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**REVIEW OF VICTORIA'S CHILD PROTECTION LEGISLATIVE  
ARRANGEMENTS**

**SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION  
APRIL 2010**

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## **About the Victorian Aboriginal Legal Service Co-operative Limited**

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973. VALS was established to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. VALS plays an important role in providing referrals, advice, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in one of three areas of law, being criminal law, family law and civil law. VALS maintains a strong client service focus which is achieved through the role of Client Service Officer (CSO). CSOs act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

VALS is actively involved in community education, research and advocacy around law reform and policy development. VALS strives to:

- a) Promote social justice for Aboriginal and Torres Strait Islander peoples;
- b) Promote the right of Indigenous Australians to empowerment, identity and culture;
- c) Ensure that Indigenous Australians enjoy their rights, are aware of their responsibilities under the law and have access to appropriate advice, assistance and representation;
- d) Reduce the disproportionate involvement of Indigenous Australians in the criminal justice system; and
- e) Promote the review of legislation and other practices which discriminate against Indigenous Australians.

## Introduction

The current submission draws upon the expertise of members of VALS' policy reform, research and advocacy unit who have been involved in consultation and reform processes relevant to child protection matters in previous years as well as VALS Family Law Solicitor who has carriage of the majority of child protection matters. VALS has also participated in a consultation with the Federation of Community Legal Centres (Vic) (FCLC) to the Victorian Law Reform Commission (VLRC) on the 10<sup>th</sup> March 2010 as a member of the FCLC Child Protection Working Group.

VALS, the FCLC and members of the FCLC Child Protection Working Group support similar reforms and hold similar concerns in relation to the child protection legislative arrangements and therefore this submission may reiterate some of the points the FCLC submission puts forward as a result of collaboration. This submission is designed to supplement the broad feedback provided to the VLRC in said consultation with members of the FCLC Child Protection Working Group.

There is concern within the sector that the current review is occurring before measures within the *Children, Youth and Families Act 2005* have been implemented and before the findings of the current KPMG review of the *Children, Youth and Families Act 2005* are finalised. There is also concern as to why the VLRC review of the *Guardianship and Administration Act 1986* and the review of Victoria's Child Protection Legislative arrangements are occurring separately. There is scepticism as to why these two reviews are operating in isolation.

VALS is aware that the Department of Justice - Courts and Tribunals Unit is inquiring into options in which to make the Family Division of the Children's Court more culturally responsive to Koori families. It is part of the 'Children's Koori Court (Family Division) Project'. The outcomes of the project are not public at this stage. VALS CEO, Frank Guivarra, is a member of the Project Management Board of the project. The process and outcomes of the project are extremely relevant to the VLRC review and should be taken into consideration. VALS is concerned, however, that the VLRC review is not framed to consider such matters as relevant. VALS is also under the impression that His Honour Judge Paul Grant, President of the Children's Court is in the process of preparing a relevant paper that should be taken into consideration during the VLRC review process.

We outline some concerns we have with the consultation process itself. VALS acknowledges that the extremely tight timeframe given to the VLRC to carry out the consultation process restricted its ability to produce a substantial discussion paper. However, the timeframe with which to consult, the time afforded to individuals, communities and organisations to respond, and the supply of a scant Information Paper is not reflective of the importance of the issues under consideration. VALS also notes the lack of direct consultation with the Commission.

VALS equally is concerned about the integrity of the process when articles such as that in *The Age* published on the due date for this submission (1<sup>st</sup> April 2010) appear. The article states that a taskforce has been set up by the Government to look at ways of making the process less adversarial and reducing court time will be released by the Government on the 1<sup>st</sup> April 2010.<sup>1</sup> These operations should be occurring transparently and in conjunction.

Moreover, despite the evidence of the over-representation of Aboriginal and Torres Strait Islander children and young people in the child protection system, the Information Paper, its terms of reference, and the "Options" within the Issues Paper all fail to acknowledge this trend as needing

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<sup>1</sup> Nador, C (2010) 'Mediation to decide a child's best interests' *The Age* 1<sup>st</sup> April  
[www.theage.com.au/victoria/mediation-to-decide-a-childs-best-interests-20100331-revj.html](http://www.theage.com.au/victoria/mediation-to-decide-a-childs-best-interests-20100331-revj.html)

specific attention. The *Child Protection Australia 2008-2009* report's main findings are that nationally, evidence shows that:

1. The number of children subject to a notification of child abuse or neglect, under care and protection orders, and out-of-home care are all rising.
2. Aboriginal and Torres Strait Islander children are over-represented in all of these areas.<sup>2</sup>

The report states that although there appears to have been a real rise in children needing protection, many factors have played a part. These include greater community awareness of child abuse, broadening of definitions of what is considered child abuse in various jurisdictions, and changes to child protection policies and practices. Furthermore, the report submits that the over-representation of Aboriginal and Torres Strait Islander children in the child protection system is even more complex, and includes:

*...the legacy of past policies of the forced removal of some Aboriginal children from their families, the intergenerational effects of previous separations from family and culture, and poor socioeconomic status.*<sup>3</sup>

Specifically, the report found that in 2008-2009:

- The rate of Aboriginal and Torres Strait Islander children on care and protection orders was more than 8 times the rate of non-Aboriginal and Torres Strait Islander children;
- The rate of Aboriginal and Torres Strait Islander children in out-of-home care was just over 9 times the rate of non-Aboriginal and Torres Strait Islander children; and
- Aboriginal and Torres Strait Islander children are 7.5 times as likely to be the subject of substantiations as non-Aboriginal and Torres Strait Islander children.

VALS argues that the challenges faced by community organisations to appropriately consider the Information Paper for this consultation is manifold for individual members or communities within the Aboriginal and Torres Strait Islander community. Additionally, we consider the omission of specific reference to the acute relationship of Aboriginal and Torres Strait Islander peoples to the current child welfare system in Victoria in the Information Paper may discourage the participation of Aboriginal and Torres Strait Islander peoples with this consultation process.

Despite our disappointment with the consultation process, it is pertinent that VALS respond to the best of its ability to the options provided. This is especially the case when considering the operation of Victoria's child protection system and its relationship with court, pre-court and post-court measures. Furthermore, VALS has a keen interest in the success of processes surrounding Victoria's child protection system in light of evidence that reveals an intersection between child protection and juvenile justice systems. For instance, there is considerable literature on the "developmental pathways" towards crime and other social problems. Research shows that the likelihood of an individual becoming involved in criminal activity is influenced by the existence of risk and protective factors in their family, school and community environments with child abuse and neglect being of particular significance (with forced removals being one of the main risk factors).<sup>4</sup>

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<sup>2</sup> Australian Institute of Health and Welfare (2010) *Child protection Australia 2008-2009* Canberra: AIHW

<sup>3</sup> Ibid p. vii.

<sup>4</sup> Homel et al (1998) in Libesman and Cunneen (2002) 'A Review of International Models for Indigenous Child Protection' Austlii Indigenous Law Resources [www.austlii.edu.au/au/other/IndigLRes/2002/1/](http://www.austlii.edu.au/au/other/IndigLRes/2002/1/)

Libesman and Cunneen highlight that although welfare and juvenile justice matters are formally separated by legislation in all Australian jurisdictions, the links between welfare and juvenile justice still exist.<sup>5</sup> There are formalised links and similar welfare functions (i.e. welfare and family support may operate from the same offices that administer community-based programs for young offenders. This means shared clients). Furthermore, there is evidence of the “drift” of children and young people from the welfare system into the juvenile justice system. A New South Wales study in the mid-1990s found that a young person who was a ward of the State was 15 times more likely to end up in a juvenile detention centre than a non-ward young person.<sup>6</sup> The group of State wards who were identified as Aboriginal and Torres Strait Islander and who appeared before the Children’s Court for juvenile offences was also dramatically over-represented, comprising 37% of all wards who appeared on criminal matters.<sup>7</sup>

The “drift” of young people from welfare into the juvenile justice system has also been recognised by the VLRC who found that children with had multiple placements and limited education as at risk.<sup>8</sup>

It is envisaged that some of the discussion and suggestions contained within our submission will contribute to a trend towards best practice that bridges the child protection/welfare and juvenile justice divide for Aboriginal and Torres Strait Islander children and young peoples.

This submission will attempt to provide informed opinions on all of the items listed under the four options in the Information Paper; however will focus on the following:

- Option 1 as is related to processes of resolution for child protection matters by agreement rather than adjudication. We will discuss the current problems inherent in the currently utilised Alternative Dispute Resolution (ADR) processes and provide examples of alternatives to this practice. The apparent underutilisation of Aboriginal Family Decision Making (AFDM), despite its success, will also be addressed.
- Option 2 will be discussed in relation to parental responsibility contracts and the attendance of children and young people at proceedings.
- Option 3 and the call for an Independent Commissioner for Child Protection matters, and more specifically an Independent Commissioner for Child Protection matters involving Aboriginal and Torres Strait Islander children and young people. Issues around the potential for some child protection functions to be handed over to Aboriginal and Torres Strait Islander organisations/communities will also be addressed.
- Option 4 will be questioned and an argument will be lodged against a tribunal specialist division of VCAT for the hearing of child protection matters in place of the Family Division of the Children’s Court.

VALS also endorses the Victorian Aboriginal Child Care Agency (VACCA) in their support for reforms to the child protection legislative arrangements as far as they are in a manner consistent with principles including:

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<sup>5</sup> Libesman and Cunneen (2002) op cit.

<sup>6</sup> For girls, wards were 35 times more likely to enter a juvenile detention centre than non-wards. Community Services Commission (1996) in Libesman and Cunneen (2002) op cit.

<sup>7</sup> Ibid.

<sup>8</sup> VLRC (1997) in Libesman and Cunneen (2002) op cit.

- A rights-based approach to child protection, in a manner consistent with the principles articulated in the Convention on the Rights of the Child, including adherence to best interest principles (Article 3), the importance of family (Article 9), the importance of cultural links (Article 20(3)), the importance of the views of the child being taken into account (Article 12) and the need to protect children from harm and abuse (Article 19).
- The emphasis in Victoria's child protection system on the best interests of the child, including the cultural connection and safety needs of Aboriginal children, as the paramount consideration in decision-making.
- Assessment, decision making and planning processes which utilise the lens of culture, as articulated in the *Aboriginal Cultural Competence Framework* (which was written by VACCA for DHS and the child and family services sector).
- The need for significant improvements to be made to the child protection system through increased resources to prevention and early intervention services. Specific strategies need to be developed and implemented as a matter of urgency to reduce the overrepresentation of Aboriginal children in the child protection system through an increase in culturally attuned Aboriginal family services and an enhanced Aboriginal Child Specialist Advice and Support Service (ACSASS).
- The need for the implementation of Aboriginal cultural competence standards (as articulated in the *Aboriginal Cultural Competence Framework*) for all DHS Child Protection staff, lawyers and Magistrates of the Children's Court to ensure a culturally responsive service.
- The need for more effective compliance with the Act in relation to the implementation of cultural support plans which should be seen as a requirement for all Aboriginal children who are subject to substantiation.
- A systemic guarantee that seeking reunification with family when appropriate will be a priority across the child protection system with adequate resourcing and training for professionals to support this guarantee.
- That Aboriginal Child Specialist Advice and Support Service (ACSASS) views will be given weight in court proceedings in line with the principle of Aboriginal self-determination (Section 12 of the Act) and will be resourced appropriately to give effect to this responsibility.
- Accountability of the Department of Human Services to the Children's Court for decisions, case plan responsibilities, the provision of services and quality standards.
- The establishment of the *Victorian Children and Young People's Commission*, independent of government, to ensure that the rights and wellbeing of children and young people are protected and promoted. The Commission should include an appropriately resourced Aboriginal Child Safety Commissioner.
- Quality service standards being determined and monitored by the aforementioned *Victorian Children and Young People's Commission*.<sup>9</sup>

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<sup>9</sup> Per VALS personal correspondence with VACCA, 31 March 2010, on file.

## Context of Reform

It is important that the current reform package of the child protection system considers the context of the previous reform package in 2005 that led to the introduction of the *Children Youth and Families Act 2005* (Vic). There are lessons that can be learned from discussions in 2004 and 2005 during the law reform consultation process and practical experience of the Act since 2005.

What is significant for the Aboriginal and Torres Strait Islander community about the 2005 reform package of the child protection system is that many of their concerns were addressed. For instance, the Act is reflective of Aboriginal and Torres Strait Islander persons' aspirations of self-determination and that children be connected with their culture and community. The Act, includes the following: Aboriginal Child Placement Principle, Aboriginal Cultural Plans, Aboriginal Family Decision Making and section 18 - Secretary may authorise Principal Officer of Aboriginal agency to act).

However, in 2010 the Aboriginal and Torres Strait Islander community finds itself in the following context:

- Aboriginal and Torres Strait Islander people continue to be over-represented in the child protection system.
- progressive reforms in the Act are not being implemented consistently which is supported by findings in 2009 of the Ombudsman in its review of the child protection system that:

*...the department is at times not meeting its statutory responsibilities to children at significant risk of harm. I must in turn conclude that the department is also not meeting its responsibilities to children under the Charter of Human Rights and Responsibilities Act.*<sup>10</sup>

This led the Ombudsman to make recommendation 14:

*Establish arrangements to ensure compliance with practice standards and key statutory obligations such as Best Interests Case Plans, Stability Plans and Cultural Support Plans. Ensure compliance is subject to independent scrutiny and regular auditing by an independent body and the outcomes of these audits are reported to Parliament.*<sup>11</sup>

Given, that the Ombudsman's report is the impetus behind the current review of the child protection system it is VALS hope that the concerns of the Aboriginal and Torres Strait Islander community are taken seriously. To put the findings of the Ombudsman outlined above in the Aboriginal and Torres Strait Islander context, and expand upon the findings, the following information is relevant:

- The failure to meet statutory obligations is arguably a result of lack of accountability of the Department and the flexibility of the principles relating to Aboriginal and Torres Strait Islander children in the Act that makes the establishment of accountability mechanisms difficult. According to the Ombudsman "[i] am concerned that there is no formal reporting of compliance with statutory requirements, such as Cultural Plans for Aboriginal children which is a significant legislative reform".<sup>12</sup>

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<sup>10</sup> Brouwer G E (2009) *Own motion investigation into the Department of Human Services Child Protection Program* Ombudsman's report presented to Parliament 25 November 2009, page 82

<sup>11</sup> Ibid

<sup>12</sup> Brouwer (2009) op cit, page 126

- In VALS' discussions with Aboriginal and Torres Strait Islander people who practice in the area of child protection the Aboriginal Child Placement Principle and cultural plans are not being implemented consistently. According to Victorian Aboriginal Child Care Agency in its submission to the Ombudsman's review of the child protection system: only 20 per cent of Aboriginal children considered to require a Cultural Plan had one developed" and "[t]he lack of compliance around the development of Cultural Support Plans has been a major concern".<sup>13</sup>
- Also, as following the Aboriginal Child Placement Principle is labour intensive the energy required to implement is not always realised. For instance, DHS workers go through the hierarchy of the Principle working their way down the steps. However, when it comes to making decisions about a child 6 months down the track they do not revisit the hierarchy. However, family circumstances change and 6 months later it may be possible to work your way back up the hierarchy to establish placement options.

VALS argues that the principles in the Act that relate to Aboriginal and Torres Strait Islander peoples should be implemented and implemented consistency. VALS adds that the principles can be strengthened by requiring that the Aboriginal Child Placement Principle be applied universally in relation to children, whether at an early stage where alternative dispute resolution is appropriate, or at a later stage, such as at Court. A flow on principle is that cultural plans should be universal and the provision of cultural plans should not be limited to a guardianship to Secretary Order or long-term guardianship to Secretary Order (s174).

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<sup>13</sup> Brouwer (2009) op cit page 77

## **A Human Rights Based Approach to Victoria's Child Protection System**

On consultation with the VALS' Family Law Solicitor who handles the majority of child protection matters, the overriding concern expressed towards a great number of the questions contained within the Information Paper was the incorrect philosophical and practical orientation of the way child protection matters are dealt with before, during and after court intervention. To his mind, the system as it stands operates as an adversarial contest between parents and the Department of Human Services (DHS). This contest allows no room for the voice of the person of central interest: the child.

Tali Gal (2009) notes that the introduction of a rights-based discourse internationally has had a remarkable impact by making children, for the first time, visible stakeholders in decision making processes.<sup>14</sup> Traditionally the most disenfranchised party in the child protection process, a human rights discourse is important not only because it reflects respect for children and young people as human beings and as equal members of society, but can also be a vehicle to structurally empower children.<sup>15</sup>

In ratifying the Convention of the Rights of the Child (CROC), Australia made commitments to the care and protection of its children. CRC articles that most obviously apply to child protection considerations include the following:

- States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (Article 19(1)).
- Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement (Article 19(2)).
- States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (Article 9(1)).
- Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known (Article 9 (2)).
- States Parties shall in accordance with their national laws ensure alternative care for such a child (Article 20(2)).

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<sup>14</sup> Gal T (2009) 'Restorative Child Protection' Paper presented to the Law Faculty Seminar, The Hebrew University, Jerusalem, 16 December 2009 [http://law.huji.ac.il/upload/Restorative\\_Child\\_Protection\\_FacultySeminar.doc](http://law.huji.ac.il/upload/Restorative_Child_Protection_FacultySeminar.doc)

<sup>15</sup> Federle (1995) in Gal (2009)

- Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (Article 20(3)).
- In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language (Article 30)

Importantly, the CROC provides a broad framework of citizenship for children through the introduction of the *participation principle* or the *participation right* (below).

- States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12(1)).
- For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (Article 12(2)).

Considering the practical meaning and implications of the participation right, VALS questions how children certain ages are to be regarded as competent participants. This will be further explored in Option 1 item 1.2 and Option 2 item 2.12. Other relevant articles within the CRC will be referenced in relation to the Information Paper Options throughout the submission.

We suggest, as others have done, that one of the barriers to building better policy and practice responses within the child protection system is the way children are viewed.<sup>16</sup> We suggest that a reconceptualisation of children and young people's role and relationship with adults in the child protection system through a holistic interpretation of human rights is one way to move forward in a positive direction.

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<sup>16</sup> Bessell S and Gal T (2007) 'Forming Partnerships: The Human Rights of Children in Need of Care and Protection' Crawford School of Economics and Government, Policy and Government Discussion Paper pp1-21 [www.crawford.anu.edu.au/degrees/pogo/discussion\\_papers/PDP07-06.pdf](http://www.crawford.anu.edu.au/degrees/pogo/discussion_papers/PDP07-06.pdf)

## Response to the VLRC Information Paper

### Option 1

#### **New processes that may assist the resolution of child protection matters by agreement rather than by adjudication.**

VALS notes the work of Tali Gal that identifies child welfare systems as suffering from, in varying degrees, six shortcomings which VALS believes operate, for the most part, in Victoria today. The six shortcomings are as follows:

- 1) Parents and State representatives engage with an adversarial environment, constructing their relationship as adversarial and hostile.
- 2) Procedural rules grant parents (and sometimes children) opportunities to state their opinions and receive information, but maintain the full decision making power in the hands of State authorities.
- 3) State-initiated plans in varying stages of the process produce referrals to “generic” available services.
- 4) An emphasis on the individual, negative rights of the stakeholders.
- 5) A presumption of rationality as a threshold for participation in decision making processes.
- 6) Extensive use of “top-down” regulation, with procedural rules guiding every stage of the process.<sup>17</sup>

VALS is highly supportive of initiatives that assist the resolution of child protection matters by agreement rather than by adjudication. Reviews and reports into the delivery of child welfare services to Aboriginal and Torres Strait Islander Australians and Indigenous communities overseas have found that conventional individualistic responses to children’s wellbeing do not substantially improve conditions for these communities and that a more holistic and community based response is required.<sup>18</sup> Within the following responses to Option 1 items, VALS will highlight areas for improvement in current systems and areas for reform for potential future systems.

#### **1.1 Do you think that the current dispute resolution conference procedure in the Family Division of the Children’s Court operates effectively?**

It can be argued that the dispute resolution process as it sits within the child protection system Victoria serves some purposes such as a pre-contest forum where issues can be clarified and narrowed thereby reducing the length of contested hearings. However, as a genuine opportunity for collaboration and meaningful resolution of issues the current dispute resolution conference procedure in the Family Division of the Children’s Court does not operate effectively. The process is overly legalistic, adversarial and effectively puts people on trial. VALS’ Family Law Solicitor for child protection matters describes his experience as being much like in a contest hearing, i.e. it is all about winning the case and is not focused on the experience and needs of the child.

It is important that dispute resolution is culturally appropriate. Culturally appropriate dispute resolution practices will differ from one Aboriginal and Torres Strait Islander community to the next. Therefore the following examples of culturally appropriate dispute resolution practices will be generalised, and may not apply to all Aboriginal and Torres Strait Islander communities.

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<sup>17</sup> Gal (2009) op cit.

<sup>18</sup> Libesman (2004) op cit.

A VALS' internship research paper *Exploring culturally appropriate dispute resolution for Aboriginal and Torres Strait Islander peoples* discusses how Aboriginal and Torres Strait Islander values differ to Western specific dispute resolution principles.<sup>19</sup> This research argues that there must be more emphasis on separateness of Aboriginal and Torres Strait Islander dispute resolution from mainstream dispute resolution. It has been highly documented that the Western style of dispute resolution is culturally alienating because it does not fit with Aboriginal and Torres Strait Islander values.<sup>20</sup> It is argued that mainstreaming Aboriginal and Torres Strait Islander parties through Western specific dispute resolution processes will perpetuate the distrust towards the process.

The research paper highlights how Aboriginal and Torres Strait Islander dispute resolution practices consist of a co-operative process where discussions are based on consensus rather than authoritarian procedural requirements. The procedures are flexible, informal and decisions are made for the community, by the community, rather than by the individual.<sup>21</sup>

The aspect of neutrality and impartiality in dispute resolution processes also needs to be addressed from a culturally considered point of view. It is argued that the insistence of mediator neutrality is a Western preference and may not be appropriate in the Aboriginal and Torres Strait Islander context. For example:

- Given the detailed and complex structures of Aboriginal and Torres Strait Islander family networks, kinship obligations, and far reaching community knowledge (the “Koori Grapevine”), it may be hard or impossible to find a completely neutral Aboriginal and Torres Strait Islander mediator.<sup>22</sup>
- It has been argued that lack of mediator neutrality can result in positive outcomes for disputants. In an inquiry into ADR, an Aboriginal and Torres Strait Islander Elder outlined an example of this. Speaking about a young man who, because of his surname, thought it was appropriate to continue committing crimes because this is what everyone in his family does. The Elder knew the boy's ancestry and reminded him that he belonged to a background of esteemed Aboriginal and Torres Strait Islander servicemen. She was therefore able to convince the young man that he was not doing the right thing by his ancestry.<sup>23</sup> Although this example was not relayed in the context of mediation as it applies to the dispute resolution conferences in the child protection system, it illustrates the point that relations and direct knowledge of parties can, in some instances, work to generate positive outcomes in Aboriginal and Torres Strait Islander communities.
- It should be noted that not all Aboriginal and Torres Strait Islander parties to a matter prefer Aboriginal and Torres Strait Islander mediators/facilitators. In some circumstances a party may prefer more neutral mediators with no community links. In some cases, kinship ties may create pressure within the situation leading to an undesirable outcome.

Kelly (2007) argues that *impartiality*, rather than neutrality, is the essential ingredient for fair Aboriginal and Torres Strait Islander dispute resolution.<sup>24</sup> Impartiality refers more directly to issues of fairness and even-headedness and addressing the communication process. Care obviously needs to be taken to affirm to parties that the mediator/facilitator is there to assist the process rather than

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<sup>19</sup> Victorian Aboriginal Legal Service Cooperative Limited (2009) *Exploring culturally appropriate dispute resolution for Aboriginal and Torres Strait Islander peoples* Melbourne: VALS

<sup>20</sup> Behrendt L (1995) *Aboriginal Dispute Resolution* Sydney: Butterworths.

<sup>21</sup> VALS (2009) op cit.

<sup>22</sup> Cunneen et al (2005) in VALS (2009) op cit.

<sup>23</sup> Alternative Dispute Resolution Inquiry (2008) *Victorian Law Reform Committee* Melbourne: June 30 transcript.

<sup>24</sup> Kelly L (2007) 'Mediation in Aboriginal Communities: Familiar Dilemmas, Fresh Developments' *Indigenous Law Bulletin* 28(6): 14.

solve the dispute itself. The issue of mediator impartiality should therefore remain flexible enough to be determined upon a case-by-case basis.<sup>25</sup>

Communication difficulties may produce problems when attempting to settle disputes within some Aboriginal and Torres Straight Islander communities by way of mainstream methods. For this reason, it may be more culturally appropriate for dispute resolution procedures in Aboriginal and Torres Straight Islander communities to cater for this. This can be done by involving local people or Elders who speak the local language, or Aboriginal English, in the decision making process.

The involvement of respected local people of authority or Elders in resolving disputes is culturally appropriate not only in a practical context but in a traditional cultural context as well. In contrast to mainstream dispute resolution procedures and courts where facilitators or decision makers are impartial, it may be desirable in some circumstances to have the settlement of disputes facilitated by an Elder who is respected, involved in and intimately aware of the issues surrounding the dispute in question.<sup>26</sup>

For any dispute resolution process to be culturally appropriate to a particular Aboriginal and Torres Straight Islander community it must be flexible. It must be able to deal with a range of issues. The process must also be flexible in regard to the amount of people who may wish to be involved in the problem solving process, as disputes in Aboriginal and Torres Straight Islander communities may be seen as a “group rather than an individual responsibility”.<sup>27</sup> Flexibility in this regard may also be culturally appropriate due to family structures, the likes of which were discussed earlier. Flexibility is also important so that the dispute resolution process can change and adapt when confronted with unanticipated cultural issues which at first may not be apparent.<sup>28</sup>

## **1.2 How could the current dispute resolution procedure be improved?**

While VALS advocates for a more culturally appropriate method of resolution of child protection matters that can be found in examples of Family Group Conferencing found in New Zealand and Aboriginal Family Decision Making such as that run out of the Rumbalara Aboriginal Co-operative, for the purpose of item 1.2 we will base our comments on improvements that can be made in the ADR system currently in place (suggestions for reform will be discussed in the Option 1 questions to follow).

With our comments on the process of ADR above, VALS believes improvements should start with the removal of the current focus of ADR, that is, a *dispute*. VALS’ Family Law Solicitor for child protection matters describes the dispute resolution procedure as being set up for DHS and himself (most commonly representing the mother) to have a contest. There is no facility for consideration for the child’s view. Collaboration is diminished through the inherent pressure of the situation. For instance, VALS’ Family Law Solicitor states that the family, their representation and DHS are all aware that if a dispute resolution conference doesn’t achieve outcomes, then a contest in court is the only alternative. This happens where the dispute resolution conference system is seen to have run out of room to negotiate and there is no avenue for progression.

Another concern for the current operation of dispute resolution conferences is the marginalisation of the voice of the child. VALS argues that practice of allowing a child to participate in conferencing on the basis of age acts as an artificial barrier. Currently set at the age of 7, this practice does not

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<sup>25</sup> Cunnen et al (2005) in VALS (2009) op cit.

<sup>26</sup> Spencer, D., & Altobelli, T. (2005). *Dispute Resolution in Australia; Cases, Commentary and Materials*. Sydney: Lawbook Co.

<sup>27</sup> Ibid, p.449.

<sup>28</sup> VALS (2010) unpublished internship research

consider the maturity or ability of the child to express themselves in person or through an advocate/representative. The child's voice is de-legitimised based on an arbitrary number.

It can be argued that this measure fails to adhere to obligations under the CROC articles below:

- States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12(1)).
- For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (Article 12(2)).

Please refer to Option 2, item 2.12 for further discussion regarding the relationship between participation rights of children and young people and the consideration of competent participants.

The current dispute resolution conferences are promoted as being less adversarial on account of the increased balance of power between DHS and the parent(s) and thereby being a more participatory mechanism. VALS argues that there is a great difference between merely having a soundboard for children, parents and families and providing a truly collaborative avenue for input and decision making. This can be considered in the CROC articles below which specifically introduces the centrality of the family, including the extended family.

- States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures (Article 3(2)).
- States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention (Article 5).

We therefore advocate, if the current dispute resolution procedure were to stay, that:

- There be opportunity to re-convene a conference if outcomes are not achieved in the first seating;
- conferences be available as an option that parties can enter into voluntarily;
- conferences be preserved as a pre-court *option* and not be used as a gate-keeping tool to formal court process;
- there be availability of Aboriginal and Torres Strait Islander facilitators/convenors for a co-mediator model;
- facilitators/convenors should be independent of DHS;<sup>29</sup>
- dispute resolution conferences facilitate, where appropriate, the views of the child either through presence at the conference or through representation; and
- there be weight given to the parent(s) and the child in decision making.

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<sup>29</sup> For example facilitators in South Australia are employed by the courts rather than by the child protection service.

### 1.3 What other ADR processes could be used for child protection matters?

Family Group Conferences were first legislated for in New Zealand in 1989 and exist as a significant innovation in child protection practice. New Zealand's Family Group Conferencing is a model that has shown the capacity to involve families and communities in a collaborative approach to child welfare concerns.<sup>30</sup> The underlying philosophy that led to the introduction of family conferencing is that nuclear families and their immediate communities, such as extended family and friends, have a right to be involved in making decisions about their children. Furthermore, the empowerment of the extended community to solve problems is more likely to result in better outcomes for children.<sup>31</sup>

The conference itself is arranged and facilitated in New Zealand by a specialist Care and Protection Coordinator (employed directly by Child, Youth and Family, the statutory Child Protection Agency in New Zealand) who together with the family will bring together: the young person/child; their advocate or legal representative; the parents; extended family members; any support person the family wishes; and the referring care and protection worker. These people are entitled by law to attend the conference.<sup>32</sup>

The conferences as they exist in New Zealand are essentially a decision-making forum that have the power to decide whether or not a child is in need of protection and how needs can be addressed. In order for a decision to be reached, there needs to be unanimous agreement between all parties (including the facilitator and the child protection worker). The decisions made within these conferences have a legal status and therefore embody no lesser status than that of a court decision. If an agreement is reached, unless it is impractical or inconsistent with the relevant Act, then Child, Youth and Families is obliged to put the agreement into practice.<sup>33</sup> If an agreement cannot be reached in the conference, then the conference can be reconvened or the case referred to court.

The New Zealand conferencing model has been described as "high tariff" legal intervention by some because (amongst other things) it is intrusive and should only be used where there are significant concerns.<sup>34</sup> This is partly due to the decision-making powers of the conference that are equivalent to a court decision.

There is debate in New Zealand around concerns of the positioning of conferences in the child protection system. While it is contended that there are merits to conducting conferences earlier in the child protection process, the concern is that conferences are often used fairly late in the child protection process because of their status as a "high tariff" intervention and that family problems may have become more entrenched by the time the conference occurs and that it would be desirable to harness the capacity of the extended family much earlier on. This argument is relevant to item 1.6 of Option 1 of the Information Paper.

Harris argues that in most (but not all) Australian jurisdictions, family conferences are not offered to families on a routine basis in the belief that families have the right to engage in this way prior to court orders being sought. Australian models have diverged heavily from the New Zealand model as follows:<sup>35</sup>

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<sup>30</sup> Harris N (2008) 'Family group conferencing in Australia 15 years on' *Australian Institute of Family Studies: Child Abuse Prevention Issues* no. 27, pp.1-19.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Connolly (2006) in Harris (2008) op cit.

<sup>35</sup> Per Harris (2008) op cit.

- In the power of conferences as decision-making forums.
- Through the lower status of conference outcomes.
- Agreement of the child protection worker has to be forthcoming in New Zealand (however negotiation about what is deemed necessary occurs within the conference). In cases where agreements are reached, these are legal outcomes that cannot be summarily dismissed subsequent to the meeting. This is in stark contrast to Queensland where case plans out of conferences can be simply amended later by the Department, or in South Australia where the Department will often proceed to court despite prior agreement at a conference.

*The degree to which governments provide families and their immediate communities the opportunity to solve problems through dialogue and cooperation prior to taking more coercive action is significant. Conferences can only play a very partial role in doing so if they are not offered to all families and if departments are not committed to implementing decisions that are made within them. Thus, it would seem that Australian jurisdictions have implemented conferencing in ways that fall short of the systematic empowerment of empowerment of families that is envisaged in the New Zealand Model.<sup>36</sup>*

Huntsman (2006) proposes that Family Group Conferencing has the potential to:

- be an effective tool for *fulfilling statutory responsibilities* by responding to individual and family situations and involving families in creating solutions to social problems;
- *improve family attitudes* to child protection authorities especially when utilised in facing cases which require cultural and family issues to be negotiated;
- be *cost-effective* as it avoids the use of courts; and
- be looked at and adopted *at a systemic level* that balances and moves between family decision-making and state enforcement.<sup>37</sup>

VALS argues that the use of conferencing mechanisms for child protection systems in Victoria is very limited and should be invested in as a preferred method of resolution by agreement at an early intervention stage. The best model of this kind can be found in the Aboriginal and Torres Strait Islander Family Decision Making program outlined below. While this program is strongly geared towards the engagement of members of the Aboriginal and Torres Strait Islander community, we argue that there are many elements to this approach that could be applied to benefit all parents, children, families and communities coming into contact with Victoria's child protection system.

The Aboriginal and Torres Strait Islander community's role in decision-making has been formalised in the *Children, Youth and Families Act 2005* (Vic). The Aboriginal and Torres Strait Islander Family Decision Making Program (commonly referred to as Aboriginal Family Decision Making or ADFM) is a process that has been evaluated and found successful. It has been expressed by people involved in responding to the VLRC review process and VALS' lawyer, however, that despite support for the use and expansion of this mechanism, ADFM is not being utilised for child

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<sup>36</sup> Harris (2008) op cit, p. 14.

<sup>37</sup> Huntsman L (2006) *Family group conferencing in a child welfare context – A review of the literature* New South Wales: Centre for Parenting & Research, Funding & Business Analysis Division, NSW Department of Community Services  
[www.dhcs.act.gov.au/\\_data/assets/pdf\\_file/0006/48750/Literature\\_review\\_on\\_family\\_Group\\_Conferencing.pdf](http://www.dhcs.act.gov.au/_data/assets/pdf_file/0006/48750/Literature_review_on_family_Group_Conferencing.pdf)

protection matters in Victoria in practice. According to VALS' solicitor, he has never appeared at an AFDM conference.

The ADFM program at Rumbalara is an example of a decision-making forum for child protection matters that operates in the spirit of self-determination. Much more than a simplistic solution driven mechanism, this ADFM program settles issues from a whole-of-community perspective where collaboration is key and responsibility for the success of agreed outcomes is shared. An evaluation report for the Rumbalara Aboriginal Cooperative Limited and the Department of Human Services - Child Protection reported the following:<sup>38</sup>

#### *Acceptance and strength*

There is a very high level of acceptance of the program due to its ability to deliver effective outcomes for children and young people.

Benefits were found through utilising a model that capitalises on the strength of the Aboriginal and Torres Strait Islander community, that is, the family base and family ties.

#### *Outcomes data*

Of the 12 cases that went through the AFDM process at the time of evaluation, none had a requirement to seek a Protection Application from the Children's Court. Furthermore, none of the 12 cases progressed under the AFDM program resulted in re-notification. This is significant in light of the Aboriginal and Torres Strait Islander Re-notification Case Audit, Data Summary Report that illustrated that on average 3.1 re-notifications following initial notification.<sup>39</sup>

In the view of those working within DHS Child Protection, under the previous management system, of the 12 families that presented for the AFDM program, 80% of the cases would have resulted in an application to the Children's Court for a protective court order and most likely placed outside the family.<sup>40</sup>

#### *Early intervention*

In the Aboriginal and Torres Strait Islander Re-notification Case Audit, Data Summary Report (paragraph 2.2) it was illustrated that most clients selected for detailed review were under 5 years of age at the time of the first notification, with 23.5% of notifications occurring before the child's 1<sup>st</sup> birthday.<sup>41</sup> It is significant when considering that of the 12 ADFM program cases, 33% of the children involved were under the age of 24 months. It is therefore evident that the program is impacting favourably in the early stages in what would have been the commencement of ongoing re-notifications had previous methods of dealing with child protection been utilised.

It is of note that AFDM staff indicated that on occasion, the AFDM program/model had been used in situations where notifications have not occurred. Instead, the family in

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<sup>38</sup> The following lists regarding the AFDM model operating out of Rumbalara in Shepparton are derived from: Linqage International (2003) *ATSI Family Decision making Program Evaluation: Approaching Families Together 2002*, Evaluation report for the Rumbalara Aboriginal Cooperative Ltd. And the Department of Human Services – Child Protection.

<sup>39</sup> (2002) per Linqage International (2003) op cit.

<sup>40</sup> Information provided by DHS Child Protection staff also indicates that in excess of 50% of those children would have been placed with non-Aboriginal and Torres Strait Islander families, Per Linqage International (2003) op cit.

<sup>41</sup> (2002) per Linqage International (2003) op cit.

recognising the benefits of using the AFDM model had requested assistance. The outcome from those situations was better resolution of issues impacting on children within the family.

### *Outcomes for Koori Families*

The majority of those interviewed as part of the evaluation who had been closely involved in the development and implementation of the AFDM program from DHS Child Protection, Rumbalara Aboriginal Cooperative and the families themselves, indicated that the program was ‘the most significant improvement in service delivery in terms of outcomes for ATSI children at risk that had ever been experienced within the ATSI community’.<sup>42</sup>

Those interviewed whose family had been directly impacted by the AFDM program highlighted the following critical points that assisted in making the model more effective:

- Family members felt they were listened to and had effective input to the process.
- Family members understood that children were at risk and there was a requirement to eliminate that risk.
- The environment which the AFDM program took place was such that families were not threatened. They chose the venue.
- The model allowed all possible mechanism and support available within the family that could address key issues to be identified.
- Families viewed the process as being community driven and not driven by DHS Child Protection, therefore they did not feel that “someone was about to steal their children”.<sup>43</sup>
- The presence of Elders at the meetings provided the appropriate level of community legitimacy to the process and facilitated acceptance of the process.

### *Involvement with the courts*

Staff at the local Magistrates’ Court (Shepparton) who deal with Children’s Court issues in the Hume region indicated that there had been significant downturn in the number of child protection related court appearances in the region since November 2002 when the program commenced (the evaluation was completed in 2003). Staff in the court system also indicated that the “treadmilling” of cases they had in the past appeared to have stopped since November 2002.<sup>44</sup>

Staff working within the courts in Shepparton identified the parallel between the model utilised for the ADFM program and the Koori Court scheme which has been successfully implemented in the Shepparton area.

During the evaluation, discussions with officials and the Melbourne Children’s Court explained the AFDM program model. These officials had seen the Koori Court in practice within Shepparton and expressed an interest in utilising the Koori Court experience and

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<sup>42</sup> Lingage International (2003) op cit, p.24.

<sup>43</sup> Ibid, p. 25.

<sup>44</sup> Detailed figures were not available to the evaluation.

applying it to the Children's Court experience with respect to Aboriginal and Torres Strait Islander children within the State.

The Courts and Tribunal Unit of the Department of Justice, in response to a directive of the Aboriginal Justice Forum, has commenced inquiring into the possibility of a Children's Koori Court (Family Division). This is one of the options mentioned in a discussion paper produced by the Unit, but which is not public at this stage. VALS can see merit in creating an option to go to a Children's Koori Court (Family Division) after a AFDM, or other process. Please see discussion of Children's Koori Court below in relation to option 4.

#### *Child protection/juvenile justice intersection*

It was revealed through discussions with juvenile justice system officials at Parkville, Turana and the Hume Regional Aboriginal Advisory Committee that in their experience, most Aboriginal and Torres Strait Islander children and youths in the juvenile justice system had been placed in foster care.

It was their opinion that there would be a significant reduction in the number of children and youths involved in the juvenile justice system if children were not placed in foster care, especially outside the Aboriginal and Torres Strait Islander family environment and were instead were cared for within their Aboriginal and Torres Strait Islander family.

#### *Time and cost effectiveness*

Discussions the evaluators had with DHS Child Protection and Rumbalara Aboriginal Cooperative staff indicated that the inclusion of generalist and specialist support agency representatives in the program saved up to 2 months in terms of timely provision of those support services.

The Aboriginal and Torres Strait Islander Re-notifications Case Audit, Data Summary Report (2002) illustrates that based on past data, there has been an average of 3.1 re-notifications per client. This would mean that of the 12 families who had been engaged in the AFDM program, 9 of the cases would have gone to court and there would have been on average up to 3 re-notifications (had the AFDM program not been used). It could be argued that this could potentially result in excess of 20 protection applications before the court over an extended period.

Specific data with respect to the cost of protection applications in the Children's Court was unavailable. DHS staff indicated, however, that on average 2 days processing by DHS Child Protection staff is required for each case in addition to the court time and resources. Also, on average 21 solicitor hours are required for each case of which the State bears the cost in almost all cases. On average a case requires a day's court time, sometimes over three or four sittings.

Therefore using conservative figures, in the 4 months between November 2002 (program commencement) and March 2003 (evaluation) for 9 cases appearing in court on one occasion, in excess of \$30,960 has been saved in court and DHS resources alone. This represents a saving of \$92,880 annually.

It is also argued that further savings can be made due to decreases in juvenile justice costs. Discussions during the evaluation with youth workers in the Shepparton area indicated that on average 120 young Aboriginal and Torres Strait Islander alleged offenders annually are

involved in the juvenile justice system. Of those young alleged offenders, 12 eventually have orders made against them, resulting in 3 or 4 being placed in custody each year.

The annual cost of maintaining a young person in custody in the region is \$135,000 annually. Therefore each year the cost of maintaining young offenders in custody in the Shepparton region is between \$405,000 and \$450,000 annually. Discussions with juvenile justice system staff indicate it is reasonable to assume that the AFDM program will significantly reduce the numbers of juvenile offenders who go into custody by a minimum of 30%. Therefore the savings annually would be between \$121,500 and \$162,000.

Overall annual savings to the State due to the introduction of the AFDM program including: Court, Departmental and Legal Service savings; decreased foster care allowance charged; decrease in juvenile justice costs; internal and case management/time of DHS staff and cost for the project and funding of the Cooperative are \$354,780 (net savings \$233,051).

Key factors for success of this program were found include the following:

- Ownership of the program by the Aboriginal and Torres Strait Islander community established by:
  - Involvement of the Aboriginal and Torres Strait Islander community in developing, implementing and monitoring the progression of the process. This showed respect for their input as a community.
  - The respect each player has for one another as demonstrated in the equal standing of partners from the Rumbalara Aboriginal Cooperative, Burri Family Preservation and the Department of Human Services.
- The presence of a strong Aboriginal and Torres Strait Islander community based health and welfare organisation (Rumbalara) that is capable of being an effective partner with DHS.
- Recognition of the respect and understanding the Elders have within the Aboriginal and Torres Strait Islander community and their unique position in the development and running process that maximises the benefits of their counsel and influence.
- The voluntary nature of Aboriginal and Torres Strait Islander families' involvement in the family decision making process as it ensures the families' commitment to the process.
- The ability of the family to have effective input into the process. This is enhanced through the families' better understanding of the process and the trust that the presence of Elders engenders.
- The clear identification of the required outcomes by DHS and others in terms of "bottom lines" that must be achieved and the appreciation of those by all concerned. It is understood that the welfare of children is pre-eminent and non-negotiable.
- The family decision making process itself allows the family and others to better understand the issues, the outcomes required and facilitates the identification of extended family resources and input. This is supported by external agency assistance that is required to achieve the "bottom line".

- The focus of the families' endeavours is the welfare of the children and the maintenance of children within the community and the culture.
- The process allows for key generalist and specialist support services to have simultaneous exposure to the key issues and outcomes required. This ensures a clear, unambiguous understanding of the issues, outcomes required, and the timelines in the provision of essential support services.
- The course of action for "bottom line outcomes" for the family and the key support services are agreed by the families (in a non-pressure environment) and endorsed by all key parties – DHS Child Protection, Rumbalara Aboriginal Cooperative/Burri Family Preservation and support agencies.
- The presence of an authorised DHS Child Protection Officer, capable of providing approval to the outcomes and means of achieving those outcomes (as identified by the family and other stakeholders) at the family decision making meetings. This facility is listed as essential to the programs success.
- Effective follow-up provided by the family decision making staff ensure all actions, undertakings and support agreed to are upheld/provided.
- The level of respect generated by all stakeholders for the Aboriginal Family Decision Making Model is such that where it has not been possible to achieve the outcomes of the first meeting, or where the agreed actions have not been followed through, stakeholders have sufficient confidence to re-convene a meeting to utilise the same process to work towards a better solution.

Following the comprehensive evaluation of the AFDM program the following recommendations, among others, were made:

- The program should be funded on a long term basis.
- In selecting other geographical areas where the ADFM program may be migrated, capacity building to enhance the capabilities of those Aboriginal and Torres Strait Islander communities should be considered as a prerequisite.
- In migrating the program to other Aboriginal and Torres Strait Islander communities, Rumbalara Aboriginal Cooperative's role should be viewed as an *example*, not as a *model* as each community would require differentiated processes (emphasis added).
- Processes whereby families are notified of the option of using the program should be reviewed in order to improve the take-up of the program.
- The support services that assist the program should be reviewed annually or when case loads increase significantly to ensure their adequacy.
- VACCA representation at the first visit to the family following a notification is critical, and every endeavour should be made to ensure there are sufficient resources to do so.
- Information gathering, handling and storing processes should be audited to ensure they provide appropriate levels of privacy.

- Data related to court case numbers and costs and Departmental costs associated with the provision of Child Protection Services and the provision of support services should be collated in order to provide comprehensive, accurate and quantifiable summation of the impact of policy initiatives.

VALS considers the Rumbalara AFDM program a shift in dealing with child protection matters as aligning with a restorative justice movement that fosters wellbeing and empowerment, shared interests and the strengths of children, young people, families and their communities. A restorative reform is theoretically linked to a broader shift in approaches to governance from the centralised, formal, top-down state regulation regime to a more pluralistic, informal, participatory, bottom-up decentralised regime that:

- Recognises interdependencies between various actors, requiring them to work together in search of mutual goals;
- Replaces the adversarial nature of win-lose situations with a collaborative nature of governance that leads to win-win situations;<sup>45</sup>
- Seeks to repair harm in ways that meet the wishes and needs of the stakeholders through a shared and equal decision making process;<sup>46</sup> and
- Represents a move within the child protection system to a state-parent-child relationship that moves away from adversarial engagements and environment in exchange for a family-centred, informal and collaborative engagement which fosters mutual trust.<sup>47</sup>

Another restorative feature of the Rumbalara AFDM program is that key stakeholders are involved in determining appropriate responses in order to reach a consensual plan in an informal and flexible way. The following fundamental assumption in the practice of child protection Family Group Conferences below relates very closely to the orientation and operation of Rumbalara's AFDM program:

*...the family, in its broad definition as to include relatives and close supporters, is the most suitable forum to make decisions regarding the child in need of protection and to monitor the implementation of those decisions. Therefore FGCs...involve the active participation of the child, nuclear and extended family and other close friends and concerned adults. Social workers and other professionals provide information about available services and resources, but are generally expected to refrain from dominating the discussion and suggesting solutions. The family, therefore, is empowered to find its own strengths to secure the wellbeing and safety of the child.<sup>48</sup>*

AFDM model above rings strong comparisons with articles within the CRC, such as with their periodic review mechanism:

*States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement (Article 25).*

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<sup>45</sup> Lobel (2004) in Gal (2009) op cit.

<sup>46</sup> Gal (2009) op cit.

<sup>47</sup> Ibid.

<sup>48</sup> Gal (2009) op cit, p. 33

The role that conferences play within the child protection framework differ locally and internationally in that some are focused on early intervention, others occur en route to court, and some are used to reach agreements once orders have already been sought by the court.<sup>49</sup> VALS argues that the AFDM program outlined above, and adaptations of this program, have the potential to operate at all of these stages. We also argue that the primary strength of this program, and adaptations of this program, should emphasise early stages of assistance. A good example of a more mainstream innovation is the Family Engagement model in Western Australia. The perceived strength of this model over other conferencing models is that it can be used with clients at all stages during a case instead of, as some conference facilitators commented, families being referred to a conference at a very late stage (often just prior to court) where a collaborative approach might have been valuable much earlier in the process.<sup>50</sup>

There is also a broad call for services to be decentralised. The Awasis Agency of Manitoba views that Indigenous child and family service provision must get in touch with grass roots issues and circumstances. This is done by having operating at a local level. In the opinion of the Awasis Agency:

*The community requirement today is to design services from the bottom-up from the community perspective, which is grounded in a more complete understanding of its social reality. The challenge is to move from mandates which emphasise efficient delivery of services that focus on effective service outcomes.<sup>51</sup>*

The Awasis Agency of Manitoba reports that the devolution of child and family services authority to the local level may improve responsiveness, management, flexibility and integration of services, and an increase in local community support and voluntarism. The agency criticises centralised services on the grounds that they are unresponsive to the needs of locals, alienating due to their inaccessibility and undemocratic in the absence of community control.<sup>52</sup>

#### **1.4 Are there some matters that are better suited to ADR than others, such as questions concerning conditions that should be attached to any final order?**

See 1.5

#### **1.5 When is ADR inappropriate for child protection matters? What protections need to be incorporated into the processes to protect vulnerable parties?**

Interestingly, families participate in a conference in New Zealand when child protection issues are serious and the risks are high.<sup>53</sup> In the United Kingdom, this circumstance would render a family ineligible for a conference.<sup>54</sup>

It is suggested that cases involving various substance abuse concerns may benefit from Family Group Conferencing whereby children can remain with family members while parents are in treatment and families can provide the necessary leverage to encourage parents to complete treatment.<sup>55</sup>

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<sup>49</sup> Harris (2008) op cit.

<sup>50</sup> Ibid.

<sup>51</sup> (1997) p.106 in Libesman and Cunneen (2002) op cit, p.15.

<sup>52</sup> Ibid.

<sup>53</sup> Huntsman L (2006) op cit.

<sup>54</sup> Doolan (2003) in Huntsman (2006) op cit.

<sup>55</sup> Crampton (2001) in Huntsman (2006) op cit.

Family Group Conferencing has been increasingly used in cases where domestic violence is present.<sup>56</sup> Suggestions have been made about conducting conferences in ways that ensure the safety of participants where such factors are present. Jones and Finnegan (2003) found that while only 5% of invitations to conferences (called Family Unity Meetings) were for ones involving sexual abuse, it was noted that conferences worked well in these cases and those involving domestic violence. They concluded the greater use of such models is warranted.<sup>57</sup> In fact, they propose that the conferences worked as well for families (in terms of successful outcome variables such as reunification goals, permanency placement programming, child/young person being placed with the family etc) with “multiproblems” such as cases of sexual abuse and domestic violence as it did for other families without these specific problems.

Huntsman (2006) reveals that some Family Group Conferencing workers identified the ‘least suitable’ cases as those that involved parents with serious mental health issues, where family networks are very small, or where families are highly transient or highly conflicted. Interestingly, conferences that were highly emotionally charged and uncomfortable for participants have been described by Huntsman as being considered in retrospect as valuable by family members.

Crampton (2000) argues that there are no types of maltreatment that are especially inappropriate for Family Group Decision Making (referring to the United States variant of Family Group Conferencing and there are not certain types of cases that should be excluded. It is noted, however, that the individual characteristics of each case should be taken into account.<sup>58</sup>

### **1.6 At what stage(s) should ADR processes be used in child protection matters?**

As noted under question 1.3, the Family Engagement model in Western Australia is an example of an innovation that fosters advantages through conferencing being available to clients at all stages during a case. VALS endorses the exploration of conference-style applications of decision-making for young people and families early in child protection cases, as well as later stages whether it be just prior to court or elements of conference-style decision making being carried over and applied within the court system itself. VALS acknowledges that further investigation into the potential for this is required in the light of research that suggest that in some cases, less formal processes like family meetings should not be considered as equivalent to conferences, but rather as a complimentary practice.<sup>59</sup>

### **1.7 Who should conduct ADR processes? What qualifications and standards of practice should ADR facilitators be held to?**

As mentioned above, there needs to be availability of an Aboriginal and Torres Strait Islander facilitator/co-convenor if required. Facilitators must collaborate with, yet be independent of, DHS Child Protection services. Facilitators, in addition to DHS Child Protection Staff, lawyers, judicial officers etc, should ensure a culturally responsive service through the implementation of Aboriginal cultural competence standards as articulated in the *Aboriginal Cultural Competence Framework* (VALS refers to the expertise of VACCA for further guidance on this issue).

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<sup>56</sup> Child Welfare League of America (2005) in Huntsman (2006) op cit.

<sup>57</sup> Jones L and Finnegan D (2003) ‘Family unity meetings: Decision making and placement outcomes’ *Journal of Family Social Work* 7(4), pp23-43.

<sup>58</sup> In Huntsman (2006) op cit.

<sup>59</sup> Harris (2008) op cit.

### **1.8 Who should be present during ADR processes?**

As stated earlier, VALS prefer to see family conference-style mechanisms used in place of the current ADR process. We therefore endorse an adaptation of the ADR process towards this alternative or a separate utilisation of initiatives such as the Rumbalara ADFM program. This program utilises the presence of the following:

- nuclear family;
- extended family;
- relevant community member(s) (including a community Elder or Respected Person if appropriate or other person that could potentially be in a position of future guardianship);
- generalist and specialist service representatives (relevant to the case determined through a pre-conference planning mechanism);
- DHS Child Protection representative;
- child or young person (if appropriate);
- child or young person legal representation (if applicable);
- legal representative to the parent(s); and
- Aboriginal and Torres Strait Islander or non-Aboriginal and Torres Strait Islander facilitator.

It is noted that this is a resource intensive list of people and the co-ordination of these participants through a the systemic use of Family Group Conferencing (or the like) requires more, rather than less, funding for training and support. To this end we stress that an investment in what can be considered a tertiary level of a public health approach, or a more primary response in court related systems, will result in less money being spent further down the track. This was demonstrated in the evaluation of the Rumbalara AFDM program outlined earlier in this submission where the investment early on led to a reduction in re-notifications, appearances in court, court time, judicial officers time, DHS time, and potentially reduces the cost of future detentions for some juvenile offenders as research demonstrates the link between juvenile offending and experience of the child protection system(s).

### **1.9 What role (if any) should lawyers play in ADR processes?**

Libesman and Cunneen (2002) highlight the criticism of some Family Group Conferencing methods relating to the lack of safeguards around due process and legal representation. Legal representation, or even legal advice as a minimum, should be provided for the family and/or child participating in the ADR/Family Group Conference to better equip children and families to combat imbalance between themselves, child protection services and other service providers. This is especially important for Aboriginal and Torres Strait Islander and other marginalised groups that are overrepresented in the child protection system. The failure for legal advice and representation of families in the dispute resolution process reduces the chance for meaningful participation in the process and poses a risk to access to justice.

Procedural safeguards regarding legal advice need to be ensured in pre-court processes such as ADR. In court, for instance, a self-representing litigant will likely be assisted to an extent by the Magistrate. In some forms of mediation and conferencing, however, the convenor or facilitator will hold a “neutral” role and can therefore not provide assistance. In other forms of conferencing, the facilitator is required to make their opinion forthcoming, however it is not their role to assist the family to better their case. In others, such as AFDM, a DHS representative is a co-convenor with VACCA. This raises complications when it is time for the convenor to confirm whether the family decision coincide with the DHS “bottom line”.

If ADR is to correct power imbalances, as it purports to do, legal assistance is required to give the family and the child better footing through providing information, awareness and protection.

VALS is concerned that both Option 1 and Option 4 below have the potential to impact the extent to which lawyers are involved in the child protection system, as both are unwelcome by many in the ADR and Tribunal setting.

### **1.10 Where should ADR processes in child protection matters take place?**

One issue relating to service decentralisation involves the setting in which the delivery of the service occurs. A number of studies suggest that services should not only be locally-based, but in addition should be offered at the client's home where possible. Food and setting are seen as important aspects of creating an informal and relaxed atmosphere in what is often an emotionally charged event.<sup>60</sup> It is likely that this acutely applies to Aboriginal and Torres Strait Islander peoples given the legacy of traumatic past child welfare interventions.<sup>61</sup>

There are also practical reasons why institutional settings may not be the ideal for reasons such as inadequate child care, inaccessibility due to lack of transport etc.

### **1.11 To what extent should ADR processes be confidential?**

Confidentiality problems are more common in small communities. Confidentiality concerns have the power to inhibit the use of models such as ADR and Family Decision Making/Family Group Conferencing. Kelly (2007) highlights how the guarantee of confidentiality is believed to be important when attempting to gain the trust of parties to the matter. It is argued, however, that honouring confidentiality principles is rarely possible within an Aboriginal and Torres Strait Islander context due to close kinship ties and multi-party nature of disputes.<sup>62</sup>

VALS research *Exploring culturally appropriate dispute resolution for Aboriginal and Torres Strait Islander peoples* highlighted the following points for consideration:

- The “Koori grapevine” was traditionally used as a tool to maintain social order, i.e. mediated outcomes were made public so that the moral weight of the community could be brought to bear on the agreements. This meant that the community retained ownership over a dispute (drawn from Cunneen et al 2005 and Sauv  1996).
- As long as disputants agree to the removal of the confidentiality clause<sup>63</sup>, there should be no reason why the confidentiality principle cannot be applied in a flexible manner (per Pringle 1996).

The Rumbalara ADFM program's voluntary status as key to its success. VALS questions whether certain confidentiality assurances are required to achieve the same level of trust and honest participation in the process. Obviously certain elements to the conference are required to be recorded in order for agreements to be linked to the conditions and service provisions linked to an agreed outcome. VALS feels lack of discussion on this in the Information Paper makes it hard to make comment on this issue. VALS would like to express caution for decisions to be made in regards to confidentiality in early conference forums that may negatively affect children, young people and families that may have their matter progress to court.

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<sup>60</sup> Huntsman (2006) op cit.

<sup>61</sup> Libesman and Cunneen (2002) op cit.

<sup>62</sup> Cunneen et al (2005) in VALS (2009) op cit.

<sup>63</sup> A contractual privilege added to the terms of an agreement to mediate.

## Option 2

**New grounds upon which State intervention in the care of a child may be authorised and reform of the procedures followed by the Children’s Court when deciding whether to provide this authorisation.**

### New grounds

#### **2.1 Are the existing grounds for finding that ‘a child is in need of protection’ in s 162 of the *Children, Youth and Families Act 2005* adequate?**

The existing grounds are adequate.

#### **2.2 Should there be additional grounds for finding that ‘a child is in need of protection’ which do not involve proof of fault on the part of a child’s parent or other primary carer?**

VALS strongly argues that there is no need for new grounds upon which State intervention in the care of a child should be authorised. An Ombudsman report into the Department of Human Services Child Protection Program (2009) reveals, the system is struggling to meet its operational responsibilities as they stand and the child protection system is stretched beyond its capacity.<sup>64</sup>

#### **2.3 Should there be a new set of grounds for earlier state intervention in the life of a child where removal of a child is not necessary but where some state supervision or assistance is appropriate?**

The FCLC highlights that the State does not require statutory powers to provide assistance to a family. VALS supports their argument that problems the child protection system is seeking to solve through legislative intervention will not be solved until significant resources are spent on improving the social, economic and cultural rights of those who are struggling in our society.<sup>65</sup> This includes the undersupply of community based supports that provide prevention and early intervention programs. We argue that one of these community based supports is AFDM programs.

VALS notes the ever-present exacerbation of problems facing children, young people and families in the child protection system as current approaches to care and protection continue to be built around bureaucratic procedures and requirements on one hand, and the scarcity of resources to care for the children and young people on the other.<sup>66</sup>

Child FIRST, which was intended to provide prevention and early intervention support where DHS statutory intervention was not warranted, is instead fulfilling entirely different roles and working in crisis intervention. This problem needs urgent redress in order to fulfil a vital early intervention assistance role. As the Ombudsman report into the Child Protection Program of DHS states, amongst other things, that:

- the senior Child FIRST manager said Child FIRST was pressured to manage high risk cases when the Department was experiencing high levels of demand;

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<sup>64</sup> Brouwer G E (2009) *Own motion investigation into the Department of Human Services Child Protection Program* Ombudsman’s report presented to Parliament 25 November 2009.

<sup>65</sup> FCLC (2010) *Submission to the Victorian Law Reform Commission: Review of Victoria’s Child Protection Legislative Arrangements* Melbourne: Federation of Community Legal Centres Victoria.

<sup>66</sup> Bessell and Gal (2007) *op cit*.

- witnesses state that Child First is suffering the same demand and capacity issues as the Department; and
- rather than Child FIRST initiatives reducing the Department's workload (as some Departmental managers had expected) Child FIRST is just meeting a community need that has been unmet for quite some time. As a consequence, Child FIRST has declined to assist families it had been expected to be able to support because the demand for its services are too great.<sup>67</sup>

#### **2.4 Could such a basis for state intervention, authorised by the court, be that 'a child is in need of assistance' or 'at risk of harm'?**

As stated above, the State does not require expanded statutory powers in order to assist children and their families.

#### **2.5 Should it be possible for there to be formal parental responsibility contracts, approved by the Court, in circumstances where the parties agree that a child is in need of assistance?**

VALS is not supportive of the term "parental responsibility contracts" as it represents a power imbalance (i.e. parents are responsible for the system that falls down around them).

That being said, VALS' Family Law Solicitor for child protection matters believes that a contract of this nature could be a good idea in some cases. However, there needs to be safeguards for parents who may enter into contracts in good faith and then learn that DHS has a separate set of rules. It must be ensured that:

- independent legal advice is provided to parents, children and young people, family members and any other potential caregivers before entering into the drafting of, or agreement and signing of, a contract;
- parents, children and young people, families, potential caregivers *and* DHS are involved in the collaborative development of the contract;
- the role of DHS be stipulated in the contract in terms of their obligations and responsibilities to the success of the contract; and
- contracts must always be in the best interest of the child or young person with the input of the child or young person.

A note on the last point – the best interest principle (found in CROC Article 3) is perhaps one of the most common phrases in child protection terminology, yet according to Bessell and Gal (2007), it suffers from vagueness and implementation difficulties. They argue that the best interest principles importance is in that it creates a duty to make an individual examination of the interest of each individual child instead on relying on general assumptions regarding children in certain situations. However, when applied without understanding the child's views and experiences it can be used to contradict the child's wishes and can potentially lead to 'over-paternalism' and 'authoritarianism'.<sup>68</sup>

#### **2.6 If 'yes', what sanctions should apply if a contract is breached?**

There should always be room for cases to be assessed on a case-by-case basis. Where a minor failure of the family, DHS or the contract can be addressed, there should be an avenue for amendment to the contract. Where a contract is blatantly or seriously breached by a family member or DHS, the matter should then be heard by the court.

<sup>67</sup> Brouwer (2009) op cit.

<sup>68</sup> Bessel and Gal (2007) op cit, p. 8.

## **Specific court processes**

### **2.8 Should the present time requirement that protection applications commenced by taking the child into safe custody be brought to Court (or before a bail justice) within 24 hours be retained?**

Yes, the present time requirement that protection applications commence, by taking a child into safe custody, be brought before the court within 24 hours should be retained.

### **2.9 If not, what period of time should apply before Children's Court authorisation of this state intervention is required?**

N/A

### **2.10 Should children be required to attend Court when a safe custody application first comes before the Court?**

This depends on the circumstances, age, competency and capacity as broadly considered earlier in this submission. It must also be ensured that legal advice be made available and the therapeutic support needs of the child are met.

### **2.11 Should children be required to attend Court at later stages?**

Children should not be "required"; they should be invited where appropriate. See question 1.2 for discussion on the involvement of children and young people in child protection processes. VALS notes that children, young people and family members must have the option of access to the Aboriginal Legal Services for representation.

### **2.12 How should children be represented in proceedings before the Family Division of the Court?**

Gal highlights how even when allowed to participate in the process, a statement made by a child or young person that does not fit the formal, legalized jargon of the process is treated with suspicion.<sup>69</sup> In Britain, where child protection conferences invite children to provide their input, their participation is still limited as illustrated in the following way:

*In practice the term participation is often used simply to mean being 'listened to' or 'consulted'. In this sense the term takes on a very passive connotation. This is in contrast to active participation, which could be taken to imply some presumption of empowerment of those involved – that children believe, and have reason to believe, that their involvement will make a difference. Here participation is undertaken with a very specific purpose of enabling children to influence decision-making and bring about change...And of course participation has to be by their choice, based on informed consent and respecting their right not to participate.<sup>70</sup>*

Research by Anne Smith<sup>71</sup> highlights that very young children are capable of understanding their experiences and expressing themselves.<sup>72</sup> Therefore, even very young children can participate in

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<sup>69</sup> Gal (2009) op cit.

<sup>70</sup> Sinclair (2004) p100-101 in Gal (2009) op cit, p.21.

<sup>71</sup> (2002) in Gal (2009) op cit.

significant ways in decision making even if communication is less disorganized or even non-verbal. Smith further argues that we need to be sensitive to children's level of understanding and allow gradual growth in the weight given to the child's view. Moreover, parents and professionals must understand that children need opportunities to express their views and make decisions in order to mature into decision-making, involved citizens.<sup>73</sup>

Gal contends that the participation right in the CRC is often understood as 'creating a procedural obligation' to invite children and young people to state their opinion and provide them with legal representation. This is a typical practice of the participation right in Britain and other jurisdictions committed to the CRC and is a 'substantial step forward in the inclusion of children in decision making processes':

*A deeper understanding of the participation right, however, calls for the involvement of children not as adversaries to the process, outsiders who are invited in to provide their input and the wait for professionals to make decisions regarding their own lives. Rather, the participation right as crafted in the CRC can mean regarding children as partners in decision making processes.<sup>74</sup>*

The British child protection system has been explicitly promoting child participation initiatives. Efforts have been made to structurally integrate child participation at various stages of the child protection process as legislated in their Children Act. Therefore, if and when a case is referred to court, children are appointed a social worker and a solicitor. The solicitor acts as the child's lawyer and the social worker represents the child's best interests and supports the child through the process.<sup>75</sup> This is one way the balance can be struck between concerns of best interest with instructions given from the child, through the solicitor. This has been described as 'dual model of representation'.<sup>76</sup>

### **2.13 Do directions hearings serve their intended function or are there better ways of identifying contested issues and managing cases?**

VALS' Family Law Solicitor for child protection matters believes that the identification of contested issues is currently happening in the ADR forum.

### **2.14 To what extent (if any) should the Children's Court adopt an administrative case management approach to child protection matters?**

They do already.

### **2.15 Should all (or some) of the provisions of Division 12A of Part VII of the *Family Law Act 1975* (Cth) which seek to encourage Less Adversarial Trials be adopted in the Children's Court?**

VALS endorses more culturally appropriate court processes including adopting less adversarial processes in the Children's Court.

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<sup>72</sup> Her review of empirical research suggest that babies, infants and preschoolers are active participants in their immediate environments.

<sup>73</sup> Gal (2009) op cit.

<sup>74</sup> Ibid, p25-26.

<sup>75</sup> Masson 2000 in Gal (2009) op cit.

<sup>76</sup> Gal (2009) op cit.

## Option 3

**The creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services.**

### **3.1 Does the Secretary of the Department of Human Services have too many functions under the *Children, Youth and Families Act 2005*?**

Yes. Inherent conflict of interest and insufficient resourcing issues are present in DHS' role of investigator, prosecutor, case manager, guardian and custodian. VALS endorses the FCLC stance that these problems are compounded by the lack of meaningful and independent oversight of DHS.<sup>77</sup>

VALS notes the current presence of the Child Safety Commissioner whose role has been investigated and evaluated as not having the ability to initiate investigations, has little investigative powers, has no coercive powers to investigate, and relies on the cooperation of DHS and other agencies to perform its functions.<sup>78</sup>

### **3.2 If yes, should some of those functions be given to an independent statutory commissioner?**

A discussion about an independent statutory commissioner, and what this would mean for the Aboriginal and Torres Strait Islander community, cannot be divorced from the following factors:

- Section 18 of the Act includes mentions DHS power of the Secretary, to authorise the principal officer of an Aboriginal agency to perform specified functions and exercise specified powers conferred on the Secretary by or under this Act in relation to a protection order in respect of an Aboriginal child.
- Leaders within the Aboriginal and Torres Strait Islander community in Victoria have been calling for an Aboriginal and Torres Strait Islander Social Justice Commissioner for a long time, and these calls have fallen on deaf ears.

VALS is concerned that the VLRC review process is overlooking the above in outlining the option of an independent statutory commissioner having some of the functions currently performed by the DHS. Both points 1 and 2 above are important in terms of the long-term empowerment of Aboriginal and Torres Strait Islander peoples and should not be overlooked.<sup>79</sup>

There are numerous issues relating to accountability within international literature on Indigenous child welfare. One which arises frequently is the political (or personal) interference over Indigenous-controlled child and family services.<sup>80</sup> There are also complex issues inherent in determining specific responsibilities where divided authority creates multiple accountability; there are problems relating to the capacity of local services to provide assured child protection; and confidentiality.<sup>81</sup>

The apparent prevalence of political interference in Indigenous Child welfare matters in Canada is closely linked to the small size of many of the First Nations Communities. There are obvious complexities to be considered in such as situation such as child protection matters hosting bias due

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<sup>77</sup> FCLC (2010) op cit.

<sup>78</sup> Brouwer (2009) op cit.

<sup>79</sup> Libesman (2004) op cit.

<sup>80</sup> Libesman and Cunneen (2002) op cit.

<sup>81</sup> Ibid.

to the closeness of parties involved who know or are related to parties to the child protection matter. Child welfare services mandated under the Child and Family Services Act in Manitoba, Canada, are provided by agencies located both in the government and voluntary service sector. The original intent of the policy was to shift a large proportion of existing resources dedicated to child and family services from existing non-Aboriginal agencies to expand or create new Aboriginal agencies. Later in the process, resources from the investigative and protective functions shifted to a service model oriented more towards early intervention and community development.<sup>82</sup> The Manitoba example is a good reference for examples of potential hurdles by way of resources issues, hand-over complications and complications arising from the division and sharing of responsibilities.

VALS is aware that there are as many supporters of Aboriginal and Torres Strait Islander community control for child protection matters as there are community members and groups holding back. This hesitation stems from exercised caution in seeking any child protection mandate for reasons such as the following:

- Under-resourcing: For any new system to work, it must be adequately resourced. There is a risk that responsibilities that are currently held by certain authorities in the child protection system may be disproportionately apportioned. A worst case scenario would be that the Department retains some of its functions, gives some of its functions to an Aboriginal or Torres Strait Islander services and the resources available to deliver such functions are disproportionately in favour of the DHS. This is especially the case given that Aboriginal and Torres Strait Islander community organisations are already over-stretched.
- Community readiness: The handover of authority needing to be phased in, in acknowledgement of the state of community readiness, using a joint management committee. A phasing scheme is designed to accommodate differing levels of community readiness. This is especially applicable to Aboriginal and Torres Strait Islander welfare as the levels of social, physical, economic and political resources and infrastructure are likely to vary considerably from one community to the next.<sup>83</sup>

VALS argues that given section 18 of the Act covers the transferral of DHS powers to the Aboriginal and Torres Strait Islander community the idea of an independent commissioner should not impede the realisation of section 18. This is especially the case given there is currently work being done by VACCA around this section and what it may look like in practice. In any discussion of what section 18 may look like in practice the following factors need to be taken into account, as they come directly from some members of the Aboriginal and Torres Strait Islander community who have expressed caution in seeking any child protection mandate due to the factors outlined above.

There has been great interest both locally and internationally on legislative reform that transfers real authority for children and families' wellbeing to Aboriginal and Torres Strait Islander communities. This is widely considered to be important to the long-term empowerment of Aboriginal and Torres Strait Islander peoples.<sup>84</sup>

Regardless of decisions around transferral of DHS powers to the community, if a commission is going to be introduced, it is imperative that the needs of the Aboriginal and Torres Strait Islander community are addressed by the commission. Any consideration of such needs should be addressed

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<sup>82</sup> Hudson P and McKenzie (2003) 'Extending Aboriginal Control over Child Welfare Services: The Manitoba Child Welfare Initiative.' *Canadian Review of Social Policy* Spring/Summer 2003, No 51, pp 49-66.

<sup>83</sup> Ibid. Libesman and Cunneen argue that a relative resource deficit is not necessarily a good reason to postpone a phased handover of responsibility for child welfare to Aboriginal and Torres Strait Islander communities.

<sup>84</sup> Libesman (2004) op cit.

at the beginning of discussions about a commission rather than tacked on the end of a process in an ad hoc manner. It is important that what eventuates, such as the following, is adequately funded and involves the Aboriginal and Torres Strait Islander community at every stage (i.e. consultation, planning, development, implementation and review):

- A specific Commission for Aboriginal and Torres Strait Islander children operating alongside the mainstream Commission.
- A specialised section within the mainstream Commission that targets the Aboriginal and Torres Strait Islander community (Aboriginal Child Safety Commissioner).

Arguments in favour of this specific approach regard the impact of colonisation processes such as: intergenerational traumas; social dislocation; child removal; community dislocation; marginalisation from social services for health; housing; education and policing as well as from family and child welfare services.<sup>85</sup> Common manifestations of these problems include: alcohol and substance abuse; high levels of family violence; economic deprivation; and their related impacts on children's wellbeing.<sup>86</sup> Other characteristics of a commission that are important is that its role:

VALS does not see an independent statutory commission having a role in individual cases. Instead, an independent Children and Young People's Commissioner could have the responsibility of promoting the rights of all children and young people at a state level. As proposed in the Youth Affairs Council of Victoria Inc (YACVic) 2001 proposal for the establishment of a Children and Young People's Commission in Victoria,<sup>87</sup> a coalition of 45 organisations and individuals proposed a model underpinned by:

1. independence;
2. statutory powers;
3. a focus on children and young people;
4. adequate resources;
5. a board perspective; and
6. accessibility.

In this proposal it was suggested that the Commissioner would, amongst other things:

- promote the participation of children and young people in relevant decision making forums;
- develop and promote best practice models and protocols for the provision of services for children and young people;
- monitor programs and initiatives for compliance with CRC;
- initiate and conduct enquiries and make recommendations to parliament and any other person or body on a matter relating to the welfare of children and young people;
- provide referral and assistance information to complaints (but not handle individual complaints); and
- apply for special standing before the court in special selected cases involving the rights of children and young people.

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<sup>85</sup> Libesman (2004) op cit.

<sup>86</sup> Ibid.

<sup>87</sup> YACVic (2001) *Are you listening to us? The case for a Victorian Children and Young People's Commission* Melbourne: Youth Affairs Council of Victoria Inc. [www.yacvic.org.au/policy/items/2009/01/256894-upload-00001.pdf](http://www.yacvic.org.au/policy/items/2009/01/256894-upload-00001.pdf)

### **3.3 Could the commissioner have a role to play in any pre-court ADR mechanisms?**

Not in individual cases. VALS would support the role of the Commissioner in the promotion of the rights of children and young people within these mechanisms and the development, promotion and review of best practice models for these mechanisms. Arguments for this are the findings of the Ombudsman's Report (2009) about there being 'many instances where the department failed to comply with its statutory obligation'.<sup>88</sup>

### **3.4 Could the commissioner be responsible for the carriage of proceedings before the Children's Court?**

VALS does not envisage the role of the Commissioner to be responsible for the carriage of proceedings before the Children's Court. See answer to question 3.3.

### **3.5 Could the commissioner have the 'first instance' capacity to authorise State intervention in 'safe custody' cases?**

See answer to question 3.3

### **3.6 Could the commissioner be capable of appointment as the guardian or custodian of a child in need of protection if there is no other suitable person?**

The commissioner should not be capable of appointment as the guardian or custodian of a child in need of protection if there is no other suitable person. For the Aboriginal and Torres Strait Islander community the Act regarding guardianship should be enforced as a priority.

### **3.7 If the commissioner is appointed as the guardian or custodian of a child, could the commissioner have the authority to exercise some functions currently fulfilled by the Children's Court such as issues of access?**

See answer to questions 3.6. Also, please refer to discussion of section 18 of the Act above.

### **3.8 Should decisions of the commissioner be subject to merits review in the Children's Court?**

Yes, there should be a mechanism is to review the merits of the decisions of the commissioner.

### **3.9 How should the independence of any new statutory commissioner be secured?**

The independence of any new statutory Commissioner could be secured by ensuring its decisions are not influenced by any government department or other agency. A good model of this is the Western Australian Office of the Inspector of Custodial Services. The Office of the Inspector of Custodial Services was established in 2000 and has its own specific governing legislation. The current Inspector, Professor Neil Morgan, is an Officer of the Parliament and does not report to a Minister or to a Department. The Inspector reports directly to the Parliament which means it is harder to get rid of the inspectorate or undermine its operation.

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<sup>88</sup> p.14

## **Option 4**

### **Changing the nature of the body which decides whether there should be State intervention in the care of a child so that it includes non-judicial as well as judicial members.**

VALS is strongly opposed to suggestions that child protection matters could be heard by a tribunal. This opposition operates on a number of grounds. Firstly, having a child protection matter heard in front of a tribunal instead of a judicial officer fails to recognise the seriousness and the significance of the matters at hand and the outcomes as a consequence of their deliberation. An expert judiciary is critical to the resolution of matter that has had to be brought before the court as a result of alternative measures to achieve successful child protection outcomes.

VALS questions whether the Information Paper's suggestion of a tribunal as a body that could decide whether there should be state intervention spawns from a desire to have a broader range of people considering child protection matters other than the judicial officers by means of a "panel". We argue there is no reason that a broadly informed group of interested parties to the matter should be prevented from participating in a decision-making panel way in the court system.

Specialised courts operating currently in Victoria such as the drug courts and the Koori Court have proved extremely successful. They utilise members other than judicial officers to inform the process in a court setting. VALS supports the preservation of courts and the judiciary as the decision-making body which decides whether there should be State intervention in the care of a child or young person. We additionally advocate for the consideration of a Koori Court-like model that could be utilised to include non-judicial members in child protection matters brought to court.

#### **4.1 Is the function of deciding whether 'a child is in need of protection' an exercise of judicial power?**

As explained earlier, the input power given to relevant stakeholders towards decision making is critical but the final word for the need of protection for a child rests with the judicial officer. We refer again to the preferred functions within the ADFM program where everyone comes together at once to address the issue from all sides and the collaborative nature of decision-making is given as much room as possible.

#### **4.2 Is it desirable to change the composition of the Family Division of the Children's Court to include people other than judicial officers in decision-making panels?**

VALS is supportive of an exploration into alternative compositions of the Family Division of the Children's Court to include people other than judicial officers in decision making. As outlined above, other specialised courts already employ the expertise of service providers and members of community in order to reach appropriate, broadly informed and balanced decisions.

#### **4.3 What people other than judicial officers should comprise decision making panels?**

See above

#### **4.4 What qualifications, if any, should they have?**

See above

**4.5 Upon what terms should any non-judicial members of the Family Division of the Children's Court be appointed?**

See above. VALS refers specifically to the Rumbalara ADFM model.

**4.6 If some or all of the functions currently performed by the Family Division of the Children's Court are to be performed by panels of people should those functions be retained by the Children's Court or should they be exercised by a tribunal?**

The functions currently performed by the Family Division of the Children's Court should be performed, regardless of what the makeup or nature of the panels are, should retain function within the Children's Court.

**4.7 If these functions are to be exercised by a tribunal should that tribunal be a division or specialist list of VCAT?**

VALS does not support the establishment of a new tribunal or a new specialist list at VCAT to perform the functions currently under jurisdiction of the Children's Court. We would like to see the evolution of the Children's Court as outlined above. In addition, having the Children's Court's jurisdiction expanded to include case planning appeals should also be considered. VALS considers the current practice of case planning appeals being heard by and decided VCAT is unsatisfactory.

**4.8 If these functions are to be exercised by a tribunal should a new Protective Tribunal be established to deal with a range of matters where the state intervenes in the lives of people for their protection?**

VALS does not support the establishment of a new Protective Tribunal to deal with state intervention in child protection matters.

## Conclusion

The VLRC Options found in the Information Paper for the Review of Victoria's Child Protection Legislative Arrangements 2010 fail to reflect the highly reported evidence of the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the child protection system. VALS has therefore aimed to address, to the best of our ability, the Options as they apply to and affect the Aboriginal and Torres Strait Islander community.

VALS refers to the Victorian Aboriginal Child Care Agency (VACCA) in support of their endorsement of reforms to the child protection legislative arrangements as far as they are in a manner consistent with principles outlined in the Introduction.

We suggest that one of the overarching barriers to building better policy and practice responses within the child protection system is the way children are viewed. We advocate for a reconceptualisation of children and young people's role and relationship with adults in the child protection system through a holistic interpretation of human rights as outlined in the CRC as one way to move forward in a positive direction.

VALS' main points in relation to Option 1 are as follows:

- conventional individualistic responses to children's wellbeing do not substantially improve conditions for these communities and that a more holistic and community based response is required.
- The dispute resolution process as it sits within the child protection system is not a genuine opportunity for collaboration and meaningful resolution of issues. The process is overly legalistic, adversarial and effectively puts people on trial. It exists much like in a contest hearing. For these reasons VALS considers the current utilisation of ADR for child protection matters inadequate.
- Aboriginal and Torres Strait Islander dispute resolution practices consist of a co-operative process where discussions are based on consensus rather than authoritarian procedural requirements. The procedures are flexible, informal and decisions are made for the community, by the community, rather than by the individual.
- The aspect of neutrality and impartiality in dispute resolution processes needs to be addressed from a culturally considered point of view. Insistence of mediator neutrality is a Western preference and may not be appropriate in the Aboriginal and Torres Strait Islander context.
- VALS argues that practice of allowing a child to participate in conferencing on the basis of age alone acts as an artificial barrier. Delegitimizing the voice of the child goes against Article 12 of the CRC.
- If the current dispute resolution procedure were to stay, VALS advocates that:
  - There be opportunity to re-convene a conference if outcomes are not achieved in the first seating;
  - conferences be available as an option that parties can enter into voluntarily;
  - conferences be preserved as a pre-court *option* and not be used as a gate-keeping tool to formal court process;

- there be availability of Aboriginal and Torres Strait Islander facilitators/convenors for a co-mediator model;
  - facilitators/convenors should be independent of DHS;
  - dispute resolution conferences facilitate, where appropriate, the views of the child either through presence at the conference or through representation; and
  - there be weight given to the parent(s) and the child in decision making.
- Conferencing mechanisms for child protection system in Victoria is very limited and should be invested in as a preferred method of resolution by agreement. The best model of this kind can be found in the Aboriginal and Torres Strait Islander Family Decision Making program. While this program is strongly geared towards the engagement of members of the Aboriginal and Torres Strait Islander community, there are many elements to this approach that could be applied to benefit all parents, children, families and communities coming into contact with Victoria's child protection system.
  - The ADFM program at Rumbalara is an example of a decision-making forum for child protection matters that operates in the spirit of self-determination. An evaluation report for the Rumbalara Aboriginal Cooperative Limited and the Department of Human Services - Child Protection reported included the following:
    - There is a very high level of acceptance of the program due to its ability to deliver effective outcomes for children and young people.
    - Benefits were found through utilising a model that capitalises on the strength of the Aboriginal and Torres Strait Islander community, that is, the family base and family ties.
    - none of the cases progressed under the ADFM program resulted in re-notification
    - Family members felt they were listened, had effective input to the process, and understood that children were at risk and there was a requirement to eliminate that risk.
    - The environment which the ADFM program took place was such that families were not threatened. They chose the venue.
    - The model allowed all possible mechanisms and support available within the family that could address key issues to be identified.
    - Families viewed the process as being community driven and not driven by DHS Child Protection.
    - The presence of Elders at the meetings provided the appropriate level of community legitimacy to the process and facilitated acceptance of the process.
    - Staff at the local Magistrates' Court indicated that there had been significant downturn in the number of child protection related court appearances in the region since the program commenced
    - Overall annual savings to the State were \$354,780 (net savings \$233,051).

- VALS sites research that suggest there are no types of maltreatment that are especially inappropriate for Family Group Decision Making and there are not certain types of cases that should be excluded. It is noted, however, that the individual characteristics of each case should be taken into account.
- VALS endorses the exploration of conference-style applications of decision-making for young people and families early in child protection cases, as well as later stages whether it be just prior to court or elements of conference-style decision making being carried over and applied within the court system itself.
- Facilitators must collaborate with, yet be independent of, DHS Child Protection services.
- In the utilisation of methods such as the preferred Rumbalara ADFM, those present at a conference should be considered to include
  - nuclear family;
  - extended family;
  - relevant community member(s) (including a community Elder or Respected Person if appropriate or other person that could potentially be in a position of future guardianship);
  - generalist and specialist service representatives (relevant to the case determined through a pre-conference planning mechanism);
  - DHS Child Protection representative;
  - child or young person (if appropriate);
  - child or young person legal representation (if applicable);
  - legal representative to the parent(s); and
  - Aboriginal and Torres Strait Islander or non-Aboriginal and Torres Strait Islander facilitator.
- Legal representation, or even legal advice as a minimum, should be provided for the family and/or child participating in the Family Group Conference to better equip children and families to combat imbalance between themselves, child protection services and other service providers. This is especially important for Aboriginal and Torres Strait Islander and other marginalised groups that are overrepresented in the child protection system
- services should not only be locally-based, but in addition should be offered at the client's home where possible
- VALS feels lack of discussion on this in the Information Paper makes it hard to make comment on this issue of confidentiality.

VALS' main points in relation to Option 2 are as follows:

- there is no need for new grounds upon which State intervention in the care of child should be authorised.
- the State does not require statutory powers to provide assistance to a family. VALS supports their argument that problems the child protection system is seeking to solve through legislative intervention will not be solved until significant resources are spent on improving the social, economic and cultural rights of those who are struggling in our society

- Some form of parental/DHS responsibility contract could be useful in some cases. However, it must be ensured that:
  - independent legal advice is provided to parents, children and young people, family members and any other potential caregivers before entering into the drafting of, or agreement and signing of, a contract;
  - parents, children and young people, families, potential caregivers *and* DHS are involved in the collaborative development of the contract;
  - the role of DHS be stipulated in the contract in terms of their obligations and responsibilities to the success of the contract; and
  - contracts must always be in the best interest of the child or young person with the input of the child or young person.
- the present time requirement that protection applications commence should be retained.
- Children should not be denied representation, either direct or by instruction, based on the systems current limited understanding of how they can comprehend events in their environment and express their views on them. We refer to the British system that engages a as ‘dual model of representation’ to combat these and other concerns,

VALS main points in response to Option 3 are as follows:

- There are problems with the current system that sees DHS performing the role of investigator, prosecutor, case manager, contract manager, custodian and guardian. The problems result from both insufficient resources to meet demand but also from inherent conflicts of interest of the multiple roles. The problems are compounded by the lack of meaningful independent oversight of DHS aside from the role that the Children’s Court plays.
- A discussion about an independent statutory commissioner, and what this would mean for the Aboriginal and Torres Strait Islander community, cannot be divorced from section 18 of the Act that includes mention of DHS the power of the Secretary, in writing, to authorise the principal officer of an Aboriginal agency to perform specified functions and exercise specified powers conferred on the Secretary by or under this Act in relation to a protection order in respect of an Aboriginal child.
- There are as many supporters of Aboriginal and Torres Strait Islander community control for child protection matters as there are community members and groups holding back. Hesitation stems from exercised caution in seeking any child protection mandate for reasons relating to under-resourcing and levels of community-readiness.
- If a commission is going to be introduced, it is imperative that the needs of the Aboriginal and Torres Strait Islander community are addressed by the commission.
- VALS does not see an independent statutory commission having a role in individual cases. An independent Children and Young People’s Commissioner could have the responsibility of promoting the rights of all children and young people at a state level and responsibilities as proposed by Youth Affairs Council of Victoria Inc (2001).
- The commissioner should not be capable of appointment as the guardian or custodian of a child in need of protection if there is no other suitable person. For the Aboriginal and Torres Strait Islander community the Act regarding guardianship should be enforced as a priority.

- The independence of any new statutory commissioner could be secured by ensuring its decisions are not influenced by any government department or other agency

And finally, VALS' main points regarding Option 4 can be summarised follows:

- VALS is strongly opposed to suggestions that child protection matters could be heard by a tribunal. Having a child protection matter heard in front of a tribunal instead of a judicial officer fails to recognise the seriousness and the significance of the matters at hand and the outcomes as a consequence of their deliberation. An expert judiciary is critical to the resolution of matter that has had to be brought before the court as a result of alternative measures to achieve successful child protection outcomes.
- We argue there is no reason that a broadly informed group of interested parties, a “panel”, to the matter should be prevented from participating in decision-making in the court system. Specialised courts the drug courts and the Koori Court have proved extremely successful in utilising members other than judicial officers to inform the process in a court setting.
- VALS supports the preservation of courts and the judiciary as the decision-making body which decides whether there should be State intervention in the care of a child or young person. We additionally advocate for the consideration of a Koori Court-like model that could be utilised to include non-judicial members in child protection matters brought to court.
- VALS does not support the establishment of a new tribunal or a new specialist list at VCAT to perform the functions currently under jurisdiction of the Children’s Court.
- VALS does not support the establishment of a new Protective Tribunal to deal with state intervention in child protection matters.

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