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

VICTORIAN ABORIGINAL LEGAL SERVICE CO-OPERATIVE LIMITED SUBMISSION TO THE IMPLEMENTATION REVIEW TEAM OF THE ROYAL COMMISION INTO ABORIGINAL DEATHS IN CUSTODY AS AT JULY 2004

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INTRODUCTION

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) welcomes this opportunity to address the implementation status of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC 1991). VALS notes that the scope and quality of this review of the implementation of the RCIADIC is unprecedented in Australia and welcomes this evidence of the Victorian Government's commitment to ongoing improvement to the rights and opportunities of Indigenous Australians.

VALS believes that the Victorian Government has implemented some valuable measures in relation to many of the RCIADIC Recommendations and that the Recommendations are still relevant. In some cases they are more relevant than ever, particularly in regard to the Commonwealth Government's wide ranging policy changes which in many cases amount to a repudiation of their previous commitment to assist the implementation of the Recommendations.

In spite of the emphasis on self determination in the RCIADIC Report, the Commonwealth Government have repudiated their commitment to this. In the case of VALS there was some hope that the Recommendation for three year funding made in 1990 might affect VALS. In 2003 funding was still on a twelve moth basis until it then moved to a six month basis. The third lot of six monthly funding has now been offered. VALS believes this is a recipe for undermining service quality and sustainability. It highlights the Commonwealth Government's retreat from and reneging from commitments made in 1997 to work collaboratively to achieve implementation of the Recommendations.

Although VALS recognises the importance of the initiatives taken, there are instances in the history of Victoria where the Government has lacked an effective commitment to implement the Recommendations. Attempts to implement the Recommendations have not been effective for reasons such as the following:

- lack of resources to implement the Recommendations;
- lack of consultation on how best to implement the Recommendations;
- Commitment to policies which are counter to the successful implementation of the Recommendations;
- Policies which are too broad to guide action.

VALS argues that the Recommendations have been implemented with varying degrees of success. In this submission, VALS will attempt to address the reasons for this occurrence and suggest ways to rectify this occurrence.

Future attempts to implement the Recommendations have to take account of the new macro policy environment, lessons from the achievements of the Victorian Aboriginal Justice Agreement (VAJA) and new policy issues which have arisen over the last five years or so.

Macro Policies

Over the last decade or so there has been a rapid rate of economic change, deregulation, market mechanisms and the idea that Government's role is to move out of the way so individuals and businesses can flourish. This has been accompanied by campaigns of intolerance against Indigenous Australians and people from other countries, particularly recent arrivals. There has also been consistent media coverage of the Courts and prisons premised on the assumption that if enough people were locked up for long enough, societies crime problems would be solved.

In spite of the economic success and wealth of Victoria and Australia, our willingness to recognise and address systemic disadvantage, and the increasing gap between rich and poor appears to be receding. This is an unhealthy attitudinal and policy mix to build support to address the RCIADIC Recommendations. The VAJA is significantly compromised, let down and undermined by what amounts to effectively an injustice plan. The Commonwealth Government has a more virulent form of 'injustice plan which includes mainstreaming, tendering, more and more narrowly targeted policies and lack of support for Indigenous organisations. The more general issue is that if the community are told that systemic disadvantage is the fault of the individual and that the solution to crime is more punishment, both of these demonstrably false propositions will undermine the willingness and capacity of Government to take appropriate action.

Perhaps an even more fundamental facet of this mind set is a lack of recognition that effective programs and policies, effective justice systems and effective government require a willingness to be flexible, recognise difference and respond. The arguments against the above characteristics, on the basis that it creates two systems of justice, or on the basis that everyone should be treated the same, are disturbing. They are disturbing because they imply that it is possible to establish institutions which can treat everybody the same. In theory it is possible, in practice it is extremely difficult. It is also disturbing because it implies that treating everyone the same should be the goal.

VALS recognises that responsibility for some of these matters is at a Commonwealth Government level. The more general point is that Indigenous Australians are fighting to overcome disadvantage in a policy environment that individualises, ignores or pays lip service to tackling systemic disadvantage.

Implementation Problems

The macro policies mentioned above have a flow on effect in terms of morale, having to explain to people why there needs to be a policy or a service or a strategy and having to justify to people why knowing something about Indigenous Australians and services might be advantageous.

To avoid efforts to marginalise programs to remedy Indigenous disadvantage these programs need to be better located as part of a range of strategies to reduce disadvantage.

The focus of the VAJA was to a large extent focused on project implementation at the expense of keeping an eye on the health of broader system changes. On the one hand the 339 Recommendation are too numerous and comprehensive to provide an accessible strategic guide to progress on implementation and the project focus of the VAJA was too narrow to facilitate a more broadly strategic approach.

New Policy Issues

Increased recognition of the incidence and costs associated with Family Violence have occurred over the last decade. Much of the RCIADIC is relevant to prevention of family violence, particularly the importance of self determination Recommendations, using prison as a last resort and a range of other Recommendations about better health, education and accommodation services. There is an issue about how the balance between criminalising Family Violence, minimising use of the criminal justice system, use of diversion and prevention and increasing community education should be achieved. There is also a need to ensure that criminalising and imprisonment don't become the default setting due to the failures of other interventions or failure to resource and develop other types of intervention.

RECOMMENDATIONS

Future Progress towards Implementation of the RCIADIC

General Recommendations

There are a range of ways that the policy climate and community awareness of the need for RCIDIAC issues implementation could be improved. These include:

1. Reaffirm the importance of working in partnership with the Koorie Community and finding ways to do this more effectively.

2. Programs and policies to increase knowledge about and discussion of rights protection mechanisms and the role of human rights standards and other mechanisms to establish a fair and just system of resource distribution and dispute resolution. By Parliaments, Governments and Courts. (This could help debunk the myth that treating everybody the same is the only or the best means of achieving justice)
3. Law making, implementation and policy making has to be more inclusive and transparent to reduce the level of cynicism about the role of Government and Courts.

4. The idea that new laws and longer sentences are effective means of achieving compliance needs to be recognised as one that has limited effectiveness.

5. The importance of community understanding and engagement in problems and solutions associated with critical social and justice issues needs to be promoted.

6. A more comprehensive Government commitment to reducing systemic disadvantage using a range of strategies. A subset of this policy would be promoting awareness that disadvantaged groups and minority group's views and interests should be respected and listened to.

7. Any proposed new legislation should, prior to development, be subject to an analysis by people with Indigenous, non-Indigenous and academic perspectives of its impact on Koorie people. The analysis could encourage things such as alternatives to legislation to be considered, how consistent the proposed legislation was with other legislation, capacity of the legislation to cause confusion, ambiguity and cost, impact on other disadvantaged groups, impact on legal aid, and human rights impacts.

8. Consultation with the community generally and Indigenous Australian communities in particular should be subject to a set of policy guidelines which recognise the value of consultation, the different forms it may take, time frame and structures which may be employed, the need for standards in relation to size and complexity of written material provided, time frames and need to provide feed back. There needs to be community input to these guidelines.

9. Consultation and the public capacity to respond to Government needs and priorities should be recognised as a scarce resource. The Koorie community in particular has difficulty responding to a multitude of inquiries, law reform and policy development processes from all levels of Government and from many Government departments.

   Attention should be given to key State Government Departments, non-Government organisations and semi Government Departments developing a forward plan to attempt to consolidate and integrate attempts to consult Indigenous Australians on an annual basis. This would help avoid duplication, poor levels of response to surveys and consultation and the complaint that research and consultation information doesn't go anywhere. Indigenous Australians must be employed to help do this and RAJACS and other groups could also assist. This could mean that several times a year there is a systematic consultation cycle involving visits to communities to gather information on highly contentious or highly significant policy, program or justice related issues. Other matters might be researched via phone calls using already existing networks and organisations.

10. Establish an annual or twice yearly Indigenous organisation 'good news stories' week to help counter the toxic and discriminatory approach that the media tends to have in relation to Indigenous organisations and people.

11. Instead of a 'whole of government' approach to RCIADIC implementation (which is utopian and difficult to establish), a more strategic approach might identify key

issues areas and key stakeholders. Thus an arc or matrix of people identify possible responses to key issues and then strategies to implement them. This is a partial response to the criticism that the Justice plan was perceived to be top down approach. Regular meetings of the Aboriginal Justice Forum and Regional Aboriginal Justice Advisory Committee (RAJAC) meetings have helped counter that problem and an integrated community consultation strategy could help reduce that problem. The arc or matrix idea is premised on the assumption that top down or bottom up both take a long time and there are some issues which can be addressed by having a middle level problem solving approach rather than a top up or down approach.

12. Some key outcomes or indicators around specific issues could be established to provide a road map which was easily identified. In relation to sentencing this could take the form of an objective of reducing the total number of Indigenous prisoners and the overrepresentation rate. It could also involve an Education Strategy to build community support. This could Involve the Sentencing Council, Crime Prevention Victoria, Corrections Victoria, RAJAC, community organisations and the media.

13. Other areas of critical importance where headline indicators might assist continuing recognition of the issues are in relation to self determination, education, Indigenous people and police and relations with non-Indigenous community and child welfare.

Specific Recommendations

Recommendations Relating to Sections of the Discussion Paper

Indigenous deaths in custody

The Coroners Act 1985 could be amended to reflect the Coroners Act (NT) 2000 which includes the following in the definition of next of kin: “where a person is an Aborigine - a person who, according to the customs and tradition of the community or group to which the person belongs, is an appropriate person” [s3(e)].

VALS calls for the Government to implement recommendations about education training and strategies related to Indigenous people in police cells to ensure that the Swan Hill incident is not repeated with disastrous and tragic consequences.

Official Prison Visitors

In light of the unfettered discretion of the Minister for Corrections to appoint Aboriginal Official Prison Visitors, VALS suggests that the Corrections Act 1986 and Corrections Regulations 1998 be amended to provide safeguards against this discretion being exercised in a discriminatory manner (ie: on the basis of criminal record). For instance, legislation could cater for the following specific situation: if a person has been convicted

for a minor offence, is twenty five years of age and above and has not re-offended within the last five years, they should be permitted to become an Aboriginal Official Prison Visitor. This safeguard is logical in light of the fact that most people offend under the age of twenty five.

Criminal record as an attribute of prohibited discrimination

VALS suggests that section 6 of the Victorian Equal Opportunity Act 1995 (attributes of prohibited discrimination) be amended to reflect progress made in other Australian jurisdictions.

Spent Convictions

A spent conviction scheme should be established in Victoria to give people a chance to live down minor criminal convictions. If legislation is not enacted then human rights will continued to be violated and discrimination will continue against people who have fulfilled the terms of their criminal conviction.[1]

Police Training and Performance Incentives

VALS argues that there is a need for the training of police to be ongoing, rather than a once off training session. VALS argues that education is required to tackle discrimination, challenge the status quo of inequality and effect institutional change. Police training, ongoing education and performance monitoring must provide a greater incentive to officers to improve their skills and knowledge in the area of Indigenous communities, Indigenous programs and government sentencing policies.

Independent investigation of Police complaints should be introduced.

Police should receive additional training in the areas of communication, negotiation and strategies for dealing with difficult people.

The Victorian Government introduced legisaltion to shield themselves from the obligation to pay damages when an assault by police occur but the police acting outside their official duties. This is an additional obstacle for the person who believes that they have been assaulted. This legislation should be reformed.

Fines

VALS welcome a fine system that is more flexible for people experiencing financial or social hardship (i.e.: ‘warning system’ and diversionary programs). VALS believe that there should be a clear right to and a clear process to convert all court fines to community based orders, that it should be an across the board rule that people can negotiate part payment of fines and that there should be lower fines for low income people.

[1] Knowler Jeanette ‘Living down the past - Spent convictions schemes in Australia

Police Cautioning

VALS welcome a fine system that is more flexible for people experiencing financial or social hardship (i.e.: ‘warning system’ and diversionary programs). VALS believe that there should be a clear right to and a clear process to convert all court fines to community based orders, that it should be an across the board rule that people can negotiate part payment of fines and that there should be cheaper fines for low income people.VALS is concerned to see that legislation, expected to be enacted

Warrant to Arrest

VALS calls for the institution of a procedure whereby Victoria Police informs VALS of the existence of a warrant to arrest

VALS welcomes the proposed amendment to the Bail Act 1977.

Decriminalising Public Drunkenness

VALS calls for the Government to stop stalling and establish non-custodial facilities (i.e.: sobering up centres) and decriminalise public drunkenness.

Underling Issues

That the Government amend the Equal Opportunity Act 1995 to include ‘social status’ and ‘drug use’ as attributes upon which people cannot be discriminated against.

Extend the consumer safety net for consumers of essential services post December 2004.

Juveniles

Take action to ensure that Indigenous juveniles do not end up in adult prisons.

Implement the proposal to raise the criminal jurisdictional limit of the Children’s Court from seventeen to eighteen years of age (Children and Young Person’s Act 1989).

Alter legislation that permits children to end up in adult prisons indirectly (ie: via Detention facility - Children and Young Person’s Act 1989).

Legislative recognition of the Aboriginal Child Placement Principle in line with other States in Australia

Legislative recognition of the essential role of Aboriginal Child Care Agencies, such as Victorian Aboriginal Child Care Agency.

The Department of Human Services consulted with the Indigenous Australian Community on the proposed reforms to the Victorian Children and Family Service System

The Department of Justice consider Gippsland (Moe) as a location for the establishment of a Koori Court, with a Children's Division.

Tendering out Legal Services for Indigenous Australians

VALS calls for the Victorian Government to again express concern to the Commonwealth Government about the proposal to Tender out Legal Services for Indigenous Australians.

VALS recommends that legal services for Indigenous Australians have twelve months notice if they are to be tendered.

VALS calls for the Victorian Government to counteract the erosion of the right to self-determination by the Commonwealth Government.

GENERAL

Background to the Royal Commission into Aboriginal Deaths in Custody

It is worthwhile to reflect on the context of the review of the implementation status of Recommendations in 2004 by discussing the background to the RCIADIC.

The RCIADIC is a study of Indigenous law and justice issues, including underlying causes which bring Indigenous Australians into excessive contact with the criminal justice system. The RCIADIC highlighted the tragic loss of Indigenous Australian's lives in the prison system. The RCIADIC has relevance and value today in 2004 and is often quoted and relied upon and reinforced in literature that addresses issues facing Indigenous Australians.

The findings of the RCIADIC can be summarized as follows:

- Indigenous Australians come into custody at a much greater rate than non-Indigenous Australians.
- Indigenous Australians die in custody at a rate relevant to their proportion of the whole population which is totally unacceptable. This occurs not because Indigenous Australians in custody are more likely to die than others in custody, but because the Indigenous population is grossly over represented in custody.

The RCIADIC contained three hundred and thirty nine Recommendations aimed at addressing the overrepresentation of Indigenous Australians within the criminal justice system and these fall into the following areas:

1) The criminal justice system.
2) Underlying issues that lead to Indigenous Australians coming into contact with the justice system.
3) Self-determination.

The RCIADIC has been subjected to the criticism that it fails to address the following issues:

- why women or youth die in prison custody, or enter the prison system.
- cultural healing, although arguably cultural healing can really only come from the Indigenous community.
- Accused of ignoring family violence and the deaths that relate to family violence

Background to the Current Review of the Implementation Status of the RCIADIC.

VALS welcomes the current review of the implementation status of the RCIADIC for a number of reasons. Firstly, VALS acknowledges that the review undertaken by the Victorian Government implements Recommendation 1a:
"That the Commonwealth Government and State and Territory Governments, in consultation with ATSIC, agree upon a process which ensures that the adoption or otherwise of Recommendations and the implementation of the adopted Recommendations will be reported upon on a regular basis with respect to progress on a Commonwealth, State and Territory basis".

Secondly, VALS acknowledges that Victoria is the first State to appoint community based co-Chairpersons to lead an implementation review. Until recently, Government Departments and agencies affected by the RCIADIC, completed a self-assessment form.[2]
Self assessment reviews have been criticised for the following reasons:

- It is difficult for staff of a Government Department or Agency to remain objective in accessing work undertaken by the Department or Agency.
- The Government Departments and Agencies accessed themselves on whether they had fully implemented, partially implemented or not implemented the Recommendations. The former terms are problematic for the following reasons:
    - The definition of the terms is unclear. It is not clear if quantity or quality of the implementation status of the Recommendations is being measured by the terms.
    - The value of such a review is doubtful because it is simplistic and does not go to the heart of the matter (ie: does not provide reasons for lack of implementation etc).

[2] 'Koori Justice: The Victorian Aboriginal Justice Agreement in Action', May 2004 Edition 5

VALS notes that it is difficult to regularly monitor the implementation of the RCIADIC and suggests that specific indicators or headline indicators should be devised to assist with the review process on a quarterly or annual basis as opposed to a comprehensive review which probably needs to occur every three to five years.

VALS notes that the Implementation Review Team has consulted with the Indigenous community in line with Recommendation 1c which provides: "[t]hat governments consult with appropriate Aboriginal organisations in the consideration and implementation of the various Recommendations in this report". However, VALS is concerned that the current RCIADIC Implementation Review has been undermined by the unrealistic timeline of six months, which has prevented a fully fledged consultation process. VALS acknowledges that attempts have been made to enhance the consultation process, such as establishment of a 1800 number. However, the short timeframe for consultation arguably defeats the purpose of consultation.

VALS argues that the RCIADIC Implementation Review must be an ongoing process, rather than an occasional review. However we also believe that there need to be a much smaller number of 'headline' or report card items which are identified as key performance indicators which facilitate a clearer and more strategic use of the Recommendations to guide action and monitor progress.

RCIADIC in the Context of 2004

Broader environmental matters that undermine specific attempts to implement the Recommendations

The 91% increase in Indigenous Australian prisoners over the last 12 years compared to a 62% increase for non Indigenous people highlights the impact of harsher sentencing policies and practices. The fact that there is no evidence that longer sentences reduce crime or increase community safety has so far not prevented Victoria and other States continuing to embrace this wasteful and ineffective practice. The failure of Victorian Governments to counter the move to higher imprisonment rates means that the RCIADIC Recommendations and the justice plan are being undermined and countered by what amounts to an "injustice plan. The macro policies, the punitive sentencing regime and the media hysteria that leads to almost double the number of Koori people in prison today compared to 12 years ago. VALS acknowledges that the increase in overrepresentation levels need to be read in conjunction with population increase and the policy climate in 2004.

Reasons for the Continued Over-Representation of Indigenous Australians within the Criminal Justice System

The following trends have arguably contributed to the continuing overrepresentation of Indigenous Australians within the criminal justice system:

- A ‘tough on crime’ or ‘zero tolerance’ approach to justice throughout the 1990s.

- Move away from an emphasis on prevention and rehabilitation to punishment.

- Increased reliance by Governments on market mechanisms to allocate resources Increased emphasis by Governments on responding to media pressureDirect and indirect attacks by government on minority groups and programs that support and advocate for them.

- Stigmatisation and suspicion of diversity, difference and specialised programs to meet the needs of different groups

- Aboriginal people are dying in custody in increasing numbers.[17] The Aboriginal and Torres Strait Islander Social Justice Commissioner reported that one hundred and forty seven Indigenous Australians have died in custody since the RCIADIC, compared with ninety nine deaths in the previous decade.[18]

- Some institutions use the Recommendations to work against Indigenous Australians. For instance, Indigenous Australians within prisons considered to be suicide risks are controlled by a chemical straight jacket (ie: administer drugs).

- Increased likelihood that Indigenous Australians are more likely than others to be charged with minor offences, particularly public order offences.[11] Minor offences have serious long-term consequences for many Indigenous Australians, as they increase the likelihood of further contact with the criminal justice system.[13]

- Failure to decriminalise public drunkenness.

- A mentality is apparent within some sections of the Indigenous community that prison is a ‘rite of passage’ or a way to find culture.

- Continuing need to improve coronial investigations of Indigenous deaths in custody.

- Continuing tension in relations between the police and Indigenous Australians

- Limited effectiveness of Victoria Police to notify VALS when an Indigenous Australian is taken into police custody.

- Growth in the Indigenous population and an increase in the numbers of Indigenous youth.

- Failure to address many of the underlying factors which lead to the over-representation of Indigenous Australians within the criminal justice system (ie: unemployment and substance misuse etc).

- Indigenous Australians continue to be subjected to direct and indirect discrimination within Australian society.

- Continuation of a cycle of the institutionalisation of Indigenous Australians. Often offences are committed by Indigenous Australians who have been involved in the Child Protection System.

- Limited success in implementing a 'whole of Government approach'

- Commonwealth Government trend to mainstream Indigenous services (ie: Tendering of Legal Services for Indigenous Australians). VALS argues that the over-representation of Indigenous Australians within the criminal justice system will continue if the proposal to tender out legal services goes ahead. The response of the VALS Chief Executive Officer, Frank Guivarra, to the proposal was: 'well, you might as well build more prisons'.

- Government trend to 'erode legal representation' by insufficiently funding legal aid services.

- Government trend to overlook Indigenous Australian's right to self determination (ie: proposed abolition of the Aboriginal and Torres Strait Islander Commission).

- Government trend of shying away from substantive justice which takes into account differences and outcomes to formal justice which claims all people are treated equally.

Positive outcomes of VAJA

The Victorian Aboriginal Justice Agreement represents a more integrated and strategic approach to implementing the Recommendations of RCIADIC. It has achieved a number of project outcomes. The Koori Court is an example of a project which has been expanded during the life of the plan and will incorporate a Koori Children's Court in the future.

The Victorian Aboriginal Justice Agreement also established Regional Justice Advisory Committees (RAJACs) and regular meetings of the Aboriginal Justice Forum. These meetings provide an ongoing opportunity for a variety of stakeholders Indigenous and non Indigenous to share knowledge and experience, identify problems, issues and sometimes solutions and respond to policy and legal changes. There are some concerns that the VAJA and RAJACs should be broader in scope and VALS believes that this is a valid policy direction. However the operation of RAJACs highlights the time required to deal with the quantity of issues and problems that have arisen in relation to criminal justice related matters. Although VALS have indicated a range of issues for the future the VAJA and the RAJACs have almost certainly prevented overrepresentation becoming worse. The VAJA and the RAJACs are a strong base to build on in the future.

INDIGENOUS DEATHS IN CUSTODY

OBJECTION TO AN AUTOPSY

The RCIADIC made 179 recommendations concerning the criminal justice and coronial systems. [3] These Recommendations have not been adequately legislated for in relation to coronial systems.

Recommendation 8 states: [t]hat the State Coroner be responsible for the development of a protocol for the conduct of coronial inquiries into deaths in custody and provide such guidance as is appropriate to Coroners appointed to conduct inquiries and inquests". VALS argues that a protocol needs to be established about cultural issues in the objection to an autopsy.

Recommendation 38 states: "[t]he Commission notes that whilst the conduct of a thorough autopsy is generally a prerequisite for an adequate coronial inquiry some Aboriginal people object, on cultural grounds, to the conduct of an autopsy. The Commission recognises that there are occasions where as a matter of urgency and in the public interest the Coroner may feel obligated to order that an autopsy be conducted notwithstanding the fact that there may be objections to that course from members of the family or community of the deceased.

The Commission recommends that in order to minimise and to resolve difficulties in this area the State Coroner or the representative of the State Coroner should consult generally with Aboriginal Legal Services and Aboriginal Health Services to develop a protocol for the resolution of questions involving the conduct of inquiries and autopsies, the removal and burial of organs and the removal and return of the body of the deceased. It is highly desirable that as far as possible no obstacle be placed in the way of carrying out of traditional rites and that relatives of a deceased Aboriginal person be spared further grief. The Commission further recommends that the Coroner conducting an inquiry into a death in custody should be guided by such protocol and should make all reasonable efforts to obtain advice from the family and community of the deceased in consultation with relevant Aboriginal organisations".

The current coronial investigation process is inadequate as it does not make provision for the above Recommendations, and instead leads to discrimination against people other than next of kin. The Coroners Act 1985 should be amended to reflect the following comments of Royal Commission into Aboriginal Deaths in Custody (RCIADIC 1991) Commissioner Elliott Johnson QC, supported by Justice Beach:

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[3] Deaths In Custody: How Many More? (1997) 2 AILR 551

- "no autopsy should be performed until the coroner has made every reasonable effort to contact the deceased's family and other interested persons to give them an opportunity to make representations in relation to the conduct of an autopsy". VALS notes that Johnson did not limit standing to next of kin, but 'other interested persons', which could incorporate Indigenous community members, Aboriginal elders and respected persons.

The Coroners Act 1985 currently does not reflect an understanding of the relevance of Aboriginal culture and community to coronial investigations. Arguably, the Coroners Act 1985 is discriminatory towards members of the Aboriginal community, Aboriginal elders and respected persons. The Coroners Act 1985 excludes people, other than senior next of kin, from objecting to autopsies.

Section 29(3) of the Coroners Act 1985 enables a senior next of kin to apply to the Supreme Court for an order that no autopsy be performed. Section 29(5) of the Coroners Act 1985 defines senior next of kin, in a hierarchical pattern, as follows:

(a) if the person, immediately before death had a spouse or domestic partner—the spouse or domestic partner; or;

(b) if the person immediately before death did not have a spouse or domestic partner or

if the spouse or domestic partner is not available—a son or daughter of or over 18;

or

(c) if a spouse, domestic partner, son or daughter is not available—a parent; or

(d) if a spouse, domestic partner, son, daughter or parent is not available—a brother or

sister of or over 18; or

(e) if a spouse, domestic partner, son, daughter, parent, brother or sister is not available—an executor named in the will of the deceased or a person who, immediately before the death, was a personal representative of the deceased.

The exclusion in section 29 of the Coroners Act 1985 of persons other than senior next of kin (i.e.: members of the Aboriginal community or Aboriginal elders and respected persons), who have cultural interests in whether or not an autopsy is performed, is discriminatory. In the case of Green v Johnstone, the most senior Aboriginal man in the Gippsland region did not have standing to initiate an objection to an autopsy.[4] The senior Aboriginal man could only write an affidavit supporting the objections of senior next of kin to an autopsy. He argued as follows: : "It is my opinion based on my knowledge of Aboriginal customary law that to carry out an autopsy on this infant is against Aboriginal cultural and religious law, which prohibits the mutilation of a body, so as not to harm the spirit of the deceased".

[4] Green v Johnstone [1995] 2 VR 176

In Green v Johnstone Justice Beach ordered that no autopsy be performed in recognition of the fact that it was contrary to Aboriginal cultural and religious law. According to Justice Beach "[i]n a multicultural society "great weight should be given to the cultural and spiritual laws and practices of the various cultural groups forming our society, and that great care should be taken to ensure that their laws and practices, assuming they are otherwise lawful, are not disregarded or abused". VALS argues that the Coroner's Act 1985 should be amended to reflect a recognition of the relevance of cultural objections to autopsies similar to that of Justice Beach.

The Coroners Act 1985 could be amended to reflect the Coroners Act (NT) 2000 which includes the following in the definition of next of kin: "where a person is an Aborigine - a person who, according to the customs and tradition of the community or group to which the person belongs, is an appropriate person" [s3(e)].

The 'reality' of the risk of Indigenous deaths in custody

The number of Indigenous deaths in custody in Victoria in comparison to other States and Territories is less, as there have been no Indigenous deaths in custody since 2000. VALS argues that these figures should not be interpreted to mean that it is safe for Victoria to become complacent about Indigenous deaths in custody. VALS is aware that the risk of Indigenous deaths in custody is 'very real', as a VALS client almost died in custody in March 2004. .

The VALS client attempted to hang himself in the cells at the Swan Hill police station, using his belt. The fact that the client was placed in the cells with his belt is in breach of operating procedures. It ignores the RCIADIC finding that belts are an object used by people to hang themselves, and that suspension points in cells need to be eliminated.[5] Recommendations (122-128) deal with safety in custody and highlight the importance of addressing the above matters.

VALS argues that the fact that the VALS client is alive today is not a result of the effective implementation of the Recommendations in terms of management and planning. Instead, the client is alive today due to the quick actions of a fellow prisoner and good fortune.

The Swan Hill incident is a harsh reminder that deaths in custody are still a threat in 2004. VALS calls for the Government to implement recommendations about education training and strategies related to Indigenous people in police cells to ensure that the Swan Hill incident is not repeated with disastrous and tragic consequences.

THE PRISON EXPERIENCE – VULNERABILITIES OF THOSE IS PRISON

ABORIGINAL OFFICIAL VISITOR PROGRAM

Recommendation 93 provides that: "governments should consider whether legislation

[5] RCIAIC (1991) paragraph 3.2.4

should provide, in the interests of rehabilitation, that criminal records be expunged to remove references to past convictions after a lapse of time since last conviction and particularly whether convictions as a juvenile should not be expunged after, say, two years of non-conviction as an adult".

> Recommendation 145ä states that: "[i]n consultation with Aboriginal communities and
> their organisations, cell visitor schemes (or schemes serving similar purposes) should be
> introduced to service police watch-houses wherever practicable".

VALS notes that the above Recommendations have not been implemented in Victoria, as discrimination on the basis of criminal record is permitted, preventing Indigenous involvement in visitor schemes. It is the opinion of VALS that the absence of detail within the Corrections Act 1986 or Corrections Regulations 1998, in relation to the grounds for appointing or refusing to appoint an Aboriginal Official Prison Visitor, has the potential to lead to discrimination.

Arguably, potential prison visitor candidates are discriminated against on the basis of their criminal record, as their record is treated as grounds for refusing to appoint them as Aboriginal Official Prison Visitors. Discrimination on the basis of criminal record "impedes the positive aspects of rehabilitation for the ex-offender and impacts on the family and associates as well" [(Law Reform Commission - Anti-Discrimination Act 1977 (NSW) [Report 92 (1999)].[188]

Section 35 of the Corrections Act 1986 states as follows:

(1) For each prison the Minister may appoint official visitors.

(2) The terms and conditions of appointment of an official visitor are those stated in the instrument of appointment.

The 'Terms and Conditions of Appointment of an Aboriginal Official Prison Visitor' [s35(2) Corrections Act 1986] require at paragraph seven disclosure of:
- Any criminal charges laid by police against the visitor;
- Any finding of a court in relation to those charges and;
- Any penalty imposed on the Visitor in relation to those charges.

(Attachment 1 of Aboriginal Official Prison Visitor Information Pack).

VALS welcomes the recent campaign of the Minister for Corrections' staff (Department of Corrections and Corrections Inspectorate) to actively recruit Aboriginal Official Prison Visitors. However, VALS is concerned that without legislative safeguards, discrimination against potential candidates on the basis of criminal record will continue. On VALS' reading of the Corrections Act 1986 and Corrections Regulations 1998 neither of these instruments implement safeguards in the appointment of Aboriginal Official Prison Visitors. Safeguards are important to prevent the Minister for Corrections, , exercising his veto discretion [s35(1) Corrections Act 1986] to accept or reject an Aboriginal

Official Prison Visitor on the basis of subjective and discriminatory values. It appears to be the unofficial policy that the Minister for Corrections' staff will not even attempt to give the Minister a brief that recommends the appointment of candidates with "excessive" and/or recent criminal histories. There is anecdotal evidence that a potential candidate, with a criminal history dating back twenty years, was excluded from the visitors' scheme without a right of review.

VALS is aware of the public policy grounds for not allowing people with criminal records to become Aboriginal Official Prison Visitors (i.e.: issues of security etc). However, there are also strong public policy grounds for permitting Aboriginal people, who have a distant and minor history of crime, and who have proven themselves to be reformed, to become Aboriginal Official Prison Visitors. The Howard League for Penal Reform, found in 1972 that the longer a convicted person "goes straight', the less likely it is that he or she will commit another crime.[6] The recommendations of the RCIADIC (1991), Aboriginal Justice Forum and Aboriginal Justice Agreement (2000) are consistent with the appointment of Aboriginal Official Prison Visitors.[7] At the VALS Indigenous Women's Justice Forum on 26 March 2004, the Implementation Review Team of the RCIADIC noted with concern that only two, out of the seven available placements for Aboriginal Official Prison Visitors, have been filled.

The Implementation Review Team of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody Review attended the Indigenous Women's Justice Forum. The issue of the low number of Official Prison Visitors was discussed. Indigenous women and men in prisons are crying out for organisations and the Indigenous community to visit them.

Suggested reform

Legislative safeguard

In light of the unfettered discretion of the Minister for Corrections to appoint Aboriginal Official Prison Visitors, VALS suggests that the Corrections Act 1986 and Corrections Regulations 1998 be amended to provide safeguards against this discretion being exercised in a discriminatory manner (i.e.: on the basis of criminal record). For instance legislation could cater for the following specific situation: if a person has been convicted for a minor offence, is twenty five years of age and above and has not re-offended within the last five years, they should be permitted to become an Aboriginal Official Prison Visitor. This safeguard is logical in light of the fact that most people offend under the age of twenty five.

Criminal record as an attribute of prohibited discrimination

VALS also suggests that section 6 of the Victorian Equal Opportunity Act 1995 (attributes of prohibited discrimination) be amended to reflect progress made in other

[6] Knowler, Jeanette 'Living down the past - Spent convictions schemes in Australia'
[7] Victorian Aboriginal Justice Agreement (2000), p 35, para 1.4

Australian jurisdictions. The Anti Discrimination Act (NT) 1996 and Anti Discrimination Act (TAS) 1998 prohibit discrimination on the basis of irrelevant criminal record. Section of the 3(1) of the Anti Discrimination Act (NT) 1996 defines "irrelevant criminal record" as:

(a) a spent record within the meaning of the Criminal Records (Spent Convictions) Act; or
(b) a record relating to arrest, interrogation or criminal proceedings where –

(i) no further action was taken in relation to the arrest, interrogation or charge of the person;
(ii) no charge has been laid;

(iii) the charge was dismissed;

(iv) the prosecution was withdrawn;

(v) the person was discharged, whether or not on conviction;

(vi) the person was found not guilty;

(vii) the person's finding of guilt was quashed or set aside;

(viii) the person was granted a pardon; or

(ix) the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises;

Spent Record Scheme

We refer to the definition of irrelevant criminal record in s3 (1)(a) (spent record) of the Anti Discrimination Act (NT) 1996. People are protected from discrimination on the basis of criminal record in the following jurisdictions, but not in Victoria: *Criminal Record Act* (NSW) *1991)*, Criminal *Law (Rehabilitation of Offenders) Act (QLD) 1986 and* Criminal Records (Spent Convictions) Act (NT). VALS calls for the enactment of legislation in Victoria based on existing spend record legislation. For instance, the *Criminal Law (Rehabilitation of Offenders) Act 1986 (QLD)* provides that a conviction will lapse after a "rehabilitation" period (i.e.: ten years for adults, five years for children, from the date the conviction is recorded). The WA Spent Conviction Act 1988 gives offenders who have not been re-convicted for a prescribed period the right to apply for an order declaring a conviction spent.[8]

A spent conviction scheme should be established in Victoria to give people a chance to live down minor criminal convictions. If legislation is not enacted then human rights will

[8] Jeanette Knowler 'Living down the past - Spent convictions schemes in Australia'

continued to be violated and discrimination will continue against people who have fulfilled the terms of their criminal conviction.[9]

PRISON AS A RITE OF PASSAGE

VALS is concerned that the prison experience is treated as a rite of passage for Indigenous Australians. There is anecdotal evidence that some Indigenous Australians go to jail to get culture, feel comfortable in prison compared to the outside world. The problem is that prison is seductive to Indigenous Australians, as opposed to the outside world. This occurrence was recognized by Commissioner Wyvill: "[p]rison became a way of life for Daniel Lacey. … The consummate tragedy of Lacey's life was that he found a place, a reputation and a degree of status in prison that he never found in freedom". According to Murrandoo Yanner prisoners are the least racist society he has ever met.[10]

VALS is concerned that in the absence of Indigenous Australians visiting Indigenous Australians within prisons, Indigenous Australians are not being exposed to positive role models. VALS argues that Indigenous Australians who have a criminal record but who have reformed can have a tremendous impact on prisoners today.

INDIGENOUS PEOPLE IN CUSTODY

VALS CRITICISMS OF THE 'TOUGH ON CRIME APPROACH'

The Government policy of 'tough on crime approach' undermines efforts to implement the Recommendations. The 'tough on crime approach':

- flies in the face of the Recommendation 92 that prison imprisonment should be utilised only as a sanction of last resort.
- influences the increase in prison population, particularly of Indigenous Australians. Over the last ten years, the Australian prison population has doubled.[11] Arguably, even if the rate of death in custody is decreasing, there is an increase in the *number* of people dying in custody.
- significantly impacts Indigenous Australians because they are overrepresented within the criminal justice system. According to Frank Guivarra, Chairperson of NAILSS and current Chief Executive Officer of VALS (2003-2004): "Every time there is a decision to increase sentences or take discretion away from Magistrates this means that the impact on Indigenous people is multiplied by the over representation factor".[12]

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[9] ibid

[10] 'Legislated intolerance? Public Order Law in Queensland' Rights in Public Spaces Conference, 8 June 2004.

[11] Victorian Aboriginal Legal Service Media Release 'Ten years Later: Aboriginal Deaths in Custody Issue Deserves Revisiting' April 12th 2001

[12] Victorian Aboriginal Legal Service Media Release 'Ten years Later: Aboriginal Deaths in Custody Issue Deserves Revisiting' April 12th 2001

- means heavier sentences, raising of minimum sentencing standards which is out weighing efforts to reduce Indigenous deaths in custody. The median length of sentence in Australia increased from 3.0 from 1991 years to 3.3 in 2001.[13]
- means emphasis is placed on a punitive approach, and less emphasis is on a rehabilitative approach.
- Has resulted in a vast expansion in funds for prisons. As a result, there has been less funding for services which would help prevent crime and strengthen communities.
- Flies in the face of research findings by Professor Arie Frieberg and others that there is no evidence that longer sentences reduce the crime rate.[14]
- is responding to media pressure and an ill informed public

INDIGENOUS PEOPLE AND POLICE

COMMUNICATION BETWEEN POLICE AND INDIGENOUS COMMUNTY

> Recommendation 215: "[t]hat Police Services introduce procedures, in consultation with appropriate Aboriginal organisations, whereby negotiation will take place at the local level between Aboriginal communities and police concerning police activities affecting such communities, including:
>
> a. The methods of policing used, with particular reference to police conduct perceived by the Aboriginal community as harassment or discrimination;
>
> b. Any problems perceived by Aboriginal people; and
>
> c. Any problems perceived by police. Such negotiations must be with representative community organisations, not Aboriginal people selected by police, and must be frank and open, and with a willingness to discuss issues notwithstanding the absence of formal complaints"

This does not appear to occur effectively across the state. Police attitudes and commitment to engaging with Indigenous communities varies considerably between different regions and stations. VALS has encountered police who believe that they should be able to follow the same approach with everyone and who fail to appreciate that VALS has an obligation and an interest in helping improve police capacity to operate effectively with Koorie people. Police training, on going education and performance monitoring must provide a greater incentive to officers to improve their skills and knowledge in the area of Indigenous communities, programs and government sentencing policies.

COMMUNICATION BETWEEN POLICE AND ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES: NOTIFICATION PROTOCOL OF ARREST OF INDIGENOUS AUSTRALIANS

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[13] The median length of sentence in Australia increased from 3.0 from 1991 years to 3.3 in 2001. Australian Bureau of Statistics, *Prisoners in Australia*, 4517.0, 30 June 2001, 34

[14] Victorian Aboriginal Legal Service Media Release 'Ten years Later: Aboriginal Deaths in Custody Issue Deserves Revisiting' April 12th 2001

Recommendation 223 states "[t]hat Police Services, Aboriginal Legal Services and relevant Aboriginal organisations at a local level should consider agreeing upon a protocol setting out the procedures and rules which should govern areas of interaction between police and Aboriginal people. Protocols, among other matters, should address questions of: a Notification of the Aboriginal Legal Service when Aboriginal people are arrested or detained".

Recommendation 224 states: "[t]hat pending the negotiation of protocols referred to in Recommendation 223, in jurisdictions where legislation, standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person other than such arrests or detentions for which it is agreed between the Aboriginal Legal Services and the Police Services that notification is not required".

> Recommendation 90 states: "[t]hat in jurisdictions where this is not already the position:
>
> a. Where police bail is denied to an Aboriginal person or granted on terms the person cannot meet, the Aboriginal Legal Service, or a person nominated by the Service, be notified of that fact;
>
> b. An officer of the Aboriginal Legal Service or such other person as is nominated by the Service, be granted access to a person held in custody without bail; and
>
> Recommendation 243 states that: "where an Aboriginal juvenile is taken to a police station for interrogation or as a result of arrest, the officer in charge of the police station at which the juvenile is detained should be required to immediately advise the relevant Aboriginal Legal Service and the parent or person responsible for the care and supervision of the juvenile of the fact of the child being detained at the police station (without prejudice to any obligation to advise any other person"

VALS argues that the implementation status of the above recommendations is handicapped by the following factors:

- The VALS Chief Executive Officer has never seen a copy of the protocol between VALS and Victoria Police to notify the former when an Indigenous Australian enters police custody.
- It is an experience of VALS to receive late notifications about the existence of Indigenous Australians within police custody (i.e.: sometimes notification takes as long as twenty three days).
- The protocol is not working efficiently and there are a lot of oversights. As a result VALS continues to raise these issues with Victoria Police.

TRAINING

Recommendation 228 states that: "police training courses be reviewed to ensure that a

substantial component of training both for recruits and as in-service training relates to interaction between police and Aboriginal people. It is important that police training provide practical advice as to the conduct which is appropriate for such interactions. Furthermore, such training should incorporate information as to:

a. The social and historical factors which have contributed to the disadvantaged position in society of many Aboriginal people;

b. The social and historical factors which explain the nature of contemporary Aboriginal and non-Aboriginal relations in society today; and

c. The history of Aboriginal police relations and the role of police as enforcement agents of previous policies of expropriation, protection, and assimilation."

VALS argues that there is a need for the training of police to be ongoing, rather than a once off training session. VALS argues that education is required to tackle discrimination, challenge the status quo of inequality and effect institutional change.

REVIEW OF POLICE

Recommendation 226 states: "[t]hat in all jurisdictions the processes for dealing with complaints against police need to be urgently reviewed. The Commission recommends that legislation should be based on the following principles:

> a. That complaints against police should be made to, be investigated by or on behalf of and adjudicated upon by a body or bodies totally independent of Police Services;
>
> e. That in the adjudication of complaints made by or on behalf of Aboriginal persons one member of the review or adjudication panel should be an Aboriginal person nominated by an appropriate Aboriginal organisation(s) in the State or Territory in which the complaint arose. The panel should also contain a person nominated by the Police Union or similar body;
>
> h. That the complaints body take all reasonable steps to employ members of the Aboriginal community on the staff of the body;

VALS is critical of the fact that the above Recommendations have not been implemented in light of the continuation of problematic relations between police and Indigenous Australians. The experience of the clients of VALS who wish to make a complaint against police is complex and it appears that only those individuals that have the courage and support networks to commence and continue a complaint receive an outcome. It is the experience of VALS that the assistance provided by the "Ethical Standards Department" (ESD) and the Ombudsman Office is limited. The lack of an independent review body of police actions undermines the credibility of the review process, and is a deterrent factor for Indigenous Australians lodging a complaint. It is positive that the Ombudsman's Office has recently appointed a n Indigenous person to assist in the taking of complaints and liaison with communities.

Independent investigation of Police complaints should be introduced.
Police should receive additional training in the areas of communication, negotiation and strategies for dealing with difficult people.

A Positive Story: Damages for Assault by Police

Recommendation 60a states that: "[p]olice Services take all possible steps to eliminate: "Violent or rough treatment or verbal abuse of Aboriginal persons including women and young people, by police officers".

VALS argues that the above characteristics have not been eradicated and continue to this day. For instance, in March 2004 Mike Zaccarro (Civil Lawyer) acted for a young Koorie male allegedly assaulted by police in 2000. The independent third person was told about the assault, but did nothing about it. This raises the issue of lack of training for independent third persons. VALS is preparing for another Trial against members of the police which is listed for Trial early in 2005. He has opened two new files of potential similar type of complaints and legal actions against members of the police.

On 31 May 2004, His Honour Judge Campbell, handed down a judgment in favour of the client assaulted in 2000, awarding him seventy one thousand dollars in Damages. The Judge found against the three Defendants (police officers) and apportioned part of the liability to the State of Victoria. VALS advises that people with complaints against police should contact him immediately, rather than let time lapse. It is also important to keep a diary of events and see a doctor as soon as possible. The client, who was awarded damages, had a strong case because he followed such Advice.There are many clients who when informed of the choices they have in relation to proceeding with police complaints will not proceed. There also many clients who allege police mistreatment but the evidence that they have available is not clear enough to ensure a reasonable chance of success.

The Victorian Government introduced legisaltion to shield themselves from the obligation to pay damages when an assault by police occur but the police acting outside their official duties. This is an additional obstacle for the person who believes that they have been assaulted. This legislation should be reformed.

Positive image of Indigenous Australians within the media

Recommendation 208 states: "That, in view of the fact that many Aboriginal people throughout Australia express disappointment in the portrayal of Aboriginal people by the media, the media industry and media unions should encourage formal and informal contact with Aboriginal organisations, including Aboriginal media organisations where available. The purpose of such contact should be the creation of a better understanding, on all sides, of issues relating to media treatment of Aboriginal affairs".

VALS notes that the success of the VALS client in challenging the police, mentioned above, was represented in the mainstream media. VALS argues that the reason for the

representation of this story within mainstream media is because of the current focus around police corruption and calls for a Royal Commission. VALS argues that if this was not the case, then it is unlikely that the success of the VALS client would have been represented in the mainstream arena. VALS argues that there is still a negative image of Indigenous Australians and organisations within the mainstream media

DIVERSION

VALS notes the Victorian Government has via the VAJA attempted to use imprisonment and arrest as a last resort by diverting Indigenous Australians away from prisons and police custody.

Community Based Order - Indigenous Adult Residential Diversion Program

Recommendation 11 states that: "[w]herever possible, departments and agencies responsible for non-custodial sentencing programs for Aboriginal persons should employ Aboriginal people to take particular responsibility for the implementation of such programs and should employ and train Aboriginal people to assist to educate and inform the community as to the range and implementation of non-custodial sentencing options".

VALS notes that Indigenous Australians experience of the Community Based Orders (CBO), which are highly structured is problematic.[15] VALS welcomes the proposal of an Indigenous Adult Residential Diversion Program (Program) by Corrections Victoria, as if implemented in 2006 it will contribute towards the implementation of Recommendation 11.

The aim of the Program is in line with the RCIADIC, as it aims to: reduce re-offending and reduce the over-representation of Indigenous people in Victoria's criminal justice system. The Program is for up to twenty Indigenous males on Community Based Orders for a period of up to six months. The program will provide additional assistance to Indigenous Australians who often have a problematic relationship with Community Based Orders. Elders/respected persons will provide leadership and support to the men and ensure that the Program incorporates Aboriginal culture and values.

Relationship Between Fine Default And Imprisonment

Recommendation 121 provides that:

a. "Where legislation does not already so provide governments should ensure that sentences of imprisonment are not automatically imposed in default of payment of a fine; and

b. Such legislation should provide alternative sanctions and impose a statutory duty upon sentencers to consider a defendant's capacity to pay in assessing the appropriate monetary penalty and time to pay, by instalments or otherwise"

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[15] Hancock, L. and Cook, S. 'Editors' Introduction' in Cook, S. and Hancock, L. (eds), *Privatising Youth Detention: A Roundtable,* Centre for Public Policy, University of Melbourne, 1999.

VALS is concerned that Recommendation 121a is not implemented. The fine system contributes to the overrepresentation in the criminal justice system of people from low socio-economic backgrounds (which includes Indigenous Australians) as often fines for such people equate to a prison sentence due to failure to pay the fine.[16] Arguably the fine system is indirectly discriminatory towards Indigenous Australians.[17] VALS notes that legislation is in place to cater for Recommendation 121b (Sentencing Act 1991 and Magistrates Court Act 1989).

Suggested Reform

VALS notes that the PILCH Homeless Person's Legal Clinic is on a reference group that is providing the Government with advice regarding the development of new legislation to make the fine system fairer. VALS welcome a fine system that is more flexible for people experiencing financial or social hardship (i.e.: 'warning system' and diversionary programs). VALS believe that there should be a clear right to and a clear process to convert all court fines to community based orders, that it should be an across the board rule that people can negotiate part payment of fines and that there should be cheaper fines for low income people.VALS is concerned to see that legisl Recognisin g indicators to be enacted by autumn 2005, does in fact go ahead.[18]

Arrest as sanction of last resort

Recommendation 87 states: [t]hat: a. All Police Services should adopt the principle of arrest being the sanction of last resort in dealing with offenders;
b. Police administrators should train and instruct police officers accordingly and should closely check that this principle is carried out in practice"

VALS notes that Indigenous Australians do not feel that police apply the principle of arrest being the sanction of last resort. Indigenous Australians feel that they are subjected to direct and indirect discrimination at the hands of police, as they are more visible to police than non-Indigenous Australians. It was noted in the RCIADIC that Indigenous deaths in custody were not a result of deliberate violence of brutality by police or prison officers. However, too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent.[19]

Extent to which arrest as a last resort is encouraged by Victoria Police

Recommendation 87c states that: "[a]dministrators of Police Services should take a more

[16] Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act' 1999
[17] Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act', 1999
[18] Newsletter of the PILCH Homeless Person's Legal Clinic, *Street Rights,* Edition 7- May 2004, pg 1.

[19] Paul Williams, Deaths in Custody: 10 years on from the Royal Commission

active role in ensuring police compliance with directives, guidelines and rules aimed at reducing unnecessary custodies and should review practices and procedures relevant to the use of arrest or process by summons and in particular should take account of the following matters:

i. all possible steps should be taken to ensure that allowances paid to police officers do not operate as an incentive to increase the number of arrests;

iii. the role of supervisors should be examined and, where necessary, strengthened to provide for the overseeing of the appropriateness of arrest practices by police officers;

iv. efficiency and promotion criteria should be reviewed to ensure that advantage does not accrue to individuals or to police stations as a result of the frequency of making charges or arrests; and

v. procedures should be reviewed to ensure that work processes (particularly relating to paper work) are not encouraging arrest rather than the adoption of other options such as proceeding by summons or caution; and

VALS is concerned that there appears to be an unwritten law or culture in the police force that if an officer is not results oriented, in terms of making a certain amount of arrests, then they are not doing their job. This raises the question of whether all arrests are legitimate or merely made to bump up a quota number.

Caution

VALS refers to recommendation 87cv above and refers to the following recommendations

- Recommendation 87d: "[g]overnments, in conjunction with Police Services, should consider the question of whether procedures for formal caution should be established in respect of certain types of offences rather than proceeding by way of prosecution".
- Recommendation 240a (in the context of youth):: "[t]hat:
  Police administrators give police officers greater encouragement to proceed by way of caution rather than by arrest, summons or attendance notice".

Arguably Indigenous Australians are cautioned less than non-Indigenous Australians. VALS research suggests considerable regional variation in police practice in respect to giving cautions. VALS notes that clear legislative rules about cautioning do not exist. They should be established and manage police behaviour by:

- Requiring, rather than simply suggesting the use of diversionary measures.[20]
- Widening police powers to caution.
- Reducing the discretion of police to choose whether to caution.[21]

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[20] Luke Garth and Cunneen Chris, Aboriginal Juveniles And The Juvenile Justice System In New South Wales, 1990.

[21] Royal Commission into Aboriginal Deaths in Custody (1991) Volume 3 para 21.3.1

VALS notes that the Recommendations are not binding on the police (recognised in Frederick John Beaver Robinett v South Australian Police Supreme Court of South Australia (2000) 116 A Crim R 492 SCGRG-00-119 [2000] SASC).[22] As a result, the onus is on Victoria police to implement policy in line with the Recommendations and the State to legislate to enforce the Recommendations.

Execution of Warrant to Arrest

Edney's analysis of Koorie and police relations is that 'the more things change, the more they stay the same', which suggests the Recommendations are not effectively being implemented. According to Edney police treatment can contribute to and amplify Indigenous offending. VALS agrees with finding, and argued this in a submission to the Victorian Parliament Law Reform Committee ('Inquiry into Warrant Powers and Procedures').

The execution of a warrant to arrest is problematic. It is the experience of VALS criminal Solicitors, Clients Service Officers and clients themselves that warrants to arrest are commonly executed in the following manners:

- Scenario 1: A Koorie person becomes aware that an outstanding warrant to arrest exists. Alternatively, Victoria Police informs VALS that such a warrant exists. The individual attends at the police station on their own accord, often with support, such as a VALS Client Service Officer, to enable to the warrant to be executed.

- Scenario 2: Koorie people in a public place are often stopped by police on 'routine matters'. The police then discover upon checking police records that there is an outstanding warrant to arrest for the individual. The police then take the individual to the police station.

VALS is concerned about the disadvantages attached to scenario two above. For instance, in scenario two there is the potential for the situation to become confrontational and the Defendant to become aggressive (i.e.: police treatment amplify Indigenous offending). There is the potential for additional charges to be laid (i.e.: resist arrest, assault police).

In contrast to scenario two, scenario one has the potential to be a less traumatic experience. An advantage of scenario one is that a person who attends a police station on their own accord is more likely to be re-bailed than a person who is required to be taken to the police station by police. Victoria Police often provide reassurance to VALS CSOs that the Defendant will be re-bailed if they attend at the police station on their own

[22] Richard Edney 'The More Things Change, the More They Stay the Same:Frederick John Beaver Robinett v South Australian Police Police Treatment of Indigenous Persons in Custody [2001] ILB 71

volition. Also, the fact that a client attended the police station of their own accord can be used as plea material.

VALS is concerned that plans put in place by VALS staff, the Defendant and police for the Defendant to attend the police station on their own accord to execute a warrant to arrest are often thwarted (scenario one). The plans are thwarted by police picking Defendants up on the street or in public (scenario two). The issue of racism within mainstream Australia can perhaps explain why Koorie Australians, simply walking down the street, are often stopped by police and are too intimidated to attend the police station on their accord.

VALS is concerned that police are not consistent in informing the Defendant or VALS staff that a warrant to arrest exists. This means that Defendant's are not given the opportunity to choose to attend at the police station of their own accord to have the warrant to arrest executed.

VALS is concerned that anecdotal evidence exists that police hold on to warrants to arrest until the end of the working week, and then execute them late Friday afternoon. The result is that some Koorie people are locked up in police cells over the weekend until the courts can deal with their matter the next week.

Recommendation

VALS supports warrant powers and procedures that maximize the occurrence of scenario one and minimize the occurrence of scenario two. VALS staff have observed examples of 'better practice' that attempt to maximize scenario one and minimize scenario two, particularly in country areas.

According to some VALS CSOs , police will approach CSOs to find an individual who is subject to a warrant to arrest and request that CSOs bring them to the police station. In another region the VALS solicitor reports that the , Magistrates will ask VALS to get in touch with absent clients and ensure that they attend on the adjourned court date. VALS CSOs see their role as one of continually educating police about Indigenous people and their culture in order to overcome racism that leads to a overly high number of Aboriginal people being picked up for so called 'routine matters'.

The maximizing of scenario one and minimizing of scenario two, by improving communication lines between VALS and Victoria Police, is not a far fetched goal. VALS and Victoria police have an understanding that the latter will inform the former when an Indigenous Australian is taken into custody. VALS calls for the institution of a procedure whereby Victoria Police informs VALS of the existence of a warrant to arrest.

VALS argues that the maximizing of scenario one will benefit Aboriginal Australians and Victoria Police. The above examples of 'best practice' have the potential to:

- improve relations between Koorie people and Victoria Police
- reduce the time police spend searching for people subject to a warrant to arrest.

Availability of Bail to Indigenous Australians

Recommendation 91b states: "[t]hat governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation:
to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people".

VALS welcomes the proposed amendment to the Bail Act 1977. It is proposed that section 4(2)(c) is repealed. VALS has long supported such an amendment and approached the Victorian Law Reform Commission in May 2001 to review the operation of section 4(2)(c) of the Bail Act 1977. As a result the Law Reform Commission produced a Draft Recommendation Paper titled 'Fail to Appear in Court in response to Bail' (Law Reform Commission Paper) and called for submissions.

In 2004 VALS welcomes moves to implement the recommendations of the Victorian Law Reform Commission paper to repeal s 4(2)(c) of the Bail Act 1977, but notes with regret that such a change has been a long time coming.

VALS agrees with the arguments put forward in the Law Reform Commission paper for repealing s4(2)(c) of the Bail Act 1977. The Bail Act 1977 has a significant and unfair impact on indigenous defendants by making it harder to obtain bail in cases where a defendant has been released on bail, fails to appear in court on the required date, is arrested for failing to appear and again applies for bail.

The effect of section 4(2)(c) of the Bail Act 1977 is that courts are restricted in what they can take into account in deciding whether to grant or refuse bail (ie: limited to circumstances where failing to appear was beyond the control of the defendant). The effect of repealing section 4(2)(c) of the Bail Act 1977 will be that the court will be placed in a better position to take into account wider factors than circumstances beyond the control of the defendant when deciding whether to grant or refuse bail. The amendments will give the courts more flexibility in re-establishing the bail of defendants who fail to appear, as the courts will be empowered to consider cultural, socio economic and environmental factors such as the following:

- Forget court date or mistake as to the date: The reality of poverty means that many Aboriginal people will not have a calendar or private organizer.
- Low literacy and numeracy levels: Some Aboriginal people have difficulty in understanding numbers or being able to read the date.
- Transport difficulties: Some Aboriginal people have a lack of money or a lack of access to public or private transport, particularly if the court is some distance away.
- Culture: Aboriginal people are often expected through custom and social obligation to move around to see relatives or attend funerals and other such community events.

- Frequent change of address or no fixed address: Aboriginal people may not receive correspondence about appearing at court if they frequently change their address of have no fixed address.
- Misunderstanding: Aboriginal people may misunderstand the need to appear in court (i.e.: they think that the court will deal with the charges in their absence).

The effect of s4 (2)(c) it that it is ‘not uncommon’ for Aboriginal people to be detained in custody [Royal Commission into Aboriginal Deaths in Custody (RCIADIC 1991), Volume 3, para 21.4.27)]. This is significant given that the findings of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC 1991) that Aboriginal deaths in custody occur more often whilst on remand ( ). The effect of s4(2)(c) is that defendants who fail to answer bail for a minor offence, but are not guilty, choose to plead guilty to avoid being detained on remand in the hope that they will receive a sentence that does not involve imprisonment. The effect of repealing s4(2)(c) will mean that Magistrates and Bail justices will be empowered to address the unfair impact the Bail Act 1977 can have on Aboriginal peoples by considering all the circumstances that prevent Aboriginal people appearing in court.

Public Drunkenness

“An institution, having significant dealings with Aboriginal people, which has rules, practices, habits which systematically discriminate against or in some way disadvantage Aboriginal people, is clearly engaging in institutional discrimination or racism”.[23]

Recommendation 223 states “[t]hat Police Services, Aboriginal Legal Services and relevant Aboriginal organisations at a local level should consider agreeing upon a protocol setting out the procedures and rules which should govern areas of interaction between police and Aboriginal people. Protocols, among other matters, should address questions of:
b. The circumstances in which Aboriginal people are taken into protective custody by virtue of intoxication”. To date, not such protocol has been established.

The offence of public drunkenness still exists, which flies in the face of Recommendation 79: “that, in jurisdictions where drunkenness has not been decriminalised, governments should legislate to abolish the offence of public drunkenness”. The Recommendation was make in acknowledgment of the fact that legislative steps do unfairly increase the prospects of Aboriginal people being convicted or imprisoned.[24]

VALS argues that Aboriginal people experience indirect discrimination at the hands of the legal system. Indirect discrimination is defined as a requirement, policy or practice which applies to everyone, but which some people cannot easily comply with because of

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[23] Royal Commission into Aboriginal Deaths in Custody 1991) Volume 2 para 12.1.30
[24] RCIADIC para 22.4.76

their peculiar circumstances.[25] A sign that the legal system indirectly discriminates against Indigenous Australians is the over-representation of Indigenous Australians within the criminal justice system (RCIADIC 1991).

A high proportion of Aboriginal Australians are captured by public order offences that treat certain people as a 'problem' that needs to be legislated for in the Summary Offences Act (VIC) 1966.[26] The legislation regulating public drunkenness is not directly discriminatory, but in practice the laws have more of an impact on Aboriginal people than non-Aboriginal people. Drunkenness cases made up 57% of the Aboriginal custodies compared with 27% of non-Aboriginal custodies.[27] More than half (67%) of the Aboriginal Deaths in Custody investigated by the Royal Commission (RCIADIC) were related to arrests due to public drunkenness. [28]

Public Order laws and the manner in which they are policed leads to indirect discrimination of Indigenous Australians in the following manner:

- Public Order laws and they manner in which they are policed contributes to the overrepresentation of Indigenous Australians in the criminal justice system.
- Public Order laws have the effect of increasing Aboriginal involvement in the justice system (i.e. target disadvantaged groups) as they have a disproportionate and adverse impact on Indigenous communities.[29] Public Order laws have been criticized as 'legislated intolerance'.[30]
- Public Order laws and the manner in which they are enforced discriminates against the poor, such as Aboriginal people who congregate in public spaces because they do not have alternative places to congregate. Public Order laws contain an assumption that people who occupy public space, have access to a private space.
- The manner in which public order laws are policed is discriminatory. Indigenous Australians are subjected to over policing of their use of public spaces. Aboriginal people are highly visible to police in a largely white non-Aboriginal population.[31] Aboriginal first offenders have about a 15 per cent greater chance of going to court than do non-Aboriginal first offenders, as the former have a lower chance of receiving a formal caution than the latter.[32] VALS has produced a study titled 'Koories and Jungais: A Study of Aboriginal and Police Relations in Victoria (2000)' which discusses the Aboriginal attitude that

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[25] Legal Information Access Centre (LIAC) Key Concepts in Discrimination Law, [2002] HotTopics 5
[26]Royal Commission into Aboriginal Deaths in Custody (1991) Volume 2 para 12.1.15
[27] op cit para 21.1.2
[28] Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act' 1999
[29] Australian Human rights and Equal Opportunity Commission – 2004 Media Release, Indigenous People and public space information share, 27 February 2004
[30] Wenham, Margaret 'Court provides a public space for questioning' *The Courier Mail* 9 June 2004.
[31] Luke Garth and Cunneen Chris, Aboriginal Juveniles And The Juvenile Justice System In New South Wales, 1990.
[32] ibid

present police practices are racist.[33]

- Indigenous and Non-Indigenous Australians are treated differently in public spaces.[34] The laws commercialise public space, rather than treat it is as community space.[35]

VALS is concerned by the finding of the Aboriginal Community Justice Panel Review that there is a tendency for the ACJP Program to be subsumed by tasks which inadvertently reinforce public order policing strategies *which are not necessarily in the interest of Indigenous people.* The Review pointed out that the concentration upon removal of people from police custody reduces the focus on the need to reduce the number of people being arrested, especially for minor public order offences. [36]

Where to from here? How to decriminalise public drunkenness

Non-Custodial Facilities

Recommendation 80 states that "..[t]he abolition of the offence of drunkenness should be accompanied by adequately funded programs to establish and maintain non-custodial facilities for the care and treatment of intoxicated persons"

Recommendation 287 states that: "the Commonwealth, States and Territories give higher priority to the provision of alcohol and other drug prevention, intervention and treatment programs for Aboriginal people which are functionally accessible to potential clients and are staffed by suitably trained workers, particularly Aboriginal workers. These programs should operate in a manner such that they result in greater empowerment of Aboriginal people.,

Decriminalization of public drunkenness would involve repealing sections 13, 14 and 16 of the Summary Offences Act 1966. The Summary Offences Act 1966 should be revised to conform to current attitudes about criminal behaviour.[37] section 13 of the Summary Offences Act 1966 does not conform to public opinions about drunkenness: (i.e. placing people in jail simply because of being drunk and not necessarily disorderly or disruptive). Legislation should be enacted that *limits* police custodial powers to intoxicated persons reasonably believed to be at a significant risk of being unable to take care of himself or herself or is behaving in a manner likely to cause injury to others or damage to property.

The new legislation should enable apprehension and detention of intoxicated persons on a

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[33] Victorian Aboriginal Legal Service 'Koories and Jungais: A Study of Aboriginal and Police Relations in Victoria (2000)'

[34] 'Legislated intolerance? Public Order Law in Queensland' Rights in Public Spaces Conference, 8 June 2004.

[35] ibid

[36] VALS Discussion Paper re ACJP Review

[37] Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act' 1999

civil rather than criminal basis.[38] In line with Recommendation 81: "That legislation decriminalising drunkenness should place a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons". The legislation should follow the spirit of legislation in jurisdictions that have decriminalised public drunkenness.[39] At ground level, police practices should be influenced by 'night patrols' which remove 'people at risk' from public places to safe places.[40]

VALS is concerned that the Government appears to be using the Recommendation 80 of to stall the decriminalisation of public drunkenness. This recommendation has been supported in a more recent report: Parliament of Victoria Drugs and Crime Prevention Committee: Inquiry into Public Drunkenness. Final Report (June 2001).[41] Prior to the RCIADIC, the Government was discussing decriminalisation (Law Reform Commission Report on Public Drunkenness June 1989).[42] VALS calls for the Government to stop stalling and establish non-custodial facilities (i.e.: sobering up centres) and decriminalise public drunkenness.

Substitution of charges

Recommendation 85. states "That:

a. Police Services should monitor the effect of legislation which decriminalises drunkenness with a view to ensuring that people detained by police officers are not being detained in police cells when they should more appropriately have been taken to alternative places of care;

b. The effect of such legislation should be monitored to ensure that persons who would otherwise have been apprehended for drunkenness are not, instead, being arrested and charged with other minor offences. Such monitoring should also assess differences in police practices between urban and rural areas; and

c. The results of such monitoring of the implementation of the decriminalisation of drunkenness should be made public".

VALS acknowledges the arguments for and against decriminalization of public drunkenness. It is arguable that decriminalization of public drunkenness will prevent indirect discrimination against Indigenous Australians becoming further entrenched and institutionalized. Also, decriminalization of public drunkenness will mean public

[38] Royal Commission into Aboriginal Deaths in Custody (1991) Volume 2 para 21.1.3

[39] Intoxicated Persons Act (NSW) 1979, Detention of Public Drunkenness Act (WA) 1989, Public Intoxication Act (SA) 1984, Royal Commission into Aboriginal Deaths in Custody (1991) Volume para 21.1.28

[40] Blanchard Lynda-Ann and Lui Leah 'Citizenship and Social Justice: Learning from Aboriginal Night Patrols in NSW [2001] Indigenous Law Bulletin 3

[41] Parliament of Victoria Drugs and Crime Prevention Committee: Inquiry into Public Drunkenness Final Report (June 2001)

[42] Victorian Aboriginal Legal Service Suggested Review of the Summary Offences Act and the Vagrancy Act, 1999

drunkenness will contribute to the overrepresentation of Indigenous Australians to a lesser extent.[43]

However, it is also argued that decriminalization will not impact rates of over-representation within the criminal justice system. Arguably, Aboriginal people are over-represented in apprehensions for public drunkenness in both jurisdictions where it remains an offence and has been decriminalised.[44] A contributing factors towards the continued overrepresentation of Indigenous Australians in jurisdictions that have decriminalised public drunkenness is the phenomenon of 're-criminalisation of public drunkenness' (i.e.: police pick up Aborigines on charges alternative to public drunkenness such as language offences, Alcoholics and Drug Dependant Persons Act 1968).[45] VALS notes that the Indigenous community feel that the repealed Vagrancy Act is still being enforced indirectly. In decriminalizing public drunkenness, care must be taken to ensure that the offence is not indirectly re-criminalised.

VALS calls for more investigation on the effects of decriminalisation in line with the above recommendations. VALS notes that the above argument about alternative charges being substituted in jurisdictions where public drunkenness has be decriminalized is not supported by evidence. In contrast, VALS is aware of the "major impact on the management of intoxicated persons**"** in Western Australia when public drunkenness was decriminalized in 1990 (Detention of Drunken Person's Act 1989).[46] For instance, between 1990-1997 admissions to sobering up centres increased eight fold.[47] VALS argues that the advantages of decriminalization outweigh the disadvantages of decriminalization (i.e.: substitution of charges).

Involvement of VALS

Recommendation 84 states "[t]hat issues related to public drinking should be the subject of negotiation between police, local government bodies and representative Aboriginal organisations, including Aboriginal Legal Services, with a view to producing a generally acceptable plan". To date there has been no communication with VALS about public drinking with any other authority.

DECRIMINALISATION OF PUBLIC ORDER LANGUAGE OFFENCES

Recommendation 86a of the RCIADIC is: "the use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge". VALS notes that this recommendation has not been implemented.

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[43] Royal Commission into Aboriginal Deaths in Custody (1991) Volume 4 para 28.3.28

[44] Australian Human rights and Equal Opportunity Commission – 2004 Media Release, Indigenous People and public space information share, 27 February 2004

[45] Royal Commission into Aboriginal Deaths in Custody (1991) Volume 2 para 21.1.72Australian Human rights and Equal Opportunity Commission – 2004 Media Release, Indigenous People and public space information share, 27 February 2004

[46] WA Drug Abuse Strategy Office, Statistical Bulletin Number 5, June 1999 – 'Utilisation of Sobering Up Centres in Western Australia, 1990-1997), p1.

[47] ibid

Public Order language offences have not been decriminalised

The Summary Offences Act 1966 should be amended to reflect attitudes towards language offences. The language offences in the Summary Offences Act 1966 were enacted in the content of a conservative society.[48] In contrast, today the use of 'swear words' is commonplace on the screen, in theatres, and on the street.[49] According to Yanner, "[i]t is ridiculous police swear, everyone swears, it shouldn't be against the law. I thought this sort of thing disappeared long ago." [50]

Chroming

The Royal Commission into Aboriginal Deaths in Custody Recommendation 62 emphasised the need to minimise contact with the criminal justice system wherever possible.

The Victorian Aboriginal Legal Service in its submission to the Drugs and Crime Prevention Committee Inquiry into the Inhalation of Volatile Substances opposed the criminalisation of "chroming". The new legislation which resulted from the review takes effect in July 2004. It does not criminalise chroming but it does make more explicit the police power to take a young person who appears to be affected by chroming to a safe environment and it increases police powers to stop search and confiscate materials that may be used for chroming.

The Victorian Aboriginal Legal Service has concerns about how this legislation will work in practice. Relations between police and Indigenous young people are in some areas less than harmonious and VALS hopes that the search powers are not used inappropriately and they don't result in an increase in charges related to public order or petty theft or going equipped to steal.

Community Policing – Night Patrol

Recommendation 214 states: "The emphasis on the concept of community policing by police Services in Australia is supported and greater emphasis should be placed on the involvement of Aboriginal communities, organisations and groups in devising appropriate procedures for the sensitive policing of public and private locations where it is known that substantial numbers of Aboriginal people gather or live"

VALS notes that community night patrols in association with police are proving successful.

Community Justice Panel

[48] Victorian Aboriginal Legal Service Suggested Review of the Summary Offences Act and the Vagrancy Act, 1999
[49] Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act' 1999
[50] 'Legislated intolerance? Public Order Law in Queensland' Rights in Public Spaces Conference, 8 June 2004.

Recommendation 220 states: "[t]hat organisations such as …. the Community Justice Panels at Echuca and elsewhere in Victoria, and others which are actively involved in providing voluntary support for community policing and community justice programs, be provided with adequate and ongoing funding by governments to ensure the success of such programs.

Recommendation 221 states : "[t]hat Aboriginal people who are involved in community and police initiated schemes such as those referred to in Recommendation 220 should receive adequate remuneration in keeping with their important contribution to the administration of justice. Funding for the payment of these people should be from allocations to expenditure on justice matters, not from the Aboriginal affairs budget".

In VALS Discussion Paper in response to the Aboriginal Community Justice Panel (ACJP) Review, VALS noted that ACJPS are under-resourced and over-burdened, which is direct contradiction to the above Recommendations.[51] As a result there is a lot of reliance on volunteers, leading to burn out.[52] Funding to ACJPs has not changed since their inception in 1988. The Aboriginal Justice Agreement made the point that in the climate of continued reduction of Commonwealth funding to Aboriginal organisations, there has already been too great a demand put on CJPs.[53]

UNDERLYING ISSUES

The RCIADIC noted that there were many underlying issues that contributed to the over-representation of Indigenous Australians within the criminal justice system. It was noted that the most significant contributing factor to over-representation was the socially, economically and culturally disadvantaged position of many Indigenous Australians.[54] The need to address underlying issues has been reinforced in the post RCIADIC climate At the 1997 National Summit on Indigenous Deaths in Custody, the Commonwealth and State and Territory Governments reaffirmed the position that addressing the underlying issues is fundamental to the achievement of long term solutions to Indigenous incarceration and deaths in custody.[22]

Lack of funding

Arguably, the reason why underlying issues contributing to the over-representation of Indigenous Australians within the criminal justice system are not being addressed is because the current Government is not committed to funding programs (i.e.: prevention programs).

[51] VALS Discussion Paper re ACJP Review

[52]ibid

[53]ibid

[54] RCIADIC (1991) para 1.11

Front end/back end approach

Arguably, the lack of resources in front end programs that can address underlying issues is counterproductive in the long run. Resources spent on the back end approach (i.e.: legal avenues) could have been saved if social intervention had occurred preventing offending behaviour.[55] For instance, public drunkenness should not been seen as a criminal law issue, but a health issue.[56] Preferably, a combination of legal and non-legal assistance should be provided to people who are trapped in patterns of social exclusion. [57]

Post release assistance

Recommendation 110 states: "[t]hat in view of the wide variety of pre-release and post-release support schemes conducted by Corrective Services authorities and other agencies and organisations in various parts of the country it is the view of the Commission that a national study designed to ascertain the best features of existing schemes with a view to ensuring their widespread application is highly desirable. In such a study it is most important that consultation take place with relevant Aboriginal organisations".

VALS is concerned that post release support assistance to Indigenous Australians, which addresses underling issues that contributed to the individual ending up in prison, are limited.

Education Campaign in Regional Areas

Recommendation 211 states: that "State Equal Opportunity Commissions should be encouraged to further pursue their programs designed to inform the Aboriginal community regarding anti-discrimination legislation, particularly by way of Aboriginal staff members attending at communities and organisations to ensure the effective dissemination of information as to the legislation and ways and means of taking advantage of it".

Recommendation 212 states: That "State Equal Opportunity Commissions should be encouraged to consult with appropriate Aboriginal organisations and Aboriginal Legal Services with a view to developing strategies to encourage and enable Aboriginal people to utilise anti-discrimination mechanisms more effectively, particularly in the area of indirect discrimination and representative actions"

VALS is pleased to note that VALS and EOCV are working together to implement the above recommendations. Both organisations are involved in discussions with other Victorian service providers to visit regional areas on a regular basis as part of an education campaign geared towards Indigenous Australians. The other service providers

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[55] 'Legislated intolerance? Public Order Law in Queensland' Rights in Public Spaces Conference, 8 June 2004.
[56] Ibid
[57] Liz Curran, 'Issues Around the World in Legal Aid' Talk 6 July 2004.

are: Consumer Affairs Victoria, Dispute Settlement Centre, Ombudsman Office and Energy and Water Ombudsman Office and the Office of the Public Advocate.

How to address the underling issue of discrimination against Indigenous Australians

The underling issue of discrimination against Indigenous Australians is often a result of discrimination on the basis of the low socio-economic status of Indigenous Australians. Indigenous Australians appear to be the target of discrimination because of the issues they face that contribute to their over-representation with in the criminal justice system (ie: homelessness). VALS argues that if the Government is not committed to addressing underlying issues the Indigenous community face, then safeguards should be established to prevent Indigenous Australians being discriminated on the basis of their extreme disadvantage.   VALS provided some suggestions that would work towards this aim in a submission to the Scrutiny of Acts and Regulations Committee ('Discrimination in the Law inquiry'). See Appendix One.

KOORI YOUTH AND THE CRIMINAL JUSTICE SYSTEM

THE VICTORIAN DUAL TRACK SENTENCING REGIME

Recommendation 62 states that "there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.

VALS is concerned that juveniles are placed in prisons with adults. The definition of child in section 3 of the Children and Young Person's Act 1989 (Vic) means that offenders aged under the age of seventeen are sentenced in the Children's Court and children cannot be sentenced to an adult prison. In contrast, young people over seventeen years of age can be sentenced in adult jurisdictions (Magistrates, County or Supreme Courts) and can be sentenced to adult prisons. The distinction between people over and under seventeen years of age is arbitrary and discriminatory, especially as people over the age of seventeen are susceptible to victimization and discrimination within adult prisons.[58]

Victoria and Queensland are the only jurisdictions that define children as a person under the age of seventeen. VALS is concerned about the impact that the current age jurisdictions of criminal courts have on Indigenous youth. Indigenous young Australians are nineteen times more likely to be detained than non-Indigenous people and 39% of the Indigenous population is under 15 years of age, compared to 20% of the general population.[59]

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[58] Jesuit Social Services 'News Release: Human Rights Day, Bracks Government Still Allows Children To Be Sentenced To Adult Prisons' Wednesday 10 December 2003.
[59] 'ATSILS demolition plan condemned' Lawyers Weekly 4 June 2004

Suggested Reform

Altering age jurisdiction of criminal courts

VALS notes that in May 2004 the Attorney General's Department released the 'Justice Statement'.[60] The 'Justice Statement' expresses a commitment to raise the criminal jurisdictional limit of the Children's Court from seventeen to eighteen years of age, through legislation to be introduced in the Spring 2004 parliamentary session. VALS welcomes this development, but notes with concern that promises to this effect have been made in the past, but not implemented. VALS considers it vital that the issue of age jurisdiction is addressed in this submission as a safeguard to ensure that the Victorian Government is encouraged to implement the promised change this time.

The grounds for reforming section 3 of the Children and Young Person's Act 1989 to raise the criminal jurisdictional limit of the Children's Court from seventeen to eighteen years of age and Sentencing Act 1991 are as follows:

- The 'dual track' sentencing regime will become accessible to people eighteen years of age (existence of both juvenile justice facilities and adult facilities).
- The law will fall in line with international conventions:
  - Article 10(3) of the International Covenant on Civil and Political Right (ICCPR) provides that juvenile prisoners are separated from adults.[61]
  - Article 37(c) of the Convention on the Rights of the Child requires the separation of juveniles from adults when young people are deprived of their liberty.[62]
  - Article 1 of the Convention on the Rights of the Child considers all people under the age of eighteen to be children.[63]

Altering legislation that permits children to end up in adult prisons indirectly

VALS argues that reform needs to go further than simply altering the jursidictional age limit of courts. The Attorney General's comments that "[i]ncreasing the age limit of the Children's Court to 18 will ensure young people don't end up in adult prisons" is not

[60] Attorney-General's Justice Statement: New Directions for the Victorian Justice System 2004-2014 (May 2004) (Department of Justice/State Government Victoria).

[61] Aboriginal and Torres Strait Islander Social Justice Commissioner - Fifth Report 1997 at www.austlii.edu.au

[62] Aboriginal and Torres Strait Islander Social Justice Commissioner -- Fifth Report 1997

[63] Victorian Council of Social Services, *Juvenile Justice* 2003-2004 State Budget Submission, pg 10.

entirely accurate.[64] It is true that the proposed reform will directly prevent people eighteen years of age being sentenced to adult prisons, but it will not prevent children sentenced to Youth Training Centre etc indirectly ending up in adult prisons.

If the Government seriously intends to ensure that young people don't end up in adult prisons it should repeal sections that have the same effect as the following:

- Section 240(1) of the Children and Young Person's Act 1989 provides that Youth Parole Board can transfer a person aged 16 years or more from a Youth Training Centre to a Prison to serve the unexpired portion of the period of his or her detention as imprisonment (similar sections: s244B and s246).
- Section 246 and 248(1)(b) of the Children and Young Person's Act 1989 privilege time served in prison over time served in a detention facility if sentenced to both forms of imprisonment.
- Section s130(1) of the Children and Young Person's Act 1989 means that children may end up in custody in a remand centre with adults. Section 130 (2)(a) of the Children and Young Person's Act 1989 provides that children remanded in custody in a police gaols are entitled to be kept separate from adults who are detained there, yet a similar condition is not attached to detention in remand centres which is a significant omission.

CHILD PROTECTION SYSTEM

VALS notes that Recommendation 62 relates to the Children Protection System and VALS refers to the following relevant Recommendations:

- Recommendation 235 states that: "policies of government and the practices of agencies which have involvement with Aboriginal juveniles in the welfare and criminal justice systems should recognise and be committed to ensuring, through legislative enactment, that the primary sources of advice about the interests and welfare of Aboriginal juveniles should be the families and community groups of the juveniles and specialist Aboriginal organisations, including Aboriginal Child Care Agencies".
- Recommendation 54 states: "[t]hat in States or Territories which have not already so provided there should be legislative recognition of: a) the Aboriginal Child Placement Principle and b) the essential role of Aboriginal Child Care Agencies".

VALS notes the existence of the Victorian Aboriginal Child Care Agency (VACCA), but also notes the absence of legislation about the role of VACCA or the Indigenous community in providing advice about the welfare of Indigenous children. At the moment, VACCA is relying on the Department of Human Services to back up VACCA

[64] Shiel, Fergus 'Young to be moved out of adult jails' May 28, 2004

recommendations, as DHS has legislative recognition. As a result, VACCA experiences frustration when DHS does not undertake certain actions in matters before it.

VALS is concerned by the Victorian Government's failure to give legislative recognition to the Aboriginal Child Placement Principle, unlike other States. In the absence of an enshrined Aboriginal Child Placement Principle, Indigenous children are being inappropriately placed with non-Indigenous families too often.

The above failures are a concern in light of recognition of the fact in the RCIADIC that there is a link between contact with the criminal justice system and removal from families.

DHS have announced plans to reform the Victorian Children and Family Service System. The first report involved no Koorie input. The second Report (Kirby Report) included input from Indigenous Australian organisations The basis for the subsequent change is narrower than the Kirby report. VALS is concerned at the timetable for change , at the lack of a strategy to deal with Indigenous concerns, about the lack of clarity about what is proposed and about the emphasis on moving more quickly to permanence of placement and the lack of emphasis on prevention, voluntary access to services and features which might reasonably be expected to reduce the level of out of home placements. VALS is also concerned about the widespread "advice" to women who are subject to notification that they should get an intervention order if they want to avoid further Departmental action.

KOORI COURT

Rise in the number of juveniles appearing at Moe Children's Court – Call for a Children's Koori Court

VALS is aware of a high number of juveniles appearing at Moe Children's Court on criminal charges. Between June 2003 and June 2004, there were one hundred and seven matters heard at Moe Children's Court. In contrast, there were seventy matters heard at Melbourne Children's Court and thirty six matters heard at Mildura Children's Court. VALS collected the previous statistics to advocate for the establishment of a Koori Court, with a Children's Division, in Gippsland. The Department of Justice plans to establish additional Koori Courts given the success of pilot Koori Courts in Broadmeadows, Shepparton and Warnambool.

VALS takes this opportunity to draw attention to the success of the Koori Court Pilot. The impact the Koori Court has had is 'absolutely amazing'.[65] The Koori Court is a product of the Victorian Aboriginal Justice Agreement (AJA). The Koori Court has clearly demonstrated that results that can be achieved when a coordinated approach is taken to tackling Indigenous Australian's disadvantage. The VAJA involved the partnership of a number of Regional Councils as well as ATSIC, the Victorian

[65] 'Legislated intolerance? Public Order Law in Queensland' Rights in Public Spaces Conference, 8 June 2004.

Government and others within the Aboriginal community. The AJA specifically committed itself to implementing the Recommendations of the RCIADIC. The success of the Koori Court is very much connected with the empowerment of Aboriginal people, a theme of the RCIADIC.

TENDERING OUT LEGAL SERVICES FOR INDIGENOUS AUSTRALIANS

VALS takes this opportunity to discuss the Commonwealth Government Proposal to Tender out Legal Services for Indigenous Australians (tender policy). Aboriginal and Torres Strait Islander Services (ATSIS) released the 'Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians' (Exposure Draft) on 4 March 2004. ATSIS propose an open competitive tender for future legal services for Indigenous Australians. VALS has drafted a joint submission with Arnold Bloch Leibler (Advisers and Lawyers) in response to the Exposure Draft.

VALS acknowledges that the proposal to tender legal services for Indigenous Australians is not State driven and recognizes that State Government opposition has been expressed to the Commonwealth Government about the proposed tender. The Commonwealth have ignored all the criticism and are proceeding albeit all States may not be tendered at once. VALS mentions the proposal in this submission and calls for the Victorian Government to again express the following concerns to the Commonwealth Government.

- The tender policy flies in the face of the Recommendations.
- The tender policy to tender fails to recognize the importance of a holistic legal service as it narrows and separates the range of services currently provided by Aboriginal and Torres Strait Islander Services (ATSILS).
- The tender policy fails to ensure the continued existence of Indigenous Australian's control of ATSILS as it makes it easier for non-Indigenous providers, than ATSILS, to win the tender.
- Funding periods of six months continue to be a totally unacceptable feature of the funding of ATSILS

THE TENDER FLIES IN THE FACE OF THE RCIADIC RECOMMENDATIONS

CONSULTATION

Recommendation 1c states: [t]hat governments consult with appropriate Aboriginal organisations in the consideration and implementation of the various recommendations in this report"

Recommendation 1d states: "[t]hat wherever appropriate, governments make use of the services of Aboriginal organisations in implementing such recommendations."

Recommendation 1e states that it is ensured that "local Aboriginal organisations are consulted about the local implementation of recommendations, and their services be used

wherever feasible”.

It is of major concern to VALS that the 2004 tender policy evolved without consultation with Aboriginal organizations, such as VALS. This is especially of concern as the 2004 ATSIS tender policy is a significant departure from the 2001 ATSIC policy. The 2001 tender policy was to use tendering as a last resort for services which were not performing adequately. The policy was to tender out ATSILS to Indigenous Australian organisations only, not non-Indigenous organisations. There is no evidence that ATSILS are performing inadequately, but regardless of this, the new ATSIS 2004 policy is to tender *all* services out, and open the tendering process up to *all* organizations and sundry.

The lack of consultation on the tender police demonstrates a lack of understanding of the legal assistance needs of Indigenous Australians and a lack of understanding of legal services for Indigenous Australians. ATSILS are the primary provider of legal services to Indigenous Australians, as 89% of legal services to Indigenous Australians are delivered by ATSILS. Between 1997-1998 and 2002-2003, the number of case and duty matters provided by ATSILS increased from 66.000 to in excess of 113,000 (Law and Justice Review Number 13, Australian National Audit Office 2003).

The tender policy is based on paternalistic assumptions, rather than an informed perspective, as ATSIS did not consult Indigenous Australians or alternative mainstream service providers (ie: VLA, LAC, private law firms) for that matter. The tender policy assumes that mainstream service delivery is appropriate for legal services for Indigenous Australians. However, it is the perspective of Indigenous Australians that mainstream service delivery is inappropriate, as mainstream services lack the capacity to provide a culturally appropriate service. Also, it is the perspective of alternative service providers that they do not want to replace ATSILS as the primary service provider of legal services to Indigenous Australians (ANAO Report).

VALS welcomes the response of Senator Kerry O’Brien (Shadow Minister for Reconciliation and Indigenous Affairs) and Senator Nicola Roxon (Shadow Attorney-General), to the tender police in a press release, dated 11 June 2004. The Senators called on the Government to immediately scrap the tender process, “give existing service providers some certainty, and start again with a proper and meaningful consultation process on how to deliver the best legal services to Aboriginal and Torres Strait Islander communities”.

SELF DETERMINATION

Recommendation 188 states “[t]hat governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.”

One of the key themes of the RCIADIC was the importance of Indigenous self-determination (Recommendations 188-204). The importance of Indigenous control of services was emphasised by Commissioner Elliot Johnson (paragraph 1.7.6 RCIADIC): "The thrust of this report is that the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands".

VALS notes that the Commonwealth Grants Commission (CGC) Report on Indigenous Funding (2002), released eleven years after the RCIADIC, uses different language but makes some similar Recommendations about how Government should deal with Indigenous organizations. The need to repeat the RCIADIC shows that the Recommendations have not been implemented.

The CGC Report argues that:
"There are important principles and key areas for action that should guide efforts to promote a better alignment of funding with needs. These include:

> (i) the full and effective participation of Indigenous people in decisions affecting funding distribution and service delivery;
> (ii) ensuring a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals;
> (vii) recognising the importance of capacity building within Indigenous communities.

Pg xvii-xix (CGC 2002)

The lack of consultation on the tender policy undermines the right to self-determination. The tender policy also ignores the right to self-determination by opening up the possibility of legal services no longer being supplied by Indigenous organisations with Indigenous staff, but mainstream providers. The tender proposal maximises the chances of attracting non-Indigenous mainstream legal aid and private law firms to bid for tender, and such organisations being granted the bid. This model of legal service provision will have a detrimental impact on Indigenous Australians because the cultural appropriateness available from Indigenous organisations will be lost. The mainstreaming of legal services for Indigenous Australians has assimilation undertones. It also flies in the face of Recommendation 1e which states "local Aboriginal organisations are consulted about the local implementation of recommendations, and their services be used wherever feasible".

The extent to which the tender policy values cultural sensitivity is questionable on the following grounds:

- cultural sensitivity is the second criteria, ranked at 30%, behind quality in the Exposure Draft. It is arguable that Indigenous Australians access the quality of a legal service for Indigenous Australians on the level of cultural sensitivity.
- the tender policy enables cultural sensitivity be met by mere cultural training. It appears that non-Indigenous service providers will easily meet this requirement is they simply plan to incorporate cultural training policies and procedures.
- there is not requirement for Indigenous Australian staff, control or management.
- there is a trade off between strong cultural sensitivity requirements and a competitive tendering process, at the expense of the former. The requirement of cultural sensitivity is

traded-off in the interests of promoting a competitive and open market for the provision of legal services for Indigenous Australians, to achieve the most efficient outcome of the tender process. The selection criteria increases the chances that organizations, other than Indigenous organizations, will be able to meet the selection criteria of cultural sensitivity by watering the concept of cultural sensitivity down.

The fact that cultural sensitivity is linked with accessibility is significant. If the cultural sensitivity of a service provider is limited, so too is access to a service. It is a concern that it is likely that some Indigenous people will not seek assistance from non-Indigenous organisations for cultural reasons.

RESEARCH

Recommendation 105 states: '[t]hat in providing funding to Aboriginal Legal Services governments should recognise that Aboriginal Legal Services have a wider role to perform than their immediate task of ensuring the representation and provision of legal advice to Aboriginal persons. The role of the Aboriginal Legal Services includes investigation and research into areas of law reform in both criminal and civil fields which relate to the involvement of Aboriginal people in the system of justice in Australia. In fulfilling this role Aboriginal Legal Services require access to, and the opportunity to conduct, research."

The tender policy fails to take into account the above Recommendation. The proposal to tender out legal services narrows the core services that legal services for Indigenous Australians are to provide. The tender proposal does include research or education within the core services that a legal service should provide Indigenous Australians.

CRIMINAL LAW

The tender policy narrows core services for Indigenous Australians requiring legal assistance, by:

- reducing representation when there is a risk of being detained in custody to priority three.
- introducing a 'one strike and you're out rule' in cases involving violence.

VALS currently provides the majority of assistance in the area of criminal law and the above policies will disadvantage Aboriginal people by exposing them to unnecessary risks of imprisonment. This flies n the face of the RCIADIC Recommendations, aimed towards the reduction of the over-representation of Indigenous Australians within the criminal justice system.

It is foreseeable the reduction of criminal law assistance will ultimately lead to:

- An increase in unrepresented or self-represented men and women, especially those who have committed minor offences.
- Increase in self representation

- Reduced effectiveness of Committals. Those who were unrepresented do not even try to run committals.[66] Committal are crucial for identifying the issues and the quality of evidence.[67]
- Increased number of Defendants failing to appear at Court.
- More Defendants experiencing pressure to plead guilty or abandon cases. Defendants "overwhelmed by the resources available to the prosecution" give up and take the easy way out of pleading guilty."[68]
  - Longer sentences and a higher population of Indigenous Australians within the prison system. The further detention and increased incarceration of Aboriginal people is a major concern of VALS in light of the findings of the RCIAIC in terms of the overrepresentation of Indigenous Australians in the justice system and rate of deaths in custody. Arguably, more prisons will be required to cater for the impact the tender policy will have on the overrepresentation of Indigenous Australians in prison.

FUNDING TO LEGAL AID

Recommendation 226g states that "Aboriginal Legal Services be funded to ensure that legal assistance, if required, is available to any Aboriginal complainant"

Recommendation 234 specifically applies to youth and states : "[t]hat Aboriginal Legal Services throughout Australia be funded to such extent as will enable an adequate level of legal representation and advice to Aboriginal juveniles".

VALS feels that funding for legal aid across the board in inadequate. Funding for Aboriginal and Torres Strait Islander Legal Services (ATSILS) and mainstream legal services has remained static in recent years.

Minister Amanda Vanstone (Minister of Immigration, Multicultural and Indigenous Affairs) announced on 30 June 2004 that the Government received useful feedback in response to the 'Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians'. She also stated that there is merit in the idea of "tenders being released in stages progressively around Australia, rather than a simultaneous approach". The tendering process will commence during the first half of the coming financial year.

Not all States will be tendered out at once, which means the bottom line is still the same: no service is guaranteed funding beyond 31 December 2004. VALS argues that the above announcements perpetuate the uncertainty VALS and other services are currently experiencing. Such uncertainty does not promote good governance, and instead adversely affects service effectiveness. In a climate of uncertainty Aboriginal ATSILS experience difficulty in retaining and recruiting sufficently experienced staff.

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[66] Erosion of Legal Representation in the Australian Justice System (February 2004), para 174
[67]op cit , para 205
[68] op cit para 224

VALS recommends that services have twelve months notice if they are to be tendered. This is the minimum time necessary to conduct a tender and ensure a successful transition process from the current provider to the new provider. The Minister should provide services in all States with a reasonable level of certainty about funding.

PROPOSED ABOLITION OF ATSIC

VALS takes this opportunity to address the proposed abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC). VALS acknowledges that plans to abolish ATSIC are Commonwealth driven and VALS calls for the Victorian Government to counteract the erosion of the right to self-determination outlined above. VALS acknowledges the positive work towards self-determination in the State of Victoria (ie: RAJACs). VALS argues that RAJACs should have a wider role in criminal justice and in the monitoring of the implementation of RCIADIC, especially in light of the proposed abolition of ATSIC.

The consequences for VALS of the abolition of ATSIC are that the Commonwealth Office of the Attorney-General's Department will be responsible for legal services for Indigenous Australians. VALS is concerned by the mainstreaming of Indigenous services and the overlooking of Indigenous Australian's right to self determination. The continuation of Indigenous services, such as VALS, is under threat by a Government prepared to abolish ATSIC, not replace this representative body, but enable Government agencies to absorb services for Indigenous Australians. The tendering out of legal services for Indigenous Australians is a blatant example of mainstreaming legal services and ignoring the Indigenous right to self determination, just as the abolition of ATSIC is.

VALS calls for the Victorian Government to hold the Commowealth Government accountable. VALS is concerned that the Federal Government is attempting to strip ATSIC of its responsibilities before legislation to abolish the organisation is passed. On 24 June 2004, the Government stripped ATSIC Commissioners of personal staff and ATSIC Commissioners are now seeking the assistance of volunteers. More than one billion dollars, of former ATSIC/Aboriginal and Torres Strait Islander Services (ATSIS) programs, has been transferred to mainstream Australian Government agencies. On 1 July 2004, some one thousand, three hundred staff commenced work in their new mainstream Government Departments.

CONCLUSION

VALS believes that the RCIADIC Recommendations are still highly relevant to the pursuit of better justice outcomes for Koorie people. Changes to the policy and political climate over the past ten years mean that Governments have been coming to terms with how to implement the Recommendations of the RCIADIC at the same time that the scale of problems facing Indigenous Australians and degree of difficulty have been worsening. It is almost as though the Government has found the right direction (partnership with Indigenous people and a planned approach) and is striding towards its objectives, only to discover that the path is one of those airport treadmills which is switched on and is taking you backwards.

VALS believes that future attempts of addressing the RCIADIC Report has to recognise the cynicism and lack of understanding by many in the Australian community of the causes and effects of disadvantage. Additionally, recognise the importance of sustained and diverse Government actions which are necessary to reduce the gaps between the well off and the disadvantaged. Programs aimed at Koorie people need to be seen to be part of Government wider role to reduce systemic disadvantage and work with the reality that the playing field has been getting even less level.

Continuing efforts by Government to work in partnership with the Koorie community and improve that relationship are critical. It is also critical that there is a wider public understanding of the range of rights protection mechanisms in place and how to use, critique and support them.

VALS believes that ‘whole of Government’ is rarely achievable but a “some of government” approach is an excellent start and should be built on. An example of this approach, on a small scale is a project developing a Diversion pilot for young people in two regions which has grown out of the VAJA. This is a process that VALS, the Department of Justice, Department of Human Services and Vic Police and ACJPs has been involved in.

The project developed from comments made by community members, plus some research by VALS which was presented to the Aboriginal Justice Forum. That led to a decision to develop a pilot and a small Steering Committee was formed. The Steering Committee brings together a range of expertise and experience. The implementation of the pilots will require negotiation with people in the local area to assess whether they have the time and interest to help develop it. There is an element of bottom up approach in terms of previous community members at VALS education sessions talking about ways to improve the system and VALS staff experiences. But there is also an element of top down support to get a pilot funded and there was also the support and interest from the Forum. This pilot will also complement some other initiatives. VALS urge the Government to redouble their efforts in the area of implementing RCIADIC Recommendations.

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APPENDIX 1

Social Status

Amend section 6 of the Equal Opportunity Act 1995 to prevent direct or indirect discrimination on the ground of social status

VALS argues that section 6 of the Equal Opportunity Act 1995 should be amended to include 'social status' as an attribute on the basis of which discrimination is prohibited. Such an amendment is supported by arguments made by Philip Lynch and Bella Stagoll (Public Interest Law Clearing House – PILCH) in their article 'Promoting Equality: Homelessness and Discrimination' and the Australian Council of Social Services.[69]

The grounds for amending section 6 of the Equal Opportunity Act 1995 to include 'social status' as an attribute on the basis of which discrimination is prohibited are as follows:

- The Equal Opportunity Act 1995 does not "provide any protection from, or redress in relation to, discriminatory treatment on the ground of social status".[70]
- Discrimination against people who are homeless, unemployed or on social security benefits should not be lawful. For instance, accommodation providers refuse rooms to people who are associated with a homelessness program or a social security recipient.
- The absence of a clause in the Equal Opportunity Act 1995 prohibiting discrimination on the ground of social status results in the further margainsalisation of people of low socio-economic status. The Equal Opportunity Act 1995 should be amended to protect some of the most vulnerable members of our community.
- The inclusion of social status as a ground of prohibited discrimination will ensure Australian laws are in compliance with:
    - international human rights norms (article 26 of the ICCPR contains the norm of non-discrimination on the ground of social origin).
    - the law in progressive jurisdictions such as Canada and New Zealand [the Human Rights Act 1993 (NZ) includes 'employment status' as a prohibited ground of discrimination].
- The reforms proposed in this submission accord with the objectives of the Equal Opportunity Act 1995 and the stated policy objectives of the Victorian Government.

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[69] Lynch Philip and Stagoll Bella 'Promoting Equality: Homelessness And Discrimination' [2002] Deakin Law Review 15

[70] ibid

VALS is in agreement with the following amendments to the Equal Opportunity Act 1995, recommended by Lynch and Stagoll, that complement the inclusion of social status as a ground of prohibited discrimination:

- Amend section 4 of the Act to include the following definition of "social status":

(a) "Social status" includes a person's status of being:

(b) (a) homeless;

(b) unemployed; or

(c) a recipient of social security payments.

(c)

- Amend section 4 of the Act to include the following definition of "homeless":

(d) A person is taken to be "homeless" if he or she has inadequate access to safe and secure housing.

(e) A person is taken to have inadequate access to safe and secure housing if the only housing to which a person has access:

(f) (a) damages, or is likely to damage, the person's health; or

(b) threatens the person's safety; or

(c) marginalises the person through failing to provide access to:

(g) (i) adequate personal amenities; or

(ii) the economic or social supports that a home normally affords; or

(h) (d) places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.

(i)

- Amend section 4 of the Act to include the following definition of "unemployed":

(j) "Unemployed" in relation to a person means not having a job or being unable to earn a sufficient livelihood.

- Amend section 4 of the Act to include the following definition of "recipient of social security payments": "Recipient of social security payments" in relation to a person means being a recipient of a payment, benefit, pension or allowance under the *Social Security Act 1991* (Cth).

Drug Use

Amend section 6 of the Equal Opportunity Act 1995 to prevent discrimination on the ground of drug use

VALS argues that section 6 of the Equal Opportunity Act (VIC) 1995 should be amended to include 'drug use' as an attribute on the basis of which discrimination is prohibited. VALS makes this argument as a form of opposition to the Commonwealth Government's plan to enact the Disability Amendment Bill 2003 (Cth). The Bill no longer includes 'drug use' discrimination in the workplace, employment, accommodation, sporting activity and club membership within the definition of disability discrimination

VALS made the following arguments in the submission to the Senate Legal and Constitutional Committee - Inquiry into the Provisions of the Disability Discrimination Amendment Bill 2003 (Cth):

- "The RCIADIC found that drug abuse (as well as alcoholism and family violence) is symptomatic of a larger picture of socio economic marginalisation. The impact of legislation that discriminates against drug users on the basis of their addiction will only serve to exacerbate the economic and social marginalisation of Aboriginal and Torres Strait Islander people".
- "….addressing the underlying causes of drug addiction rather than discriminating against those who have a drug addiction is an approach that would demonstrate that the government is really committed to addressing drug abuse in our communities".
- "Lawful discrimination on the basis of a person's drug addiction when services for treatment are unavailable or waiting lists do not allow access to treatment programs is unacceptable".

  The Disability Discrimination Amendment Bill 2003 (Cth) "violates Australia's obligations under international human rights law; particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These covenants are intended to protect people from all types of discrimination before the law and can not be ignored".

ACCESS TO ESSENTIAL SERVICES

Discrimination against consumers of essential services

Recommendation 198 states: "[t]hat governments commit themselves to achieving the objective that Aboriginal people are not discriminated against in the delivery of essential services and, in particular, are not disadvantaged by the fact that the low levels of income received by Aboriginal people reduce their ability to contribute to the provision of such services to the same extent as would be possible by non-Aboriginal Australians living in similar circumstances and locations"

VALS argues that people of low socio economic backgrounds experience direct or indirect discrimination in the provision of essential services, which should be universally accessible. For instance, it is the experience of some Indigenous Australians for services to be cut off for four to five weeks, instead of two to three days, as is the case for other

Australians.[71] The 2001 Census statistics show Indigenous Australians to be highly vulnerable consumers.[72]

VALS is concerned that the consumer protection 'safety net', legislated for in the Energy Legislation (Consumer Protection And Other Amendments) Act 2003, is due to expire on 31 December 2004 and alternative protection for consumers is lacking. Section 1a(i) of the Energy Legislation (Consumer Protection And Other Amendments) Act 2003 contains a sunset clause, as the purpose of the Act is to: amend the Gas Industry Act 2001 and the Electricity Industry Act 2000 to extend the consumer protection safety net for gas and electricity customers until 31 December 2004.

Suggested Reform

Legislative extension of safety net

VALS supports a broad-based safety net and calls for a legislative extension of the safety net post December 2004 and the strengthening of the Retail Code if the Essential Services Commission fails to adopt a comprehensive fuel poverty alleviation strategy by 31 December 2004.[73] If there is no safety net post 2004 and no effective essential services market, just as there was in December 2003 which motivated the extension of the safety net to 31 December 2004, then discrimination may occur. VALS notes that the Essential Services Commission will submit a Final Report to the Minister by 15 June 2004 on Special Investigation: Review of Effectiveness of Retail Competition in Gas and Electricity which will discuss post 2004 reform.

VALS calls for legislation that reflects the following principles:

- Ongoing need for consumer protection safety net.
- Guarantee of minimum supply of essential services regardless of the ability to pay (ie: cost of essential services should not equal more than a nationally agreed percentage of income).[74]

VALS considers the above suggested reforms as essential in light of the fact that discrimination agaisnt Indigenous Australians perpetuates a level of disadvantage that can contribute to Indgienous Australians entering the criminal justice system.

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[71] Smith Cath, CEO of Victorian Council of Social Services speaking at Discrimination in the Law Inquiry: Public Information Session on 20 May 2004.

[72] Victorian Aboriginal Legal Service 'Initial Comments about the "Effectiveness of Retail Competition: Issues Paper"' Published by the Essential Services Commission (2003)

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