



Australian Law Reform Commission

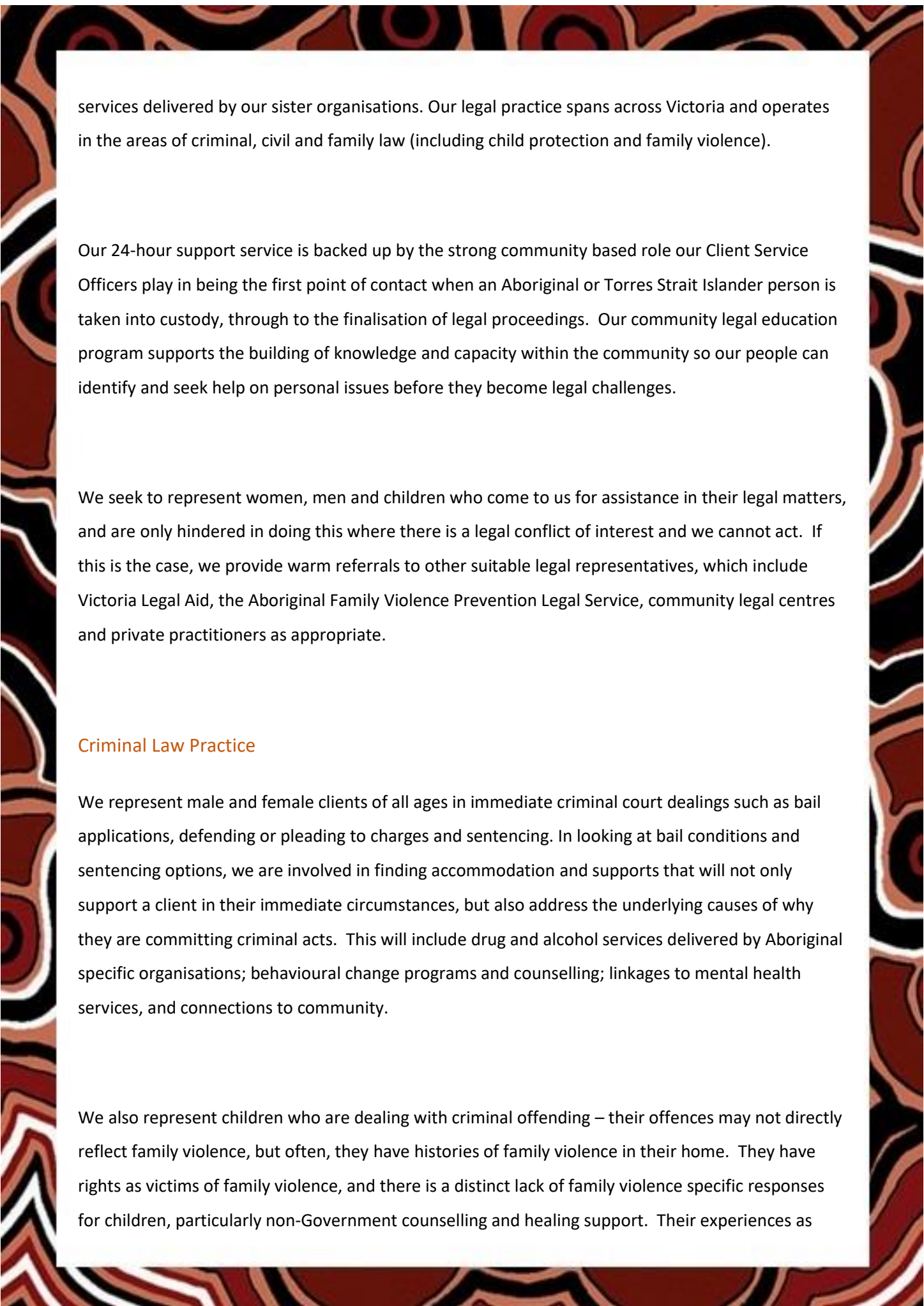
Review of the Family Law System

Response

Background to the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service (“**VALS**”) is an Aboriginal community controlled organisation established in 1972 by committee, and incorporated in 1975. 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. 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

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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.

Criminal Law Practice

We represent male and female clients of all ages in immediate criminal court dealings such as bail applications, defending or pleading to charges and sentencing. In looking at bail conditions and sentencing options, we are involved in finding accommodation and supports that will not only support a client in their immediate circumstances, but also address the underlying causes of why they are committing criminal acts. This will include drug and alcohol services delivered by Aboriginal specific organisations; behavioural change programs and counselling; linkages to mental health services, and connections to community.

We also represent children who are dealing with criminal offending – their offences may not directly reflect family violence, but often, they have histories of family violence in their home. They have rights as victims of family violence, and there is a distinct lack of family violence specific responses for children, particularly non-Government counselling and healing support. Their experiences as

victims of family violence are distinct from the adults in the home, and requires separate responses. They may struggle to identify family violence and how it has impacted on their life. They may feel responsible for the violence in their home, or feel guilty if they tell someone about it. A lack of stable home environment can lead to absences from school or links with sports and community activities, and can mean children are left without guidance and find themselves making poor decisions leading to criminal behaviour and charges.

Youth and Family Law Practice

Our Youth and Family Law Practice represents both adults and children's in the areas of youth justice, child protection and family law. We are increasingly seeing a significant number of children who are being removed by the Department of Health and Human Services due to family violence and/or substance misuse. In the course of representing clients we often observe children to be suffering from the anxiety of separation and being away from family, plus coming into contact with the older children who have been in the child protection system for extensive periods of time, which may cause anxiety, distress and place them at risk of harm in other ways. Often these children are involved with the justice system and the first offending often begins whilst they are in the care of DHHS.

VALS data indicates a 56% increase in family law and related matters (information, advice, referrals and legal representation) between 2010-13.¹ This reflects an increased awareness and reporting of Family Violence issues and the current mandate for Police to respond to family violence incidents at higher rates. VALS has increased the size of the Youth and Family Law Practice through grants and yet we are still not able to meet the demand and are required to regularly refer matters out. Also, as our service model is holistic, when people require our support for police or other family violence services, we often find they require internal and external referrals for many other legal and holistic services, including for parenting or child protection issues.

¹ VALS Data 243 2009/10 – 380 2012/13.

Civil Law Practice

Our civil law practice encompasses a range of legal areas which can often follow issues concerning child safety such as family violence. When a victim of family violence needs to relocate from the family home, issues may arise i.e. preserving or relinquishing tenancy, changing locks, recovering personal property and other related matters. Issues such as maintain a tenancy, resolving debt and infringement issues and issues relating to employment and discrimination are also dealt with on a regular basis by our civil law practice as these can often lead to instability which would place our most vulnerable community members, children and the elderly at risk.

Balit Ngulu

Balit Ngulu has been established by the Victorian Aboriginal Legal Service in response to the needs of Aboriginal youth to have a say in their own affairs and to be able to work towards breaking the cycle of disadvantage. Balit Ngulu aims to provide legal advice and assistance in the areas of youth justice, child protection, family law, and civil law issues to Aboriginal and/or Torres Strait Islander youth across Victoria. Balit Ngulu will provide integrated and culturally appropriate services to Aboriginal and/or Torres Strait Islander youth to address issues such as recidivism, cultural, family, education, employment, and leadership so that they can self-determine their own futures.

Community Justice Programs

VALS holistic supports to clients are provided by way of the Community Justice Program's Sections which conducts our pre-and post-release support programs, our Local Justice Worker Programs and our Aboriginal Community Justice Panels Programs. The CJP Section also facilitates our 24-hour support service which 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.

Community Legal Education

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.

THE REALITY FOR ABORIGINAL FAMILIES

Child Protection

Family violence, often coupled with substance misuse, is one of the key contributors to the 1067 reports of child abuse or neglect in relation to Aboriginal children between 2012 and 2013. Often these reports of child abuse or neglect are substantiated at higher rates for Aboriginal children² and often leads to the child being removed from the home and being placed in kinship or out of home care. In 2014 an inquiry conducted by the Commission for Children and Young People found that 88% of children reviewed were impacted by family violence and 87% were affected by a parent with alcohol or substance abuse issues.³

The rate of Aboriginal child removal is increasing at an alarming pace and Victoria's removal rate is now increasing faster than any other State or Territory in Australia. In Victoria, the number of Aboriginal children removed from their families and placed in out of home care increased by 98% between 2007-08 and 2013-14⁴ yet for non-Aboriginal children, the increase was just 45%. In just twelve months, from June 2013 to June 2014, there was a 42% increase in Victorian Aboriginal children in statutory care which was the highest increase in the country for that period.⁵

The alarming rates of DoHHS intervention within Aboriginal families acts as a significant deterrent to disclosing family violence to Victoria Police or seeking the assistance of support services. Additionally, Stolen Generation policies which resulted in the separation of families, and deterioration of the family structure and cultural identity has meant that a victim of family violence is unlikely to report an abusive partner to prevent their child from being removed and conversely a perpetrator may not seek help for the same reasons. Aboriginal parents are not confident that

² Australian Institute of Health and Welfare

³ Commission For Children And Young People, *Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria*, October 2016, page 10.

⁴ Productivity Commission, *Report on government services: Volume F Community Services*, 2015, Table 15A.20 available at <http://www.pc.gov.au/research/recurring/report-on-government-services/2015/community-services/child-protection/government-services-2015-volumef-chapter15.pdf>

⁵ Productivity Commission, "Report on government services: Volume F Community Services", 2015, Table 15A.20 available at <http://www.pc.gov.au/research/recurring/report-on-government-services/2015/community-services/child-protection/government-services-2015-volumef-chapter15.pdf>

should the family violence issue be reported, and one of them excluded is from the home, that there will be housing options available to them should they require it. Additionally, service delivery can be offered contingent on separation and those who need the service are sometimes reluctant to make this decision.

In order to address the underlying issues of family violence the Victorian Government should place far greater emphasis on providing culturally appropriate early intervention, wrap around services and prevention activities rather than further criminalisation. Investing in wrap around services will result in families actively seeking help at the early stages and addressing the underlying issues of the family violence such as substance misuse, intergenerational trauma and homelessness. By treating these issues families will become stronger and develop a healthy relationship structure which will reduce the risk of family violence behaviours escalating and remove the need for child protection intervention.

Incarceration and criminalisation

The rates of incarceration for Aboriginal and Torres Strait Islander communities has increased in the last 25 years since the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**). In Victoria, in both youth justice and adult prisons, Aboriginal people are incarcerated at higher rates than non-Aboriginal people per head of population, and the gap is rising. In all Australian states and territories in 2014–15, Aboriginal and Torres Strait Islander young people (aged 10 to 17 years) had a higher rate of detention than non-Indigenous young people. In Victoria, Aboriginal and Torres Strait Islander young people are approximately 13 times more likely than non-Aboriginal counterparts to be detained within Youth Justice.⁶

From 2005 to 2016, the Aboriginal imprisonment rate increased from 957 to 1,541 prisoners per 100,000⁷, an increase of 70%, compared to a 34% increase in the non-Aboriginal population. Aboriginal Victorians are now well over ten times more likely to be imprisoned than the general

⁶ Sentencing Advisory Council, "Sentencing Trends – Young Indigenous People in Detention", accessed at <https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/young-indigenous-people-in-detention>

⁷ ABS, Prisoners in Australia 2016, Catalogue 4517.0

population.⁸ Aboriginal unsentenced prisoners account for 27% of all unsentenced prisoners nationally and they are likely to spend 2.4 months on remand.⁹ The picture is not much better for Aboriginal youth with 79 out of 520¹⁰ youths incarcerated in Youth Justice Centres identifying as Aboriginal, with the vast majority being held on remand. Unsurprisingly, 36 had previously been incarcerated within the Youth Justice Centres with the most common offence types being:

- robbery [30];
- acts intended to cause injury [40];
- property damage [19],
- prohibited weapons; and
- dangerous or negligent acts [21].¹¹

This over representation is attributable to a number of factors, not least the ongoing trauma resultant from colonisation, child removal, and social inequality. Closing the Gap statistics still demonstrate that Aboriginal and Torres Strait Islander people continue to suffer from a range of gross inequalities in education, health and wellbeing, employment and life expectancy, all of which contribute to offending.

Homelessness

Aboriginal people are overrepresented as users of specialised homelessness services for all domestic and family violence clients, with around 24% identifying as Indigenous. Aboriginal family violence clients were more likely than non-Aboriginal clients to be female and live in a sole parent household. Aboriginal clients experiencing domestic and family violence were also more likely to be children than non-Aboriginal clients, with 38% being under the age of 15¹². This indicates a complete lack of

⁸ Darby, "Victoria's Prison Population 2005 to 2016", Sentencing Advisory Council, 2016, page 13.

⁹ Ibid.

¹⁰ Department of Health and Human Services, 'Youth Justice Data Report', 31 December 2016.

¹¹ Department of Health and Human Services, 'Youth Justice Data Report', 31 December 2016.

¹² Australian Institute for Health and Welfare, "Domestic and Family Violence and homelessness 2011-12 to 2013-14", accessed at <http://www.aihw.gov.au/homelessness/domestic-violence-and-homelessness/intersection/>

services for child victims of family violence and will lead to them becoming involved with child protection and the juvenile justice system.

To reduce the high rate of homelessness, Aboriginal families suffering from the effects of family violence require not only short-term accommodation options but a plan that moves them from that space to a long term self-sustainable property. Housing sustainability is essential to increasing the safety of the family both in the short term and long-term journey of these families.

Health

Violence has immediate effects on the physical, mental and behavioural health of families which can persist long after the violence has stopped. The health consequences of violence can be immediate and acute, long-lasting and chronic and can include depression, self-harm, smoking, obesity and substance misuse. A 2004 study by VicHealth, which examined the health impacts of domestic violence found that:

“Intimidate partner violence is all too common, has severe and persistent effects on women’s physical and mental health and carries with it an enormous cost in terms of premature death and disability. Indeed, it is responsible for more preventable ill-health and premature death in Victorian women under the age of 45 than any other of the well-known risk factors, including high blood pressure, obesity and smoking”¹³

Domestic violence can also have profound negative impacts on children, including emotional and behavioural impacts, health and socio-economic impacts. One of the most long-lasting effects is the risk of intergenerational transmission of violence, because when children witness domestic violence

¹³ VicHealth, “The health costs of violence: measuring the burden of disease caused by intimate partner violence. A summary of findings”, 2004, p. 8, available at: www.vichealth.vic.gov.au/media-and-resources/publications/the-health-costs-of-violence (accessed 12 January 2015).

they can develop attitudes that justify their own use of violence and boys who witness violence are more likely to approve of violence and therefore engage in family violence relationships as adults.

Family Violence

Family violence within Aboriginal families is a leading contributor to Aboriginal child removal, incarceration, homelessness, poverty, mental illness, poor physical health and substance misuse. Economic modellings by KPMG indicate that the impact of family violence on the Australian economy is staggering and rising each year¹⁴. It is important to understand what family violence is in the Aboriginal community in order to understand how it happens and persists. Aboriginal definitions of the nature and forms of family violence are broader and more encompassing than those used in the mainstream. The Victorian Indigenous Family Violence Task Force defined family violence as:

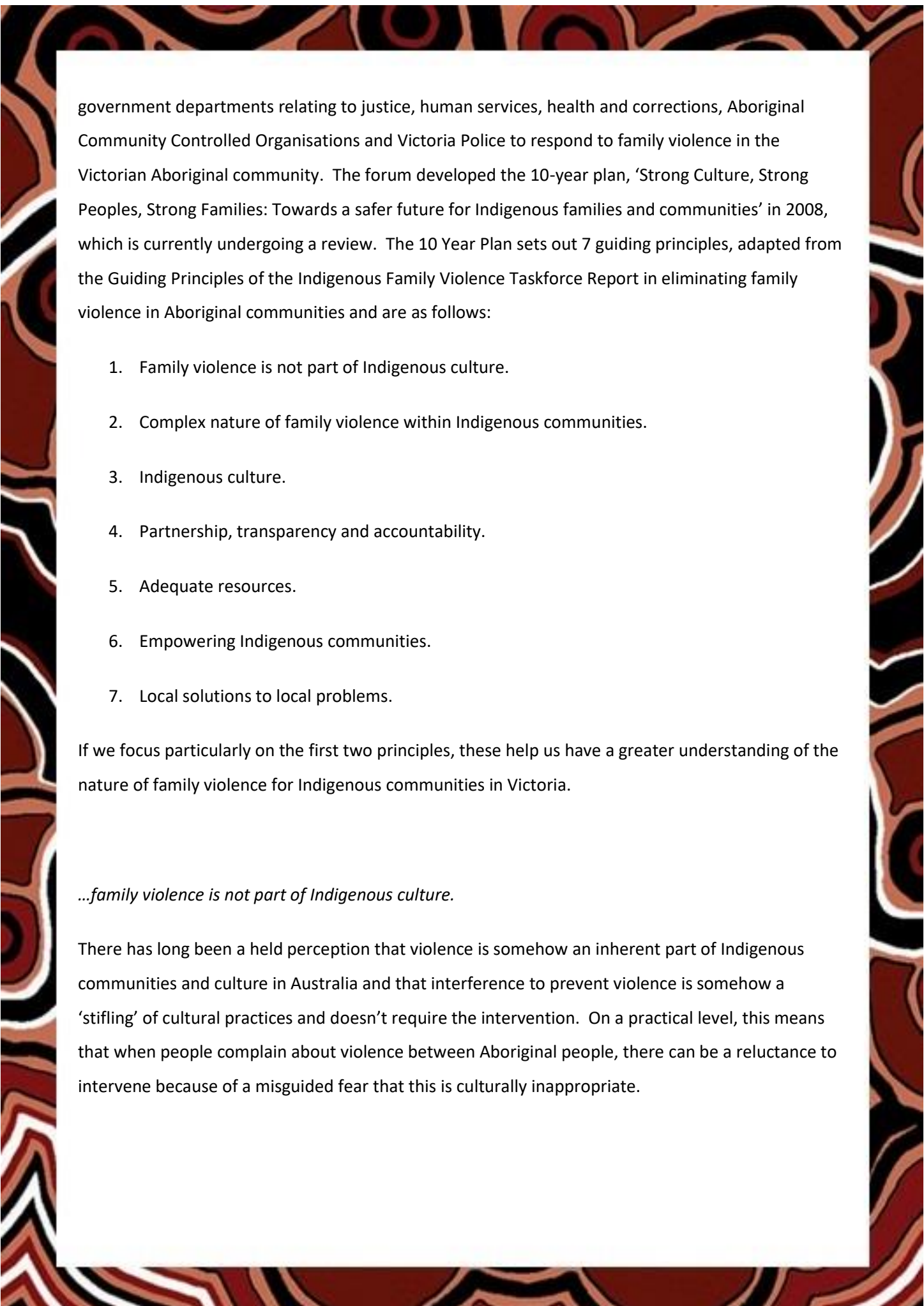
*'An issue focused around a wide range of physical, emotional, sexual, social, spiritual, cultural, psychological and economic abuses that occur within families, intimate relationships, extended families, kinship networks and communities. It extends to one-on-one fighting, abuse of Indigenous community workers as well as self-harm, injury and suicide.'*¹⁵

Aboriginal family violence can encompass a range of acts that are criminal, such as physical and sexual assault as well as non-criminal, such as emotional and spiritual abuse. These forms of abuse can extend beyond the immediate family unit and into the community which further contributes to overall levels of violence reported by Aboriginal people and the trauma experienced within families and kinship networks.

VALS is a member of the Victorian Indigenous Family Violence Partnership which brings together the Indigenous Family Violence Regional Action Groups (IFRAGs), the Office of Aboriginal Affairs Victoria,

¹⁴ Cost to Australia economy was \$13.6 billion in 2008-2009 financial year and is set to increase to \$15.6 billion in 2021-22. National Council to Reduce Violence Against Women and their Children, "The Cost of Violence Against Women and Their Children", accessed at http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/vawc_economic_report.pdf

¹⁵ Victorian Indigenous Family Violence Taskforce Final Report December 2003, p. 123



government departments relating to justice, human services, health and corrections, Aboriginal Community Controlled Organisations and Victoria Police to respond to family violence in the Victorian Aboriginal community. The forum developed the 10-year plan, 'Strong Culture, Strong Peoples, Strong Families: Towards a safer future for Indigenous families and communities' in 2008, which is currently undergoing a review. The 10 Year Plan sets out 7 guiding principles, adapted from the Guiding Principles of the Indigenous Family Violence Taskforce Report in eliminating family violence in Aboriginal communities and are as follows:

1. Family violence is not part of Indigenous culture.
2. Complex nature of family violence within Indigenous communities.
3. Indigenous culture.
4. Partnership, transparency and accountability.
5. Adequate resources.
6. Empowering Indigenous communities.
7. Local solutions to local problems.

If we focus particularly on the first two principles, these help us have a greater understanding of the nature of family violence for Indigenous communities in Victoria.

...family violence is not part of Indigenous culture.

There has long been a held perception that violence is somehow an inherent part of Indigenous communities and culture in Australia and that interference to prevent violence is somehow a 'stifling' of cultural practices and doesn't require the intervention. On a practical level, this means that when people complain about violence between Aboriginal people, there can be a reluctance to intervene because of a misguided fear that this is culturally inappropriate.

...complex nature of family violence within Indigenous communities.

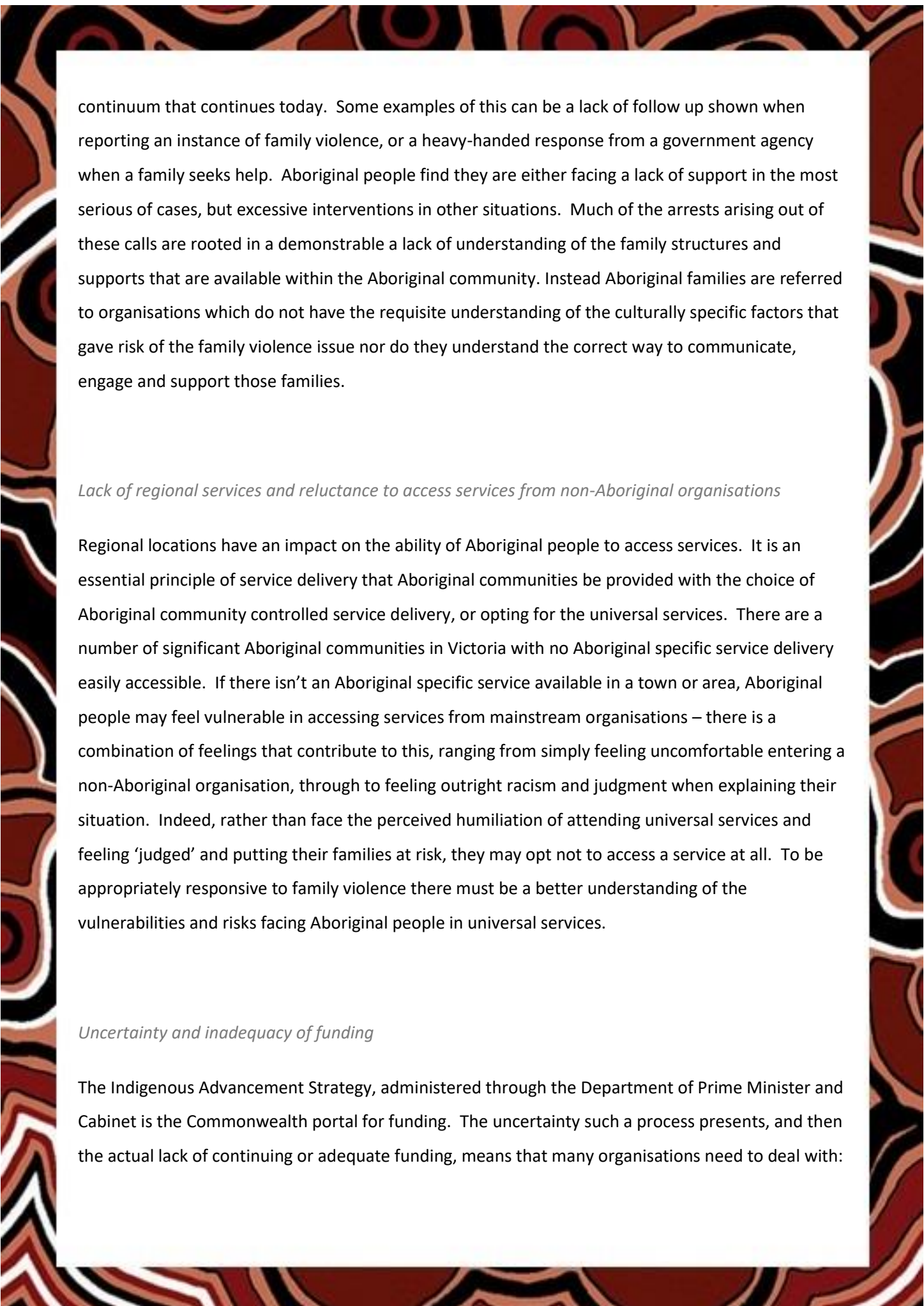
Family violence within Indigenous communities is complex because Indigenous communities, family structures and the issues faced are complex. With a history of colonisation, dispossession, break down of cultural practices and language and denial of expressions of identity, this means that the traditional factors that feature in a person's resilience (identity, family supports, kinship) can be absent. The 'normalising' behaviours that are set out in Western nuclear families with traditional roles of a male and female parent does not apply to Aboriginal families, where the importance of uncles, aunties and cousins (related by blood or not) are held paramount. Further a patriarchal social system whereby men are in authority over women in all aspects of society is not accepted or practiced within Aboriginal communities where importance is placed on the Elders of the community being within a position of authority.

Reluctance to report

The continuing impact of the Stolen Generation means the reporting of family violence is particularly difficult for many victims, or those witnessing family violence. Aboriginal communities are acutely aware of the catastrophic impact Government policies have had on their families. This then gives rise to a reluctance to disclose information that might put another person in jail, break up their family or put them in conflict with their community. There is a significant gap of confidence in Aboriginal communities that police and government welfare departments are able to respond to issues in a culturally responsive and supportive manner, and in particular, keep children safe. As such, it is understandable that Aboriginal people are wary of making reports that, whilst may have the immediate impact of decreasing the risk of immediate harm, have the longer term of impact of breaking up a family, putting children into out of home care, sending someone into custody, becoming homeless or other impacts.

The dichotomy of inaction or overreaction

There are significant issues of trust between Aboriginal people, the police and government services. There are many reasons for this, an accumulation of events over time which have led to an overarching distrust of Government intentions in relation to Aboriginal communities. This is a



continuum that continues today. Some examples of this can be a lack of follow up shown when reporting an instance of family violence, or a heavy-handed response from a government agency when a family seeks help. Aboriginal people find they are either facing a lack of support in the most serious of cases, but excessive interventions in other situations. Much of the arrests arising out of these calls are rooted in a demonstrable lack of understanding of the family structures and supports that are available within the Aboriginal community. Instead Aboriginal families are referred to organisations which do not have the requisite understanding of the culturally specific factors that gave risk of the family violence issue nor do they understand the correct way to communicate, engage and support those families.

Lack of regional services and reluctance to access services from non-Aboriginal organisations

Regional locations have an impact on the ability of Aboriginal people to access services. It is an essential principle of service delivery that Aboriginal communities be provided with the choice of Aboriginal community controlled service delivery, or opting for the universal services. There are a number of significant Aboriginal communities in Victoria with no Aboriginal specific service delivery easily accessible. If there isn't an Aboriginal specific service available in a town or area, Aboriginal people may feel vulnerable in accessing services from mainstream organisations – there is a combination of feelings that contribute to this, ranging from simply feeling uncomfortable entering a non-Aboriginal organisation, through to feeling outright racism and judgment when explaining their situation. Indeed, rather than face the perceived humiliation of attending universal services and feeling 'judged' and putting their families at risk, they may opt not to access a service at all. To be appropriately responsive to family violence there must be a better understanding of the vulnerabilities and risks facing Aboriginal people in universal services.

Uncertainty and inadequacy of funding


The Indigenous Advancement Strategy, administered through the Department of Prime Minister and Cabinet is the Commonwealth portal for funding. The uncertainty such a process presents, and then the actual lack of continuing or adequate funding, means that many organisations need to deal with:

- Excessive amounts of time spent on going through application processes, when the expertise of organisations is their work on the ground with communities.
- Loss of staff, as staff seek other, more secure employment which eradicates the ability to build capability within the organisation and diminishes the relationship between the client and the organisation.
- Loss of confidence from community and individuals accessing services as they question whether or not they will be able to continue with the service if funding is withdrawn or reduced.
- Families in crisis falling through the gaps as organisations unable to guarantee their services due to a looming funding cycle.
- Diminished ability to provide necessary services to the community across metropolitan and regional centres.

Family violence is a focus area that will require sustained Government investment to achieve outcomes. In order to maximise the use of funds, the principles of self-determination and Aboriginal community control should be weighted in decision making, to ensure Aboriginal communities own and control family violence responses from concept to evaluation. This is a fundamental efficiency which will free up funds to provide more front line, first point of contact services. The Victorian Government must ensure they remember that family violence is not about money or political point scoring but about saving lives.

Culturally insensitive responses

Holistic and culturally sensitive support programs recognise some family violence victims will not leave their family. There are many factors for this, particularly in relation to sibling, elder and intimate partner family violence. Some of these factors are impacted by culturally specific issues which can include the fear of exclusion and isolation from family and community. Organisations that work with family violence victims must have an understanding of the cultural and historical issues that impact on Aboriginal families today. Such issues as trauma and loss that if not acknowledged in



the experiences of family violence victims will perpetuate the victimisation and fail to acknowledge legitimate risk associated with such persons.

It must be acknowledged that it may take a victim of family violence many attempts to leave their violence situations, and victims will not always act on the legal or other advice that is given to them when they first access services. Sometimes simply knowing there are services to go to, or possibilities of a way out can assist with coping with a situation, and allows the individual to build up confidence and resilience. One of the first steps families can take is to undertake family mediation, whether informally through the community or utilising a more formal service, to talk through the arrangements for the children that support the child's cultural identity and foster the connection between the child and their extended family and community.

EXECUTIVE SUMMARY

The family law system, in our experience, has both its advantages and its disadvantages for Aboriginal and Torres Strait Islander communities. We acknowledge that many judicial officers have taken the time and consideration to develop a sophisticated understanding of the cultural and identity rights of not only Aboriginal children but also Aboriginal communities. However, the lack of a legislated Aboriginal and Torres Strait Islander Child Placement Principle within the *Family Law Act* has meant that there is little cultural protection in the family courts for our community members when they are confronted with a judicial officer who has no or little appreciation and understanding of the sacred identity and cultural rights our children hold. Whilst the Family Law Act imposes an obligation on judicial officers to consider the right of the child to enjoy their Aboriginal culture our practical experience demonstrates that whilst courts are increasingly recognising Indigenous cultural practices kinship obligations, childrearing practices and traditional adoption practices they still have some ways to go.

There are several barriers to accessing the family law system that are unique to Aboriginal people and often prevent them from being able to ensure their child's access and maintenance of their unique cultural identity. Whilst such barriers can be characterised as structural or procedural they must be considered together as a whole not only to better understand the experience of the Aboriginal community but also to develop innovative solutions. These barriers include:

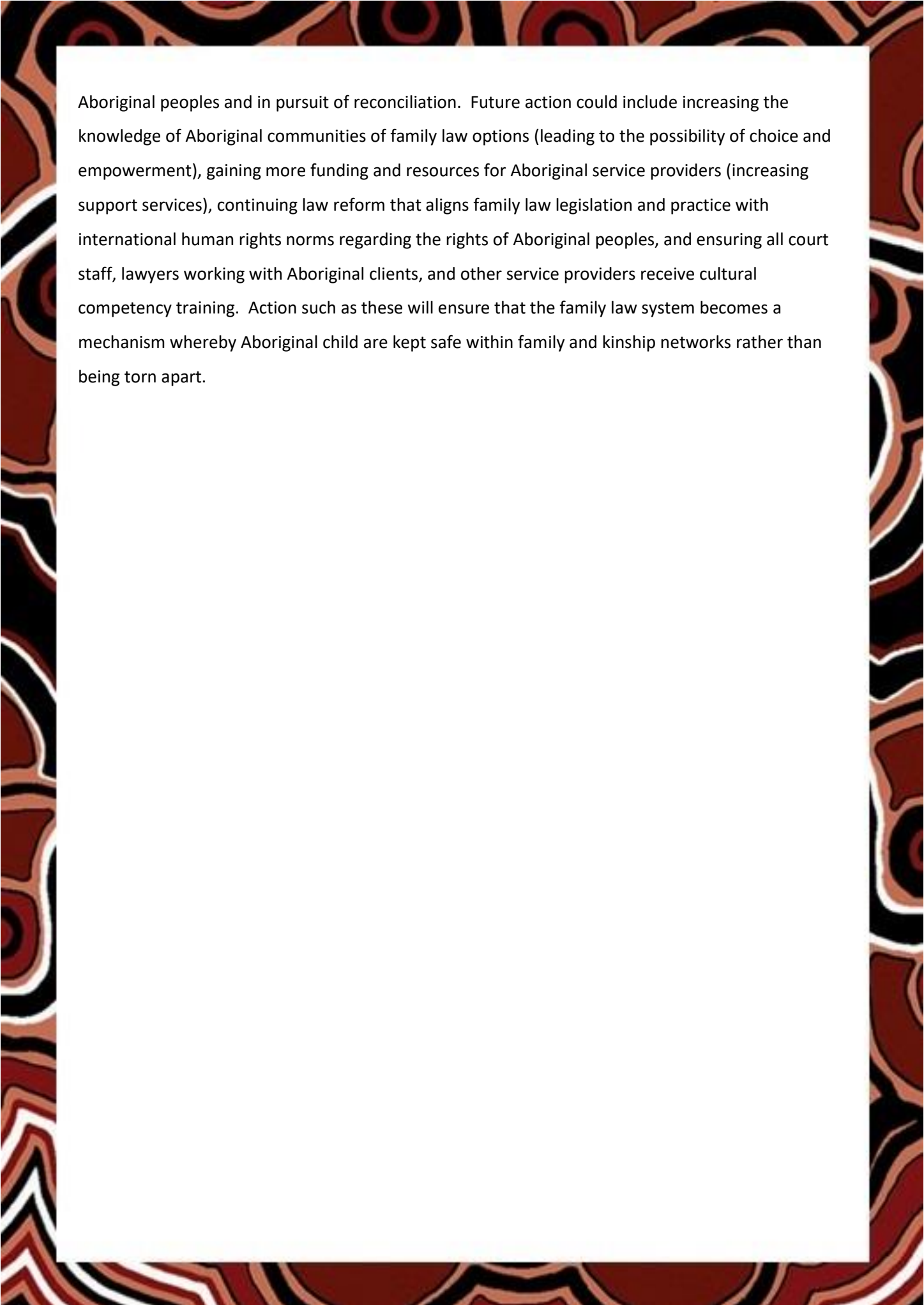
- Lack of cultural awareness;
- Language barriers;
- Lack of understanding of legal rights and obligations;
- Inability to identify legal issues;
- Distrust of mainstream and government services;
- Bias;
- Disadvantage
- Formality of the legal system
- Lack of Aboriginal Child Placement Principle
- Lack of Indigenous Liaison Officers, Indigenous Family Consultants and Indigenous Family Dispute Resolution Practitioners

- Inability to accommodate Indigenous Cultural Practices and Values
- Admissibility and Reliability of Evidence of Indigenous Elders
- Risk of alerting child protection authorities
- Lack of access; and
- Inability to meet costs.

There are systemic, procedural and substantive legal issues that confront Indigenous people in accessing legal justice in Australia that are pervasive and systemic, yet they can be overcome. The burden of addressing these issues should not overshadow the enormous potential the family law system must meet the cultural and legal needs of Aboriginal and Torres Strait Islander children and families. The family law system can be used as a shield, rather than a sword, so that Aboriginal families can develop culturally safe care arrangements for children without the intervention of child protection authorities and the trauma that results from that. Whilst there are ongoing engagement issues for metropolitan, regional and remote communities with legal institutions if the necessary reforms are made the system could empower Aboriginal communities to decide for their most vulnerable members that keep them connected to their culture, their community and their kin.

The family law system can no longer be thought of as a system that starts when an Initiating Application is filed with the court, it must begin before that by entrenching itself in local communities, providing legal advice and support and providing or supporting the provision of community legal education events. The family law system needs to be engaged as an early intervention process so that families can access it prior to the involvement of child protection authorities. Part of this will be getting the message out to Aboriginal communities that the family courts can make orders that reflect the child's Aboriginal culture as they are required to consider the cultural rights of Aboriginal children.

There is significant scope for the family law system to become more accessible and more culturally safe for Aboriginal litigants. Family law systems must increase accessibility to family law options for Aboriginal people as part of a broader commitment to increasing equitable access to justice for



Aboriginal peoples and in pursuit of reconciliation. Future action could include increasing the knowledge of Aboriginal communities of family law options (leading to the possibility of choice and empowerment), gaining more funding and resources for Aboriginal service providers (increasing support services), continuing law reform that aligns family law legislation and practice with international human rights norms regarding the rights of Aboriginal peoples, and ensuring all court staff, lawyers working with Aboriginal clients, and other service providers receive cultural competency training. Action such as these will ensure that the family law system becomes a mechanism whereby Aboriginal children are kept safe within family and kinship networks rather than being torn apart.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

Increase long-term funding of ACCOs providing family law related services. ACCOs play a critical role in providing culturally safe access to the family law system and in assisting the courts in understanding and responding to the historical, cultural and complex factors related to Aboriginal family disputes.

Recommendation 2

Increase legal assistance funding, as per the 2014 recommendation of the Productivity Commission to increase funding to legal assistance services by \$200 million.

Recommendation 3

Amend the Family Law Act to fully implement the Aboriginal and Torres Strait Islander Child Placement Principle (**ATSICPP**). Aboriginal and Torres Strait Islander children maintaining their cultural identity should not be put at risk through involvement in the family law system. The current implementation of the ATSICPP by family law courts does not recognise the importance of children maintaining connection to extended their family, community and culture, an understanding of these cultural needs can only be done in partnership with Aboriginal communities.

Recommendation 4

Increase funding of community legal education activities provided by ACCOs for Aboriginal and Torres Strait Islander communities on topics relating to family law including but not limited to family law, family violence, intervention orders, child protection etc. CLE significantly increases access to the family law system by empowering individuals and communities with culturally appropriate and plain English information concerning their rights and obligations and how to enforce them. CLE also plays an important role in building relationships and trust between communities and the legal system.

Recommendation 5

Increase funding of court support services to guide parties through the family law system. Specific funding should be allocated to court support persons that are trained in cultural competency.

Recommendation 6

Fund Aboriginal Family Liaison Officers for all states and territories as they make a significant contribution to the cultural safety, and therefore accessibility, of the Family Court. They can translate legal information into plain English, monitor the cultural safety of court proceedings, advise judges and court officials, and guide Aboriginal people through court process and ensure they have access to appropriate services.

Recommendation 7

Increase employment of Aboriginal people in all areas of the court system. The imbalance in the overrepresentation of Aboriginal people as clients in the family law system and underrepresentation of Aboriginal people employed in the family law system is a significant barrier to Aboriginal people accessing the family law system that can only be overcome by increasing Aboriginal employment.

Recommendation 8

The Family Law Act be amended to require judges consider cultural reports and the opinions of cultural advisors when making decisions on family law matters involving Aboriginal children. This change would significantly increase the cultural safety of courts for all Aboriginal people involved in disputes. VALS recommends there be two reports: a brief report for interim orders and a detailed report to be considered in hearings, and that the report should be written by an ACCO connected to the child, parent or extended family.

Recommendation 9

Introduce funding for ACCO dispute resolution services that are mobile and therefore both accessible to regional areas and culturally safe as they can be held on the traditional land of the child. ACCO run dispute resolution services will increase access to the family law system as they are culturally safe and will reduce delays in the court system.

Recommendation 10

Expand the pilot of Specialised Indigenous Lists to all states and territories and to regional areas. The less formal setting, extra support from ACCOs and participation of elders, significantly reduce the barriers to Aboriginal people accessing the family law system. It's important the pilot is implemented in different contexts for a successful ongoing model to be developed from the pilot.

Recommendation 11

Implement compulsory training in inherent bias for all family judicial officers and court staff. Inherent bias is regularly experienced by Aboriginal parents and therefore acts as a barrier to Aboriginal people accessing the family law system. To overcome this it is necessary that all judges are aware of their own inherent bias and are equipped with a range of tools to ensure they recognise and value non-Anglo-Saxon family structures and methods of parenting.

Recommendation 12

Introduce funding for ATSILS to prepare cultural reports for all cases that concern Aboriginal children. The funding should be allocated to training ATSILS staff in preparing reports and for travel to allow report writers to travel to where the family lives and interview relevant family and community members.

Recommendation 13

The Federal Circuit Court employ Aboriginal Liaison Officers, in the same way as they are employed by the Victorian Magistrates Court and the Children's Court. The lack of Aboriginal Liaison Officers within the family law system has meant an absence of engagement and satisfactory outcomes for Aboriginal communities and many report feeling unsafe, misunderstood and confused about the family courts operations.

Recommendation 14

The Family Law Act be amended to include the Aboriginal definition of family violence. Indigenous definitions of the nature and forms of family violence are broader and more encompassing than those used in the mainstream. Such a change is critical to the family law system being culturally safe for Aboriginal people and for it to ensure the safety of Aboriginal children.

Recommendation 15

The Family Law Act be amended to more closely align with the Aboriginal and Torres Strait Islander Child Placement Principle, so it explicitly includes the child's interests in preserving their Aboriginal identity through connections to family, community, country and cultural identity.

Recommendation 16

Strengthen mediation requirements before the filing of family law matters and increase funding for mediation services. This would allow more disputes to be resolved outside of the court setting, which is also more accessible and culturally safe for Aboriginal people, and therefore frees up time for courts to resolve more complex disputes.

Recommendation 17

Empower court registrars to finalise 'minor' disputes in cases where the majority and most significant disputes, such as child custody, visitation and property, have already been resolved.

Recommendation 18

Implement a framework for dealing with family violence in Family Dispute Resolution (**FDR**). The framework would put the safety of children and families first while at the same time ensuring that parties facing allegations of family violence are still given the opportunity to fulfil compulsory FDR and avoid adversarial court processes.

Recommendation 19

Expand and amend the trial of the Parenting Management Hearings (**PMH**) to ensure the trial experiences different cultural and community contexts, such as those in remote Aboriginal communities, and require an Aboriginal person or representative of an ACCO be on any panel hearing a matter concerning an Aboriginal party.

Recommendation 20

Establish and fund a follow up process to support parties after the conclusion of court. This service would be especially beneficial to families with limited understanding of the court system and requirements, and increase the cultural safety of the court system for Aboriginal families.

Recommendation 21

Fund Aboriginal Family Violence Liaison Officers (**AFVLO's**) to be present to advise and support clients with understanding the court process and accessing alternative dispute options. These

AFVLO's would also play an important role in ensuring parties in a family law dispute understand their options and provide critical support for parties experiencing or in fear of family violence.

Recommendation 22

Expand legally-assisted family dispute resolution processes for disputes involving family violence or abuse. Such legal assistance could reduce the restrictions on families affected by family violence being involved in FDR. More specifically, legal assistance in FDR for both parties would help counter the impact of historical or existing power imbalances in a relationship

Recommendation 23

Increase measures to prevent the family law system being misused as a form of abuse or to delay proceedings. Effective measures identified by VALS include requiring judges to consider applying the *Rice v Asplund* test at all preliminary hearings to prevent matters unnecessarily going back to court; penalties as a deterrent to the misuse of or abuse of court processes; and amendment of state and territory laws so that abuse of process is included in definitions of family violence and can therefore be prosecuted by the police.

Recommendation 24

Introduce problem solving decision-making processes within the family law system to strengthen risk management of children in families with complex needs, and increase the involvement of ACCOs and support services in the design of any new problem-solving models.

Recommendation 25

Incorporate family inclusive decision-making processes into the family law system as it is a culturally appropriate process that recognises and values the role of extended family and community, and puts the interests of the child first. An effective family inclusive decision-making model would contribute to diverting disputes from the Family Court and empower communities to find solutions that are in the best interests of the child.

Recommendation 26

Expand integrated services in the family law system to include a services hub or 'one stop shop' located in federal family courts, an Aboriginal support worker employed by an ACCO to coordinate

integrated services and manage referrals for all Aboriginal families, and representatives from ACCOs helping with counselling, employment, case management and behavioural change be co-located with family lawyers.

Recommendation 27

Amend the jurisdiction of the Family Court to reduce fragmentation by providing the Family Court with capacity to deal with child protection and family violence. Reducing the need for families to engage with multiple courts is an important step in addressing the safety concerns of children.

Recommendation 28

Expand the funding and training for Independent Children's Lawyers (ICLS) to ensure there are sufficient numbers of ICLs with the capacity to provide individualised support and build trust with children, and that ICLs are appropriately skilled in cultural safety, family violence and trauma informed care.

Recommendation 29

Establish a registrar to monitor mandatory and ongoing training of all family law professionals in the areas of child safety and behaviour, family violence, trauma-informed care and cultural competency. Such training equips family law professionals with the skills required to competently engage with the family law system and with Aboriginal families.

Recommendation 30

Amend Section 121 of the *Family Act* to allow more open publication of cases and information regarding common determinations of the Family Court and the reasoning behind decisions, this could include statistics of court outcomes and average times of different family law processes. VALS emphasises that any changes to s 121 must ensure that client confidentiality is prioritised.

RESPONSE TO THE ISSUES PAPER

OBJECTIVES AND PRINCIPLES

Question 1: What should be the role and objectives of the modern family law system?

VALS believes the primary role and objective of the modern family law system should be to ensure the physical, cultural, emotional and material safety and security of men, women and children, with the best interests of the child as a primary objective.

The family law system should also be a consistent, reliable and trusted framework that contributes to building trust between vulnerable communities and legal professionals. Our communities have a long-held distrust of legal institutions because of the historical and current discrimination that has resulted in disproportionate rates of incarceration, child removal, and over-policing and under-policing. For the family law system to be truly accessible to Aboriginal people it is critical that it actively demonstrates and practices respect and understanding of Aboriginal culture and the impacts of colonisation on family relationships, including family violence.

The modern family law system should empower Aboriginal Community Controlled Organisations to represent and advocate for victims, accused and perpetrators of family violence. The role played by ACCOs in the family law system has proven essential to Aboriginal people accessing the legal system. ACCOs are essential to breaking the cycle of violence in Aboriginal communities as they provide community-driven and trauma-informed approaches to family violence. ACCOs empower Aboriginal families and communities by providing cultural healing, restoring strength and dignity and self-determination.

A key objective of the modern family law system should be to quickly resolve disputes. Delays in the family law system erode trust in the ability of the law to resolve disputes, leave victims of abuse in

vulnerable situations where the abuse may continue, contribute to the trauma of family violence, and can result in accused persons being held on remand for excessive periods of time. Delays also contribute to the prohibitive costs and financial pressures of engaging in family law, which put strain on the resources of ACCOs to support clients.

The modern family law system should also play a role in recognising and valuing different family units and relationships, and the importance of culture to family. Aboriginal families, their relationships and obligations, are unique and result in family law issues manifesting in unique ways that can create conflict with a rigid legal system. Through recognising and valuing Aboriginal culture the family law system can not only resolve disputes more effectively but can also contribute to the strengthening of Aboriginal culture, which is a powerful protective factor against family violence.

Question 2: What principles should guide any redevelopment of the family law system?

VALS believes the redevelopment of the family law system should be guided by the principle of Aboriginal self-determination and by the primacy of children's rights. Having Aboriginal self-determination as a guiding principle would contribute to the voices of Aboriginal communities being valued and to strengthening ACCOs in their work, which would ensure the importance of culture to tackling family violence and resolving family disputes is actively recognised.

Aboriginal and Torres Strait Islander Child Placement Principle

The Aboriginal and Torres Strait Islander Child Placement Principle (**ATSICPP**) recognises the importance of connections to family, community, culture and country in child and family welfare legislation, policy and practice, and asserts that self-determining communities are central to supporting and maintaining those connections. The ATSICPP was founded to ensure systemic change to counter the embedded racism within mainstream systems that led to the Stolen Generations by

ensuring a focus on recognising the inherent value of culture in the lives of Aboriginal and Torres Strait Islander children, families and communities. The ATSICPP aims to:

1. Ensure an understanding that culture underpins and is integral to safety and wellbeing for Aboriginal and Torres Strait Islander children is embedded in policy and practice;
2. Recognise and protect the rights of Aboriginal and Torres Strait Islander children, family members and communities in child welfare matters;
3. Increase the level of self-determination of Aboriginal and Torres Strait Islander people in child welfare matters; and
4. Reduce the over-representation of Aboriginal and Torres Strait Islander children in child protection and out-of-home care systems.¹⁶

ATSICPP was accepted in 1984 at a Social Welfare Ministers Conference with all states and territories agreeing that Aboriginal and Torres Strait Islander children should be permitted to grow and develop in their own families and communities, and in the instance they need to be removed from the care of their family they should be placed with Aboriginal or Torres Strait Islander carers. Since that monumental consensus was reached each Australian state and territory has adopted the ATSICPP to varying degrees in child protection and adoption legislation.

The lack of ATSICPP within the Family Law Act is a barrier for Aboriginal families. Aboriginal communities feel that there is a risk involved in engaging with the family law courts as they are unsure whether children will stay with immediate or extended family members or kin and question whether they are putting that child's cultural identity at risk.

VALS acknowledges that family law courts have previously noted the importance of maintaining and fostering an Aboriginal child's identity to ensure their wellbeing, particularly where they are placed with non-Aboriginal carers. In the *Marriage of B and R*¹⁷ the Family Court noted the unique experiences of Aboriginal people, including the experience of forced removals of children and

¹⁶ SNAICC, "Understanding and Applying the Aboriginal and Torres Strait Islander Child Placement Principle", accessed at http://www.snaicc.org.au/wp-content/uploads/2017/07/Understanding_applying_ATSICCP.pdf

¹⁷ (1995) 19 Fam LR 594.

subsequent identity crises arising out of growing up in a foreign environment and being isolated from their Aboriginal identity.¹⁸ The Court held that these factors are relevant to the Court's consideration of an Aboriginal child's welfare and what is in that child's best interests:

Aboriginal culture and history and the interaction of Aborigines [sic] in a predominantly white culture are unique and judicial consideration of the significance must go much further than the fact that one has a right to know one's culture.¹⁹

The Court accepted evidence that the effects on Aboriginal children of being raised in a Western environment where their Aboriginal identity was not reinforced could contribute to 'severe confusions of that identity and profound experiences of alienation'.²⁰ The Court also held that life as an Aboriginal person means confronting discrimination on a daily basis, that the removal of an Aboriginal child to a foreign environment is likely to have a devastating impact on that child, that Aboriginal identity and self-esteem is more likely to be reinforced from within the child's Aboriginal community, and that children brought up in ignorance of their Aboriginality or in circumstances which belittle or deny their Aboriginality are likely to experience significant impacts on their self-esteem and self-identity into adult life.²¹ The court held that the above factors are unique to Aboriginal experiences and are relevant to determining the best interests of an Aboriginal child, and thus:

By failing to recognise these uniquely Aboriginal experiences, its effect is to administer something less than equal justice to Aboriginal people. By pretending that these experiences are not what they are – tragic, relevant, and unique – this approach treats Aboriginal people as if they were not who they are. It recognises less than their complete identity and humanity. That is an effect which this court finds objectionable, and the approach taken is one which we reject.²²

¹⁸ Ibid.

¹⁹ Ibid 594 (Fogarty, Kay and O'Ryan JJ).

²⁰ Ibid.

²¹ Titterton, Adelaide, "Indigenous Access to Family Law in Australia and Caring for Indigenous Children" [2017] UNSWLawJl 7; (2017) 40(1) University of New South Wales Law Journal 146

²² Ibid.

In the matter of *Nineth and Nineth [No 2]*, Murphy J held that it would be 'profoundly detrimental' for an Aboriginal child to be deprived of living his cultural life and that he deserved the opportunity to live within his culture.²³ In this matter, the child had been living with his Aboriginal great-aunt who had embraced a Christian faith and abandoned her cultural heritage. As a result it was held that in terms of promoting the child Aboriginal culture it would be in his best interests to live with his grandmother who had significant a deep belief in her culture and community.²⁴

The diversity and specificity of Indigenous cultures has also been acknowledged in *Davis v Davis*.²⁵ In that case the child was living with her white father and paternal grandmother in La Trobe Valley, Victoria. The child's mother was a West Arrente woman who lived in Central Australia.²⁶ Young J made orders for the child to relocate with her mother to Central Australia so that the child would be able to enjoy her right to her specific and unique Western Arrente culture. His Honour found that it would not be sufficient for the child to continue to live in La Trobe Valley with exposure to the Aboriginal Koori culture of that area. Young J held that for the child to maintain her cultural connections it was required for her to spend time with family members and her Indigenous community.

Despite the ATSICPP not having been incorporated into family law legislation, it appears that judicial officers exercising family law jurisdiction have a sophisticated understanding of the implications of placements and child care arrangements for Indigenous children and the impact on their identity, self-esteem, and continuing connection to culture. However, this is highly predicated on the judicial officer themselves and as such there is no guarantee for an Aboriginal party that they will have a judicial officer who has a sophisticated knowledge base when it comes to child care arrangements for Aboriginal children.

We note that across the states and territories there appears to be a limited understanding and application to the ATSICPP and a perception that it only concerns the placement of Aboriginal

²³ Indigenous Issues Committee of the Law Society of New South Wales, above n 70, 7. See Bringing Them Home Report, above n 7, 514 (recommendation 46a).

²⁴ Ibid.

²⁵ [2007] FamCA 1149; (2007) 38 Fam LR 671.

²⁶ Ibid.

children. VALS believes the ATSICPP has the capacity to provide some level of guarantee and protection to vulnerable Aboriginal communities. We would encourage the family law system to acknowledge that the ATSICPP recognises the ongoing destructive impacts of policies and practices of colonisation and the removal of Aboriginal children and as such the only way to remedy the issue is to ensure that Aboriginal communities are making the decisions about their children and determining how they will remain connected to their family, community and culture. ATSICPP will require the family law system to work in partnership with Aboriginal communities in decision making to ensure that the connections that are so vital to develop and maintaining a child's sacred cultural identity are understood and promoted.

VALS supports the recommendation of the National Family Violence Prevention Legal Service Forum that any changes to the family law system must follow three principles that recognise and respond to the unique experiences and needs of Aboriginal and Torres Strait Islander families. The principles recommended by the National FVPLS Forum and supported by VALS are:

- Culturally safe
- Trauma-informed
- Family violence sensitive²⁷

Access and Engagement

Question 3 and 4: In what ways could access to information about family law and family law related services, including family violence services, be improved? How might people with family law related needs be assisted to navigate the family law system?

A 2013 report by the Australian Indigenous Legal Needs Project found that "Indigenous people in Victoria are 'being shafted' (in the words of an Indigenous person we spoke to) because they do not know their rights, they do not know how to access information and services, and often the services

²⁷ Djirra submission p.12

are not funded to deal adequately with the many civil and family law problems Indigenous people face.”²⁸

The low-level of Aboriginal engagement with the family law system is largely the result of the historical and ongoing experiences of Aboriginal people with the Australian legal system. These include disproportionately high rates of child removal and incarceration, systemic discrimination and the failure of the Australia legal system to be culturally safe and accessible. These have resulted in Aboriginal people lacking trust in the Australian legal system and therefore avoiding accessing family law out of fear of punitive outcomes for themselves, their ex-partner or the removal of their children.

Aboriginal people have also avoided accessing family law as it is often perceived to be culturally inappropriate or unsafe. Aboriginal culture and traditions have means to resolve family disputes that have been severely disrupted by colonisation, as a result Aboriginal families are often left with their only option for resolving contested or complex family disputes through the colonial legal system that has been imposed upon them. The Australian legal system has only ever made minor changes to become more accessible to Aboriginal people, and Aboriginal people have therefore relied on their own organisations to navigate and access the legal system. The underfunding of ACCOs to provide legal and other related services, including interpretation, continues to be a major barrier to Aboriginal people accessing the family law system.

VALS recommends the following be adopted to improve access to information about family law for Aboriginal people to assist them in navigating the family law system:

- Increased funding for community legal education (CLE)

Community legal education is tailored to the needs of different age groups and communities and can be in various formats such as outreach, legal clinics, materials and projects. CLE empowers individuals and communities by providing culturally appropriate and plain English

²⁸ Australian Indigenous Legal Needs Project, “The Civil and Family Law Needs of Indigenous People in Victoria”, p.15, accessed at https://www.jcu.edu.au/__data/assets/pdf_file/0011/121889/jcu_131180.pdf

information directly to communities. CLE also plays an important role in building relationships and trust between communities and legal assistance services.

- Increased funding for legal assistance

Many of the gaps and problems in access could be resolved if resourcing was adequate. For example, problems of a Melbourne-centric model of service delivery are partly the result of funding limitations, as is the limited availability of civil lawyers employed by VALS. Increased resourcing across the legal assistance sector would allow for more strategic approaches to legal needs, which would result in better access to legal information for clients and the community, as well as better targeted and designed CLE in communities.

- Easy to read facts sheets

Fact sheets outlining the legal process, obligations and how to access legal services should be presented in plain English and be widely available in courts, police stations, community organisations and community spaces.

- Information on the back of orders

This information should include, in plain English, contact information for legal assistance, an overview of family law processes, such as mediation, and easy to digest summaries of obligations to adhere to court orders.

- Easily accessible online information

Both CLE programs and the Federal Court need increased resources to improve online access to information. Digital platforms provide the opportunity to provide more accessible information through the utilisation of options such as images and diagrams, videos and audio, chat windows to ask questions, and links to legal assistance services and other sources of legal information.

The Family Court website should a source of easily accessible information and documents, however, in its current design it acts as just another impediment to Aboriginal people accessing the family law system. The Family Court website needs to be updated to simplify

navigation, access to documents and plain English summaries of court processes and obligations.

- Court support person

To provide information on referral pathways and legal processes. This role should be funded and affiliated with the court and be held by people trained in cultural competency to ensure they meet the needs of Aboriginal people that are in contact with the court system. Such a person would help reduce the intimidation of court settings and allow for efficient referral to appropriate services.

Question 5: How can the accessibility of the family law system be improved
for Aboriginal and Torres Strait Islander people?

A holistic approach requires recognition of the systemic and historic barriers to Aboriginal people accessing family law, the greatest of which is the fear of children being removed because of a parent disclosing family violence or revealing a relationship breakdown to courts. The impact of the inter-generational trauma of past and current child removal policies on Aboriginal people accessing the family law system is compounded by the historic and ongoing distrust of police and the broader justice system.

‘Families are incredibly reluctant to use Family Law Court...that’s another court system which is really alienating. People are really frightened of it...The Family Law Court is an option that a non-Aboriginal person might use but not many of our families would even contemplate it. (Indigenous community organisation worker)’²⁹

²⁹ “The Civil and Family Law Needs of Indigenous People in Victoria”, p.86

Increase funding of ATSILS

Increased funding of ATSILS is required to expand the provision of family law services, both in terms of legal casework and assistance but also in terms of community legal education events. It is essential that Aboriginal people in regional and metropolitan areas are provided with culturally appropriate advice and information services to ensure they are aware of the framework of the family law system and what rights and obligations are created.

There are a myriad of barriers preventing Aboriginal people from accessing the family law system, increasing the resources of ATSILS to educate, support and represent Aboriginal people involved in family law disputes is a necessary step to overcoming the barriers and empowering Aboriginal communities to access the family law system.

Fund Aboriginal Family Liaison Officers for all states and territories

Aboriginal Family Liaison Officers make a significant contribution to the cultural safety, and therefore accessibility, of the Family Court. They can translate legal information into plain English, monitor the cultural safety of court proceedings, advise judges and court officials, and guide Aboriginal people through court process and ensure they have access to appropriate services.

In Victoria, Koori Liaison Officers have greatly contributed to Aboriginal people accessing courts. Providing Aboriginal Family Liaison Officers would ensure the same supports are in place for the family law system, would help facilitate early risk assessment, evidence gathering and access to culturally appropriate support services for both children and parents.

Increase employment of Aboriginal people in all areas of court

Aboriginal people are overrepresented as clients in the family law system and under-represented in employment in the family law system. VALS advocates the adoption of strategies to increase the Aboriginal workforce in the family law system as this will significantly improve the cultural

competency of the family law system and its accessibility to Aboriginal people. The Family Law Council has previously called for the implementation of strategies to increase the number of Aboriginal and Torres Strait Islander people employed in the family law system.³⁰

Consideration of culture

The Family Law Act provides some recognition that a child's culture be considered in resolving family law matters. However, judges have at times demonstrated they are not competent in valuing or understanding the complexities of Aboriginal culture and kinship responsibilities. VALS believes that cultural evidence should first be sought from Elders, and that it should be a requirement that judges consider cultural reports and the opinions of cultural advisors when making decisions on family law matters involving Aboriginal children. Further to this, court personnel should undergo specially tailored training to improve their ability to consider evidence of culture.

Cultural reports for interim orders and family hearings

There should be two forms of cultural reports: brief cultural reports to be considered ahead of interim orders and detailed cultural reports ahead of family hearings. Cultural reports should outline the cultural supports required by the child or parents and these should be given equal weighting by the courts as interim and family reports. Cultural reports should also be produced for extended family when they are fulfilling a parental role in the matter.

The reports should be written by an ACCO that is connected to the child, parent or extended family. The report writer should consult with the family and extended family when appropriate, and with relevant community members. This information should be included alongside academic information that assists in explaining the experiences of the family, such as, the impacts of inter-generational trauma and child removal on the family and their community.

³⁰ Family Law Council, "Improving the Family Law System for Aboriginal and Torres Strait Islander clients", 2012, Recommendation 2, p. 97.

The aim of reports should not only be to provide the court with a better understanding of the unique circumstances and experiences of the Aboriginal family, but also to provide a greater voice for the Aboriginal family in court. It can be particularly difficult for Aboriginal families to discuss both the traumatic impacts of colonisation and the complexities of Aboriginal family support networks and cultural requirements. Cultural reports, therefore, can play a significant role in overcoming the cultural barriers presented by the family court system and greatly assist judges in gaining a more comprehensive understanding of the circumstances and needs of particular families.

ACCO dispute resolution service

VALS believes the funding of ACCO run dispute resolution services would greatly increase access to the family law system, increase consideration of cultural issues and improve the efficiency of the family law system by reducing delays in determinations being reached. Such dispute resolution bodies should be mobile to allow them to be held on the traditional country of the child. In the case of two Aboriginal parents, the resolution should be held on the country that the child has spent the greatest time. This would also increase the ability of relevant elders to be involved regarding cultural considerations.

Expand pilot of Federal Court Specialised Indigenous Lists

Specialised Indigenous Lists have been piloted at the Sydney Registry of the Federal Circuit Court of Australia since 2016. The specialised listing days are for family law matters involving an Indigenous party and provide a less formal court setting with extra support from ACCOs on the listing days. VALS strongly advocates expanding the pilot to all states and territories, including to regional areas. Such a change in court settings will significantly improve Aboriginal people accessing the Family Court and the participation of elders who can provide advice regarding the cultural needs of any children involved.

Address Inherent Bias

Academic literature identifies a bias where the family law system emphasis and adopts Anglo Saxon values and fails to accommodate Aboriginal values and traditions thereby creating a bias. For example, a court can show a cultural bias against Aboriginal parenting practices as they don't appear to have the permanency and stability that the Anglo-Saxon model of parenting promulgates. In practice we have seen the courts inability to push aside Anglo-Saxon parenting values in situations where young mothers have accepted the help and guidance of older family members in the raising of their child, which often results in these young children having fluid and flexible care arrangements so that the young mother can learn from her elders but also pursue education and economic opportunities to support her family. These young mothers are often punished for these decisions in the approach the court, the practitioners, the family reporters take in the family law process as she is no longer considered a primary carer.

Further research conducted by Stephen Ralph in 2011 found that Indigenous clients perceived bias and unfairness against them in family court processes.³¹ In the Court User Satisfaction Survey conducted by the Family Court and FCCA in 2015, Indigenous interviewees reported the lowest levels of satisfaction arising from feeling that their matter had been handled unfairly, feeling unsafe, feeling unclear about court processes.³²

Question 9: How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

The Issues Paper identified many of the main barriers to people in rural, regional and remote areas accessing the family law system. These included geographic barriers, limited transport options, lack

³¹ Stephen Ralph, 'The Best Interests of the Aboriginal Child in Family Law Proceedings' (1998) 12 Australian Journal of Family Law 1;

³² Ibid, 20, 26, 28.

of support services, limited specialist Aboriginal and Torres Strait Islander services and limited availability of interpreters for Aboriginal people with English as an additional language.

It is well established that rates of family violence and child removal are higher in rural, regional and remote communities than in metropolitan areas. This is due to the factors mentioned above but also cultural factors and the nature of relationships in smaller communities. The Royal Commission into Family Violence found that in rural, remote and regional areas:

‘Victims can be reluctant to seek help when the police, court staff and the relevant services know the perpetrator. Intertwined with this can be a fear that the victim’s (or the perpetrator’s) circumstances will become more widely known in their community and could result in ostracism.’³³

VALS supports the recommendations made in the Issues Paper, that access to the family law system be improved by the use of communication technology, increasing the availability of family law services and interpreters and ‘improved collaboration with Aboriginal and Torres Strait Islander specific services.’³⁴

Fundamentally, the under-funding of legal services must be addressed as a priority to address the gap in access to family law services for Aboriginal people. ATSISL’s such as VALS, Balit Ngulu and Djirra must be resourced sufficiently to deliver family law services to Aboriginal people as they are the principle providers of legal services to metropolitan and regional Aboriginal communities.

VALS also recommends that family law services be increased in rural, remote and regional areas by better funding existing ACCOs and Aboriginal legal services to collaborate and innovate practices

³³ Victorian Royal Commission into Family Violence, Summary and Recommendations, 2016, p. 217

³⁴ Australian Law Reform Commission, Issues Paper, p.34

that would deliver holistic and culturally appropriate legal services. Building trust in rural, remote and regional areas takes a considerable amount of time and the relationships already established by service organisations should be built upon when it comes to delivering community legal education events and as pathways to accessing legal advice for Aboriginal communities.

VALS also recommends increased resourcing of mainstream services in rural, remote and regional areas, as some individuals may choose a mainstream service to increase confidentiality and privacy, or avoid complex community relationships. Mainstream services should adopt VALS accreditation-style cultural awareness program and a Cultural Competence Framework to ensure they are welcoming and culturally safe for Aboriginal people to access legal services.³⁵

VALS supports the recommendation by Djirra that regional circuit courts are too infrequent and put too great a strain on the resources of ATSILS's. Solutions to this can be found in establishing more permanent courts in regional centres, increasing the frequency of circuit court visits and better resourcing of ATSILS's to assist clients travelling to and from metropolitan court hearings.

Question 10: What changes could be made to the family law system, including
to the provision of legal services and private reports, to reduce the cost to clients of
resolving family disputes?

Costs to clients is a major barrier to Aboriginal people accessing the family law system to resolve family disputes. It is important that in attempting to overcome the financial barrier the importance of respect and understanding for an individuals and communities culture is upheld and appropriately resourced. The preparation of comprehensive family reports makes a significant difference in reducing financial barriers and in ensuring culture is valued and respected in the process of resolving

³⁵ VALS, Access to Justice Submission (June 2016) rec 9.

family disputes. VALS recommends extra funding be allocated to ATSILS for them to prepare cultural reports for all cases that involve Aboriginal children.

VALS supports the following recommendations from NATSILS regarding family reports:

- funding for Aboriginal and Torres Strait Islander psychologists to undertake training on how to prepare family reports;
- funding to enable report writers to travel to where a family lives (whether in a city or remotely) to ensure all surrounding circumstances are presented to the report writer;
- guidelines should be prepared to ensure report writers who travel to remote communities do not prejudice the person due to cultural differences;
- family reports should include important information such as kinship mapping, and interviews with people outside the nuclear family, for example, aunties or other important figures in the community;
- funding for Family Consultants so that families are not required to provide the same information multiple times.

Question 11: What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

VALS recommends the production of video and printed guides to inform and empower litigants without legal representation regarding court procedures. It must be recognised that the main driver of people representing themselves is the prohibitive cost of private representation and the difficulty in accessing under-resourced legal services. VALS believes that increasing the funding, and therefore availability and accessibility of legal services, must be a priority to reduce the number of litigants going to court without legal representation.

Printed and video guides should both include:

- outline of court procedures;
- diagrams and flow-charts outlining the stages of legal proceedings, including estimated time frames of each stage;
- plain English definitions of legal language;
- annotated forms, explaining how they need to be completed;
- pro-forma parenting order;
- explanation of admissible evidence and how it can be present in court;
- explanation of how culture is considered in court orders and the role of family reports; and
- contact information for legal and family services, including ATSILS.

Both the video and printed guide should use design and language that does not further intimidate people with little knowledge of the legal system and/or have little trust in the legal system. Both should also be easily accessible: the video easily found in internet searches and on the Family Court website, and the printed guide to be mandatorily provided to all litigants without legal representation.

In addition to providing video and print information to self-represented litigants, VALS recommends that it be a requirement that all such persons meet with a duty lawyer or legal service before attending court and at regular intervals during the legal process. As part of this recommendation, all identified Aboriginal people must first be referred to an ATSIL or another relevant ACCO to receive legal advice regarding self-representation, and have access to an Aboriginal Liaison Officer when at court.

Question 12: What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Aboriginal Liaison Officers

VALS recommends that Aboriginal Liaison Officers be employed in the FCCA, just as they are in the Magistrates Court and Children's Court. Aboriginal Liaison Officers play a critical role in assisting parties to overcome language and cultural barriers, and in navigating the complexities of the family law system. The current lack of Aboriginal Liaison Officers and Aboriginal Family Consultants working at the Family Court and FCCA has been identified as an impediment to Aboriginal communities' access to the family law system.³⁶

We note that between 1996 and 2008, the Family Court had a program that employed six Aboriginal Liaison Officers which was discontinued as the Commonwealth government expressed a view that such positions should be the responsibility of community based agencies.³⁷ Despite the program having a 'highly significant impact on the relationship existing between Indigenous people and the broader Australian system of law'.³⁸ The Family Court nevertheless complied with the Commonwealth's wish. The lack of Aboriginal Liaison Officers and Aboriginal Family Consultants within the family law system has meant that there is an absence of engagement and satisfactory outcomes for Aboriginal communities and many still report feeling unsafe, misunderstood and confused about the family courts operations.

Duty Lawyer Services

VALS recommends that funding for duty lawyer services be a priority to meet the needs of unrepresented litigants. The earlier recommendation that unrepresented litigants be required to

³⁶ Family Law Council, 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report (Terms 1 & 2)' (Interim Report, June 2015), 34.

³⁷ Stephen Ralph, 'Indigenous Australians and Family Law Litigation: Indigenous Perspectives on Access to Justice' (Report, Family Court of Australia and Federal Magistrates Court of Australia, 1 October 2011), 10

³⁸ Stephen Ralph, 'Addressing the Needs of Indigenous Women in the Family Court' [2004] IndigLawB, 27.

meet a duty necessitates increased funding of ATSILS to ensure they can provide such a service to Aboriginal people entering the family law system.

Community Legal Education

VALS recommends increased funding of community legal education on family law topics. Such education would better inform Aboriginal communities of how the family law system operates, how their culture can be considered by the court, and how they can access legal assistance when faced with a family law problem.

Review of the Family Law System

Legal principles in relation to parenting and property

Question 14 and 16: What changes to the provisions in Part VII of the Family Law Act could be made to produce the best outcomes for children? What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?

Part VII of the FLA has strong language regarding the best interests of the child and states that ‘a court must regard the best interests of the child as the paramount consideration’.³⁹ VALS believes the application of this section of the FLA is insufficient regarding Aboriginal children as the legislation limits the consideration to ‘the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture.’⁴⁰ VALS recommends that this be amended to more closely align with the Aboriginal and Torres Strait Islander Child Placement Principle, so that in regards to Aboriginal children this

³⁹ Commonwealth Family Law Act, 122

⁴⁰ Ibid, 123

‘paramount consideration’ explicitly include the child’s interests in preserving their Aboriginal identity through connections to family, community, country and cultural identity.

VALS is concerned that the construction of family within the Family Law Act privileges the concept of the Anglo-Saxon nuclear family of two parents and the child’s connection to those respective parents. The emphasis on nuclear family structures conflicts with Aboriginal parenting practices and leaves the latter looking alien and not normal despite community members having had parenting obligations outside of their own biological children for generations. Stephen Ralph argues that:

The Aboriginal perspective is based upon a collectivist view of family and social life that sees responsibility for the growing up of children invested in many people. According to this view children come to trust in the capacity and commitment of a multitude of people to care for them and nurture them through childhood and into adulthood. By this means children come to take their place in Aboriginal society where responsibilities and obligation to family and kin are deeply rooted and pervasive.⁴¹

The United Nations Committee on the Rights of the Child has noted that applying the best interests of the child principle to Indigenous children requires attention:

the best interests of the child are conceived both as a collective and individual right ... [it] requires consideration of how the right relates to collective cultural rights ... In decisions regarding one individual child, typically a court decision or an administrative decision, it is the best interests of the specific child that is the primary concern. However, considering the collective cultural rights of the child is part of determining the child’s best interests.⁴²

The Committee recommended that for any legislation, policy or program affecting Indigenous peoples there should be consultation with Indigenous communities and the opportunity for

⁴¹ Stephen Ralph, ‘The Best Interests of the Aboriginal Child in Family Law Proceedings’ (1998) 12 Australian Journal of Family Law, 1

⁴² Committee on the Rights of the Child, General Comment No 11: Indigenous Children and Their Rights under the Convention, 50th session, UN Doc CRC/C/GC/11 (12 February 2009) 6–7 [30]–[32].

those communities to meaningfully contribute to how the best interests of Indigenous children can be decided 'in a culturally sensitive way'.⁴³ Furthermore, Indigenous litigants have expressed dissatisfaction for the ways in which courts have considered cultural issues under the best interests of the child principle:

*Comments provided by Indigenous litigants in interview revealed that many believed the concern they expressed about the importance of cultural issues was ignored, or at worst viewed as a disingenuous attempt to gain a strategic advantage over the non-Indigenous other party. Several litigants expressed anger and distress at having their Aboriginal identity questioned and challenged during court proceedings.*⁴⁴

The same study that reported this dissatisfaction also found that Indigenous clients were not satisfied with the assessment of cultural issues in family reports.⁴⁵ The limited research available on family reports indicates that family report writers may misunderstand the complexities of family violence, particularly the gendered nature of family violence and the link to child abuse in Aboriginal communities.⁴⁶ The inconsistent quality of family reports could particularly affect Aboriginal victims, who experience unique forms of family violence often at higher rates than non-Aboriginal victims as judicial officer privilege these reports any inadequacy, misunderstanding, lack of cultural competency and inability to engage could determinately affect the outcomes Aboriginal victims are able to secure in the family law system.⁴⁷ It is critical that family report writers are given adequate cultural competency training as well as family violence training, including on how family violence affects Aboriginal families.

⁴³ Ibid.

⁴⁴ Stephen Ralph, 'Indigenous Australians and Family Law Litigation: Indigenous Perspectives on Access to Justice' (Report, Family Court of Australia and Federal Magistrates Court of Australia, 1 October 2011), 10.

⁴⁵ Ibid.

⁴⁶ Rachael Field et al, 'Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?' (2016) 25 Journal of Judicial Administration, 212, 226.

⁴⁷ Ibid.

Question 15: What changes could be made to the definition of family violence, or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?

The safety of children must be a priority in the consideration of any changes to the definition of family violence and to the Family Law Act. The following recommendations highlight the need to reduce delays in the family law system and to increase understanding of family violence in the context of Aboriginal communities, both of which are in the interests of increasing the safety of children and their families.

In order to reduce delays in the hearing and resolution of family violence allegations in courts VALS recommends the Family Law Act be amended to make family violence allegations a greater priority in court listings and to allow the use of evidence previously presented in another court.

The Family Law Act already requires the hearing of child abuse and family violence allegations are a priority in courts (Section 67ZBB). However, it is the experience of VALS that these changes are not sufficient and victims of child abuse and family violence still face significant delays when accessing the family law system with such allegations. This legislation should be amended to be more specific in the requirement that courts prioritise and deal promptly with child abuse and family violence matters. Such legislative change must also be supported by increased resourcing of courts, especially an allocation of funding for more judges, which would have a significant impact on cases being heard and decided on earlier.

VALS recommends that the Family Law Act be further amended to include the Aboriginal definition of family violence. Indigenous definitions of the nature and forms of family violence are broader and more encompassing than those used in the mainstream. The Victorian Indigenous Family Violence Task Force defined family violence as:

‘An issue focused around a wide range of physical, emotional, sexual, social, spiritual, cultural, psychological and economic abuses that occur within families,

*intimate relationships, extended families, kinship networks and communities. It extends to one-on-one fighting, abuse of Indigenous community workers as well as self-harm, injury and suicide.*⁴⁸

Indigenous family violence encompasses a range of acts that are criminal, such as physical and sexual assault, and non-criminal, such as emotional and spiritual abuse. Family violence includes intergenerational violence and abuse, affects extended families and kinship networks. An individual can be both a perpetrator and a victim of family violence.⁴⁹

Resolution and adjudication processes

Question 20: What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

It is the experience of VALS that current court processes often cause unnecessary delays in a child spending time with parents and/or siblings. Such delays have a disproportionate impact on Aboriginal children as they can disrupt a child's connection to family, community, country and culture. Delays in the resolution of family law have also been identified as one of the main factors discouraging Aboriginal people from accessing the family law system.⁵⁰

VALS believes significant improvements to timely and cost-effective resolution of family law disputes can be found in the following recommendations:

- Strengthen mediation requirements before the filing of family law matters. This would allow more disputes to be resolved outside of the court setting, which is also more accessible and

⁴⁸ Victorian Indigenous Family Violence Taskforce Final Report December 2003, 123

⁴⁹ 'Strong Culture, Strong Peoples, Strong Families: Towards a safer future for Indigenous families and communities: 10 Year Plan' (2008)

⁵⁰ The Civil and Family Law Needs of Indigenous People in Victoria, 72

culturally safe for Aboriginal people, and therefore frees up the time for courts to resolve more complex disputes. The success of this recommendation is wholly dependent on increasing the resources of mediation services, as in the current system the delays in accessing the family law system often begin with delays in accessing mediation services.

- Empower court registrars to finalise 'minor' disputes in cases where the majority and most significant, such as child custody, visitation and property, have already been resolved.
- Decreasing delays in courts accessing information and documents that are held by state entities, including court records, and records from Department of Human Services and police. In order to reduce delays, such documents would not require the granting of a subpoena but would require tailored privacy and confidentiality requirements.
- VALS also believes that specialised Aboriginal court lists, as outlined in response to Question 5, would also improve the timeliness of resolving family law disputes.

Question 21: Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

VALS strongly agrees with the recommendation in the Issues Paper that courts provide greater opportunities for disputes to be resolved outside of courts, such as compulsory Family Dispute Resolution (**FDR**). The success of such resolution processes requires a new framework for assessing the risk of family violence, greater involvement of ACCOs in mediation and a significant increase in the resourcing of services that provide FDR. VALS is supportive of compulsory FDR and believes it is an important tool in speeding up the resolution of disputes, reducing time spent in the court system, and is more culturally safe for Aboriginal people than the court system.

There is a need for reform of the FDR process to better identify, respond and work with allegations of family violence. It is estimated that 70% of families that attend FDR have a history of family

violence.⁵¹ VALS lawyers have highlighted that any raising of family violence issues during FDR, whether historical, unfounded or minor, often derail the FDR process and unfairly stigmatize one of the parties. Due to allegations of family violence many VALS clients have not pursued resolving family law matters and others have entered into informal parenting arrangements.

VALS recommends the implementation of a framework for dealing with family violence in FDR. The framework would put the safety of children and families first while at the same time ensuring that parties facing allegations of family violence are still given the opportunity to fulfil compulsory FDR and avoid adversarial court processes. The framework would also require specialist input on assessing the suitability of parties with family violence allegations for FDR, and where the risk of family violence is assessed to be low FDR would be continued. These specialists would include legal practitioners and family violence workers.

VALS welcomes the trial of the Parenting Management Hearings (**PMH**) and believes such a model can facilitate the early resolution of family disputes concerning one or more Aboriginal parties. In aiming to keep matters out of the court and resolve matters in a 'less adversarial forum' the model is particularly suited to meet the cultural needs of Aboriginal families.⁵² VALS recommends that the trial be expanded and that amendment be made that requires an Aboriginal person or representative of an ACCO be on any panel hearing a matter concerning an Aboriginal party.

⁵¹ House of Representatives Standing Committee on Social Policy and Legal Affairs, A better Family Law System to Support and Protect those Affected by Family Violence (December 2017) p 89
http://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/toc_pdf/Abetterfamilylawssystemtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application%2Fpdf

⁵² Attorney-General's Department, Submission 89, p. 8 in House of Representatives Standing Committee on Social Policy and Legal Affairs, A better Family Law System to Support and Protect those Affected by Family Violence (December 2017) p 99
http://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/toc_pdf/Abetterfamilylawssystemtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application%2Fpdf

Question 23: How can parties who have experienced family violence or abuse be better supported at court?

Involvement in the court system is an intimidating scenario for Aboriginal victims of family violence and can often have a re-traumatising impact. VALS recommends funding Aboriginal Family Violence Liaison Officers (**AFVLO's**) to be present to advise and support clients with understanding the court process and accessing alternative dispute options. These AFVLO's would also play an important role in ensuring parties in a family law dispute understand their options and provide critical support for parties experiencing or in fear of family violence. If family law clients better understand the safety and security mechanisms at the court they would be more willing to engage in the court processes and to address issues of family violence.

VALS also recommends the establishment of a follow up process to support parties after the conclusion of court. Clients of VALS have been left confused and frustrated by the sudden end of involvement and interest from multiple jurisdictions and organisations after their court process has been finalised. Such experiences can be particularly traumatising for victims of family violence or abuse and further stigmatise the family law system in the eyes of the Aboriginal community.

Question 24: Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

VALS supports the expansion of legally-assisted family dispute resolution processes for disputes involving family violence or abuse. Such legal assistance could reduce the restrictions on families affected by family violence being involved in FDR. More specifically, legal assistance in FDR for both parties would help counter the impact of historical or existing power imbalances in a relationship.

Legal assistance in FDR would also lessen the use of family violence allegations to stall processes and would help ensure that any allegations made had sufficient merit to be considered by the FDR

process. VALS lawyers have reported the use of unfounded allegations of family violence to stall proceedings and disadvantage the other party, legally-assisted FDR processes would help reduce this by better ensuring allegations of family violence could be substantiated.

VALS also recommends that ongoing funding be provided to the current Commonwealth pilot of enhanced models of legally-assisted and culturally appropriate FDR. This model has great potential to better support Aboriginal families engaged in FDR and it is therefore essential that funding be provided beyond the pilot stage and that ACCOs are widely consulted in the evaluation of the pilot.

Question 25: How should the family law system address misuse of process as a form of abuse in family law matters?

VALS is aware that the family law system is often used by one side to punish, pursue revenge or abuse the other party. VALS lawyers have reported that an aggrieved party will often use allegations of family violence or abuse to delay the resolution of proceedings. VALS lawyers have been involved in numerous cases where unsubstantiated allegations of family violence and abuse have resulted in one party not having access to their children for a number of years or one party abandoning the family law process out of frustration, depression or distress caused by the allegations and delays.

VALS lawyers have also highlighted that the costs involved in countering allegations of family violence are prohibitive for some parties and therefore they are unable to defend themselves against the allegations and FDR is not pursued.

Case Study

Client A:

Client A had three children with his former partner, whereby his former partner made allegations of sexual abuse that had arisen out of innocent play wrestling between Client A and his children. The Mother had a troubled experience of sexual abuse herself as a child which made her hyper vigilant and colored her interpretation of the contact between Client A and his children. DHHS investigated and then closed their file without substantiating the abuse. Client A has not seen his children since September 2016 and as he is the Aboriginal parent the children have no link to culture. Family law proceedings commenced August 2017 and due to court delays the matter will not proceed to trial until August 2018. Parties are in a queue waiting for supervised visits at a contact centre to commence and it will be over 18 months before Client A is able to see his children. Client A suffers depression because of all the delays and an inability to clear his name despite the allegations being found to be baseless by DHHS on many occasions.

VALS recommends the following reforms to prevent the processes of the family law system being misused as a form of abuse:

- Require judges to consider applying the *Rice v Asplund* test at all preliminary hearings to prevent matters unnecessarily going back to court;
- Introduce penalties as a deterrent to the misuse of or abuse of court processes; and
- Amend state and territory laws so that abuse of process is included in definitions of family violence and can therefore be prosecuted by the police.

Question 26: In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

VALS believes that the legally assisted culturally appropriate dispute resolution pilot is a promising development that will reduce delays and costs in FDR by providing better support to families and we refer you to our response to Question 24 for further detail.

Question 29: Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

VALS believes that the introduction of problem solving decision-making processes within the family law system could make a significant contribution to the risk management of children in families with complex needs, and that it is essential that the involvement of ACCOs and support services is embedded in the design of any new problem-solving models.

In Victoria the Neighbourhood Justice Centre (**NJC**) provides a good example of how problem solving decision-making can reduce pressure on courts and better identify and manage risk. The NJC's Magistrate outlined the benefits of a problem solving approach in the family law system:

'Problem solving justice has the potential to yield benefits for the Family Court relating to: identifying and responding to the safety and welfare of children; understanding and responding to complex spousal conflict; assessing parenting including the impact on parenting of various and possibly co-existing social problems; assessing future parenting capacity based on creating opportunities for

*change and assessing whether change is likely to be sustainable, thereby enabling better substantive outcomes as well as reducing the number of lengthy trials.*⁵³

Another useful example of problem solving decision-making is the pilot of the Indigenous List in the Sydney Federal Circuit Court as it uses a problem-solving approach to all parenting matters. A critical component of the model that should be included in the expansion of problem solving decision-making is the involvement of relevant support services. For example, the Indigenous List model involves representatives from the Wirringa Baiya Community Legal Centre, Family Advocacy and Support Service, Relationships Australia and the Men's Shed in matters involving an Aboriginal or Torres Strait Islander child.

Question 30: Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?

VALS believes family inclusive decision-making processes should be incorporated into the family law system as it is culturally appropriate process that recognises and values the role of extended family and community, and puts the interests of the child first. An effective family inclusive decision-making model would contribute to diverting disputes from the Family Court and empower communities to find solutions that are in the best interests of the child.

VALS recommends that the design of a family inclusive decision-making process should be consistent with the principles outlined in the Victorian *Children Youth and Families Act 2005*. The *Children Youth and Families Act 2005* requires adherence to the following principles:

⁵³ Neighborhood Justice Centre, "Submission to Family Law Council", accessed at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/FLC-submissions/David-Fanning.pdf>

- (a) in making a decision or taking an action in relation to an Aboriginal child, an opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views;
- (b) a decision in relation to an Aboriginal child, should involve a meeting convened by an Aboriginal convener who has been approved by an Aboriginal agency and, wherever possible, attended by—
 - (i) the child; and
 - (ii) the child's parent; and
 - (iii) members of the extended family of the child; and
 - (iv) other appropriate members of the Aboriginal community as determined by the child's parent;⁵⁴

VALS further recommends that the design of a family inclusive decision-making model is:

- Flexible and able to adapt to the differing circumstances and processes of Aboriginal communities. This requires the establishment of reciprocal relationships with local community groups to provide cultural advice and leadership.
- Includes preparation meetings to ensure each party understands the methods and aims of the process. These meetings should take place without the presence of government staff so the facilitator can build trust and family members are more comfortable to tell their story.
- Meetings be co-convened by a convener from the Department of Human Services and an Aboriginal convener from an ACCO. It is critical that the Aboriginal convener is the lead convener and is able to meet with the families without the presence of the department staff.

⁵⁴ Victorian, Children Youth and Families Act 2005, 25

Integration and collaboration

Question 31: How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

VALS agrees with the Issues Paper that the fragmentation of services makes it difficult for the needs of different families to be recognised and met by the family law system and that many people accessing the family law system are also facing issues, such as, housing needs, financial needs and therapeutic needs. An integrated services approach or 'wrap around service' is an effective system to meet the complex needs of families accessing the family law system.

VALS recommends that the expansion of integrated services in the family law system include the following:

- A services hub or 'one stop shop' be located in federal family courts as the first point of contact for people accessing the family court where they are directed to culturally appropriate services;
- An Aboriginal support worker employed by an ACCO to coordinate integrated services and manage referrals for all Aboriginal families; and
- Representatives from ACCOs helping with counselling, employment, case management and behavioural change be co-located with family lawyers.

Question 32: What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

VALS recommends that significant changes be made to the jurisdiction of the Family Court to reduce fragmentation by providing the Family Court with capacity to deal with child protection and family violence. The current system whereby families are often moving between different courts regarding

matters that are strongly interconnected, such as allegations of child abuse and parenting arrangements, can have a severe re-traumatising effect on families and delay resolution of matters before different courts.

VALS agrees that reducing the need for families to engage with multiple courts is an important step in addressing the safety concerns of children. In order to achieve this VALS recommends the following:

- Streamline information sharing across jurisdictions as delays in communication between courts can result in significant delays and place children and victims of family violence at greater risk. Family Courts and Magistrates Courts should be automatically linked to raise alerts and facilitate communication of information regarding risks to children and family members.
- A pilot of the model proposed by Justice Benjamin of the Family Court of Australia. Justice Benjamin's model is a new court that incorporates both the family law court and the child protection courts. This model would allow the family law system to provide holistic support and respond to complex matters that put children at risk.

Children's experiences and perspectives

Question 34: How can children's experiences of participation in court processes be improved?

VALS recommends that children's experience of the family court be improved through better resourcing, training and capacity of ICLs, age-appropriate education for children on the court system, making children feel safe in the court space, and empowering the voice of children in proceedings.

ICLs play an important role in guiding and supporting children, especially when there is a complex and high level of dispute regarding care arrangements. ICLs need to be resourced to spend more time with children at regular intervals so that they build a trusting relationship with the child and can more quickly respond to developments in the case. ICLs also require greater training to ensure they understand the role of culture in different family arrangements.

Children need to feel safe, comfortable and welcome in the court space. This can be better achieved by giving a child an introductory tour of the court on a non-sitting day, so they can begin to understand how the court operates and become familiar with the physical setting. Children should also be given an opportunity to meet the sitting judge, as it is important that they understand that the role of the judge is to make decisions in their interest. A video similar to that produced by The Central Australian Family Legal Unit could be used to provide a child-friendly explanation.⁵⁵

Great value also needs to be placed on the voice of children in proceedings. This should begin with the involvement of children in family reports and conferencing. Children should also be given the opportunity to express their opinion directly to the Judge in Court or in chambers, this places greater value on the views of the child and contributes to the child building trust in the court.

Question 35: What changes are needed to ensure children are informed about the outcome of court processes that affect them?

It is important that children are informed of ongoing developments in the court and that all relevant outcomes are clearly explained to them by a trusted person. Family consultants and Aboriginal Liaison Officers are in an appropriate position to be responsible for ensuring children are clearly explained the outcomes of court decisions that impact them. In the current system communication

⁵⁵ Family Law Council, "Improving the Family Law System for Aboriginal and Torres Strait Islander Families", 2013, accessed at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf> p 63

of such information to children can be *ad hoc* and it can be left to parents, who can be biased or unprepared, to explain the outcomes to their children in a fair and clear manner.

VALS recommends the following be requirement for the roles of family consultants and/or Aboriginal Liaison Officers:

- At the conclusion of each sitting clearly explain the developments to children present, including the roles of different people in the court.
- Following the decision of a judge, clearly explain the outcomes and the meanings relevant to the interested parties.
- Provide parents with training on how to explain court processes and outcomes to their children.

Question 36: What mechanisms are best adapted to ensure children's views are heard in court proceedings?

The United Nations Convention on the Rights of the Child outlines the right of children to freely express their views and be 'be heard in any judicial and administrative proceedings affecting the child...'⁵⁶ The Australian family law system has some effective mechanisms in place to allow the views of children to be heard and valued in Family Court. However, improvements need to be made to ensure the voice of children is properly valued by the court and that people working with the children are appropriately trained and resourced. ICLs and family consultants both play important roles in ensuring the views of children are heard and valued.

⁵⁶ UNCRC, Article 12

VALS recommends court processes be amended to ensure:

- The views of children be considered a priority by the court from the beginning of the case being heard, and therefore be heard at the beginning of proceedings.
- Children are able to give their views in a safe space in which they feel comfortable, highlighting the need for children to be familiar with the court setting and the judge before involvement in proceedings.
- Court process be amended to require ICLs to meet face to face with children before the child or ICL represent the children's views in court.
- Children, young people and parents be provided with a complaints mechanism to raise concerns over how children have been heard and how their views have been presented in court.

VALS also recommends that funding and training for ICLs be expanded to ensure there are sufficient numbers of ICLs with the capacity to provide individualised support and build trust with children, and that ICLs are appropriately skilled in cultural safety, family violence and trauma informed care.

Question 37: How can children be supported to participate in family dispute resolution processes?

Children have an important role to play in the family dispute resolution process and in order for the best interests of the child to be pursued it is essential that their voices are heard and valued. VALS recommends the following to better support the participation of children in the family dispute resolution process:

- Rigorous safeguards to protect children from possible emotional harm through their involvement in the family dispute resolution process. This would necessarily involve consultation with a child behavioural expert to assess the maturity and capacity of the child when determining their involvement in the family dispute resolution process.

- Cultural competency training for all family consultants working with any families that have any members that are Aboriginal or Torres Strait Islander, and greater resourcing for the employment of Aboriginal and Torres Strait Islander family consultants. It is important that family consultants understand, respect and value the different experiences and needs of Aboriginal children.
- Family consultants be resourced and directed to meet with both children and parents more than once, to help consultant build rapport and trust with the child over time.

Question 38: Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

The involvement of children in decision-making and dispute resolution processes poses a number of risks for the safety and emotional wellbeing of children. Any involvement of children in family law systems should enforce the following safeguards to mitigate risk to children:

- Child behavioural expert to assess child and determine their maturity and emotional ability to be involved in family law processes.
- Assessment of the history of any family violence by a family violence expert to determine if the child is at risk from family violence.
- FDR consultant to be highly trained in child behaviour and family violence to assess if the child is being placed under emotional pressure or a fear of violence by either parent, including pressure such as coaching the child to preference a particular parenting arrangement.
- FDR consultant to assess any special needs of the child, including cultural, emotional and communication supports.

Question 39 and 40: What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs? How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

VALS agrees that all children should be given the opportunity to safely participate the family law system, regardless of their cultural background or special needs. VALS recommends the following changes:

- A comprehensive national survey to investigate the experiences of children in the family law system, the barriers to children's voices being heard and the ability of the family law system to recognise and respond to the needs of children from different cultural backgrounds.
- Cultural competency be improved across the family law system, including prioritising the employment of Aboriginal ICLs, family consultants and support workers.
- Consultation with cultural experts to ensure court settings are culturally safe spaces for children.

Review of the Family Law System

Professional skills and wellbeing

Question 41 and 42 :What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies? What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

Family law professionals should be required to undergo mandatory training and ongoing professional development in the areas of child safety and behaviour, family violence, trauma-informed care and cultural competency. Such training should be monitored through a register to ensure that all ICLs, Aboriginal Liaison Officers, family consultants, mediators and judicial staff are equipped with the skills required to competently engaged with the family law system.

VALS recognises that a number of quality training programs and measures of competency exist, but believes in most cases such training and competency requirements should be mandatory. For example, the *Family Law Act* requires all judges in the Family Court to be deemed suitable 'by reason of training, experience or personality' but judges on the Federal Circuit Court are not required to meet this suitability test.⁵⁷

VALS recommends the following measures to ensure family law professionals are equipped with the necessary skills and training:

- All professionals working the in the family law system undergo mandatory training in the following areas:
 - Child development;
 - Family violence;
 - Trauma informed practice;
 - Drug and alcohol use; and
 - Cultural competency and awareness.
- The establishment of a national accreditation body to ensure all family law professionals have undergone required training in core competencies and are engaged in ongoing training. This could be modelled on or an expanded version the accreditation system for FDR practitioners.
- Prompt resourcing of training and accreditation to ensure the training deficit is resolved and all new professionals in the family law system are equipped with the core competencies

⁵⁷ Professor Patrick Parkinson AM, Private Capacity, Committee Hansard, Canberra, 17 October 2017, 1

required. The training deficit was highlighted in a report by the Australian Institute of Family Studies that most ICLs felt that ‘they did not have sufficient training to elicit, and more importantly, interpret children’s view.’⁵⁸

Governance and accountability

Question 45 and 46: Should s 121 of the Family Law Act be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children? Question 46: What other changes should be made to enhance the transparency of the family law system?

VALS agrees that changes need to be made to increase the transparency of the family law system to increase participants understanding of the system and ensure fair access. The reporting of cases, determinations and reasons in the media can play an important role in breaking down negative perceptions of the family law system and providing the public with a mechanism to actively participate and understand the operations of the family law system. Publication of information regarding the operation of the family law system can also play a part in building consensus and understanding both between the court and the community and between different jurisdictions.

VALS recommends changes to Section 121 of the *Family Act* to allow more open publication of cases and information regarding common determinations of the Family Court and the reasoning behind decisions, this could include statistics of court outcomes and average times of different family law processes. VALS emphasises that any changes to s 121 must ensure that client confidentiality is prioritised. It is critical that the right balance is reached between privacy and the public interest. VALS believes it is critical that Subsection 3A is maintained to ensure the privacy and confidentiality of families.

⁵⁸ Australian Institute of Family Studies, Independent Children’s Lawyers Study—Final report, 2014, p. 38.