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**VALS' submission to the Sentencing Advisory Council in response to Sentencing Practices for
Breach of Family Violence Intervention Orders - Confidential Draft for Comment
Sent 16 February 2009**

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INTRODUCTION

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) welcomes the opportunity to comment on the Sentencing Advisory Council's draft Sentencing Practices for Breach of Family Violence Intervention Orders Report.

The passing of the *Family Violence Protection Act 2008* (Vic) brought a number of positive changes, some of which aimed to protect victims through improvements to the intervention order scheme and increase the rate of reporting and prosecution of Family Violence.

Examining sentencing practices for breach of Family Violence Intervention Orders is the next step in refining the process through which concerns of inconsistent sentencing and sentencing that does not reflect the seriousness of offending in some cases can be addressed. Further, this process is important in order to address misguided sentencing practices for breaches that often occur in the name of taking a hard line against Family Violence, but fail to result in sound solutions to victims, offenders or the community as cycles of Family Violence continue.

The response by organizations such as VALS on topics related to Family Violence is critical, particularly in the light of the myth in Australia that Family Violence is part of Aboriginal culture. This misconception is detrimental to all Indigenous Australians (including men) as it may, among many things:

- Undermine the merit of alternative dealings with Family Violence by Indigenous Australians in place of some criminal justice approaches;
- Influence police in that they may not act on Family Violence within the Indigenous Australian community in the same way they do the non-Indigenous Australian community;
- Have the potential to obstruct the access to, and appropriateness of, men's participation in behavioural change programs; and
- Act towards the persistence of systemic discrimination that occupies many levels of society, government, law enforcement and justice systems.

This submission highlights the perspective of Indigenous Australians revealed through VALS' and other research:

- * VALS outlines the dynamics of Indigenous Australian Family Violence and the response to it, discussing why Indigenous Australians may be reluctant to use justice systems;
- * VALS engages in an examination of the pros and cons of a criminal justice and restorative justice response to Family Violence;

- * VALS urges that reforms relating to breaches of Family Violence Intervention Orders should be reflective of a trend away from seeing imprisonment as the only solution to crime, the “tough on crime” approach as opposed to restorative justice approaches, the “smart on crime” approach;
- * VALS expresses support for men’s behavioural change programs with a disclaimer that they should not only be made available to people convicted of Family Violence; and
- * VALS supports calls for relevant information about Family Violence to be made available to Courts.

Indigenous Australian Perspectives Require Particular Attention in Family Violence Matters

Shocking statistics revealing the instance of Family Violence in Indigenous communities continue to highlight a complex societal problem out of control. For example, Queensland’s Aboriginal and Torres Strait Islander Women’s Task Force on Violence has documented violence against Indigenous women in some areas as being estimated at a rate of 45 times more likely than for non-Indigenous women, and ten times more likely to die as a result (Memcott, Chambers, Go-Sam & Thomson 2006).

Despite the statistics on the incidence and nature of Family Violence being imperfect due to under-reporting, and problems around access, research results continue to reinforce the disproportionate occurrence of Family Violence in Indigenous communities of Australia and the resulting traumatic impact (Memcott et al. 2001 in Mouzos & Makkai 2004).

The higher prevalence of Family Violence in the Victorian Indigenous community is widely understood to be influenced by the impacts of contemporary social and economic marginalisation coupled with the historical impacts of colonisation and associated disruption to Indigenous culture and identity (VicHealth 2007). Therefore, any response to Family Violence in Indigenous communities needs to acknowledge the social, cultural and historical context of that community (PADV 2003 in VicHealth 2007). This includes the response to breaches of Family Violence Intervention Orders.

Family Violence is an extremely complex problem and reservations about the extent to which the criminal justice system can stop or deter violent behaviour are widespread. Research conducted by VALS in 2005 highlighted that the criminal justice system was generally seen by members of the Australian Indigenous community as ineffective in responding to each the following objectives:

- Putting an end to violence;
- Preventing further violence for an individual victim through changing the offenders behaviour;
- Punishing and holding the offender accountable for their violence;
- Sending a message to the community that domestic and family violence is wrong in the hope of altering the attitudes and behaviour of community members;

- Supporting the victims by validating their stories and experiences;
- Repairing the relationship between the offender and the community; and
- Compensation to the victim.¹

Further, this research identified that the Indigenous Australian community found Intervention Orders as having little impact on the behaviour of the offender. Overall, ‘access and implementation of Intervention Orders were seen as ineffective in responding to the reality of family violence in the Indigenous Australian Community’ (9).

While it is not the purpose of the current discussion to address such variants as education, socio-economic status and employment disadvantage in the Australian Indigenous community, it is important to remember the numerous factors in play when considering Family Violence. Two such factors are the way in which we deal with coming to the aid of victims of Family Violence, and the best way to prevent and/or reform violent behaviour.

Family Violence Intervention Orders are one way the justice system aims to intervene in Family Violence situations. In light of conceptual and procedural shortcomings and the way breaches of such orders are dealt with.

Reasons for Reluctance to use the Legal System

The first area that needs to be addressed is the effective utilisation of a Family Violence Intervention Order and Breach of Family Violence Intervention Order proceedings by those requiring assistance of the criminal justice system. Substantial evidence suggests that Indigenous Australian women are much more likely to be victims of violence within the family, and to sustain injury, than non-Indigenous Australian women (Strategic Partners 2003 in Mouzos and Makkai 2004). The problem of Family Violence in Indigenous Australian communities arises from no one factor. There is a web of contributors to situations that Family Violence arises out of.

The present draft aims to address the low rate of prosecution for Family Violence matters despite recent reforms. The first point of note is the hurdles to reporting Family Violence in the first instance. In instances of Family Violence there is often a reluctance to report such violence or seek help either due to fear of the offender, fear for children and pets, not wanting the offender arrested, belief that the incident is too minor or trivial to report, little faith in the power of the police or another agency to help, and/or feelings of shame and guilt.

It also has to be understood that Family Violence is unique and extremely dissimilar to most other forms of violence. Women who are victimised by a stranger are more likely to perceive the incident of violence as a crime than women who are victimised by a person known to them, who are more likely to describe the incident as ‘wrong but not a crime’ (Mouzos & Makkai 2004: 96). It is therefore clear that it is not only the closeness of relationship that can be a factor in the non-reporting behaviour of Family Violence victims, but there is also a lack of understanding of the laws that deal with acts of Family Violence, what these laws do, and what behaviours are legitimate for attention under these laws.

¹ Interestingly one of the lowest ranking objectives in terms of perceived effectiveness through the criminal justice system was ‘stopping the violence’.

While the focus of the draft report is on the Court response, specifically the sentence imposed for a breach of a Family Violence Intervention Order, the police response is also relevant as actions on behalf of a victim by police are determining factors in the volume and nature of breaches that will present before the Court. Additionally, the presentation of information to the Court is central to sentencing processes. This is of critical concern when considering the negative experiences the Australian Indigenous community traditionally has during police engagement.

For this reason, not only does the Indigenous community need to be engaged by Community Legal Education regarding police involvement and powers in Family Violence situations. Additionally, police attitudes and misconceptions around what constitutes Family Violence need to be addressed in unison with Family Violence and cultural awareness training. This is not to say that the majority of police officers are not committed to the protection of victims of Family Violence. It may be the case that insufficient training relating to Family Violence and the seriousness of breaches, which may manifest in seemingly insignificant or minor acts on behalf of the offender, is predominant.

For many there is deep confusion about the system and the processes and their rights. A lack of information and understanding is a significant barrier to a person's ability to make successful decisions. This absence of knowledge and presence of confusion not only surrounds what happens during police attendance to a Family Violence situation, but also around the prosecution process and options for sentencing.

Education is the key to reducing violence, and this can be achieved by increasing community awareness, and informing women of their rights and available support. Given that many women who experienced violence chose to confide in friends or work colleagues about their experiences, suggests that increasing community awareness would also enable family and friends to respond appropriately and supportively... Similarly, the level of service fragmentation across Australia seems to hamper the effective delivery of social services to people in need (Mouzos & Makkai 2004: 114).

Sentencing Practices

VALS would hope that any maximum penalty for a breach of a Family Violence Intervention Order is reflective of an awareness of the dynamics of Family Violence and recognises the dangerous trend towards seeing imprisonment as the only solution to crime as opposed to restorative justice approaches.

Item 3.5 states that '(t)here is no specific guidance as to how family violence cases or breaches of Family Violence Intervention Orders in particular should be treated by the courts, other than general statement from the higher courts.' Obviously work is urgently required towards guides for best practise specifically tailored to Family Violence Intervention Order breaches. VALS argues that consistency in sentencing will be greatly hindered without this tool.

“Tough on Crime” versus a “Smart on Crime” Approach (i.e. Restorative Justice)

VALS disagrees with item 3.19 where it is stated that '(t)he effectiveness of Family Violence Intervention Orders in protecting the victim by “stopping the unwanted behaviour” depends on the “threat of the consequences for the breach” and if ‘penalties upon successful prosecution are perceived as light, then arguably there may be little impact on defendants’.

This sentiment assumes that harsher penalties are a primary element in changing offender behaviour. Research strongly suggests the converse. It is true that breach of Family Violence Intervention Orders is a serious offence that needs to be dealt with in a way that reflects the denouncement of such behaviour. Sentencing that is symbolic of this through the use punitive measures such as prison time, however, is simply that – “symbolic”.

Instead of employing the increasingly irrelevant “tough on crime” stance, and statistically unsupported methods that accompany it as a display of seriousness in dealing with breaches of Family Violence Intervention Orders, VALS argues for a “smart on Family Violence” approach. This approach demonstrates the seriousness of Family Violence Intervention Order breaches through consideration of the cause, and actions towards behavioural change and healing.

In a submission to the Victorian Government in response to the ‘Review of Family Violence Laws Report’ (2006), VALS defined a “Smart on Family Violence Approach” as one that uses a criminal justice approach strategically and recognizes the limitations of punitive interventions, the importance of applicant empowerment, healing and the need to encourage community support to address this issue. The submission discussed:

- Restorative justice;
- Criminal justice response that deals with Family Violence as a safety issue, as opposed to a punitive issue; and
- Meeting the needs not only of applicants of Family Violence, but also perpetrators.

A smart on Family Violence approach also reflects an awareness of the following:

- The deterrent effect of imprisonment is questionable. The use of the criminal justice system to stop violence is only ever partially successful. In spite of vociferous calls for longer sentences from pockets of the public there is criminological evidence that more punitive sentencing has no or a negligible effect on the level of crime being committed. In an article in 2002 “the weight of expert opinion is that harsher sentencing brings about small, if any, reductions in the crime rate”.²
- That there is a false dichotomy that holds the criminal justice system as retributive and restorative justice as reparative. Daly (2002) argues that we must stop viewing restorative justice as existing as the converse of justice.
- Whilst the issue of assisting applicants is positive, the criminal justice system is not the only option to achieve this. Also, the needs of perpetrators should not be forgotten as a result of emphasis on applicants. If the needs of perpetrators are addressed, then applicants are likely to also benefit.
- There is a place for a criminal justice response to Family Violence, but punitive measures alone are not enough to address Family Violence. Also, there is a need to minimise

² Leone Vikki ‘Crime and doing time’ *The Age* 4 September 2002 as at <http://www.education.theage.com.au/pagedetail.asp?intpageid=962&strsection=&intsectionid=0>

reliance on the criminal justice system as to do so is impractical and ignores the scope of the problem. In other words, a smart on crime approach does not advocate the decriminalisation of Family Violence but argues for the creation of space for alternatives to a criminal justice response that either operates alongside it or within it.

- Indigenous Australians are over-represented in the criminal justice system and as such it is preferable that responses to Family Violence are not based solely on the punishment of the person who has used violence. Such a system is unlikely to be perceived as one of assistance to Indigenous Australian people who have a shared consciousness about the consequences of colonisation.
- Family Violence occurs in the context of a family. As a result, the response to Family Violence should not necessarily be the same as that to violence towards a stranger, but adapt to the unique dynamics of Family Violence.
- Due to the dynamics of Family Violence, a criminal justice response to Family Violence is not the only option with merit. Instead, other options such as restorative justice that are more flexible and able to take into account the unique and varying dynamics of Family Violence should be offered.
- A policy approach that relies solely on legal casework provision will ignore prevention and community strengthening approaches. Applicants need assistance to influence these policy issues. The Victorian Indigenous Australian Family Violence Strategy advocated a community strengthening approach rather than one based primarily on a criminal justice approach.

The Council highlights the importance of sentencing responses being appropriate given the weighty impact on how breach behaviour is perceived by victims, offenders and the wider community (item 3.1). VALS urges the Council to consider whether the above item was considered through a lens catering to the wider public and is all-inclusive, or alternatively devoid of an Indigenous perspective. How breach behaviour is perceived, and the sentencing option appropriate in response to that breach, may be different for Indigenous Australians and other members of the public.

This may not always be the case, however there are strong arguments for some Indigenous Australian's perspective on appropriate sentencing focusing more heavily on causes of offending and healing of victim, offender and community rather than empty retributive measures such as prison. Further discussion addressing alternatives to prison as appropriate sentencing options for breach of Family Violence Intervention Orders can be found in later sections of this submission.

Some arguments strongly warn that in cases that involve gendered harms, such as Family Violence, restorative justice cannot only be seen as diversionary (which restorative justice practices has been greatly modelled towards in Victoria and Australia through a focus on juvenile offending) but also clearly condemning offending behaviour.³ For this reason, any restorative practices during or following sentencing need to be focused to the unique nature of Family Violence.

³ See Hudson 1998 and Daly 2002.

A major concern in the use of restorative justice responses to instances of Family Violence involves the possibility of re-victimisation. The likelihood of this is increased when considering the intimacy of some Indigenous Australian persons living on reserves and outstations where shame might be thrust upon women and children rather than the offender.

However, one Queensland study showed Indigenous Australian women viewed the 'criminal justice system as a part of the ongoing oppression of their people, as not involving Indigenous people, failing to solve the underlying problems, and having the potential to exacerbate violence by the offender and his family against a woman and her children' (Nancarrow 2003 in Stubbs 2004: 9). In the same study, the Indigenous Australian women felt that some problems were 'too big' for communities to deal with and in these cases a criminal justice response was needed for cases of serious violence. There is therefore a clear indication that a collaboration of complimentary efforts is required.

Another Way of Advocating for a “Smart on Crime” Approach

In a previous submission (2006) VALS' sought to explain the distinction between a “tough on crime” approach and a “smart on crime” approach by discussing the notion of a safety lens.

Safety lens

VALS argues that Family Violence should be dealt with as a safety issue, as opposed to a punitive issue, in the context of the criminal justice system. VALS argues that an appropriate balance should be struck between safety, accountability and agency.

The problem with the goal of safety is that the path to achieving it can be considered in numerous ways. Some people place primacy on a criminal justice response which in effect gives primacy to the accountability of perpetrators. Indigenous Australian persons are more likely to emphasise the importance of agency (e.g. the applicant's capacity to make decisions) but also emphasise a more holistic way of the perpetrator taking more responsibility and the community taking more responsibility.

VALS argues that more attention should be given to an agency approach to safety that acknowledges that applicant just wants the violence to stop, rather than the perpetrator to be prosecuted. The criminal justice system should respond to this dynamic of Family Violence by dealing with Family Violence as a safety issue, as opposed to a punitive issue.

Ways in which the criminal justice system could treat Family Violence as a safety issue as opposed to a punitive issue:

- Develop protocols which attempt to correct systemic bias in police use of discretion. This approach would provide an ongoing means of police improving their response to Family Violence.
- Provide training to police officers on how to treat Family Violence as a safety issue as opposed to a conviction issue.
- Given the underfunding of Indigenous Australian organisations, particularly in the context of Family Violence, it is recommended that Indigenous Australian community agencies should be resourced to provide services to people responding to Intervention

Orders and Breach of Intervention orders (i.e. alternative accommodation etc) who in the majority of times are men. At the Indigenous Australian Women's Justice Forum in March 2005, women attending the forum called for more services for their men.

- In light of barriers for Indigenous Australians towards learning about their rights, community sessions that target Indigenous Australians are appropriate. To ensure success, Indigenous Australians should be involved in the sessions (i.e. partnership between Indigenous Australian community and Government in delivering the sessions). Financial and other support needs to be provided to relevant Indigenous Australian agencies involved in raising awareness about Family Violence in the Indigenous Australian community.
- VALS argues that diversion may be an appropriate sentencing option for breach of an Intervention Order in certain circumstances.

The 'safety lens' approach is strengthened by the recent report by the Australian Institute of Health and Welfare (AIHW) that shows Indigenous Australians, especially Indigenous women and children, rely on the Supported Accommodation Assistance Program (SAAP). Further, it is Indigenous Australian women and children fleeing domestic violence that rely on emergency government accommodation more than any other group in the population (2009). One in 14 Indigenous Australian women accessed homeless shelters under the SAAP program (totalling 72% of Indigenous people seeking emergency shelter) in 2006-2007 compared with one in 196 non-Indigenous Australian women. This represents a desperate need for crisis accommodation for women in Family Violence situations as well as men.

Record of Conviction

When sentencing an offender to the most serious types of sanction such as imprisonment or suspended sentence, the Court must record a conviction. When a Court sentences an offender to a Community-Based Order, however, the Court is authorised to decide whether a conviction should be recorded or not.

It is imperative that the Court be privy to and gives consideration to all of the circumstances of the case for all parties involved when exercising this discretion. This includes the influence a recorded conviction can have on economic and social well-being, the possibility of hindering job prospects or the occurrence of various other forms of discrimination on the basis of a record.

VALS very recently explored the multifarious ways in which a recorded conviction can have unprecedented effects on Indigenous Australians in a submission to the Department of Justices in response to the draft model Spent Convictions Scheme (2009). Evidence was provided to demonstrate how a record of conviction poses many barriers for people wanting to participate in society in a positive way. According to the 2001 census, unemployment among Indigenous Australian Victorians was 3 times higher than for non-Indigenous Australian Victorians.⁴ It is highly arguable that if unemployment figures were improved, then the over-representation of Indigenous persons in the criminal justice system would reduce.

⁴ Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody Statistical Information Volume 2 October 2005 p. 20

While a breach of a Court Order is inherently serious, recording a conviction may not always be in the best interest of women who have taken out Family Violence Intervention Orders. As the Council's draft highlights, 'family violence service providers suggested that some women do not want to report breaches of orders for fear that the recording of a conviction against the offender would have a negative impact on the defendant's employment. This is particularly relevant in cases where the victim wants the violence to stop, but wishes to maintain the relationship' (item 3.34).

Fines and Community-Based Orders

Item 3.54 of the draft states the most common sentence imposed on offenders who breached a Family Violence Intervention Order was a fine. VALS argues that this is an inappropriate sanction for breaches of Family Violence Intervention Orders. The prevalence of fines imposed for this offence fails to address a broad range of issues:

- It is probable that the victim may end up being the payer of the fine (as noted in the draft);
- The occurrence of the above serves to penalise the victim and fails to address the behaviour of the offender;
- It is an ineffective deterrent to future behaviour involving Family Violence as causes are not addressed and solutions are not remedied through the forfeiting of moneys;
- It may fail to act as a function of punishment due to the offender being of low-socioeconomic status and therefore having no facility to service a fine;
- Fines do not meet the purpose of sentencing. They have no rehabilitative or healing effect and do not increase the safety of the victim and the community.

There is far greater facility for behavioural change, increased safety of the victim, and decreased instances of Family Violence stemming from breaking cycles of violence through community-based orders as apposed to fines. Community Based Orders can include counselling and behavioural change programs. This sentencing option should be encouraged over inappropriate "punishment" serviced through fines.

Circle Sentencing

A concern frequently voiced by Indigenous community members regarding Family Violence is the way the offenders are treated by the criminal justice system once a violent act has been brought to its attention and it is argued that the:

... 'blindness' to the context in which violent acts are carried out is a key part of what drives recidivism, or continued family violence, and that coupled with offenders not being made to understand the consequences of their actions in terms they can relate to, by people whose authority they are bound by culture to respect (Memmott, Chambers, Go-Sam & Thomson 2006: 18).

VALS' research provides details of further barriers to Family Violence victims at the Court level, specifically the Court environment itself (2005). In addition, another element highlighted by a number of Indigenous women was the almost superfluous role of the victim in the Court situation.

Currently, Circle Sentencing style Courts such as the Koori Court, do not hear Family Violence matters. While VALS recognises the careful consideration and reasoning that lead to the decision to exclude Family Violence matters from the Koori Court, future possible benefits to the development of mechanisms such as this require continual examination. This is especially the case in light of the fact that the Koori Court can hear assault matters in the context of Family Violence if an incident, such as assault does not relate to a breach of a Family Violence Intervention Order.

The Koori Court does deal with Family Violence matters in an informal manner. The distinction between an assault charge and an assault plus breach Family Violence Intervention Order charge, is arguably arbitrary when you take into account that many Family Violence Intervention Orders are initiated by the police rather than the victim. A 2005 review of the Koori Courts in Victoria found they had been very successful in reducing repeat offenders, with recidivism rates of 12.5% and 15.5% compared to the general Koori rate of 29.4%.⁵ The decision about the outcome of the evaluation should rest in the hands of the Indigenous Australian community just as it did when the limitations to the jurisdiction of the Koori Courts was decided at its inception by the Koori community.

VALS is aware of the perspective of some Indigenous Australian Elders do not want to deal with Family Violence due to the very dynamics of Family Violence and the potential ramifications for them personally as a member of the Indigenous Australian community. On the other hand VALS' research indicates that many Indigenous Australian women wish to raise the issue of expanding the jurisdiction of the Koori Court 'to include the offence of Family Violence as was originally envisioned, pointing to the success of the Koori Court in addressing other forms of crime' (2005: 13):

The figures speak for themselves ... it's about the person rather than the crime. The Koori Court is trying to address the causes (Community Service Worker).

They say domestic violence is different, that it is too serious. Well, what does that say to us? Violence is violence no matter which way you cut it (Koori Court Elder).

You need the support services. It's holistic. Domestic violence isn't just domestic violence. It's poverty. It's drugs and alcohol. Domestic violence is the symptom. The Criminal Justice System sees it as the disease. That's the problem (Koori Court Elder).

Complications noted, there are elements present in the philosophy and practice of the restorative justice methods that have the potential to engage Indigenous Australian men with their behaviours, as well as give legitimacy to behavioural change programs as a practicable option over fines and prison alternatives. A lot has been said and written about circle sentencing locally, nationally and abroad. The process has generally been described as aiming to:

- Empower Indigenous communities in the sentencing process by reducing barriers that exist between Courts and the Indigenous persons;
- Increase the level of Koori community participation and ownership of the administration of law;

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- Reinforce the status and authority of Indigenous Elders and Respected Persons;
- Provide a forum for those most affected by the offence, rather than the State, in the resolution of conflict;
- Provide meaningful and relevant sentencing options that includes community support for defendants in serving their sentence;
- Allow for a voice to be given to victims of crime;
- Increase and improve support provided to victims of crime;
- Promote healing of the individual and the community; and
- Break the cycle of recidivism (Harris 2006; Strang 2001; and Stubbs 2004).

The structure and nature of sentencing is of critical importance when considering the handing down of mandatory men's behavioural change programs. The process through which the sentencing decision has been reached can influence the way such a sentence is carried out. A culturally based and culturally sensitive response to Family Violence is needed to engage Indigenous Australian offenders and address the 'real cause' of Family Violence.

In cases of Family Violence, the predominance of female victim's calls for additional consideration to a panel in this kind of sentencing. Participation in the justice process is sometimes viewed as an opportunity to address the imbalance of power between survivors and offenders or to resolve the emotional impact of the assault (Konradi & Burger 2000).

Studies that examine the motivations and expectations of women seeking legal redress highlight that substantive justice, or a fair outcome in the form of a guilty verdict, is not their sole concern. Survivors are often more concerned about procedural justice, or how justice is done, than with substantive justice. Moreover, women's involvement in the criminal justice system is not simply instrumental; it often reflects a range of motivations and a substantial emotional investment (Australian Institute of Criminology 2005: 17).

There is a call for a mandatory requirement for equal representation by men and women in sentencing circles, especially considering evidence of the subordinated position of the latter (Stubbs 2004). In any utilisation of a circle sentencing model this needs to be addressed as circle sentencing is premised on assumptions of parties participating equally.

VALS has previously argued the merits of considering a Dispute Resolution and Mediation Service that would provide an early intervention non-Court based strategy which could improve dispute outcomes, reduce the incidence of Family Violence and child removal and help improve knowledge of and utilisation of the legal system (2006). It was suggested that the service model may be similar to the Dispute Settlement Centre Koori Dispute model, but adapted to deal with family conflict. Access to the proposed service would be available only after both parties had received legal advice.

VALS has also previously suggested it could possibly take the form of both parties remotely and via a spokesperson clarifying what each wants to happen. This could be followed by both parties being advised of their options and appropriate referrals. If there is subsequently an agreement

reached this could be like a non-accountable undertaking. If it does not work then there could be the option of a Court mandated dispute resolution process with accountable undertakings.

The Indigenous Australian approach attempts to create a space for behaviour and relationship to improve. It does not condone violence, nor exclude criminal justice options, but it places more emphasis on healing than mainstream approaches do. A bias towards healing approaches is arguably a good thing for a system that responds to Family Violence.

Men's Behavioural Change (Draft Recommendation 1)

Like much of the literature over the past decade, VALS research endorses the increased findings that prisons achieve little in addressing causes of offending.

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 (Cunneen 2000: 2-5).

The potential for 'increased criminal sanctions as having the potential to incarcerate more minority men' is a very real concern for Indigenous women 'especially given Indigenous men's historical over-representation in the Criminal Justice System' (VALS 2005: 10). These concerns exist outside the impact of prison on an individual, as many women state that prison achieves little in terms of addressing the "causes" of Family Violence.

VALS strongly supports the drafts recommendation for the government to fund the development and delivery of a State-wide men's behavioural change program. VALS can identify similar benefits flowing from such programs as restorative justice models (ie: restoration, healing and accountability). However, this recommendation calls for such a program to be specifically designed for convicted Family Violence offenders. Alternatively, a men's behavioural change program should additionally cater to individuals that are at risk of entering into behaviours of Family Violence and those who may have already entered into such behaviour but have not had a conviction. This would act as a more proactive measure in preventing the extent of Family Violence impacts and incidents rather than existing to reform behaviour after the violence has occurred.

The success of a men's behavioural change program rests on a number of factors including, but not limited to:

- A restorative framework. Behavioural change programs need to not only confront the violent behaviour, but also provide for the possibility of individual, family and community healing where possible.
- Men being encouraged to take responsibility for violence or behaviour they believe may lead to violence.
- A culturally appropriate, tailored, accessible and flexible model which meets the specific needs of the Australian Indigenous community. Without this there is a risk that Indigenous Australian men will face difficulty in completing the program. In effect this would be setting Indigenous Australian men up to fail and given the severe consequences of failure the potential for systemic discrimination should be addressed.

- Group and individual sessions.
- A monitoring system to measure the effectiveness of the program in preventing initial violence, recidivist offending or someone falling through the cracks. (i.e.: formal communication protocols between the Courts and service providers of men's behavioural change programs). Without this there is no way to monitor or evaluate the offender's progress and therefore does not act to help those most likely to fall between the cracks of the system.
- Being widely available. In State-wide adoption, rural and regional areas would need focused attention on the number, location and accessibility of programs. The shortage of existing places in the behavioural change programs is illustrated even in the metropolitan areas where, as the draft report highlights, significant waiting lists exist.
- Increase Magistrates' awareness of men's behavioural change service providers.

Item 4.26 expresses the strong feeling from men's behavioural changes service providers that their programs must *never* be used as diversion from the criminal justice system (emphasis added) and should exist as an add-on, not a replacement, for criminal justice responses. Without further information provided as to the reasoning behind these arguments to the Sentencing Advisory Council, this stance is highly questionable. While decisions around the operation of Family Violence responses on the whole should in no way be the responsibility of behavioural change program service providers, restricting services as a 'serious consequence' for Family Violence offenders is purely reactive and limits the likelihood of reductions to incidents of Family Violence.

Reducing rates of recidivism should not be the sole incentive to introduce reform relating to breaches of Family Violence Intervention Orders. Preventing serious Family Violence should be afforded equal, if not higher impetus. It should be noted that behavioural change programs can be identified as a useful tool to deal with other behaviours other than that may be associated with Family Violence.

Additionally, services that have the potential to prevent Family Violence or intervene in Family Violence situations at an early stage are paramount considering the limitations of the criminal justice system to deal with Family Violence issues. VALS does not believe that the criminal justice system can provide a complete answer to the problem of Family Violence. Of course, there will always be many individuals who want and require the police to arrest and charge individuals who breach Family Violence Intervention Orders. It is suggested, however, that if a more broad and flexible range of supports were made available, that included non-police supports, greater numbers would engage in taking action against breach of Family Violence Intervention Orders.

Worldwide there is a growing consensus that it is possible to prevent violence against women before it occurs and that the problem of Family Violence is too great to limit efforts to responding to violence after it has occurred (World Health Organisation 2002). Early intervention strategies (referred to as secondary prevention in some cases) are targeted at those who exhibit early signs of perpetrating violent behaviour or of being subject to violence (VicHealth 2007). These strategies have multiple purposes. Not only can they aim to change behaviours, but can also strive to give or add to people's skills. The idea is to attempt to address

the control of behaviours before rooted patterns of behaviour are formed. Further, primary prevention involves intervention before the occurrence of violence and currently exists as a small area of practise is in Victoria however there is a wealth of knowledge, practice and evidence elsewhere that indicates that such interventions are both viable and acceptable (VicHealth 2007).

There is evidence that indicates clear benefits in targeting intensive interventions towards certain groups in the population. These exist outside of universal interventions that aim to address social norms and educate in schools and so on. Communities such as the Australian Indigenous population (along with other relatively small communities in the population) experience a particularly elevated risk of violence (VicHealth 2007). In these cases, targeted interventions are required.

Voluntary versus Mandatory Programs

There is a strong argument that only men who voluntarily attend a behavioural change program will be invested and motivated to a degree that would encourage the likelihood of change in behaviour. It is conversely argued that mandatory programs increase the likelihood of success due to the sustained attendance rate. VALS argues that voluntary and mandatory behavioural change programs should be made available and applied in appropriate circumstances in light of the fact that neither is perfect.

A VALS' family solicitor described the circumstances of a client in response to hearing of the draft Report. A client was ordered to complete a men's behavioural change program. Reportedly only one of the members in the group was attending voluntarily and this dynamic was an obvious hindrance to the working of the group. Those attending mandatorily were not as compelled to contribute and this undermined the programs usefulness.

In a situation where someone is found in breach of a Family Violence Intervention Order, mandatory completion of a men's behavioural change program is a highly more appropriate option over fines or prison time. This is particularly so for individuals who have no facility to pay fines, or who have little chance of betterment to themselves or their families via the serving of a prison sentence. In the case of prison, the negative environment and increased adversity following release does not function to reduce Family Violence behaviour. It acts only as a delay.

For some members of society, sentencing an individual to a mandatory men's behavioural change program represents a soft sentence for a serious offence. What needs to be recognised, however, is that if assistance and tools towards behavioural change are not provided to perpetrators of Family Violence, no favours are being provided to victims. In order to help victims put an end to Family Violence, there is a need to change the offending behaviour and fines and prison time cannot achieve this.

In instances where mainstream services provide basic anger management and behavioural change programs to groups to men with a multitude of varying issues, circumstances and backgrounds, the likelihood of the offender to see the program as applicable or beneficial when attending mandatorily is reduced. There is clearly a need for men's behavioural change programs to be Family Violence specific and culturally specific. Without these fundamental legs to stand on, a mandatory order to attend such programs is vacant of any legitimate grounds from which to engage Indigenous Australian persons in breach of Family Violence Intervention Orders.

The Cycle of Violence

The cyclical nature of violence is justification to provide behavioural change programs in a proactive as well as reactive fashion.

Ample domestic violence literature argues that abusive behaviour is transmitted across generations (Mouzos & Makkai 2004). This is done not only through the direct experience of Family Violence, but also through the witnessing of Family Violence as a child or youth which can manifest in the reproduction of violent behaviour in adulthood or victimisation in adulthood. For example, results from one analysis indicate that instances of either physical and/or sexual abuse for women as a child significantly increase the likelihood of victimisation in adulthood (Mouzos & Makkai 2004). Victimisation in adulthood can also be attributed to simply witnessing violence as a child. This is another reason why taking steps towards changing behaviours that lead to Family Violence *after* the violence has occurred and intervention orders are sought is limited in scope.

VicHealth have conducted research towards a framework to guide the primary prevention of violence against women. In a 2007 publication, *Preventing Violence Before it Occurs*, it is recommended that the Victorian Government endorse development and planning that:

- Includes both primary prevention strategies targeted at the whole population as well as intensive strategies targeted to specific populations that are at higher risk of violence;
- Includes women as integral to the effectiveness of prevention models;
- Engages representatives and experts of at risk groups working within the community;
- Supports the Victorian Indigenous Australian community;
- Includes emphasis on intervention with children and young people;
- Ensures appropriate evaluation and monitoring;
- Has cross-Government support; and
- Is adequately resourced (2007: 23).

Information Provision (Draft Recommendation 2 and 3)

The draft recommends that in order to enable Magistrates to understand the nature and impact of breach behaviour on particular victims, police and police prosecutors should ensure that they provide Magistrates with sufficient information about the context of the breach at sentencing.

VALS agrees that when dealing with Family Violence matters, appropriate sentencing decisions can only be reached with the following information:

- Circumstances of the breach;
- Original behaviour that led to the imposition of the order;

- History and dynamics of the victim and offender's relationship;
- Prior offences and findings of guilt – particularly those relating to the victim in question and/or other Family Violence offences

The draft also recommends that if the above information does not form part of the brief of evidence then Magistrates should request that the prosecution provide it to them. The issue of the Magistrate having all of the appropriate information in order to make an informed sentencing decision is addressed through initiatives such as the Coen Justice Group, outlined below.

The Coen Justice Group – A Community Response to Family Violence in Queensland through the Local Justice Initiatives Program

As a direct response of the Queensland Government to the recommendation of the Royal Commission into Aboriginal Deaths in Custody (1991), this program allocates funding to Indigenous Australian communities and organisations to develop justice strategies at a local level to suit particular needs. In Queensland there is encouragement for diversionary and interventionist alternatives to arrest, custody and recidivism.

Established in 2000 the Coen Local Justice Group is comprised of Elders and various organisational representatives, one of whom is present at each sitting of the Magistrates' Court in Coen. Their role is to put formal submissions to the Court concerning sentencing and diversionary alternatives available to the Court for offenders (Kristiansen & Irving 2001).

Phillip Port, Chairperson of the Coen Local Justice Group observed that:

Often a prison sentence is culturally and socially detrimental to offenders...this is evident when some offenders are released from jail and re-offend immediately. These offenders are sometimes more hostile and have more chance of re-offending because they have not actually been rehabilitated, only locked up (Kristiansen & Irving 2001).

A critical point to note from this example is the encouragement of its members to take responsibility for developing and promoting alternatives to imprisonment for Family Violence offenders whilst simultaneously maintaining a stance of no tolerance of violent behaviour. The intentions and actions of Local Justice Groups such as this demonstrate that prison is not the only way to enforce a stance that vehemently opposes Family Violence.

VALS adds that such information is relevant to restorative justice models. Also, another specialist Court that may assist in dealing with Family Violence and merit expansion is the specialist Family Violence services at some Courts.

CONCLUSION

VALS argued that the Indigenous Australian perspective requires particular attention in Family Violence matters given the disproportionate occurrence of violence in Indigenous Australian communities. VALS highlights the perspective of some Indigenous Australians through research completed by VALS. The research reveals that there is distrust and confusion about the criminal justice response to Family Violence that is particular to the Indigenous Australian community. Exploration of the benefits of alternative approaches are canvassed, such as restorative justice

which takes an opposite approach to the dominant trend of a “Queensland’s Aboriginal and Torres Strait Islander Women’s Task Force on Violence has documented violence against Indigenous women in some areas estimated at a rate if 45 times more likely than for non-Indigenous women, and ten times more likely to die as a result (Memmott, Chambers, Go-Sam & Thomson 2006) “tough on crime” approach. VALS prefers a “smart on Family Violence” approach that uses a criminal justice approach strategically and recognizes the limitations of punitive interventions, the importance of applicant empowerment, healing and the need to encourage community support to address Family Violence.

VALS urges the Council to ask itself whether item 3.19, which favours a tough on crime approach, took into account the Indigenous Australian perspective and item 3.1 which acknowledges the existence of different perspectives. VALS would hope that any maximum penalty is reflective of an awareness of the dynamics of Family Violence and a trend away from seeing imprisonment as the only solution to crime as opposed to restorative justice approaches.

VALS argues that the distinction between an assault charge and an assault plus breach Family Violence Intervention Order charge, is arguably arbitrary when you take into account that many Family Violence Intervention Orders are initiated by the police rather than the victim.

VALS strongly supports recommendation for Government funding for the development and delivery of a State-wide men’s behavioural change program. However, this recommendation is too narrow in only applying to convicted people rather than those at risk of entering into behaviours of Family Violence and those who may have already entered into such behaviour but have not been convicted. The program should have a prevention and restorative framework. The cyclical nature of violence is justification to provide behavioural change programs.

VALS agrees that when dealing with Family Violence matters, appropriate sentencing decisions can only be reached with all relevant information. This is paramount in the exercise of judicial discretion considering the effect of a recorded conviction on a person in terms of future prospects (i.e.: employment). VALS adds that such information is relevant to restorative justice models.

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