



Victorian Aboriginal Legal Service Co-operative Limited (VALS)

Aboriginal and Torres Strait Islander Clients & the Family Law System

Submission to the Family Law Council of Australia

June 2011

Victorian Aboriginal Legal Service Co-operative Limited
6 Alexandra Parade [P.O. Box 218]
Fitzroy, Victoria 3065
03 9419 3888
www.vals.org.au

*For any questions regarding the content of this submission, please contact Research Officer, Louise Hicks,
on 03 9419 3888 or lhicks@vals.org.au*

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 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 Aboriginal and Torres Strait Islander peoples to empowerment, identity and culture;
- c) Ensure that Aboriginal and Torres Strait Islander peoples 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 Aboriginal and Torres Strait Islander peoples in the criminal justice system; and
- e) Promote the review of legislation and other practices which discriminate against Aboriginal and Torres Strait Islander peoples.

For further information about VALS, please see our website: www.vals.org.au



The Victorian Aboriginal Legal Service Co-operative Limited (VALS) welcomes the opportunity to make a submission to the Family Law Council on issues within the family law system as they apply to VALS' clients. This submission is intended to build on the information provided in the face-to-face consultation VALS' Principle Family Law Solicitor and Research Officer had with Dr Rae Kaspiew and Naomi Pfitzner regarding this reference to the Family Law Council, 6 April 2011.

We also refer the Inquiry to the previous work VALS has done in the area of family law as it applies to our clients and strongly urge that these works, and the works referenced within them, are sought and independently applied to the current terms of reference, including:

1. Submission in response to the Australian Law Reform Commission (ALRC) & New South Wales Law Reform Commission (NSWLRC) *Family Violence: Improving Legal Frameworks Consultation Paper*¹

The above submission addresses issues including the following:

- The problematic nature of so called 'friendly parent' provision in section 60CC(3)(c) of the *Family Law Act 1975* as noted in the Chisholm Family Courts Review whereby this provision is appropriate in some circumstances, however it has the serious consequence of discouraging some parents from disclosing violence by the other parent (or the parent's partner).
- Where a parent wants to remove themselves and their child from violence/a threat of violence but is conflicted by the potential for this action to be used against them later in court. They are similarly conflicted if they stay in a situation under threat of violence with the intention to better their chances in court, however may be conversely accused of knowingly putting the child at risk by staying.
- VALS' Family Law Solicitors note that legal and practical reforms aimed at addressing issues arising out of interactions between relocation orders and or allegations of family violence are being heavily geared towards what the court considers to be in the best interests of the child. While acknowledging the wellbeing and safety of the child as the primary concern, VALS' solicitors warn that the parent's rights also need to be considered in any decision for the best interest of the child because in many cases appropriate consideration of the parent's rights has an effect on their ability to parent.
- 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.² This research argues that there must be more emphasis on the 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. It is argued that mainstreaming Aboriginal and

¹ http://vals.org.au/static/files/assets/dd352ce8/Fam_Vio_Legal_Frameworks_ALRC_sub_Final.pdf

² Victorian Aboriginal Legal Service Cooperative Limited, 'Exploring culturally appropriate dispute resolution for Aboriginal and Torres Strait Islander peoples' (2009) at <http://vals.org.au/law-reform-and-policy-development/submissions/post/alternative-dispute-resoution-adr/>

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. The aspect of neutrality and impartiality in dispute resolution processes also needs to be addressed from a culturally considered point of view.

2. Submission to the Standing Committee on Legal and Constitutional Affairs in response to the *Family Law Amendment (Shared Parental Responsibility) Bill 2005 Exposure Draft*³

The above submission addresses issues including the following:

- Access to legal representation prior to Family Dispute Resolution.
- Access to culturally appropriate mediation/family counselling services in mainstream and Aboriginal and Torres Strait Islander organisations.
- Changes to the language and context of the *Family Law Act 1975*.
- The compulsory nature of mediation/family counselling.
- Unavailability of family mediation/counselling in the presence of a report of family violence.

1. Ways the family law system meets client needs

1.1. Legal Assistance

The Victoria Legal Aid's merit and financial criteria have changed in recent years. Given that clients who are entitled to aid are now expected to complete Legal Aid Applications and forward us supporting financial documentation, some clients feel discouraged about continuing to engage with our service due to what they may perceive as another "barrage" of paper work. There is therefore sometimes resistance when trying to encourage client's to comply with requests relevant to securing legal aid.

VALS understands that the manner in which information is gathered for our family law clients can be hard for them, especially when distance, requiring fax and post communication, and literacy problems are factored in. We see engagement with the family law system drop off significantly in these cases.

While VALS endeavors to help clients overcome the hurdle of paperwork (by always making it clear that should a client experience difficulties in completing any forms required for family law representation, VALS is able to assist them in doing so by telephone), we consider this to be an area that could be addressed in order to better meet the needs of Aboriginal and Torres Strait Islander family law clients.

There also appears to be a significant proportion of the Aboriginal and Torres Strait Islander community who remain unaware of what the family law system is and how it operates. VALS has made attempts to increase the community's awareness of family law in the community however there is still a great need for work to be done in this area.

³http://vals.org.au/static/files/assets/40806ee1/VALS_Submission_Shared_Parental_Responsibility_Bill_2005.pdf

1.2. Family Relationship Services

The introduction in 2007 of the requirement for clients to engage with a Family Dispute Resolution Centre and obtain a Dispute Resolution Certificate prior to being able to issue proceedings has had a significant impact on the way Aboriginal and Torres Strait Islander clients engage the family law system. A large number of clients who make contact with VALS fail to re-engage after being referred to a Family Dispute Resolution Centre. Many simply “give up”, reporting a sense of frustration with what are perceived as barriers being placed in the way of them achieving desired outcomes for their children and/or grandchildren.

Those who do re-engage with VALS report a sense of frustration about the delays in securing the initial consultation with the Dispute Resolution Service Worker, and having done so, further frustration at the length of time that the services provide the other party, or parties to a dispute, to respond to invitations to participate.

Furthermore, such services are in some cases viewed with suspicion amongst community members. This is despite the services themselves having sought to make themselves more user-friendly by ensuring that service providers are trained to recognise and tailor their service to meet the needs of Aboriginal and Torres Strait Islander peoples and other culturally and linguistically-diverse clients. There is also a noticeable suspicion of “the system” by potential clients whose experiences appear to be negatively informed by their own or immediate and extended family member’s experiences of the criminal justice system and child protection system.

VALS’ community contacts have expressed to us that the reluctance to engage is often due to the fact that mediators are seen as authority figures. One employee of a Family Relationship Service said their service was experiencing difficulties encouraging Aboriginal and Torres Strait Islander peoples to utilise mediation either as a means to resolve disputes without the need for Court intervention, or as a pathway into the Court system. Practical difficulties in accessing Family Dispute Resolution services, particularly in regional areas, may also be a factor contributing to low numbers of participation.

We therefore believe that there is work to be done in this space to better meet the needs of Aboriginal and Torres Strait Islander family law clients. It is acknowledged that there is a valid intention in the requirement of parties to seek a mediation service before accessing the courts, however this is not always the best option. As this is a statutory requirement, VALS suggests that ways in which the Family Dispute Resolution can be improved should be given attention. We will point to a few examples of how this could be considered below.

1.3. Courts

One VALS Family Law Solicitor contends that some courts still struggle to come to terms with contemporary understandings of cultural appropriateness and awareness in their operation. There are also some VALS clients that express frustration with the fact that achieving results sought by them can be a slow process, with most Family Law Act matters in particular often remaining on foot for periods of up to 12 to 18 months prior to any final determination being reached.

2. Ways the family law system can better meet client needs including ways of engaging clients

Community awareness

As previously mentioned, there is a general lack of understanding within the Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander community of what the Family Law System is and how it works. In the case of Aboriginal and Torres Strait Islander members of the community, VALS solicitors suggests that one contributor to this lack of understanding is the over-familiarity with the criminal justice system and that this individual, family or community-wide thinking is entrenched in terms of how the law is perceived to apply to them.

One way the family law system can better meet Aboriginal and Torres Strait Islander clients needs includes investigating ways of engaging through community awareness raising and dispelling myths about the nature of the family law system and that mainstream legal aid, as well as VALS, provide Family Law advice and representation.

Legal advice and representation

In 2005, VALS expressed concern to the Standing Committee on Legal and Constitutional Affairs⁴ that there existed potential for people to be denied access to legal representation before they undergo compulsory Family Dispute Resolution by way of initially being turned away from the court. While we acknowledged, as we do now, the adversarial nature of the courts, it was considered that a negative impact was likely without immediate legal advice in order to address any power imbalances between the parties. We argued that legal advice prior to Family Dispute Resolution would be beneficial in that people would be aware of their rights and the legal framework into which they were about to enter.

VALS additionally argued, and we still maintain, that people should not only have appropriate legal advice and/or representation prior to Family Dispute Resolution, but they should also have access to appropriate Family Dispute Resolution Services. If a Service is culturally aware and sensitive, outcomes are more likely to be meaningful, relevant and workable for Aboriginal and Torres Strait Islander parties.

Culturally appropriate services

VALS has a history of supporting mainstream services in becoming more culturally aware and accessible to Aboriginal and Torres Strait Islander people and VALS has a number of cooperative arrangements to support this. VALS is diligently mindful of the need to have Aboriginal and Torres Strait Islander *and* non-Aboriginal and Torres Strait Islander services for Aboriginal and Torres Strait Islander peoples – the purpose of which is to cater for conflicts of interest and the personal preference of the client.

At the time of writing to the Standing Committee on Legal and Constitutional Affairs in 2005, there were no Koori mediators qualified to handle family disputes. VALS is interested if the current Inquiry will look into progress made in this area. We argued that if a Koori person was ordered to compulsory Family Dispute

⁴ Victorian Aboriginal Legal Service Co-operative Limited, 'Submission to the Standing Committee on Legal and Constitutional Affairs in response to the *Family Law Amendment (Shared Responsibility) Bill 2005* Exposure Draft', (2005) at http://vals.org.au/static/files/assets/40806ee1/VALS_Submission_Shared_Parental_Responsibility_Bill_2005.pdf

Resolution, they should have access to, if requested, a Koori counsellor/mediator. VALS also called for the funding for Koori mediators and Koori organisations to help Aboriginal and Torres Strait Islander people prepare for and navigate the new system under changes to the Act. Again, VALS is interested if the present Inquiry will be investigating movement in this area.

3. Considerations taken into account when applying the Family Law Act to Aboriginal and Torres Strait Islander clients

There are 2 main references to Aboriginal and Torres Strait Islander people in the Family Law Act. Section 61F relates to determining parental responsibility:

Application to Aboriginal or Torres Strait Islander children

In:

- a) applying this Part to the circumstances of an Aboriginal or Torres Strait Islander child; or
- b) identifying a person or persons who have exercised, or who may exercise, parental responsibility for such a child;

the court must have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture.

Also, one of the factors which the Court uses to determine what's in the child's best interests, and is the most widely used section in the act (s60CC), refers to one of the additional considerations the court should take into account as follows.

If the child is an Aboriginal child or a Torres Strait Islander child:

- the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
- the likely impact any proposed parenting order under this Part will have on that right;
- the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- any family violence involving the child or a member of the child's family

Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

- a) to maintain a connection with that culture; and
- b) to have the support, opportunity and encouragement necessary:
 - i. to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - ii. to develop a positive appreciation of that culture.

Therefore the Court is concerned to ensure that Aboriginal and Torres Strait Islander children maintain a connection to their culture and will seek to make decisions which allow this to happen. Importantly, this

has to be balanced against all the other factors in section 60CC, as demonstrated in the following case example.

“Charlie” is a VALS client that lives in interstate and their non-Aboriginal partner took their children and moved to Melbourne. VALS’ Family Law Solicitor included information in the Affidavit about the children’s link to their Aboriginal culture in that State, however the Court still ordered that in the interim at least the children stay in Melbourne where they have zero connection to culture, largely due to the Mother’s allegations of domestic violence against our client.

4. National Indigenous Law and Justice Framework

The first stated goal of the National Indigenous Law and Justice Framework is to improve all Australian justice systems so that they comprehensively deliver on the justice needs of Aboriginal and Torres Strait Islander peoples in a fair and equitable manner. The objective under this goal is to provide Aboriginal and Torres Strait Islander peoples in urban, regional and remote settings with access to services that are effective, inclusive, responsive, equitable and efficient. VALS argues that this objective and respective goal relates to our ongoing struggle to retain adequate funding.

Action 1.1.1c of this objective is to increase employment and retention of Aboriginal and Torres Strait Islander peoples in justice and justice-related programs, policy management and service delivery. VALS argues that our service is limited in our ability, due to our historical challenges in obtaining equitable funding, to further encourage increased employment and retention of staff.