



Victorian Aboriginal Legal Service Co-operative Ltd.

Head Office:
6 Alexandra Parade,
P.O. Box 218
Fitzroy, Victoria 3065
Phone: (03) 9419 3888 (24 Hrs)
Fax: (03) 9419 6024
Toll Free: 1800 064 865

VALS submission to the Victorian Law Reform Commission in response to: Interim Report: Family Violence Police Holding Powers – sent 24 November 2005

Thank you for the opportunity to comment on the Interim Report: Family Violence Police Holding Powers (Report). The Victorian Aboriginal Legal Service Co-operative Limited (VALS) has the following comments:

VALS acknowledges that a Family Violence Police Holding Power is positive in that it will result in perpetrators of family violence more frequently being removed from the family home, rather than the victim and children being removed. However VALS has concerns about the power and requests that the power be re-thought in light of:

- the following issues that affect Indigenous Australians;
- the fact that Term of Reference 6 of the Victorian Law Reform Commission (VLRC) brief is to have regard to the accessibility of the Crimes Family Violence Act and whether it is working effectively for Indigenous communities.

Firstly, VALS is shocked and disappointed by the process in which Police Holding Powers have been debated to date. VALS is under the understanding that the VLRC Interim Report was tabled in Parliament on 15 September 2005 and the recommended police holding powers were introduced to Parliament on 18 October 2005 and are currently at the second reading stage. The speed at which this process has occurred is a concern, especially as the introduction of police holding powers was only discussed in three paragraphs (para 5.64-5.66) of the Consultation Paper.

The Impact of Holding Powers on Indigenous Australians:

VALS is concerned by any increase in police powers because of the disproportionate impact that the powers may have on Indigenous Australians, who come into contact with police more often than non-Indigenous Australians (ie; over-representation in the criminal justice system). Nationally, Aborigines make up 21 per cent of the prison population.¹ In the context of family violence, nationally Indigenous Australians are forty five times more likely to experience family violence than non-Indigenous Australians.

It was commented at a meeting between the VLRC and the Indigenous Australian community on 28 June 2005 that police holding powers might be acceptable if they are applied consistently. However, it is VALS' experience that supposedly neutral laws are not applied consistently or do not

¹ Banks, Amanda, 'Justice fails mentally ill Aborigines' *The Australian (WA edition)* November 3, 2005, p.6

have a uniform impact on all Australians. Not all Australians are equal and as a result laws have a unique impact on disadvantaged people. For instance, public drunkenness laws have an indirectly discriminatory impact on Indigenous Australians.

VALS is concerned that police holding powers have the potential to have a disproportionate impact on Indigenous Australians in comparison to non-Indigenous Australians.

Punitive Effect of Police Holding Powers on Indigenous Australians:

VALS is concerned that police holding powers will have a punitive effect on Indigenous Australians. VALS is concerned that:

1. Despite the rhetoric that the perpetrator will ‘placed’ in a police custody as a last resort, the recommendations prioritise a pro-prosecution approach to family violence (ie: as per the Police Code of Conduct).² VALS questions how the pro-prosecution approach of the Police Code of Conduct can be reconciled with the aim of holding a perpetrator in custody as a last resort. VALS argues that these two aims cannot be reconciled, and that in practice the holding of people at the police station will not be a last resort, but a first resort. As the two aims cannot be reconciled members of Victoria Police and the community will be confused by the holding powers.
2. The proposal prioritises an amendment to the criminal justice system, rather than exerting efforts to work outside this framework and give priority to alternative systems of dealing with family violence.

1. Prioritising a Pro-Prosecution Approach

The pro-prosecution nature of the proposal is exhibited in the following characteristics:

- **Breadth of the Police Holding Power due to Lack of Clarity**

There is lack of clarity about what ‘place’ to take the alleged perpetrator to. VALS is under the understanding that at the request of Victoria Police the VLRC did not make explicit in its recommendations exactly where the ‘place’ people are directed to will be. VALS is critical of the lack of clarity around the ‘place’ where people will be taken as it has the potential to be misleading. VALS is aware that in some the Northern Territory and Queensland the legislation is more openly honest about the role of police cells as the first resort. VALS argues that in reality the ‘place’ that Indigenous Australians will be taken to the police station as a first option. VALS justifies this on the basis of the following:

- *Reality in Practice*

After speaking with solicitors from Aboriginal Legal Services, Legal Aid and Police in other States and Territories it appears that it is the practice to take perpetrators to the police station. In particular, VALS received information from the ACT that police take the perpetrator back to the police station as it is more efficient to serve the Order on the perpetrator at the station.

² Victorian Law Reform Commission Family Violence Police Holding Powers Interim Report (August 2005), p.25

- *Lack of Appropriate 'Place'*

There is a lack of appropriate 'places', other than the police station, to hold people at, so the default position will be that people are held at the police station. This has serious implications for Indigenous Australians in terms of the Royal Commission into Aboriginal Deaths in Custody (1991). It is essential that the 'place' where people are directed to is culturally appropriate. VALS argues that the police station is a culturally inappropriate 'place' to hold Indigenous Australians. The cultural inappropriateness of the police station is a reason why Indigenous Australians do not call police in the first 'place'. It was also mentioned at the meeting on 28 June 2005 that women would feel like they were betraying family by sending the man away.

VALS is concerned that despite the cultural inappropriateness of a police station, the majority of Indigenous Australians will be held at a police station. It will become the default position to hold a person in a police cell. In effect, the police station will become the first resort due to lack of appropriate alternative 'places'. Also, if the 'place' is inappropriate, the perpetrator is practically being set up to fail as they will not remain at the 'place'. There is no mention in the Report of the 'place' being a culturally appropriate 'place'. VALS argues that the most culturally inappropriate 'place' is the police station in light of the history between Indigenous Australians and police. However, with a lack of service provision it appears that the default will be the police station.

VALS is concerned that if an increase in police powers is not accompanied by an increase in the level of service delivery to Indigenous Australians then the impact of the police powers on the Indigenous Australian community will be negative. There needs to be funding for services to accompany the increase in police powers. It was recommended at the meeting on 28 June 2005 that the Victorian Law Reform Commission invited Indigenous Australians to that: *We should not extend police powers without an accompanying extension of Aboriginal services.*

VALS is under the impression that the motivation for the recommendation of not extending police powers without an accompanying extension of Aboriginal services was motivated by acknowledgment of the following:

- Lack of specific services for Indigenous Australians, especially those that operate 24 hours a day. If police holding powers are introduced they should not be introduced until the planned Time Out/Healing Centres are established.
- Existing Indigenous Australian services are over burdened as it is and will feel the extra burden of catering for Indigenous Australians who are directed to their service under the police holding power.
- The historical relationship between Indigenous Australians and Victoria Police.
- There is a lack of service providers who provide a culturally sensitive service who can cater for the person directed to their service under the police holding power.

VALS is also concerned that the holding power will increase the rate at which Indigenous Australians end up having charges, such as resist arrest or assault police, laid against them. This is because of the poor relations between Victoria Police and the Indigenous Australian community.

VALS recommends that the ‘place’ where the alleged perpetrator will be sent should be:

- The police cell as a last resort;
- Culturally appropriate ‘place’.

Insufficient Safeguards to Prevent Abuse of the Broad Holding Power

Role of the Aboriginal Community Justice Panel

VALS acknowledges that the VLRC has given thought to safeguards to protect disadvantaged people subject to the holding powers. However, VALS argues that the following safeguard has flaws, people must be granted access to an Aboriginal Community Justice Panel representative or appropriate support if they identify themselves as Aboriginal or Torres Strait Islander (2(h)(iv)).

The flaws are that:

- It appears that the safeguard applies to instances where the perpetrator has refused to remain at the ‘place’ and detained at the ‘place’ or police station. It does not appear that the safeguard covers the situation where a perpetrator is directed to remain at a ‘place’ (ie: police station or alternative ‘place’) which may or may not be in the company of a police officer.
- VALS questions whether the safeguard covers the situation where Indigenous Australians are taken by police to ‘places’ other than the police station. Arguably, Indigenous Australians are at risk of abuse of power by police if police are removed from the police station setting where their actions are observable by other police officers.
- The extent to which Aboriginal Community Justice Panels (ACJPs) will be able to support Indigenous Australians and put the recommendation into practice is questionable. This is because the ACJPs do not exist in every region (eg. Melbourne Metropolitan area) The ACJP is under-funded currently and only manned by volunteers. More funding should be provided to ACJPS. It should not be an expectation that Indigenous Australians will volunteer, their labour is valuable. Not all Koories desire ACJP involvement or not all ACJPs desire involvement with all members of the Indigenous Australian community.

Role of the Victorian Aboriginal Legal Service

VALS questions the role that VALS as an organisation will play in instances when police holding powers are exercised. It is recommended that VALS falls into the category of ‘other appropriate support person’ that the perpetrator can have access to if detained.

VALS assumes that VALS will be notified through the E*Justice notification system when a person is taken into custody for not complying with the holding power and stresses that this needs to be the case if it is not indeed the case. VALS has an agreement with Victoria Police that when an Indigenous Australian is taken into custody that VALS will be notified. VALS would go further and say that the perpetrator should not only have access to VALS when they are detained, but earlier on when they are at the 'place' where they have been directed to remain (ie: before refusal to remain at the 'place' occurs).

VALS seeks clarification on the status of the perpetrator when they are subject to the first phase of the holding power (ie: directed to remain at a 'place', possibly in the company of a police officer). For instance, are they in custody at this stage? VALS recommends that as a safeguard VALS should be notified when a person is subject to the first phase of the holding power. These recommendations are motivated by the over-representation of Indigenous Australians in the criminal justice system and the high number of Indigenous Australian deaths in custody. VALS supports that fact that the reform is motivated by the safety of the victim and children, but argues that in light of the relationship between Indigenous Australians and the police the safety of the alleged perpetrator should not be overlooked.

Record on Attendance Register at Police Station

VALS is concerned by the safeguard that states that an adequate record is to exist of the exercise of the holding power at a police station. VALS insists that there should be a similar safeguard and record in instances where the person is held at a 'place' other than the police station and the police officer remains at the 'place'. VALS questions whether the failure to mention the need to record the exercise of the power at a 'place' other than the police station reveals the true intentions of the proposal to introduce police holding powers, namely that perpetrators are to primarily be held at police stations.

Death

VALS also inquires as to the liability of the operators of the 'place', other than the police station, who consent to a person being held at their 'place'. The Report seems to be at pains to state that police are not liable, but does not make any reference to the liability of operations of alternative places. For instance, what will happen if an Indigenous Australian commits suicide at a 'place' other than the police station? VALS recommends that the requirements of the RCIADIC, in terms of cells (ie: hanging points) apply to all 'places' whether or not they are police station.

- **Breadth of the Holding Power**

VALS is concerned by the breadth of the holding power which makes it a draconian power that has the potential to be misused. For instance, the power enables the alleged offender to be uprooted and it could be used as a licence to ship perceived trouble makers, such as Indigenous Australians, out of town. Arguably there are similarities between police holding powers and police 'move on' powers, which are known to have a disproportionate impact on Indigenous Australians in comparison to their non-Indigenous Australian counterparts.

VALS believes that framing provided for the grounds for using the powers (ie: reasonable belief of grounds for an Intervention Order) is too broad.

VALS is aware that Victoria Police have the power to arrest, but have been criticised for not using this power in the context of family violence, and a holding power will give police more powers. VALS is concerned that if holding powers are framed broadly there is a risk that police will use the removal power as a matter of course.

- VALS recommends that use of the power should be limited to instances where there is a risk to the physical safety of another or others. In effect this excludes the power in instances of harassment etc.
- **Breadth of Power to Arrest Without a Warrant Upon Failure to Remain at the ‘Place’:**

VALS is concerned by the breadth of the power to arrest without a warrant upon failure to remain at the ‘place’. For instance, a person can be arrested for not committing a crime in the true sense of the word, or even approaching the victim, but simply not remaining at a ‘place’. In effect the power is more inhibiting of a person’s liberty and freedom of movement than an Intervention Order. In particular, VALS is concerned that Indigenous Australians will be caught by this power because they are directed to remain at a culturally inappropriate ‘place’.

- **Compounded with the Breadth of the Holding Power is the Lack of Agency of the Victim and Perpetrator:**

The breath of the police holding power leaves no room for agency or choice/election by the victim or perpetrator, as any discretion is entirely left in the hands of the police officer. VALS argues that any reform to a police response to family violence needs to take into account the unique history between Indigenous Australians and the police which is as follows:

- Relations between Indigenous Australians and police has been negative in some instances, resulting in the former not trusting the latter’s use of discretionary powers.
- Indigenous Australians victims of family violence when given the choice are reluctant to call police because they do not want the perpetrator to come into contact with police and open the possibility of mistreatment or death at the hands of police.
 - VALS recommends that the victim be given some agency and choice as to whether the perpetrator is taken to a ‘place’.
 - VALS recommends that the perpetrator be given some agency and choice as to the ‘place’ where they are sent. It may be that the perpetrator wishes to go to a particular service or residence, or even a police station.
 - VALS recommends that the ‘place’ where the perpetrator is being directed to attend should be given the opportunity to say whether they consent to the perpetrator being held there. The Indigenous Australian ‘place’ (ie: time out house) should be involved in the decision making process around how the police holding power is

implemented (ie: protocol around sending perpetrator to the time out house, such as whether the police remain at the 'place' with the offender).

2. Prioritising Amendments to the Criminal Justice System:

Feedback was provided to the VLRC following the meeting on 28 June 2005 that during the meeting too much emphasis was placed on a criminal justice response to family violence. This was exhibited by the majority of the meeting being devoted to topics related to improving the criminal justice system, such as increasing police powers, as opposed to alternatives to the criminal justice system. VALS made a similar comment in a submission in response to the Review of Family Violence Law Consultation Paper. VALS acknowledges that the VLRC commission attempted to rectify the oversight of alternative responses to family violence by holding a meeting for Indigenous Australians to discuss this topic. However, the VLRC has made clear where its priorities lay by releasing an Interim Report that only provides for improvements to the criminal justice system (ie: police powers), as there is no mention of alternative responses. VALS urges the VLRC to consider alternative responses in the Final Report at least.

OTHER CONCERNS:

Lack of Clarity about how the Perpetrator Will Get To and From the 'Place':

There is lack of clarity about how the perpetrator will get to and from the 'place'. It is a concern that the perpetrator will be stranded at the 'place' with no way of getting home, especially if they are released at night time, and picked up again by police for another offence. This raises the issue of how far will the 'place' be from the perpetrators home?

Lack of Mention of Training

VALS is concerned by the lack of mention of the need to train police about the use of holding powers. Indigenous Australians should be involved in this training. Police Officers should be trained about the possible reaction of Indigenous Australians to the powers in light of Koori and police relations in the past. Also, police officers should be made aware of the need to direct Indigenous Australians to attend culturally appropriate 'places' and have a list of appropriate 'places'. Also, there should be community education on the police holding power so that people are aware of their rights and can hold police accountable for the exercise of the power.

VALS repeats a main point: If police powers are going to be increased, support for the Indigenous Australian community also needs to increase. Thank you for the opportunity to comment on the Interim Report: Family Violence Police Holding Powers. If you have any queries please contact Greta Jubb (Research Officer).