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VALS submission to the Victorian Parliament Law Reform Committee in response query re Pre-European Aboriginal Burial Remains - sent 17 May 2006

Thank you for the opportunity to comment on whether the Protocol for management of Aboriginal skeletal remains between the Coroners Court and Aboriginal Affairs Victoria (AAV), relating to pre-European Aboriginal burial remains, should be enshrined in the Victorian Coroners Act 1985 (Act).

The Protocol provides that if it can be established reliably that the reported remains are Indigenous Australian and from an era prior to contact with Europeans, then the Coronial Services Centre will transfer responsibility for those remains to AAV. The Protocol is positive to the extent that it stops the Coroner investigating Indigenous Australian burial remains and this should be enshrined in the Act as is the case in Queensland. The Queensland Coroners Act 2003 states: the Coroner must stop investigating a death if “the coroner’s investigation shows that the body is indigenous burial remains.” (Part 3 s12(2)(a). However, the Protocol transfers responsibility of burial remains to AAV ahead of Indigenous Australians and this element should not be enshrined in the Act.

ARGUMENTS AGAINST ENSHRING THE PROTOCOL IN LEGISLATION

The arguments against enshrining the Protocol in legislation are:

- AAV is a Government Agency. The benefit of enabling the State Coroner's Office or the Indigenous Australian community to deal with burial remains is that both are independent of Government.
- There is growing distrust amongst the Indigenous Australian community of the handling of heritage matters by AAV. This distrust is influenced by the proposed Aboriginal Heritage Bill which has been criticised as:
 - Decreasing the authority of Traditional Aboriginal people to make decisions in relation to their own cultural heritage.
 - Increases power of the Minister of Aboriginal Affairs in relation to cultural heritage at the expense of the Indigenous Australian voice.
 - Increasing the tensions among Indigenous Australians as they will have to compete to be heard.
 - Resulting in more decisions being ‘settled’ by VCAT, a body with no Indigenous Australian expertise and a leaning that favours development

- Replacing current Inspectors, who are volunteers and Indigenous Australians, with paid public servants who will be ‘yes men’ to the Government mandate.
- The Protocol does not make it clear that AAV will involve the Indigenous Australian community when burial remains are discovered or Indigenous Australians have any decision making power. AAV is given prominence over Indigenous Australians under the Protocol. The Queensland Coroners Act 2003 provides an example of legislation that enshrines an arrangement to the effect of the Protocol. In Queensland, a Government Department (Department of Natural Resources and Mines) is notified of the burial remains ahead of the Indigenous Australian community pursuant to s26(2)(a) of the Queensland Coroners Act 2003. Indigenous Australians do not have recourse under the legislation to challenge the Government if the Government does not notify them of the remains.
- Indigenous Australians should be involved and given decision making power when Indigenous Australian remains are discovered. Indigenous Australians should have investigation and burial remains management powers. Indigenous Australians should be given prominence over AAV in relation to burial remains in order to ensure Indigenous Australian beliefs, law and customs are respected and Indigenous Australians’ right to self-determination is respected.

ALTERNATIVES TO ENSHRING THE PROTOCOL IN LEGISLATION

VALS argues that rather than enshrining the Protocol in legislation the following should occur:

Removal of AAV as the middle man

When Indigenous Australian pre-European burial remains are discovered AAV should be removed from the position of middle man when dealing with such remains. According to AAV representatives the current practice is for AAV, when notified by the Coroner pursuant to the Protocol, to notify Indigenous Australians. The positioning of AAV as the middle man between the Coroner and Indigenous Australian community is inefficient and it would make sense to create a direct contact and communication line between the Coroner and relevant Indigenous Australian community. Also, the positioning of AAV as the middle man places AAV in a position of power as Indigenous Australians rely on the goodwill of AAV to notify them of the remains. The power imbalance between Indigenous Australians and AAV raises the issue of whether AAV will take into account the Indigenous Australian perspective in coming to a decision. Decision making power in relation to burial remains should rest entirely in the hands of the Indigenous Australian community.

Perhaps the model in the Tasmanian Coroners Act 1995 could be adopted where the Coroner refers the matter of the remains to an Aboriginal organisation approved by the Attorney-General [s23(2)].

As a result, the Coroner does not carry out investigations, but the Aboriginal community does and prepares a report for the Coroner, s23 (3)(b).. If the Report states the remains are Aboriginal the jurisdiction of the Coroner ceases, s23(4), and if the Report state the remains are not Aboriginal the jurisdiction of the Coroner is reinstated, s23(5). In Tasmania in 2002 a Protocol was established in relation to section 23 of the Tasmanian Coroners Act 1995, naming the Tasmanian Aboriginal Land Council (TALC) as the Attorney-General approved organisation and outlining the practical assistance provided to the TALC and practical work performed by TALC. VALS endorses the Section 23 Protocol which is attached at Appendix 1.

In support of the argument that the Indigenous Australian community should be involved when burial remains are discovered VALS cites Recommendation 39 of the Royal Commission into Aboriginal Deaths in Custody (1991): “That in developing a Protocol with Aboriginal Legal Services and Aboriginal Health Services as proposed in Recommendation 38, the State Coroner might consider whether it is appropriate to extend the terms of the Protocol to deal with any and all cases of Aboriginal deaths notified to the Coroner and not just to those deaths which occur in custody”. VALS has not had any discussions to the effect of the Recommendation and is prepared to enter into discussions about this. VALS notes that the list of organisations in Recommendation 39 should not be considered exhaustive.

Introducing Guidelines

Recommendation 38 of the RCIADIC can be used to endorse the argument that guidelines relating to the treatment of Indigenous Australian burial remains should be introduced. Such guidelines should be based on the RCIADIC findings and recommendations. The need for this is recognized in the section 14(2) of the Coroners Act (QLD) 2003: “[w]hen preparing the guidelines, the State Coroner must have regard to the recommendations of the Royal Commission into Aboriginal Deaths in Custody that relate to the investigation of deaths in custody”.

VALS welcomes the fact that in Queensland Human Remains guidelines exist. Having said the above, VALS is concerned that Indigenous Australians are not involved early enough in the process of dealing with burial remains in Queensland and argues the same should not occur in Victoria. This is in spite of the fact that section 14(3)(b) of the Coroners Act (QLD) 2003 states: “[g]uidelines must deal with investigations of deaths involving human remains found in a suspected traditional burial site, and in particular, must provide for the early notification and involvement of the Aboriginal or Torres Strait Islander community having a connection with the burial site”.

The guidelines do not deliver on the above aspiration as page 3 of Part 3 (Legislative Framework) of the Guidelines makes it clear that: Indigenous Australians are only notified/involved once the remains are not deemed a crime scene and the Department of Natural Resources and Mines (NRM) have attended the scene to conduct investigation (ie: collect data on ethnicity, antiquity) to determine if the remains are Indigenous Australian. The effect of the guidelines is that the extent of involvement of the

Indigenous Australian community is only at the reburial and management of remains stage VALS argues that Indigenous Australians should not only be involved at the late stage once the remains have been determined to be Aboriginal. The Queensland model contrasts with the Tasmanian model, as the latter model is the optimum model that gives the TALC investigation powers. Indigenous Australians should be involved at the earliest stage possible when remains are discovered, and at least at the same stage as the NRM on the grounds that the remains are suspected to be Indigenous Australian. Indigenous Australians and NRM should attend the scene and conduct the investigation together. This will ensure accountability of NRM, or AAV in Victoria if they are to continue to be the middle man.

VALS endorses the content of the Queensland Guidelines, available at http://www.nrm.qld.gov.au/cultural_heritage/legislation/human_remains.html), that offer some cultural awareness information on Indigenous Australian burial remains. For instance Part 2 - Human Remains (General Information for Police) is excellent in providing a background to police who may come across Indigenous burial remains (ie: types of Aboriginal burial).

Indigenous Australian Coroners.

Another option is for Indigenous Australian remains to be deemed within the jurisdiction of Coroner, but that Indigenous Australian Coroners deal with such remains. Indigenous Australian Coroners would have the requisite expertise of a Coroner and cultural awareness of an Indigenous Australian.

Change wording of Protocol

VALS argues that if the suggestions above are not adopted and the Protocol is to be enshrined in legislation, it should not be enshrined in its present form. If the Indigenous Australian community is notified of burial remains by AAV, as is asserted to be the practice by AAV, this practice should be duly recorded in the Protocol to ensure accountability of AAV to the Indigenous Australian community.

Other Matters

VALS argues that there is need for increased powers for the State Coroner in relation to claims for a body of a deceased for funeral and burial. The current situation is that if there is competing interests for the body of a deceased then the Coroner will not release the body to either competing party and leaves it to one party to apply to the Supreme Court for an Order as to who the body will be released to for funeral. The distress caused by going through the Supreme Court Hearing warrants a quicker resolution of the claims of a deceased body for burial. The Coroner should be given power to make a decision promptly. There should be the possibility of an Appeal against the Coroners decision.