be amended to require a report on the outcome of all search warrants, containing the following information: (a) whether the warrant was executed; (b) reasons for non-execution; (c) the date, time and place of execution; (d) names of individuals who executed the warrant and individuals who were present at the premises; (e) whether an occupier's notice was served; (f) a list of seized property; (g) confirmation countersigned by the occupier or other appropriate individual that receipts were issued for seized property; (h) a description countersigned by the occupier or other appropriate individual of any damage that occurred during the search; (i) confirmation countersigned by the occupier or other appropriate individual that they were informed of their rights to challenge the warrant; (j) additional information as prescribed by specific legislation; (k) a section on directions to be given by magistrates pursuant to section 78(5) of the *Magistrates' Court Act 1989.*
72	**access to reports affected individuals** That legislation permit individuals affected by the warrant to apply to the issuing court for access to relevant reports on the outcome of search warrants.
74-83 SEARCH & SEIZURE WARRANTS: OTHER ISSUES	
74	***annual reports on use of covert search warrants*** *That Section 13 of the Terrorism (Community Protection) Act 2003, be amended to require the*

	submission of annual reports under that section as soon as practicable, but within three months of the end of the financial year that forms the reporting period.
75	***annual reports on use of covert search warrants*** *That, if Recommendation 74 is not implemented, section 13 of the Terrorism (Community Protection) Act 2003 be amended to provide that where the Parliamentary tabling date for reports on the use of covert search warrant powers falls outside Parliamentary sitting periods, such reports be publicly disseminated, using the regime in section 102K of the Police Regulation Act 1958 as a model.*
76	**covert search warrants** That legislation be amended to (a) allow covert searches of property only with express authority clearly stated in a warrant; (b) require that the warrant must specify in what circumstances the execution may be carried out covertly; (c) restrict the availability and use of covert search warrants to exceptional circumstances in the most serious offences and to a narrow class of permissible applicants; (d) set rigorous safeguards including requiring: (i) a Supreme Court judge to determine applications; (ii) applicants to demonstrate why, and issuing judges to be satisfied that, covert search is necessary and justified; (iii) a report within a specified period on execution or non-execution; (iv) a rebuttable presumption that the target of the search shall be notified of its occurrence as soon as practicable; and (v) prompt and public annual reporting and trend analysis on the use of the powers.
77	**covert search warrants** That any resulting covert search warrants regime be subject to a review within three years
78	**control of crime scenes** That legislation be amended to provide police with clear powers to establish and control crime scenes.
79	**search of vehicles** That legislation be amended to include vehicles within the definition of premises subject to a search warrant.
80	**search and seizure of computer hard drives** That legislation be amended to enable officials executing search warrants to make copies of hard drives at the premises being searched, to retain these copies rather than the original hard drive and to leave the original hard drive with the owner where appropriate.
81	**notices to produce** That legislation be amended to provide for the issue of production notices instead of search warrants in appropriate circumstances, and that the Government determine such circumstances and the appropriate issuing authority for such notices.
82	**consolidation of search warrant powers & procedures** That the Government undertakes consolidation of Victorian search warrant powers and procedures, modelled on the *Search Warrants Act 1985* (NSW) and including the following elements: (a) the creation of a new Act which consolidates standard search warrant provisions in

	line with the Committee's recommendations in Chapters Three to Seven; (b) the retention of existing Acts conferring search warrant powers, which will continue to authorise relevant officials to use search warrants; (c) the presumption that all other aspects of search warrant powers conferred by existing Acts will be governed by the standard procedures in the new Act; and (d) the provision in existing Acts conferring search warrant powers of such special conditions and exemptions from the standard procedures as are justified, consistent as far as possible with the purpose and effect of the standard procedures in the new Act.
83	**nationally consistent guidelines** That the Government considers asking the Standing Committee of Attorneys-General to develop a set of nationally consistent guidelines for search warrant powers and procedures.
84-88 WARRANTS FOR SURVEILLANCE & TELECOMMUNICATION INTERCEPTION	
84	***digital records*** *That the Surveillance Devices Act 1999 be amended to include digital records in the definition of 'record'.*
85	***offences in relation to which a surveillance warrant may be granted*** *That the Surveillance Devices Act 1999 be amended to provide that a warrant may only be granted for the use of a surveillance device in relation to a relevant offence which is defined as:* *(a) an offence punishable by a maximum term of imprisonment of three years or more, or for life; or* *(b) an offence that is prescribed by the regulations.*
86	***offences in relation to which a surveillance warrant may be granted*** *That the Surveillance Devices Act 1999 section 17(1) be amended by adding the following provision:* *"(d) in the case of an application for a warrant relating to an offence other than a serious indictable offence - that exceptional circumstances exist."*
87	***- emergency authorisation*** *That the Government continues to review the use of the provision in the Surveillance Devices Act 1999 which allows an application for an emergency authorisation in relation to serious drug offences, to establish whether there is sufficient justification for the continuing inclusion of the provision.*
88	***admissibility of improperly or illegally obtained evidence*** *That the Surveillance Devices Act 1999 be amended to specifically make inadmissible evidence illegally collected by a surveillance device without a properly authorised warrant.*
89-123 PENALTY ENFORCEMENT WARRANTS	
117	***debtor's notice*** That the *Magistrates' Court (General Regulations) 2000* be amended to require the service of a debtor's notice of rights and obligations to render the execution of a penalty enforcement warrant valid. The notice should be consistent with relevant parts of Recommendation 47 to Recommendation 50.

124-130 ARREST WARRANTS	
124	**consolidation of powers & procedures** That the Government institute a regime to consolidate Victorian arrest warrant powers and procedures by: (a) the removal of existing arrest warrant procedures from the various authorising Acts and from the *Magistrates' Court Act 1989* into the same consolidated Warrants Act as has been recommended for search warrants; (b) the retention of existing Acts conferring arrest warrant powers, which will continue to authorise relevant officials to use arrest warrants; (c) the presumption that all other aspects of arrest warrant powers conferred by existing Acts will be governed by the standard procedures in the new Act; (d) the provision in existing Acts conferring arrest warrant powers of such special conditions and exemptions from the standard procedures as are justified and consistent as far as possible with the purpose and effect of the standard procedures in the new Act.
125	***agreement to inform VALS of arrest warrant*** *That Victoria Police work with VALS to formalise an agreement for the notification of VALS of any outstanding arrest warrants for indigenous people, in cases where it is practicable and reasonable to do so.*
126	***agreement to inform VALS of arrest warrant*** *That the agreement be subject to similar performance monitoring by Victoria Police as the agreement with VALS regarding arrest notification and take account of the recommendations of Victoria Police's forthcoming report into the timeliness of arrest notification.*
127	***arrest warrant statistics*** *That Victoria Police ensure the collection of arrest warrant statistics, as part of the new database that replaces LEAP, at all stages of its involvement in arrest warrant processing. The statistics should record the date and time of day of execution and whether the arrestee is an indigenous person.*
128	**improved record keeping: agencies** That the terms of Recommendation 18 to Recommendation 22 be adopted in relation to the creation of an arrest warrants register by each agency with arrest warrant powers, with the additional requirement that the register record whether the subject of the warrant is an indigenous person, wherever such information is available or can be practicably obtained.
129	**improved record keeping: issuing officers** That the terms of Recommendation 23 to Recommendation 32 be adopted in relation to the establishment, reporting and monitoring of arrest warrants registers for the Magistrates', County and Supreme Courts, with the additional requirement that the register record whether the subject of the warrant is an indigenous person, wherever such information is available or can be practicably obtained.
130	**improved record keeping: issuing officers** That in implementing Recommendation 34 and Recommendation 35, the Government require the inclusion of information, wherever it is available or can be practicably obtained, as to whether the subject of an arrest warrant is an indigenous person.