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VALS' response to the Human Rights and Equal Opportunity Commission's request for comments on the Declaration on the Rights of Indigenous Peoples – sent 1st September 2008

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INTRODUCTION

Thank you for the opportunity to provide comment on the Declaration on the Rights of Indigenous Peoples. The Victorian Aboriginal Legal Service Co-operative Limited (VALS) is a longstanding supporter of the Declaration (Declaration).

This submission contains information about:

- whether and how a commitment to particular sections of the Declaration should be emphasised;
- Steps the Government should take to support the Declaration;
- How the Government should implement the Declaration in the long term;
- Need for the Declaration.

The stance of VALS is not to be taken as representative of all Indigenous Australians and contains an emphasis on legal issues.

Question 1.

Which sections of the Declaration would you like the government to emphasise a commitment to?

VALS emphasises each element of the Declaration since the Declaration reflects minimum standards of human rights (Article 44). VALS supports the Declaration in its entirety, especially as VALS' Chief Executive Officer, Frank Guivarra, had a long involvement with the Working Group on the Draft Declaration on the Rights of Indigenous Peoples

VALS argues the words of Ms Victoria Tauli-Corpuz, Chairperson of the United Nations Permanent Forum on Indigenous Issues, made in the context of interpretive statements of the Declaration by member States, support the need for a commitment to the entire Declaration. She stated that the significance and implications of the Declaration should not be minimized in any way. She stressed the need to read the Declaration "...in its entirety or in a holistic manner and to relate it with existing international law".

She acknowledged that effective implementation of the Declaration would test the commitment of States to protect, respect and fulfil Indigenous peoples' collective and individual human rights. Similarly, VALS acknowledges the magnitude of implementing the Declaration and the hard work and good will that will be required, but once again uses the words of Ms Tauli-Corpuz to motivate the Government to do the right thing for all Australians: "rise to the historic task before us and make the Declaration on the Rights of Indigenous Peoples a living document for the common

future of humanity.”¹ VALS contends that the arguments by those countries who vote against the Declaration alleging that it was a flawed document and cannot be implemented are incorrect.²

If VALS had to choose between aspects of the Declaration, we would ascribe priority to the rights listed below. The reason for this is that:

- the explicit denial of these rights in Australia’s history has come to forefront in recent events and revelations in Australia and the denial of these rights is disadvantaging Indigenous Australians peoples;
- the rights are very broad and can be implemented in multiple ways.

The rights are:

Self-Determination

Right to self-determination (Articles 3-4) as VALS considers that the right to self-determination is the basket that all other human rights sit in. This right is linked to the consultation which is incorporated into the following articles in relation to various rights: 2,17,19,30, 32, 36, and 38. VALS emphasises the need for “free, prior and informed consent” before adopting and implementing legislative or administrative measures that may affect them” (Article 10, 19). VALS argues that an emphasis on the right to self-determination is legitimate especially in light of Article 46 which clarifies the fact that self-determination is not tantamount to secession.

Freedom from Discrimination

Right to freedom from discrimination (Articles 2, 8, 9, 14, 15, 16, 21, 22, 24, 29 & 42) as VALS is concerned by the amount of discrimination that Indigenous Australians experience. This is exhibited by the number of Indigenous Australians accessing VALS’ civil law service complaining about discrimination. The need to emphasise a commitment to freedom from discrimination is apparent by the fact that in Australia’s history the Racial Discrimination Act 1975 (Cth) has been wound back three times, each time to create laws that disadvantage Indigenous Australians (ie: Wik, Hindmarsh Island Bridge & Northern Territory Intervention in relation to welfare payments).

Financial and Technical Assistance

Right to financial and technical assistance in order to implement the Declaration (Article 39) as there is currently a shortfall in funding for Indigenous Australians which is detrimentally impacting Indigenous Australian’s enjoyment of fundamental human rights.

Redress

¹ Sixty-first General Assembly Plenary 107th & 108th Meetings (AM & PM) General assembly adopts declaration on rights of indigenous peoples; ‘major step forward’ towards human rights for all, says president’ as at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>

² Ibid.

Right to redress through effective mechanisms (Article 8, 11, 20, 24, 28, 32, 40) for past and any future injustices as this is currently lacking.

Question 2.

What steps do you think that the government should take to show support for the Declaration?

The steps the Government should take to show support for the Declaration is to:

- Endorse the Declaration by making Australia a signatory to the Declaration.
- Implement the Declaration in domestic law, such as the Constitution.
- Work with Indigenous Australians in line with the spirit of the Declaration, rather than against it.

Question 3.

In the long-term, what steps should the government take to implement the commitments in the Declaration in Australia?

Listed below are some suggestions on how to implement the commitments in the Declaration. The list is not exhaustive and the content has been kept broad rather than detailed in recognition of the need for further discussions between the Government and Indigenous Australians on how to implement the Declaration. Also, VALS is not representative of the entire Indigenous Australian community. The suggestions below reflect the fact that VALS is engaged with the legal system and reflect many of the messages that VALS finds itself repeating. VALS does not wish to discount the legitimacy of other focuses by different Indigenous Australian organisations. VALS is supportive of a holistic approach to issues facing the Indigenous Australian community.

In the long-term, the steps that the Government should take to implement the commitments in the Declaration in Australia are:

GENERAL

Framework

Use the Declaration as a framework to address human rights abuses.

Inclusive

Whilst it is important that Aboriginal Affairs does not become a political football, in seeking political bipartisan support to Aboriginal Affairs the Government should not forget the need to include and have the support of Indigenous Australians. The Government should involve Indigenous Australians in the development and implementation stage of policy/programs/services. In furthering the Government's aim of social inclusion it should be inclusive of Indigenous Australians at the beginning stages of any process. It is difficult to provide effective input at the end of a process (ie: Indigenous Australian considerations tacked on at the end of the process rather than designed in at the beginning). The Government should work in partnership with Indigenous Australians. It is important to listen to Indigenous Australians and work with them as they are experts on the issues that effect them as they live and breathe them.

The Government should show leadership in relation to issues facing the Indigenous Australian community and leave a legacy in this regard. For instance, the Government should instill in Australian society the promotion and protection of Indigenous Australian's human rights in a manner that cannot be wound back by successive Governments (ie: Constitutional reform/referendum). The right to freedom from discrimination should not be wound back in ways that it has in the past.

Apology

Turn the momentous occasion of the apology to Indigenous Australians into momentum. It is important that the momentum is not lost and that next steps are taken as follow up to the apology.

Commitment

The Rudd Government should be mindful of the backlash against the Howard Government for voting against the Declaration given that it was overwhelmingly voted in favour of by the international community. The Rudd Government should not backslide in relation to indications of support for the Declaration.

Engage With and Learn from Others

The Government should engage with the process of, and people involved in, the 2nd UN decade on Indigenous Peoples and UN processes in general. The Government should be open to learning from those who have a better track record at protecting Indigenous people's human rights. For instance, there are countries overseas that have introduced positive initiatives for their Indigenous Peoples and this will become even more the case as countries seek to implement the Declaration. The Government should keep abreast of such developments. The Government may also learn from the experience of the experience in Victoria and the ACT where a Charter of Human Rights has been introduced.

Change Culture through Education

Conduct an education campaign that speaks the truth about human rights and the Declaration (ie: the Declaration is a non-binding human rights instrument of the General Assembly and creates no new rights in international law). This is instead of misleading the public about the Declaration (ie: scaremongering about the right to self-determination). The education campaign will contribute to a change in culture around Indigenous Australian's human rights. If a culture of rights occurs then Indigenous Australians will not need to argue about the existence of their human rights, but simply have to prove a breach of their human right. Education should be targeted at middle class Australians who assume that everyone has enjoyment of their human rights and so do not see the need for the Declaration or a further rights discourse.

SPECIFIC

Self-Determination/Consultation/Representative Structure

Implement the commitment to self-determination and consultation (see Articles relating to self-determination and consultation above) by introducing a representative structure that Indigenous Australians contribute to the development of in order to comply with Articles 18-19. Some

possibilities that need to be discussed are a replacement of ATSIC, a quota of Indigenous Australians in Parliament or the introduction of an Indigenous Australian Political party.

The Government should be strategic in how it engages with Indigenous Australians to avoid consultation fatigue for Indigenous Australians. VALS suggests that the Government develop formal partnerships with Indigenous Australians in order to develop consultation protocols which ensure that communities are consulted effectively on Government initiatives and programs. VALS is in favour of consolidation of consultation which 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 to achieve integration of consultation and promote synergies. 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.

Bill of Rights

In order to comply with Article 38, requiring States in consultation and cooperation with Indigenous peoples to take measures, including legislative measures, to achieve the ends of the Declaration, the Government should introduce a Federal Bill of Rights either in legislation or the Constitution. The Government should at least amend the Federal Constitution to include the right to freedom from discrimination (see articles relating to discrimination above).

Indigenous Australian and Non-Indigenous Australian Organisations

In accordance with Article 5, which provides that Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions the policy of mainstreaming services should be abolished. It should not be assumed that just because Indigenous Australians do not live in remote areas they are assimilated (ie: urban) and can access mainstream services. Remoteness is not only a matter of distance but also social isolation.

Indigenous Australians should have a choice between mainstream and Indigenous Australian services. Both types of services should be provided rather than one provided at the expense of the other. The Government should also ensure that mainstream services are supported by the Government to ensure that they do provide a culturally appropriate service. Indigenous Australian services should be supported in terms of technical and financial assistance in order to meet the needs of Indigenous Australians, as currently such services are underfunded.

Other Articles that reflect the above sentiment about mainstreaming are: Article 8 right not to be subjected to forced assimilation or destruction of culture, Article 23 right to right to be actively involved in developing and determining health etc programmes and, as far as possible, to administer such programmes through their own institutions, Article 34 right to promote, develop and maintain institutional structures.

In accordance with Article 5, the Government should introduce Aboriginal and Torres Strait Islander Social Justice Commissioners in States and Territories to complement the National Aboriginal and Torres Strait Islander Social Justice Commissioner. The Commissioners could hold the Government accountable to the implementation of the Declaration.

Life, Physical and Mental Integrity, Liberty and Security of Person

In accordance with Article 7, which relates to the rights to life, physical and mental integrity, liberty and security of a person, the Government should continue with its commitment to close the gap in life expectancy. It should also consider restorative justice/therapeutic jurisprudence as a means to address issues of family violence/conflict with appropriate safeguards in place to respond to the issue of power imbalance.

Also, more Indigenous Australian specific Mental Health Services must be provided so that people with a mental illness are not incarcerated because there are no proper facilities for their treatment. The recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) must be fully implemented in order to reduce the over-representation of Indigenous Australians peoples in the criminal justice system. The RCIADIC address underlying issues of the over-representation of Indigenous Australians in the criminal justice system that are outlined in Article 21 and 23 (education, employment, vocational training and retraining, housing, sanitation, health and social security).

Redress

In accordance with Article 8 and other Articles relating to redress, the Government should establish a mechanism for redress for members of the Stolen Generations, people who have been removed from their land, lost their culture and those effected by the policy of not paying wages (ie: stolen wages). The mechanism should not place the onus on the Indigenous Australian claimant to prove their case as often relevant paperwork has been destroyed, instead the onus should be on the Government to prove that the Government does not need to provide redress (ie: proof that payment of wages was made). Article 17 and 20 relating to economic exploitation is also relevant to stolen wages. Also, the mechanism should not have a fixed term of operation, but remain available for as long as it is required. Also, a Bill of rights, with a complaint mechanism, should be introduced in order to hold people accountable to the Declaration.

Land

In order to adhere with Article 10, 25-29 relating to land amongst other things the Rudd Government must review the Howard Government's policy to lease Aboriginal land (ie: 99 year lease) before implementing it itself. Also, articles relating to land prompt the need for land justice and a review of the Native Title system.

Treaty

In order to comply with Article 37, the Government should work with Indigenous Australians towards a treaty.

Funding

In order to comply with Article 39, the Government should provide financial and technical assistance to Indigenous Australian organisations. The Government should not be concerned about winning votes by providing tax cuts, which middle class Australians want, but using the money to enhance service delivery. Perhaps in relation to redress the source of financial assistance can be a percentage of land tax. Also, investment should be made in the capacity of Indigenous Australians.

4. Other comments: Need

A basic comment that VALS makes in respect of the Declaration, is that it is needed. Indigenous Australians do not have the full enjoyment of human rights as do other Australians. There is a need for substantive equality (ie: special measures, affirmative action such as implementing a Declaration specifically about the rights of Indigenous peoples) in order to ensure the respect of Indigenous Australian's human rights. The absence of formal protection of human rights in Australia, such as in the Constitution or a Bill of Rights, effects Indigenous Australians more than most middle class and higher class Australians. Most Australians enjoy human rights by relying on the benevolence of the Government which was the intention of the founders of the Australian Constitution.

However, Indigenous Australian's fate at the hands of Australian Governments has proven that a formal rights protection structure is required rather than relying on the benevolence of Governments. It is for this reason that VALS supports the Declaration in totality. Such support is also apparent in comments of a representative from Finland who responded to the Declaration by saying: adoption would strengthen the rights of indigenous peoples worldwide and serve as a comprehensive framework for cooperation in implementing new minimal international standards for indigenous people's rights.³

CONCLUSION

The following arguments are made in this submission:

- A commitment to each element of the Declaration should be emphasised, rather than particular sections of the Declaration.
- If there is no other way to implement the Declaration other than emphasising particular sections then VALS emphasises the following relevant and broad rights:
 - Right to self-determination;
 - Right to freedom from discrimination;
 - Right to financial and technical assistance;
 - Right to redress through effective mechanisms.
- The Government should take the following steps to show support for the Declaration:
 - Become a signatory to the Declaration;
 - Implement the Declaration in domestic law;
 - Work with Indigenous Australians.
- VALS general comments about the implementation of the Declaration are:
 - Use the declaration as a framework.
 - Take an inclusive approach that involves Indigenous Australians at the beginning of a process and in the development and implement of an outcome.

³ Ibid.

- Turn the momentous occasion of the apology to Indigenous Australians into momentum.
 - The Rudd Government should not backslide in relation to indications of support for the Declaration.
 - Engage with others and learn from their example about how to implement to the Declaration, specifically other countries and States/Territories in Australia that have a Bill of Rights.
 - Conduct an education campaign that transforms Australian culture from one that assumes all are equal to one that recognises inequality and the need to respect the rights of Indigenous Australians.
- VALS specific comments about various Articles of the Declaration are:
 - *Self-determination/consultation/representative structure*: replace ATSIC, quota of Indigenous Australians in Parliament or the introduction of an Indigenous Australian Political party and consultation protocols (ie: consolidation of consultation).
 - *Bill of Rights*: introduce a Federal Bill of Rights either in legislation or the Constitution. The Government should at least amend the Federal Constitution to include the right to freedom from discrimination.
 - *Indigenous Australian and non-Indigenous Australian organisations*: The Government should not implement a policy of mainstreaming but recognise the need for both mainstream and Indigenous Australian organisations.
 - *life, physical and mental integrity, liberty and security of person (Article 7)*: continue with commitment to close the gap in life expectancy, consider restorative justice/therapeutic jurisprudence as a means to address issues of family violence/conflict with appropriate safeguards in place to respond to the issue of power imbalance. Indigenous Australian specific mental health services, fully implement the RCIADIC.
 - *Redress (Articles 8, 17, 20)*: establish a mechanism for redress for members of the Stolen Generations, people who have been removed from their land, lost their culture and those effected by the policy of not paying wages (ie: stolen wages). The mechanism should not place the onus on the Indigenous Australian claimant to prove their case, but place the onus on the Government to prove that no injustice has occurred.
 - *Land (Articles 10. 25-29)*: Review leases and native title system.
 - *Treaty (Article 37)*: Work with Indigenous Australians towards a treaty.
 - *Funding (Article 39)*: Provide financial and technical assistance by emphasising service delivery over tax cuts and sourcing reparation from land tax. Also, investment should be made in the capacity of Indigenous Australians.
 - VALS also argues that the Declaration is needed as Indigenous Australians do not have full enjoyment of their rights unlike other Australians. There is a need for substantive

equality and formal protection of human rights in the Constitution or a Bill of Rights rather than relying on the benevolence of Governments as Australian Governments do not have a good record in relation to Aboriginal Affairs. Given this need, VALS is fully supportive of the Declaration and the potential for its implementation.