



Victorian Aboriginal Legal Service Co-operative Ltd.

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10 November 2004

Mr Jon Cina
Victorian Parliament Law Reform Committee
Level 8, 35 Spring Street
MELBOURNE VIC 3000

Dear Jon,

Re: Inquiry into Warrant Powers and Procedures - Further information

Thank you for inviting me to speak on behalf of the Victorian Aboriginal Legal Service Co-operative Limited at the Public Hearing on 19 October 2004 in relation to the Inquiry into Warrant Powers and Procedures. I write to provide the Victorian Parliament Law Reform Committee with information that was requested at the Public Hearing, but that I was unable to provide. VALS accepts the transcript of the Public Hearing is accurate.

1. Examples of unfair treatment of Indigenous Australians by the police, including excessive use of force and instances of inappropriate arrest, and how widespread such practices are.

VALS frequently experiences first hand examples of unfair treatment of Indigenous Australians by the police. It is common for VALS clients to require the services of a criminal law solicitor (ie: in relation to criminal charges laid) and a civil law solicitor (ie: civil claim against police). Please find attached a list of cases that the VALS Civil Law Solicitor has referred to the Ombudsmans Office to deal with complaints about police as of April 2004.

According to the VALS Civil Law Solicitor, the use of excessive force is common when a warrant to arrest exists for the following reasons:

- The Indigenous Australian may know of the existence of the warrant and run away from the police, so the police feel compelled to use force in this instance
- The existence of a warrant to arrest practically gives police power to use excessive force. The existence of a warrant to arrest may be an extra reason to use excessive force.
- The existence of a warrant to arrest practically gives police an excuse or justification to use excessive force as the existence of the warrant will serve to back up their actions. The existence of a warrant gives police extra protection if they use excessive force.

VALS understands that an outsider who is unaware of the work undertaken at VALS would think that the unfair treatment of Indigenous Australians is a thing of the past.

VALS does not want to put itself in the position to comment on whether police brutality towards Indigenous Australians is worse or better than it was twenty years ago. VALS does want to stress the point that police brutality towards Indigenous Australians still occurs and more measures need to be taken to prevent it.

Listed below are some recent case studies of excessive use of force by police towards Indigenous Australians:

In 2000 a 15 year old Indigenous Australian male came to the attention of police for allegedly stealing a mobile phone from a vehicle. The response by police was excessive as thirteen police officers, traveling in seven police vehicles, from four police stations attended at the scene. The Indigenous Australian was assaulted and received bruising and ‘tram track markings’ from a baton on his back, arms and legs.

On 14 June 2004 an Indigenous Australian was allegedly struck on the head by police with a torch seven times. He was handcuffed and lying on the ground. He was charged with unlicensed driving, use unregistered motor vehicle and resist arrest.

A twelve year old Indigenous Australian male in Traralgon came to the attention of police for allegedly smashing a bus window. The male alleges that police seriously assaulted him on 4 November 2004. VALS is now in the process of investigating this allegation.

2. VALS views on the number of Police Aboriginal Liaison Officers.

There are forty three Police Aboriginal Liaison Officers (PALO) at Victoria Police. Please find attached a list of the PALOs and where they are located.

Some issues about the position of Aboriginal Liaison Officer are as follows:

- The position of PALO is voluntary only.
- PALOs are not given relief from other duties in order to perform duties associated with being the PALO.
- PALOs are not required to be Indigenous Australian.
- PALOs are not independent of Victoria Police.
- The position of PALO is not defined which raises the issue of what the PALO is and is not required to do (ie: jurisdiction).
- The position of PALO is not a portfolio in itself, which shows a lack of commitment of Victoria Police to optimizing the potential of the position of PALO.
- Should the position of PALO be improved or should a new position of Aboriginal Community Liaison Officer (ACLO) be introduced? Victoria Police are in the process of recruiting four ACLOs.

3. Examples of the practice of arresting Indigenous Australians at night and on Friday nights, and information about how widespread this practice is.

VALS has found it difficult to provide case studies on the topic of police holding on to warrants to arrest. It is intrinsic in the VALS allegation that police hold on to warrants that one person's word will be pitted against the word of another (ie: Indigenous Australian's word against a police officer). Also, it is difficult to measure the subjective opinions of police officers in relation to the manner in which they execute warrants. In spite of these fall backs, the fact cannot be escaped that VALS solicitors and Client Service Officers have observed a definite trend of police holding on to warrants. VALS acknowledges that further research into this trend is essential and plans to undertake such research and develop mechanisms to capture information necessary to the conduct of such research. However, at this stage VALS does not have data readily available on the occurrence of police holding on to warrants and we apologise for any inconvenience caused.

At this stage, you may find the following information, provided by a VALS criminal law solicitor on the execution of warrants, useful:

- It is our experience that old warrants are usually enforced when fresh charges arise (e.g. on weekend for drunk and old warrants outstanding) and these are then dealt with on Monday at Sale Court.
- More recent bench warrants may be executed at inconvenient times, but are usually carried out within a day or two of a Court sitting (eg: a weekend scenario, but also during the week, which ends up near a Court sitting day – with Sale Court Mondays and Tuesdays, Bairnsdale Wednesday and Thursdays).
- Arrest and incarceration on Fridays or failing bail by a Bail Justice is perhaps the worst case scenario with the Defendant having to wait to next week. Inconvenience may be related to severity of charges and police knowledge of Defendant's living arrangements.
- Further observations include: failure to execute warrant when it would appear that the Defendant is obviously in town, because of his/her presence on streets, but warrant is not executed. It is assumed that the Defendant knows there's a warrant for him or her, usually because they have missed their Court date and they were on bail to appear. The sleeping warrant thus would appear to be dependant on police knowledge, but also in their power as to execution. We assume that police are waiting for the Defendant to come to their attention because of wrong doing, not because police are doing their job. This is positive because it seeks to reduce policing but also gives impression of lax police attention.

Suggested explanations as to why police hold on to warrants:

- Oversight by Victoria police or lack of planning. It was suggested that warrants are not executed at appropriate times due to the nature of police work (ie: shift work). The rotation of police on roster and poor communication between back to back shift workers means that warrants are held on to.
- Police power trip over Indigenous Australians

4. How would you change police procedures in relation to the arrest of vulnerable and disadvantaged people that may be included in the Police Manual?

Include a distinct section in the Police Manual that deals with the arrest of vulnerable and disadvantaged people (ie: consolidate provisions).

VALS argues that provisions need to be in place to protect vulnerable and disadvantaged people not only when they are arrested, but also when they are not arrested (ie: taken to police station but no charges laid, come into contact with police but summonsed).

5. Examples of the use of Intervention Orders as a defacto warrant (ie: police take out IO on behalf of an individual, which gives police an easy means of arrest.

VALS acknowledges that family violence is a very complex issue and there are no easy answers surrounding how to intervene in instances of family violence. However, VALS has identified a trend whereby Indigenous Australians are over-policed by the Intervention Order System. Arguably, the Intervention Order System is used as a mechanism to fast track the arrest of Indigenous Australians. For further information, VALS urges you to consider VALS response to the Victorian Law Reform Committee Review of the Crimes (Family Violence) Act 1989 which will be released late 2004.

6. How often is VALS not informed of the arrest of Indigenous Australians?

VALS argues that its staff are often not informed of the arrest of Indigenous Australians within a reasonable amount of time. VALS is notified of the existence of an Indigenous Australian in police custody by a manual and automatic process. VALS considers it reasonable to be notified of the existence of an Indigenous Australian in custody within two hours by the LEAP notification system. This is a manual process that involves making an entry in the Attendance Book. Information is then faxed to VALS.

VALS considers it reasonable to be notified of the existence of an Indigenous Australian in custody within one hour by the E-JUSTICE notification system. This is an automatic process whereby an email is sent to VALS and Record Services Branch once police enter into the computer that a person identifies as of Aboriginal or Torres Strait Islander descent (ie: specific field in data base for this purpose). The Record Services Branch telephones VALS to let VALS know about the email as back up.

VALS has collected the following data for two weeks in May (14-29 May 2004) and August (14-29 August 2004). In May 2004, VALS was not informed in a reasonable amount of time that 27 Indigenous Australians, out of 187, had been taken into police custody. The system whereby VALS is notified when an Indigenous Australian is taken into custody failed 14% of Indigenous Australians that VALS is aware were arrested in May 2004. Such people were disadvantaged because they waited an inordinate amount of time for VALS to provide them with a service following notification. Refer to table 1.

In August 2004, VALS was not informed in a reasonable amount of time that 11 Indigenous Australians, out of 85, had been taken into police custody. The system whereby VALS is notified when an Indigenous Australian is taken into custody failed

13% of Indigenous Australians that VALS is aware were arrested in August 2004. Refer to Table 2

TABLE 1: 14 May to 29 May 2004

	Notifications	Inordinate Delay in Notifications	% of delay
E-JUSTICE	79	18	
LEAP	108	9	
Total	187	27	14

TABLE 2: 14 August to 29 August 2004

	Notifications	Inordinate Delay in Notifications	% of delay
E-JUSTICE	73	11	
LEAP	12	0	
Total	85	11	13

In May 2004 the following inordinate delays were noticed :

OTHER POINTS

Please find attached the report produced by VALS in March 2002 titled 'Koori Young People, Diversion and Police Cautioning'. Please find attached a summary of the VALS submission that was prepared for the Public Hearing on 19 October 2004.

Thank you for this opportunity to expand upon comments made at the Public Hearing.

Yours Sincerely,

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Research Officer



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Koori Young People, Diversion and Police Cautioning - 2003

Report Summary

According to police statistics, Indigenous young people in Victoria do not receive the benefit of diversionary programs such as police caution to the same extent as non-Indigenous young people. While the Victorian Aboriginal Legal Service (VALS) believes that the Indigenous status of the young person has some effect on police decisions to caution, VALS also accepts that there are factors which can make it difficult for police to caution Indigenous young people. These factors are examined in the body of the report.

According to the police, some of the difficulties in cautioning Indigenous young people arise because:

1. Indigenous young people reoffend at a greater rate than non-Indigenous young people. If the offender has a prior offence, a caution is not applicable.
2. VALS advises offenders to say "No comment." Unless the offender admits to the offence, a caution is not applicable.
3. Parents or guardians are unavailable. The parents or guardian must be present for a young person to be cautioned.
4. Indigenous young people are less co-operative and therefore a caution is not appropriate.

VALS data shows that some regions pursue diversion options less consistently than others. Consequently, police use of cautioning can be improved.

VALS believes that there are several strategies which could be implemented to circumvent some of the obstacles to giving Indigenous young people cautions, and also to ensure a more consistent police approach to cautioning. The following is a summary of these:

VALS Recommendations:

- *Instead of arresting young offenders, police make greater use of diversion options, such as informally warning and formally cautioning young people, even if it means cautioning a second time.*
- *Police make greater use of second cautions.*

- *Where applicable, if the offender is advised by a VALS solicitor to admit to the offence, the police give their assurance to caution the offender.*
- *Police use the Client Service Officers to locate parents/guardians or other relevant family members and to negotiate a time for the caution to take place.*
- *Nominated community members, including Client Service Officers be allowed to stand in for the parents or guardians.*
- *Community Elders and/or Community Justice Panel representatives be included in the cautioning process.*
- *Police refer at risk young people to the CJP or appropriate services;*
- *Discussions occur with community Elders, Community Justice Panel representatives and/or Client Service Officers about their possible role in delivering cautions.*
- *RAJAC explore the pros and cons of legislative changes which would allow the court to refer a case back to a caution.*

1. Introduction

Society recognises that young people should be treated differently to adults by having a separate court and separate sentencing options for people under 17. However, some police, media and members of the public believe the Children's Court should be more punitive in its approach to young people. Yet, as Cunneen & White (2002: 375) point out, punitive responses have proved to:

- be expensive
- damage offender's life chances
- do little to prevent recidivism
- fail to act as a general deterrent
- fail to address the fundamental causes of crime.

Additionally, there is growing realisation that very few young people become persistent or chronic offenders. Studies of recidivism show that around 70% of offenders will not reappear before the court, and of the 30% who do reoffend, around half returned to court only once (Cain, 1996).

There is now an expansion of programs and legislation which aim to increase the flexibility of the court and divert young people from further involvement in the criminal justice system. The aim of this report is to examine the usefulness of cautioning as a form of diversion, some of the reasons why Indigenous young people receive less cautions, and how the cautioning process could be made more effective for Indigenous people.

2. Shortcomings of Cautioning

Although cautioning is preferable to arrest, several studies found that cautioning has resulted in a widening of the net of social control, i.e. the introduction of the cautioning policy in Victoria (as in other states) saw an increase in police cautions

far in excess of the drop in court appearances as a result of cautioning (Higgins, 1982). This is presumably a consequence of the increased use of formal cautions over informal warnings.

Formal cautions are not the same as a conviction. According to Victoria Legal Aid, it is rare in the Children's Court for cautions to be considered part of a young person's record. Recent court decisions mean that this situation is likely to continue. Yet cautions influence how an offender will proceed through the criminal justice system on second contact with police.

Once a person has received a caution, future police contact is likely to result in a more serious response, such as being taken to court. This means that increases in the total number of people being cautioned eventually has an effect on the number of people proceeding through the criminal justice system.

The greater use of informal warnings would mitigate against some of the net widening effects of cautioning to some degree, as well as helping to improve relations between police and Indigenous young people.

Recommendations:

- ***The Victoria police are briefed about the rationale for sentencing of young people in the Children's Court and the rationale for using diversion strategies.***
- ***The Victoria Police be encouraged to make greater use of informal warnings***

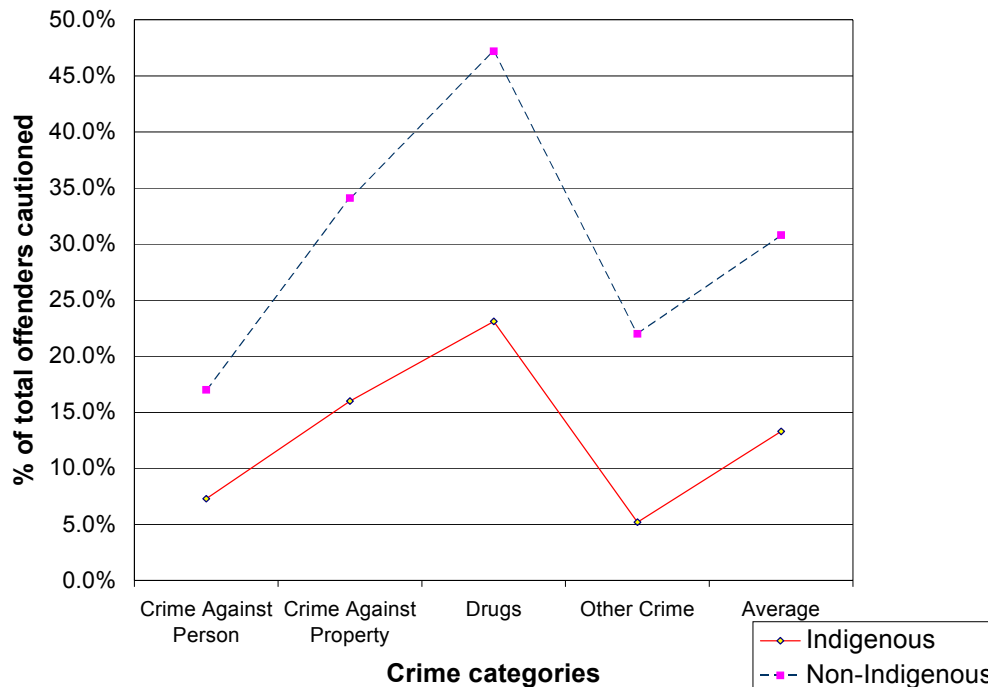
3. Why do Indigenous young people receive fewer cautions?

Various studies across Australia have found that Indigenous young people do not receive the benefit of a police caution to the same extent as non-Indigenous young people (Doherty, 1997; Luke & Cunneen, 1995; South Australian Office of Crime Statistics, 2001, Cunneen & White, 2002).

This is borne out by recent Victorian police statistics. From July 2000 to June 2001, Indigenous juveniles received fewer cautions in all crime categories (except rape) than non-Indigenous juveniles. For example,

- the offence of bicycle theft resulted in the cautioning of 6.7% of Indigenous juveniles compared to 22.6% of non-Indigenous juveniles;
- the offence of regulated public order resulted in the cautioning of 10.5% of Indigenous juveniles compared to 30.7% of non-Indigenous juveniles;
- the overall cautioning rate for Indigenous juveniles was 13.3% compared to 30.8% of non-Indigenous juveniles.

Cautions of Indigenous & Non-Indigenous Juveniles as a Percent of Offenders Processed 1 July 2000-30 June 2001 (Source: Victoria Police)



Victorian Aboriginal Legal Service (VALS) has examined research and talked to several police officers, Client Service Officers and criminal law solicitors in order to examine some of the reasons why Indigenous young people receive fewer cautions.

2.1. "Indigenous young people reoffend at a greater rate than non-Indigenous young people"

Victorian police guidelines advise that the offender should have no prior criminal history in order to receive a caution. According to police, as Indigenous young people tend to reoffend at a greater rate than non-Indigenous young people, fewer Indigenous offenders are eligible for cautioning.¹ (However, higher Indigenous recidivism figures may reveal more about the over-policing or visibility of Indigenous communities than reoffending rates.)

In order to examine whether police are cautioning when applicable - i.e. when the young offender has no prior record, the Victorian Aboriginal Legal Service examined statistics from its database concentrating on first offenders. These show that in 2002, 86% of Indigenous juveniles without previous formal contact with police received a

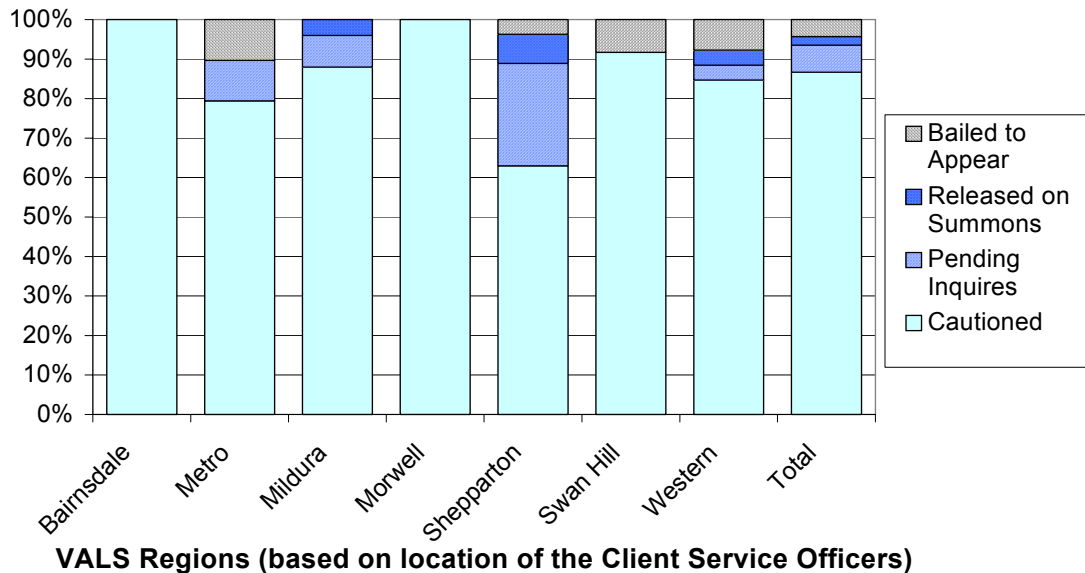
¹ There are no recidivism statistics that compare all Indigenous and non-Indigenous juvenile offenders in Victoria. However, studies which have examined recidivism in other states, and/or across specific groups of offenders demonstrate that Indigenous youth usually have higher recidivism rates (see Department of Human Services, 2001).

caution. Comparable statistics for non-Indigenous first offenders are unavailable but this figure is considerably higher than expected considering that, based on police figures, the overall cautioning rate of Indigenous young people of 13.3%.

It seems likely, therefore, that some of the gap between Indigenous and non-Indigenous cautioning rates is attributable to Indigenous people having higher rates of prior contact with police. However, the figures revealed that there appears to be significant differences in police practices across regions, which implies that police do not always apply discretionary powers in a consistent manner. For example:

- Bairnsdale and Morwell cautioned 100% of first offenders, whereas Shepparton had lowest cautioning rate of 63%;
- Bairnsdale and Morwell have no cases "pending inquires", whereas Shepparton had the highest rate of 25.9%;
- Metro and Swan Hill did not issue any summonses; however, they arrested and bailed 10.3% and 8.3% of offenders (proceeding by way of arrest and bail places the young person at greater risk than issuing a summons.)

Method of Processing Indigenous Juvenile Offenders in Victoria 2002 in Victorian Aboriginal Legal Service regions (based on VALS data)



(Only young people who have had no prior caution or court contact)

In light of the varying treatment of Indigenous young people across the regions, It cannot be discounted that the Indigenous status of the offender plays some role in police decisions to caution or not. Although there are no commensurate studies available for Victoria, a study on the NSW juvenile justice system by Luke & Cunneen concluded that:

Aboriginal young people are more likely to receive harsher outcomes from police decisions to apprehend and prosecute, even when offence and criminal history differences are controlled for. It seems that young Aboriginal people have a 10-15% greater chance of going to court rather than receiving a formal police caution. While this difference is not large, the compounding effect over time may be very significant, particularly in relation to decisions concerning first offenders where the acquisition of a criminal record is likely to influence later discretionary decisions (Cunneen & White, 1995: v).

Police guidelines advise that second cautions should only be given in exceptional circumstances. However, VALS maintains that there is good reason why greater use should be made of second cautions:

- Given the negative long-term impacts of being in remand or in detention and the damaging effects of having a criminal record, more juveniles should be given the possibility of a second caution, especially considering that around 50% of juveniles will not go on to offend a third time.
- It has often been suggested that higher offending and reoffending rates for Indigenous young people are in part attributable to over-policing and/or the greater visibility of Indigenous communities. Therefore, the rate of over-representation of Indigenous young people could be partially addressed by increasing the use of second cautions.
- Potentially 10-15% of young Indigenous people acquire a criminal record because of their Indigenous status rather than because of the severity of the offence. The greater use of second cautions would mitigate this to some extent.

Recommendation:

- ***The Victoria police make greater use of second cautions.***

2.2. "VALS advises offenders to say "No comment"'"

In order to receive a caution, offenders must admit to the offence. According to police, one reason for the reduced cautioning rate of Indigenous young people is because Aboriginal legal services advise offenders to say "No comment". This effectively forces police to arrest the offender.

It is difficult to acquire figures about how often Indigenous young people say "No comment". According to VALS solicitors, unless the young person has significant experience of the criminal justice system (in which case a caution is not usually applicable), they are very unlikely to say "No comment" even when advised to do so. A further point is that non-Indigenous offenders are also advised to say "No comment", which, if followed, would also limit the ability to caution non-Indigenous juveniles.

There are potentially ways around the "No comment" issue.

- When a caution is applicable, but the alleged offender will not admit to the offence, they should be given the opportunity to talk to a Client Service Officer or solicitor at VALS. On police assurance that the offender would be cautioned if they confess, the solicitor could advise the offender to admit to the offence.
- In South Australia, if a juvenile comes before the court because of an initial refusal to admit to the offence, but once in court changes the plea, the court can refer the case back to a caution or a conference. This is currently not the case in Victoria. According to Cunneen & White (2002:172), this system has the additional advantage of being less discriminatory compared to police discretion.

Recommendations:

- ***Where applicable, if the offender is advised by a VALS solicitor to admit to the offence, the police give their assurance to caution the offender.***
- ***RAJAC explore the pros and cons of legislative changes which would allow the court to refer a case back to a caution.***

2.3. "Parents or guardians are unavailable"

The parent or guardian should be present in order for the young person to receive a caution. According to police, it is difficult at times to locate the parents or guardians, and consequently, a caution can not be given. However, there are realistic means of circumventing this obstacle:

- One of the Client Service Officers at VALS has pointed out that police will ring him if they are unable to find the parents. The Client Service Officer then sets a time to attend the police station together with the young person and their parents. If for some reason, the nominated time is not suitable, then another time is set. As a result of this approach, the young person is not penalised because the parents are unavailable in the first instance.
- The cautioning criteria could be extended to allow for the presence of another family member, an appointed Elder from the community, the Community Justice Panel regional representative or the Client Service Officer from VALS.

Recommendations:

- ***The police use the Client Service Officers to locate parents/guardians or other relevant family members and to negotiate a time for the caution to take place.***

2.4. "Indigenous young people are less co-operative"

One of the reasons given by police for the reduced rate of cautioning is that Indigenous young people are less co-operative. It should be emphasised that many Indigenous people in Victoria feel that police powers are used inappropriately to over-police and scrutinise them within the context of racism (James, 2000). This belief cannot be divorced from the historical role of police in perpetuating injustices against Indigenous people. Avoiding the discussion of whether the police over-police Indigenous communities or not, it is clear that police/Indigenous relations need to be improved. The greater use of informal warnings, cautions and second cautions with Indigenous young people is one way that this can be achieved.

The negative history between Indigenous people and police also raises the question of whether cautioning by the police officer acts as an effective deterrent for Indigenous young people. Because of their status in the community, representatives of the Community Justice Panels (CJP) and community Elders could be seen as more effective people to deliver a caution.

Additionally, police should notify the CJP as soon as they are concerned that a young person's behaviour puts the young person at risk of being charged, or if they are in any danger. If necessary, the CJP can then refer the young person to appropriate services.

According to anecdotal information, Echuca Police make use of informal warning and referral to Indigenous specific services when faced with an Indigenous young person who has not committed a serious offence. This type of response is a more effective solution to juvenile crime than punitive treatment of the offender. As Buttrum (1997:6) points out in his examination of what works with juvenile offenders, there is no benefit to be gained from being tough on young people, if the underlying social and personal problems remain unattended, or are exacerbated by justice interventions.

Recommendations:

- ***Instead of arresting young offenders, police make greater use of diversion options, such as informally warning and formally cautioning young people, even if it means cautioning a second time.***
- ***Police refer at risk young people to the CJP or appropriate services.***
- ***Discussions occur with community Elders, Community Justice Panel representatives and/or Client Service Officers about their possible role in delivering cautions.***

4. Conclusion

Although cautioning diverts some people from court, it also has the effect of substituting formal cautions for informal warnings. This means more people are formally caught up in the criminal justice "net".

VALS figures indicate police formally caution the large majority of Indigenous first offenders. There are significant differences in police practice across regions, however, with some regions such as Bairnsdale and Morwell showing a more consistent use of diversion than areas such as Shepparton.

The high percent of Indigenous first offenders who receive cautions suggests that cautioning obstacles such as "No comment" and the absence of parents or guardians are not significant in many cases. Yet, although the numbers may be small, it seems unjust to punish offenders because of parental unavailability, or because the offender has been advised to say "No comment."

The study conducted by Luke and Cunneen (1995), it appears that the level of under-utilisation of cautioning of Indigenous young people is in the order of 10-15%. Although this figure may not appear to be large, the compounding effect over time may be significant, as the acquisition of a criminal record makes the offender ineligible for a caution on second contact with police.

There are many reasons Indigenous young people receive fewer cautions than non-Indigenous people, some of which are discussed above. The cautioning system could be improved to allow Indigenous young people to be diverted from the courts at a greater rate than they are now. As the police have the discretion to decide whether and how a young Indigenous offender will proceed through the justice system, police commitment to the effective diversion of Indigenous young people, either through cautioning or informal warnings, is paramount.

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Victorian Aboriginal Legal Service Co-operative Limited Submission to the Victorian Parliament Law Reform Committee in Response to the Warrant Powers and Procedures Discussion Paper (July 2004)

INTRODUCTION

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) welcomes this opportunity to respond to the Warrant Powers and Procedures Discussion Paper (July 2004). The Discussion Paper contains many comments from stakeholders that VALS agrees with. Also, many of the issues raised in the Discussion Paper support the comments VALS made in its preliminary submission.

VALS was established in 1972 and provides case work, in the areas of criminal law, family law and civil law, to the Indigenous Australian community. I will share with you information provided to me by VALS solicitors and Client Service Officers.

VALS has observed that in 2004 there is a trend towards getting 'tough on crime'. For example, the tough on crime mentality is apparent in the media and groups that are vocal about lenient sentencing etc. VALS is critical of the tough on crime approach and VALS main criticism of the warrant process is that it is used as a vehicle to further the 'tough on crime' approach. VALS supports a smart on crime approach which I will discuss later.

CONCERNS: VALS CLIENT'S EXPERIENCE WITH WARRANT POWERS AND PROCEDURES

VALS is concerned that:

- A punitive and coercive approach is taken during the warrant process often when it can be avoided. In the case of Penalty Enforcement Warrants, Indigenous Australians are often subjected to harsh measures at the hands of the Sheriff, such as seizure of property or arrest. It is a concern that this is a result of there being an inadequate amount of time (seven days) to pay a fine once the Sheriff becomes involved.
- That search warrants are often carried out with excessive force
- That warrant powers and procedures are used as a vehicle to over-police Indigenous Australians. As Indigenous Australians are 12 times more likely to be incarcerated than non-Indigenous Australians, warrant powers and procedures have a disproportionate impact on Indigenous Australians.
- **Negative Police Culture that impacts Indigenous Australians:**

➤ Inconsistency in informing VALS of the Existence of a warrant to arrest: Police are inconsistent in informing VALS of the existence of warrants to arrest. VALS is aware of two scenarios in which warrants to arrest are executed at the police station. The difference is the manner in which the Defendant reaches the police station, one is coercive or forceful and the other is not.

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 the warrant to be executed.

Scenario 2: Koorie people in a public place are often stopped by police on so called '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 that often, plans put in place for the Defendant to attend the police station on their own accord to execute a warrant to arrest are often thwarted when scenario one occurs. This means that the Defendant is denied advantages attached to scenario 1 (ie: likelihood of rebailing) and is disadvantaged by scenario two (potential for the situation to become confrontational resulting in additional charges being laid. This is a concern given that police courtesy calls are extended to non-Indigenous Australians as to the existence of a warrant to arrest but are not extended to Indigenous Australians.

➤ Lack in informing Defendant about existence of a warrant: There is no formal procedure whereby police notify the Defendant of the existence of a warrant to arrest over their head at an early stage (ie: pre-execution of warrant).

➤ Pro arrest culture: Indigenous Australians are more likely than non-Indigenous Australians to be victim of the pro arrest police culture which places police under pressure to meet an arrest quota. Arguably, racism has a part to play in the heightened visibility of Indigenous Australians to police.

➤ Holding on to warrants: Police have a practice of holding on to warrants to arrest until the end of the working day or week, before they are executed, resulting in Indigenous Australians unnecessarily being imprisoned over night or over the weekend,.

➤ Inconsistency in informing VALS when an Indigenous Australian is in police custody: There is an agreement between VALS and Victoria Police that the later will inform the former when an Indigenous Australian is taken into custody. However this is not consistently complied with, resulting in breach of the Victoria Police Manual Quarter 4 2004-2004 (VPM). The agreement is in the following terms in the VPM (Topic 113-01, Section 4.3.5):

- “Where a person who identifies as being of Aboriginal or Torres Strait Islander descent is taken into custody for any reason the police member responsible must:
 - complete the Attendance Register as required. This will create a notification to the Victoria Aboriginal Legal Service (VALS).”

The breach of the VPM is relevant to an inquiry into warrant powers and procedures as the breach means that sometimes VALS is not informed of the arrest of a Indigenous Australians pursuant to a warrant to arrest. e-justice automatic email, Criminal Record. Cant go backwards.

Negative Culture of the Court System and the way it impacts Indigenous Australians: Victorian Courts are inconsistent in issuing warrants to arrest when a person fails to appear at Court. Some Courts will issue a warrant if a Defendant is not present at Court by 10.00 on the dot, whereas others wait for Defendants to arrive. Courts take a punitive attitude to fail to appear as this is treated as an offence that is placed on your record. The effect of having a record of failing to appear is that it entrenches individuals further into the justice system (ie harder to get bail). Warrants are almost used as a weapon against those who are seen to be taking the Court seriously. The Court’s first response is to punish, rather than ask why many Indigenous Australians fail to appear.

It is a concern that often Magistrates place a condition on a warrant that the individual is not to be bailed except via Court order, which means there is no choice but to lock the individual up.

- **Ad hoc Nature of Warrant Powers and Procedures:** The Ad hoc development of warrant powers and procedures affects the fairness, consistency and efficiency of warrants.²

Warrants are lost in the System: Multiple warrants are issued against the same person and are lost in the system.³

Rubber Stamping of warrants: Magistrates rubber stamp warrants According to a VALS solicitor the warrant process is a ‘sausage factory’ and people’s ‘liberty is taken away lightly’.

Inefficient Internal Accountability Mechanisms: Internal disciplinary mechanism of Victoria Police is inefficient because the Ethical Standards Department is not an independent body

Transparency of Issuing Search Warrant – Availability of Police Affidavit in support: It is difficult to ascertain whether a search was conducted within the terms of

² Ibid 1

³ Ibid 35

the warrant authorizing it because the police affidavits in support of the applications for the warrant are not disclosed to the Defendant or their counsel.⁴

Transparency of Executing Search Warrant: In some instances individuals are not shown a search warrant

Warrant issues that arise in respect of children who are subject to protection interventions: Indigenous Australian children involved in the child protection system go through a traumatic experience when a warrant is placed over them to ensure their apprehension.

Concern with discussion paper: It is concerning that the vulnerability of Indigenous Australians was not specifically mentioned in the Discussion Paper on VALS reading when ‘warrants relating to the protection of vulnerable groups’.⁵

REFORMS VALS CONSIDERS NECESSARY TO ADDRESS ANY CONCERNS: RECOMMENDATIONS

VALS main criticism of warrant powers and procedures are that they reflect a tough on crime approach. The main point VALS wants to make is that VALS supports a ‘smart approach’ to warrant powers and procedures, as opposed to a punitive or coercive approach. A smart approach is to take a flexible approach. In practical terms, a flexible approach may mean:

If we were to break a flexible approach into three broad topics it would be firstly

- Officials in the warrant process take the time to consider the specific circumstances of Indigenous Australians so that the officials respond in a culturally sensitive manner.
- Re-development of the warrant process to target Indigenous Australians and meets their specific concerns.
- Improvement of accountability mechanisms of warrant powers and procedures to Indigenous Australians.

Here are some recommendations that might provide a way of doing that

⁴ Ibid 58

⁵ Victorian Parliament Law Reform Committee, ‘Warrant Powers and Procedures Discussion Paper’, July 2004, 68

Officials in the warrant process take the time to consider the specific circumstances of Indigenous Australians so that the officials respond in a culturally sensitive manner.

Recommendation:

1.1 Given the high likelihood of Indigenous Australians being impacted upon by warrant powers and procedures, it is essential that warrant powers and procedures, and officials/agencies enforcing them, take into account issues affecting the Indigenous Australian community and are culturally sensitive.

1.4 VPLRC enter into meaningful consultation with the Indigenous Australian community about warrant powers and procedures. I would like to add that it is important that not only important to talk to Indigenous Australians but also involve them in the development of measures to address issues affecting their community.

2.5 Consideration should be given to increasing the range of special circumstances that fall under the Enforcement Review Program (ERP). VALS argues that the effects of colonization on Indigenous Australians should also be considered by the ERP.

5.2 The development of a set of general principles applicable to all coercive powers. The Indigenous community should be involved in the development of such principles. Guidelines or standardized rules should be developed to ensure that warrants are executed in the least instructive manner.⁶

3.11 VALS supports the recommendation to change police Standing Orders or procedures in the Police Manual concerning the arrest of vulnerable and disadvantaged people. The changes should:

- specifically deal with police interaction with Indigenous Australians.
- Reflect an awareness of the past relationship between police and Indigenous Australians
- Implement Recommendation 87 of the RCIADIC that arrest be used as a last resort.
- Mandate that police refer vulnerable and disadvantaged people to appropriate services.
- Coercion should be used as a last resort
- Encourage a minimalist response to crime as opposed to an assertive or coercive approach which takes up a lot of effort. Rather than the police take all the effort, give people a chance to remedy the situation themselves (cautioning).
- more of an effort to ensure they have the assistance they need, ie representation by lawyer, to be able to be on level playing field
- more accountability so vulnerabilities/disadvantages are not abused
- recognize the need for substantive equality

⁶ Ibid 39

3.18 The training of members of Victoria Police in relation to Indigenous Australians (ie: cultural sensitivity training) should not be a once off. Instead, such training should be a continual process that is constantly updated.

3.19 There is a need for standardized training. Indigenous Australians should be involved in training on issues affecting Indigenous Australians.

Extra: A solicitor suggested changing the warrant process to be a purely administrative task. At the moment the warrant process has the potential to criminalize people, as criminal sanction is attached to failing to appear. If the warrant was treated in a purely administrative sense, it will just compel people to the police station. The solicitor also suggested that legislation should outline lawful excuses for failing to appear.

Re-developing the warrant process to target Indigenous Australians and meets their specific concerns. This may involve:

- being committed to looking at alternative approaches to a tough on crime approach and being prepared to fund them.
- creating space for an intermediate step in the warrants process for Indigenous Australians.

2.1 In relation to Penalty Enforcement Warrants, consideration should be given to providing disadvantaged people with additional warnings to pay fines. This may mean allowing disadvantaged people more than seven days to pay a fine when it comes to crunch time. VALS agrees with recommendations in the West Heidelberg Community Legal Service on the Perin Court.

3.2 VALS admits more thought is needed on this recommendation. A formal process be developed whereby Indigenous and non-Indigenous Australians who are subject to a warrant to arrest are notified of its existence before the execution of the warrant. However, this is complicated. Should it be on Defendant who knows not turn up.

10.1 In relation to search warrants VALS argues that supporting affidavits and statements be made available to the Defendant and Counsel.

Creating space for Indigenous Australians to act as an intermediary in the warrant process.

2.2 VALS should be informed that the Sheriff intends to attend an individual's home to either seize property or arrest them etc, so that a CSO can attend with the Sheriff in both instances to ensure accountability and educate Indigenous Australian. However, problem as not get involved in Perin Court matters, there is a need for someone.

Funding so limited that have to prioritise

3.3 An agreement should be developed whereby Victoria Police inform VALS about the existence of warrants of warrants to arrest so that it may facilitate surrender of the individuals concerned.

Should it be the Court or the Police? Should it be the solicitor who knows not turn up. People move a lot. Confidentiality issues means VALS can't question. Could mean get new clients who fall through system later.

13.1 An agreement should be put in place whereby the Victorian Aboriginal Child Care Agency (VACCA) attend with Victoria Police when the former execute a warrant relating to child protection matters.

3.14 Measures should be put in place to ensure increased recruitment of Indigenous Australians within Victoria Police.

3.15 The role of Police Aboriginal Liaison Officer (PALO) should be optimized by making the role of PALO a portfolio in itself.

Improving accountability mechanisms of warrant powers and procedures to Indigenous Australians.

3.1 Measures need to be put in place to change police culture which results in failure to notify VALS of the existence of a warrant to arrest. Accountability mechanisms need to be put in place to ensure that police culture/measures are monitored.

3.6 That the police practice of notifying VALS when Indigenous Australians are taken into custody be investigated.

3.7 That agreements between VALS and Victoria Police be enshrined in legislation.

3.20 An Independent training body established to ensure accountability of Victoria Police.

8.1 That agencies report their activities relating to warrants to Parliament as an effective way of ensuring that records are kept and "that the process is open and available to public scrutiny and comment".⁷

9.1 An external accountability mechanism should be established to ensure scrutiny of actions of Victoria Police.

11.1 Instances of entry and search both with and without consent should be recorded on video or audio tape.⁸

⁷ Ibid 37

⁸ Ibid 39

The arguments for such recommendations are that they have the potential to result in:

- Improved relations between Koorie people and Victoria Police;
- Reduce the demand on Victoria Police/court system. Minimalist approach. Give people a chance to self correct. Not automatically go to coercive approach. Citi-link.
- May have a positive effect on non-Indigenous Australians if applied across the board.

VALS acknowledges that there will be people who do not support the VALS ‘smart on crime approach’. They may argue that special treatment of Indigenous Australians results in reverse discrimination. However, VALS would respond to this by arguing that there is a difference between formal and substantive equality and that there is nothing more unequal than treating unequal people equally. VALS encourages such people to dig a little deeper into the issues. When one takes a flexible approach and begins to understand the extreme disadvantage and crisis experienced by the Indigenous Australian community, it becomes apparent that special treatment is appropriate. The purpose of affirmative action is not to disadvantage non-Indigenous Australians, but to ensure that all Australians live on a level playing field. There are examples of successful programs or services that meet the specific needs of Indigenous Australians, such as the restorative justice model of the Koori Court.

VALS argues that the arguments against a tough on crime approach are more compelling than criticisms of a smart approach. The tough on crime approach:

- does not address the over-representation of Indigenous Australians in the justice system, as identified by the Royal Commission into Aboriginal Deaths in Custody, but contributes to it.
- Professor Arie Frieberg has conducted research into sentencing which shows that a tough on crime approach does not deter offenders.

OTHER POINT

VALS wishes to raise a new point about warrant powers and procedures. VALS is aware that ‘failure to appear’ law often has a detrimental impact on Indigenous Australians. The criminalization of failure to appear by issuing a warrant to arrest should not be a first resort in instances when the Indigenous Australian has failed to appear on a summons date. In this instance, a minimalist approach should be taken. The criminalizing of failure to appear when summonsed has the potential to further entrench Indigenous Australians within the justice system.

CONCLUSION

VALS is critical of the tough on crime approach and VALS main criticism of the warrant process is that it is used as a vehicle to further the ‘tough on crime’ approach. The main point VALS wants to make is that VALS supports a ‘smart approach’ to warrant powers and procedures, as opposed to a punitive or coercive approach. A smart approach is to

take a flexible approach. It is to give people a chance to remedy the situation themselves, just as the civil law system does (ie: send letters of warning).

The recommendations can fit into three main areas:

- Officials in the warrant process take the time to consider the specific circumstances of Indigenous Australians so that the officials respond in a culturally sensitive manner.
- Re-developing the warrant process to target Indigenous Australians and meets their specific concerns.
- Improving accountability mechanisms of warrant powers and procedures to Indigenous Australians.