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Victorian Aboriginal Legal Service Co-operative Limited Submission to the Victorian Law Reform Commission in response to the 'Review of the Bail Act Consultation Paper' (November 2005) – sent 22 February 2006

INTRODUCTION:

According to the Royal Commission Into Aboriginal Deaths In Custody (RCIADIC) *"[t]he lack of flexibility of bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in police custody. This is the case for both adults and juveniles"*[1]. The Victorian Aboriginal Legal Service Co-operative Limited (VALS) argues that that disadvantaged people should not be worse off because of their cultural or socio-economic status when it comes to bail.

In this submission, VALS will endeavour to outline the issues that Indigenous Australians have with the Bail Act 1977. Invariably, discussion will also occur of police powers of summons, arrest, bail and remand. VALS argues that some members of Victoria Police do not use the powers outlined above appropriately when dealing with Indigenous Australians and this contributes to the over-representation of Indigenous Australians in the criminal justice system. VALS' analysis of the cause of this problem is that police too often adopt a 'tough on crime' approach, rather than a 'smart on crime' approach.

VALS argues that the primary purpose of the Act should be to ensure the safety of the community, and this includes the safety of victims, witnesses and the accused (ie: if the accused is at risk of self-harm etc). The basis for determining whether the safety of the community is at risk will be the seriousness of the offence/nature of crime, rather than socio-economic or cultural biases.

VALS argues that the Act should be amended to be flexible enough to take into account cultural and socio-economic difference, be accessible to Indigenous Australians and conditions imposed on Indigenous Australians should be realistic and ultimately be framed in a manner that reduces the over-representation of Indigenous Australians in the criminal justice system. According to a VALS Client Service Officer (CSO) the Act

[1] Royal Commission into Aboriginal Deaths in Custody, Volume 3 paragraph 21.4.2 as at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/index.html

should be "amended to assist Indigenous peoples rather than hinder them at the point of contact with the criminal justice system. The Bail Act should be more understanding of the high representation of Indigenous Australian peoples in custody today."

VALS makes suggestions on how this can be achieved which can be summarized as:

- Smart on crime approach
- Involving Indigenous Australians in the bail process.
- Making sure that non-Indigenous Australians involved in the bail process are aware of the issues facing Indigenous Australians.

SMART ON CRIME APPROACH:

The 'tough on crime' approach reflects the Government policy of responding punitively to crime and not wanting to be seen to be too lenient towards offending, which has resulted in an increase in the prison population. The 'tough on crime' approach is inflexible and therefore unable to take into account cultural and socio-economic factors that may lead to people to come to the attention of police. In contrast, 'smart on crime' approach takes into account cultural and socio-economic factors that may lead people to come to the attention of police. Examples of a 'smart on crime' approach are:

- diversion from the criminal justice system.
- therapeutic or restorative justice.
- an acknowledgment that victims do not always want heavy penalties such as prison, but instead, they support a range of measures which they believe are more effective in stopping further offending.[2] According to recent research from the UK two-thirds (62%) of victims think that going to prison does not prevent re-offending of non-violent crimes (ie: shoplifting, car theft and vandalism). 80% of victims call for more constructive activities for young people in the community, better supervision by parents and seven out of ten victims call for more treatment programs for offenders suffering from mental health problems and drug addiction.
- Recognition of the truth that the criminal justice system is not neutral and does not have an equal impact on all Australians as the scales of justice of tipped against disadvantaged Australians. Often disadvantaged Australians have negative experiences of the criminal justice system, such as not accessing it to the extent that advantaged Australians do. This recognition leads to the further realisation that that there is not only a place for formal equality, but also substantive equality. Formal equality treats everyone as though they are on an even playing field and

[2] 'Victims say stopping re-offending is more important than prison' as a *Drugscope* 16 January 2005 as at http://www.drugscope.org.uk/news_item.asp?a=1&intID=1281

there is no difference. Substantive equality recognises difference (ie: advantaged and disadvantaged people exist) and the need put special measures in place that specifically target disadvantaged people to ensure they have equal access to the justice system (ie: special treatment).

The punitive 'tough on crime' approach results in Indigenous Australians being disadvantaged by the Act in the following manner as the Act is too inflexible to take into account cultural and socio-economic difference:

- Indigenous Australians being less likely to be placed on bail than non-Indigenous Australians. The manner in which the Act is framed makes bail inaccessible to Indigenous Australians.

- The bail conditions Indigenous Australians are placed on are too onerous and set Indigenous Australians up to fail and breach the conditions.

Tougher bail laws according to Professor Chris Cunneen, Director of the NSW Institute of Criminology, have turned jails into "large-scale warehouses".[3] He also said the bail laws had increased the imprisonment of Aborigines because many were unable to meet accommodation and supervision requirements as " [t]he changes in bail laws particularly affect marginalized groups, because they are less likely to be employed or at school" The NSW Bureau of Crime Statistics Director, Dr Don Weatherburn said police strategies and bail laws had led to an increase in prisoners as "police over the last few years have put a lot of energy into targeting repeat offenders, and those people are more likely to go to jail because they have prior convictions".

PURPOSE OF ACT:

The Act should be amended to prevent Indigenous Australians being disadvantaged by their cultural and socio-economic differences to non-Indigenous Australians and the Act having a having a punitive effect. VALS argues that this can be achieved by the Bail Act 1977 (Act) listing the purposes of the Act and the purposes of the Act being narrow.

Comment: Question 2: Is there a need for a statement of purpose or an objects clause in the Bail Act 1977? If so, what do you think the objects of the Act should be? What should the purposes of the Act be?

The primary purpose of the Act should be to ensure the safety of the community, and this includes the safety of victims, witnesses and the accused (ie: if the accused is at risk of self harm etc). The basis for determining whether the safety of the community is at risk will be the seriousness of the offence/nature of crime, rather than socio-economic or cultural biases. The Act should not contain purposes that are a basis for wide ranging bail decisions and conditions that often discriminate against low socio-economic and culturally different groups. Examples, of such purposes are: *ensure the accused's attendance at Court* and *prevent re-offending*. Another criticism of such purposes is that they have a more tenuous link with the primary purpose of community safety. Also, VALS questions the causal link between these purposes and outcomes. Does requiring a

[3] Pearlman Jonathan, 'Our convict state – one in 600 behind bars' 3 January 2006 as at http://www.smh.com.au/text/articles/2006/01/02/1136050394325.html

person to report to a police station three times a day increase the likelihood of the accused attending Court or decrease the likelihood of re-offending?

VALS argues:

- If the purposes of the Act are narrow (ie: include purpose of community safety and exclude purposes such as ensure the accused's attendance at Court and prevent re-offending); and

- If primacy is given to the purpose of community safety, and the basis for determining whether the safety of the community is at risk will be the seriousness of the offence rather than socio-economic and cultural biases; then

    - the impact of the Act on Indigenous Australians will be less discriminatory, as the likelihood of decisions relating to bail being based on cultural and socio-economic biases will be reduced.

VALS supports the following conditions:

- Provide fair, and as far as possible, simple criteria for refusing bail;

- Provide for release on bail with conditions that are the least onerous that may be imposed on the accused;

- Promote transparency;

- Require decisions makers to provide reasons for refusal of bail.

VALS argues that more is required than simply listing the purposes of the Act. A strategy that frames the bail process needs to be devised which makes clear:

- Whether bail decisions should incorporate all of the listed objectives or it is sufficient to meet some of the objectives. If so, what purposes should be given priority over other purposes?

    - VALS argues that it is sufficient for bail decisions to incorporate some of the listed objectives, otherwise the bail process is in danger of having a punitive effect. VALS argues that the purpose of ensuring community safety should be given priority. VALS also emphasizes the need for conditions that are the least onerous.

ARREST:

Some members of Victoria Police do not use their power of arrest of Indigenous Australian adults or children appropriately. An indicator of the inappropriate use of arrest when dealing with Indigenous Australians is the over-representation of Indigenous

Comment: Question 62: Are police using their powers of arrest of children appropriately? What steps should be taken to reduce the arrest rate of Indigenous children?

Australians in arrest figures. Figures for 2003-2004 show that 51% of people charged were proceeded against by means of arrest. Figures for 2003-2004 show that 57% of Indigenous Australian accused charged were proceed with by means of arrest.[4] In Victoria non-Indigenous Australian l young people are more often brought before the Children's Court by way of summons than arrest. Between 1993-94 and 1994-95 there was a 46.4% increase in Indigenous Australian youth formally processed by the Victorian police, compared to a 4.6% increase for non-Indigenous Australian young people in the same period (Mackay 1996a page 6).[5] These statistics are evidence that recommendation 87(a) of the RCIADIC that Indigenous Australians be arrested as a last resort is not being implemented.

The reasons for the over-representation of Indigenous Australians in arrest figures are as follows and are divided under the heading cultural and other factors:

Cultural Factors:

- Underlying racism influences the actions of police to arrest more Indigenous Australians adults and children than non-Indigenous Australians. Police cannot investigate every crime that comes to their attention. As a result, they must use their discretion and choose what criminal behaviour they are going to investigate and/or charge. Indigenous Australians are discriminated in this area. [5] The high visibility of Indigenous Australian peoples is a significant factor in policing practices. For instance, the police practice of over-policing Indigenous Australians results in unnecessary and trivial charges being laid or Indigenous Australians being unable to use public space without coming to the attention of police (ie: public drunkenness laws indirectly discriminate against Indigenous Australians).[6] According to a VALS' CSO *"[f]or some reason the police and the wider community equate blackness with trouble. Because of been over-policed Koori children use up their 'out of jail cards' and compile a lengthy juvenile record early in their teens. Every Koori child between 10 and 18 I know of has had a negative experience with the police in Swan Hill"*.

- Police do not use their power to caution appropriately as a paper produced by VALS in found that: from July 2000 to June 2001, Indigenous Australian juveniles received fewer cautions in all crime categories (except rape) than non-Indigenous juveniles as "the level of under utilisation of cautioning of Indigenous Australian young people is in the order of 10-15% when you focus on people who have had no prior police contact". [7] For example,

[4] Victorian Law Reform Commission 'Review of Bail Act Consultation Paper' (2005) p.21
[5] http://www.scu.edu.au/schools/edu/student_pages/2000/kmyers/visibility.htm
[6] ibid
[7] Victorian Aboriginal Legal Service, 'Police Cautioning of Indigenous Juvenile Offenders in Victoria' 2003.

- the offence of bicycle theft resulted in the cautioning of 6.7% of Indigenous Australian juveniles compared to 22.6% of non-Indigenous juveniles;

- the offence of regulated public order resulted in the cautioning of 10.5% of Indigenous Australian juveniles compared to 30.7% of non-Indigenous juveniles;

- the overall cautioning rate for Indigenous Australian juveniles was 13.3% compared to 30.8% of non-Indigenous juveniles". [8]

- Diversion options, other than cautioning, are not accessible to Indigenous Australians. This is because serious and repeat offenders are considered ineligible for diversionary programs and are dealt with more punitively through sentencing regimes that are more akin to adult models. The segregation of treatment for `minor' and `serious' juvenile offenders is occurring predominantly along racial lines. [9] Also, diversionary programs controlled by Indigenous Australians are limited in number, under-resourced and under-utilised by the courts.[10]

- VALS endorses Recommendation 62 RCIADIC diversionary schemes should be designed in close consultation with Indigenous Australian communities or adapted to local circumstances. [11]

The high arrest rate of Indigenous Australians serves to:

- further damage the relations between Indigenous Australians and Victoria Police.

- Increase recidivism, as once someone has contact with the criminal justice system, the chances of offending increase.[12]

Other Factors:

[8] ibid

[9] Human Rights and Equal Opportunity Commission , 'Bringing them Home, National minimum standards', as athttp://www.austlii.edu.au/cgi-bin/disp.pl/au/other/IndigLRes/stolen/stolen61.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

[10] ibid

[11] Human Rights and Equal Opportunity Commission 'Bringing them Home: Causes of separation' as at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/IndigLRes/stolen/stolen56.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

[12] Australian Institute of Criminology, *Indigenous Justice in Australia, Courts and Sentencing as at http://www.aic.gov.au/topics/indigenous/cjs/sentencing.html*

- increased police powers.[13]

- policies aimed at targeting recidivists.[14]

- Mandatory arrest for some offences

Proceeding by way of arrest doubles the possible avenues to custody, either by way of bail refusal or by way of custodial sentence.[15] The high arrest rate of Indigenous Australians automatically places Indigenous Australians within the domain of the Act and gives police the opportunity to use their powers in relation to bail. Given the high arrest rate of Indigenous Australians it is essential that the bail system is amended so that it operates in a fair manner for Indigenous Australians who are more likely to be subject to the Act than non-Indigenous Australians. Unfortunately, the Act as it currently stands operates to the detriment of Indigenous Australians.

VALS suggests that:

- Police should follow the directive of the RCIADIC to use arrest as a last resort (87a RCIADIC).

- That governments should review relevant legislation and police standing orders so as to ensure that police officers do not exercise their powers of arrest in relation to Aboriginal juveniles rather than proceed by way of formal or informal caution or service of an attendance notice or summons unless there are reasonable grounds for believing that such action is necessary. The test whether arrest is necessary should, in general, be more stringent than that imposed in relation to adults. The general rule should be that if the offence alleged to have been committed is not grave and if the indications are that the juvenile is unlikely to repeat the offence or commit other offences at that time then arrest should not be effected. [RCIADIC 239]

- That:
  a. Police administrators give police officers greater encouragement to proceed by way of caution rather than by arrest, summons or attendance notice;
  b. That wherever possible the police caution be given in the presence of a parent, adult relative or person having care and responsibility for the juvenile; and

[13] ibid
[14] ibid

[15] Human Rights and Equal Opportunity Commission 'Bringing them Home: Causes of separation' as at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/IndigLRes/stolen/stolen56.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

c. That if a police caution is given other than in the presence of any such person having care and responsibility for the juvenile such person be notified in writing of the fact and details of the caution administered. [RCIADIC 240]

- There should be police should receive training about the context of arrest of Indigenous Australians in order to reduce the arrest rate of Indigenous Australians.

- In the event that Indigenous Australians are arrested and subjected to the Act, the Act should be amended to ensure it does not work to the disadvantage of Indigenous Australians.

- Ensure diversion programs are culturally appropriate for Indigenous Australians.

- Provide ongoing cultural awareness training to police, such as training in the importance of ensuring that Indigenous young people are not unnecessarily separated from their families (para 18.168).[16] According to the VALS *CSO "...it all comes back to educating the police on the different social realities and different culture that Indigenous people experience compared to the wider community. This way they can make more informed decisions before using their powers of arrest"*.

- Deal with the underlying causes of offending (ie: socio-economic issues).

- Decriminalise law that have a disproportionate impact on Indigenous Australians (ie: public drunkenness) and are arguably indirectly discriminatory.

- 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 (Cain, 1996:1).

- The Victoria police be briefed about the rationale for sentencing of young people in the Children's Court and the rationale for using diversion strategies (Recommendation of VALS Cautioning Paper).[17]

- The Victoria Police be encouraged to make greater use of informal warnings (Recommendation of VALS Cautioning Paper).[18]

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[16] Australian Law Reform Commission 18. Children's involvement in criminal justice processes 1997 as at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/84/18.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

[17] Victorian Aboriginal Legal Service, 'Police Cautioning of Indigenous Juvenile Offenders in Victoria' 2003

SUMMONS:

Some members of Victoria Police use their power to summon inappropriate. Police opt to charge on bail when it would be more appropriate to use summons. This is an occurrence that effects the general Australian population, yet effects the Indigenous Australian population to a greater extent.

VALS suggests:

- Provisions be included in the Crimes Act 1958 that are similar to the provision in the Children and Young Person's Act 1989; presumption that a summons will be used, except in exceptional circumstances.

- That, in the first instance, proceedings for a breach of a non-custodial order should ordinarily be commenced by summons or attendance notice and not by arrest of the offender (RCIADIC recommendation 102).

- That summons can be served on an accused's family member/friend/community member for the accused.

BAIL DECISION:

Some members of Victoria Police use their powers to decide whether to grant bail inappropriately. This is evidenced by many Indigenous Australians not being granted bail. There are some socio-economic reasons why members of the community are denied bail. Some of these reasons have particular significance for Indigenous Australians and cultural factors have unique significance to Indigenous Australians. The factors outlined below are more likely to be detrimental to the Indigenous Australian community because they are more likely to be arrested than non-Indigenous Australians and the decision made about bail in light of the factors.

Cultural Factors:

The Act and its conditions for release of accused should take into account the cultural differences.

- Some Indigenous Australians do not have a fixed address and instead live at multiple addresses. Police prefer to bail Indigenous Australians to a fixed address which results in bail being denied.

- Indigenous Australians are put in a 'show cause' situation too readily which results in bail being denied. The reason police challenge the right of Indigenous

[18] ibid

Australians to bail may be influenced by racism. It is difficult to challenge a police member's opinion that bail should not be granted when the accused does not have accommodation available.

- High rate of fail to appear at Court by Indigenous Australians results in bail being denied. In its submission to the RCIADIC Commission, the Queensland Attorney-General's Department acknowledged the inequitable outcomes of current bail procedures in the context of failure to appear at Court which mentions cultural and socio-economic factors:

> *Queensland bail laws under the Bail Act are strict in order to enforce attendance in Court (which is desirable in the interests of the administration of justice) but may not be designed to cater adequately for people who are not trying to escape justice but through mental or physical disability, life style, communication difficulties or lack of education are incapable of reliably getting themselves to court at an appointed place or time. Courts take a stern view of people who fail to appear in Court without a valid excuse, but a valid excuse tends to be determined consciously by reference to normal standards. In reality many disadvantaged people before the Courts are not capable of conforming to such standards and, arguably, may be unfairly penalised if this results in them failing to appear in Court. In some cases, in the north, a difficulty involved is the distance required to be travelled to appear in the superior Courts in Cairns.*[19]

- Indigenous Australians mode of communication is different to non-Indigenous Australians mode of communication and the over-whelming majority of police are non-Indigenous, which results in bail being denied. For instance, police become suspicious of Indigenous Australians who do not make eye contact or remain silent and refuse to bail them (ie: indicator of guilt). However, Indigenous Australians often behave in this manner for cultural reasons.[20]

- Police abuse their power by offering incentives to accused to talk, such as suggesting that if the accused admits guilty then bail will be granted, and then failing to follow through with this promise. This practice further entrenches the power imbalance between the police and accused as the former is offering

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[19] Royal Commission into Aboriginal Deaths in Custody, Volume 3 paragraph 21.4.18 as at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/index.html

[20] Australian Law Reform Commission 18. Children's involvement in criminal justice processes 1997 as at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/84/18.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

something the latter wants. If an Indigenous Australian finds themselves in this situation they are likely to make an admission as they are intimidated by police for historical and cultural reasons.

- VALS is not always notified, or in a timely manner, that a person is in custody so VALS is not given the opportunity to provide legal advice to an accused. Failure to notify VALS increases the likelihood of bail being refused.

- Contrary to the law police delay the bail decision in relation to people affected by alcohol or other drug to a substantial degree until the person is sober and this practice is open to abuse. This deferral disadvantages Indigenous Australians who are disproportionately affected by laws such as public drunkenness, as Indigenous Australians are more likely than non-Indigenous Australians to use public space as cultural space.[21]

- Indigenous Australians are over-represented in the criminal justice system, and so their prior conviction effects the chances of them being granted bail. The question that needs to be asked is why Indigenous Australians are over-represented in the criminal justice system.

VALS suggests:

- The Act should be more understanding to Indigenous Australian peoples and their reasons for having a record of non-appearances at court. There are many reasons why Indigenous Australian peoples don't turn up to court such as financial hardship, homelessness, drug and alcohol abuse, mental health problems, family crisis, funeral and being intimidated by the thought of going to Court.

- VALS should be notified immediately that an Indigenous Australian is in custody.[22]

Socio-economic Factors

The Act and its conditions for release of defendants should take into account these socioeconomic differences.

- Inadequate accommodation results in denial of bail as police are reluctant to bail an individual if they do not have a fixed address. According to a CSO *"In my*

[21] Royal Commission into Aboriginal Deaths in Custody, Volume 3 paragraph 21.4.25 as at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/index.html

[22] Human Rights and Equal Opportunity Commission , Bringing them Home, National minimum standards, as athttp://www.austlii.edu.au/cgi-bin/disp.pl/au/other/IndigLRes/stolen/stolen61.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

experience, there is never enough accommodation for Indigenous people on bail. Many of our clients are in' transition', which is a polite term for being homeless." If services are unavailable, then the accused suffers the consequences and is not granted bail. It is inappropriate to deny a person their liberty and to use gaol as a de facto mechanism for providing services that should be provided for the disadvantaged in our community.[23] A Solicitor may deliberately hold off making a bail application because there is no accommodation available, so the accused stays in prison on remand until accommodation is available. Recently, a client was held on remand from 28/12/05 to 24/1/06 (28 days). The solicitor was unable to make the bail application until 21/1/06 as prior to this date the client had no accommodation. The client is currently residing at a hostel. In theory the laws of bail apply equally to everyone. However, they do not when the issue of beds crops up. Due to the difference in socio-economic status there is no equality and the scales of justice are tipped against those with low socio-economic status.

VALS suggests:

- The Act should be amended to be akin to the Children and Young Persons Act 1989 which states that a child is not to be refused bail on the sole ground that he or she does not have any, or adequate, accommodation.[24]

- Adequate resourcing be provided for bail hostel programs.[25]

- Education of police on the socio-economic differences and cultural differences of Indigenous Australian peoples should occur so they can make more informed decisions when deciding bail for Indigenous Australian peoples.

- "Where police bail is denied to an Aboriginal person … the Aboriginal Legal Service, or a person nominated by the Service, be notified of that fact" [RCIADIC Recommendation 90(a)]. It is VALS' experience that this recommendation is not implemented. There is no formal mechanism in place for Victoria Police to notify VALS that an Aboriginal person has been denied bail and is to be remanded. It depends on the personality of the individual police officer if they call VALS to notify staff that an Indigenous Australian has been refused bail. Generally, the onus is on VALS CSO contact the police station to find out if the client has been

[23] NSW Legal Aid Review of bail law in NSW Discussion paper 2004 as at

http://www.legalaid.nsw.gov.au/data/portal/00000005/public/56645001121315211406.do

[24] Australian Law Reform Commission 18. Children's involvement in criminal justice processes 1997 as at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/84/18.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

[25] ibid

bailed or remanded. Victoria Police should be given a directive in line with Recommendation 90a of the RCIADIC.

- The Attorney General's Department record information on Aboriginal access to bail …." as required by Recommendation 89 of the Royal Commission into Aboriginal deaths in custody and publish it annually.[26]

- "There be a statutory requirement that the officer-in-charge of a station to whom an arrested person is taken give to that person, in writing, a notification of his/her right to apply for bail and to pursue a review of the decision if bail is refused and of how to exercise those rights". [RCIADIC Recommendation 90(c)]. Indigenous Australians should be given an Indigenous Australian specific publication about bail.

- That governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation: "to enable the same or another police officer to review a refusal of bail by a police officer" [RCIADIC Recommendation 91(a)]

- That governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation: to-revise any criteria which inappropriately restrict the granting of bail to Aboriginal people; [RCIADIC Recommendation 91(b)]

VALS is uncertain about the following recommendation of the RCIADIC:…."that governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation: to enable police officers to release a person on bail at or near the place of arrest without necessarily conveying the person to a police station [RCIADIC Recommendation 91(c)].

VALS would only support this recommendation if:

- If on-the-spot bail powers are used in remote areas only.

- VALS is notified that the person is subject to on-the-spot bail powers. Currently, VALS is notified when an Indigenous Australian is in the custody of police. It would be inappropriate if on-the-spot bail powers resulted in VALS not being able to assist Indigenous Australians who do not go back to the police station. Support should be provided to those subject to on-the-spot bail powers through VALS or other mechanisms. Support should be provided because:

    - the power imbalance between Indigenous Australians and police would be intensified if on-the-spot bail is used. The safeguard of having other

[26] Aboriginal Justice Advisory Council 'Aboriginal People and Bail Courts in NSW'

police observe the actions of the arresting officer, which occurs at the station, would not be in place.

- Also, there is the risk that Indigenous Australians will not understand the on-the-spot bail process and hence not comply with the terms of bail. Communication difficulties that exist between Indigenous Australians and Victoria Police may be exacerbated in an on-the-spot bail scenario.

- There need to be limits on the conditions that could be imposed for on-the-spot bail, to ensure that unreasonable conditions are not imposed which then can not be reviewed until a first court appearance. Specifically, on-the-spot bail should not include financial conditions.[27]

BAIL CONDITIONS:

Bail conditions imposed on Indigenous accused are not adequately taking into account cultural and socioeconomic differences

Comment: Question 55: Are the bail conditions imposed on Indigenous accused adequately taking into account cultural and socioeconomic differences? Are excessive financial conditions being imposed on Indigenous accused within Victoria?

Indigenous Australians get particular forms of bail that, in general are too onerous, unreasonable or unrealistic conditions and setting people up to fail. The bail conditions are inappropriate as they do not take into account cultural and socio economic differences experienced by Indigenous Australians. Socio-economic and cultural disadvantage is a factor in the over-representation of Indigenous Australians in the criminal justice system. The Report was based on arguments such as the most significant contributing factor to bringing Indigenous people into contact with the criminal justice system was their disadvantaged and unequal position within the wider society Also, the elimination of Indigenous disadvantage would only be achieved through empowerment, self-determination and reconciliation. The over-representation of Indigenous Australians in the criminal justice system represents a failure of society to deal with Aboriginal disadvantage.[28]

Cultural Factors:

The following bail conditions are inappropriate in that they do not take into account the cultural differences of Indigenous Australians and are consequentially onerous bail conditions for Indigenous Australians and they experience difficulty in complying with the conditions. Conditions that are culturally inappropriate are punitive as they deny a person a right to practice their culture which is a form of racism:

[27] NSW Legal Aid Review of bail law in NSW Discussion paper 2004 as at http://www.legalaid.nsw.gov.au/data/portal/00000005/public/56645001121315211406.do

[28] http://www.scu.edu.au/schools/edu/student_pages/2000/kmyers/detaining.htm

- The accused cannot associate with the co-accused. This is a culturally inappropriate bail condition as it means that the accused cannot go to community or family events because the co-accused will be there also. Alternatively, the accused cannot live at their home because the co-defendant lives there also. This condition has a disproportionate impact on Indigenous Australians given that Indigenous Australian homes often house immediate and extended family members (ie: kinship network). Both conditions are culturally inappropriate because they are disruptive to every day life and community/family life and denies the accused (or co-accused) access their home, family or community.

- The accused cannot reside at a particular address on the basis that a resident of that address has a criminal record. This is a culturally inappropriate condition for similar reasons discussed above.

- The accused is bailed to reside at one fixed address. This is a culturally inappropriate bail condition in light of the fact that often Indigenous Australians do not reside at one fixed address (ie: spend part of the week at one house and the other half of the week at a different house). Indigenous Australians may treat both the house they own, and the house belonging to their Aunt, as their own house. One VALS staff member explains this by saying that family member's homes are extra rooms to one's own house. Bailing a person to one fixed address denies the Defendant to spend time in different houses.

    - VALS suggests a more culturally appropriate bail condition would enable a person to be bailed to reside at multiple addresses.

- The accused is bailed on the condition of engaging with a service provider or completing a program (ie: drug and alcohol counseling, CREDIT program). This is culturally inappropriate because the services/programs that the Indigenous Australians is mandated to engage with are culturally inappropriate. Indigenous Australians criticize the CREDIT program as culturally insensitive. If the services are culturally inappropriate, then the accused is not likely to meet bail conditions. Such conditions contain a patriarchal, punitive, or even racist, flavour that seeks to control the lives of Indigenous Australians by individuals/systems that think they know what is best for people who are unable to help themselves and need to be taught a lesson or two. Another example of such a superior attitude over Indigenous Australians is the removal of Indigenous Australian to missions and reserves. This is culturally inappropriate as Indigenous Australians have the right to self-determination by virtue of the fact that they were the first peoples to inhabit the land of Australia and should be given the ability to control their own lives and make choices rather than have values from alternative cultures imposed upon them. Similarly, the condition of abstaining from alcohol and being subject to random breath testing is onerous.

- VALS suggests that a more culturally appropriate bail condition would be to require Indigenous Australians to attend Indigenous Australian organisations or organisations that provide cultural awareness training to staff. This has resource implications.

- VALS suggests that a more culturally appropriate bail condition would recognise Indigenous Australian's right to self-determination (eg: training, report to Aboriginal Co-operative, see below).

- The accused is bailed to report at the police station. This is a culturally inappropriate condition given the historical relationship between Indigenous Australians and the police. In the eyes of Indigenous Australians Victoria Police has implemented legislation and policies that disadvantage Indigenous Australians. As a result Indigenous Australians distrust and are intimated by police and do not find entering a police station easy.

    - VALS suggests that a more culturally appropriate condition would be to require that accused report to Indigenous Australian organisations (ie: Aboriginal Co-operatives). Recommendation 2 of the Aboriginal Justice Advisory Council (AJAC) Bail Report stated that s*ection 36(b) of the NSW Bail Act,* provides for the use of acceptable persons to certify the defendant's ability to meet their bail undertakings, *should be strengthened.* The AJAC study found that this appeared to be under used, yet is a provision that can provide an avenue for respected local aboriginal community members to come forward and support the Aboriginal defendants.[29]

- The accused is bailed to comply with strict time frames that are culturally inappropriate. For instance, reporting conditions or a curfew limit a person's ability to perform their cultural responsibilities such as taking care of relatives, and attending funerals, and family and community functions.[30]VALS suggests that conditions would be more culturally appropriate if they were flexible to take into account cultural responsibilities. A great dilemma for Indigenous Australian accused is a strongly felt obligation associated with the death of a family member not contemplated when the bail agreement was entered into.[31] Indigenous Australian funerals do not span over one day, but multiple days.

- The accused is bailed on the condition that they comply with a curfew. Such a condition is culturally inappropriate as it has the effect of removing Indigenous

[29] NSW Legal Aid Review of bail law in NSW Discussion paper 2004 as at

http://www.legalaid.nsw.gov.au/data/portal/00000005/public/56645001121315211406.do

[30] ibid

[31] Royal Commission into Aboriginal Deaths in Custody, Volume 3 paragraph 21.4.27 as at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/index.html

Australians from public space areas. It is also punitive as it is a form of detention and criminalization of non-offending behaviour.[32] This arguably has a racist motive of removing Indigenous Australians, considered to take part in anti-social behaviour, from the public arena. Indigenous Australians use public space as cultural space. Indigenous Australians often gather in a park to accommodate large numbers of people who will not fit into one house.

The above bail conditions are imposed by people (ie: members of Victoria Police, Bail Justice or Magistrate) who is not aware of cultural issues that are relevant when bailing an Indigenous Australian. VALS is aware of instances where Aboriginal Bail Justices who are rostered on to deal with bail are not called upon by police who are aware that an Indigenous Australian person is in their custody. This is culturally inappropriate as it is likely that an Aboriginal Bail Justice is more likely to impose culturally appropriate bail conditions and be better at gauging which conditions the Indigenous Australians is more likely to comply with because they are less onerous. This is reflective of a broader problem of police hand picking Bail Justices that they know will agree with them and Indigenous Australians having no guarantee of appearing before an Aboriginal Bail Justice, but it is ad hoc.

VALS suggests that bail conditions may be more culturally appropriate if the following occurs and these suggestions have resource implications:

- Introducing a fairer Bail Justice system that is centralized and not administered by Victoria Police.

- Where there is no alternative but to impose bail conditions, the conditions must be designed to maintain as far as possible the links between the Indigenous Australian and his or her culture.

- Requiring Bail Justices to undergo not only cultural awareness training, but *ongoing* cultural awareness training, in order to retain their status as Bail Justices. Cultural awareness training should also be provided to Victoria Police and the Courts.

- Utilizing Aboriginal Bail Justices to their full potential by ensuring Indigenous Australians appear before an Aboriginal Bail Justice. This would mean transforming the basis of the existence of Aboriginal Bail Justices from formal equality (ie: diversity within the pool of Bail Justices) to substantive equality (ie:

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[32] Australian Law Reform Commission 18. Children's involvement in criminal justice processes 1997 as at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/84/18.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

special treatment for Indigenous Australians that specifically targets them to reduce the over-representation rate in the criminal justice system). The current breed of Aboriginal Bail Justices are not entitled to the title 'Aboriginal Bail Justices' as they are merely Bail Justices who just happen to be Aboriginal. This is not the fault of the Aboriginal Bail Justices but the system in which they are working as it is based on formal, rather than substantive equality.

- Consulting widely with the Indigenous Australian community, particularly Koori Court Elders/Respect People and Aboriginal Workers as to whether a specialist forum based on circle sentencing be convened in Victorian Courts to deal with matters relating to bail (ie: initial application for bail and follow up vary/revoke bail). VALS notes that the Koori Court Unit at the Department of Justice is in the process of providing an options paper for the Justice Forum, regarding Koori Court Elders and Respected Persons being able to sit on contested matters. Currently, bail applications are not heard in the Koori Court this will be discussed within the options paper. This suggestion is based on recommendation 13 of the AJAC that: The Attorney General's Department Pilot a Bail Project for 6 months, based on the circle sentencing format where magistrates or bail justices can discuss bail conditions informally with defendants and their families to ensure that those conditions are appropriate and that defendants and their families fully understand those conditions.[33]

  - VALS suggests the Indigenous Australian community should be consulted on:

    a) Whether the Koori Court should be involved in the decision of whether to grant bail and or;

      - At this stage VALS agrees with the Commission that difficulties would arise if the decision to decide to grant bail was separate from a specialist forum to consider the imposition of bail conditions. It makes more sense to combine these two things as in practice the bail decision is often intimately linked to the nature of the bail conditions.[34] If the Koori Court were to hear bail related matters it should be involved in both the decision whether to grant bail and the conditions to be imposed on bail.

    b) Whether the Koori Court should be involved in the imposition of bail conditions on Indigenous Australian accused.

Comment: Question 56: Should a specialist forum based on circle sentencing be convened in Victorian courts to deal with the imposition of bail conditions on Indigenous accused? Are there any difficulties with this initiative? Are there any other ways to achieve the involvement of an Indigenous accused's family and community members in ensuring compliance with bail conditions?

[33] Aboriginal Justice Advisory Council 'Aboriginal People & Bail Courts in NSW'

[34] Victorian Law Reform Commission 'Review of Bail Act Consultation Paper' (2005) p.111

- VALS is aware of the following arguments for the enabling of the Koori Court to deal with the imposition of bail conditions:

    - The bail conditions imposed by the Koori Court are more likely to be culturally appropriate and realistic. This is because Indigenous Australians are more attuned to the issues facing Indigenous Australians. Support mechanisms required to be put in place to assist an Indigenous Australian person to meet their bail conditions are more likely to be identified at the Koori Court. Given that making bail applications are essentially an exercise in assisting a client to access social services, which depends on availability of services, Koori Court is in a position to understand the needs of the Indigenous Australian community.

    - The bail conditions may be more meaningful to the Indigenous Australian person because they were formulated in the Koori Court, as opposed to a mainstream Court which is culturally alienating and often meaningless. A description of the Koori Court is as follows: "[w]hat we'd learned previously was that the traditional court structure, which is I think it was originally meant to intimidate witnesses and so forth, isn't appropriate for Indigenous people and is seen as intimidating and alienating…."[35]

    - Enabling the Koori Court to hear bail related matters will empower the Indigenous Australian community and go some way to recognizing their right to self-determination.

    - Enabling the Koori Court to hear bail related matters is not giving Indigenous Australians a soft option. VALS envisages that the accused will comply with the bail conditions imposed by the Koori Court as they will not look forward to appearing before the Koori Court Elders/Respected Persons if they breach their conditions. Sentences imposed by the Koori Court that contain conditions (ie: suspended sentence) have a high rate of being complied with.

c) Is it too much for the Koori Court to hear bail related matters? Is it too much to ask of Koori Court Elders/Respected people to have a

[35] Haxton Nance 'Hopes new SA Family court will also change attitudes' - ABC Radio The World Today - Friday, 3 February 2006 12:42:00

role in granting bail and the conditions. What are likely to be the repercussions for the Koori Court Elders/Respected persons in the community (ie: backlash)? Is it too much to ask Koori Court Elders/Respected people to have a role in the bail process considering that they are not trained in the legal profession?

- VALS argues that if the Koori Court is to deal with bail related matters were to deal with the imposition of bail conditions then appropriate training about the Bail Act should be provided to Koori Court Elders and Respected Persons.

d) Are the practical issues associated with the Koori Court too difficult to overcome? If not, how should they be overcome?

- VALS argues that the idea of expanding the jurisdiction of the Koori Court to hear bail related matters has the potential to benefit some Koori people, but it also has the potential to work against Indigenous Australians in practice. The practical difficulties are:

  - the bail decision should be made as soon as possible after arrest, yet Koori Courts only sit on specific days (ie: fortnightly) and are usually fully listed with sentencing cases. Consequently, there will be a delay in hearing bail matters in the Koori Court. This places Indigenous Australians at risk of being in custody for a longer amount of time than is currently the case in mainstream Courts.

  - The logistics of transporting Koori Defendants held in remand to Koori Courts would rely on the police. The Indigenous Australian community have a distrust of police member's ability to do this consistently.

  - Police may use the Koori Court as a bargaining tool and say that the Indigenous Australian dDefendant can go to the Koori Court for a bail application if they confess and admit guilt (ie: inappropriate use of police powers).

- If the Koori Court Bail Application is only an option for those willing to plead guilty, then perhaps more people will decide to plead guilty.

- VALS agrees with the Magistrates' Court submission that:
  - A process should not be endorsed that resulted in "delay and had the consequence of detaining Koori accused in custody any longer than is currently the case".
  - VALS should receive increased resources to appear in the Koori Court to deal with bail related matters as VALS pears in the majority of cases in the Koori Court.
  - In locations where there is no Koori Court an Aboriginal Liaison Officer should be introduced.

- VALS also suggests that:
  - More Koori Courts should be introduced and their sitting times extended.
  - VALS recommendation above in relation to Aboriginal Bail Justices (ie: Indigenous Australians having the guarantee of appearing before an Aboriginal Bail Justice) and the expansion of the jurisdiction of the Koori Court to hear bail matters are complimentary. Perhaps if it is impractical for a person to appear before a Koori Court in a reasonable amount of time, they should appear before an Aboriginal Bail Justice. Alternatively, a non-Indigenous Australian Bail Justice could call an Indigenous Australian to assist.
  - The practical problem of people being remanded in custody until the Koori Court sits could be overcome perhaps by only enabling the Koori Court to hear applications to vary/revoke bail. The accused will be released on bail, imposed by a mainstream Court, until the Koori Court sits.

- Developing other ways to achieve the involvement of an Indigenous accused's family and community members in ensuring compliance with bail conditions . For instance:

    - Accused report to Aboriginal co-operative rather than police station
- Enshrine that unconditional bail is a right (HREOC Bringing Them Home Report National Minimum Standards - (Standard 8: Juvenile justice Rule 9).[36]

The conditions mentioned above also raises issues of socio-economic difference.

Socio-economic Factors:

The following bail conditions are inappropriate in that they do not take into account the socio-economic differences of Indigenous Australians and lead to indirect discrimination against disadvantaged people because they are either:

- Harder for disadvantaged people, in comparison to advantaged people, to comply with and are unrealistic which means they are likely to be breached and be subject to a warrant and police powers of arrest.

    - The condition that a surety is paid poses more of a burden to disadvantaged people, rather than advantaged people because the former is likely to struggle to comply with the condition (ie: difference in the degree of difficulty).

    - The condition that the accused reside at a fixed address presents a higher degree of difficulty in terms of compliance than for a disadvantaged person. For instance, a person may become homeless whilst on bail.

    - The condition that a person reporting to a police station presents a higher degree of difficulty in terms of compliance for a disadvantaged person in comparison to an advantaged person. For instance, if a person does not have transport to get to the police station (ie: not own a vehicle or funds to use public transport).

        - VALS suggests that the conditions should provide protection against too onerous, unreasonable or unrealistic conditions and set people up to fail and should take into account socio-economic difference. This could be specifically mentioned in the Act.

[36] Human Rights and Equal Opportunity Commission , 'Bringing them Home, National minimum standards', as at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/IndigLRes/stolen/stolen61.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

- There should be less reliance on financial sureties for disadvantaged people (Recommendation 1 in the AJAC Bail Report).

- There is a real need to ensure that the amount for sureties and securities, if used, are determined on a fair, sound and equitable basis.[37]

- Communication of bail conditions should be as clear as possible in order to ensure the accused understands the conditions and hence is less likely to breach them. Communication strategies should target the particular needs of disadvantaged people, such as Indigenous Australians.

- "Where police bail … is granted on terms the person cannot meet, the Aboriginal Legal Service, or a person nominated by the Service, be notified of that fact". [RCIADIC Recommendation 90(a)]

- Inaccessible to disadvantaged people due to their socio-economic status.

  - The condition that a surety is paid is more likely for an advantaged person to be placed on this condition than a disadvantaged person. The question of whether excessive financial conditions are being imposed on Indigenous Australian accused depends on the definition of excessive. Given the low socio-economic background of Indigenous Australians a figure may be excessive for them, but not for others. It is VALS' experience that generally financial conditions are not imposed on Indigenous Australians. Disadvantaged people are likely to be subjected to other bail conditions that are arguably more disruptive of every day life and one's liberty than the bail condition of a surety imposed on a rich person. As disadvantaged people are not likely to get surety, or if it is excessive, they will be under conditions on their own undertaking. A breach of a condition on ones own undertaking is treated more harshly than a surety, as it failure to comply with a promise to the Court.

  - The condition that the accused reside at a fixed address is more accessible to an advantaged person, who has accommodation and employment, than a disadvantaged person who is homeless or have a permanent address and unemployed.

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[37] NSW Legal Aid Review of bail law in NSW Discussion paper 2004 as at http://www.legalaid.nsw.gov.au/data/portal/00000005/public/56645001121315211406.do

- "The Attorney General's Department record information on Aboriginal access to …. bail conditions" as required by recommendation 89 of the Royal Commission into Aboriginal Deaths in Custody and publish it annually.[38]

- VALS suggests that disadvantaged people should not be worse off because of their socio-economic status when it comes to bail conditions.

- Issues of socio-economic disadvantage should be addressed so that all bail conditions are accessible and the over-representation of Indigenous Australians in the criminal justice system is addressed. The RCIADIC found that socio-economic issues are a factor in the over-representation of Indigenous Australians in the criminal justice system.

The RCIADIC contains suggestions on how to facilitate greater access to bail and should be followed.

REMAND:

Police use their power to place Indigenous Australians on remand inappropriately. Indigenous Australians are more likely to be placed on remand than bailed and done in a punitive manner. This is contributed to by cultural and socio-economic issues which are linked.

According to the Bail Act Consultation Paper: "The June quarter of 2005, the remand rate for Indigenous Victorians was 244.7 per 100 000 of the adult Indigenous population.31 Over the same period, the remand figure for non-Indigenous Victorians was 16.5 per 100 000 of the adult population.32 This means that in the June quarter, the remand rate for Indigenous Victorians was approximately 15 times higher than for non-Indigenous Victorians"[39]

According to the RCIADIC Implementation Review:
"The proportion of Indigenous prisoners on remand rose from 50 per cent in 1999-00 to 61 per cent in 2002-03. For non-Indigenous prisoners the proportion on remand rose from was 46 per cent in 1999-00 to 53 per cent in 2002-03. Indigenous prisoners tend on the whole to be younger, more likely to be there for the offences of 'Assault', 'Break and Enter' and 'Justice Procedures' (which include breaches of court orders), and to be

[38] Aboriginal Justice Advisory Council 'Aboriginal People & Bail Courts in NSW'

[39] Victorian Law Reform Commission 'Review of Bail Act Consultation Paper' (2005) p.14

serving shorter sentences, whereas non-Indigenous prisoners tend more often to be held for 'Murder', 'Sex Offences' and 'Drug Offences'.[40]

According to the Australian Bureau of Statistics Prisoners in Australia, 2005 Report:
"Indigenous unsentenced prisoners were more likely to be on remand for acts intended to cause injury (45%) than non-Indigenous unsentenced prisoners (21%). Indigenous unsentenced prisoners were less likely to be on remand for charges of homicide and related offences (7% of Indigenous remandees, 11% of non-Indigenous remandees) and illicit drug offences (2% of Indigenous remandees, 10% non-Indigenous remandees)."[41]

Cultural Factors:

The high rate of Indigenous Australians on remand is culturally inappropriate on the following basis:

- Remand is used to remove Indigenous Australians from society as they are seen through the lens of negative stereotypes. The use of remand in this manner is culturally inappropriate and akin to removing Indigenous Australians to missions and reserves and removing Indigenous Australians from their families and placing them in institution (ie: stolen generation). The institutionalization of Indigenous Australians is a policy of Government that is culturally inappropriate.

- Remand has the effect of removing people from their culture when they have not been found guilty.

- Remand is not a safe place for members of the Indigenous Australian community to be placed. The RCIADIC found that Indigenous Australians are more likely to die on remand than sentenced prisoners. Remandees will be subjected to conditions within the institution that are harsher than for people who are sentenced. For instance, they do not have access to the same programs or freedom of movement.[42]

- Remand has the effect of further entrenching Indigenous Australian contact with the criminal justice system. This contrasts with culturally appropriate responses to the over-representation of Indigenous Australians attempt to put measures in place to reduce the over-representation rate. Remand further entrenches

[40] RCIADIC Implementation Review', Volume 2 Statistical Information, page 100.
[41] Australian Bureau of Statistics 'Prisoners in Australia, 2005 Report 4517.0 as at http://www.abs.gov.au/Ausstats/abs@.nsf/0/8D5807D8074A7A5BCA256A6800811054?Open

[42] Australian Law Reform Commission 18. Children's involvement in criminal justice processes 1997 as at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/84/18.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

Indigenous Australian contact with the criminal justice system and result in unnecessary or preventable contact with the criminal justice system. For instance:

- whilst on remand people are more likely to plead guilty when they are in fact innocent. Remandees feel pressure to plead guilty as such matters are generally dealt with fairly quickly whereas it may take several months for a defended matter to come before the court.[43]

- Whilst on remand people are put in contact with other people in the prison system who do not have a good influence on others when it comes to life decision. Arguably, prisons are training grounds for further offenders.

- Those held on remand often do not receive custodial sentences. The treatment of people are guilty before they have been found guilty is reflective of the punitive nature of the Act. Almost half of all Indigenous people gaoled in New South Wales, after having been refused bail, do not receive a custodial sentence when their case is finalised in court (Aboriginal Justice Advisory Council). [44]

- VALS suggests:
  - When bail has been refused the suspect is to be remanded in the custody of an Indigenous bail hostel, group home or private home administered by the appropriate accredited Indigenous organisation unless this option is not available in the locality (HREOC Bringing Them Home Report National Minimum Standards - Standard 8 Rule 11).[45]

  - That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort. (3:64) [RCIADIC Recommendation 92]

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Socio-economic Factors :

Remand is used inappropriately to provide a resolution to some social problem, such as lack of adequate housing (see above).[46]

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[43] ibid

[44] ibid

[45] Human Rights and Equal Opportunity Commission , Bringing them Home, National minimum standards, as athttp://www.austlii.edu.au/cgi-bin/disp.pl/au/other/IndigLRes/stolen/stolen61.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

[46] Australian Law Reform Commission 18. Children's involvement in criminal justice processes 1997 as at http://www.austlii.edu.au/cgi-

VALS suggests:

- An officer of the Aboriginal Legal Service or such other person as is nominated by the Service, be granted access to a person held in custody without bail; [RCIADIC Recommendation 90(b)]

- In the case of bail refusal Indigenous alternatives are to be used in preference to detention in police cells.[47]

OTHER QUESTIONS:

Do the Client Service Officer and Aboriginal Community Justice Panel programs provide an effective service to clients who are in police custody and face the prospect of a bail hearing? If not, what specific problems are there with these services and the bail system? Is there any conflict between the roles of members of the Aboriginal Community Justice Panel and Aboriginal Bail Justices? (156)

The assistance that CSOs and Aboriginal Community Justice Panels (ACJPs) members provide to clients who are in police custody and face the prospect of a bail hearing is:

- Moral support to the accused. They are effective in doing this as they are Indigenous Australian and can identify with the accused in a culturally sensitive manner. For instance, CSOs follow up a person who has an outstanding arrest warrant. . They accompany this person to the police station in order for the warrant to be executed. It is VALS' experience that bail is more likely to be granted in this situation than if the arrest warrant is executed in another context (ie: on the street when the accused does not expect it).

- Advocate on behalf of an accused before a bail justice. CSOs and ACJP members work effectively by providing personal background and information about Indigenous Australians seeking bail. For instance, they understand Indigenous Australians and their reasons for having a record of non-appearances at Court (ie: financial hardship, homelessness, drug and alcohol abuse, mental health problems and intimidated by the thought of going to court).

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bin/disp.pl/au/other/alrc/publications/reports/84/18.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

[47] Human Rights and Equal Opportunity Commission , Bringing them Home, National minimum standards, as athttp://www.austlii.edu.au/cgi-bin/disp.pl/au/other/IndigLRes/stolen/stolen61.html?query=%22culturally%22+and+%22appropriate%22+and+%22bail%22+and+%22and%22+and+%22on%22+and+%22and%22+and+%22on%22

- VALS suggests that this service could be made more effective if ACJP members and CSOs were educated more on the Bail Act and the law. One CSO acknowledged that because a solicitor has a better understanding of the law than a ACJP member or CSO the chances of release on bail increase.

A factor that limits the effectiveness of both CSOs and ACJP members in doing the above is under-funding and over-work. Six regional CSO and four metropolitan CSOS are expected to cover the entire State of Victoria. The funding for ACJP has not increased in the past fifteen years and as a result the ACJP relies on the assistance of volunteers.

- VALS suggests that both programs could be improved if adequate funding was provided to meet demand in order to enable these mechanisms to meet their full potential and not be overburdened.

Listed below are some factors that limit the effectiveness of Aboriginal Community Justice Panel members, and some suggested solutions, that were mentioned in the Review.

- Training of ACJP panel members is difficult considering that the majority are volunteers and there is a high turn over rate of volunteers.

- The quality of ACJP varies in different locations and depends on personalities involved. This means there is a discrepancy in the services provided throughout the State.

- It is preferable for the ACJP to have Indigenous Australian control

    - VALS suggests that the ACJP should not be auspiced by Victoria Police.

There is a conflict between the roles of ACJP members and Aboriginal Bail Justices and the two roles should be kept separate. ACJP member's role is to support Indigenous people during a bail hearing and on the other hand Aboriginal Bail Justice must follow the Act in deciding bail. According to a VALS CSO "I would not like to be an Aboriginal Bail Justice and ACJP member at the same time". This CSO commented on a time when a ACJP member was also an Aboriginal Bail Justice: everyone left the police station (except the Defendant) confused on what their role was.

Are there sufficient support services for Indigenous accused who come into contact with the bail system, especially in regional Victoria? Are there sufficient accommodation options for Indigenous accused on bail?

There are not sufficient support services for Indigenous accused who come into contact with the bail system, especially in regional Victoria. There are not sufficient accommodation options for Indigenous Australian accused on bail.

Outlined throughout this submission is the notion that if a person does not have accommodation they are disadvantaged in the bail process. Indigenous Australians are socio and economically disadvantaged and demand for housing assistance means that there are long waiting lists. Over Christmas 2005, it was hard to get a placement. Arguments that the law is applied equally and fairly to all overlooks difference and the impact of a supposedly neutral system on disadvantaged people.

There should be:

- Indigenous Australian specific bail hostels.
- Should be Aboriginal Liaison Officer in all Courts
- More VALS CSOS

The following quotes reflect the sentiment that there is inadequate support:

- There are "insufficient adequate resources to meet the needs of the Koori Court" (Dr Mark Harris who evaluated the Koori Court)
- There is a "paucity of programs for Koori offenders with psychiatric illness, intellectual disability or acquired brain injury" (Magistrates Court submission).

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