



# Victorian Aboriginal Legal Service Co-operative Ltd.

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## Response to the Standing Committee of Attorneys-General Working Group on Indigenous Issues “National Indigenous Law and Justice Framework 2009-2015”.

While it is understood that the *National Indigenous Law and Justice Framework 2009-2015* (Framework) is a blueprint and therefore a launching pad for action to reduce Aboriginal and Torres Strait Islander disadvantage in law and justice, it appears that rather than the Framework expressing strong and decisive strategies and actions following the *National Indigenous Law and Justice Strategy Consultative Draft (Consultative Draft)* in 2007, examples to the opposite affect can be found.

The *Consultative Draft* contained a number of specific and direct proposals in response to certain aims. For example, Action 2 Measure 2.1;

- ‘Identify unmet legal aid needs and barriers to accessing legal services’ was paired with “processes” such as ‘Review Indigenous legal aid funding formula’;
- ‘Review State and Territory government contributions to Indigenous legal aid and seek consistent approach’;
- ‘Undertake further research to identify unmet legal needs’; and
- ‘Consult with State and Territory legal aid commissions and community legal centres’.<sup>1</sup>

Paradoxically, it appears that more recent and more broadly informed Framework is vaguer, less tangible, and lacking in decisive action-oriented goals for its stated aims and the processes expressed in the Consultative Draft. Instead of the Framework galvanising its aims through proposed actions gleaned from previous consultation, conversely it reads as a watered down version of the Consultative Draft, with ambitious and broad ranging goals, but with no stated movements to action them.

The “Strategy” and “Action” format of this draft framework on initial face-value appears to provide clear distinction between what the SCAG Working Group on Indigenous Issues would like to see achieved, and the steps that are recommended in achieving or “Actioning”, these strategies. However, on closer examination the stated “Actions” are generally unspecific and preliminary.

This document lacks the expected galvanisation of many elements found in the Consultative Draft and resultantly exists as a document (in the words of the Framework itself) that on the whole limits itself to incorporating ‘the general thrust of the feedback from stakeholders’.<sup>2</sup>

<sup>1</sup> Attorney-General’s Department (2007) *Consultative draft: National Indigenous Law and Justice Strategy ACT*: Australian Government, p. 11.

<sup>2</sup> *Ibid* p. 7.

For example, the earlier Consultative Draft presented suggestions such as:

- fund programs relating to initiatives to improve early identification of mental health issues in the criminal justice system (p.17);
- expand the number of community level projects funded which are aimed at reducing arrest rates (p.17);
- complete review of resources necessary to conduct a national clearinghouse feasibility study on Indigenous law and justice issues (p. 23);
- provide additional training opportunities to assist communities better engage, communicate and negotiate with Governments, policy-makers, and program administrators (p. 23);
- increase number of safe houses and similar facilities providing protection, counselling, life skills and mentoring in urban, regional and remote Indigenous communities (p. 28);
- consider the expansion or formalisation of processes relating to alternative sentencing options, traditional justice and related restorative justice schemes (p. 26); and so on.

The 2009-2015 Framework lacks a sense of momentum spurred from the Consultative Draft by broadening terms and restraining from any mention of existing or possible future projects. While many of the sentiments in the document are highly valuable, such as emphasising the importance of community engagement, looking at broad patterns of crime in relation to other issues such as drug use and alcoholism, and so on. However, there is a noticeable lack of decisiveness on any new initiative or expansion of existing programs that aim to address similar objectives to those found in the Consultative Draft.

For instance, in response to Strategy 4.3.1 which is to ‘increase the number of and access to culturally competent treatment services for Aboriginal and Torres Strait Islanders’, the “Action” (4.3.1a) is to ‘identify and address the barriers that prevent or discourage Aboriginal peoples and Torres Strait Islanders with alcohol and substance abuse issues from accessing or seeking treatment’.<sup>3</sup> Another “Action” is to ‘ensure effective referral and case management arrangements are developed to provide an integrated and ongoing response to alcohol and drug related violence’ (Action 4.2.1b).

These “Actions” are stated without any indication of already identified barriers to be addressed, how referrals can be “effective”, “developed” and “integrated”. Nor is a plan suggested that would glean from new or existing research such barriers. There is no mention of systems, organisations or programs that already exist that aspire to the same end in any jurisdiction, nor is any research referred to that might indicate a possible approach to be considered. As such, a large proportion of the Framework’s “Actions” provide little indication of specifically *where* attention can be paid and *how* this Framework can act as a tool to achieve its stated goals.

Strategy 5 is written to imply that justice outcomes require the reduction of alcohol and substance abuse. It would be truer to say that such a reduction is about preventing injustice occurring in the first place. ‘Justice outcomes’ alludes to issues in post-crime time frame (i.e. crime perhaps due to

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<sup>3</sup> Ibid p. 27

alcohol). Perhaps this strategy, among others, should be reconsidered through a different lens with prevention of crime in mind.

Some of the “Action” responses corresponding to a specific “Strategy” do not represent logical steps from one to the other. For instance, Strategy 2.3.3 involves **implementation** of holistic responses and the corresponding “Action” does not use the word implement, but instead ‘**identify**’ factors driving over-representation in the justice system. No mention of such factors that are identified in an abundance of the relevant literature in recent years are mentioned. To *identify* these factors is the first step, the action should be what is done to hone in on these factors to remedy the problem. ‘Implement’ is a stronger word than ‘identify’. The apparent watering down of the “Action” is disappointing.

It is noted that the current Framework has been made for public consultation ‘and does not necessarily represent the views of the Standing Committee of Attorneys-General or any individual Attorney-General or Government Minister’.<sup>4</sup> With this and earlier comments in mind, it is questionable whether the apparent backing away from specific actionable outcomes stems from a desire to achieve broad consensus on the framework either within SCAG or/and the broader public, or if there is a reluctance to name any specific programs or initiatives in an effort to distance the Framework from possible commitments alluded to in the Consultative Draft.

It is disappointing to see that despite submissions from organisations such as VALS, the Law Institute of Victoria, and the North Australian Aboriginal Justice Agency that called for recognition of Aboriginal and Torres Strait Islander Legal Services (ATSILS) as a significant stakeholder with which to engage, discuss and negotiate with during the consultative process in 2007, there is still no explicit mention of ATSILS present in the Framework.

The Framework calls for “justice services” to be more accessible to Aboriginal and Torres Strait Islander Peoples, but places no mention of supporting ATSILS as key to bridging gaps in access to justice. Support of ATSILS should have been included as an Action item. In VALS’ 2007 submission argued that:

*... the Strategy does not adequately intersect with ATSILS as it does not specifically mention the word ATSILS. VALS is concerned that this omission is deliberate. VALS should not be omitted from the Strategy given that law and justice advocacy is the bread and butter of ATSILS. VALS is unclear whether the omission is due to an apparent renaming of ATSILS or a blatant exclusion of ATSILS from the Strategy (p.9)*

The Framework similarly fails to intersect with ATSILS as demonstrated clearly in Strategy 1.2.3: ‘Addressing the barriers that prevent Aboriginal peoples and Torres Strait Islanders from accessing services relevant to civil and criminal law systems’. This strategy calls for Action 1.2.3e: ‘Explore options needed for the continued provision of appropriate and accessible information for Aboriginal Peoples and Torres Strait Islanders of available services, and develop and implement a strategy for the delivery of that information’.<sup>5</sup>

The obvious fit to the very services outlined above *is* ATSILS, yet the mere mention of an Aboriginal Legal Service is relegated to the margins of the document as abbreviated quoted comments rather than existing as a central tenant to “Strategy” and “Action” concerns. To turn

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<sup>4</sup> Ibid p. 1

<sup>5</sup> Ibid p.14

attention to VALS itself, the organisation is actively involved in community development, research and law reform.

VALS strives to:

- (a) promote social justice for Aboriginal and Torres Strait Islanders;
- (b) promote the right of Aboriginal and Torres Strait Islanders to empowerment, identity and culture;
- (c) ensure that Aboriginal and Torres Strait Islanders enjoy their rights, are aware of their responsibilities under the law and have access to appropriate advice, assistance and representation;
- (d) reduce the disproportionate involvement of Aboriginal and Torres Strait Islanders in the criminal justice system, and;
- (e) promote the review of legislation and other practices which discriminate against the Aboriginal and Torres Strait Islander community.<sup>6</sup>

VALS is involved in advocacy, research, Community Legal Education and operates in partnerships with other Aboriginal and Torres Strait Islander-run and mainstream organisations to achieve Strategy 1.2.3. VALS operates throughout Victoria as the main legal service provider for the Aboriginal and Torres Strait Islander community. It is disappointing that the Framework's strategy for addressing the barriers that prevent Aboriginal peoples and Torres Strait Islanders from accessing services relevant to civil and criminal law systems fails a mention of a single ATSILS.

Furthermore, the Strategy contains no recognition of the fact that ATSILS are operating on a funding pool that has no major increase since the early nineties however during this time the Indigenous Australian population has more than doubled. This places considerable limitations on the capacity of ATSILS to respond to community need. This is a core access to justice issue.

### **Royal Commission Into Aboriginal Deaths In Custody**

The Framework's Strategy 1.3.1 is to 'Undertake an analysis of the RCIADIC recommendations of contemporary relevance' to be served by Action 1.3.1a: 'Cross reference key findings of the analysis with the Framework and develop Strategies and Actions in response to key findings that are not captured in the Framework'. Considering the stated absence of funding attached to the aspirations of the Framework, this Strategy is one that would require a vast amount of resources and investment.

It should be stressed that although considerable time has passed since the recommendations of the RCIADIC, they are still very much of contemporary relevance. There is no need to exclude any of the recommendations from analysis on this basis. In addition, if the Committee is serious about moving towards obtaining any measure of Strategy 1.3.1, it is suggested that the Framework should reconsider taking on the action of analysing the RCIADIC recommendations and instead:

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<sup>6</sup> Victorian Aboriginal Legal Service Co-operative Limited (2004) *About Us* [online] <http://www.vals.org.au/about/about.htm>

- a) look to the literature that has already considered the RCIADIC recommendations and the extent to which they have been implemented or otherwise;
- b) engage with organisations such as VALS, other ATSILS, Community Legal Services, various clearinghouses and resource centres, academic institutions, public advocates, and so on, to obtain local and specialist knowledge of the implementation of the RCIADIC recommendations (or lack thereof)<sup>7</sup>;
- c) support and promote the work of individuals, groups and organisations who are undertaking this kind of research about the RCIADIC; and
- d) support the co-ordination of knowledge from around the country relevant to this issue (see suggestion below).

The Australian Indigenous Law Review (AILR) released a Special Edition for their 12<sup>th</sup> Volume which took as its theme “Coronial Reform and Preventing Indigenous Death”. This AILR Special Edition contains a report along with various articles and commentaries looking at, inter alia, vagaries of jurisdiction in coronial reform and Indigenous death prevention, the centrality and contemporary relevance of the RCIADIC, human rights in coronial inquests and various studies of partial implementation of the RCIADIC recommendations in some jurisdictions. This AILR edition represents a wealth of knowledge from which to begin the task of realising the contemporary relevance of these recommendations.

There is also recent national research demonstrating significant failures and weaknesses in the current piecemeal system of coronial recommendation pathways across different Australian jurisdictions. This issue would benefit from recognition and support from SCAG’s Working Group on Indigenous Issues. To give a sense of this research, Watterson, Brown and McKenzie (2008) contended that:

- Even where comprehensive and appropriately targeted recommendations are made, in most jurisdictions they are discretionary and non-legally binding.
- There is a lack of easily accessible public information about what recommendations are made and whether they are responded to, and in what manner.
- Where there are responses, they are often inadequate and poorly communicated, with no provision for systematic documentation.
- The study found there were ‘recurring instances where coronial recommendations had not been communicated or had been miscommunicated, or were lost within bureaucratic processes’ (p.5).
- Fewer than half of coroners’ suggestions to prevent future deaths were implemented by Governments across Australia, with the proportion in each jurisdiction of coronial recommendations that were implemented ranging from 27 per cent to 70 per cent.

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<sup>7</sup> For example, VALS has written numerous submissions surrounding various aspects of the RCIADIC and is currently engaging a student intern through the Aurora Internship Program to track the developments of the RCIADIC recommendations.

- The study also showed that implementation of coronial recommendations by State and Territory Governments and agencies was ad hoc, with implementation of particular recommendations often being dependent upon media pressure, advocacy group intervention, and family and community action.
- Coroners may therefore make potentially life-saving recommendations only for them never to be responded to or implemented, with no follow-up and no public awareness of what has happened.
- The lack of consistency across State and Territory boundaries, including the ‘patchy’ approach to prevention, together with few mechanisms to monitor the progress of recommendations and consequently little in the way of public accountability, creates a serious obstacle to uniform best practice in inquests, to attempts at systematic research, and ultimately to more effective death prevention across Australia.

The research surrounding the implementation of the recommendations, both directly following the RCIADIC and more recently, contain strong evidence of high contemporary relevance that remains a neglected area of concern and is in need of widespread support and action. This is a key area that the SCAG Working Group on Indigenous Justice could focus attention to aid momentum to positive change.

### **Priorities**

It needs to be recognised that not all jurisdictions are the same, and furthermore that within each jurisdiction there are metropolitan, urban, regional and remote communities that may share some similarities, but are simultaneously distinct. It is therefore appropriate for VALS to comment on what it believes to be of priority in Victoria.

#### Victoria

As mentioned in the VALS submission in response to the 2007 Consultation, the stated law and justice priorities in Victoria are largely in the Aboriginal Justice Agreements (MK I and MK II). The AJA reflects an agreement in principle with the idea of partnership with Aboriginal and Torres Strait Islander Peoples and consultation prior to decisions being made. State Government Departments have varying degrees of recognition of the need for Aboriginal specific policies and programs and have different consultative arrangements to the AJA.

The law and justice priorities in the AJA were determined by the Department of Justice in consultation with the Aboriginal and Torres Strait Islander community. The AJAs were established through the use of demographic data and ongoing consultative mechanisms. It is disappointing that the Framework makes no reference to these Agreements as a model, especially considering their in-depth, broad consultation and information gathering. VALS’ policies are based on the Attorney-General’s Department (Cth) *Policy Directions* to ATSILS, Board decisions and responses to community and Government changes.

## VALS

The key actions and programs that VALS is utilising to address the law and justice priorities are to:

- Participate in Government and non-Government bodies and Committees;
- Engage as a party to Memorandums of Understanding with a number of organisations and parts of Government in order to ensure greater accessibility of policies and services for Aboriginal and Torres Strait Islander peoples;
- Advocate for continuing improvements and standards to guide Government consultative processes;
- Advocate for more equitable access to education, housing, employment and health rights;
- Advocate for increased recognition of systemic discrimination in institutions and policy making;
- Advocate for less punitive and more appropriate sentences, more effective youth diversion strategies, better access to civil remedies and improved access to Koori dispute resolution.
- Advocate for better legal aid funding.
- Advocate for enhanced Youth Diversion Projects.
- Conduct Community Legal Education work.
- Base Client Service Officers in seven regions to provide an after-hours service.

### **Examples of Good Practice**

The Framework Feedback Form states that an essential part of achieving the stated goals is to identify good practice with the proposal that a compendium of good practice initiatives will be published in the future. VALS contributed to this task during the 2007 consultation, yet none of the initiatives provided by VALS or anyone else appears in the current Framework. It is hoped that the following is included in the proposed compendium to be published in the future:

- Diversion – for example the Police Cautioning and Youth Diversion Program;
- Koori Court;
- Client Service Officers;
- Aboriginal Liaison Officers;
- Community Legal Education;
- E\*Justice Notification System;
- Decriminalisation of public drunkenness/ time-out houses;

- Community engagement and involvement;
- “Smart on Crime” rather than “Tough on Crime” policies.

Questions to be asked when determining key measures include:

- What are the differences/similarities for urban, regional and remote areas?
- Was there earlier engagement?
- Is the program long-term?
- Is the relationship strong and equal?
- Is the meaningfulness of the system existing outside of what can be considered statistically meaningful?
- What is capacity and has it been strengthened?
- Has cultural appropriateness been strongly considered?

While it is pleasing to see the broad consideration of issues relating to the over-representation of Aboriginal and Torres Strait Islander peoples within the criminal justice system and the vision for sustainable approaches that embrace reconciliation and trust, the Framework’s vast aspirations with little indication of how such aspirations will be aspired to, forces the reader to question which parts, if any, will be attained.

It is highly important to recognise, as the Framework does, the emergent issues of the times such as the increasing rate of offending and incarceration for the female Aboriginal and Torres Strait Islander population. However suggested “Actions” in response, such as the development of culturally appropriate programs, seeking and developing rehabilitative interventions, and implementing good practice therapeutic models, is a mammoth undertaking in itself, let alone existing as one piece in large sea of other undertakings. Therefore, while the aspirations of this Framework are sound and well-meaning, scepticism towards actual action-oriented outcomes is hard to escape.

Through future developments, it is hoped this Framework evolves into a document that:

- has a clear identity (i.e. if the Framework does not necessarily represent the views of the Standing Committee of Attorneys-General or any individual Attorney-General or Government Minister, then *who* and *what* does it represent?);
- expresses decisiveness and conviction;
- overtly identifies ‘areas of priority’, jurisdictions and stakeholders that will be engaged as part of the Frameworks implementation;
- explicitly recognises ATSILS;

- explicitly states the programs, models, research and initiatives being explored;
- redefines what is categorised under “Action”, where items married to this category specifically relate to an existing or new program/research/undertaking that can be identified and progress tracked;
- recognises the individual and unique nature of each jurisdiction, and the metropolitan, regional and remote diversities within each of these jurisdictions;
- with an understanding of the above, recognises that methods of diversion, policing and sentencing options and reform can be compared across jurisdictions, but may not be transferable across jurisdictions; and
- is descriptive and tangible and less watered down.

## References

Attorney-General’s Department (2007) *Consultative draft: National Indigenous Law and Justice Strategy* ACT: Australian Government.

Victorian Aboriginal Legal Service Co-operative Limited (2007) *VALS’ submission to the Commonwealth Attorney-General’s Department in response to the Consultative Draft - National Indigenous Law and Justice Strategy* Fitzroy: Victorian Aboriginal Legal Service Co-operative Limited.

Watterson R, Brown P and McKenzie J (2008) ‘Coronial Recommendations and the Prevention of Indigenous Death’ *Australian Indigenous Law Review* 12 (SE2): 4-26.