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**VALS' submission to the Department of Justice in response to the Family Violence
Bill 2007 Discussion Paper – sent 7 November 2007**

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Thank you for the opportunity to provide comment on the Family Violence Bill 2007 Discussion Paper.

Introduction

In this submission VALS addresses some of the questions in the Discussion Paper. VALS' answers to the questions are based on VALS' previous submissions as part of the family violence law reform process, Federation of Community Legal Centres' submission to the Bill and Indigenous Australian specific consultation on the Bill.

In this submission VALS provides an Indigenous Australian perspective and so concentrates on the effect of the Bill, either intended or unintended, on Indigenous Australians who hold the status of being disadvantaged in Australian society. VALS argues it is desirable that the goals of family violence laws are: safety, agency and accountability. Also, one way of characterizing the difference between Indigenous and non-Indigenous perspectives on family violence is by contrasting the relative importance given to the safety-agency-accountability goals.

VALS argues that the Bill gives limited attention of Indigenous Australian perspectives and whilst liberal feminist approach have advanced political and public recognition of the problem of family violence it does not have all the answers.

Preamble: Goals of safety, agency and accountability

Summary of VALS' previous submissions

VALS' submission in 2005 to the Victorian Law Reform Commission (VLRC) suggested that it would be beneficial to better separate the civil remedies from the criminal and separate the operation of short term safety interventions from longer term orders and assault charges. We argued that an effective and properly resourced criminal justice response should be accessible to all. However, we argued that a criminal justice response would only be likely to be used by a small proportion of family violence victims and there needed to be other strategies such as restorative justice, healing and rehabilitation and more accommodation options. VALS argued that a pro-prosecution approach, irrespective of the views of victims, was likely to be counter-productive and deter people from seeking help earlier. We criticised the VLRC failure to consider any of the evidence on the effectiveness of mandatory and pro-prosecution policies. VALS quoted the Women's Safety Committee on Family Violence that recommended three goals: safety, accountability and agency. We argued that one way of characterizing the difference between Indigenous and non-Indigenous perspectives on family violence was by contrasting the relative importance given to the safety-agency-accountability goals.

Difference between mainstream and Indigenous Australian perspective on family violence

The data paints a picture of family violence where history is recognized as a factor. This does not excuse violence but it helps explain the context of that violence. Reducing family violence is linked to attitude, relationship and behavior change. The frame is wider than the couple, it is the extended family and the community. The findings are similar to those of a research study in Queensland by Nancarrow (2003) 'In Search of Justice in Family Violence: Exploring Alternative Justice Responses' (Nicole Bluett-Boyd 2005) which focus on the difference between mainstream and Indigenous Australian perspectives on family violence.

The Bill reflects the non-Indigenous approach which is based on retributive justice framework which contrasts with an Indigenous Australian restorative justice approach. Mainstream approaches to family violence are more likely to emphasise safety and accountability using the police and Courts as symbol of community ahead of 'agency'. Indigenous Australian perspectives are more likely to emphasise safety and agency where agency includes the couple, extended family and community. Indigenous Australians are more likely to talk about healing and rehabilitation of the perpetrator. Non-Indigenous Australians are more likely to talk about criminal sanctions and the deterrence value of penalties. The Victorian Indigenous Family Violence Task Force Report, Nancarrow (2003) and research titled 'In Search of Justice in Family Violence: Exploring Alternative Justice Responses' (Nicole Bluett-Boyd 2005) highlighted some of these matters.

After reading the VLRC Final Report, it was clear that Indigenous Australian perspectives had been given very limited attention. Restorative Justice approaches for example were dealt with in a line or two. The draft Bill continues that approach.

The VLRC has predominantly adopted a liberal feminist framework in examining the problem of family violence. This framework has been the dominant framework over the last couple of decades. Supporters of this framework have been instrumental in securing wider public recognition of the scope and seriousness of family violence. The framework has drawn attention to the gendered nature of family violence, the impact of family violence on children and the unwillingness of the criminal justice system to respond adequately to the seriousness and scope of the problem.

Although it has advanced political and public recognition of the problem of family violence, liberal feminist approaches do not have all the answers. In 2006 Toni Makkai Director of the Australian Institute of Criminology outlined some of the consequences of this approach, including lack of interaction with a health and public health approach. Some women have criticized mandatory and pro-arrest approaches as re-victimising women. There have also been a range of criticisms that pro-arrest and mandatory arrest do not work, or if they do work they will work only to some extent with middle class offenders. There is also some evidence that with some groups in the community (eg: disadvantaged groups) it makes their behaviour worse.

VALS has tried to raise the issue of the criminal justice system not being perceived to be a particularly effective response to family violence by many Indigenous Australian victims of family violence, who are predominantly women. Perhaps it would have been more effective to make the point that the criminal justice system is not perceived to be an effective vehicle by the vast majority of women who are subject to family violence. In other words Indigenous Australian and non-Indigenous Australian women have largely not used the criminal justice system to try to deal with the problem. Writers such as Anna Stewart have highlighted that the majority of women want police intervention to achieve short term safety not prosecution and punishment.

Attachment A highlights some of the points which should be considered by Government bureaucrats and other stakeholders who are interested in a more inclusive approach to the problem of family violence and Indigenous Australian communities.

Law reform process

VALS agrees with the points made in the Federation of Community Legal Centres submission. In particular VALS wishes to reiterate need for:

1. Realisation that limitations have been placed on the reform process due to the public having a short time to provide feedback and in turn Department of Justice staff have a short time to incorporate the written comments.
2. A comprehensive approach is essential to implementation of the Victorian Law Reform Commission recommendations in its *Review of Family Violence Laws Report* (2005). The non-legislative changes recommended in the *Report* are crucial to providing the cultural change and resources necessary to ensure the efficacy of the new legislation. The VLRC recommendations relating to non-legislative actions have been put on the back burner as they were not in the 07/08 budget. People have got sleepy about them.

QUESTIONS

User friendliness (Q 1-2)

The draft Bill is not user-friendly as anything that is 109 pages long is going to provide challenges for many people. VALS suggests that the Bill be simplified. One of the issues which a user might be interested in is what control they have over what happens if a) they make an application or b) someone applies for them c) who can provide evidence about the complaint?

Purpose (Q 3)

The purpose of the Bill should be:

- Maximize the ‘safety’ of persons who have experienced family violence.
- Prevent and reduce family violence to the greatest extent possible.

- Promote agency of victims.
- Promote accountability and rehabilitation of perpetrators of family violence for their actions.

Principles (Q 5)

The Women's Safety Committee on Family Violence recommended three goals: safety, accountability and agency. These three goals encapsulate a central problem. In the search for safety some people emphasize accountability over agency. The people who prioritise 'accountability' over 'agency' want to pursue safety by ramping up the criminal justice system powers. A possible unfortunate consequence is that women who do not want to prosecute will be denied decision making power. This it is argued by proponents, will be for the protection of the woman and will deter other perpetrators. In an increasingly risk averse culture 'agency' risks always being trumped by safety and accountability. In all but the most extreme cases these goals will all have some relevance to decision making. The principles put forward emphasise the goals of safety and accountability and underestimate the goal of agency. The principles emphasise some characteristics of family violence as a social phenomena but fail to communicate the importance of seeking to appropriately balance safety, agency and accountability.

If it is necessary to tell Magistrates' in a preamble to a bill that family violence is predominantly 'committed by men against women and children' doesn't this reflect badly on the selection process and ongoing training of Magistrates?

At the Indigenous Australian peoples consultation there were a number of suggested inclusions to the principles.

There should be a principle:

- around promoting rehabilitation and healing and acknowledging the intergenerational nature of family violence.
- Recognising that elder abuse is a problem (especially with the demographics of the ageing population).
- That captures the repetitive nature of family violence.
- That acknowledges the need to respect Indigenous Australian victims in the context of negative experience of the justice system which leads to intimidation.

These points relate to at least one of the three goals. It is clear that rehabilitation and healing relates to the goal of accountability, elder abuse highlights the safety goals in relation to a particularly vulnerable group and the comments about the negative experience of Indigenous people with the justice system highlights that 'agency' is going to be difficult to promote to many Indigenous Australians.

An alternative to persevering with an ever longer list of principles would be to instead develop a principle of seeking to balance the three goals of safety, agency and

accountability. This would reflect the reality that there are differing views about how best to intervene and prevent family violence as well as what is best in each individual case.

Definition of family violence (Q 6)

VALS agrees with the points made in the Federation of Community Legal Centres submission in relation to the definition of family violence. In particular, VALS wishes to reiterate need for:

1. To avoid confusion specify that ‘family violence’ includes ‘domestic violence’ to avoid confusion and replace ‘is violent’ in 6(1)(a) with ‘is physically or sexually abusive’.
2. Insert after ‘financial autonomy’, the phrase ‘or the access to economic or financial resources’ to protect those who have an administrator who is abusing them economically, but the person cannot therefore be said to have previously had economic or financial autonomy.
3. ‘*Emotional abuse* means. . .’ should be replaced by ‘*Emotional abuse* includes, but is not limited to. . .’ as it clarifies that the list of examples is not intended to be exhaustive. Also add to the list: ‘threats by the respondent to kill a person’s children or to commit suicide’.
4. Should include deliberately isolating someone from their community and not allowing them to express their Indigenous cultural identity and participate in important cultural activities.

Examples (Q 8)

Section 6(1) a-e already makes it clear that the scope of ‘family violence’ is exceptionally broad. The lists of matters which might be included could be part of education about what the Bill means. Again it suggests that Magistrates’ are unable to comprehend the purpose and content of a Bill without a lengthy set of examples of what the Bill means.

Definition of Family Member (Q 9)

The definition of family member appears to cover diverse family relationships. For instance, Indigenous Australian’s concept of family is captured by the definition of relative. The inclusion of some recognition of Aboriginal relatives is supported. Perhaps Magistrates’ should seek advice from Indigenous Australians about matters of family where there is uncertainty or dispute in a case before him/her.

Carers

The lengthy and complicated argument that some applicants may be able to use other remedies is not supported. First on the grounds of simplicity it would be simpler if all people with complaints against carers could use the Bill. Second it is likely to provide quicker access to justice than other options.

VALS supports the recommendation made in the Federation of Community Legal Centres submission. In particular VALS wishes to reiterate the need to:

- include *all* carers in the definition of family member (VLRC Recommendation 17) as this would support the agency of persons with carers - often women with disabilities - to define 'family' for themselves. Of particular concern is that the alternative remedies do not provide access to the immediacy of response and the assurance of safety offered to others by the proposed Bill.

Any plans to commence a Koori Family Violence Court should involve the Indigenous Australian community from the outset.

Definition of informal care relationship (Q 10)

VALS supports calls from the disability sector that family violence laws should apply to a formal care relationship.

Safety Notice (Q 11)

VALS agrees with the concerns about the safety notice scheme raised in the FCLC submission. VALS does not support the introduction of Police Safety Notices at this time as there needs to be safeguards.

VALS wishes to highlight some of the suggested safeguards mentioned in the FCLC submission in order to:

- make the Safety Notice system as safe as possible;
- prevent police seeking Safety Notices after hours in situations where police could reasonably apply to Courts during business hours;
- prevent victims being disadvantaged by the use of the Safety Notice system rather than the after hours Complaint and Warrant or Interim Intervention Order system.

The safeguards are:

- Police training, including cultural awareness training (ie: consider all accommodation needs according to the approach that is consistent with the Bill which contains a presumption that victims should stay but must listen to victim and prioritise safety over issues of convenience).
- If the victim does not attend at the first return date a mechanism must be put in place to ensure that a similar approach to the current one is followed (ie: police extend bail and/or obtain an Interim Order relying on their ability to give hearsay evidence for interim applications).

- Where both the victim and perpetrator attend at the first return date and the perpetrator wishes to oppose the making of an order the perpetrator should not be able to dispute the making of an Interim Order that will last until the contest date.
- In relation to monitoring, data should be disaggregated by demographics including cultural diversity.
- In relation to evaluation of the trial the Indigenous Australian perspective should be sought.
- Further efforts to improve current after-hours response (involving police and Courts) are required.

VALS agrees with points made at the Indigenous Australian consultation

The workability of Safety Notices in terms of not providing false hope will be determined by:

- availability of services (ie: such as accommodation in the right location, sobering up centres, behaviour change, men's counselling, time out services, behaviour change, anger management and a support worker for the perpetrator who has to comply with the order which are all Koorie specific).
- police training and development of protocols with local Koori communities.
- Community education to assist the community to understand what Safety Orders mean and how they work
- legislative flexibility around conditions in the order, such as craft conditions which say that a person cannot approach a family member whilst they are drunk.
- Police Practice accountability in terms of use of their new power and effective enforcement of an Order.
- Police required to ask someone if they are Indigenous Australian when issuing a Safety Notice.
- Safety Notices are equally available in urban and rural areas.

Concerns re Police Safety Notices being introduced

VALS agrees with the FCLC's following concerns about Safety Notices:

- Lack of independent and specialist decision maker.
- Undermining standing of Intervention Order process.
- Notices being issued against person who is actually a victim.
- Increasing risk to victim where done without her consent.
- Potential for decline in reporting to police.
- Decreased protection for children.
- Systems in place/being established to improve after-hours response not fully utilised/trialed (ie: Magistrates' Court based After-Hours Unit is new, need to improve electronic communications between police and Courts, explore possibility of telephone applications).

Balance between safety and autonomy (Q 19)

We have made the point already that the principles should include the goals of safety agency and accountability. Also, the ‘treating applicants with respect’ principle is a fairly unconvincing attempt at recognising agency.

The Bill improves the likelihood that women who need a Safety Notice or Interim Order will be able to obtain them speedily. At the same time the emphasis on ‘safety’ and police powers to take out orders means that ‘agency’ is likely not to be prioritised as highly as safety at the complaint stage. This may be the best compromise possible at this stage. However, the lack of police time, lack of accommodation options, record of police jailing Indigenous Australian people, police frustration with repeat complainers and the prosecution policy of the police is likely to lead to two different results:

1. Tapering off of call outs to police by applicants as the police become more prosecution oriented and put Indigenous Australian people off side meaning only the most desperate applicants call them.
2. Third parties call police and more people are put in jail for breaching orders.

Final Orders against the wishes of the person who is being acted for

The proposal that Final Orders can be made against the wishes of the applicant ignores and undermines agency as a goal and is open to misuse and has the potential to have unintended consequences.

The proposal highlights the lack of recognition of agency and the dominance of safety as a principle. The effect of the proposal is to mandate divorce or separation. The dominance of safety as a principle is also evident in the Northern Territory Emergency Response to child abuse. The Emergency Response involves a law and order approach and those who not support the intervention, largely because Indigenous Australians have not been consulted, are seen to be supporting the abuser over the abused.

The dominance of the safety principle apparent in the proposal contains the assumption that the proposal will have intended consequences only. However, there is a danger in framing a law for extreme situations as it may have unintended consequences. It is dangerous to address the issues on a ‘protect parties against family violence at all costs’ basis.

The proposal opens up the risk of:

- police may use their powers under the proposal more often when a victim is a repeat player (ie: call out to incident of family violence multiple times) as they are frustrated by this and short of resources (ie: police time is valuable as is Court time).
- Serving as a disincentive for people to apply for assistance in the first place.
- Exercise of the power disproportionately affects disadvantaged people.
- Final Orders being another pathway for putting more people in jail when they breach orders.

VALS argues that:

- Whether or not a Final Order is made with or without consent of the victim support needs to be provided to the victim and perpetrator (ie: Indigenous Australian specific behaviour change, anger management).
- When Police/Court are not sure about which way to proceed (ie: with or without the consent of the victim) they should take into account the perspective of an Indigenous Australian family violence worker.

Exclusion (Q 21)

The exclusion provisions are problematic in light of the fact that there is a lack of emergency accommodation for men, particularly Indigenous Australian men. The Department of Human Services emergency accommodation for men has not been culturally appropriate, as it is not appropriate to leave men by themselves in a motel. Healing services and time-out services are unlikely to be able to provide emergency accommodation due to lack of funding.

Residential Tenancies Act (Q 23)

VALS argues in relation to the amendments to the Residential Tenancies Act that legal advice should be available to those using VCAT.

Other

Holding powers

It is important that police inform VALS when exercising holding powers on a Koori person

Conclusion

VALS supports the goal of family violence laws being: safety, agency and accountability. One way of characterizing the difference between Indigenous and non-Indigenous perspectives on family violence was by contrasting the relative importance given to the safety-agency-accountability goals. VALS argues that the Bill gives limited attention of Indigenous Australian perspectives and whilst liberal feminist approach have advanced political and public recognition of the problem of family violence it does not have all the answers. The Bill reflects the non-Indigenous approach which is based on retributive justice framework of pro-prosecution which emphasises safety and accountability using the police and Courts as symbol of community, ahead of 'agency'. Non-Indigenous Australians are more likely to talk about criminal sanctions and the deterrence value of penalties. In contrast the Indigenous Australians restorative justice framework emphasises safety and agency where agency includes the couple, extended family and community, healing and rehabilitation of the perpetrator.

VALS remaining arguments are influenced by the above perspective and are:

- The opportunity to provide feedback on the Bill is inadequate.
- The draft Bill is not user-friendly.
- There are two options when it comes to principles. Firstly, principles should be inclusive of Indigenous Australian perspectives. Secondly, principles should be in line with the simpler ‘balancing safety agency and accountability’ outlined above.
- The definition of family violence should be amended in line with suggestions in the FCLC submission and include deliberately isolating someone from their community and not allowing them to express their cultural identity and participate in important cultural activities.
- The proposal to include information such as family violence is predominantly committed by males against females in the preamble to the Bill raises questions about how magistrates are selected and trained
- The definition of family member appears to cover diverse family relationships and perhaps Magistrates should seek advice from Indigenous Australians about matters of family where there is uncertainty or dispute in a case before him/her.
- It would be simpler, and arguably fairer, if all people with complaints against carers could use the Bill. Family violence laws should apply to a formal care relationship.
- Any plans to commence a Koori Family Violence Court should involve the Indigenous Australian community from the outset.
- VALS does not support the introduction of Police Safety Notices as there need to be more safeguards.
- The proposal that Final Orders can be made against the wishes of the applicant is similar to the emergency response to child abuse in the Northern Territory and arguably:
 - ignores and undermines agency as a goal
 - is open to misuse as police may use their powers under the proposal more often when a victim has called them on multiple occasions as police are frustrated by this and conscious of their limited resources to respond.

- the further the Bill embraces the notion that women's safety requires that orders are made, irrespective of their wishes, the greater the risk that the bill revictimises particular women and deters other women from seeking help.
- in the absence of appropriate accommodation, rehabilitation and healing programs the Bill will be another pathway for putting more people in jail when they breach orders.
- Support needs to be provided to the victim and perpetrator.
- Police/Court should ensure that applicants have been provided with referral assistance to consult Indigenous Australian family violence worker or mainstream support services prior to final orders being made.
- The effectiveness of Exclusion provisions is problematic in light of the fact that there is a lack of emergency accommodation for Indigenous Australian men.
- Legal advice should be available to those using VCAT.
- Police should inform VALS when exercising holding powers on a Koori person