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## VICTORIAN ABORIGINAL LEGAL SERVICE RESPONSE TO SCRUTINY OF ACTS AND REGULATIONS COMMITTEE'S INQUIRY INTO 'DISCRIMINATION IN THE LAW' (sent June 2004)

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## **INTRODUCTION**

This submission inquires into Victorian Acts and Regulations that discriminate, or may lead to discrimination, against any person. As the major legal representative of Aboriginal and Torres Strait Islander people in Victoria, the Victorian Aboriginal Legal Services (VALS) has day to day contact with Aboriginal and Torres Strait Islander people in the criminal, family and civil justice systems and has first hand experience with the myriad of issues surrounding discrimination. VALS argues that a combination of legislation and education is required to tackle discrimination, challenge the status quo of inequality and effect institutional change.

## **OBJECTION TO AN AUTOPSY**

### ***Discrimination against people other than next of kin***

It is the opinion of VALS that the Coroners Act (VIC) 1985 should be amended to 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 (ie: 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 Victorian Aboriginal Legal Service Response to Scrutiny of Acts and Regulations Committee's Inquiry 2 into 'Discrimination in the Law (June 2004)

Gippsland region did not have standing to initiate an objection to an autopsy.<sup>1</sup> 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”.

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 should also 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:

- “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.

Additionally, 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)].

## **ABORIGINAL OFFICIAL VISITOR PROGRAM**

### ***Discrimination on the basis of criminal record***

It is the opinion of VALS that the absence of detail within the Corrections Act (VIC)1986 or Corrections Regulations (VIC) 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)].<sup>188</sup>

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<sup>1</sup> *Green v Johnstone* [1995] 2 VR 176

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, Andre Haermeyer, 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 (ie: 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.<sup>2</sup> The recommendations of the RCIADIC (1991), Aboriginal Justice Forum and Aboriginal Justice Agreement (2000) are consistent with the appointment of Aboriginal Official Prison Visitors.<sup>3</sup> 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.

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<sup>2</sup> Knowler, Jeanette 'Living down the past - Spent convictions schemes in Australia'

<sup>3</sup> Victorian Aboriginal Justice Agreement (2000), p 35, para 1.4

## ***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 (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 also 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. The Anti Discrimination Act (NT) 1996 and Anti Discrimination Act (TAS) 1998 prohibit discrimination on the basis of irrelevant criminal record. Section 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) (NT )Act. VALS calls for the enactment of legislation in Victoria based on existing spend record legislation. For instance, the *Criminal Law (Rehabilitation of Offenders) Act (QLD) 1986* provides that a conviction will lapse after a “rehabilitation” period (ie: 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.<sup>4</sup>

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.<sup>5</sup>

## **THE VICTORIAN DUAL TRACK SENTENCING REGIME**

### ***Discrimination leading to children being sentenced to adult prisons***

The definition of child in section 3 of the Children and Young Person’s Act (VIC)1989 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.<sup>6</sup>

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.<sup>7</sup>

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<sup>4</sup> Jeanette Knowler ‘Living down the past - Spent convictions schemes in Australia’

<sup>5</sup> Knowler Jeanette ‘Living down the past - Spent convictions schemes in Australia’

<sup>6</sup> Jesuit Social Services ‘News Release: Human Rights Day, Bracks Government Still Allows Children To Be Sentenced To Adult Prisons’ Wednesday 10 December 2003.

<sup>7</sup> ‘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'.<sup>8</sup> 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.<sup>9</sup>
  - 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.<sup>10</sup>
  - Article 1 of the Convention on the Rights of the Child considers all people under the age of eighteen to be children.<sup>11</sup>

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

VALS argues that reform needs to go further than simply altering the jurisdictional 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 entirely accurate.<sup>12</sup> 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.

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<sup>8</sup> Attorney-General's Justice Statement: New Directions for the Victorian Justice System 2004-2014 (May 2004) (Department of Justice/State Government Victoria).

<sup>9</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner - Fifth Report 1997 at [www.austlii.edu.au](http://www.austlii.edu.au)

<sup>10</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner -- Fifth Report 1997

<sup>11</sup> Victorian Council of Social Services, *Juvenile Justice* 2003-2004 State Budget Submission, pg 10.

<sup>12</sup> Shiel, Fergus 'Young to be moved out of adult jails' May 28, 2004

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.

## **SPORT**

### ***Discrimination in Sport: Exemptions***

An exemption in Division 7 (Discrimination in Sport) of the Equal Opportunity Act (VIC) 1995 is arguably discriminatory. Section 66(1) states as follows: “[a] person may exclude people of one sex from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant”. Section 66(3) states as follows: “Sub-section (1) does not apply to a sporting activity for children under the age of 12 years”. The distinction between people over the age of twelve and under the age of twelve appears arbitrary and may lead to discrimination against those who do not fall within the protection of the Equal Opportunity Act 1995 (ie: those over the age of twelve). VALS suggests removing the distinction between people aged below and above twelve.

## **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.<sup>13</sup>

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<sup>13</sup> Lynch Philip and Stagoll Bella ‘Promoting Equality: Homelessness And Discrimination’ [2002] Deakin Law Review 15

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”.<sup>14</sup>
- 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 marginalisation 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.

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":

“Social status” includes a person’s status of being:

  - (a) homeless;
  - (b) unemployed; or
  - (c) a recipient of social security payments.
  
- Amend section 4 of the Act to include the following definition of “homeless”:

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

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

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<sup>14</sup> ibid

- (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:
    - (i) adequate personal amenities; or
    - (ii) the economic or social supports that a home normally affords; or
  - (d) places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.
- Amend section 4 of the Act to include the following definition of "unemployed":  
 "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”.

## **INDIRECT DISCRIMINATION: PUBLIC ORDER LAWS**

*“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”.*<sup>15</sup>

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 their peculiar circumstances.<sup>16</sup> 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).

### ***Public Drunkenness***

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.<sup>17</sup> 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.<sup>18</sup> More than half (67%) of the Aboriginal Deaths in Custody investigated by the Royal Commission (RCIADIC) were related to arrests due to public drunkenness.<sup>19</sup>

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.

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<sup>15</sup> Royal Commission into Aboriginal Deaths in Custody 1991) Volume 2 para 12.1.30

<sup>16</sup> Legal Information Access Centre (LIAC) Key Concepts in Discrimination Law, [\[2002\] HotTopics 5](#)

<sup>17</sup>Royal Commission into Aboriginal Deaths in Custody (1991) Volume 2 para 12.1.15

<sup>18</sup>Royal Commission into Aboriginal Deaths in Custody (1991) Volume 2 para 21.1.2

<sup>19</sup> Victorian Aboriginal Legal Service ‘Suggested Review of the Summary Offences Act and the Vagrancy Act’ 1999

- Public Order laws have the effect of increasing Aboriginal involvement in the justice system (ie target disadvantaged groups) as they have a disproportionate and adverse impact on Indigenous communities.<sup>20</sup> Public Order laws have been criticized as ‘legislated intolerance’.<sup>21</sup>
- 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.
- 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.<sup>22</sup> 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.<sup>23</sup> 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 present police practices are racist.<sup>24</sup>

### ***Suggested Reform***

#### *Decriminalisation of public drunkenness*

VALS is concerned that public order laws are contributing to the overrepresentation of Indigenous Australians in the criminal justice system. In light of this, the Summary Offences Act 1966 should be revised to conform to current attitudes about criminal behaviour.<sup>25</sup> Arguably, section 13 of the Summary Offences Act 1966 does not conform to public opinions about drunkenness: (ie placing people in jail simply because of being drunk and not necessarily disorderly or disruptive).

VALS agrees with recommendation 79 of the RCIADIC that public drunkenness should be decriminalized. Such decriminalization would involve repealing sections 13, 14 and 16 of the Summary Offences Act 1966. Also, 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 civil rather than criminal basis.<sup>26</sup>

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<sup>20</sup> Australian Human rights and Equal Opportunity Commission – 2004 Media Release, Indigenous People and public space information share, 27 February 2004

<sup>21</sup> Wenham, Margaret ‘Court provides a public space for questioning’ *The Courier Mail* 9 June 2004.

<sup>22</sup> Luke Garth and Cunneen Chris, *Aboriginal Juveniles And The Juvenile Justice System In New South Wales*, 1990.

<sup>23</sup> *ibid*

<sup>24</sup> Victorian Aboriginal Legal Service ‘Koories and Jungais: A Study of Aboriginal and Police Relations in Victoria (2000)’

<sup>25</sup> Victorian Aboriginal Legal Service ‘Suggested Review of the Summary Offences Act and the Vagrancy Act’ 1999

<sup>26</sup> Royal Commission into Aboriginal Deaths in Custody (1991) Volume 2 para 21.1.3

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The legislation should follow the spirit of legislation in jurisdictions that have decriminalised public drunkenness.<sup>27</sup> At ground level, police practices should be influenced by ‘night patrols’ which remove ‘people at risk’ from public places to safe places.<sup>28</sup>

VALS is concerned that the Government appears to be using the recommendation 80 of the RCIADIC to stall the decriminalisation of public drunkenness: “..[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”. 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).<sup>29</sup> Prior to the RCIADIC, the Government was discussing decriminalisation (Law Reform Commission Report on Public Drunkenness June 1989).<sup>30</sup> VALS calls for the Government to stop stalling and establish non-custodial facilities (ie: sobering up centres) and decriminalise public drunkenness.

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 drunkenness will contribute to the overrepresentation of Indigenous Australians to a lesser extent.<sup>31</sup>

However, it is also argued that decriminalization will not impact rates of overrepresentation within the criminal justice system. Arguably, Aboriginal people are overrepresented in apprehensions for public drunkenness in both jurisdictions where it remains an offence and has been decriminalised.<sup>32</sup> 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’ (ie: police pick up Aborigines on charges alternative to public drunkenness such as language offences).<sup>33</sup> In decriminalizing public drunkenness, care must be taken to ensure that the offence is not indirectly re-criminalised.

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<sup>27</sup> 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

<sup>28</sup> Blanchard Lynda-Ann and Lui Leah ‘Citizenship and Social Justice: Learning from Aboriginal Night Patrols in NSW [2001] Indigenous Law Bulletin 3

<sup>29</sup> Parliament of Victoria Drugs and Crime Prevention Committee: Inquiry into Public Drunkenness Final Report (June 2001)

<sup>30</sup> Victorian Aboriginal Legal Service Suggested Review of the Summary Offences Act and the Vagrancy Act, 1999

<sup>31</sup> Royal Commission into Aboriginal Deaths in Custody (1991) Volume 4 para 28.3.28

<sup>32</sup> Australian Human rights and Equal Opportunity Commission – 2004 Media Release, Indigenous People and public space information share, 27 February 2004

<sup>33</sup> Royal Commission into Aboriginal Deaths in Custody (1991) Volume 2 para 21.1.72 Australian Human rights and Equal Opportunity Commission – 2004 Media Release, Indigenous People and public space Victorian Aboriginal Legal Service Response to Scrutiny of Acts and Regulations Committee’s Inquiry 13 into ‘Discrimination in the Law (June 2004)

VALS notes that the above argument about alternative charges being substituted in jurisdictions where public drunkenness has been 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).<sup>34</sup> For instance, between 1990-1997 admissions to sobering up centres increased eight fold.<sup>35</sup> VALS argues that the advantages of decriminalization outweigh the disadvantages of decriminalization (ie: substitution of charges).

### *Decriminalisation of public order language offences*

Obscene or offensive language charges are used frequently against Aboriginal people, though not to the same degree as arrests or detentions for drunkenness.<sup>36</sup> The RCIADIC recommended the decriminalization of language offences that adversely impact Indigenous Australians. Recommendation 86a stated: “[t]he use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge”. 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.<sup>37</sup> In contrast, today the use of ‘swear words’ is commonplace on the screen, in theatres, and on the street.<sup>38</sup>

### *Legislation regulating use of cautions*

As noted above, Indigenous Australians are less likely to receive a caution than non-Indigenous Australians. Perhaps clear legislative rules should be established that are in line with the following RCIADIC recommendations that attempt to manage police behaviour by:

- Requiring, rather than simply suggesting the use of diversionary measures.<sup>39</sup>
- Widening police powers to caution.
- Reducing the discretion of police to choose whether to caution.<sup>40</sup>

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information share, 27 February 2004

<sup>34</sup> WA Drug Abuse Strategy Office, Statistical Bulletin Number 5, June 1999 – ‘Utilisation of Sobering Up Centres in Western Australia, 1990-1997), p1.

<sup>35</sup> *ibid*

<sup>36</sup> Royal Commission into Aboriginal Deaths in Custody (1991) Volume 2 para 21.1.5

<sup>37</sup> Victorian Aboriginal Legal Service Suggested Review of the Summary Offences Act and the Vagrancy Act, 1999

<sup>38</sup> Victorian Aboriginal Legal Service ‘Suggested Review of the Summary Offences Act and the Vagrancy Act’ 1999

<sup>39</sup> Luke Garth and Cunneen Chris, *Aboriginal Juveniles And The Juvenile Justice System In New South Wales*, 1990.

<sup>40</sup> Royal Commission into Aboriginal Deaths in Custody (1991) Volume 3 para 21.3.1

## **INDIRECT DISCRIMINATION: THE FINE SYSTEM**

The fine system [court imposed fines (Sentencing Act 1991), parking fine etc] is inherently flawed and is arguably indirectly discriminatory towards Indigenous Australians.<sup>41</sup> The fine system is unfair because it has a harsher impact on people of low socio-economic background compared to people of a higher socio-economic background. 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.<sup>42</sup>

### ***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 (ie: 'warning system' and diversionary programs). VALS is concerned to see that legislation, expected to be enacted by autumn 2005, does in fact go ahead.<sup>43</sup> VALS argues that the following methods can also work to make the fine system fairer:

- Introduction of means testing when fining a person;
- Increased flexibility in fine payment.

## **ACCESS TO ESSENTIAL SERVICES**

### ***Discrimination against consumers of essential services***

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.<sup>44</sup> The 2001 Census statistics show Indigenous Australians to be highly vulnerable consumers.<sup>45</sup>

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

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<sup>41</sup> Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act', 1999

<sup>42</sup> Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act' 1999

<sup>43</sup> Newsletter of the PILCH Homeless Person's Legal Clinic, *Street Rights*, Edition 7- May 2004, pg 1.

<sup>44</sup> Smith Cath, CEO of Victorian Council of Social Services speaking at Discrimination in the Law Inquiry: Public Information Session on 20 May 2004.

<sup>45</sup> 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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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.<sup>46</sup> 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).<sup>47</sup>
- Recommendation 198 of the RCIADIC: That Governments commit themselves to achieving the objective that Aboriginal people are not discriminated against in the delivery of essential services.

### **NATIVE TITLE**

#### ***Discriminatory extinguishment of native title***

VALS agrees with Peter Yu, a disappointed critic of native title, that national land rights legislation needs to be put back on the table.<sup>48</sup> The Land Titles Validation Act (VIC) 1994 provides for the retrospective validation of acts [past (part 2), intermediate (part 2A) and future (part 2C)] exhibiting a clear and plain intention to extinguish native title. The Land Titles Validation Act 1994 is racially discriminatory and in contravention of section 10 of the Racial Discrimination Act 1975 (Cth).<sup>49</sup> The Act has the effect of legislating Aboriginal land rights “out of existence”.<sup>50</sup>

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<sup>46</sup> Ibid.

<sup>47</sup> Appendix 1 From ‘Community Sector Policy Statement on Utilities’, 28 July 2001  
VCOSS Special Investigation: Review Of Effectiveness Of Retail Competition In Gas And Electricity (2004)

<sup>48</sup> Rintoul Stuart and Saunders Megan, ‘Little to be earned from titles alone’ *The Australian* June 05, 2002

<sup>49</sup> McNeil Kent ‘Racial discrimination and unilateral extinguishment of native title’ [1996] *Australian Indigenous Law Reporter* 45

<sup>50</sup> Harradine Brian ‘Brian Harradine: Native title's untapped potential’ *The Australian* June 07, 2002  
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The United Nations International Committee on the Elimination of Racial Discrimination (CERD) criticized the 1998 amendments to the Commonwealth Native Title Act (1993) as discriminatory, as the amendments prefer the rights of non-Indigenous title holders over Indigenous land rights.<sup>51</sup> The Land Titles Validation Act 1994 is discriminatory because it makes native title more liable than other non-Indigenous land titles to extinguishment.<sup>52</sup> The interests in land of other racial groups in Australia cannot be extinguished in a similar manner as that propounded in the Land Titles Validation Act 1994, but under s 51 of the Commonwealth Constitution (acquisition of property on just terms in certain circumstances).<sup>53</sup> The rules of extinguishment violate the human right of Indigenous peoples in Australia not to be arbitrarily deprived of their legal rights to land.<sup>54</sup>

Not only does the Land Titles Validation Act 1994 dictate that Aboriginal interests in land take second place to white interests in land, but compensation for the extinguishment of native title is limited. Section 130 of Land Titles Validation Act 1994 provides compensation, but only to the extent (if any) that the native title rights and interests were not extinguished otherwise than under this Act).

VALS calls for land rights legislation to be put back on the agenda to address the above issues, and for Indigenous Australians to be involved in the process of legislating for land rights.

## **VICTORIAN CONSTITUTION**

### ***Discrimination in the Victorian Constitution***

VALS supports a positive recognition of Indigenous Australians within the Victorian Constitution. VALS argues that the absence of a reference to Indigenous Australians in the Victorian Constitution is discriminatory. The exclusion of Aboriginal people from the Constitution has racist origins (ie: white Australia policy).

VALS notes that on 28 May 2004, Premier Bracks announced plans to amend the Victorian Constitution to “officially recognize the historical status and contribution of Aboriginal people to the state”<sup>55</sup>. VALS welcomes this announcement and the ‘Exposure Draft of the Constitution (Recognition of Aboriginal People) Bill’ can be viewed at [www.dvc.vic.gov.au](http://www.dvc.vic.gov.au).

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<sup>51</sup> McNeil Kent ‘Racial discrimination and unilateral extinguishment of native title’ [1996] Australian Indigenous Law Reporter 45

<sup>52</sup> McNeil Kent ‘Racial discrimination and unilateral extinguishment of native title’ [1996] Australian Indigenous Law Reporter 45

<sup>53</sup> *ibid*

<sup>54</sup> *ibid*

<sup>55</sup> Aboriginal and Torres Strait Islander Commission Media Release 3 June 2004 as found at [www.atsic.com.au](http://www.atsic.com.au)

VALS has some concerns about the process by which the Bill will be drafted. Failure to engage in a consultative process with Aboriginal people would repeat the original injustices perpetrated against Aboriginal people. It is important that the Government is accountable to the objective of involving Indigenous Australians in the process of Constitutional reform.

VALS argues that Constitutional recognition of Indigenous Australians should go further than that proposed by the Bracks Government. The rights of Indigenous Australians should be recognized and guaranteed in the Constitution, such as the right to self determination. This is especially the case in light of the Commonwealth Government's proposed abolition of the Aboriginal and Torres Strait Islander Commission.

## **CONCLUSION**

VALS is aware of Victorian Acts and Regulations that discriminate, or may lead to discrimination, against any person, particularly Aboriginal and Torres Strait Islander people in Victoria. VALS notes that Aboriginal and Torres Strait Islander people experience severe disadvantage in society. VALS calls for the Scrutiny of Acts and Regulations Committee to consider the suggestions of VALS to amend, repeal and enact Acts and Regulations in the manner outlined in this submission.

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