



## Review of the diversion program in the Magistrates' Court.

Submission from the Victorian Aboriginal Legal Service.

Thank you for the opportunity to prepare a written submission to assist the Magistrates' Court of Victoria in its review of the diversion program and its current operations.

### Background to the Victorian Aboriginal Legal Service (VALS)

VALS is an Aboriginal community controlled organisation. It was established in 1972 by committee, and incorporated in 1975. The VALS is committed to caring for the safety and psychological well-being of clients, their families and communities and to respecting the cultural diversity, values and beliefs of clients. The VALS vision is to ensure Aboriginal and Torres Strait Islander Victorians are treated with true justice before the law, our human rights are respected and we have the choice to live a life of the quality we wish.

We operate in a number of strategic forums which help inform and drive initiatives to support Aboriginal and Torres Strait Islander people in their engagement with the justice, and broader legal system, in Victoria. We have strong working relationships with the other five peak Aboriginal Community Controlled Organisations in Victoria and we regularly support our clients to engage in services delivered by our sister organisations. Our legal practice spans across Victoria and operates in the areas of criminal, civil and family law (including child protection and family violence).

Our 24 hour support service is backed up by the strong community based role our Client Service Officers play in being the first point of contact when an Aboriginal or Torres Strait Islander person is taken into custody, through to the finalisation of legal proceedings. Our community legal education program supports the building of knowledge and capacity within the community so our people can identify and seek help on personal issues before they become legal challenges.

We seek to represent women, men and children who come to us for assistance in their legal matters, and are only hindered in doing this where there is a legal conflict of interest and we cannot act. If this is the case, we provide warm referrals to other suitable legal representatives, which include Victoria Legal Aid, the Aboriginal Family Violence Prevention Legal Service, community legal centres and private practitioners as appropriate.

### VALS' criminal law practice

VALS has a large criminal law practice with 12 lawyers servicing Magistrates' Courts across Victoria. We also provide legal casework and representation in matters before the Children's Court and County Court, and across the Koori Courts at all three levels.

VALS seeks to intervene as early as possible for our clients to divert them away from the criminal justice system. As such, we will act in matters where organisations such as Victoria Legal Aid will not, because they are lower offending and do not attract a likelihood of imprisonment. However, we also do not deal with matters as a duty lawyer service and try to avoid 'pleading people up' on the day of their first appearance without appropriate supports in place. With legal services in family and civil

law, our criminal lawyer can work holistically to try to address underlying issues of offending – often housing and family disputes are triggers for criminal behaviour.

Wherever possible and appropriate, we will seek diversion for our offenders if it is their first time offending. We also represents nearly 70% of the offenders before Koori Courts, which in and of itself is a diversionary and therapeutic sentencing forum.

### A meaningful diversion program

Diversion as it currently stands can be an appropriate measure for certain types of offenders, namely offenders who may have because of poor judgment committed a criminal act and are highly unlikely to engage in such behaviour again. However, for offenders with complex life histories or circumstances, particularly Aboriginal offenders, their personal circumstances means that first time offending is sometimes too severe for diversion, or diversion barely makes an impact on the life circumstances of the offender, and becomes a token offering.

With overrepresentation of Aboriginal people in the criminal justice system, the importance of diversionary options for Aboriginal offenders, particularly young offenders, is paramount. Our concerns is that often, Aboriginal offenders are not getting the benefit of diversion because of they are coming into contact with the criminal justice system at young ages, and diversion (and also cautioning) is essentially seen as being ‘used up’ at an early stage.

Koori Court has demonstrated that culturally appropriate court processes and responses are more effective with Aboriginal offenders. Similarly, diversion should be a culturally appropriate response for Aboriginal offenders.

### Getting diversion approved

Many of our challenges with diversion are simply in the process of getting diversion approved and how this varies across different police stations and Magistrates’ Courts.

**Appropriateness of the offence:** There appears to be a lot of discretion and inconsistency about the types of matters that can be considered for diversion. In addition, matters that might seem appropriate for diversion and supported by the informant can be refused by the police prosecutors at court, making the process frustrating for the informant and the client. In some circumstances, assaults will be referred for diversion, when in others they won’t be. Cases where a high profile person has received diversion for a serious assault or other offence send the message to the public that diversion is available where the defendant is well resourced.

**Diversion for first time offending only:** The general rule is that if diversion is used on one occasion, it cannot be sought again, even if the type of offending is completely different. Further, where there has already been an offence recorded, diversion won’t be considered, again, even if the type of offending is different. This can be very difficult for a client who may have offended out of poor judgment or difficult circumstance, they are remorseful, and are unlikely to offend again.

**Ability of prosecution to override consent for diversion:** Even when diversion is approved by the informant and considered suitable by the diversion coordinator, the prosecution at court can override this. We believe it should ultimately be the Magistrates’ decision whether diversion should be approved, and what conditions should be attached.

**Appropriateness of financial contributions:** For many offenders, meeting the required financial contribution to, for example, a Court Fund, can be prohibitive to the availability of diversion in the

first place or failure to pay can mean diversion is withdrawn and the individual must go before the court.

### Particular issues for young offenders and diversion

Although young offenders are dealt with through the Children's Court, we believe our feedback on diversion in that court is relevant for the work of the Magistrates' Court, as there are some overlapping issues, particularly with cultural appropriateness. The Ropes Program has had very positive outcomes for young offenders, however in our practice, we have identified some key issues that are of concern in the program being suitable for all young offenders, particularly for Aboriginal offenders. Unfortunately diversion for young offenders is not part of legislative options. This would provide greater consistency in approach and implementation.

**Lack of cultural applicability for young people:** Often, young Aboriginal people are coming into contact with the criminal justice system because of their lack of identity or disconnection from culture and community. Culturally appropriate responses aim to address these issues and connect Aboriginal young people to their culture. However, we have had cases in where we have been told that the Ropes Program, being the only program police are 'mandated' to adjourn matters to, is the only program that can be done to complete a diversion, so we have situations where Koori Kids are being required to complete both Ropes for the police purposes and other cultural programs.

**Age or content inappropriateness for older offenders:** The Ropes programs may lend itself to being appropriate for younger offenders (for example, between the ages of 10-13) however as offenders get older, it is questionable whether such programs are suitable and actually has an impact on offending. Further, for young people who do not have an interest in physical activity, the Ropes program may not be the best option for the individual.

**The requirements for the informant to attend the program:** The requirement for the police officer who charged the offender to be a participant can cause time delays as rosters and work requirements are worked out. It can mean that children are waiting a long time to complete a Ropes Program, which may mean that there is more offending between the decision to go on the program, and actually completing it. For younger offenders, there needs to be fast responses to the behaviour that is being dealt with.

**The interplay between out of home care and criminal offending:** Sadly, we are seeing too many aboriginal children being removed from their families and placed in out of home care. For these children, it often means the first time away from not just immediate family but also community, in areas that are not close to their home. It is inevitable that some children will act out in ways that reflect their disconnection from culture and family and disruption of life from being placed with strangers. We see a disturbing trend in children being first time offenders after they have been removed from families, when their removal was meant to be a safe response to their living circumstances. We see children being charged with offences such as criminal damage to out of home care property or premises which sees them come into the criminal justice system, and diversion is not available because of either the location of the children (often children are placed in out of home care in regional areas) or the offending is considered not appropriate (because it is considered to be offences caused at someone's place of work, rather than the home of the child). A process of diversion that actually takes into consideration why children are in the environments (because of the alleged inability of their parents to look after them) would go further in addressing these issues and making sure that children are supported.

## Intersection of diversion and Koori Court

Diversion technically does not require going before a Magistrate to be dealt with. There is scope, however, with Koori Court being the diversionary forum that it already is, that, once a person has pleaded guilty, after appearing before the Koori Court, that person may still get the sentencing outcome of diversion, and not get a criminal record. This would allow greater use of culturally appropriate responses to address underlying issues of identity and cultural connection.

## Culturally appropriate programs

A number of Aboriginal cooperatives from around the state have developed and engage Aboriginal youth in programs that divert them away from criminal offending. Some examples are:

- The Mildura and District Aboriginal Services, which offers Youth Justice Programs and Early School Leavers Program.
- Ballarat and District Aboriginal Cooperative, which offers Youth Services including after school programs and oversees the Aboriginal youth and Victoria Police teams that enter the annual Murray Marathon teams.
- Dandenong and District Aboriginal Cooperative Limited, which offers youth services that meet each week to support young people in their school work, the aspirational goals and other challenges in life, as well as referrals into other supports.

In addition to the youth specific programs, Aboriginal cooperatives have a range of programs that support families with their parenting and life skills and provide cultural connectivity.

Particularly in the regional areas, where access to programs such as Ropes is not available, and there is greater opportunity for people to be 'on country', it is possible that these programs could be utilised to meet the ends of diversion in a culturally safe space.

Further, a number of other forums, such as the Regional Aboriginal Justice Advisory Committees (RAJACs) and the Indigenous Family Violence Regional Advisory Groups (IFVRAGs) offer programs that address justice and family violence issues in culturally appropriate ways, such as behavioural change or life skills. These are opportunities that could be utilised for local courts and regions.

## A model from overseas – the Midtown Community Court, New York City

Meena Singh, our Director of Legal Practice and Strategy was recently in New York and had the opportunity to observe the work of the Midtown Community Court. They have two distinct diversionary options, where offenders accepted responsibility for their charges:

- 'Quality of Life' offending (such as minor traffic or public behaviour offences) attracted the requirement to attend a 2 hour course on basic law abidance – this was in recognition of the many different cultures and countries that people came from, and how their experiences may mean they do not understand how certain behaviours are illegal. On completion the offender would come back before the Magistrate and have the matter struck out.
- Misdemeanours (similar to our summary offences, usually covering property offences such as theft or handle stolen goods or possession of small amounts of drugs) attracted an on the day initial appointment with a counsellor, followed by 3-5 individual counselling sessions to identify underlying reasons for offending and personal issues that needed linkages to supports. At the end of attendance at all the sessions, the person would come back to the Judge with a counselling report, then placed on a 6 month bond to be of good behaviour. At the end of the 6 months, if there was no further offending, the matters were recorded as dismissed, and the court file sealed.

The benefits of these two approaches is that people are actively receiving some sort of intervention or information that supports a change of behaviour. It makes people accountable for their actions, but can also support the individual to find appropriate supports that will assist them in more meaningful ways.

### Recommendations for an improved diversion program

VALS has a number of recommendations for creating a diversion program that is consistent in its approach, yet flexible to meet the needs of the offender and actually create an outcome that is more likely to divert a person away from the criminal justice system.

- Diversion should aim to address the underlying issues of offending and prevent people coming back. The conditions for diversion should address why people have gotten into a situation of offending – counselling, referrals to drug and alcohol and other supports should be considered.
- Individual actions the offender has taken to address their behaviour should be considered in lieu of, not in addition to, conditions of diversion.
- For young offenders, conditions including attendance at school or continuing with sport or cultural activity could be appropriate.
- Diversion should be monitored – where there has been obstacles to complying with conditions, there should be scope for second opportunities, particularly if the individual is dealing with a lot of issues personally.
- Allow lawyers and/or offenders to make submissions (in person or written) on the appropriateness of the diversion.
- Magistrates should have the final approval for the diversion program.
- Consider diversion where there has been previous low level offending, a different type of offending or a significant break in offending.
- Training for the Bench in cultural awareness, diversion protocols and options to support greater consistency from the Bench when considering diversion and determining conditions.
- A broader range of offences to be considered for diversion, looking at individual circumstances.
- Conditions should be appropriate to the individual person's circumstances and reasons for offending.
- Magistrates Courts in different regions should look to create partnerships with Aboriginal organisations and other supports (such as health services with counselling programs) to create opportunities to link people into meaningful diversionary activities that address underlying causes of offending.

We are happy to participate in any further discussions with the Magistrates' Court and look forward to working together in the future. For further details or comment, please contact:

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