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**VALS' submission to the Department of Justice in response to the Forensic Procedures Review of Investigation Powers Discussion Paper (January 2007) – sent 25 May 2007**

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## **Introduction**

Thank you for the opportunity to comment on the Forensic Procedures Review of Investigation Powers Discussion Paper (January 2007).

This submission contains the response of the Victorian Aboriginal Legal Service Co-operative Limited to individual questions. VALS has not answered the questions in consecutive order but placed the questions under the following headings to highlight the following themes:

- Court discretion should be retained and police powers should not be increased
- Requirements surrounding forensic procedures should not be watered down.
- Further protections need to be in place for suspects

### **Court Discretion Should Be Retained and Police Powers Should Not Be Increased**

VALS is concerned by the slant of some of the questions that there is eagerness to remove Court discretion in relation to forensic procedures and instead place power in the hands of police in relation to forensic procedures. VALS argues this is reflective of a general trend to increase police powers as part of a 'tough on crime' stance. Increased police powers in relation to forensic procedure are justified by police on the basis of enhancing investigation which will produce results in terms of convictions. VALS prefers a 'smart on crime' approach that acknowledges that tough on crime approaches often have a disproportionate impact on marginalised communities, such as Indigenous Australians.

VALS argues that Court discretion should be retained in relation to forensic procedures and police powers should not be increased. As forensic procedure sampling has civil liberties implications it is appropriate that Court, rather than Police, make the decision about whether a forensic procedure is conducted. In a Court the option is open to challenge an application for a forensic procedure in order to protect civil liberties, but this option is not open if police make a decision about forensic procedure. However, VALS adds that it should be a requirement that Court business relating to forensic procedures should not be heard if suspects are un-represented by a lawyer so that suspects are aware of their rights. In this instance matters should be adjourned for the suspect to obtain the services of a lawyer. Also, when police make an application for a forensic procedure to the Court then the police should not only notify the suspect, but also their lawyer.

### **Question 2**

*Should suspects be requested to comply with a forensic procedure, rather than consent to a forensic procedure? If yes, should this request be limited to certain kinds of procedures? If yes, should more matters be required to be explained to the suspect and recorded? What further matters should be explained and recorded than are currently under s.464SB?*

VALS argues that suspects should not be requested to comply with a forensic procedure, but rather consent to a forensic procedure. The reason for this is because

the proposal increases police power yet again and consent should remain relevant to whether a forensic procedure occurs. VALS agrees with the concerns outlined in the discussion paper: it will lessen existing safeguards and accountabilities by effectively giving authority to all members of the police force to authorise the conduct of a forensic procedure.

VALS welcomes the fact that the proposal would not apply to such as a child or a person who is mentally impaired. VALS argues that if the proposal proceeds then it should be confined to the conduct of certain procedures (e.g. non-intimate procedures, or self-administered buccal swabs at the most). Also, more matters should be required to be explained to the suspect and recorded than are currently in s.464SB in order to ensure the suspect understands what is happening and their rights.

### **Question 12**

*Should a senior police officer have the power to authorise the taking of a non-intimate sample from an offender found guilty of a forensic sample offence (option 1)? Or should an offender be automatically required to provide a non-intimate sample upon a finding of guilt for a forensic sample offence where a term of imprisonment is imposed (option 2)? Or should a court order continue to be required for the conduct of all forensic procedures on offenders?*

VALS does not endorse either Option 1 or 2. A Senior Police Officer should not have the power to authorise the taking of a non-intimate sample from an offender found guilty of a forensic sample offence, whether or not a term of imprisonment is imposed, because:

- Just because a person has offended once does not mean they will re-offend.
- Unlike Court decisions, decisions made by Police are not open or transparent.
- The Court is in a better position to weigh up all relevant factors in the decision of whether a forensic procedure should be conducted than police.

VALS prefers Option 3 as a Court Order should continue to be required for the conduct of all forensic procedures on offenders. VALS is in favour of Courts retaining discretion rather than Court discretion being re-directed to police due to poor relations between Police and the Indigenous Australian community. For instance, Indigenous Australians are highly visible to police, which is a contributing factor to their over-representation in the criminal justice system. A worst case scenario that would eventuate if Option 1 or 2 were adopted is that Indigenous Australians would also be over-represented in forensic procedure data which has civil liberty implications. VALS welcomes the fact that Option 1 or 2 will not apply to children and incapable persons.

### **Question 44**

*Should the legislation provide that a senior police officer can authorise the taking of a buccal swab and the taking of a blood sample or hair sample (where the person physically resists)?*

The legislation should not provide that a senior police officer can authorise the taking of a buccal swab, taking of a blood sample or hair sample in any circumstances. Police should not be able to authorise a procedure at the first instance or authorise a procedure that is in the second instance due to the suspect physically resisting. The Court should order all forensic procedures rather than give police discretion. Discretion should not be removed from the Court.

### **Requirements Surrounding Forensic Procedures Should Not Be Watered Down**

VALS is concerned by proposals that appear to water down requirements before a forensic procedure is conducted, use forensic samples for a wider purpose, and extend retention of forensic data because of civil liberties implications. VALS argues that proposals that remove discretion from the Court to Victoria Police contribute to making it easier for forensic procedures to be approved. VALS is concerned that the motivation behind making it easier for forensic procedures to be approved is to build up a data base of information on the entire population. This raises the issue of civil liberties as does proposals to remove the need for forensic relevance of a forensic procedure and, thereby making it easier to conduct a forensic procedure

#### Approval of forensic procedure

#### **Question 4**

*Should the law in relation to compulsory suspect sampling be changed? If yes, is the preferred option: Option A –Remove the need for forensic relevance, Option B – Remove the need for forensic relevance when a suspect is charged with an offence for which a compulsory offender sample can be taken or some other, and if so, what alternative?*

VALS does not agree with Option A or B in that they remove the need for forensic relevance. This is because it makes it easier to approve a forensic procedure, thereby weakening protections of civil liberties and creating a situation where civil liberties can be arbitrarily impinged. The need for forensic relevance is a legitimate requirement that acts as a check and balance and should be retained in relation to all matters, regardless of whether or not a suspect is charged with an offence for which a compulsory offender sample can be taken. The need for forensic relevance in apparent by the fact that forensic sampling does not assist in the investigation of all offences (ie: obtaining property by deception).

If forensic sampling takes place when it is not relevant then civil liberties will be impinged and this is not justified or necessary. There needs to be justification for subjecting the suspect to a possibly intrusive procedure. VALS argues that the possibility of matching a suspect to an unsolved or unrelated crime is not sufficient justification for removing forensic relevance. The requirement of forensic relevance is the only basis for justifying the need to subject suspects to possible intrusive procedures.

### **Question 5**

*Should police be able to apply for a court order that a number of people who belong to a group that police reasonably suspected of committing an offence must provide a sample?*

VALS argues that police should not be able to apply for a Court Order that a number of people who belong to a group that police reasonably suspect of committing an offence must provide a sample. If this proposal were adopted VALS will expect that it would work to the disadvantage of Indigenous Australians in a group (ie: Indigenous Australians rather than non-Indigenous Australians are singled out, arguably due to prejudices).

### **Use of forensic sample**

### **Question 3**

*Should the current law in relation to matching suspect samples be restricted? Specifically, once a suspect sample has been taken for the purpose of investigating a specific offence, should the law prohibit comparing that sample against crime scene material from unrelated offences (i.e. cold hits) or permit comparisons with other crime scene material if the suspect is charged with the offence that the sample was taken in relation to?*

VALS argues that the current law in relation to matching suspect samples should be restricted. Use of the forensic samples should be limited to investigating a specific offence for which a person is charged and not extended to comparing the sample against crime scene material from unrelated offences (i.e. cold hits).

VALS agrees with point of view articulated in the Discussion Paper: “a suspect is no different from any other person. Any interference with the personal autonomy and privacy of a suspect is justified on the basis of investigating the specific offence for which the suspect is under investigation. This would suggest that there is no basis for allowing a suspect sample to be matched against unrelated offences”.

VALS does not agree with the following argument of the Coldrey Committee, that it is in the public interest for forensic material legitimately acquired to be subsequently available for comparison with similar information relevant to other offences.

VALS argues that if the proposal to match suspect samples proceeds then the Court should be involved in authorising the use of the sample, rather than the police.

### **Retention of Forensic Procedure**

### **Question 55**

*Should the legislation allow a sample to be retained beyond the time limits unless a person requests that it be destroyed?*

The legislation should not allow a sample to be retained beyond the time limits unless a person requests that it be destroyed. This is a reverse onus that is unfair. If the

proposal is adopted then clear processes would be required to ensure that people were aware of their right to request the destruction of information. It would also be necessary to inform a person of the uses that may be made of their sample.

### **Further Protections Need To Be In Place For Suspects**

VALS argues that further protections are needed to protect the rights of suspects. Given the nature of forensic procedures and the implications it has for civil liberties there should be protections in place. These protections should be available for all, whether they are subject to a Court Order or consent to a forensic procedure. There should be no gaps in regulations in relation to volunteers, mass sampling, children, incapable persons, what happens when a forensic procedure is resisted, who conducts a forensic procedure, cautioning and covert collection of forensic material.

#### **Question 1**

Does this list reflect the appropriate purposes of forensic sampling?

The list does not reflect the appropriate purposes of forensic sampling. The appropriate purpose of forensic sampling is to be used for offender sampling of adults only. For instance, forensic sampling should be conducted upon those charged with 'serious offender offences' as defined in Schedule 1 of the Sentencing Act 1991 (Vic), such as sexual offences. VALS is concerned by the trend that accepts that the appropriate purpose of forensic sampling is to further police investigations. VALS argues that this contravenes civil liberties, particularly in relation to children.

#### **Question 13**

Should the legislation specifically define the different categories of volunteers (e.g. victims, relatives of missing persons, potential suspects)?

The legislation should specifically define the different categories of volunteers (e.g. victims, relatives of missing persons, potential suspects) to enhance the clarity of the legislation.

#### **Questions 14-15**

*With the exception of missing persons, should volunteers only be permitted to provide a sample in relation to a specified indictable offence?*

With the exception of missing persons, volunteers should only be permitted to provide a sample in relation to a specified indictable offence. This should be included in the legislation as there is currently a gap in legislation relating to limitations on the circumstances when a person can volunteer to provide a sample and what the sample is used for. Volunteers should have the same rights as other types of people who provide samples.

## **Questions 16-17**

*With the exception of missing persons, should the legislation prohibit including volunteer samples on the DNA database system?*

With the exception of missing persons, the legislation should prohibit including volunteer samples on the DNA database system. This is especially the case if the sample is provided for the purpose of investigating a specific offence.

## **Question 18**

*If a volunteer withdraws consent to the retention of their sample and is identified as a suspect should the application for the retention of the sample be heard and determined in the presence of the volunteer? If yes, should there be any exceptions?*

If a volunteer withdraws consent to the retention of their sample and is identified as a suspect the application for the retention of the sample should be heard and determined in the presence of the volunteer. This safeguard should be in place for volunteers who are identified as a suspect through volunteer samples.

## **Question 23**

*If police propose to undertake mass sampling, should this process be regulated? If yes, should this be by legislation or by the development of protocols?*

If police propose to undertake mass sampling the process should be regulated to ensure consistency and safeguards for suspects, particularly in relation to privacy, such as:

- The identity of those who refuse to undertake the sampling should be kept confidential.
- There should be checks and balances to ensure that consent to take part in a mass sampling is truly voluntary and not compelled for fear of being the odd one out.
- It should not be assumed that refusal to take part is inconsistent with innocence.
- Mass sampling should only occur by Court Order.<sup>1</sup>

## **Question 24**

*Should a court order be required and additional safeguards apply once a volunteer is identified as a suspect?*

A Court Order should be required and additional safeguards apply once a volunteer is identified as a suspect.

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<sup>1</sup> Criminal Law - Justice Statement (Department of Justice) Forensic Procedures, Review of Investigation Powers Discussion Paper (January 2007) p. 55

### **Questions 25-27**

*Should children above a certain age be permitted to consent to a forensic procedure? Should the consent of both children above a certain age and the consent of their guardian be required before a forensic procedure may be conducted? If yes to the above questions, what age is appropriate?*

Children above a certain age should not be permitted to consent to a forensic procedure. VALS is against the forensic sampling of children and calls for a moratorium on the forensic sampling of children, intimate, non intimate or otherwise. VALS is concerned by numerous incidents where orders have been made on children, in some cases, as young as thirteen. If such a moratorium cannot be achieved, then there should at least a moratorium on the forensic sampling of children 14 and under.

### **Questions 28-29**

*Should the Magistrates' Court be required to consider the 'welfare of the child' before making an order under s.464U? What should the 'welfare of the child' mean in this context?*

The Magistrates' Court should be required to consider the 'welfare of the child' before making an order under s.464U. The 'welfare of the child' should be considered in the context of stigmatisation of the child for being subject to a Court Order and best interests of the child.<sup>2</sup>

### **Questions 31-34**

*Should the legislation regulate the taking of forensic samples from child volunteers, including where the child is a victim or a sample is provided for elimination purposes? If yes to the above question, at what age should a child be able to volunteer at? (e.g. 12 or above, 10 or above, 15 or above?) Should consent of a parent or guardian also be required? If yes to question 3, if there is disagreement should a court order be required?*

A forensic sample should not be taken from children when the child is a victim as this will result in further victimisation.

### **Question 35**

*Should the definition of incapable person be expanded to reflect the definition in the Commonwealth Crimes Act 1914?*

The definition of incapable person should be expanded to reflect the definition in the Commonwealth *Crimes Act 1914* because it is broader. Also, VALS argues that there should also be a moratorium on the forensic sampling of the mentally ill and incapable individuals.

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<sup>2</sup> op cit 59

### **Questions 40-41**

*Should incapable persons be expressly excluded from the volunteer provisions? Or should the legislation specifically regulate the taking of samples from incapable persons who are victims or from whom a sample is sought for elimination purposes? If yes should a court order be required in those circumstances? Why, or why not? Or should there be a substituted consent regime?*

Incapable persons should be expressly excluded from the volunteer provisions because of the risk of them not understanding what they are volunteering to do.

### **Question 43**

*Should the legislation specify that where a sample is required for the purpose of extracting the DNA profile of the person from whom it is taken, the sample must always be taken by buccal swab, unless the person physically resists, in which case either a blood sample or hair sample should be taken?*

VALS does not agree with the proposal outlined in the question. Instead, the legislation should specify that where a sample is Court Ordered the sample must always be taken by buccal swab which is to be self-administered as a first option and administered by a medical practitioner as a second option. If the person physically resists the matter should return to Court to seek another Court Order granting permission to conduct a blood or hair sample.

### **Questions 45-46**

*Should a person from whom an intimate sample is to be taken be able to have the procedure conducted by or in the presence of a doctor or nurse of their choice? Should a person upon whom an intimate physical examination is to be conducted be able to have the procedure conducted by or in the presence of a doctor or nurse of their choice?*

An intimate sample and intimate physical examination should be conducted by or in the presence of a doctor of the individual's choice. The police should be removed from the sample collection stage as this stage should be a medical issue. It should be possible to conduct the forensic procedure at the premises of the individual's doctor rather than the police station. Indigenous Australians often are averse to entering police stations because of poor relations with police (ie: history of abuse and deaths in custody). Also, it is the experience of a VALS' solicitor that the manner in which Victoria police conduct a forensic procedure is questionable in terms of risk of contamination of the sample.

### **Question 47**

*Should suspects be required to be cautioned prior to giving a forensic sample if they have already been cautioned under s.464A(3) of the Crimes Act?*

Suspects should be required to be cautioned prior to giving a forensic sample if they have already been cautioned under s.464A(3) of the *Crimes Act*. There is a

continuing need for a suspect who is already in custody and has been cautioned to be cautioned again before a forensic procedure because:

- there may be a time lapse between a caution and the forensic procedure and repetition of the cautioning may refresh the suspect's memory.
- The individual may not have understood the caution the first time and repetition may enhance the capacity of the suspect to understand the caution.

### **Questions 48-49**

*Should the requirement that the conduct of a forensic procedure be video-recorded or witnessed only apply when the person resists (regardless of whether it is an intimate or non-intimate procedure)? Should it apply in any other circumstances?*

The requirement that the conduct of a forensic procedure be video-recorded or witnessed should apply not only when the person resists (regardless of whether it is an intimate or non-intimate procedure), but in all circumstances, especially when samples are being taken from children and incapable persons. This will provide evidence that can prove or disprove inappropriate conduct and hold Victoria police accountable.

### **Question 51**

*Which of the above options regarding the covert collection of forensic material in Victoria is preferred? Option A – make no change to the covert collection of forensic material within Victoria? Option B – regulate the covert collection of forensic material within Victoria? Option C – prohibit the covert collection of forensic material within Victoria? Option D – prohibit the covert collection of forensic material within Victoria unless it is authorised by warrant?*

VALS prefers Option C which prohibits the covert collection of forensic material within Victoria. The covert collection of forensic material is a gap in the system, permitting material to be collected in the absence of a Court Order and consent. It also raises the issue of privacy. If Option C is not adopted then VALS prefers Option B, which is regulation of covert collection, as it inappropriate to rely on indirect regulation through rules of admissibility of evidence. Also, the forensic material should only be used in relation to a specified offence.

### **Questions 56-60**

*Is there a need for an offence regarding the confidentiality of volunteer's identity?*

VALS agrees that there should be an offence regarding the confidentiality of volunteer's identity. Individuals who do not consent to participate in a mass screening program must not be identified or identifiable to other members of the community and failure to do this should be an offence. This would help ensure that where a person does consent it is because they have chosen to freely rather than as a result of pressure or a fear of adverse consequences arising from not consenting

## Conclusion

VALS argues that given the potential of forensic procedures to impinge civil liberties the following should occur:

- Court discretion should be retained and police powers should not be increased.
- Requirements surrounding forensic procedures should not be watered down.
- Further protections need to be in place for suspects.

VALS is also in favour of Court discretion being retained and police powers not being increased because of poor relations between Indigenous Australians and the police. VALS is against the general trend to increase police powers as part of a 'tough on crime' stance and prefers that a 'smart on crime' approach that acknowledges that tough on crime approaches often have a disproportionate impact on marginalised communities, such as Indigenous Australians. VALS recommends that:

- Court business relating to forensic procedures should not be heard if suspects are un-represented by a lawyer
- When police make an application for a forensic procedure to the Court then the police should not only notify the suspect, but also their lawyer.
- Suspects should not be requested to comply with a forensic procedure, but rather consent to a forensic procedure (Question 2).
- A Senior Police Officer should not have the power to authorise the taking of a non-intimate sample from an offender found guilty of a forensic sample offence, whether or not a term of imprisonment is imposed. A Court Order should continue to be required for the conduct of all forensic procedures on offenders (Question 12).
- The legislation should not provide that a senior police officer can authorise the taking of a buccal swab, taking of a blood sample or hair sample in any circumstances (Question 44).

VALS argues that requirements surrounding forensic procedures should not be watered down. VALS is against making it easier to conduct a forensic procedure, using forensic samples for a wider purpose, and extending retention of forensic data. VALS is concerned that the motivation behind making it easier for forensic procedures to be approved is to build up a data base of information on the entire population, which has civil liberties implications. VALS recommends that:

- The need for forensic relevance is a legitimate requirement (Question 4).
- Police should not be able to apply for a Court Order that a number of people who belong to a group that police reasonably suspect of committing an offence must provide a sample (Question 5)
- Matching suspect samples should be restricted. Use of the forensic samples should be limited to investigating a specific offence for which a person is charged and not extended to comparing the sample against crime scene material from unrelated offences (Question 3)
- It should not be a requirement that a sample be retained beyond the time limits unless a person requests that it be destroyed (Question 55)

VALS argues that further protections are needed to protect the rights of suspects. Given the nature of forensic procedures and the implications it has for civil liberties there should be the following protections in place:

- Forensic sampling is used for offender sampling of adults only (Question 1)
- Legislation should specifically define the different categories of volunteers (Question 13)
- With the exception of missing persons, volunteers should only be permitted to provide a sample in relation to a specified indictable offence (Question 14-15)
- With the exception of missing persons, the legislation should prohibit including volunteer samples on the DNA database system (Question 16-17)
- If a volunteer withdraws consent to the retention of their sample and is identified as a suspect the application for the retention of the sample should be heard and determined in the presence of the volunteer (Question 18)
- If police propose to undertake mass sampling the process should be regulated (Question 23)
- A Court Order should be required and additional safeguards apply once a volunteer is identified as a suspect (Question 24)
- Children above a certain age should not be permitted to consent to a forensic procedure. VALS calls for a moratorium on the forensic sampling of children, intimate, non intimate or otherwise. If such a moratorium cannot be achieved, then there should at least a moratorium on the forensic sampling of children 14 and under (Questions 25-27).
- The Magistrates' Court should be required to consider the 'welfare of the child' before making an order under s.464U. The 'welfare of the child' should be considered in the context of stigmatisation of the child for being subject to a Court Order and best interests of the child (Questions 28-29).<sup>3</sup>
- A forensic sample should not be taken from children when the child is a victim as this will result in further victimisation (Questions 31-34).
- The definition of incapable person should be expanded to reflect the definition in the Commonwealth *Crimes Act 1914* (Question 35).
- Incapable persons should be expressly excluded from the volunteer provisions (Questions 40-41).
- Where a sample is Court Ordered the sample must always be taken by buccal swab which is to be self-administered as a first option and administered by a medical practitioner as a second option. If the person physically resists the matter should return to Court to seek another Court Order granting permission to conduct a blood or hair sample (Question 43)
- An intimate sample and intimate physical examination should be conducted by or in the presence of a doctor of the individual's choice, preferably at the doctor's premises (Questions 45-46).
- Suspects should be required to be cautioned prior to giving a forensic sample if they have already been cautioned under s.464A(3) of the *Crimes Act* (Question 47).
- The requirement that the conduct of a forensic procedure be video-recorded or witnessed should apply in all circumstances (Questions 48-49).
- The covert collection of forensic material should be prohibited (Question 51)
- There should be an offence regarding the confidentiality of volunteer's identity (Questions 56-60).

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<sup>3</sup> ibid 59