



## Victorian Aboriginal Legal Service Co-operative Ltd.

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### **VALS Submission to Consumer Affairs Victoria in Relation to ‘Indigenous People and Private Rental Housing’ Research Paper – sent 25 March 2008**

VALS has some additional comments on the ‘Indigenous people and private rental housing’ research paper by way of follow-up to the meeting on 18<sup>th</sup> February 2008.

#### **Consultation/Whole of Government approach**

VALS acknowledges the comments in the minutes for the meeting on 18<sup>th</sup> February 2008 about over-consultation of Indigenous Australians and need for a “Whole of Government” response. VALS is supportive of an approach that minimises consultation fatigue and achieves a ‘Whole of Government’ response. VALS, in collaboration with other Indigenous Australian organisations, submitted to the Government a document titled “A Fairer Victoria for Indigenous Communities: A Framework for Action” which is attached. The framework is an attempt to provide advice on how to achieve a Whole of Government approach. It recommends partnership with the Indigenous Australian community in order to minimise consultation fatigue. It specifically proposes the:

1. Development of formal partnerships between statewide and peak organisations and Government to enable the development of protocols which ensure that communities are consulted effectively on Government initiatives and programs (i.e.: consolidation of consultation).

This may involve multiple Government Departments sitting down together and bringing to the table various projects they intend to undertake in a given year that require consultation. It may result in agreement of a schedule for consultation with Indigenous Australians and consolidation of consultations. For instance, rather than two separate consultation processes on discrimination by the Department of Justice and Department of Education taking place, both Departments may engage in a Indigenous Australian consultation process together.

2. Government provide funding for an annual Indigenous sector joint forum to develop:
  - An annually updated framework for culturally inclusive policy.
  - Quarterly meetings to provide advice about consultation strategies, timing of consultation and possible integration and synergies to help minimise community consultation fatigue.

- Advice to Government departments on key policy initiatives in the early stages of development.

## **Research**

VALS agrees with comments of Mr Imber in relation to research being tied to objectives, such as input to new programs. VALS adds that Indigenous Australians should be involved in this undertaking of this research.

## **Tenancy Advocacy Groups (rec 5.2.8)**

Funding should be made available for Indigenous Australians to be employed by the Tenants Union of Victoria. The roles for Indigenous Australians at such an organisation could be:

1. Aboriginal Liaison Officer (ie: conduct outreach and community legal education)
2. Lawyer.

## **Marketing (rec 5.2.9)**

VALS argues that not only should good news stories about Indigenous Australian tenants be relayed but the flip side should also be represented. The effects of discrimination should be highlighted (ie: the downward spiral after discrimination takes place). This will hopefully serve as a disincentive to discriminate and make people aware of the consequences of their negative actions towards Indigenous Australians.

## **Cultural Awareness Training (rec 5.2.10)**

In order to make cultural awareness training more accessible there should perhaps be a cultural awareness clearing house so that people know where to get cultural awareness training from.

## **Education (rec 5.3.1)**

Education of landlords, property owners and investors is important. There is the potential to mandate such education at vital stages to give landlords etc the incentive to do it (ie: education session required before property put on the market). VALS agrees with recommendation 5.3.3 and is prepared to disseminate information concerning successful legal action.

## **Compulsory Documentation (rec 5.3.4)**

VALS agrees with the recommendation of compulsory documentation of reasons for refusing tenancy applications. VALS argues that such an action is helpful in that it:

- 1) Promotes transparency
- 2) Causes an individual to self-reflect on their Western assumptions.

The recommendation is along similar lines as a project VALS has engaged in with Victoria Police which relates to limited cautioning of Indigenous Australian youth. The project has resulted in a Victoria Police protocol that if an Indigenous Australian youth is not cautioned a 'failure to caution' form is completed which requires documentation of reasons for failure to caution. This protocol has the potential to change police culture with respect to cautioning.

#### **Complaint Mechanisms (rec 5.4.1)**

The point that Ms Greta Clarke was attempting to make in relation to complaint mechanisms at the meeting on the 18<sup>th</sup> was that the system of Alternative Dispute Resolution is problematic for Indigenous Australians because it is a Western construct. There is need to improve the dispute resolution process to make it more appropriate for Indigenous Australians. Please find attached VALS' submission to the Victoria Parliament Law Reform Committee in relation to Alternative Dispute Resolution (Appendix B). An argument made in this submission is that there needs to be better integration of various reviews trying to improve the dispute resolution process as they are currently operating in isolation (ie: review of Equal Opportunity Act 1995, Victorian Parliament Law Reform Committee and Civil justice review by the Department of Justice). It would be unwise for CAV to embark on an inquiry about Victorian Equal Opportunity and Human Rights Commission (VEOHRC) complaint mechanisms without working in collaboration with the VEOHRC.

## **Appendix A**

### **A Fairer Victoria for Indigenous Communities: A Framework for Action**

**A Proposal for building the capacity of community-controlled Aboriginal organisations in Victoria. Prepared by:**

- *Victorian Aboriginal Community Services Association Limited (VACSAL);*
- *Victorian Aboriginal Education Association Limited (VAEAI);*
- *Victorian Aboriginal Child Care Agency (VACCA);*
- *Victorian Aboriginal Community Controlled Health Organisation (VACCHO);*
- *Victorian Aboriginal Legal Service Co-operative Limited (VALS).*

**October 2006**

## **Introduction**

This is a proposal for the Victorian Government to build the capacity of the Aboriginal statewide and peak organisations to work together to improve outcomes for Indigenous Victorians. It includes a draft Framework for Action, and a funding proposal. It outlines the key principles we consider crucial to building effective partnerships with Indigenous communities, and the key areas in which the government can build the capacity of Aboriginal organisations.

Aboriginal statewide and peak organisations were established in Victoria by Indigenous communities to ensure a 'voice' in the development of policy and programs for Indigenous people. We represent our communities in the areas of health, education, child and family welfare, juvenile justice, community services and the law and, in many cases, provide Indigenous-specific services, which play an important role in cultural maintenance. Our organisations have evolved over several decades to reflect the changing needs and aspirations of the growing Victorian Indigenous demographic. We are key stakeholders in the work of improving outcomes and increasing opportunities for Indigenous people, pre-dating the establishment of ATSIC as advocates for Indigenous communities.

Our organisations play a unique role in both community and government. Our long-established networks throughout Victorian regions ensure a thorough, proven consultative mechanism. As we were created by our communities, we remain community-controlled and, as such, are key to Indigenous self-determination. We are anchored in community – not separate from it – and are always answerable to our communities.

As non-government organisations with a strong focus on policy, we are well-placed to facilitate partnerships between government and communities, and to advocate for the community. Our partnerships with government have been successful. They include: Yalca, a policy-based partnership between VAEAI and the Victorian State Government; the Aboriginal Justice Agreement and Koori Courts

As the 2007 state election approaches, we urge the Bracks government to continue its commitment to Indigenous communities by continuing to support our organisations to represent them at a statewide, local, and regional level. We are committed to working with the government towards 'a fairer Victoria' for Indigenous people.

### ***A Fairer Victoria for Indigenous Communities***

The Victorian Labor Government's social policy platform, *A Fairer Victoria*, was first released in 2005 and updated and expanded in 2006. It stresses the importance of supporting communities to be self-determining and effective (Strategy 13). It also promotes building new partnerships with Indigenous communities (Strategy 9). We welcome this emphasis on Indigenous communities; however, we also stress the importance, in working with communities, of building on existing partnerships and protocols.

For the government to expand its capacity to work effectively with communities, it is necessary to build the capacity of Indigenous community-controlled organisations to work with a cross-sector focus in both a policy and, where applicable, a service-provision capacity; expanding and enhancing our partnerships with government departments, non-government organisations and, most importantly, with each other. Supporting Indigenous organisations to work together will enable communities to utilise the extensive networks and local knowledge that our organisations bring together.

## **Our vision: key principles**

### **Reconciliation and Self-determination**

Indigenous peoples have long thrived through strong, sustainable social, cultural, legal, economic and ecological systems. Our capacity was greatly diminished by the process of colonisation which dispossessed and fragmented our communities. Today, this diminished capacity is evidenced by disproportionate rates of disadvantage, impoverishment, poor health and incarceration. To foster a true spirit of reconciliation, it is necessary to acknowledge the past and its impact on the present; but also to develop sustainable policies which acknowledge, and build on, the existing capacities and strengths of Indigenous communities.

### **Self-determination**

Self-determination is internationally recognised as a human right. It is fundamental to building the capacity of our communities to overcome disadvantage. We believe that Indigenous Victorian communities are best-placed to work together to achieve positive outcomes for our people.

### **Culture**

We believe that culturally-centred approaches to overcoming Indigenous disadvantage are the most effective. Australian Indigenous cultures are the longest continuing cultures in the world: sophisticated and holistic, linking spirituality with politics, education, economics, ecology and law. Victoria is rich in a diversity of Indigenous and Islander cultures. Our cultures are not static but constantly changing and evolving. Policy that is grounded in a respect for culture and an understanding of the need to ensure that it thrives into the future is vital.

## **Indigenous Peak Organisations and the Changing Policy**

### **Environment**

Statewide and peak organisations play an important role contributing to the development of policy for Indigenous Victorians in the areas of health, education, child and family welfare, juvenile justice, community services and the law. We provide high quality policy advice to

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government in our respective areas of expertise; assess the quality of services; advocate for the development of improved services; and work to ensure, through various partnerships, strategies and agreements, that our people have access to culturally appropriate services. In many cases, we are also instrumental in providing non-Indigenous organisations with guidance on effectively engaging Indigenous people.

Since our organisations were established, the demand for our input into policy development has dramatically increased. This in turn places a great demand on the Indigenous community. In today's sophisticated policy environment, it is necessary for Indigenous organisations to be supported to contribute to policy development in a sophisticated, long-term capacity.

### *Specific Actions*

We suggest that the state government increase funding for Indigenous organisations to develop policy, research and program delivery capacity. Funding each of the five peak and statewide organisations to employ a Senior Project Officer and a Junior Project Officer would enable:

- *Improved workplace planning and training for Indigenous people*
- *Improved quality and range of partnerships between Indigenous service providers, government and non-government organisations*
- *Forecasting the likely impact of Government policy initiatives on Indigenous people.*
- *Providing advice about integrating and prioritising community consultations and service provider feedback.*
- *Developing policy proposals to improve outcomes for Indigenous people*
- *Liaison with non-Indigenous organisations to improve services.*
- *Gathering information from service users and community members about ways to strengthen community.*
- *Disseminating information on good practice to non-Government organisations and all levels of Government.*
- *Providing input into the research and development of national and international best practice for services.*
- *Identifying how programs and services could better reflect United Nations human rights standards, particularly in relation to economic, social and cultural rights.*

## **Building the Capacity of Indigenous Service Providers**

The Australian Bureau of Statistics estimates that the Indigenous population base will increase by up to 44.1% by 2009. Specifically, this will mean a dramatic escalation in the population of youth. Indigenous organisations are already facing increasing demand for services and expertise. There is a critical need to build the capacity of Indigenous statewide and peak organisations to remain responsive to a community which is changing demographically.

A majority of Indigenous people prefer to use Indigenous services where possible. By drawing on local knowledge, understanding of culture, and community consultation, Indigenous service providers are best placed to tackle specific issues and to offer culturally appropriate services. In some cases the availability of Indigenous services is limited by funding or there is no proximate service.

There are key challenges for peak and statewide organisations in providing Indigenous services:

- *Meeting an increasing demand for Indigenous services and coping with limited funding and extensive reporting requirements;*
- *Finding resources in this challenging environment to contribute to policy development, research and pilot projects, and forward planning;*
- *Sustaining and evaluating partnerships with non-Indigenous service providers (including providing quality information about culturally appropriate service provision).*

### *Specific measures*

We suggest that the state government

- *Commit to the rolling out, funding and sustainability of best practice service delivery models as may emerge from the evaluation of pilot projects;*
- *Develop a sustainable Indigenous Sector Capacity Building Plan for developing skills and providing resources in the areas of:*
  - *Infrastructure/administration;*
  - *Recruitment, education and training;*
  - *Research and evaluation;*
  - *Advocacy;*
  - *Governance and management;*
  - *Community development and consultation and*
  - *Community sector-wide and government liaison*

## **Cross-sectoral Policy Work and Whole-of-Government**

*A Fairer Victoria* promotes cross-sectoral, ‘whole-of-government’ approaches to social policy and service delivery. We strongly support this move; we have long believed in holistic approaches to policy and service provision. Linking services is the most effective way to ensure that the needs of the Indigenous community are met, and that Indigenous people are informed of what services are available; particularly in isolated communities.

Successful whole-of-government and cross-sector approaches require effective partnerships between departments and organisations, as well as between organisations (e.g., Indigenous and non-Indigenous service providers).

At present, peak organisations are mandated to provide policy advice and/or services exclusively in their area of expertise (i.e. health or education). Supporting statewide and peak organisations to work proactively together on cross-sectoral policy issues would enable us to

combine our expertise, experience and community networks to develop long-term initiatives that would benefit Indigenous communities.

We believe this could lead to significant progress in improving the efficiency of the community consultation process, developing long-term research projects and forecasting the likely impact of government policy initiatives on communities.

The 2006-2007 State Budget allocates \$10.8 million for new representative arrangements. If these new arrangements are to work well it is important that communities are supported, resourced and given access to relevant information. For this valuable initiative to be successful, it is vital that existing consultative arrangements and partnerships are taken into account and potential consultation fatigue is minimised.

Our organisations already have extensive representative models and community consultation structures which have proven to be effective in consulting Indigenous communities.

### *Specific measures*

We suggest that government provide funding for an annual Indigenous sector joint forum to develop:

- *An annually updated framework for culturally inclusive policy.*
- *Quarterly meetings to provide advice about consultation strategies, timing of consultation and possible integration and synergies to help minimise community consultation fatigue.*
- *Advice to government departments on key policy initiatives in the early stages of development.*

## **Building Partnerships with Indigenous Communities**

Formal partnerships between statewide and peak organisations and government are a highly effective means of promoting culturally appropriate and relevant best-practice strategies. Such partnerships enable the development of protocols which ensure that communities are consulted effectively on government initiatives and programs (i.e.: consolidation of consultation). Formal partnership arrangements facilitate the development of long-term policy and provide opportunities for the state government formally to commit to principles which are endorsed by Indigenous communities.

Building on existing partnerships and developing new partnerships are important steps in increasing the capacity of statewide and peak organisations to represent Indigenous communities.

### *Specific measures*

We suggest that the State Government, in consultation with Indigenous statewide and peak organisations,

- *Develop clear and equitable partnership protocols for engagement on issues concerning our areas of expertise,*

- *Resource Indigenous statewide and peak organisations to participate more extensively in governmental engagement processes*

## **Partnerships between Indigenous and non-Indigenous service providers**

We commend government initiatives to make cultural competence a key requirement for registration for non-Indigenous service-providers (for example, child and family welfare). However, the onus to provide cultural competence training generally falls on Indigenous statewide and peak organisations. Government needs to ensure that our organisations are adequately supported to provide this training; and to develop protocols to facilitate partnerships between Indigenous and non-Indigenous organisations; in particular, to ensure that such partnerships are genuine, sustainable, and of benefit to Indigenous organisations and communities.

### *Specific measures*

We suggest that the state government, in consultation with Indigenous organisations, develops guidelines and standards for the formation and maintenance of equal partnerships. These guidelines should be underpinned by recognition of, and respect for, Indigenous culture and expertise, and should include the following commitments:

- *To provide a culturally sensitive and accessible service to the Indigenous community that meets their needs.*
- *To be accountable in service delivery for funding that is secured for the purpose of meeting the needs of Indigenous people*
- *To develop culturally respectful and appropriate partnerships, policies and practices with Indigenous agencies.*
- *To support the capacity building of appropriate Indigenous organisations.*
- *To develop partnership arrangements with Indigenous organisations that ensure that there are proper protocols in place and that Indigenous organisations benefit from the partnership.*
- *For statistical purposes, to have in place a process of identifying whether a client is Indigenous or Torres Strait Islander.*
- *To make statements of acknowledgement and incorporate recognition of Indigenous traditional ownership/custodianship in their Constitutions.*
- *To acknowledge the traditional owners and custodians of the land at public meetings.*
- *To make cultural competence a key policy and to employ an appropriate Indigenous organisation to deliver cultural competence training.*
- *To employ Indigenous persons when appropriate and provide appropriate support.*

## **Appendix: Draft Funding Proposal**

We propose that the Victorian Labor Government provide funding from the Departments of Education, Human Services, Justice, and Victorian Communities, for the initiatives we have outlined above. Specifically, these are:

1. Five senior project workers and five junior project workers to be managed by the CEOs of the respective statewide and peak organisations. The indicative budget for this would be \$750,000.
2. Funding for an annual Indigenous sector joint forum (see page 6).



## Appendix B Victorian Aboriginal Legal Service

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VALS' submission to the Parliament of Victoria Law Reform Commission in response to 'Alternative Dispute Resolution Discussion Paper September 2007'

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**VALS' submission to the Parliament of Victoria Law Reform Commission in response to 'Alternative Dispute Resolution Discussion Paper September 2007' – sent 18 December 2007**

*“Balance is based on the understanding that all forms of life and all peoples are intrinsically complementary, and will flourish if the domain of each is perceived and respected”*  
(Marsden, as cited in Oman, 2004:83).<sup>1</sup>

## INTRODUCTION

Thank you for the opportunity to provide comment on the 'Alternative Dispute Resolution Discussion Paper'

In this submission VALS argues that there is need to create space for

- a community based Alternative Dispute Resolution (ADR) model that is a distinct entity separate from the Courts;
- Greater use of restorative justice approaches and;
- Utilisation of Indigenous Australian knowledge in the development of ADR models, dispute resolution processes and restorative justice programs.

VALS discusses obstacles to creating valued space for the above and makes suggestions on an appropriate ADR model for Indigenous Australians.

### Obstacles to Creating Valued Space: Failure to Prioritise Systemic Discrimination

Our submission starts from the premise that access by 'marginalised' groups to ADR should be the starting point in analysing improved policy. The term 'marginalised' could be replaced by 'groups who are subject to widespread systemic and institutional discrimination'. The reason why VALS emphasises this element of the ADR issue is not simply because VALS works with 'marginalised' people. It is also because we have extensive experience at attempting to advocate for more inclusive and realistic

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<sup>1</sup> Victor Wenona, 'Alternative Dispute Resolution (Adr) In Aboriginal Contexts: A Critical Review' April 2007, page 2 as at [http://www.chrc-ccdp.ca/pdf/adrred\\_en.pdf](http://www.chrc-ccdp.ca/pdf/adrred_en.pdf)  
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policies only to see cost considerations or mainstream political objectives largely exclude the possibility of significant improvement.

#### Formal Equality Usually Trumps Substantive Equality

VALS is also aware of the pervasiveness of the idea that treating people equally is the pinnacle of good practice and fairness. This idea is pervasive in social groups, the media, bureaucracy and with most politicians. This idea tends to displace or hide the concept of systemic discrimination or institutional discrimination or the idea that treating people who are unequal as if they were equal is unfair and often further disadvantages marginalised people. Many people accept that it is fair to fine rich and poor people exactly the same amount. But how much fairer would it be if people were fined in terms of their average hourly wage. Rather than being like a regressive taxation policy which disproportionately hits the poor, fines would be more progressive with an equal number of hours for a rich and a poor person but a different financial impact. There is need for both formal and substantive equality.

#### Failure to Understand Systemic Discrimination

The research commissioned by the Department of Justice about systemic discrimination in the criminal Justice system (Blagg, Morgan Ferrante, Cunneen, 2004) Systemic Racism as a Factor in the over-representation of Aboriginal people in the Victorian Criminal Justice System” indicates how limited the ability of justice agencies is to understand the concept of systemic discrimination, let alone discuss it or respond to it.

Dealing with systemic discrimination involves far more than saying ‘we have an Aboriginal worker or an Aboriginal program’. It involves looking at the results of these programs. It also involves looking at what the mainstream policy settings are in the rest of the justice agency and the Government and what they are achieving.

#### Incoherent and Fragmented Reform Agenda

In the main, the State Government conducts consultations and rolls out its reform agenda without any standards, principles or connectedness between the various parts. Speed is prioritised not quality or equity or simplicity.

The civil justice review, ADR review and the serial Equal Opportunity Act reviews deserve to be integrated. Also, some strategic principles should be adopted which will give the system some greater coherence, accessibility and equity.

The idea put forward in the ADR report, that greater Government intervention, regulation and bureaucracy in the ADR system will bring greater simplicity and certainty strains credulity. Certainly, the NADRAC approach to regulation is far more cautious and respectful of the different contexts in which ADR is practiced than the ADR Discussion Paper which bristles with suggestions and proposals that suggest managerialism is the solution to the ‘untidy’ ADR field.

#### Consulting After the Event

Recognising the difficulty of considering the needs of marginalised groups at the end of the policy development process, VALS has repeatedly advocated the importance of considering impacts on marginalised groups at the beginning of the policy development process rather than at the end of the process.

The economic social and cultural differences that affect marginalised groups should be factored in at the beginning of the policy development process and throughout the policy development process. This would mean considering marginalised group's present knowledge base and attitudes to an issue. This would mean considering how complicated the new system or program is and how it will impact disadvantaged groups.

#### A Strategic Social Justice Approach

If we consider the civil justice system, the ADR review and the Equal Opportunity Review from a strategic social justice perspective there should be principles and strategies in common as there should be some interconnectedness.

None of these reviews pays much attention to encouraging people to negotiate. There are two aspects to promoting the incidence of negotiation one is attitudinal and the other is systemic.

Where there are two people with similar power and status this could be something encouraged by better advice services, community legal education and negotiation resources.

Where the dispute involves a matter of some urgency (eg: impinging on health, child welfare, housing, school attendance) a more systemic approach would be to create a fast tracking option to the Magistrate's court. This would encourage negotiation to occur because there would be the fall back option of a quick Court appearance if one side was unreasonably declining to respond to the matter. This option would also be useful where there were two interconnected problems and both were contributing to serious risks to the wellbeing of children or family wellbeing. VALS' response to the Civil Justice Review has advocated a version of the triage approach used in hospitals so that urgent matters can be better dealt with by Courts.

The ADR review and the Civil Justice Review essentialise the notion of dispute resolution and, with the exception of proposing a levy in the Civil Courts to fund some legal advice for some litigants, there is little headway in relation to simplifying the system, recognising systemic discrimination or creating a fast track for urgent matters. The key goal is saving valuable Court time and there is a strong current of managerialism. The notion of social justice is unconvincingly tacked on at the margins.

The Equal Opportunity Act Review Paper is the only paper that analyses the problem of systemic discrimination in any depth. It recognises that Indigenous Australian people bring different problems to the Victorian Equal Opportunity and Human Rights Commission than non-Indigenous Australian people. It recognises that there are systemic barriers to some groups articulating their problems let alone effectively using a Court or Tribunal.

VALS has previously argued that systemic discrimination has to be strategically addressed. One key way is to include a culturally inclusive framework at the beginning of the policy development process. The other is to 'design in' opportunities for Koorie ideas and values which should be considered as a policy or program is developed. Another is to recognise that some western assumptions about communication and culture may handicap an understanding of the importance of other cultural approaches.

All three of the reviews (ie: civil law, ADR and Equal Opportunity) should share a commitment to identifying and reducing systemic discrimination and institutional discrimination. All three areas of review should consider a strategic way to mirror the hospital triage system which has a capacity to recognise more urgent cases and fast track them.

### A Confused and Confusing Picture of ADR

The Discussion Paper seems unclear about as to what the benefits of ADR are. Although the Discussion Paper seems to imply ADR is cost effective, it is not clear what ADR is meant to do. The Field Report on Supply Side ADR casts doubt on how cost effective ADR is. Nor is it ever clear whether ADR is meant to be a cut price alternative to Court or an early intervention option which is more flexible and involves the parties in developing a solution.

The Discussion Paper never adequately addresses the issue of the relationship between Courts and ADR. Although the complexity and differences between forms of ADR are noted there is no attempt to suggest that there may need to be some difference in approach to ADR. There is almost no discussion of the different legitimacy base of ADR practitioners (eg: technical, professional formally qualified models and models which draw on the idea of diversity and knowledge of the field or trained lay people).

The co-mediator model which has been a feature of many of the more community based ADR programs, and better fits with the concept of trained lay person helping build social connectedness rather than tertiary educated technical expertise, is mentioned only once. The Discussion Paper states that a co-mediator model is believed to contribute to neutrality. There is another aspect to the co-mediation model in that it can increase the level of support for the parties. For example, where there is a male-female conflict and the mediators are male and female, or where one person is a lot older than the other and the mediators chosen mirror this.

In practice the co-mediator model is used more in facilitative mediation than it is where ADR is effectively about arbitration. This underlines the futility of trying to treat all ADR models in the same way. It also highlights the different theories of change inherent in the different models. At one end of the spectrum there is an idea of creating an environment in which a negotiated settlement can be an outcome and the participants have some ownership of the solution. At the other end of the spectrum it is a fact gathering exercise which a trained expert will adjudicate. The closer we get to the arbitration end of the spectrum the less differentiation there is from a Court hearing. On the other hand in a Koori Court environment there can be, depending on

the skill of the Magistrate, a drawing out of the elements of the situation in order to identify a sentence which incorporates effective rehabilitation.

The Discussion Paper canvasses a wide range of views. In doing this it touches on a range of value positions but the relative merits of many of these issues and their interconnectedness is not discussed. The Discussion Paper is an eclectic catalogue of opinions and positions and comments.

The question arises how helpful is it to try to group all the various ADR models under the one mast head or system. A more fundamental question is 'when would ADR be preferable to Court for a client'? The first observation to make is that if legal aid and Court waiting lists are unreasonably long and if there is no fast tracking path for urgent matters, ADR is going to be effectively forced on someone because Courts are inaccessible. The second issue is if Courts and/ or Governments decide that they will use ADR as a hurdle to jump before you can go to the Courts, as the Commonwealth Government have with the family law legislative changes, then there will be nothing alternative about ADR. It will be another part of the bureaucracy and a further source of substantive inequality for inarticulate people and marginalised groups.

Traditionally there was an idea that ADR was likely to be preferable where two parties were likely to have an ongoing relationship. There is also a strong preference for avoiding significant power differences between the parties.

VALS advocates that prior to using ADR all parties should get clear legal advice about the scope of the ADR process that they are engaging in and their rights in terms of withdrawing from the process.

The idea of compelling people into ADR without providing them with legal advice, which is what the Family Relationship Centres are engaged in, fails to protect vulnerable people and is an unfortunate precedent.

Mandatory ADR is a contradiction in terms.

ADR or Courts?

The Discussion Paper cannot decide whether ADR is a cheaper alternative to Court, a faster alternative to Court, an alternative to the adversary system or a more flexible approach to dispute resolution than a Court. Is ADR subsidiary to the Court or complementary to the Court? Consequently, the issues of effectiveness, risk management, uniformity, diversity, credentialism and costs and benefits float around devoid of a framework.

The Discussion Paper includes comments such as:

- The durability of agreements reached through an ADR process may also be affected by the fact that, as opposed to Court orders, they may lack enforceability where some matters have not been agreed upon.
- Where either party is dissatisfied with an element of the process, there is no fundamental right of judicial review.

Why should an alternative to a Court include the possibility of judicial review? Both the statements above imply that ADR without these characteristics of Courts are deficient.

These comments take fundamental features of ADR and posit them as deficits. Are ADR models in conflict with Courts? Some of the Discussion Paper seems to be premised on this assumption.

It is unhelpful to diminish the distinction between formal (Court) and informal dispute (around a table) mechanisms. If mandatory ADR is extended people should be made aware of their legal rights. VALS' issues with mandatory mediation are:

- Willingness/voluntary factor important.
- Contradiction in terms.
- Power of Court.
- Effectiveness of settlement.
- Absence of autonomy.
- Advocating mandatory mediation assumes that it will have a positive outcome and there will be no undesirable consequences.
- Mandatory mediation has a disproportionate effect on disadvantaged groups.
- Staffed by white middle class.
- Some people do not see the distinction between coercion to enter into mediation with coercion to settle.

#### Appropriateness of Court or ADR for Indigenous Australians

Chapter 6 of the Discussion Paper, which examines marginalised groups, includes the following observation under the heading 'Community involvement in service design':

*Programs and services aimed at marginalised groups are more likely to be appropriate and acceptable to these groups if they are actively involved in service design.<sup>456</sup> This helps to ensure that ADR services are not automatically underpinned by western cultural norms.<sup>457p78</sup>*

This highly pertinent observation unfortunately does not inform thinking elsewhere in the Discussion Paper.

Behrendt has argued that white justice structures whether court or ADR will intimidate most Indigenous Australians. Although the inclusion of Indigenous

Australian mediators will help ameliorate the power difference in some forms of ADR real progress has to involve continuing dialogue and experiment to better incorporate Indigenous Australian ideas and needs. This will not necessarily look the same in every region. It may operate differently where one party is Indigenous Australian and the other is not. Victor makes similar arguments about the power difference, language difference even when both parties are using English and the epistemological differences between western and Indigenous perspectives.<sup>2</sup>

A co-mediation model, with two mediators assigned to each case is commonly used by some service providers. This enables parties and mediators to be matched on a range of criteria, including cultural background, age and gender.<sup>218</sup> The presence of two mediators may also help preserve the perception of neutrality. Behrendt argues that this co- mediation model is more likely to work for Indigenous Australians. She also argues that the idea of neutrality is less likely to be appealing to an Indigenous Australian than the idea of someone who they can relate to in some way.

Accreditation, Standardisation and Bureaucracy

VALS is concerned at:

- The quality of discussion about ADR makes it unclear what is distinctive about ADR.
- How it differs or should differ from Courts.
- The failure to strategically consider the different versions of ADR, and the relationship of ADR to achieving greater flexibility and inclusion.
- That bureaucratisation and credentialism will further preclude practitioner diversity and Indigenous Australian participation.

The International Conflict Resolution Centre when responding to A NADRAC paper on National Accreditation of Mediators summarised some of the interconnections and different scenarios using the ideas of ‘hurdles’ and ‘maintenance’ in a way that the ADR paper has not (see below).

*Different combinations of hurdles and maintenance have potential merits and drawbacks as summarised below:*

A. Low hurdles/Low maintenance	B. High hurdles/Low maintenance
<ul style="list-style-type: none"> <li>• High practitioner diversity</li> <li>• No significant bureaucracy</li> <li>• Minimal support structures for practitioners</li> <li>• Variation of practitioner skill levels</li> <li>• Some assurance of quality</li> </ul>	<ul style="list-style-type: none"> <li>• Reduction of practitioner diversity</li> <li>• Moderate level of bureaucracy</li> <li>• Moderate support structures for practitioners</li> <li>• Good mediator skill</li> </ul>

<sup>2</sup> Victor Wenona, (2007) above n 1

<p>practice and adherence to ethics</p> <ul style="list-style-type: none"> <li>• Reduced emphasis on 'reflective practice' and professional development</li> <li>• Less public credibility</li> <li>• New practitioners easily accepted within the ADR field</li> </ul>	<p>levels</p> <ul style="list-style-type: none"> <li>• Reduced emphasis on 'reflective practice' and development</li> <li>• High public credibility</li> <li>• Unlikely to be universally acceptable within the ADR field</li> <li>• Harder for new practitioners to gain entry into the ADR field</li> </ul>
<b>C. High hurdles/high maintenance</b>	<b>D. Low hurdles/High maintenance</b>
<ul style="list-style-type: none"> <li>• Reduction of practitioner diversity</li> <li>• High level of bureaucracy</li> <li>• Significant support structures for practitioners</li> <li>• High mediator skill levels</li> <li>• Promotion of particular ADR styles</li> <li>• Reduced emphasis on responding to the individual client's needs due to the promotion of particular ADR styles or requirements to follow rigid or complex maintenance procedures</li> <li>• High public credibility</li> <li>• Unlikely to be universally acceptable within the ADR field</li> </ul>	<ul style="list-style-type: none"> <li>• High practitioner diversity</li> <li>• Moderate level of bureaucracy</li> <li>• Moderate support structures for practitioners</li> <li>• High mediator skill levels</li> <li>• Long-term commitment to practitioners and from practitioners</li> <li>• Substantial public credibility if: <ul style="list-style-type: none"> <li>• implemented with support structures addressing the developmental needs of practitioners ; and</li> <li>• consumer education is provided explaining the inadequacies of 'hurdles' as appropriate indicators of practitioner quality</li> </ul> </li> <li>• Easily accepted within the ADR field</li> </ul>

NADRAC Website 29<sup>th</sup> November 2007.

VALS believes practitioner diversity is a high priority while the degree of maintenance should be connected to the practitioners strengths and weaknesses, the sector or environment and the complexity and rate of change which is occurring in that sector, and the extent to which the ADR model is 'deliberative ADR as opposed to 'facilitative'.

VALS believes that the further a model moves towards being deliberative the less difference there is between a Court and an ADR option.

*The government funding and reporting requirements can be rigid and bureaucratic based upon quantifiable measurements while many Aboriginal methods of dispute resolution are characterized by their flexible processes, people-orientation, use of cyclical time, and more qualitative measurements in assessing the success of the conflict resolution process. Aboriginal communities may be forced to change their circle in order to fit it into square bureaucratic requirements<sup>3</sup>.*

### Creating Space for ADR

Space should be created for ADR as a distinct dispute mechanism to the Courts that is valuable because it provides options to the public prior to getting to the stage where Court action is needed.

Instead, the value attributed to ADR is often fuelled by the economic cost savings it offers to the Court process, hence it is in the shadow of the Courts. Such value attribution is apparent in the increasing trend for Courts to mandate ADR before the Courts consider a dispute. ADR is seen as a pre-court stopper or speed hump as is apparent by the requirement to attend Family Relationship Centres before going to Court. The value in early intervention community based ADR is that it captures disputes at an early stage when they are arguably easier to resolve than when they get to the later stage of being presented in Court (ie: conflicts that have come to an extreme point and have aged). Placing ADR in the shadows of the Courts (ie: send to ADR from Court) is counterproductive as many conflicts do not reach Court. As a consequence, people may not go to ADR.

The concern sometimes expressed that the results may be unfair to one party or outside community norms could be minimised by improving access to pre ADR legal advice and by continuing to exercise caution about accepting cases where there is a significant power difference or violence.

### Punitive Sentencing: the Challenge for Restorative Justice

Restorative justice provides an alternative to a punitive approach (smart on crime rather than tough on crime). The challenge for advocates of restorative justice, such as VALS is that space for restorative justice is lacking. Restorative justice is often rejected due to fear because it is the 'unknown'.

The mainstream political priority of building prisons and extending the severity of sentences in preference to pursuing prevention, proposing proportionality or rediscovering rehabilitation means the criminal justice system is being backed into a 19<sup>th</sup> century corner. Fondness for imprisoning people has become disassociated from crime rates, from criminology and from rational debate. Governments fund research which highlights the fact that much punitiveness has been encouraged by the media and is fuelled by selective use of information (Sentencing Advisory Council, 2006),

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<sup>3</sup> Victor Wenona, (2007) above n 1, page .11

but usually ignore it as it is regularly claimed by politicians that longer sentences are what people want. However, the Victorian Sentencing Advisory Council research highlights that there is widespread misinformation about the criminal justice system largely as a result of the influence of selective reporting by the media. When people are given something more than the tabloid's selective superficialities their preferences in sentencing are much less punitive. Research also indicates that punitive sentencing has a particularly negative impact on most disadvantaged people including Indigenous Australian people.

### Indigenous Australian Knowledge

Also, space is not created for Indigenous Australian knowledge and the positive impact it can have on dispute resolution. It is common for Indigenous Australians not be consulted, or consulted ineffectively. Whilst there are some dispute resolution models that are based on Indigenous knowledge, they are lacking. Some stakeholders at meetings to further the Supply-Side Research Project, identified particular focus areas for development, one of them include Indigenous Australian issues. One stakeholder comment is: *"Probably the first one is indigenous Victorians. I have particular concerns in relation to that area. Community conflict issues are significant in regional areas and there is no support and no development of conflict resolution leadership and communication skills in those areas, and there is no network either".*<sup>4</sup>

### ADR MODEL

The model of ADR that VALS prefers is outlined below:

#### ADR

##### Target Indigenous Australians

A model that targets the needs of Indigenous Australians by taking into account factors outlined in the section below titled 'Access'.

##### Community Based

A model which creates space for community based ADR which captures which is in a position to provide early intervention. The model should be regional and could be based on the CLC model, or even link in with the CLC model. This ADR model should have a separate independent status on its own merits that is not associated with the Courts.

##### Co-mediation

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<sup>4</sup> Field Chris 'Alternative Dispute Resolution in Victoria: Supply-Side Research Project' 26 February 2007 as at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Reports\\_and\\_Guidelines\\_2/\\$file/cav\\_report\\_adr\\_supply\\_side\\_research\\_2007.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/cav_report_adr_supply_side_research_2007.pdf)

A community based co-mediation model which involves a diverse pool of lay people to mediate who reflect the general community make up (ie: similar to jury members). This model is equipped to take into account difference and provide flexibility. This contrasts with the professional side of mediation where people can only be mediators if they are accredited.

#### Community Education

A model incorporating Community education about ADR (see awareness below)

#### Community Regulation

A community based ADR model that is regulated by the community, which means Government involvement should be minimalist (ie: social cohesion through community control). If the Government is involved red tape will increase and the community nature of ADR will be undermined. Regulation is also possible through co-mediator model (ie: regulation by peers), accreditation requirements, training, quality assurance.

#### Not undermine voluntariness or be punitive

A model that does not include aspects that are punitive or undermine the voluntariness of ADR, such as:

- Mandatory mediation;
- Incentives to participate;
- Sanctions for not participating ;
- Absence of real choice through lack of service delivery.

#### Legal Advice

A model that ensures that prior to using ADR all parties get clear legal advice about the scope of the ADR process that they are engaging in and their rights in terms of withdrawing from the process.

#### Triage

A model that adapts a version of the triage approach used in hospitals so that urgent matters can be better dealt with by Courts.

#### Measurement

A model that is measured in a manner that takes the following needs into account

- Analysis of the value of community ADR in its own right, rather than as a shadow of the Courts (ie: not emphasise impact on the Court system).

- Appropriate resources and training for local Indigenous Australians to develop capacity for measurement.
- Capturing of information about quality, not only quantity.
- Acknowledgement that process is seen by some as more important than outcome.
- Inclusion of questions such as:
  1. are people aware of ADR?
  2. if they are aware of it, do they then use it?
  3. How long did the agreement reached at the ADR last?
  4. Was the ADR model based on Indigenous Australian knowledge?
  5. Was the process seen as fair even though the outcome was negative?
- Take into account complex underlying issues which may impact ADR, such as punitive sentencing and failure to implement recommendations of the Royal Commission into Aboriginal Deaths in Custody.

#### Confidentiality

There should be a requirement of confidentiality for ADR providers in ADR proceedings (ie: not linked to Court). According to a VALS' solicitor if ADR is not admissible in Court it is more likely to be successful at the ADR stage.

#### Common standards

There should be common standards for ADR practitioners that should appear in guidelines that target the needs of Indigenous Australians (ie: cultural awareness training).

#### Restorative Justice

The profile of research supporting restorative justice and not supporting punitive sentencing should be raised and the findings implemented. A change in culture relating to punitiveness should be enacted. (ie: public education, A National Indigenous Strategy to challenge punitiveness).

#### Indigenous Australian knowledge

Rather than adopt the dominant model of Western-based paradigms, such as negotiation, conciliation, arbitration and mediation, the following should be considered:

- Indigenous paradigms, which call for the rejuvenation and reclamation of ways in which disputes may be resolved according to the culture and custom of the Indigenous party involved (however, not generalise as Indigenous Australian culture is diverse).
- Combination of Western-based and Indigenous paradigms. (“Indigenization” of Western paradigms, convergence in which the two systems meet and work together).<sup>5</sup>

VALS prefers Indigenous paradigms that simply do more than “accommodate” Aboriginal identity.<sup>6</sup> Aboriginal Courts and tribunals operate closer to the western end of the continuum of ADR as these are lacking in comparison to indigenised Western paradigms.<sup>7</sup>

## ACCESS

VALS is predominantly concerned with access to ADR issues for the Indigenous Australian community, who fit within the conception of marginalised peoples in the Discussion Paper. There are advantages and disadvantages associated with ADR process for marginalised individuals and communities.

### Positive Features

The following features of ADR offer the potential to increase access to justice:

- Alternative to, or diversion from, the Western legal system that is culturally alienating;
- ADR is closer to Indigenous Australian dispute resolution. Astor and Chinkin have noted that the use of ADR techniques by indigenous communities precedes white settlement of Australia.<sup>8</sup>
- Reduction in time and cost involved in resolving disputes.

### Negative Features

The following negative features of ADR have the potential to decrease access to justice:

The issues that VALS has identified in relation to Indigenous Australians access of ADR, or to justice via ADR, is as follows:

### *Gaps*

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<sup>5</sup>Victor Wenona, (2007) above n 1, page 3

<sup>6</sup>Victor Wenona, (2007) above n 1, page 33

<sup>7</sup>Victor Wenona, (2007) above n 1, page 34

<sup>8</sup>Field Chris (2007) above n 11

A gap in specific ADR services for Indigenous Australians and cultural sensitivity of mainstream ADR services. It appears that the only mainstream services attempting to provide a culturally sensitive service is the Dispute Settlement Centre which has an Indigenous Liaison Officer role.

### *Inconsistent*

The extent to which ADR providers incorporate features to improve access for marginalised communities is inconsistent and ad hoc.

### *Referral*

Not only is there is the problem of referral loss, but also referral options for Indigenous Australians.

### *Power imbalance*

There is the existence of power imbalances, especially in the context of family violence. Some argue ADR suffers from the same problem of the legal system, that is it reflects Western cultural values are alienates Indigenous Australians who have different cultural values. Many power imbalances “inherent to disputes involving Aboriginal people are firmly rooted in most Western ideologies and institutions”.<sup>9</sup> Evidence of power imbalance is apparent in the following:

- Aboriginal people are forced to have their rights and voices heard within the dominant Western legal discourse.<sup>10</sup>
- State is a coloniser of conflict and Traditional methods of dispute resolution have been taken away and/or fallen into official disrepute.<sup>11</sup>
- Cultural appropriation.
- Internal colonialism meaning Aboriginal communities view their own traditional legal systems as inferior to those of the colonial powers and adopt only those “aspects of [I]ndigenous knowledge, values, and processes that do not conflict with Western values and laws” (Bell, 2004:243).<sup>12</sup>
- Indigenous Australian forums of dispute resolution retain dependency upon the laws, systems and resources outside of, and often in contradiction to

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<sup>9</sup> Victor Wenona, (2007) above n 1, page 8

<sup>10</sup> Victor Wenona, (2007) above n 1, page 9

<sup>11</sup> Nolan Christine, ‘Alternative Dispute Resolution in Aboriginal and Islander Communities: The Community Justice Program's Experience’ in Australian Institute of Criminology *Australian violence: contemporary perspectives II (1995)* as at <http://www.aic.gov.au/publications/aust-violence-2/nolan.html>

<sup>12</sup> Victor Wenona, (2007) above n 1, page 17

Aboriginal culture.<sup>13</sup> Aboriginal forums are given jurisdiction by an authority other than their own<sup>14</sup>. “The “strings” attached to government funding often force Aboriginal communities to do one of two things: either mirror and/or model Western forums and institutions, or administer justice (as a Western goal) through the use of Indigenous cultures (Lee 2005).<sup>15</sup> “Aboriginal methods of dispute resolution that are dependent upon government funding and/or non-Aboriginal agencies for jurisdiction have an additional challenge of meeting two often diametrically opposed sets of standards and requirements”<sup>16</sup>.

- Indigenous cultures and worldviews have been misunderstood and oppressed. Therefore, any culture not in line with the Western Judeo-Christian paradigm was deemed to be “backward,” “obsolete,” inferior and “if at all, of negligible value” (1992:7). The ability to decentre the Western worldview in order to understand Aboriginal ones is important to the ADR movement and the proper resolution of inter- or intra-cultural conflict/need to “decolonize methodologies” (Smith, 1999).<sup>17</sup> Many Western values are often held to be universal but find no resonance in Indigenous cultures.<sup>18</sup>

#### *General issues*

The Primary Dispute Resolution issues are translatable to ADR generally. It was identified that the reasons for the limited use of PDR services by Indigenous Australians included:

- Not specific: the limited number of Indigenous family mediators/counsellors;
- Not in own community: preference to seek assistance inside their particular communities;
- Underdevelopment of networks: underdevelopment of formal and informal networks between service providers and Aboriginal and Torres Strait Islander communities;
- Modes inappropriate: existing models of mediation are not appropriate to the specific needs and expectations of Aboriginal and Torres Strait Islander communities;
- Stereotypes, racism: at times racist, stereotypes workers in these services held;

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<sup>13</sup> Victor Wenona, (2007) above n 1, page 10

<sup>14</sup> *ibid*

<sup>15</sup> Victor Wenona, (2007) above n 1, page 11

<sup>16</sup> Victor Wenona, (2007) above n 1, page 10

<sup>17</sup> Victor Wenona, (2007) above n 1, page 24

<sup>18</sup> Victor Wenona, (2007) above n 1, page 25

- Western culture assumptions: assumptions about ‘the family’ – moving beyond an Anglo-centric understanding of family;<sup>19</sup>
- Cross-cultural: mediation may not be appropriate between Aboriginal and non Aboriginal disputants. In the case of a dispute which arose because of a breach of Aboriginal law, it would not be appropriate for a mediator from outside the community to act in any way unless invited to do so.<sup>20</sup>
- Pressure: Pressures may be felt by Indigenous Australians not only to enter mediation but also to conform to the community view.<sup>21</sup>

*Differences to Western models and privileging of Western models*

The differences between Western and Indigenous Australian culture is apparent in the following table:

Indigenous Australian	Non-Indigenous Australian
Communal	Individual
Wholistic approach	Life as a divisible whole
Time spent on relationship building	Time spent on intensive negotiation
Mediator’s personal involvement/first hand knowledge is valued	Mediator’s neutrality valued.

Indigenous Australians in comparison to non-Indigenous Australians value flexible processes, people-orientation, use of cyclical time, and more qualitative measurements in assessing the success of the conflict resolution process.<sup>22</sup>

Potential solutions

The gaps in access to justice can be filled by targeting the needs of marginalised people and specific examples of this are:

*Self reflective*

Be self reflective about operating procedures and try and improve them. An example of being self reflective us the review of the Primary Dispute Resolution (PDR) which contained the following potential solutions:

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<sup>19</sup> Hughson Sally Dr, ‘Primary Dispute resolution: Embracing Diversity’ p6 as at <http://www.leadr.com.au/HUGHSON.PDF>

<sup>20</sup> ATSIC, ‘Discussion Paper: Issues Of Fairness And Justice In Alternative Dispute Resolution (Adr), 1998, para 4 as at [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/\(A0E22772974CC5513F69378CCFFF57C2\)~ATSIC.rtf/\\$file/ATSIC.rtf](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/(A0E22772974CC5513F69378CCFFF57C2)~ATSIC.rtf/$file/ATSIC.rtf)

<sup>21</sup> ATSIC (1998) above n 27, para 12

<sup>22</sup> Victor Wenona, (2007) above n 1, page 11  
**VALS Submission to Consumer Affairs Victoria in Relation to ‘Indigenous People and Privat29 Rental Housing’ Research Paper – sent 25 March 2008**

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- Consider alternatives to written agreements' as not all Aboriginal and Torres Strait Islander people trust written agreements. Alternatives could be verbal or third party as witness.<sup>23</sup>
- Use friendly, easy to understand language throughout the process.<sup>24</sup>
- Recognition and support of the extended family roles and values.
- Availability of Aboriginal and Torres Strait Islander support people.
- Need to consider all aspects of service delivery – from intake, venue where it takes place, and filling out forms - to ensure cultural appropriateness.
- Must have choice to either use an Aboriginal or Torres Strait Islander mediator.
- Train non-Indigenous mediators to improve awareness of Indigenous issues and values.<sup>25</sup>
- Cultural Awareness Training;
- Services must promote themselves to the Aboriginal and Torres Strait Islander communities;
- Develop appropriate promotional materials that attract the eye; verbal promotion;
- Develop Different ways of working;
- Develop ways of working that embrace a person-centered perspective (ie: flexible easily understood models; checking preferred process and working together to develop a process that people are comfortable with);
- Provide Aboriginal and Torres Strait Islander liaison officers.<sup>26</sup>

*Distinct*

The needs of indigenous Australians arising in the context of ADR should not be subsumed under those of other ethnic minority cultural groups. Specific Indigenous

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<sup>23</sup> Hughson Sally Dr, above n 26, page 9

<sup>24</sup> Ibid

<sup>25</sup> Hughson Sally Dr, above n 26, page 8

<sup>26</sup> Hughson Sally Dr, above n 26, page 9

Australian cultural considerations need to be addressed in the context of individual communities.<sup>27</sup>

### *Involvement*

The Indigenous Australian community should be involved in ADR service design at the beginning rather than tack it on at the end. Taking an inclusive approach makes sense as it is more likely to work if Indigenous Australians are involved and have ownership. This has the potential to benefit non-Indigenous Australians too.

### *Share information*

Information should be shared between practitioners about best practice dispute resolution techniques in relation to Indigenous Australians. Consideration should be given to the way NADRAC and the LIV share information on ADR and the following ways CLCs share information: intranet and conferences).

### *Appropriate mediator*

Mediators need to be broadly representative of the community and acceptable to the whole community.<sup>28</sup> If it is accepted within ADR circles that you shouldn't have two male mediators when there are male and female parties, then should not have two non-Indigenous Australian mediators.<sup>29</sup> Where non-Aboriginal mediators are used, these mediators must have undergone cultural awareness training and must have significant experience in dealing with Aboriginal people, families and communities.<sup>30</sup>

### *Choice*

There should be a choice between:

- targeted services that are Indigenous Australian organisations or culturally sensitive mainstream services in acknowledgement of the fact that some aspects of traditional dispute settlement are not the preferred choice of some indigenous people.<sup>31</sup>
- Koorie mediator and non-Koorie mediator.

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<sup>27</sup> **ATSIC (1998) above n 27, para 14**

<sup>28</sup> Nolan Christine (1995), above n 18

<sup>29</sup> Kelly Loretta 'Recent Developments in NSW in Aboriginal Family Mediation' *Indigenous Law Bulletin* 2002 15(5) 2002, p14 as at <http://www.austlii.edu.au/au/journals/ILB/2002/14.html>

<sup>30</sup> *ibid*

<sup>31</sup> **ATSIC, 'Discussion Paper: Issues Of Fairness And Justice In Alternative Dispute Resolution (Adr), 1998, para 4 as at [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/\(A0E22772974C5513F69378CCFF57C2\)~ATSIC.rtf/\\$file/ATSIC.rtf](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/(A0E22772974C5513F69378CCFF57C2)~ATSIC.rtf/$file/ATSIC.rtf)**

### *Consistency*

It should be ensured that the same person does both the intake and the mediation.<sup>32</sup>

### *Free*

ADR provision should be free, rather than based on a user pays model, particularly if mediation is mandatory. If a user pays model is adopted then there should be the safeguard of a free service, such as a means test.

### *Referral*

The referral process should be improved by:

- Introducing referral guidelines between service providers that take into account the needs of Indigenous Australians,
- Collecting data on referrals (see below);
- Introducing a central gateway for accessing information about ADR. VALS supports an information gateway (ie: via website) but is concerned by centralisation of services as this disadvantages regional and rural areas. VALS suggests that it is better to provide appropriate funding to current services so that they are equipped to provide and respond to referrals rather than centralise the referral process.

### *Flexibility*

The ADR system should be flexible enough to enable parties to make a complaint or lodge a claim with ADR service providers through another person (ie: family or support worker).

### *Data*

Data should be collected on Indigenous Australian's use of ADR so that trends can be observed and the need for systemic change identified. It would be useful to ask people if they are of Aboriginal and Torres Strait Islander descent and ask these people their satisfaction with the ADR process. There is a role for both Government and private ADR providers in such data collection/reporting.

### *Human Rights*

There should be inclusion of a mechanism for ensuring that breach of human rights does not occur during the course of a negotiated settlement of a dispute.<sup>33</sup>

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<sup>32</sup> Kelly Loretta (2002) above n 36, page 14

<sup>33</sup> ATSIIC, (1998) above n 27, para 8

## *Awareness*

Awareness raising should be promoted through effective promotion of ADR providers and services by both individual services and Government. Promotional material could be in the form of community education sessions, publications and posters. Such promotion should be targeted at the general community, but there should also be specific targeting towards vulnerable groups, such as Indigenous Australians. For instance, Indigenous Australian specific publications which are noticeably so (ie: Indigenous Australian colours and artwork) that is in plain English should be provided. Indigenous Australian people should be involved in the development of such materials. Services can do joint education campaigns. It should be made clear to Victorians that they have a number of options before them. A publication of VALS titled 'Be Strong: Know your rights Kit.' outlines different pathways to resolution of disputes in the following manner:

- Deal directly with the person/s involved;
- Use a complaint process, a tribunal or a Court;
- Tell other organisations and ask them to take action.

## *Training*

Training should be provided for ADR practitioners, the content of which includes cultural awareness that is ongoing. Training should not be treated as a distinct module or topic, "without being fully integrated into all aspects of skill acquisition, process design, and implementation." The problem with this is that Indigenous Australian culture is "conceptualized as something external that divides us, without recognition that culture is everywhere, including within us; it is a set of lenses through which we see all human interaction and information. When communication and process design skills are taught without reference to the cultural assumptions underlying them, processes are more likely to mirror bureaucratic, legal culture than the culture of any particular ethnocultural group."<sup>34</sup>

## *Safeguards*

Safeguards should be introduced to ensure that ADR is only used in appropriate circumstances, such as

- Guidelines;
- Screening for family violence
- Assess whether any apparent agreement to the settlement is the result of actual agreement.<sup>35</sup>

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<sup>34</sup> Victor Wenona, (2007) above n1, page 19

<sup>35</sup> ATSIIC (1998) above n 27, para 12

## NADRAC

Comply with the Statement of Principles devised by National Alternative Dispute Resolution Advisory Council in the context of Indigenous Australian ADR.<sup>36</sup>

### *Family Violence*

VALS acknowledges there are differing views on the usefulness or appropriateness of ADR in the context of family violence. VALS argues that if family violence is addressed in the ADR setting then legal advice should be sought before proceeding, especially for the victims, so it is clear what their options are.

An argument for applying ADR to the family violence context is that ADR is appropriate if it is about resolving issues in a relationship (such as residence of, and contact with, children) where violence has or is an aspect of the relationship provided safeguards are in place to prevent any further intimidation.<sup>37</sup>

Also, arguably restorative justice models (such as victim-offender 'mediation') are better suited to dealing with family violence in Indigenous Australian communities. "A restorative justice model differs from mainstream mediation because of its engagement with the community of concern. The presence of the community arguably addresses the shortcoming of mediation in matters involving domestic violence, as the violence is open to public scrutiny (ie: community support and protect the interests of the victim, and can act to prevent future violence) and it can be a forum to display the Aboriginal community's disapproval of violence."<sup>38</sup> Those who say mediation is never appropriate for family violence are working with a 'Western' mediation model which is founded on the concept of 'negotiating for oneself'. It rests on assumptions: 'settlement' and the individual nature of conflicts as discussed above, and that 'protection' remedies in fact effect safety. "Given that virtually none of these assumptions hold true in an Aboriginal community, it is no surprise that Aboriginal people commonly identify family fighting and domestic violence as concerns suitable for mediation." "Within the context of 'Western' society, concern with women's protection has underlined the exclusionary policy about mediation and 'domestic violence'. Within the context of an Aboriginal community, it is, by high contrast, the legal remedies which compromise women's safety."<sup>39</sup> An Aboriginal woman who charges her husband/brother/father with violent acts is responsible for whatever dangers or death may befall him once he passes through to the justice system (ie: social disapprobation, hated by the family, anger of perpetrator exacerbated) It may be argued that mediation is safer than the existing alternatives in the Aboriginal context, Mediation could theoretically provide a safe, legitimate and supportive

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<sup>36</sup> NADRAC 'Indigenous Dispute Resolution and Conflict Management' January 2006, as at [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/\(EAF6E03C496C7A11D2A141976803674B\)~Indigenous+Dispute+Resolution+and+Conflict+Management.DOC/\\$file/Indigenous+Dispute+Resolution+and+Conflict+Management.DOC](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/(EAF6E03C496C7A11D2A141976803674B)~Indigenous+Dispute+Resolution+and+Conflict+Management.DOC/$file/Indigenous+Dispute+Resolution+and+Conflict+Management.DOC)

<sup>37</sup> National Criminal Justice Reference Service 'Victim-Offender mediation' [http://www.ncjrs.gov/html/ojjdp/2001\\_2\\_1/page1.html](http://www.ncjrs.gov/html/ojjdp/2001_2_1/page1.html)

<sup>38</sup> Kelly, Loretta (2002) above n 36, page 4.

<sup>39</sup> Sauve Madeleine, 'Mediation: Towards An Aboriginal Conceptualisation' Indigenous Law Bulletin, (1996) 3(80) Aboriginal Law Bulletin 10.

environment which respects both women and men's primary need for community and family.<sup>40</sup>

Similarly, the research VALS' commissioned for Bluett-Boyd found that Indigenous Australians prefer a restorative justice approach to family violence over a criminal justice response, whilst the preference for non-Indigenous Australians is the opposite.

Also, there is School of thought which has resulted in the renaming of ADR to make it applicable in the family violence context (ie: "victim-offender meeting," "conferencing," and "dialog". This name change in recognition of the fact that the process should not be primarily focused on reaching a settlement. However, the process is successful and most do result in a settlement. (Umbreit, 1997).<sup>41</sup> Findings about offender-victim mediation are:

- About two-thirds of the crime victims who are invited to participate in mediation choose to do so.
- About two-thirds of the cases referred to mediation result in a face-to-face mediation session.
- Over 90% of the cases actually mediated face to face result in a written agreement.
- Over 90% of the written agreements are satisfactorily completed.
- Victims and offenders who participate in mediation are very likely to experience satisfaction and a perception of fairness and justice.
- Victims who participate in mediation report a reduction in their fear of being re-victimized by the same offender.
- Offenders commit fewer and less serious offenses after participating in mediation. (Mark S. Umbreit and Robert B. Coates. "Cross-Site Analysis of Victim-Offender Mediation in Four States." *Crime and Delinquency*. 39(4): 565-585. 1993).<sup>42</sup>

Some examples of applying ADR to the family violence context are:

- The joint proposal of the Dispute Settlement Centre and VALS relating to the extension of the services of the former to circumstances involving family violence (see extract of proposal at Appendix A).

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<sup>40</sup> *Ibid* .

<sup>41</sup> 'Victim-Offender mediation (2001) above n 48

<sup>42</sup> Price, Marty 'A Road Somewhat Traveled' VOMA Quarterly Conference Review Fall Winter 1996 as at <http://www.voma.org/docs/vomaq96.html#Victim-Offender>

- Family violence service in Kempsey that provided shuttle mediation in the context of family violence.
- Victoria Legal Aid Round table dispute management which is required to get VLA funding and includes family violence. In the experience of a VALS. solicitor the agreement process is successful partly because the Indigenous Australian community do not want to go to Court.

## CONCLUSION

In this submission VALS argues that there is need to create space for

- a community based Alternative Dispute Resolution (ADR) model that is a distinct entity separate from the Courts;
- Greater use of restorative justice approaches and;
- Utilisation of Indigenous Australian knowledge in the development of ADR models, dispute resolution processes and restorative justice programs.

VALS discusses obstacles to creating valued space, such as failure to prioritise systemic discrimination, formal equality usually trumps substantive equality and there is need for both formal and substantive equality, failure to understand systemic discrimination, incoherent and fragmented reform agenda and consulting after the event. VALS makes suggestions to overcome the above and at the core of which is the targeting of the needs of Indigenous Australians and adoption of a community based co-mediator model.

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