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**VALS submission in response to the Attorney-  
General's Justice Statement 2, 'The Next  
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## INTRODUCTION

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) recognises the significant work done in the Attorney-Generals Justice Statement 2. The Justice Statement is positive in that it seeks to improve justice issues in Victoria for the future in addition to the initiatives already in motion following the initial Justice Statement from 2004. VALS' submission in May 2008 for the proposed Justice Statement 2 detailed concerns and recommendations at length and we take this opportunity to reiterate some areas that have not been actioned or been given reference in the Justice Statement 2. We also take the opportunity to make some additional comments in response to the content in the Justice Statement 2.

The areas that will be discussed in this submission are:

- Enduring 'tough on crime' discourse, resulting in increased imprisonment which concerns VALS given the impact on its clients.
- VALS' valuing of a holistic notion of restorative justice. Also, VALS' valuing of not simply alternative dispute resolution, but *culturally* appropriate dispute resolution.
- Infringements Act and the need for flexibility.
- The need for practical training for legal practitioners about the Charter of Human Rights and Responsibilities.
- Specific measures to achieve substantive equality.
- Need for further detail and consultation on the Youth Peer Justice Panels.
- Disappointment that the Justice Statement 2 displays no consideration of decriminalisation of public drunkenness.

### Enduring 'tough on crime' discourse

Overall the Justice Statement 2 conveys a positive restorative and healing orientation when considering the larger picture of the criminal justice system. However, VALS expresses concern towards the response that the Justice Statement 2 gives to the reported increase in number of people sentenced to imprisonment by the higher courts by a factor of 22 per cent between the 2000-01 and 2006-2007 periods, stating: 'The government has backed up its *tough approach* to serious crime by providing in the 2008-09 Budget for an extra 594 prison beds to accommodate the rising prison population' (14: italics added).

While VALS recognises the appropriateness of dealing firmly with serious offenders, the continuing presence of a 'tough on crime' discourse throughout the justice system promotes increased prison beds as the answer to a rising prison population. There have been numerous investigations into punitive policies and practices and their negative effects on various marginalised groups. Despite this available knowledge produced over recent decades, the actions of those in power as well as the wider public encourage the trend towards an increasingly punitive society. As the punitive script prescribes, it is held that the stronger the penalty, the greater the deterrence to the act of the crime.

This is simply not the case. As articulated by Cunneen, the fact remains that in their present form:

*Prisons do not disappear problems, they disappear human beings...mass incarceration is not a solution to unemployment, nor is it a solution to the vast array of social problems that are hidden away in a rapidly growing network of prisons and jails ... prisons do not work. Racism has undermined our ability to create a popular critical discourse to contest the ideological trickery that posits imprisonment as key to public safety (2000: 2-5).*

An in-depth investigation into the failings of tough on crime measures to the deal with crime and the negative impacts of punitive policy on the Indigenous population in the face of alternatives will be sent when it is available. VALS is currently working on the document.

### **Alternative Dispute Resolution (ADR) and Restorative Justice**

VALS welcomes the attention the Justice Statement 2 gives to issues of equal opportunity and addressing disadvantage through the promotion of problem solving courts, recognition of issues around access to legal assistance, and the support for Alternative (or Appropriate) Dispute Resolution (ADR).

As mentioned in VALS' submission in preparation for the Justice Statement 2, there is still a concern that in its present form, ADR reflects western cultural values and therefore has the potential to alienate Indigenous Australians who are consequentially disadvantaged by the presence of a power imbalance. For example, when considering mediation, Indigenous Australians favour a mediator's personal involvement and/or first hand knowledge whereas non-Indigenous Australians value the neutrality of a mediator.

Cultural values and traditional structures shaped by the input and decision making of Indigenous Australians towards ADR implementations is needed if existing power inequalities are to be remedied. VALS will send when it comes to hand further research it has done on culturally appropriate ADR.

The attention the Justice Statement 2 gives to ideas around Restorative Justice is encouraging, however fails to recognise the scope of measures that relate to this ideal. The Justice Statement 2 recognises the way in which Restorative Justice engages the offender as far as taking responsibility for their actions and providing explanations to victims of crime and purports that the aim of Restorative Justice Programs is to improve victims' satisfaction with the justice system. VALS recognises the importance of giving a place for victims of crime to participate in the justice process as this is often not the case in the traditional Court setting. However, this should not be viewed as the central aim of Restorative Justice Processes.

Restorative Justice looks at crime through a much wider lens, seeking holistic solutions that not only aid the healing of the victim, but also aims to assist a process of healing of the offender and the community. VALS therefore cautions against the limited idea that ‘benefits for victims’ is the ‘primary reason for pursuing development of restorative justice approaches’ (29). In addition, when the Justice Statement 2 refers to the wider community benefits of restorative approaches, again the victim’s journey – aided and supported to move on, requiring less long-term assistance, and are sooner able to return to work – is of primary focus. Positive outcomes for victims of crime is a significant factor in restorative models, however the outcomes for the Indigenous community go well beyond this individual aspect.

Establishments such as the Koori Courts, and the Police Cautioning and Koori Youth Diversion Program have gone to great lengths to engage the Koori community in the justice system while simultaneously giving ownership to Indigenous Australians. These measures, amongst others, have aided in limiting Indigenous contact with the criminal justice system, created a less alienating justice system, reduced rates of recidivism, and has increased Indigenous input into the healing of offenders, victims, and the broader community. Recognising and supporting the far reaching potential of Restorative Justice Initiatives gives *all* participants in the criminal justice processes a chance to have their dignity recognised.

VALS supports Culturally Appropriate Dispute Resolution (CADR). The allocation of \$6.2 million to expand ADR initiatives into regional Victoria signals confidence in the merits of community-based services. It is strongly recommended that this expansion process will entrust flexible models that allow for culturally appropriate dispute resolution processes rather than relying on mainstream western models of mediation as outlined earlier. This is an essential factor in increasing the likelihood for Indigenous Australians being able to access justice. As ADR moves away from adversarial models in the administration of justice, the opportunities for parties involved in disputes to participate in the justice process is increased.

Work is needed in the area of awareness raising in order to correct the widespread misguided public profile of ADR and other restorative justice initiatives that are frequently criticized as being a soft option that leans in favour of offender needs. In order to address the systemic discrimination permeating the criminal justice system, restorative justice measures need to be given a public profile to counter these misconceptions. Awareness around restorative justice as a ‘smart on crime’ mechanism that benefits victims, heals and strengthens communities, promotes rehabilitation and reduces re-offending is vital to this end. As a result, confidence in these criminal justice measures by the public also has the potential to strengthen cultural awareness and trust placed in the justice system.

## **Infringements Act**

The operation of the *Infringements Act* is an area for ongoing and careful scrutiny by the Government. VALS encourages the intended improvements to fairness by simplifying forms to make them more accessible to culturally diverse communities. In order for this process to be truly accessible, however, systems must be in place in support of forms relating to fines so that individuals are aware of their options, rights and responsibilities in such matters. This is of vital importance to socially disadvantaged groups in the community, such as Indigenous Australians who, through the failure to pay fines and respond to infringement notices, are likely to incur further and compounding penalties and therefore increase their contact with the criminal justice system. While the usefulness of the proposed instalment payment plan is apparent, it should be noted that for some members of the community, a more flexible model is necessary in order to reduce the likelihood of further penalty following failure to adhere to a payment plan due to monetary constraints.

## **Charter of Human Rights and Responsibilities**

The enactment of the Charter of Human Rights and Responsibilities represented a positive step towards the strengthening of human rights protection in Victoria. While a review by the Equal Opportunity and Human Rights Commission found the Charter to have significant impact, through the expansion of the public policy parameters in Victoria to include human rights assessment of new laws, the usefulness and applicability of this Charter has not yet been realised.

While recognizing the infancy of the Charter, having taken full effect in January 2008, VALS believes initiative needs to be taken to encourage the effective adoption of the Charter by legal practitioners. In order to do this, it is suggested that practical training for legal practitioners be provided about the Charter.

This training would:

- raise awareness of the Victorian Charter of Human Rights and Responsibilities;
- encourage and support legal practitioners to pursue effective advocacy work on behalf of clients through practical application of human rights and Charter arguments;
- promote the efficient practice of law in Victoria; and
- achieve better outcomes for clients.

There is need for such training as it is currently not provided and the Federation of Community Legal Centres Human Rights Working Group has evidence that Community Legal Centres (CLCs) want to know how to use the Charter in practice. The Working Group is in the process of producing the 'CLC Needs Analysis Report' which at preliminary stages indicates that the Charter is currently under-utilised by the majority of

Victorian CLCs and the most commonly cited reason for this is a lack of time and resources for CLC staff to engage with the Charter.<sup>1</sup>

### **Substantive Equality**

The Justice Statement 2 echoes the emphasis on substantive equality expressed by VALS' submission to the Department of Justice in response to the proposal of the current justice statement. The Justice Statement 2 communicates 'it is time to place a greater emphasis on the need to achieve *real* equality, as well as formal equality ... formal equality is about providing the same legal rights to everyone but often fails to recognise the differences that may exist between groups ... strategies to achieve real equality recognise these differences and seek out ways to overcome them, including adopting special measures that focus on particular disadvantaged groups' (22). On this point VALS wishes to reiterate specific measures mentioned in our submission to the proposed Justice Statement 2:

- **Indigenous Community Engagement Officer**

This role is currently only provided at the Dandenong Magistrates' Court. Data indicates the success of this role as the number of Indigenous Australians assisted has strikingly increased since the position was introduced. This represents a clear example of increased community engagement with the Court system.

- **Aboriginal Liaison Officers**

This role is only available in the Magistrates Court jurisdiction. Such a role should be provided in all Courts, such as Family Courts. In addition, VALS argues that there should be more than one Aboriginal Liaison Officer at Melbourne Magistrates' Court.

- **Diversion**

Diversion options that are made available at some Courts are not available at others. This needs to be rectified. In addition, mainstream diversion programs are not accessible to Indigenous Australians and therefore engagement needs to be improved. It is for this reason that VALS undertook the Koori Youth Cautioning Pilot.

- **Community Legal Education**

If organisations such as VALS increased capacity to provide community legal education, which included a legal clinic, community engagement could be better fostered. As stipulated in detail in our May 2008 submission, community education campaigns should be: targeted, regular, flexible and informal in

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<sup>1</sup> Federation of Community Legal Centre - Human Rights Working Group 'CLC Needs Analysis Report' which is likely to be available in February 2009

structure, providing handy and desirable education materials, held at an accessible venue, harbouring two-way communication, and providing draw cards such as entertainment and refreshments that increase the likelihood of significant and ongoing attendance.

### **Youth Peer Justice Panels**

In line with the overall orientation of the Justice Statement 2 in the modernisation of Victoria's legal system there exists the prospective development of Youth Peer Justice Panels. VALS supports Youth Peer Justice Panels in principle, but without further detail cannot support it in entirety.

With the aim of growing towards an engaged court system, the present Justice Statement points to a justice system where youth are involved. Possibly in the form of a diversionary option, these panels may utilise youths as prosecutors, jurors, mentors and advocates. It has been argued that youth panels can greatly enhance the ideals of accountability, positive peer influence, competency development, empowerment and community participation for young people (Omaji 1999).

With the Justice Statement stating judgement by peers being proven as an effective tool in holding youths accountable, delicate and significant issues surrounding this proposed mechanism need to be addressed. Concerns noted by those interested in the prospect of developing youth peer panels appear to exist in similar volume to opinions singing its merits. VALS' particular concerns are as follows:

- In a situation where youths are in a position of dispensing justice to their peers, it is imperative that peers *are actually peers* and not youths from far removed economical or cultural situations than that of the alleged offender. Without this assurance, there is increased potential for indirect discrimination resulting from predisposed presumptions about certain people whose situation is far removed from their own. The panel of youths should be reflective of society. This is an especially critical point when you consider the establishment of specialist judicial mechanisms such as this being driven by a philosophy of appropriate engagement in the justice system that promotes possibilities of healing, problem-solving, and therapeutic direction.
- The question needs to be asked whether appointed youths to various positions in peer panels can be, even with adequate training, equipped to deal with instances when offenders present with sometimes serious and multifarious needs.
- The possibility exists that the teen justice peer panel will be doubling up on youth diversion schemes already established in Victoria. While the philosophy behind the proposed model serves many positives, interference with other diversion programs may give rise to complications and interference.

- If minor offences are being directly dealt with through existing schemes, the additional or separate benefit for these panels needs to be explicitly articulated. Without this clarification there is room for systems working against each other rather than in a complimentary fashion. This calls for consideration of the benefits of possibly combining youth diversionary mechanisms, or alternatively ensuring the design of the panel does not compromise other operations in this area thereby establishing clear roles and unique purpose.

VALS recommends that for an effective Youth Peer Justice Panel model to exist, not only does there have to be extensive consultation with the relevant organisation and bodies, but *as important* is that youths themselves are involved in the consultation and formulation process. VALS recognises that the value placed on youths as citizens, who can accrue increased respect for the justice system, is flagged through the consideration of youth justice peer panels.

This strategy has been applied elsewhere, with the United States using this tool of peer influence and mobilisation in the reduction of delinquency and recidivism in some youth courts boasting of a 95% success rate (Omaji 1999). A Victorian model, however, should not be based solely around the success of an overseas model. Instead, success of this internationally based project should be taken as encouragement towards formulation a tailored local model to fit the specific and unique needs of the young Victorian populous. Investigation into this area also needs to consider:

- The appropriateness of various forms of punishment available to be handed down;
- The limits placed on what offences can be heard by the youth peer justice panels and which ones cannot, i.e. should the scope of these panels only be utilised so far as minor offences such as vandalism? etc;
- The potential to decrease instances of stigmatisation using an alternative avenue to mainstream criminal justice procedures; and
- The serious possibility that youths handing down punishments to other youths, especially those who are closely affiliated, may give rise to instances of ‘teen warfare’ (Omaji 1999).

### **Decriminalisation of Public Drunkenness**

On a final note, VALS again draws attention to the issues surrounding public drunkenness.

Existing legislation in Victoria continues to treat public drunkenness as a criminal offence as opposed to a public health and safety issue. In our submission in response to the proposed Justice Statement 2 in May 2008, an in-depth examination of the negative impacts of public drunkenness laws was stipulated and reasons to decriminalise provided. It is with disappointment that the Justice Statement 2 displays no consideration to these

issues as part of the modernisation of the justice system through the reform of criminal law.

VALS fervently urges the Department of Justice to address this issue and treat it with the urgency it requires as Victoria remains the only Australian state where being drunk in a public place itself is considered a criminal offence. This represents a justice system in Victoria that is lagging behind rather than standing as a champion of modernised systems of justice.

## **CONCLUSION**

VALS expresses appreciation of the significance of the Justice Statement 2 in seeking to improve justice issues in Victoria. VALS repeated concerns and recommendations from its original submission of May 2008 and included additional comments.

The main arguments VALS wishes to convey are:

- The endurance of a ‘tough on crime’ discourse, which is in part evidenced in the Justice Statement, has a negative effect on various marginalised groups such as Indigenous Australians.
- Whilst it is positive that the Justice Statement 2 gives recognition to restorative justice, VALS’ conceptualisation of restorative justice is broader than that in the Justice Statement 2 and does not solely focus on the victim. Instead, VALS is inclusive of the offender and community.
- Moves towards appropriate Alternative Dispute Resolution (ADR) are positive, but it is imperative not to assume that what is an ‘appropriate’ model of dispute resolution for one group of people is appropriate for another. Culturally appropriate dispute resolution is vital.
- The proposed infringement instalment payment plan is useful, but a more flexible model is necessary in order to reduce the likelihood of further penalty following failure to adhere to a payment plan.
- There is need for practical training for legal practitioners on the Charter of Human Rights and Responsibilities in order to achieve effective legal advocacy.
- Some ways to achieve substantive equality are to provide:
  - Indigenous Community Engagement Officers at more than one Court;
  - Aboriginal Liaison Officers in Courts other than the Magistrates Court (ie, Family Courts);
  - Koori Courts for all Indigenous Victorians regardless of where they live;
  - Diversion options available to all regardless of where they live or which Courts they go to; and
  - VALS’ capacity to deliver Community Legal Education that includes a legal clinic (funding).

- VALS supports the Youth Peer Justice Panel proposal in principle, but further work is required in developing a model and so VALS will reserve its approval until the proposal details become apparent.
- It is imperative that peers *are actually peers* and not youths from far removed economical or cultural situations than that of the alleged offender.
- Victoria is lagging behind the remainder of Australia in not decriminalising public drunkenness which should be seen as a public health and safety issue rather than a criminal issue.

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