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Submission to Victoria Department of Justice in response to *Review of the non-family violence intervention order system: Discussion paper February 2009* – sent 27 April 2009

INTRODUCTION	2
Does the current stalking intervention order system adequately protect and address all types of non-family violence matters?.....	4
Ability of the system to protect vulnerable people.....	5
Legal issues for people with a mental illness.....	7
Is the streaming of cases appropriate?.....	9
Referrals to mediation	10
Restorative Justice	13
Should any changes be made to the definition of ‘stalking’ for the purpose of obtaining a non-family violence intervention order?.....	14
Mediation and violence/threats of violence	15
What behaviour should be included in a definition of ‘violence’ for the purposes of the new system?.....	16
Mediation issues and processes.....	16
Is mediation appropriate where one or both parties is a child?.....	16
Matters assessed for suitability and referred to mediation.....	16
Diversion of appropriate matters to mediation after application for non-family violence intervention order is made	17
What should non-family violence intervention orders be called?.....	18
Applications by police	19
Determining conditions for a non-family violence intervention order.....	19
Alternative ways of giving evidence	19
Multiple perpetrators or victims.....	21
Public Awareness	21
CONCLUSION	21
Bibliography.....	23

INTRODUCTION

There is no singular conception of stalking. On the contrary, numerous conceptions of stalking have emerged across jurisdictions in Australia and around the world. Consequentially no singular legal construct, description of stalking, or behaviour that constitutes stalking in one jurisdiction would necessarily meet the proofs required in another (McEwan, Mullen & MacKenzie 2007).

A number of factors that are common to most legal definitions of stalking, however, include conduct which is intentional, repeated, non-reciprocated, perceived as threatening, and which has the effect of causing fear or alarm in the person being stalked (Scottish Parliament 2000). As succinctly put by one commentator, stalking can be described as:

...a course of conduct which harasses, threatens, intimidates, molests, alarms or causes distress to an individual and which is carried out their for that purpose or for the purpose of compelling that person to do or refrain form doing anything which that person has a right to refrain from doing or to do (Allen 1996).

When talking about stalking legislation, it must be recognised that a broad spectrum of behaviours is relevant, from minor harassing nuisances such as that commonly found in neighbourhood disputes through to more serious predatory and pursuit-style stalking. Across this spectrum, harassment and stalking is associated with serious economic, emotional and social difficulties for victims. As illustrated in research drawn together by Blaauw, Sheridan and Winkel (2002), it is shown that in many cases the victims suffer direct financial loss, leave their jobs/place of education, “go underground” (i.e. temporarily living and working elsewhere) or move permanently and generally avoid social contacts. The effects of harassment and stalking therefore result in not only hardship resulting directly from the behaviour that is classified as harassment or stalking, but can filter into many other areas of an individual’s life.

The remedy to the filtering effects of harassment and stalking experiences into multiple areas of daily life falls outside the power of the non-family violence intervention order system’s review to change. Important, however, is the careful consideration of changes to this system in order to assist people in stopping stalking and harassing behaviours in a way that protects, respects, and increases the likelihood that these behaviours warranting intervention orders can be addressed before situations move in a more serious direction.

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) welcomes the opportunity to make a submission in response to the Discussion Paper *Review of the non-family violence intervention order system*. If done well, it is hoped that the revised non-family violence intervention order system could facilitate not only the protection of persons for harassing and stalking behaviours, but also retain a preventative function as systems act to divert such behaviours in the future in some cases. It is also hoped that the encouragement towards mediation, as opposed to court-based resolution of situations, will promote solution seeking that does not require the employment of punitive and adversarial methods that are culturally appropriate and accessible.

In this submission the areas relating to the review on the non-family violence intervention order system that are discussed include:

- Consideration of the rationale for the review of the non-family violence intervention order system;
- The ability for the current system to adequately protect and address all types of non-family violence matters;
- The broad scope of behaviours that can be considered as harassment through to serious predatory-like stalking and an exploration of what a two tiered system could look like in order to address more specifically behaviours;
- Issues around access to justice that would significantly influence the success of the system;
- The appropriateness of proposed system in allocating cases into either a mediation stream or court stream;
- The benefits of mediation and a discussion about how and when referrals could take place;
- Issues to be considered in mediation such as when one party is a child, the option of diversion to mediation *before* applications for non-family violence intervention orders are sought, and when there are threats of violence;
- Alternative ways of giving evidence; and
- Public awareness issues.

Rationale for the new system

A clear rationale for the new system, as is absent in current Victorian legislation, needs to address the importance of having a intervention order system separate from that which deals with family violence matters. Clear stipulation as to who can use non-family violence intervention orders, and against whom and under what circumstances is vital for its effective employment and use. Just as important is the clear stipulation of in what circumstances it is inappropriate to use a non-family violence intervention order.

The Discussion Paper proposes the following objectives for the new system:

- to provide effective and speedy protection for victims from violence, harassment and predatory behaviour;
- to encourage effective resolution of the underlying factors in interpersonal disputes through referral of suitable matters to appropriate dispute resolution;
- to reduce the volume of matters proceeding to hearing for an intervention order and the number of recurring cases; and
- to support the development of stronger and more resilient communities.

It is encouraging to see a strong focus in the above objectives on finding appropriate methods with which to resolve disputes. To the Discussion Paper's list of objectives VALS argues for the additional objectives:

- to provide culturally appropriate mediation and court based processes;
- recognise the preventative benefits of early mediation methods at the grass roots community level;
- court-based solutions to be considered as a last resort; and
- to educate communities about systems involved in intervention orders and how they can be accessed and dealt with.

Does the current stalking intervention order system adequately protect and address all types of non-family violence matters?

In response to the above question posed in the discussion paper, VALS considers that it would be naive to assume that any one system could completely address *all* the ills relating to what the system aims to remedy. It has been argued, however, that the introduction of the criminal stalking legislation and the civil remedy through intervention orders has proven to be successful in providing avenues to protect victims of a previously difficult to prevent behaviour (Dussuyer 2000).

Research recognises that intervention order systems need ongoing examination to steer ongoing improvement. One such piece of research suggests that the practical application of the legislation since its introduction has highlighted the following areas as opportunities for improvement (Dussuyer 2000):

- stalking legislation is not perceived by focus groups as effectively pre-empting actual threats and attacks;
- how the legislation deals with stalking behaviour as evidence of a dysfunctional mental condition;
- apparent abuse of intervention order procedures in disputes resulting in what is considered a waste of resources;
- addressing the possible side effects of stalking legislation loosing its specificity partly due to the increased widening of definitions of stalking;
- its ability to deal with person's incapable of understanding the effects of their behaviour. The operation of new legislation could be enhanced with the increased cooperation between the justice and health systems in relation to the treatment of stalking offenders exhibiting mental health problems (and increased use could be made of treatment orders for these offenders);
- to assess the effectiveness of the stalking legislation in regards to preventing stalking behaviour by persons already convicted of stalking; and
- the possibility of intervention orders to be made available in respect of the one offender, rather in respect of each victim, in cases involving an alleged stalker and multiple victims.

The above suggestions are highly relevant and represent areas that require investigation. It should be noted that the results of this study were formulated out of responses and perspectives of Magistrates and police. These suggested improvements are therefore the result of very specific orientations within the justice system. It is hoped that extensive information is gathered from consultations resulting from this submission process and others in order to consider alternative views of intervention order systems affect a diverse cross section of the community.

Ability of the system to protect vulnerable people

One of the key issues raised through preliminary consultations among stakeholders (as mentioned in the Discussion Paper) is that ‘the current system could be strengthened to better address the needs of marginalised people and vulnerable groups, such as people with mental health issues and people with disabilities experiencing violence from their carers’(12).

At the Vulnerable Persons Workshop in relation to the review of the non-family violence intervention order system¹, what is meant by, and the use of the term “vulnerable person” attracted passionate discussion. It was suggested that it is not individuals and their disabilities that makes them “vulnerable” but instead the systems that society employs which in fact put certain individuals at risk. It is insufficient systems that disempower, marginalise, isolate and ignore – not the disability itself. It was argued that if the correct systems were in place then the risk of being in a vulnerable position would decrease.

McEwan, Mullen and MacKenzie have noted that in the mental health domain, a new problem has developed for professionals dealing with stalkers and their victims, as their definitions of stalking have gradually separated from those initially created by legislative bodies (2007). This is occurring the more mental health care professionals understand about stalking behaviour, its perpetrators and its victims. They suggest that ‘this has now reached the point where the recognised problem behaviour no longer fits each and every legal construct of stalking’ (2007:208).

Anti-stalking provisions were introduced into the Victorian *Crimes Act (1958)* in January 1995 through which stalking was established as an offence. In addition to specific conduct requirements (i.e. telephoning, loitering outside victim’s home or place of work, leaving offensive material, surveillance and acting in a way that could arouse fear etc), the original version of this legislation stipulated that the perpetrator must have engaged in the behaviour with the *intent* to cause mental or physical harm, apprehension, fear, or ought to have known that their actions had the potential to do so (McEwan, Mullen & MacKenzie 2007).

Importantly, the *Crime (Stalking) Act (2003)* removed the requirement that the victim actually experience a detrimental impact, however this is only provided when the stalker was shown to have engaged in the stalking behaviour with malicious intent. The Victorian Attorney-General justified this change by stating:

The offence of stalking should focus on the behaviour of the offender rather than the response of the victim...The intention on the part of the offender to cause fear...is the key factor that should make the behaviour criminal. The fact that a target of stalking is unaware or is not easily frightened should not prevent prosecution of the offence²

¹ Held at the Victorian Department of Justice 31st March 2009.

² Parliament of Victoria (2003) in McEwan, Mullen & Mackenzie (2007:212).

The strength of a reviewed stalking intervention order system will in part rest on the more sensitive and complex matters where mental illness, disability, marginalisation, diminished capacity of certain individuals, cultural factors and the like come in to play.

Criminal Justice in Australia has taken a positive turn in recent times to consider the way legislation, processes, and institutions deal with and treat individuals with mental illness. Changes in management of serious mental disorders, such as schizophrenia, has made it possible for increasing numbers of individuals to lead semi-dependent or independent lives in the community. For communities that have not been exposed to persons with a mental illness before, there are reasonable grounds for concern in relation to reactions to schizophrenia sufferers that may result in the inappropriate use of intervention orders.

It is often said that people fear what they don't understand. This notion is supported by research such as that captured in the United States where it was found that there is an underlying negative attitude toward individuals with mental health problems, an exaggeration of impairments or "threat" associated with these disorders, and startling negativity toward individuals with substance dependence problems (Pescosolido et al. 1999 in Morgan et al. 2008). As deinstitutionalisation continues in the context of what some argue as inadequate specialist and community support, this has led to the criminalisation of mental illness (Cold, Lewis & Reveley 1993).

The capacity of communities to deal with other emerging "problems" such as marginalisation, homelessness, poverty, criminal behaviour and victimisation can be easily considered in the same light as the mental illness example. Consider this in the knowledge of research such as Silver (2000) whose central hypothesis was linked with the following: stigma attached to mental illness and perceptions that the mentally ill were dangerous; and beliefs that mentally ill persons were best managed by family members or officially sanctioned experts such as police (in Morgan et al. 2008).

While VALS in no way wishes to lump together individuals with a mental illness and those experiencing other difficulties that put them at risk of exposure to intervention orders, it is of note that mental illness and other factors such as homelessness, drug and alcohol abuse and marginalisation are all areas of related concern as they are associated with criminality and victimisation (Morgan et al. 2008). What is more, it is often the case that some of these issues which are 'burdens of everyday life' are far more prevalent in individuals with psychosis than in the general population (Jablensky et al. 2000 in Morgan et al. 2008).

Responding to linkages that have been found between cognitive impairment and the criminal justice system has been in urgent need of attention for considerable time. The potential for disadvantage through involvement in the criminal justice system has endured through the lack of such mental health considerations. Howells, Thomas-Peter and Day (2004) suggest that although the criminal justice system and the health care system have fundamentally different social functions, there are areas of common purpose and interest. Both hold a responsibility to protect *all* members of the community from harm. The criminal justice system, from initial points of contact with police through to Correctional Services and release, holds an obligation to provide adequate health and mental health services to offenders.

People with a mental illness are overrepresented in Victorian prisons with 40% of prisoners experiencing serious mental illness and the proportion increases when other types of mental and psychiatric disabilities, such as personality disorders, are also considered (Deloitte Consulting 2003). Social disadvantage and inadequate treatment of mental health in the community inevitably equates to too many people with untreated illness ending up in prison:

Ill health and marginalisation, not criminality, are the drivers, but this goes unacknowledged by a justice system which often only serves to exacerbate illness, and may increase reoffending (Smart Justice 2009).

Social disadvantage and inadequate access to services being linked to negative contact with the justice system is an all too common theme for the Indigenous Australian community. Misunderstandings and misdealings with mental health matters acts as an additional contributor towards marginalisation for the disadvantaged and the disempowered.

Legal issues for people with a mental illness

Consultations undertaken by Karras et al. (2006) through the Law and Justice Foundation of NSW indicated that people with a mental illness experience particular legal issues. Such issues often reflect their financial and social disadvantage, as well as their incapacity that may be caused by their illness. The legal issues identified range from failings under the NSW *Mental Health Act 1990* and adult guardianship issues through to housing, employment, discrimination, domestic violence and family law and care protection issues. They argue: ‘These legal issues can have serious financial and personal consequences if not addressed, which highlights the importance of resolving them through accessing legal assistance’ (xviii).

Barriers to accessing legal assistance

The consultations for this same project also revealed that people with a mental illness face a number of barriers to accessing legal assistance. These barriers exist for other ‘at risk’ members of the community and include the following:

- *A lack of awareness of legal rights* – individuals do not realise that their problem has a legal element and a potential remedy.
- *Being overwhelmed*, and therefore too frightened, or lacking the motivation, to seek legal assistance.
- *Being mistrustful*, or frightened of, divulging personal information to legal service providers which may prevent the service provider from adequately assisting the client.
- *Difficult behaviour* – some individuals with mental illness may exhibit difficult behaviour that makes it challenging for service providers to assist them.
- *Lack of mental health care and treatment*, in the absence of which, can result in the exacerbation of the above barriers (Karras 2006).

In addition to these individual barriers, those that were interviewed in this research project argued that there are also systemic barriers experienced by people with mental illness accessing legal services. These include:

- *The limited availability of affordable legal services*

Given that people with a mental illness tend to have lower levels of income, they are likely to be reliant on increasingly stretched services such as Legal Aid, Community Legal Centres (CLCs), Aboriginal Legal Services and pro bono legal service provision.

- *Time constraints placed on legal service provision*

Stakeholders argued that while people with a mental illness often require longer appointment times with lawyers, the limited resourcing of CLCs, Legal Aid and Aboriginal Legal Services make this extremely difficult.

- *Remote, rural and regional issues*

Stakeholders suggested that the lack of affordable legal services is even more pronounced in rural in regional areas. The organisation and cost to travel long distances to access services can create additional barriers.

- *Difficulties in identifying mental illness*

Legal service providers may not always be able to identify that a client has a mental illness. This may result in a person not receiving the time, assistance and understanding they need to resolve a legal issue.

- *A perceived lack of credibility*

Stakeholders observed that some lawyers find people with mental illness less credible, and are less inclined to believe what they say, and more ready to dismiss their claims (Karras 2006:xix-xx).

Barriers to participating in the legal system

The Karras study (2006) also identified a number of barriers that prevent people from accessing and participating in the legal system. It was noted that while cognitive impairment is not always a symptom of mental illness, this can create barriers in understanding legal documents and their terminology and understanding legal processes within the broader justice system. In addition, features of the courtroom environment, in terms of their structure and formalities, can intimidate people with a mental illness and this has the potential to exacerbate their symptoms.

The findings also suggested certain benefits of Alternative Dispute Resolution for people with a mental illness. Concerns were raised, however, around the problem of people with a mental illness being unrepresented during the ADR process and therefore creating power imbalance between the parties involved.

Criminal legal issues

Research indicates instances where people with a mental illness may be charged with offences relating to behaviour arising from their illness such as offensive language and conduct, assault, resisting arrest and assaulting police:

*As a general rule it's usually public disorder ...where they bring themselves under notice due to their actions.*³

*A lot of our clients with mental health issues or alcohol problems get pulled up on offensive language. If they are walking a bit strangely or they look like they are under the influence, a police officer will pull them up.*⁴

People living with a disability, whether mental or physical or both, or who experience varying forms of marginalisation, live in a much more closed system than others in the community. Access to supports is therefore somewhat limited. In relation to the current discussion, access to justice, digestible information, courts, legal advice and representation that are all critically vital to aid the protection of groups and individuals suffering from illness, disability and marginalisation in instances of harassment and stalking. This needs to operate from both the application and the receiving end of a non-family violence intervention order. The intervention process therefore needs to be tailored to these considerations. In instances involving 'at risk' individuals it is specifically important to:

- treat intervention order applications seriously;
- consider carefully the appropriateness of the mediation stream for someone with an increased likelihood to be of re-victimisation and/or power imbalance;
- in the case that an intervention order application is taken out on an individual with mental and/or physical disability and/or issues around various forms of marginalisation, consider:
 - the likelihood of the alleged offender to be suffering from problems outside of their disability or mental illness etc that may contribute to their perceived offending behaviour, i.e. drug dependency, self medication, alcohol abuse etc;
 - look to address the above mentioned through referral to treatment;
 - in the case that the intervention order be made, that conditions within the order consider the practical issues that would effect compliance and likelihood of breaches; and
 - act on decisions made in the application in a timely manner;

It is especially vital that non-family violence intervention orders and breaches of these orders are taken seriously and acted on as such. This should be the case with all intervention orders but *especially* in the case of someone at higher risk of being in a vulnerable situation. The time frame in which non-family violence intervention orders are acted on is critical.

Is the streaming of cases appropriate?

The idea of streaming cases into either a 'court stream' or 'mediation stream' has obvious appeal as it attempts to divert matters away from the courts where appropriate. VALS endorses the provision of diversion to mediation as would be a move away from the more traditional and increasingly outdated adversarial methods of administering justice in Victoria.

³ Consultation with NSW police inspector in Karras et al 2006:58.

⁴ Consultation with CLC workers in October 2004 in Karras et al 2006:59.

The way in which mediation can truly fulfil a diversionary, resolution oriented and preventative aim would be if it was triggered into action earlier than generally considered in the Discussion Paper. While the option of mediation at later stages of the non-family violence intervention order system should be encouraged, VALS suggests that obtaining this form of intervention order should be provided on the condition that mediation is first attempted. Of course this early mediation would only be appropriate for the more minor disputes that are absent of violence or threats of violence or where predatory-like behaviours aren't present.

Therefore, in appropriate cases, mediation before the issuing of a non-family violence intervention order has the possibility of:

- reducing the number of unnecessary intervention orders issued;
- increasing the likelihood that matters are resolved before situations are allowed to escalate;
- decreasing the chances of sensitive and delicate situations being further disturbed and exacerbated by the issuing of a non-family violence intervention order to an unknowing recipient;
- Preventing intervention orders being processed ex parte;
- Encouraging the collection of all relevant information and facts prior to formal proceeding if later required in the court stream; and
- Providing and opportunity to engage in a restorative model of justice.

Referrals to mediation

The discussion paper outlines the potential benefits of mediating appropriate disputes to include:

- resolution of the underlying issue, resulting in a better outcome for parties;
- an opportunity for parties to learn better communication and conflict resolution skills for use in future disputes;
- a greater likelihood of compliance with the agreement resulting from mediation, as it has been made by the parties, rather than imposed by the court, leading to fewer police call-outs and fewer prosecutions for breaches of intervention order made as a result of mediation

VALS would extend this list, illustrating the vast benefits for the Indigenous Australian population of Victoria that could be provided by mediation within systems such as the Dispute Settlement Centre of Victoria (DSCV) Koori services, and extending into the wider community. The DSCV is 'committed to providing services which meet the cultural needs of Koori people and their communities through a range of initiatives including the Koori Project Officer ... the DSCV mediation panel has also trained and gazetted Koori mediators who meet the cultural needs of the Koori community'.⁵

⁵<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profile/s/JUSTICE+-+Dispute+Settlement+Centre+of+Victoria+%28About+Us%29>

While this recognition of the cultural needs of Koori persons is extremely positive by way of seeking the appropriate resolution of disputes, VALS wishes to further considerations in this area to include the following:

- VALS endorses the appropriate encouragement towards mediation of interpersonal disputes. Not only does a process of mediation have the potential to teach parties ways in which to resolve the current and future disputes, but also has the potential to limit contact with the courts.
- Resolution outside the court system (where appropriate) is of great significance to some members of the Koori community in part due to the reduced contact with a formal and intimidating and confrontational environment, reduced situations of power imbalance, and greater opportunity for respect between the parties involved.
- Mediation increases the chances of a level playing field where the disparity of power can be reduced.
- Effective outcomes can be more effectively sort by removing the intimidation of the courts that can result in apparent admissions of guilt through misunderstandings either on behalf of a Koori individual or a misunderstanding on behalf of a Magistrate who fails to recognise what is referred to as Aboriginal English (AE). (Please refer to the section addressing appropriate ways of giving evidence found later in this submission for further discussion in this area).
- Limiting contact with the courts has the potential to reduce stigmatisation.
- Opportunity to reduce future dispute situations:
 - There exists an opportunity for the parties involved to learn from the mediation process and learn skills in relation to communication and dispute resolution.
 - There is potential for healing as both or all parties have opportunity to express their side of the story. This process promotes understanding, respect for others' situation, reduces hostility towards 'the system' through better understanding of the situation and attempt at fairness administered through the justice system.
 - Relationships can be preserved.
- Likelihood of success increased. Compliance in attending methods of resolution could arguably increase if given an option outside the formal court system for some individuals.

Potential disadvantages and risks in mediation of disputes:

- re-traumatisation of victims'
- inappropriate mediation process where culturally appropriate service not provided. The result is the potential power imbalances and poor knowledge or understanding of rights; and
- inappropriate and baseless outcomes due to the failure to acknowledge Aboriginal English and the effects it has on communication of facts and events (discussed further in later section of this submission). For example a member of the Koori community may agree to an outcome to be agreeable rather than because it was their desired outcome (i.e. gratuitous concurrence).

Additionally the same individual may not fully understand the stipulations of agreements, if reached, therefore increasing chances of breaking an agreement and ending up in the court stream.

Safeguards needed as a result involve:

- *Accessibility*
 - More Koori tailored mediation model and facilities.
 - More training on cultural appropriateness in mainstream mediation.
 - Awareness and education around Aboriginal English.
 - Increased availability of mediation in regional and rural areas.
- *Increased safety measures*
 - Option for victim to pull out of mediation at any time.
 - Availability of a briefing of situation before attending mediation.
 - Available support in mediation to help address power imbalances. A member of the Koori community should be available in this role.
 - Increased awareness of various methods of Mediation such as via phone-link and methods of shuttle mediation.

The Dispute Settlement Centre of Victoria (DSCV) provides, as the consultation paper notes, a free service to help people resolve their disputes. Dispute Settlement Centre of Victoria Koori services states commitment to providing services which meet the cultural needs of Koori people and their communities through a range of initiatives including the Koori Project Officer.

The Koori Project Officer promotes DSCV services and is available to confidentially discuss any issue of dispute and mediation options. The DSCV mediation panel also has trained and gazetted Koori mediators who meet the cultural needs of the Koori community, and conducts training for Koori Communities and organisations. Koori mediators need to be trained and placed across mediation centres.

With the above positive aspects of mediation noted, it is important to address the availability of mediation proposed in the Discussion Paper. VALS argues that mediation should not be provided to parties once a non-family violence intervention order has already been taken out. If both parties are not privy to the intervention order, there is an increased likelihood that vexatious applications will be made; increased likelihood that the serving of an intervention order could exacerbate the situation to an unsuspecting recipient; and increased chance of progression in the seriousness of the situation in the interim time before mediation is organised, if at all. This last point should be stressed in the light of the common view (expressed in the Discussion Paper itself) that intervention orders do *not* act to stop the harassing or stalking behaviour in any real or long term way as it does not address the underlying cause of the dispute or pursuit.

VALS proposes the consideration of, where appropriate, intervention order applications processed on the condition that mediation has been attempted first. A similar approach has been taken in Victorian family law matters where counselling is required to be undertaken prior to the commencement of proceedings in court. It is therefore not so much dependent on the authority given to the registrars to enforce mediation, but alternatively enforced by the procedure involved in obtaining a non-family violence intervention order.

Registrars would of course remain in a position enabling them to streamline certain matters to court. The appointment of specialist registrars trained in non-family violence intervention order matters in conjunction with a dispute assessment officer, or other, who can assess the suitability for mediation in more complex cases should also be encouraged.

With this process built in to the application process for a non-family violence intervention orders, the Department's aim of encouraging mediation as stipulated in the Discussion Paper is more attainable. Also, the condition of attempted mediation on the availability of obtaining an intervention order in appropriate cases preserves the use of the courts as a last resort.

In specific response to some of the questions in the Discussion Paper relating to this area, VALS argues:

- If the matter were not appropriate for mediation the matter should be fast tracked to the court stream.
- If proceedings had started following a decision to fast track to the court stream without mediation first, the Magistrate should retain the power to adjourn proceedings so that mediation could be attempted where appropriate.
- The system should retain flexibility so that a matter may be 'reclassified' from the court stream to the mediation stream or vice versa where a decision-maker was of the view that the matter had been incorrectly classified or circumstances had changed.

Restorative Justice

At this stage in the discussion it is appropriate to address the importance of Restorative Justice and the ways in which this can and should be strived for through the revision of this legislation. The 2008 Mental Health Strategy expresses a goal in relation to victims and witnesses to increase and extend their involvement with the justice system and for offenders to reduce their involvement in the justice system. Restorative Justice Models have championed these goals through the recognition that outdated, increasingly irrelevant, culturally inappropriate, ineffective and adversarial processes in the Justice System fail to serve victims, offenders and the community.

Victims have traditionally been largely excluded from processes in the justice system. Restorative Justice considers the significance of the victims' involvement and gives them a voice in processes that affect them, justice outcomes, the offender and the community. VALS therefore recognises the benefits of Restorative Justice philosophy in the evolution of legislation in this area. As with victims in the justice system traditionally being removed from processes relevant to them, individuals experiencing mental illness are subject to question about their ability to make decisions and have control over their lives and treatment decisions and are therefore removed from systems that are supposed to be in place to assist them.

Restorative Justice has been shown to take various forms, however all show the necessity of involving *real* stakeholders that are affected. In a nutshell, the restorative objective is a shift away from ‘punishment and the infliction of pain’ to ‘repairing the harm’ (Gabbay 2005: 357).

As Restorative Justice Models have been adapted nationwide over the years, additional advantages of the conferencing process have been reported to include, among many things:

- The use of age appropriate dynamics in line with behaviour and thinking patterns of specific groups;
- Facilitates reintegration within the community;
- Consults victims in a respectful and non-adversarial manner; and
- Promotes the community’s trust in the system (Polak 2007).

It is not a stretch at all to see how the above advantages could be applied to conceptualisations of the way mediation and the non-family violence intervention order system can evolve into the future.

Should any changes be made to the definition of ‘stalking’ for the purpose of obtaining a non-family violence intervention order?

Research tells us that around 50% of those who could fit most legal definitions of stalking persist in their harassing behaviours for only a day or two and the other half will typically continue to pursue and intrude on their victim for many months (McEwan, Mullen & MacKenzie 2007). This evidence highlights the need for a broad spectrum of behaviours to be recognised. Further, it begs us to consider whether one definition of stalking is sufficient to identify matters that appropriately fall under this legislation and if one course of action for all behaviours under this legislation is wise.

McEwan, Mullen & MacKenzie (2007) suggest that the sensitivity and specificity of anti-stalking legislation could be improved if the laws recognised that stalking can differ in severity; from mildly annoying and intrusive behaviours such as multiple phone calls or text messages over a short period of time, to prolonged campaigns of intrusion involving surveillance, following and assaultive or threatening behaviour. They suggest that one consideration could be to provide separate prosecutorial options for harassing and stalking behaviours in conjunction with legislation that could more effectively target offenders attracting different levels of risk.

This form of differentiation has already been recognised in some Australian legislation. For example, in South Australia (South Australian *Criminal Law Consolidation Act 1935* s19AA(3)) a person charged with stalking can be found guilty under a lesser charge of ‘offensive behaviour’ in the case that some elements of stalking aren’t met. Similarly Western Australian legislation has a provision for an alternative offence of ‘intimidation’ as part of their anti-stalking code [*Criminal Code Act Compilation Act 1913* s338W(2)].

In their proposed model, McEwan, Mullen & MacKenzie (2007) consider a harassment offence could be defined behaviourally as a course of conduct consisting of:

- a) up to and including 10 unwelcome intrusions
- b) over a period of less than 48 hours

that is undertaken either:

- a) with knowledge that the behaviour could cause fear or apprehension in the victim, or
- b) reckless to the fact that their behaviour may have caused fear or apprehension in the victim and actually did have that affect.

They further outline how stalking could alternatively be defined and differentiated as a course of conduct consisting of:

- a) four or more unwanted intrusions continuing over a period longer than 48 hours, or
- b) unwanted intrusions that contravene an order imposed by the court

which are carried out:

- a) in the knowledge that engaging in this course of conduct would be likely to cause physical or mental harm, or
- b) with recklessness as to the fact that their behaviour would be likely to cause physical or mental harm and it actually did have that effect.

The authors believe that by ‘differentiating between types of intrusive behaviour in this fashion, the courts could then be given a greater range of remedies to deal with serious stalking offences’ (2007:215). The frequent conflation of the terms ‘harassment’ and ‘stalking’ is very understandable yet division or differentiation between the two needs to be considered in the crafting of appropriate responses to behaviour.

It should be stressed that it is always a delicate practise to put measures of time into outlines of courses of conduct as is done above, as this has the potential to greatly affect the intended workings of the system (i.e. a circumstance or situation may warrant action under an understanding of harassing or stalking behaviour yet may not fulfil requirements of occurring, for example, for more than 48 hours etc).

Mediation and violence/threats of violence

Will it ever be appropriate to mediate a case where there has been violence or threats of violence between the parties?

Effective and appropriate mediation outcomes can only be truly met if the parties involved enter into and participate in the mediation process from positions of equal power. Without a power balance, the dominance of one party over another increases the likelihood of revictimisation and a poor mediation outcomes.

It is logical to assume that where violence or threats of violence exist, that mediation should be considered extremely carefully as there is an enhanced likelihood of the presence of power imbalance and revictimisation. In some circumstances the availability of shuttle mediation or the like may be of use in reducing these negative elements. Of course the appropriateness of mediation in all its forms must be viewed in the light of the seriousness of the violence and the benefit or otherwise to both parties (i.e. case by case basis).

What behaviour should be included in a definition of ‘violence’ for the purposes of the new system?

While it is understood that family violence is unique and extremely dissimilar to most other forms of violence, the recent revision of what is considered violence within the *Family Violence Protection Act 2008* (VIC) should be noted as highly relevant to this discussion. This is because what is considered as violence in the family violence legislation recognises the plethora of avenues that violent offending can operate within.

Elements that exist outside of general conceptions of violence such as assaulting a person, emotional abuse such as threats, and controlling behaviours can be seen as violence under family violence legislation. VALS promotes the conception of violence in this way and argues that the adoption of similar elements to the non-family violence intervention order system is appropriate and useful in dealing with behaviours falling under both harassment and stalking banners.

Mediation issues and processes

In Western notions of mediation, the neutrality of the third party is what is valued. When viewed from an Aboriginal and Torres Strait Islander perspective, this is not necessarily the case. When mediating disputes involving members of the Koori community it can be viewed as valuable to have a third party that is from the Koori community. This is in part due to the increased chance that this person comes into the situation with knowledge and understanding of the community and parties within that community that are involved and the most respectful way to proceed in resolution of the matter.

Is mediation appropriate where one or both parties is a child?

The question of whether mediation is appropriate where one or both of the parties is a child depends on who falls into the category of ‘child’. Much like conceptions of “youth” and “juvenile” are ever-changing as are their definitions from jurisdiction to jurisdiction, what is considered a “child” needs to be clarified.

While for some young persons, say under the age of 12, may find the mediation stream troublesome either due to the intimidation from being in close proximity to the alleged offender, or to the process of mediation itself, likewise the court stream may present an equally intimidating and confronting process.

In the case where both parties in the dispute are young persons, all attempts must be made to prevent contact with the courts. The focus must be on diversion. This is especially the case for the Indigenous Australian population given their over-representation in the criminal justice system.

Provided that dispute resolution and mediation processes ideally provide an environment of power balance, this may be hard to ensure when one party is a child.

Matters assessed for suitability and referred to mediation

The Discussion Paper asks a number of specific questions in relation to the appropriate authority and appropriate assessment for referral to mediation. While elements of this discussion can be found in other areas in this submission, the following answers act to clarify areas the Discussion Paper seeks feedback on.

Q12: How can court registries best be linked with mediation service providers to allow for the swiftest possible referral process?

Registrars and Dispute Assessment Officers (DAOs) should all be provided with information about, and be made explicitly aware of, culturally appropriate mediation services provided within community, in Aboriginal co-operatives and within mainstream organisations where available. Parties should be made aware of the availability of these services and if there is a choice of venue or service, the parties should be empowered to have input into which mediation service they feel would be of most benefit. This could increase the probability of compliance to ordered mediation.

Availability and linking to culturally appropriate mediation is of critical importance for accessibility, engagement, compliance, ownership of the matter, opportunity for healing, and understanding of matters that may in part result from, or be aided in resolving through, aspects of culture.

Q16: What powers should registrars have in relation to non-family violence intervention order applications (e.g. to refuse)?

VALS is of the view that registrars should not have the power to refuse applications for non-family violence intervention orders unless the claim clearly falls outside what the system is designed to act on. It would be appropriate to have an appeal mechanism (Q17) where a registrar decides not to accept an application. In this case the matter would be assessed by a Magistrate and denied, or ordered into either the mediation or court stream.

Q18: What training would registrars require to undertake this role? Would all registrars do this or would it be specially trained registrars?

The effectiveness of the reviewed non-family violence intervention order system rests on the ability of certain operators at certain entry points to deal with the legislation, protocols and individuals at hand. The decisions of these gatekeepers are of critical importance to the outcome of a matter. To undertake such a weighty decision making role, registrars would be required to have robust training to be confident and proficient in making decisions of this nature.

While all registrars would be expected to have knowledge of the proposed reviewed system, there should be specialist registrars stationed to act as authority to the harder and more complex or serious circumstances surrounding a request for a non-family violence intervention order. The appointment of specialist DAOs also needs to be explored in this area.

VALS strongly urges the inclusion of cultural awareness as part of the training of registrars and DAOs. This needs to be strongly incorporated into education around non-family violence intervention order systems from the outset in order to avoid ad hoc and tokenistic practices with little effect on systemic change.

Diversion of appropriate matters to mediation after application for non-family violence intervention order is made

As touched on earlier, VALS questions whether mediation should only occur *after* an application for a non-family violence intervention order is made. In line with the discussion paper's proposed aims, mediation before the processing of an intervention order application could have the potential to deal with a matter early on and potentially prevent increased aggravation between parties through more

formal processes. Further, there would be a decreased chance of vexatious applications making their way into the system if matters could be dealt with early in the piece.

It is not beyond the realm of this discussion and this legislation to consider how mediation can act as a powerful prevention and diversionary tool. Early mediation could have unforeseen effects when you consider how seemingly minor matters can escalate into far more serious ones. For example, while neighbourhood or “backyard disputes” could be regarded in the legal profession as of lesser importance than other legal disputes, in 2000 it was found that about 28 homicides in Australia each year had their genesis in “backyard disputes” (Charlton 2000 in Kayrooz, Dalton, Colavecchio & Hibberson 2003).

The above example represents a significant issue in light of the fact that neighbourhood disputes show no sign of abating given the trend of modern society towards poor community relations especially in urban centres where there is a continuing erosion of informal social interaction (Mukherjee & Wilson 1987 in Kayrooz, Dalton, Colavecchio & Hibberson 2003).

Q19: If a previous assessment had taken place, should new facts and circumstances be required to initiate a reassessment? Who should have capacity to initiate a reassessment?

If there is increased harm or a threat of increased harm that cannot be reasonably ignored, reassessment of streaming decisions should be provided. Registrars should hold the capacity to initiate reassessment of matter that may or may not result in the fast tracking into the court stream.

Q20: Should the results of mediation be binding?

Agreements should not be binding at the mediation stage. Mediation may not be successful after only one sitting. Time may be needed for trial and error for situations for which resolution is being sought. Outcomes of mediation should be documented and agreements noted where possible. This could prove as an important tool for individuals who have attempted mediation and it has not worked. The notice of attempted mediation and failure of the dispute to be resolved out of the mediation, even if agreements were reached, should act to allow a person to go back to the registrar and put the intervention order application in motion.

What should non-family violence intervention orders be called?

Using the words ‘stalking’, ‘harassment’ and ‘violence’ in the naming of this particular intervention order needs to be carefully considered in light of possible connotations. This is important for those with limited knowledge of or existence of intervention order systems, their use, and their differentiation.

The current ‘non-family violence intervention order system’ title defines itself by what is not. In other words it is labelled in relation to its separation from family violence intervention orders. It isn’t in itself inappropriate, but is considered an exhaustive title by many stakeholders that VALS has been in discussions with in relation to submissions on this review.

Remaining possibilities may be the options of ‘restraining order’ or simply ‘intervention order’.

Applications by police

Should the police have an obligation to make, or consider making, an application for a non-family violence intervention order in certain circumstances? Should there be any limits on the ability of police to make applications for non-family violence intervention orders against the affected person's wishes?

Where a criminal charge has been laid, consideration must be given to the process that follows that particular criminal charge. If someone seeks an intervention order against someone that has criminal charges against them, one would hope that this information be readily available and alerted to registrars dealing with the request, and that a tailored decision be made in light of the outstanding charge. If, for instance, someone was requesting a stalking intervention order against a person who had recently been charged with a serious assault, this information could be highly beneficial to the registrar who might otherwise motion the applicant to mediation for an unrelated (and possibly trivial in appearance as a stand alone situation) matter.

That being said, police should be obligated to make applications for a non-family violence intervention order in more extreme circumstances where a person may not be seeking the application themselves due to fear of further victimisation or harm to themselves, a loved one or their property etc.

Determining conditions for a non-family violence intervention order

Conditions for a non-family violence intervention order need to be considered on a strict case-by-case basis. While harassment or stalking behaviours may be very similar in two separate situations, the context and environment of these matters may be distinctively unique from one another.

For example, in rural, regional and remote areas of the state, some space and place restrictions attached to an intervention order may run the risk of unfairly exposing the alleged offender to risk of breach behaviour. If, for example, the incident(s) that resulted in the seeking of an intervention order occurred in or around the sole food retailer in town, to condition an individual subject to an intervention order against entering or coming within 200 metres of that place is putting that individual in a near possible situation.

Every condition of an intervention order must therefore be considered not only in the best interests of the victim. Placing an alleged offender on an order with unconsidered conditions can result in unjustly punitive ramifications as a result of increased likelihood of breach behaviour.

Alternative ways of giving evidence

Aboriginal English (AE) has been recognised as a form of English which differs from Standard Australian English (SAE) in a number of significant ways. VALS' research (Roberts 2007) highlights a particular irony that exists for lawyers in that impersonality, direct questioning and exact dates, times and distances are commonly used to 'get the facts'. However when dealing with AE speakers these strategies may create obstacles to understanding the events which have occurred.

For example, some common types of questions identified in a report by Calma (2007) were identified as creating communication difficulties for Indigenous Australian clients in the court system such as; either/or questions, hypothetical questions, negative questions, and questions that include the use of double negatives, figurative speech or abstract concepts or references.

This report went on to illustrate:

- the use of direct questioning is generally considered rude in Aboriginal culture and may lead to the defendant answering 'I don't know' regardless of the truthful reply, because they consider the method of questioning inappropriate;
- direct questioning can result in embarrassment making the respondent appear visibly uncomfortable. This may be interpreted as a sign of guilt or an avoidance of the question; and
- the cultural issue of 'gratuitous concurrence'. This is when an Indigenous Australian agrees with a question because they wish to keep the person asking the question happy.

It should be noted that there are numerous forms of AE as dialects vary across and within jurisdictions. The above mentioned, however, have been noted as common but should not be assumed to apply to all.

Another important element to note when considering 'appropriate' ways of giving evidence for some Koori individuals making or being served a non-family violence intervention order applications involves questions relating to specific information relating to time, dates and quantities. VALS' research (Roberts 2007) in this area found that some Indigenous Australians often first provided responses that are non-specific and are more likely to relate something to something else, i.e. As and answer to the question "How many drinks did you have?", an answer could be as vague as 'Oh must have been quite a few' or specific in relation to another situation, for example 'Must be more than Freddie' (Eades 2000 in Roberts 2007).

Another consequence of Indigenous Australian's unfamiliarity with giving specific responses is that they may unintentionally give inconsistent responses and in turn be considered as unreliable. Couple the above mentioned with the inappropriateness for some Indigenous Australian individuals to mention the name of deceased persons and the complexities around non-verbal communication such as the use of eye contact, and it is clear that the effective collection of information for the appropriate allocation of referral, mediation, intervention order and attached conditions all rely on understandings of these issues when dealing with the Koori community.

The work of Eades (2000) is useful in this area which suggests the following:

- The substantial cultural gap can be in some cases be quite simply addressed by: putting more time and resources into correct translation (training 'communication facilitators'); educating the legal profession; and making jury members and solicitors aware of cultural differences and allowing more time for cross examination.
- Difficulties presented by pragmatics require more energy to reconcile. There needs to be allowance for examination to take a more conversational style and the permitting of narrative accounts or qualitative (as opposed to quantitative) evidence.

Should applications for orders against a person who is under 18 usually be heard in the Children's Court?

Applications for orders against a person who is under 18 should usually be heard in the Children's Court.

Multiple perpetrators or victims

The question around the systems ability to deal with multiple perpetrators or victims presents highly complex considerations. While an intervention order system could be greatly aided in cases of multiple perpetrators or multiple victims by a highly integrated information system, VALS would argue that the push towards mediation in itself could be useful in these complex matters involving multiple parties. This is due to the addressing of the underlying cause of the dispute as apposed to handing out multiple intervention orders that do no act to resolve anything but simply inhibit certain behaviours.

Public Awareness

A number of booklets have been published over the years aimed at increasing public awareness about the issue of stalking. In the past groups such as the Victorian Community Council Against Violence have used this medium to identify communicate a list specifying different types of behaviour that can constitute stalking and highlight stalking as a form of violent behaviour that can be perpetrated by anyone, including a partner or ex-partner. Other groups such as Victoria Legal and the Victoria Legal Foundation have previously produced booklets in an effort to increase access to intervention orders by the community (Dussuyer 2000).

This sort of proactive public awareness raising is needed from Government when making changes to systems around intervention orders. Further, this needs to happen in a targeted way where different sections (i.e. Indigenous Australians) of the community are consulted as to how this information could be best accessed by them and who can assist them with enquiries relating to processes involved in the non-family violence intervention order system. Without adequate understanding in the community, this intervention order system is likely to go unused, avoided and/or misused.

CONCLUSION

It is encouraging to see the review of the non-family violence intervention order system has engaged information seeking that is broad in scope and aims to address complex areas. VALS hopes that the review incorporates the importance of access, cultural awareness, and the benefits of a restorative philosophy in methods of mediation.

It is hoped that strong focus remains on people and communities who are at a higher risk of exposure to intervention orders resulting from the inappropriate dealing with what can be incorrectly identified as harassing or stalking behaviour in the review process. The needs of these individuals, groups and communities must be considered in order to avoid discriminatory and overly punitive measures against those who may be undeserving.

In summary, VALS has expressed the importance of the following in the current submission:

- mental health conceptions and legislative conceptions of stalking behaviour need to be somewhat aligned;
- social disadvantage and inadequate access to services is linked to negative contact with the justice system and is an all too common theme for the Indigenous Australian community. Misunderstandings and misdealings with matters acts as an additional contributor towards marginalisation for the disadvantaged and the disempowered;

- there are systemic barriers experienced by people with who are marginalised, disabled and/or suffering mental illness accessing legal services contributed to by the limited availability of affordable legal services or adequately funded and resourced legal services;
- caution around applications for non-family violence intervention orders being processed ex parte;
- the consideration of, where appropriate, intervention order applications processed on the condition that mediation has been attempted first;
- the appointment of specialist registrars trained in non-family violence intervention order matters in conjunction with dispute assessment officer, or other, who can assess the suitability for mediation in more complex cases should be encouraged;
- with the mediation condition built in to the application process for a non-family violence intervention orders, the Department's aim of encouraging mediation as stipulated in the Discussion Paper is more attainable. Also, the condition of attempted mediation on the availability of obtaining an intervention order in appropriate cases preserves the use of the courts as a last resort;
- the Magistrate should retain the power to adjourn court proceedings so that mediation could be attempted where appropriate;
- the system should retain flexibility so that a matter may be 'reclassified' from the court stream to the mediation stream or vice versa where a decision-maker was of the view that the matter had been incorrectly classified or circumstances had changed;
- While it is understood that family violence is unique and extremely dissimilar to most other forms of violence, the recent revision of what is considered violence within the *Family Violence Protection Act 2008* (VIC) should be noted as highly relevant. What is considered as violence in the family violence legislation recognises the plethora of avenues that violent offending can operate within;
- Western notions of mediation where the neutrality of the third party is what is valued does not necessarily apply for the Koori community;
- VALS strongly urges for the inclusion of cultural awareness as part of the training of registrars and DAOs. This needs to be strongly incorporated into education around non-family violence intervention order systems from the outset in order to avoid ad hoc and tokenistic practices with little effect on systemic change;
- understanding and education on the use of Aboriginal English is imperative to obtaining true justice outcomes;
- police should be obligated to make applications for a non-family violence intervention order in extreme circumstances where a person may not be seeking the application themselves due to fear of further victimisation or harm to themselves, a loved one or their property etc; and
- VALS would argue that the push towards mediation in itself could be useful in complex matters involving multiple parties. This is due to the addressing of the underlying cause of the dispute

as apposed to handing out multiple intervention orders that do no act to resolve anything but simply inhibit certain behaviours.

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