



Victorian Aboriginal Legal Service Co-operative Ltd.

Head Office:
6 Alexandra Parade,
P.O. Box 218
Fitzroy, Victoria 3065
Phone: (03) 9419 3888 (24 Hrs)
Fax: (03) 9419 6024
Toll Free: 1800 064 865

VALS' submission to the Victorian Government in response to the 'Review of Family Violence Laws Report' - sent 14 June 2006

Thank you for the opportunity to comment on the 'Review of the Family Violence Laws Report' (Report) by the Victorian Law Reform Commission (VLRC).

Introduction

Recent media stories about camps around Alice Springs have made the claim that traditional Aboriginal culture accepts Family Violence. Less well publicised are the thoughts of Behrendt (Lateline 18th March 2006) and other Indigenous Australian experts who have stated that traditional Aboriginal culture did not approve rape or violence towards women and that women were not thought of as second class citizens. Clearly some parts of contemporary Aboriginal post-colonial Australia have tragically failed to preserve some of those values. The Commonwealth Government have emphasised a criminal justice response when wiser heads have suggested much more needs to be done including education, reconnecting with culture, housing and jobs for Indigenous Australians.

Different Trajectories and History in Thinking about Family Violence

It is worth noting the very different trajectory of Aboriginal and mainstream cultural attitudes towards women. In much of Western culture over the last two centuries there has been a push to advance women's position from one of second class citizen, or chattel, to one of equal (ie: greater equality with men). This has involved changes over the last 100 years, such as the right to own property, to vote, to work after marriage, equal pay and making rape in marriage illegal. Many of these changes have been pursued via political activism, the legal system and law reform. These significant changes have not been paralleled by reductions in Family Violence.

Many Aboriginal people view the increase in Family Violence as being paralleled by a loss of culture accompanying white occupation of Australia. Many Aboriginal people are skeptical about the extent to which the criminal justice system can stop or deter violent behavior.

While the liberal feminist approach is to look forward to the ongoing progress of applicant's rights emerging out of the history of oppression many Aboriginal people believe the way to improve the situation is to draw on the strengths of culture and history. This is in order to both heal the harm and prevent the continuation of Family Violence.

VLRC Report unmoved by Aboriginal perspectives

The VLRC Report makes little mention of the values, strengths and challenges facing Indigenous Australian people nor is there evidence of investigation of models of response which are more culturally appropriate. An article written about Criminal Justice Interventions to Family Violence by Holder says.

“Driven by a desire for self determining solutions and a reclamation of Indigenous skills and experiences, communities in Australia, Canada and the USA are actively pursuing a range of responses to Family Violence. These include family reconciliation cultural camps, healing circles, and peacemaking as well as continued efforts to make the non-indigenous justice system more responsive (Greer 1994; Kelly, L. 1999; Coker 1999; Blagg et al 2000; Braithwaite & Strang 2001). However, these initiatives are not without Indigenous voices urging caution (McGillivray & Comaskey 1999).” (Holder 2001)

Five years after this article was written the VLRC Report has almost nothing to say about this issue. It has heard the Indigenous Australian voices urging caution about the above but little else.

Policing is a critical aspect of dealing with Family Violence. It appears that the single biggest leap forward in almost twenty years since the invention of Intervention Orders is the introduction of the Police Code of Practice for the Investigation of Family Violence (Code) in 2004. The Report provides a glowing endorsement of the Code. Taking Family Violence ‘seriously’ which the Code promises, as well as investigating all reports of Family Violence, including collecting evidence are steps forward albeit almost twenty years after the Crimes Family Violence Act was introduced in 1987. The Code also states that police will provide referrals for applicants. None of this change required legislation, just a bit of leadership and some policy and procedures. These measures *should* increase applicant’s confidence in calling on the police to help deal with Family Violence.

However, the policy also introduced pro-arrest and pro-prosecution strategies which the Report assures us are successful strategies because prosecutions have increased dramatically by over 70%. The value and effectiveness of this policy is highly contested and the VLRC has given very little attention to the wide ranging critiques of pro and mandatory arrest.

Urging Caution About Use of Criminal Justice System is Not Treated Seriously

The VLRC Report is 110% committed to a tougher more punitive enforcement of Intervention Orders. Any mention of issues, such as the negative effects of over reliance on a criminal justice approach to prevent Family Violence, is interpreted as an argument that advocates Aboriginal people should have less protection from the law than non-Aboriginal people (paragraphs 5.12 and 5.13). That statement makes an unwarranted and heroic assumption about the effectiveness of a pro-arrest criminal justice approach in

providing protection. It also presumes that anything short of unqualified support for a pro-arrest criminal justice approach is being soft on Family Violence and accepting a lesser level of protection for Indigenous Australians. This is not an accurate presumption.

The VLRC Report having dismissed the issue of the impacts of the criminal justice system on Aboriginal people then by way of justification notes that the Code recognizes the need to be culturally sensitive implying that this is some form of effective amelioration of the problem (Para 5.14.) Later the VLRC Report acknowledges that there are problems with how to be culturally sensitive in relation to Indigenous Australian Communities and that further police research is occurring Para 5.66. The police have been talking about introducing pro-arrest policies since at least 1999 and VALS has been highlighting the problems since then. The bottom line is that enthusiasm for ‘tough’ approaches is much greater than interest in taking account of the views of Indigenous Australian Communities.

A Non-Aboriginal Rationale For Being Careful About Using The Criminal Justice System To Deal With Family Violence.

Over a decade of research on policing domestic assault suggests a clear conflict between punishment and violence prevention (Sherman and Strang 1996).

Due to the narrow assumptions that frame this Report and the cursory attention that Aboriginal perspectives have received in relation to Family Violence the first section of this response will be focused solely on the limitations of the VLRC Report. These limitations apply to a wide range of people, not simply Aboriginal people. There will be no mention of culture or restorative justice alternatives or dispute counseling or culturally specific perpetrator programs in this section. The arguments against over reliance on criminal justice responses to Family Violence in this paper are not premised on Aboriginal specific arguments which we have made previously to little effect. Instead VALS will draw attention to mainstream evidence that suggests:

- ❖ It is possible to have a strong criminal justice approach which does not rely on pro-arrest and pro prosecution policies;
- ❖ the risks associated with over reliance on a criminal justice solution;
- ❖ the primacy of empowering applicants and;
- ❖ the need to prioritise the criminal justice response on physical violence.

Strong Criminal Justice Response Does Not Require Pro-arrest policies

VALS recognizes and supports an effective criminal justice response accessible by all applicants as one important aspect of responding to Family Violence. A criminal justice response will be the only effective option for some applicants and the option of choice for

some applicants. The VLRC Report is full of case studies where police action was demanded by applicants and the police failed to provide it.

It is vital that the training and the administrative processes within the criminal justice system are improved to ensure that the system does not re-victimise applicants trying to use the criminal justice system to ensure their safety.

VALS supports most of the recommendations in the Report however we have concerns about the over reliance on criminal justice responses in general to deal with Family Violence and the failure to grapple with the wide ranging critiques of pro-arrest and mandatory arrest policies in particular. Because of its focus on the pro-arrest policies, which have failed elsewhere, and the lack of substance to supporting the applicant's right to choose the best option, the Report lacks balance and is too narrow in focus.

VALS does not believe that the criminal justice system can ever provide more than a small part of the answer to the largely hidden problem of Family Violence. There are already many applicants who want police to arrest and charge perpetrators and many more who would choose this option if there was a more flexible range of supports available including non-police supports. The greater the reliance on arrest as a measure of success the greater the likelihood that people who are easy targets will be chosen for prosecution. There is less likelihood that police skill and discretion will be enhanced and the importance of applicant empowerment will be diminished.

Rationale for pro and mandatory arrest

The VLRC Report explains the rationale for pro and mandatory arrest policies as: "...removing responsibility and blame for criminal proceedings from the person who has experienced violence. They also aim to address criticisms of police inaction in Family Violence matters by reducing the discretion available to police" (Para 5.21).

In the rationale above there is no claim that the applicant will be better protected by pro-arrest and mandatory arrest. Where police pursue arrest and prosecution irrespective of applicant's wishes then in a legalistic sense the applicant cannot be blamed. It is not clear in the real world that most perpetrators appreciate the distinction between arrest pursued by police pursuant to pro-arrest policies or arrest pursued by the applicant. There is a vast array of research which is critical of:

- ❖ the effectiveness of pro-arrest;
- ❖ increased risk of violence when pro-arrest is activated;
- ❖ the conflict between pro-arrest policies and applicant empowerment and;
- ❖ the need to rethink pro-arrest solutions.

One example of an alternative approach to pro-arrest is to conceptualise the applicant or victim less as an applicant or victim and more as someone employing help seeking behavior. Police intervention in this context is seen as a resource not necessarily a solution.

On the question of whether prosecution in and of itself actually makes the victim safer and deters further offending, the evidence to date is uncertain Pg 18 (Holder 2001).

Mills surveys the benefits and problems of mandatory intervention policies and the arguments on both sides (pp.563-8).

Benefits:

- Forces professionals to take domestic violence seriously.
- Treats domestic violence and violence between strangers equally.
- Ensures (supposedly) equal treatment of races, ethnic groups, etc.
- Some evidence (though it is by no means conclusive) that arrest deters future violence, and therefore protects applicants.
- Dismantles sexism at the institutional level.

Problems:

- The ‘stake in conformity’ thesis, and its supporting research, suggests that arrest may actually increase *long-term* violence among certain groups of males (most notably, those who were unemployed or belonged to racial/ethnic minorities). In fact, the implications of this are that the States effort to treat all equally (ie: the same and not recognise difference) ends up treating all unequally: it assumes an equality/sameness in the population that is not a reality.
- Ford & Regoli (‘The criminal prosecution of wife assaulters’, in *Legal Responses to Wife Assault: Current Trends and Evaluation*, 1993) found that the deterrent effect of prosecution is actually contingent on the battered women *choosing* to continue with prosecution, rather than it being mandatory and pursued by the State with or without the victim’s involvement or consent.
- Davis et al, in their study (*The Deterrent Effect of Prosecuting Domestic Violence Misdemeanours*, 1998), found little support that law enforcement response reduces recidivism.

Considering these, Mills argues that, a) mandatory State intervention may actually increase intimate abuse, and, more interestingly b) mandatory State intervention continues “many of the emotionally abusive elements of the applicant’s relationship with

the batterer” (p.568). She sees the unwavering support (by some feminists, typically liberal) for mandatory intervention as contradicting the feminist commitment to applicant’s self-development and empowerment, and interprets it as an instance of the patriarchal influence on feminist thought; “that some women in the feminist legal community have adopted a strategy that is, albeit unwittingly, designed to ignore battered women’s individual narratives is self-defeating” (p.613). Feminists who interpret equality and justice simply as a matter of treating everyone the same forget the revelation that triggered the rise of their discourse: that the universality of the vision of the status quo is false (ie: it is actually male, patriarchal). To those who argue that mandatory intervention is needed to challenge the public/private distinction that sanctions the patriarchal oppression of applicants, Mills responds: “It is not the privacy of the crime that requires protection, but rather the woman’s emotional relationship to it... most, if not all, battered women experience intimate abuse as emotional – not as legal or political” (p.569) (Finighan, J, Unpublished paper 2006).

Davis (1998) questions the morality of an approach (eg: pro-arrest) which we know will put some groups of applicant at higher risk of violence.

Pro-arrest may in a formal or legalistic sense take responsibility away from the applicant it, but in a substantive sense this is a legal fiction and there is no basis for saying that it will increase her level of protection. What of the other rationale for pro-arrest the need to counter police inaction?

As we mentioned earlier the introduction of a policy that police investigate all allegations of Family Violence, that they refer people to support services and that they collect evidence that could be used to support a prosecution are all examples of police action which have been achieved without legislative change and do not rely on a pro-arrest policy. As will be argued in the section below about the primacy of applicant empowerment, pro-arrest encourages the police to focus on arrest and prosecution ahead of applicant empowerment. Pro-arrest has been used as symbol of applicant empowerment when it is arguably more accurately described as applicant disempowerment.

The VLRC Report assures us that pro-arrest policies are a success because prosecutions have increased by over 70%. We are not told whether these matters occurred with applicant support or not and we are not told what the success rate is. In the USA and Canada where pro and mandatory arrest are common there are huge numbers of cases where the applicant does not appear.

In contradiction to the VLRC assumption that increased arrests equals success Holder, (2001) says, “Most researchers now argue for a wider and contextual analysis of police decision-making and the use of arrest in domestic violence situations (e.g. Buzawa & Buzawa 1996a; Sherman, Schmidt & Rogan 1992; Worden & Pollitz 1984). These researchers argue that by itself, arrest is an ambiguous indicator of responsible policing, and that the individual and combined charging, prosecuting and adjudicating activities of other criminal justice practitioners significantly contribute to the individual and public

interest obligations regarding domestic violence (e.g. Tolman & Weisz 1995; Murphy, Musser & Maton 1998).”

Under the present and proposed policy in the Report it is clear that there is a premium placed on prosecutions rather than trying to emphasise an applicant being given advice and support to decide which options to take. The literature on pro-arrest policies does not indicate that these policies are generally successful nor that greater pressure by police to assist with prosecution can assist with systemic change.

Provision of a post Family Violence, non police, advocacy and support worker to advise the applicant would be more likely to enhance the level of successful prosecutions and improve the effectiveness of help seeking behavior than pro-arrest policies which assume reducing police discretion and mandating pro-arrest is a panacea.

Police action can be assured without using pro-arrest policies. Arrest and prosecution rates should not become proxies for applicant satisfaction and empowerment. Response times, collection of evidence to be used for a prosecution and responsiveness to the applicant’s wishes are better indicators of a quality service by police than prosecutions.

An Uncritical Over Reliance on the Criminal Justice System

Criminal justice is a blunt-edged instrument in complex social and inter-personal issues. Its cumbersome machinery is reactive rather than proactive. It is incident-based, patriarchal, hierarchical, defendant-focussed, and generally not research driven in its interventions. Reformers have sometimes placed a lot of energy and expectation on one-off solutions (eg: legislation) or quick fixes (eg. Drug or Family Violence Courts). Debates about whether the criminal justice system is there for deterrence, rehabilitation, retribution, or restoration (or all of these), also lap the edges of domestic violence reforms (Holder 2001 Pg 7).

General Problems with the Criminal Justice System

“The failure of the criminal justice system”

Points made under this argument are:

- The under-reporting of crime (in the case of inter-spousal violence, thought to be about 10%) (Bannenberg and Rossner, 2003; Hudson, 2002; Koss, 2000; McElrea, 2004; Morris, 2002; Morris and Gelsthorpe, 2000).
- Low rates of prosecution (Bannenberg and Rossner, 2003; Busch, 2002; Hudson, 2002; Koss, 2000; Morris, 2002; McElrea, 2004).

- The downplaying of the criminality of Family Violence and the placement of it as a relationship problem rather than a problem in and of itself (Busch, 2002).
- The structural inequality and misogyny embedded in the criminal justice system (Morris and Gelsthorpe, 2000; Stubbs, 1997).
- The disproportionate effect of race and class on applicants accessing the criminal justice system (Bannenberg and Rossner, 2003; Busch, 2002).
- Long periods of remand when the offender and applicant are in limbo (Maloney and Reddoch, 2003).
- The portrayal of applicants as applicants, when empowerment is a preferable approach (Hudson, 2002).
- Re-victimisation of applicants through Court processes (Busch, 2002; Hudson, 2002; Koss, 2000; McElrea, 2004).
- The tendency of the adversarial criminal justice system to maximise conflict and minimise the relationship aspect between applicant and offender (Busch, 2002; Hayden, 2000).
- The failure of the criminal justice process to remove any imbalance of power between applicant and offender (important as restorative justice is often criticised for failing to deal appropriately with imbalances of power) (McElrea, 2004).
- The unsuitability of criminal justice processes, such as the need for evidence when inter-familial offending takes place in private, often without witnesses and the need for the State to prove the applicant's case (Curtis-Fawley and Daly, forthcoming; Hudson, 2002, McElrea, 2004). Koss (2000:1335) refers to the "psychic price" of testifying in Court.
- The failure of mandatory arrest policies (Busch, 2002; Koss, 2000; Morris and Gelsthorpe, 2000).¹
- The expressed view of some applicants who are apprehensive of the consequences of conviction. For example, if the offender is acquitted then the applicant may bear the brunt of his anger at being prosecuted. If the offender is convicted and incarcerated, this has a profound economic and emotional impact on the family. Applicants may want the offender

¹ New Zealand has never had a policy of mandatory arrest, but rather the policy approach is to treat violence between family members as seriously as violence between strangers (Martin, 1996).

punished but in many cases they just want the violence to stop (Bannenberg and Rossner, 2003; Hudson, 2002; Morris and Gelsthorpe, 2000).

- The failure of Court-ordered treatment, such as counselling for offenders (Koss, 2000).”

The source of the above is Parker 2004 Restorative Justice and Family Violence: A Review of the Literature; Ministry of Justice, Wellington NZ

Although academic Arie Frieberg, Sentencing Advisory Council Chair, has more recently been associated with advocacy of more punitive sentencing policies he used to be quite critical of these. In 1999 Frieberg delivered a paper at an Australian Institute of Criminology conference which attributed the rapid increase in prison numbers to the public pressures to give up on rehabilitation of offenders and instead focus on punishment. In 2002 in his report to the Victorian Government on Sentencing he argued that harsher penalties had either no impact or negligible impact on crime levels. It is generally recognized that criminal justice system responses to crime are expensive, ineffective and involve pouring considerable sums of money down the drain.

The VLRC report takes a liberal feminist approach to the criminal justice system ignoring the already dramatic over representation of low income people in jails, the high re-offending rate and the problem of police bias in terms of who is policed most and who is prosecuted. Of course we cannot give up on arresting people who are violent just because the system is ineffective and biased but we should be realistic about the major problems, both social and economic, that over reliance on criminal justice solutions present. There is really no hint of this reality in the VLRC Report.

The Primacy Of Empowering Applicants

The VLRC Report specifically empowers police to take out Interim Intervention Orders against the applicant’s wishes but not Final Orders. Providing this power or discretion is used with skill and sensitivity and police are trained to use this power properly this may well be a positive inclusion in a new Act. However the VLRC Report is much less clear about prosecutions without applicant support. The Report is effusive in its praise of the 2004 police Code and its pro-arrest and pro prosecution policy, which includes deciding to prosecute irrespective of the applicant’s wishes. The Report says applicant should not be compelled to give evidence but there is no recommendation in the Report to ensure that compulsion and duress are not used to make the applicant assist the Court. There are widespread reports of frustration by police in Canada and USA, and even in some levels of Government, about failed attempts at prosecution due to applicant not appearing at Court.

The pro-arrest policies grew out of the 1984 Milwaukee research. This research has been widely copied and criticized. One of the ironies of the original research is that there was a considerable difference in re-victimisation rates between applicant who experienced the police as supportive and those that who did not. This element of the research was not a

feature of the replication research (Miller). This is interesting because it suggests that the police pro-arrest behavior may not be the only factor effecting applicant's re-victimisation rate. It suggests the significance and importance of the police attitude to the applicant and the applicant's felt level of support by police or other support mechanisms may influence outcomes for applicants. By privileging the idea of arrest and prosecution the police may be distracted from the bigger picture of applicant satisfaction which is more likely to involve measures such as prompt attendance, sensitive communication, warnings and or temporary removal of the perpetrator and effective referral.

There are a wide range of results that indicate the majority of applicants are not seeking a pro-arrest and pro prosecution approach. Stewart (2001), for example highlights that over 60% of women were seeking assistance to stop the violence not proceed with the whole prosecution and Court room option. USA figures (re: stayed Court cases) are often well over 50% of attempted prosecutions. Pro-prosecution policies set police on an adversarial path with over 60% of women who seek help. We have pointed out earlier the pro-prosecution message being given to the police is at odds with the notion of applicant empowerment. It is also at odds with what the majority of women want.

The ineffectiveness of pro-arrest policies has still not led to their removal instead there are a range of proposals for new research and other attempts to try to reinvent them. The attempts to move on takes many forms, some of which pay more attention to applicant empowerment and some of which ignore it further. These include:

- ❖ reduce the status of the applicant even further via applicant free prosecutions;
- ❖ acknowledge the importance of applicant empowerment and then advocate applicant free prosecution;
- ❖ advocate greater use of non-police supports either prior to or after arrest.

Side stepping applicant participation

Responding to 'uncooperative applicants' who will not provide evidence or do not turn up at Court some United States jurisdictions have streamlined their no applicant prosecution schemes. This is the ultimate in ignoring the 'uncooperative' applicant and focusing only on the behavior (ie: Family Violence) not the people involved. So far this has not extended to installing CCTV in the houses of at risk applicant.

Acknowledging the importance of applicant empowerment and then strengthening the criminal justice approach

A Canadian Literature review on pro-charge policies and crown discretion (MacRae 2003) highlights the complexity of the pro-arrest enterprise today. The conclusion MacRae reaches is that the research both supports and criticises this kind of policy. MacRae says that there is agreement that these policies alone cannot curb the incidence of domestic assault and that a coordinated, communicative criminal justice response is required.

The recommendations highlight the contradictions of the pro-arrest agenda twenty years after it was championed in the USA. The recommendations say on the one hand: that applicant support and empowerment is a key factor in educating applicants to participate in pro-prosecution (Rec 4). On the other hand, “[t]he power imbalances in domestic violence require the police to arrest (Rec1), and Prosecutions without applicants schemes should be investigated” (Rec 11).

Recognising The Influence Of Pre And Post-Arrest Systems

Another direction is the idea of ‘arrest plus’ and in this context Deleon-Granados, Wells and Long (2005) advance evidence that community education and informal controls may reduce the incidence of re-offending. Holder (2001) also highlights other successful approaches.

*“Some recent studies are showing, however, how the interaction between, and strategic engagement of informal social support with, formal interventions such as from the justice system, are producing strong results for abused women’s safety. For example, a recent study in Michigan (USA) compared two groups of women leaving a domestic violence shelter (Sullivan & Bybee 1999). One group was assigned a volunteer ‘advocate’ while the other was a control group. In the ‘advocacy group’, each volunteer worked with a applicant over a two year period to help her assess her needs and goals and then assisted her to access resources such as housing, employment, legal assistance, transportation, childcare, counselling for children and social support. Both groups were interviewed every six months over two years. Twice as many women in the ‘advocacy’ group experienced **no** violence whatsoever over the two years. This group also experienced less depression and a higher quality of life. Of those who wished to end the relationship, the ‘advocacy’ group were more effective. Applicant with advocates perceived themselves as significantly more effective in obtaining community resources and assistance, as well as interpersonal social support.*

*.....In another study, Goodman, Bennett and Dutton (1999) examined the role of informal support within the criminal justice system in Washington DC. They found it to be positively influential on victim ‘follow-through’ in domestic violence prosecutions. The 92 women interviewed identified lack of social support from family and friends as a significant obstacle to follow-through. Women with more material aid such as child care, transportation or emergency money from family and friends were **twice as likely** to follow through. Epstein (1999, p. 20) concludes that these studies ‘indicate that in many cases, an increase in victim support from family, friends, and trained personnel can be enough to empower victims to exit the cycle of violence’. Similar conclusions are drawn by Liz Kelly (1999) in her evaluation of a civilian advocacy project located within an English police station. Studies such as these strongly suggest that the development of more proactive and strategic partnerships between formal providers and informal supporters is full of potential in assisting victims of domestic violence (Holder 2001, Pg 6).”*

The Impact of Emphasising Non- Physical Violence.

The Report spells out in great detail the circumstances which constitute family violence. This includes a much more detailed list than presently exists, such as emotional abuse psychological abuse, financial abuse pet abuse etc. Many of these circumstances do not constitute criminal behaviour but the breach of Intervention Orders in relation to these things will constitute a criminal offence. The VLRC wants an education campaign to encourage a recognition of the wide range of behaviours which constitute Family Violence. The emphasis on non physical violence, which may increase protection for some applicants, is also likely to make it more likely that men will think about using Intervention Orders. The likelihood of this is increased by the changes to the Family Law Act which has drawn further attention to Family Violence as a factor in custody disputes. While it is unlikely that a large proportion of men would try to use Intervention Orders based on emotional abuse as part of a preemptive initiative ahead of a custody battle this is just one of a range of possibly time consuming eventualities which Courts and police may be forced to deal with.

There is a high likelihood of a considerable increase in the number and complexity of Intervention Orders leading to a situation where clear cases of physical violence are not dealt with due to the influx of psychological and emotional violence matters. Resources are always stretched in dealing with Family Violence matters so if there is no sense from the legislation as to what should be prioritised then various stakeholders will make their own decisions about priorities.

VALS believes the new Act should prioritise prevention of physical violence. Physical violence represents a more immediate threat than other forms of violence and is more likely to be able to be dealt with by a Court as there is likely to be some physical evidence.

This would help prevent situations arising such as the following: a female calls the police alleging physical violence, her partner a male alleges psychological violence. If each is important as the other the police would be likely to judge that they should take out an Intervention Order against each person.

Recommendations

1. A Purpose of the Act should be to help maximise empowerment of applicants.
2. Applicants should not be compelled or coerced to assist a prosecution.
3. Police should provide a robust, prompt and flexible response to Family Violence providing all possible assistance to applicants including collecting evidence which might assist a prosecution and providing referrals to both parties. Police accountability should be judged against applicant satisfaction and should not be based on predetermined assumptions about the best outcome (eg: pro-arrest or mandatory arrest procedures).

4. There should be a range of services other than police who after police have attended a Family Violence complaint can provide information and support to assist an applicant to decide which course(s) of action the applicant wants to take.
5. There should be education campaigns and services to highlight high risk life stages, such as separation or pregnancy. The services should target men and applicant who are about to separate and encourage safety plans to be established. Prenatal services and doctors should provide advice to people about heightened risk of Family Violence after pregnancy.
6. There should be a wider range of safe and culturally appropriate accommodation options including income support where the male is removed from the home.
7. There should be a range of culturally appropriate support and counseling services funded.
8. While recognizing that all forms of Family Violence cause harm the Act should ensure that priority is given to people responding to physical violence.

What a Smart On Family Violence Approach Looks Like In Practice Is Giving Alternative Options The Time Of Day

VALS regards most of the recommendations as useful in expanding and linking the capacity of the criminal justice system to respond to Family Violence. There clearly needs to be a robust, well coordinated, well resourced and sensitive criminal justice response to applicants. VALS is concerned that there appears to be almost no recognition of the limitations of a criminal justice approach to Family Violence. VALS is concerned about the following aspects of the recommendations:

- Pro-arrest/prosecution flavour that results in the overlooking of the following ‘smart’ responses to Family Violence, such as:
 - Restorative justice;
 - Criminal justice response that deals with Family Violence as a safety issue, as opposed to a punitive issue.
 - Enhanced existing Civil Law options;
 - Meeting the needs not only of applicants of Family Violence, but also perpetrators.

Tension Between A ‘Getting Tough On Family Violence’ Approach Versus A ‘Smart On Family Violence’ Approach

Family Violence is a serious problem, but it is not always a problem that applicants wish to use the criminal justice system to remedy. In relation to Family Violence matters VALS believes there is a tension between ‘getting tough on Family Violence’ and ‘getting smart on Family Violence’. VALS believes a tough on Family Violence approach is influenced by a broader policy of a tough on crime or punitive approach, or law and order campaign.

VALS defines a smart on Family Violence approach as one that uses a criminal justice approach strategically and recognizes the limitations of punitive interventions, the importance of applicant empowerment and the need to encourage community support to address this issue..

What A Smart On Family Violence Approach Has That A Tough On Family Violence Approach Does Not Have

VALS questions the appropriateness of a pro-arrest/prosecution/Intervention Order approach and favours a smart on Family Violence approach. What a smart on Family Violence approach looks like in practice is prioritising applicant empowerment and giving alternative options to the criminal justice system the time of day.

A smart on Family Violence approach reflects an awareness of the following

- A tough on crime approach is not necessarily a smart on crime approach. For instance, the deterrent effect of imprisonment is questionable. The use of the criminal justice system to stop violence is only ever partially successful. In spite of vociferous calls for longer sentences from pockets of the public (ie: applicants groups), there is criminological evidence that more punitive sentencing has no or a negligible effect on the level of crime being committed [Frieberg (2003)].
- The notion that the introduction of the Intervention Order system resulted in the de-criminalisation of Family Violence and so there is a need to get tough on crime now by way of compensation is unhelpful. It is unhelpful as it results in alternatives to the criminal justice system that may operate in conjunction with it or separate to it, not being fully explored because they are assumed to be too lenient. VALS responds to arguments that the Koori Court is too lenient or a soft option by explaining how appearing before an Elder/Respected Person is more daunting and meaningful for an Indigenous Australian than appearing before a Magistrate only. Also, a low charge rate does not necessarily equal decriminalization of Family Violence. Instead it may reflect a variety of factors including police use of discretion but also evidentiary problems and a disinclination to pursue charges by the applicant.

- Whilst the current ‘hot topic’ of assisting applicants, particularly applicant and children, is positive, the criminal justice system is not the only option to achieve this. Also, the needs of perpetrators should not be forgotten as a result of emphasis on applicants. If the needs of perpetrators are addressed, then applicants are likely to also benefit.
- There is a place for a criminal justice response to Family Violence, but punitive measures alone are not enough to address Family Violence. Also, there is need to minimise reliance on the criminal justice system as to rely simply on the criminal justice system is impractical and ignores the scope of the problem. In other words, a smart on crime approach does not advocate the de-criminalisation of Family Violence but argues for the creation of space for alternatives to a criminal justice response.
- Greater reliance on the criminal justice system to intervene in Family Violence should be treated with caution given the cost, the ineffectiveness and the threat to family and community safety that it represents. The threats that over reliance on the criminal justice system poses to family and community safety are: the immediate problem of the criminal justice system response to Family Violence not working, the flow on effect of deterring all but the most desperate cases and it diverts funds from other more productive approaches.
- Indigenous Australians are over-represented in the criminal justice system, as such, it is preferable that responses to Family Violence are not based solely on the punishment of the person who has used violence. Such a system is unlikely to be perceived as one of assistance to Indigenous Australian people.
- In behavioral terms Family Violence is like any other form of violence. The distinction in practice is the context and relationship within which the behavior occurs. Family Violence occurs in the context of a family. As a result, the response to Family Violence should not necessarily be the same as that to violence towards a stranger, but adapt to the following unique dynamics of Family Violence:
 - often the parties involved wish to remain together rather than separate/divorce as a result of Family Violence.
 - Many applicants who call police are seeking short term safety not punishment and conviction of a partner. A pro-arrest approach puts police into conflict with what more than 60% of applicants want. The more the system moves to a more punitive approach the less likely many Indigenous Australian and non-Indigenous Australian applicants will seek help.
- Due to the dynamics of Family Violence a criminal justice response to Family Violence is not the only option with merit. Instead, other options, such as

restorative justice, that are more flexible and able to take into account the previously mentioned dynamics of Family Violence, should be offered.

- A balance needs to be made between ensuring support and assistance for applicant who want to see prosecution for an assault and those applicants who want police assistance to deal with Family Violence as a safety issue
- A balance needs to be struck between safety, agency and accountability. A pro-arrest policy is in conflict with the goal of agency.
- A policy approach that relies solely on legal casework provision will ignore prevention and community strengthening approaches. Applicants need assistance to influence these policy issues. The Victorian Indigenous Australian Family Violence Strategy advocated a community strengthening approach rather than one based primarily on a criminal justice approach.
- Applying a one size fits all response to Family Violence (ie: arrest), that ignores Indigenous Australian's unique experience of Family Violence and responses to Family Violence is counterproductive.

How the VLRC Report Has More of a Tough on Family Violence Flavour than a Smart on Family Violence Approach and the Negative Consequences.

VALS argues that the VLRC Report has more of a tough on Family Violence flavour than a smart on Family Violence approach and as a result has negative consequences. The content of the Report and Recommendations are geared towards strengthening the pro-arrest/prosecution/Intervention Order approach or tough on Family Violence approach in the manner outlined below: VALS argues that a smart of crime approach is more appropriate:

Content Of The Report That Reflects An Uncritical Acceptance Of The Code

Aspects of the Report reflect an uncritical acceptance of the Police Code of Practice for the Investigation of Family Violence (Code) and a bias in favour of the Code which has a pro-arrest/prosecution/Intervention Order slant. For instance, the VLRC commend Victoria Police for its leadership in adopting and implementing the Code which has lead to "significant changes in the way police respond to Family Violence".² There is no discussion of why this has taken 17 years.

VALS acknowledges that there are positive aspects of the significantly changed response of police to Family Violence (ie: referral, gathering evidence). However, VALS is aware of criticisms of the Code and disappointed in the uncritical acceptance of the Code in the Report. The Report is quick to applaud the Code for increasing the number of Police

² Victorian Law Reform Commission, 'Review of Family Violence Laws Report' (February 2006) p. 116

initiated Intervention Orders by 72%.³ However, the Report is slow to unpack this data and ask questions such as: has this trend resulted in applicants being inhibited in calling police or what impact has this had on safety?

The Report is quick to applaud the balance the Code strikes between police discretion and applicant agency, referring to the Code's case conferencing process as a "welcome development".⁴ However, from VALS' perspective the case conferencing process does not strike an appropriate balance, giving police decision making power and not applicants. The case conferencing process is geared around relieving any concerns the applicant may have about the legal proceedings rather than empowering the applicant to decide whether to proceed with legal proceedings.

Recommendations That Reflect A Pro-Arrest/Prosecution/Intervention Order Flavour Through What They Exclude

The following Recommendations are geared towards a pro-arrest/prosecution Intervention Order flavour through what they exclude:

- Recommendations about ignoring the needs of perpetrator. For instance, exclusion of 'rehabilitation' from the listed purposes of the Act in Recommendation 3. Including the purpose of rehabilitation would be consistent with calls in other submissions to the VLRC that the VLRC appears to rely upon in justifying the contents of Recommendation 3. For instance Robinson House BBWR argues: "[l]aws must encompass the aspects of rehabilitation and punishment that is required to protect. "...including some rehabilitative strategies.. at the early stages of the civil process may support protection goals".⁵
- Recommendations about ignoring agency. 'Agency' is excluded from the listed purposes of the in Act in Recommendation 3. Including the purpose of agency would be consistent with calls in other submissions to the VLRC that the VLRC appears to rely upon in justifying the contents of Recommendation 3. For instance, the Domestic Violence and Incest Resource Centre argues: "[t]he importance of ensuring that the system supports the agency of applicants in planning for their own safety cannot be stressed too strongly..."⁶
- Recommendations that ignore the following alternative options that may work in conjunction with the legal system or separate to it.

- Restorative justice;

³ 'Legislation and Policy: Victoria Update' as in Australian Domestic and Family Violence Clearinghouse Newsletter, No 23 January 2006

⁴ VLRC (2006) above n 2, p. 127.

⁵ Ibid p.74

⁶ Ibid p. 76

- Dealing with Family Violence as a safety issue in the context of the criminal justice system;
- Enhancing existing Civil Law options.

Giving Smart On Family Violence Approaches The Time Of Day

This section contains reasons for giving smart on Family Violence approaches the time of day and criticises the VLRC for ignoring these reasons.

Restorative Justice

The Report contains Recommendations that do not give restorative justice the time of day, but rather ignore it. There is almost no mention or discussion of the failures of twenty years of pro-arrest and pro-prosecution policies however restorative justice is treated as something that is problematic and requires further study.

Recommendation 5 calls for further research to be conducted before restorative justice practices are considered for use in Family Violence matters. This Recommendation is flawed because:

- By simply recommending further research without further guidance the issue of introducing restorative justice options is placed on the backburner.
- It ignores the existence of further research (including devising standards) has been conducted in other countries, such as New Zealand.⁷
- It ignores the catch twenty two situation whereby development of restorative justice options depends on research, but research depends on the existence of restorative justice programs in order to analyse them. It appears there is a double standard as restorative justice is subjected to more scrutiny than a pro-arrest/prosecution approach before restorative justice is accepted. This ignores evidence that pro prosecution does not work. The criticisms of the effectiveness of pro-arrest and pro-prosecution policies were given scant attention in the VLRC Consultation Paper or Report. Critiques of pro-arrest. Anna Stewart (1999) highlights critiques of pro-arrest policies as do Buzawa and Buzawa (1996). One criticism is that alternative approaches are as successful or more successful. Another critique is that pro-arrest policies are more likely to work on middle class males who are more likely to be deterred by the threat of imprisonment. A report by Chris Cunneen (1999) titled ‘Zero Tolerance Policing - Implications for

⁷ New Zealand Restorative Justice Practice Manual drafted by the Restorative Justice Trust.
<http://www.restorativejustice.org.nz/Manual.htm>

Indigenous People' found that a a zero tolerance would lead to an increase in Aboriginal people being jailed for trivial offences.⁸

- It can be argued that more research is required about a pro-arrest approach, particularly in relation to marginalised peoples, and so VALS endorses Recommendation 22 that the Code be independently reviewed.
- Is based on problematic reasoning that despite recognition of the fact that pro-arrest approach disproportionately affects ethnic minorities and the disadvantaged (p120), “these findings cannot be used to justify a lesser level of protection for marginalised groups by the police.” (p.120, para 5.13).
 - VALS is critical of this reasoning because it engages with theories of formal and substantive equality and cultural sensitivity in a manner that assumes that restorative justice will provide a lesser level of protection than State intervention. Arguably, this is not the case as if applicants choose to avoid State intervention and there are no restorative justice options available, protection will not be provided at all or only limited protection via support services or applicants informal methods of coping. A criticism of restorative justice is that it keeps Family Violence in the private arena. However, if applicants do not report Family Violence for fear of a pro-arrest/prosecution approach, then Family Violence will remain in the private arena also. Harm is caused by laws and policy that fails to recognise difference or that an un-even playing fields exist and assumes all laws apply to everyone equally.
 - Restorative justice is not a soft option, it is just different, and has the potential to be more culturally sensitive than State intervention. There may be some discomfort that a restorative justice approach is ‘letting perpetrators off’, however the reality is that the criminal justice system approach frequently fails. Furthermore, the more punitive the criminal justice approach is the more likely that disadvantaged applicant will decide not to use the Intervention Order system. According to Ursel, “Ongoing evaluation of the Manitoba specialised justice response to Family Violence demonstrates that the more the criminal justice system works in concert with the needs of the applicant (eg safety, empowerment) and delivers consequences to the offender, the more likely people are to engage this system.”
 - VALS is also critical of the reasoning because it undervalues Indigenous Australian’s ways of dealing with issues, as restorative justice is more similar to traditional ways of dealing with conflict than State intervention.

⁸ Cunneen Chris ‘Zero Tolerance Policing - Implications for Indigenous People’(1999)
http://www.atsic.gov.au/issues/law_and_justice/zero_tolerance_policing/Report/default.asp

VALS argues that Indigenous Australian ideas can work to benefit non-Indigenous Australian Australians (culturally inclusive approach). VALS argues it is wise to develop a system which will work for the most disadvantaged families and then look at how it fits the mainstream family. This approach is the reverse of most policy development (ie: culturally inclusive from the beginning). The usual approach is to develop something which looks OK to the mainstream population and then add on a couple of additional lines to encompass cultural and linguistic diversity and the needs of the disabled. This is exactly the approach taken by the VLRC .

- Queensland researcher Heather Nancarrow (2003) has highlighted the different emphasis that Indigenous Australian and non-Indigenous Australian applicants place on approaches of dealing with Family Violence. Nancarrow states: *The two groups had different understandings of restorative justice, however and different views about the role of restorative justice. For the Indigenous women restorative justice was preferred as the primary response with the criminal justice system assisting in more serious cases. The non indigenous women preferred the criminal justice system as the primary response with potential for restorative justice as a supplement to address weaknesses in the criminal justice system, where women wanted it*(pg 68). Nancarrow argues that Indigenous Australian applicant's perspectives cannot be simply added on to the dominant feminist paradigm. Instead effective strategies must make Indigenous applicant's standpoint the central standpoint (pg 68). If this were the approach adopted by the Consultation Paper it would have given more time to exploring the merits of an Indigenous Australian approach and non criminal justice approaches.
 - Nancarrow's research methods have been applied in Victoria with similar outcomes in research commissioned by VALS: In Search of Justice in Family Violence - Exploring Alternative Justice Responses in the Victorian Indigenous Australian Community - produced September 2005 by Nicole Bluett-Boyd

Recommendation 6 calls for standards to be established for particular processes, practitioners to be trained and programs to be monitored and evaluated if restorative justice practices are introduced. This Recommendation contains some merit but is flawed to the extent that it:

- Ignores the fact that safeguards are not only required for a restorative justice approach, but also a pro-arrest approach. Both approaches have the potential to re-victimise the applicant or produce a negative outcome as a result of power imbalance. Linda Mills' paper 'Killing her softly: intimate abuse and the violence

of State intervention’ discusses this in the context of a pro-arrest policy. Mills discusses mandatory arrest, and whilst the VLRC are not advocating mandatory arrest but a pro-arrest approach, the effects of the mandatory and pro-arrest approaches are aligned. Mills ends her article by presenting her own model of a ‘survivor-centred’ approach to intimate violence, to counter the ways in which the traditional criminal justice approach reproduces the experiences of a violent relationship.

- Ignores the fact that whilst standards and safeguards are important, at the same time each community now has a lawful right to deliver its own unique restorative process. There is the danger that if the standards are imposed the result will be that programs lose their uniqueness and Indigenous Australian ownership. The danger of over-regulation is something that needs to be taken into account when devising standards.⁹

Examples of restorative justice approaches that could prove beneficial:

A Dispute Resolution and Mediation Service that would provide an early intervention non-Court based strategy which could help reduce family separation, improve dispute resolution outcomes, reduce the incidence of Family Violence and child removal and help improve knowledge of and utilisation of the legal system. The service model may be similar to the Dispute Settlement Centre Koori Dispute model, but adapted to deal with family conflict. Access to the proposed service would be available only after both parties had received legal advice.

It could take the form of both parties remotely and via a spokesperson clarifying what each wants to happen. This could be followed by both parties being advised of their options and appropriate referrals. If there is subsequently an agreement reached this could be like a non accountable undertaking. If it does not work then there could be the option of a Court mandated dispute resolution process with accountable undertakings. The Indigenous Australian approach attempts to create a space for behavior and relationship to improve. It does not condone violence, nor exclude criminal justice options, but it places more emphasis on healing than mainstream approaches do. A bias towards healing approaches is arguably a good thing for a system that responds to Family Violence.

In conjunction with a well resourced community development and restorative justice approach there should be: increased access to housing and support. This would be more likely to meet the needs of Indigenous Australian families and some other cultural groups than a state of the art criminal justice approach.

⁹ Bowen, Helen ‘Recent Restorative Justice developments in New Zealand/Aotearoa’ presented at the International Bar Association Conference 2002
Durban, South Africa as at
<http://www.restorativejustice.org.nz/Documents/Durban%20Paper%20by%20Helen%20Bowen.doc>

Dealing With Family Violence As A Safety Issue, As Opposed To A Punitive Issue, In The Context Of The Criminal Justice System

VALS argues that Family Violence should be dealt with as a safety issue, as opposed to a punitive issue, in the context of the criminal justice system. VALS argues that an appropriate balance should be struck between safety, accountability and agency.

VALS agrees with Recommendation 4 which makes it clear that the VLRC gives safety primacy: “[i]n making decisions, courts should treat the safety of victims of Family Violence as paramount. However, VALS questions the extent to which this Recommendation permeates the rest of the Report. It appears that the Report is not striking an appropriate balance between safety, accountability and agency.

The problem with the goal of safety is that the path to achieving it can be interpreted very differently. Some people place primacy on a criminal justice response, which in effect gives primacy to the accountability of perpetrators. The Report reflects an overemphasis on accountability in an attempt to achieve safety which has led to pro-arrest/prosecution approach. Indigenous Australian people are more likely to emphasise the importance of agency (eg: the applicant’s capacity to make decisions) but also emphasise amore wholistic way of the perpetrator taking more responsibility and the community taking more responsibility. VALS argues that more attention should be given to an agency approach to safety that acknowledges that applicant just want the violence to stop, rather than the perpetrator to be prosecuted. The criminal justice system should respond to this dynamic of Family Violence by dealing with Family Violence as a safety issue, as opposed to a punitive issue.

Those who advocate an ‘agency’ approach argue that except in extreme circumstances (eg: risk of serious physical violence) the priority should be agency. This means the emphasis is to prioritize a response to the applicant achieving greater safety and trying to be flexible in responding to safety needs. The accountability model adopted by the VLRC’s pro-prosecution approach is like the hamburger with the lot model; you seek police assistance and you buy the whole package (ie: arrest, charge, prosecution and sentencing). Those who support the ‘agency’ model would argue that the hamburger with the lot model is not responding to what applicants want, but applying a one size fits all solution. Forcing people to be accountable (eg: mandating reports and pro-arrest policies) undermines flexibility and creates obstacles to applicants who are wanting help and safety.

Ways in which the criminal justice system could treat Family Violence as a safety issue as opposed to a punitive issue:

- Redefine the role of police, which has occurred in Manitoba according to Ursel. Ursel says: “[t]he new paradigm of justice asks Police to redefine their role from ‘centre-stage actor’ to participant in a process. It asks Police to increase patience

and tolerance of repeated call-outs from applicants and recognise that her primary motivation for calling police is safety for herself and her children”.

- Make the focus of Intervention Orders responding to applicants requests for safety and ‘agency’. Also, conceptualise convictions as one of several possible outcomes. Rather than foster a mentality that convictions are a priority responding more quickly to emergency calls would be a valuable objective for police in a system where safety and agency were the priority.
- Investigate non-police based emergency intervention models and pilot such a model.
- Develop protocols which attempt to correct systemic bias in police use of discretion. This approach appears to provide an ongoing means of police improving their ability to respond to Family Violence.
- Provide training to police officers on how to treat Family Violence as a safety issue as opposed to a conviction issue.
- Follow the example of the Tasmania Safe at Home initiative (2004) that resulted in legislation requiring:
 - risk screening” (an assessment carried out by a police officer of the likelihood of the repetition or escalation of Family Violence) and
 - “safety audit” (an audit carried out by a police officer of the physical and other measures immediately available to enhance the safety of an affected person or affected child and includes the preparation of a plan to implement those measures).
- Stay abreast of developments by the Geraldton Aboriginal community and the Western Australian Departments of the Attorney General (DotAG) and Corrective Services (DCS) are working together on a project that aims to reduce the imprisonment of Aboriginal people as the result of family and domestic violence.¹⁰

Enhancing Existing Civil Law Options

The tough on Family Violence approach results in the overlooking of enhancing the civil justice system and an emphasis on the criminal justice system. VALS argues that space should be created for enhancing the civil justice system. VALS agrees with the argument in a submission to the VLRC that there is a need to employ “civil law remedies to

¹⁰ The first phase of this project is expected to conclude in June after recommendations for the design of a locally and culturally appropriate model are endorsed. The Media contact for this initiative Louise Rowe (08) 9264 1099.

enhance the safety and protection of applicants where evidence of a criminal offence does not exist or, where it does, to complement and augment criminal law responses .¹¹

VALS argues that the emphasis on a strengthened criminal justice system at the expense of a strengthened civil justice system is flawed because the International sources that the VLRC rely on to advocate for the former system:

- are not used correctly as whilst the sources recommend a system that incorporates a criminal justice and civil justice response to Family Violence the sources do not seem to favour a criminal justice response over a civil justice response, and yet the flavour of the VLRC Report emphasises a criminal justice response. For example:
 - The Good Practice Report simply says that both criminal and civil remedies should be made available for the effective prevention and redress in cases of violence against applicants.¹²
 - General Recommendation No. 19 (11th session, 1992) Convention on the Elimination of All Forms of Discrimination Against Women states at clause (r)(i): measures that are necessary to overcome Family Violence should include: Criminal penalties where necessary and civil remedies in cases of domestic violence. Interestingly, the phrase ‘where necessary’ is applied to criminal penalties and not civil remedies. A pro-arrest/prosecution approach does not reflect the phrase ‘where necessary’.
 - The Report sources a book titled ‘A Powerful Journey: Stories of Women Leaving Violent Situations (2004) as finding that a pro-arrest approach, one out of a list of police actions, is more effective in a crisis.¹³ However, upon reading this article VALS did not identify a preference for a pro-arrest approach. The status of the International sources is questionable, such as International recommendations and ‘declarations’ are not considered binding in a contractual sense.

Ways in which the civil law option could be enhanced are:

- Change the name of the Intervention Order to Family Safety Order or Community Safety Order. These orders could initially be of limited duration (ie: one day to fourteen days). The Orders could be initiated by the person whose safety was at risk or people other than police, such as

¹¹ Tasmania Department of Justice and Industrial Relations ‘Safe at Home: A Criminal Justice Framework for Responding to Family Violence in Tasmania’ Options Paper August 2003 as at <http://www.safeathome.tas.gov.au/publications>

¹² VLRC (2006) above n 2, p.16

¹³ VLRC (2006) above n 2, p.65. The editors are Debra Parkinson, Kerry Burns and Claire Zara.

Family Violence workers or community health workers. The Orders could be linked to fast tracking access to counseling and support services.

- The Orders could be linked to non-Court based dispute settlement workers or lawyers or paralegals outlined above.
- Recognise the potential to tailor Intervention Orders using the civil law process of discovery and identifying contested issues and issues that the parties agree on. Dispute settlement workers, lawyers or paralegals could be involved in this process that will have similarities to a pre-hearing conference in the civil law process and draw upon skills of mediation and/or negotiation and exposition. For instance, imagine a scenario where the applicant is to stay in the house and the perpetrator is to leave, but the utilities for the house are in the name of the perpetrator. The parties may be able to work out an arrangement (either directly if appropriate or through a third person (ie: dispute resolution practitioner or lawyer) to deal with the above scenario using the pre-hearing conference stage that is eventually built into an Intervention Order that is tailored to the particular needs of the parties. This process will give lawyers more scope to present to a Magistrate draft conditions to an Intervention Order that is particular to the case, and both parties have indicated consent to at the pre-hearing stage. This will overcome criticisms of inflexibility of Intervention Orders and Magistrates simply using a template of conditions for an Intervention Order.

Meeting the Needs Not Only of Applicants of Family violence, But also Perpetrators.

VALS agrees with many of the following Recommendations that have particular significance to Indigenous Australian Australians. These recommendations reflect an understanding of the dynamics of Family Violence, particularly in the Indigenous Australian community. However, VALS does have some suggestions on how to improve the Recommendations. The main flaw of the Recommendations is that they overlook the needs of men or perpetrators. This is a result of an emphasis of a pro-arrest/prosecution approach and conception that the needs of applicants who are female and children have been overlooked in the past and this needs to be rectified.

Recommendations Relating To Indigenous Australian Australians

VALS agrees with:

- Elements of the following recommendations relating to the needs of applicants, however argues that the needs of perpetrators should also be addressed.
 - Recommendation 26 relates to an Indigenous Australian victim support scheme that is available to offer support when the police are called to a Family Violence incident (to be considered by the Indigenous Australian Family Violence Partnerships Forum). VALS is aware of the success of a similar support program in the context of child protection. A protocol

exists between the Victorian Aboriginal Child Care Agency (VACCA) and the Department of Human Services (DHS) that the latter will notify the former when they intend to visit a residence and the VACCA and DHS representatives attend the residence together. Ideally, the support personnel should be Indigenous Australian Australians as they will:

- Provide a culturally sensitive service;
 - Identify with the parties involved in the Family Violence incident and likewise the parties will identify with them;
 - their presence has the potential to ease the concern of the parties involved in the Family Violence incident, especially in light of poor relations between Indigenous Australian Australians and police. Ultimately, this may result in more Indigenous Australian Australians calling police in instances of Family Violence.¹⁴
 - However, such a program should not be made available only to the applicant, but also to the perpetrator. A applicant support person and perpetrator support person should attend a Family Violence incident with police.
- Recommendations relating to cultural awareness training in relation to Indigenous Australian Australians for police, registrars and Magistrates. (Recommendations 27, 34, 38). These recommendations are appropriate in light of barriers that Indigenous Australian Australians face in accessing the justice system, which is culturally alienating.
- However, training should not simply be about issues facing Indigenous Australian applicants (Recommendations 34 and 38). Training should also be about Indigenous Australian men as applicants and respondents.
 - The general recommendations relating to training do not go far. Cultural awareness training is excluded from the recommended training of Court Staff (recommendation 61), and this omission should be rectified.
 - The Indigenous Australian recommendations relating to cultural awareness training do not go far enough. Like the general training cultural awareness training should be ‘regular’ (Recommendation 21):

¹⁴ For similar reasons, VALS supports Recommendation 48 that support be provided to Indigenous Australian applicants seeking to undertake the Certificate IV in Government (Court Services).

- Recommendation 46 relating to funding for Indigenous Australian Australians in the context of Family Violence. Given the underfunding of Indigenous Australian organisations, particularly in the context of Family Violence, this recommendation is warranted.
 - However, Indigenous Australian community agencies should be resourced to provide services to people responding to Intervention Orders (ie alternative accommodation etc), who in the majority of times are men. At the Indigenous Australian Women’s Justice Forum in March 2005 women attending the forum called for more services for their men.
- Recommendation 47 relating to community information sessions for the Indigenous Australian community. In light of the barriers in the way for Indigenous Australians in learning about their rights community sessions that target Indigenous Australians are appropriate.
 - Note: to ensure the success of these information sessions Indigenous Australians should be involved in the sessions (ie: partnership between Indigenous Australian community and Government in delivering the sessions). VALS argues that the information sessions should be considered part of the community campaign outlined in recommendation 151. This will ensure financial and other support is provided to relevant Indigenous Australian agencies involved in raising awareness about Family Violence in the Indigenous Australian community.
- Recommendations relating to the definition of Family Violence (Recommendations 7, 8, 11, 14 (see disclaimer below), 15, 16), in particular emotional abuse and denigration of spiritual beliefs. Recommendation 17 relating to the definition of ‘family member’, in particular mention of ‘a relative according to Aboriginal tradition or contemporary social practice’ and ‘a relative according to any other traditional or contemporary social practice’.
 - However, the definition should be inclusive of Torres Strait Islander, Both Aborigines and Torres Strait Islanders are Indigenous Australian Australians.
- Elements of Recommendation 138 relating to considering, when more information is available, diversion as sentencing option for breach of an Intervention Order in appropriate circumstances. Specific mention is made to circumstances where Indigenous Australian offenders live in a community where diversion programs are provided. VALS argues that diversion may be an appropriate sentencing option for breach of an Intervention Order in certain circumstances.

- However, this recommendation does not go far enough as it is not proactive about:
 - Commissioning research to inquire into the benefits of diversion;
 - Ensuring that the sentencing option of diversion is available to all people, not just those where a diversion program is currently provided. This raises funding issues.

Recommendations Relating To Legal Advice

VALS agrees with many of the following Recommendations relating to legal advice. However, VALS does have some suggestions on how to improve the recommendations. The main flaw of the recommendations is that they are not consistent. They overlook the needs of perpetrators to have legal advice.

VALS agrees with:

- Recommendation 39 that applicants and respondents should have access to legal advice prior to applications for Intervention Orders being finalised in uncontested applications and legal representation in contested matters. Legal advice is important in the context of a pro-arrest/prosecution trend, requirements on the respondent in reporting his/her intentions and not doing personal cross-examination (ie: Recommendation 145 see below).
- Recommendation 41 that policies and programs should be developed for such services, including standards and management practices to improve consistency of access to legal advice and representation for litigants and Courts.
- Elements of Recommendation 40 that Community Legal Centres should be funded to provide court assistance services for applicants.
 - However they contain the flaw of overlooking the necessity of men or perpetrators receiving legal advice. Community Legal Centres should also be funded to provide Court assistance to respondents. This would be consistent with the above Recommendation 39.
- Elements of Recommendations relating to who is permitted to cross-examine (Recommendations 143-145). VALS agrees with Recommendation 143 that the respondent should not be able to personally cross-examine: the applicant or applicant; any family member of the parties or any other person the court declares a protected witness. However, the VLRC Recommendations relating to how legal advice will be secured for a Respondent are flawed. Recommendation 145 states that *If the respondent refuses, or cannot access legal representation, the magistrate must instruct Victoria Legal Aid to provide legal assistance for the purpose of cross-examination.* However, this overlooks the fact that VLA may be

in a conflict of interest situation or the need to refer to the Respondent to a specific legal service, such as VALS.

Other Matters That Will Aid the Applicant/Respondent:

VALS agrees with the following recommendations that will aid the applicant/respondent, notably these recommendations recognise the needs of respondents.

- Recommendation 45 that Magistrates provide a clear verbal explanation to the respondent and the protected person where either is present in Court. It is important that time is taken to explain matters.
- Recommendation 86 that a plain English brochure should be provided to respondents at the time of service that gives information to help them decide whether to contest an application or order.

Other Recommendations VALS Agrees With

VALS agrees with the following:

- **Administrative issue:** *The Crimes (Family Violence) Act 1987 should be repealed and new legislation, entitled the Family Violence Act, should be enacted (Recommendation 1).* It is appropriate to enact a specific Act in relation to Family Violence that differentiates between Family Violence and other forms of violence that have a rightful place in the Crimes Act (ie: community based interpersonal disputes).
- **Procedural of renewal of Intervention Order:** *The legislation should allow an Intervention Order to be renewed without the applicant having to prove that further Family Violence occurred during the period of an Intervention Order (Recommendation 9).* This is a fair procedure change and will prevent the re-applicantisation of applicants by the legal system and ensure their safety.
- **Aid/abet breach of Intervention Order:** *The new Family Violence Act should provide that a person protected by an Intervention Order cannot be prosecuted for aiding and abetting an Intervention Order breach under the Crimes Act 1958. If police believe a protected person has consented to a breach, they should explain to that person the procedure for varying or revoking an order. If necessary police should apply for a variation and revocation on behalf of the protected (Recommendation 33).* VALS agrees with the arguments in the Report about the inappropriateness of the offence of aid and abet breach of an Intervention Order. This amendment recognises the dynamics of Family Violence and the wishes of the applicant and increase safety as applicant may be more willing to take out an Intervention Order in the absence of this offence.

- VALS is aware of a case where a female applicant was charged with aiding and abetting breach of an Intervention Order. This client has indicated that she is too scared to get another Intervention Order if necessary once her ex-partner gets out of prison because she does not want to go back to Court again after appearing before the Court to answer charges of aid and abet an Intervention Order.
- **Specialisation:** The Magistrates' Court should establish a specialist list for Family Violence matters, including Intervention Order applications, criminal charges relating to Family Violence and victims of crime compensation (Recommendation 37). Specialist jurisdictions are effective in dealing with specific problems. VALS notes the success of the Family Violence Court.
- **Safety and Court environment:** VALS agrees with recommendations 56-59, dealing with the Court environment, as they will ensure the safety of applicants.
- **External Review of Police Code of Practice:** An independent and external review of the impact of the Police Code of Practice for the Investigation of Family Violence should be conducted within two to three years of the Code's full implementation (Recommendation 22).
- **Agency:** Recommendations that go some way to recognising agency: (ie: Recommendation 29: Police should not be able to apply for a final order without the consent of the protected person unless the person is a child or has a cognitive impairment).

CONCLUSION

The Report contains recommendations that VALS supports and does not support. There is a tension between getting a tough on Family Violence approach as opposed to a smart on Family Violence approach and this tension is particularly difficult for Indigenous Australian communities. VALS has attempted to deal with this tension by arguing that:

- A tough on crime approach is not necessarily a smart on crime approach. The VLRC Report has more of a tough on Family Violence flavour than a smart on Family Violence flavour through what it includes and excludes than a smart on Family Violence approach and as a result has negative consequences.
- A smart of crime approach does not advocate the de-criminalisation of Family Violence but argues for the creation of space for alternatives to a criminal justice response.
- A balance needs to be struck between safety, agency and accountability and there is a lot to learn from Indigenous Australians in striking this balance.

- The following smart on Family Violence approaches are overlooked due to an emphasis on a pro-arrest/prosecution approach and should be given the time of day:
 - Restorative justice;
 - Criminal justice response that deals with Family Violence as a safety issue, as opposed to a punitive issue.
 - Enhanced existing Civil Law options;
 - Meeting the needs not only of applicants of Family Violence, but also perpetrators.

Also, the specific recommendations relating to Indigenous Australians and legal advice are positive, but there is room for improvement.

References

Australian Domestic and Family Violence Clearinghouse Newsletter 'Legislation and Policy: Victoria Update' as in, No 23 January 2006

Bowen, Helen 'Recent Restorative Justice developments in New Zealand/Aotearoa' presented at the International Bar Association Conference 2002 Durban, South Africa as at:

<http://www.restorativejustice.org.nz/Documents/Dubran%20Paper%20by%20Helen%20Bowen.doc>

Cunneen Chris 'Zero Tolerance Policing - Implications for Indigenous People'(1999)
http://www.atsic.gov.au/issues/law_and_justice/zero_tolerance_policing/Report/default.asp

Davis, R, Mandatory Arrest and Restraining Orders from Domestic Violence Facts and Fallacies 1998

Heger, David, Mandatory Arrest and Prosecution Policies for Domestic Violence: A Critical Literature Review and the Case for More Research to Test Victim Empowerment Approaches, University of Missouri – St Louis, 1998

Holder, R, Domestic and Family Violence: Criminal justice Interventions Australian Domestic and Family Violence Clearing House, 2001

Mills,L Killing Her Softly: Intimate Abuse and the Violence of State Intervention
Harvard Law Review Volume 113, No. 2 December, 1999.

DeLeon-Granados,W; Wells,W; Long, J, Beyond Minneapolis: A Preliminary Theoretical Model for Alleviating the Conceptual Ruts in Domestic Violence Intervention Research. Western Criminology Review
Finighan, J, Unpublished paper, 2006

MacRae Jamala, Relationship Violence and Diversion: A Literature Review on Pro-Charge Policies and Crown Discretion, British Columbia Institute Against Family Violence, 2003

Parkinson, Debra Burns Kerry and Zara Claire (eds), 'A Powerful Journey: Stories of Victims Leaving Violent Situations (2004)

Restorative Justice Trust, 'New Zealand Restorative Justice Practice Manual' as at
<http://www.restorativejustice.org.nz/Manual.htm>

Sherman, L and Strang, H Policing Domestic Violence: The Problem Solving Paradigm paper presented at Problem Solving Policing as Crime Prevention, Stockholm. 1996

Tasmania Department of Justice and Industrial Relations 'Safe at Home: A Criminal Justice Framework for Responding to Family Violence in Tasmania Options Paper August 2003 as at <http://www.safeathome.tas.gov.au/publications>

Victorian Law Reform Commission, 'Review of Family Violence Laws Report' (February 2006)