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LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 25 February 2008

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Ms G. Clarke, Research Officer, Victorian Aboriginal Legal Service.

The CHAIR — Thank you very much, Greta, for coming along and talking to us. There are just a few preliminaries before we begin. The proceeding this afternoon is conducted under the Parliamentary Committees Act. That means that whatever you say here is protected by parliamentary privilege, so there cannot be any litigation or any action taken against you. If you say some of the same things outside this hearing, you are not protected by that privilege. As well as that you can see that Hansard staff are recording the discussion we are having today. You will be sent the transcript after the meeting, and you will be able to make some slight changes to that document, but obviously not to redo what it was that you said.

We have had a look at the material you sent to us. Thank you very much for that and all of the work that has gone into it. We have got obviously some questions out of our reading and examination of that, but we found a useful way to go is to throw open the floor to you. You tell us the story in relation to the terms of reference and then we can jump in with various things and hopefully have a really productive conversation.

Ms CLARKE — Thank you for inviting the Victorian Aboriginal Legal Service to appear before this committee. At the outset I want to acknowledge that we are meeting on Aboriginal land, the land of the Wurundjeri people of the Kulin nations.

I will provide a brief summary of the submission that was handed in last year. The two main points I really want to highlight are that space needs to be created for a community-based ADR model that is a distinct entity from the court system. There is also a need to create space for the utilisation of Indigenous Australian knowledge in the development of ADR processes, particularly restorative justice programs.

To add a bit of context about access issues for Aboriginal people to ADR, VALS is aware that there are some gaps in service delivery. As far as we are aware, there are no Koori-specific ADR services in the sense of, for example, the Dispute Settlement Centre; but the Dispute Settlement Centre does have Koori mediators and a Koori liaison officer. In restorative justice practices there are more Koori-specific programs available, and I will discuss them later.

ADR is a western concept, and just like the legal system it can be culturally alienating to Aboriginal people. I have a quote from a researcher whose name is Smith. He says:

> … the ability to decentre the Western world view in order to understand Aboriginal ones is important to the ADR movement.

An example of the different value system of Aboriginal people and non-Aboriginal people would be that for Aboriginal people, having a mediator who has a personal involvement or first-hand knowledge of the situation is valued, whereas in a non-Indigenous Australian context a neutral mediator is valued. What I am going to be talking about is actually influenced by a book written by an Aboriginal lady who is a lawyer. She argues that despite the alternatives of ADR it is still a problematic alternative for Indigenous Australians. That is because it is incapable of addressing the power imbalance if Indigenous Australians do not have input to it. She asks for a model that goes beyond merely transferring the dominant paradigms of ADR into the Aboriginal community, such as having Koori mediators or cultural awareness training. She wants it to go further than that. She wants it to be implemented by Indigenous Australians in their own communities, which recognise traditional cultural values and traditional structures of decision and dispute resolution.

Based on that I have a list of aspects of, I suppose, a Koori-friendly ADR service. First of all there should be a choice between a mainstream service and a targeted service for Aboriginal people. This is necessary because not all Aboriginal people will access the targeted service, but it cannot be assumed that they will automatically access the mainstream service, so there needs to be a choice. There needs to be a strategic justice approach adopted by this review. It was identified in the discussion paper that there are parallel reviews happening to enquire into the civil justice process — equal opportunity, the human rights commission, the Equal Opportunity Act — and they seem to be operating in isolation. What we are on about is addressing systemic discrimination and systemic issues, so if reviews such as this could come up with a strategic social justice approach that links in with other reviews, it is more likely to have a bigger impact and have substantive change.

I want to talk about how to prioritise addressing systemic discrimination. One of the ways to do that is to have a culturally inclusive framework in this strategy. This means involving Aboriginal people at the beginning of the process rather than at the end, designing in Koori concepts and being self-reflective about Western assumptions. Also there needs to be space created for restorative justice. A culturally inclusive framework may look like a

restorative justice model. It is closely related to indigenous forms of dispute resolution, such as the victim–offender mediation which involves multiple parties.

Going on with my list — a community-based model which creates space for a community-based, as opposed to in-the-shadow-of-the-courts-based, ADR process: this model could be regional and maybe based on the community legal service model, which has happened in South Australia. There are community justice centres that offer legal services and mediation. I am not aware of anything like that in Victoria, though. Or perhaps it could be based on the community legal service model in the sense that it is regional but at an arm's length distance from a CLC service, because there are problems of conflict of interest in having a legal service and a mediation service. It seems that there have been attempts at combining the two, and they have folded, and people have tripped over themselves with the conflict of interest problem. I think best practice at the moment is recognised to be an arm's length basis.

The co-mediation model is favoured by Behrendt, who I mentioned before, an Aboriginal lady. She says it will work well for Indigenous Australians, as they can have someone they can relate to. There should also be education accompanying this model as part of the social change strategy. There should be education for the Aboriginal community about services available, so having specific education materials, pamphlets that might be really accessible because of the colour. They might be the same colour of the Aboriginal flag or have Aboriginal artwork on them. Those sorts of things make things stand out for the community, and at the same time having education for the legal profession about ADR as an alternative and maybe improving their referral processes and information sharing between practitioners about best practice.

There should be a safeguard in this model that I am talking about, and that is the provision of legal advice before going to ADR. With ADR there is a risk of power imbalance, particularly in the family violence context. It is important that people are aware of their rights, aware that they can disengage if they want to, and that sort of thing.

Also you could learn something from the triage model in the hospital system where there is an urgent fast-tracking process. There are degrees of emergency in the emergency ward, and priority is given to the one who needs the most help. We could fast-track dispute resolution — for example, this is in the context where there is a trend now in the family law context that you have to go to a family relationship centre before you can file papers in the Family Court. So there could be a fast-tracking process when it is urgent. 'Urgent' could be a welfare issue for the child or something like that, so that there is at least not a hurdle to getting to a dispute resolution stage quickly, and problems that are happening can be dealt with at an early stage rather than waiting to go through mediation and then the court system.

In conclusion, we suggest that ADR needs to target the needs of Indigenous Australians. We suggest adopting a community-based co-mediator model which creates space for legal advice and restorative justice. Indigenous Australians should be involved in the development and implementation of this model.

The CHAIR — Thank you very much, Greta. There is a lot in what you have just told us, and I think we all appreciate what you are saying about ADR and indeed all our institutions being fundamentally Western in their premises and in the way they operate. I think we are open to that view. Then you went through a very comprehensive list of some of the components that we need to consider in setting up a process that matches the needs and cultural aspirations and being of Indigenous Victorians. Could I just ask you to draw for us a picture of what you imagine it might look like for us when you try to put some of those things together — how it feels, and what the experience would be that is different to what we are trying to do at the moment?

Ms CLARKE — I can talk to you about a proposal that the Victorian Aboriginal Legal Service had on the books for a long time, and this proposal has just never been funded. Ultimately we want to set up a Koori Dispute Settlement Centre. What that would look like is maybe we would employ a project officer at VALS to spend about nine months researching the literature, perhaps talking to communities in two areas — so we would have the pilot in two areas — forming a local reference group and ultimately coming up with a model.

I am a non-Indigenous Australian myself, so for me to say exactly what it would look like is problematic. It is the local reference group that would actually come up with it, and it would look different in each area. It is to meet the particular needs of community. There are some examples I can tell you about in a minute that already exist.

I think we would have a coordinator role at the Victorian Aboriginal Legal Service. I think we would make it on an arm's length basis. We would also have an intake worker and we would employ sessional mediators who were Koori, so we would train them up. We could even jump on the back of the Dispute Settlement Centre that already

has trained Koori mediators. Incidentally, they are not trained around family law issues, family conflict and intra-community fighting. From my understanding, it is more workplace, neighbourhood disputes and that sort of thing. The focus of this particular project I am telling you about is around family law, child protection issues, family violence, because there is a huge gap there at the moment.

Maybe in, say, a metropolitan area and in a country area there would be some mediation that can happen, some dispute resolution or whatever is appropriate. It would not occur in the same place — there would be maybe the library, the local council offices or the Aboriginal co-op. The sessional mediators would choose the appropriate place, and that is where the ADR would happen. That is a model that could fill a gap. That would involve the Aboriginal community at the development stage and also the implementation stage.

Another example is the Koori Court. That happened that way: there was a Koori caucus that spoke about the idea. We have Koori elders and respected people involved in the actual delivery of the restorative justice concept. It is very successful. Recidivism rates have been proven to reduce. Before the Koori Court, the recidivism rate was 29 per cent, and it has gone down to about 12 per cent.

There are some models that exist currently that we could expand upon — for example, in regard to the Koori Court I know there are discussions happening now to introduce it into the County Court system. There are also ideas about putting it into the Victims of Crime Assistance Tribunal. I suppose it is just extending the pilot out further now that it has proven successful.

Through the Victorian Aboriginal Child Care Agency in partnership with the Department of Human Services there is also Aboriginal family decision making which is now legislated for in the Children, Youth and Families Act. Section 12 talks about self-determination for Aboriginal people, and Aboriginal decision making is that in practice. It is based on group conferencing principles that originally came from New Zealand. Basically the family and people interested in the welfare of the child come together and they come up with a plan for what will happen with the child, where they will stay, how much contact there will be with the biological parents and things like that. I think the distinction between that and, say, something that just the Department of Human Services case managers is that with Aboriginal decision making the DHS worker and the VACCA worker go out of the room at some point. That is when the family can talk and ultimately it is their decision provided it meets the bottom line for the DHS worker. Sometimes it is basically what the DHS worker suggested.

The problem with that model is that it is only the people who are, I suppose, in a really bad situation who have come to the attention of child protection, so it is like the back end; the problem has already happened. There is nothing at the front end. To catch the problem early and to have Aboriginal decision making just does not exist. I think VACCA wants to extend that service delivery but that may be a little while coming. It is a model that can be developed. Is that enough?

The CHAIR — That is quite good — no, very good; quite good sounds a bit mean! That was fantastic. I just want to come back to how the committee might further engage, but let us just leave it on that and hear from other people.

Mrs KRONBERG — I am interested to know a little bit about where the difference would be in terms of the Koori community. What would the idea of restoration be, let us say, for stealing something from somebody's home or picking them up? What is the thing that people would see as justice being done if you are a victim?

Ms CLARKE — Sure. It is probably similar to non-indigenous people. The gentleman who was sitting here before was talking about how victims respond to group conferencing. The outcomes that come out of those come out of, I suppose, juvenile justice group conferencing for Aboriginal people, because it is very similar to what was traditionally practised in the sense that people came together and there was respect for elders — they deferred to a higher authority — but they came up with a group solution; the community was involved. I suppose the Koori Court borrows from that in involving elders. Group conferencing can also do that. It might be an apology; it might be a monetary payment; the victim might just get out of it some form of reconciliation between two family groups.

There is a lot of internal conflict within the Aboriginal community — basically family group against family group. A lot of juveniles get caught up in that, on assault charges and things like that. Ultimately what is needed is social harmony so people get along better. If you have two families who are involved in this process maybe it will result in reconciliation in the community itself. Arguably that dysfunction in the community is a result of colonisation and people turning, I suppose, to the people closest to them to bring out their anger and their hurt. That is one argument.

I think there would be similar ways that a dispute could be resolved and what works well for the non-indigenous community would work for the Aboriginal community.

Mr FOLEY — We have heard from Victoria Police, and a number of different people have put submissions to the committee about early diversions to restorative justice, group conferencing and a whole range of what we are calling ADR responses. Noting your position that people should have advice before that occurs, and that there is a broader policy position available about an alternative Koori stream, do you have any views as a practitioner in the field as to what that scheme would mean practically for Koori communities? What would it mean for practical things like earlier plea, discounting and participation in conferencing before any sentencing, and any of those kind of practical measures?

Ms CLARKE — I think you are talking about diversion from the police, or even from the courts. VALS supports both those options. The key is making them accessible to the Aboriginal community. There are great diversion programs through the police and through the courts, but when it comes down to it, the number of Aboriginal people who access them — given their overrepresentation in the criminal justice system — is less than you would expect. I think that is because Aboriginal people are not involved in it in terms of access issues. I think it was raised at a Regional Aboriginal Justice Advisory Committee meeting — which is a structure through the Department of Justice — that the Ropes program with the Victoria Police and things like CISP were not being accessed. I understand it is going up; the rate is increasing but it marks to us that diversion also needs to be targeted perhaps at Aboriginal people.

VALS through the Aboriginal Justice Forum where RAJACs meet together, commissioned a report that ultimately led to a pilot at the Victorian Aboriginal Legal Service about cautioning, and that is in two regions — Morwell and Mildura. It is the same set-up in the sense that there was a steering committee in both regions. Police were on the steering committee. The outcome is a protocol that sits within the Victoria Police manual. It is an attempt to increase the rate at which Aboriginal people are cautioned because it is low. Basically it involves more people at the cautioning stage, so it is not just the police officer; the cautioning can be deferred until an Aboriginal family member and people instrumental in the person's life are there, and an Aboriginal worker can be at the cautioning too — just having somebody who you know is either a support person or a family member.

Basically there is shame in being cautioned in front of people, and then once that shame has been dealt with, then as a group they work out how to, I suppose, put things in place in the person's life to stop them reoffending in the future. Because there is a culture within the police force of low incidence of cautioning of Aboriginal people, it is also educating the police so they realise they have to have a reason why they do not caution an Aboriginal juvenile. That reason is sent through to VALS and we follow up on that. After the group come together there is a follow-up process for three months, and the youth resource officer within Victoria Police is responsible for that.

That is an example at the police diversion stage of a Koori-specific model. It was introduced because we recognised that the mainstream diversionary tactics were not always accessible.

Mr BROOKS — You might have part answered this question, but it is around the advice the committee has already received about the juvenile justice group conferencing and how young Indigenous people are accessing that service in rural and regional areas but not in the Melbourne metro area. The question is just, I suppose, further to that answer you have just given us, whether there be would specific reasons why that might be the case.

Ms CLARKE — Yes. I do not know, but it is probably very different in each region. It can be dynamics between people as well. It comes down to practical things like that. If it is not at a neutral venue — say it happened at an Aboriginal cooperative, and there was a family that basically ran the co-op and they were linked in with one of the parties disputing, then the other side would not engage in the process. It can be all sorts of things like that. I suppose awareness of rights and services that are available is a huge problem, and that is how an Indigenous-specific education module or a community education campaign could make people more aware of that. The Koori Court is not in every region. Hopefully it will be rolled out eventually, but some people just do not have a targeted appropriate service in their region.

The CHAIR — You say in your submission that the relationship between ADR providers and communities are really underdeveloped, and you also talked in response to other questions about a lot of it arising out of people not getting on well with each other at that grassroots level. How might networks and conversations amongst ADR providers and local communities be strengthened?

Ms CLARKE — A really good network is the RAJAC network. Purely for the Victorian Aboriginal Legal Service, the way we increase our profile and get people to access us is we have a community legal education officer and she visits the regions, and the RAJACs basically hand out the invites and drive people in a bus to the location. This education work is in partnership with other services, and they are dispute resolution services — the Victorian Equal Opportunity and Human Rights Commission, Consumer Affairs Victoria, the Office of the Public Advocate and the Ombudsman — and they are around civil justice.

These services already have a network through education. They struggled with their profile being high within the Aboriginal community, and that is their motivator — to join with an Aboriginal organisation such as VALS and network together. What was interesting for those people and what they learnt from the Aboriginal people who were part of that network was that providing a PowerPoint presentation on your service is not necessarily going to work. The format has changed — it has sort of developed — and it is now case scenarios, where the Office of Police Integrity, which is also a service involved, and VALS did a joint case scenario where someone was arrested but at the same time there were issues around how the police handled the person, and it was acted out. That network is really useful, I think, perhaps if justice agencies and group conferencing get involved, because all of these services are about resolving conflict in some way.

The CHAIR — I guess just to respond a bit to that, the big picture that I think the committee is picking up and focusing on is the way the general community — not only Indigenous communities but a whole set of communities — is having its dispute resolution capacities over a period of time expropriated from it and focused in the state and through the judiciary. That is happening to all communities, and part of what the imperative and impulse of the inquiry and the whole ADR movement is about, to some extent, is returning that as far as possible to local people to sort out, where appropriate, in ways that best suit them. In that sense, what you describe in the Indigenous community is not different to what is happening in other areas, but the specificities in each case have to be accommodated, and that is what we are sort of struggling with. The question I want to focus on then is whether you are doing any work on how Indigenous Victorians are being strengthened to work out their own issues, like in those family conflicts or in just interpersonal ones that may not have to do with family or groups. We have asked everyone that, so we will ask you as well.

Ms CLARKE — How Koori communities are struggling to deal with their own problems?

The CHAIR — Yes, and individuals within that, and families within that.

Ms CLARKE — You mentioned the fact that the conflict within the community is a by-product of the way in which Australia was colonised, and as a result of that you have to take a holistic approach. If a child welfare issue is at stake, that links in education and that links in child protection and things like that, and the general consensus is that the way to deal with the problems in the Aboriginal community — it scares people, because it is huge — is not to just take bite-sized chunks and say, 'We're going to deal with education here', but to take a holistic approach. I suppose this joint education campaign is not just VALS but everyone coming together. Someone may find that they have two services that are involved in this joint education campaign that they can engage with. Just one service going out there is not going to deal with all of the issues, and ultimately if a holistic approach is taken in the Aboriginal community, that will be good.

Something that differentiates between Aboriginal values and non-Aboriginal values is that a service — this applies to ADR too — focuses on the individual, whereas Aboriginal people are more than the individual, they are their community. Group justice conferencing incorporates the community, and that is why it works well for Aboriginal people. It works for non-Aboriginal people too, but that is why specifically it works well for Aboriginal people. Basically the answer is a community-based holistic approach.

The CHAIR — I will ask you to talk a bit more about the Koori Court, which you did touch on before. I think we generally agreed there is potential, now that it is at the point where it is, and you might want to talk about the Drug Court as well if that comes into your thinking. How do you think, in more detail, restorative justice practices and principles could be applied to the Koori Court to extend what we have learnt out of that? One of the things you said was to have more of them.

Ms CLARKE — Yes, that is an option, and to have them in different court scenes. One of the complaints about the Koori Court is that you have to plead guilty to go there. I suppose that is in line with restorative justice principles of an offender admitting guilt and coming to the table with the victim, but given the overrepresentation

rate in the criminal justice system of Aboriginal people, the argument is that it would be good to extend that beyond just people who plead guilty to also include people who plead not guilty. That is a way of extending the Koori Court process.

Just on what I mentioned about the Victims of Crime Assistance Tribunal, a lot of work will be needed on that before it actually happens because in a sense it is a tribunal, it is not a court and because of that it is inquisitorial, whereas courts are adversarial, and the tribunal member plays a very key role in what happens during the proceedings. I suppose issues about independence are flouted — the problems of transferring a Koori Court model to a VOCAT model.

Another way that the Koori Court could be expanded is to deal with family violence and more serious offences, so the Koori Court Act, which was enacted in 2002, excludes the Koori Court jurisdiction to family violence and sexual assault, I think. There is a body of research within the Aboriginal community that family violence can be dealt with in a restorative justice context. It may even be more successful — not successful, it is the process — or efficient in the sense of people being happier with the outcome than a criminal justice approach, but I want to make it clear that we are not advocating the decriminalisation of family violence.

Restorative justice can either operate alongside the criminal justice system in a formal court structure or be completely separate. In the instance of family violence it would probably operate alongside. We had an honours student. We have an MOU with the Melbourne University criminology department to do research that is proactive, so she did research based on something that had been found in Queensland, interviewing Aboriginal women about family violence. What they found in Queensland was also repeated in Victoria — that non-Aboriginal women prefer a criminal justice response to family violence over restorative justice. Flip that around and it is the opposite for Aboriginal people. They prefer a restorative justice approach as opposed to a criminal justice approach, and I suppose it is about early intervention into instances of family violence. It is also about problems with the criminal justice system — allegations that police do not respond to calls. When they have been to a Koori family and they know that there are problems of domestic violence, police just do not turn up. There is also the problem of deaths in custody, and Aboriginal women who have a shared consciousness with the Aboriginal men, not wanting to put their men in a position where there is a risk of death in custody, so they do not call the police and things like that. It is very controversial actually even in the non-Indigenous context about ADR and family violence, but it is a little bit different in the Aboriginal context because of reports like this that show that Aboriginal people want to at least explore it because of the problems with the criminal justice system.

The CHAIR — The other thing I wanted to ask about is clearly Indigenous Victorians have a different experience of colonisation to communities living in other parts of Australia where it would be fair to say that the communities are more traditionally intact, and so there is a greater line of historical knowledge of how things are done than exist in parts of Victoria. You work at a national level. VALS works nationally?

Ms CLARKE — We are state, but we are linked in with all the other Aboriginal legal services.

The CHAIR — So do you find that there is a variation of views that goes across the continent? Are there things that Victorian Indigenous communities can learn from what is happening elsewhere?

Ms CLARKE — Yes, in the Northern Territory where there was less contact, and the contact did occur later on with white people, ways of living have remained intact and customary law is more stable, and I think there are uses of customary law in court settings — for example, part of a sentence may involve the permission for a spearing to happen. Traditionally with people who did the wrong thing, the aim was to ostracise them and to make them different and set apart from the rest of the community and have a constant reminder of the transgression. A spear in the leg would result in a permanent limp, so that was a visual sign of justice, whereas in Victoria customary law still exists, for example, as to who can marry one another. There are very strict laws about kinship and basically if the wrong people from different groups of Victoria marry, it is equivalent to incest. Customary law does still exist, and the best people to talk to are the elders because they still have the knowledge. They basically, when they were young, could hear things still, whereas the young people today, what was passed on has been lost, so that knowledge about customary law is with the elders in Victoria, and perhaps they have the answer. There is a lot of controversy about customary law as well being used in a western legal setting, and the whole Northern Territory emergency intervention that happened last year was on the back of revelations by a Crown prosecutor about lenient sentencing. That was about a promised marriage, and that sort of thing, but I think the legal system in Victoria has said we can have the Koori Court, but any concept of customary law, apart from it involving the

Aboriginal community, just does not exist. Customary law does not exist in Victoria. I do not think that is completely true, but it is definitely not to the same extent as other places in the country.

The CHAIR — Very interesting. For the point I flagged before, do you have any ideas at this point — and this is not the last opportunity obviously — how the committee could usefully engage with people in the Koori community who could talk to us about these issues?

Ms CLARKE — Sure. There is one worker at the Dispute Settlement Centre who is responsible for getting out messages about the Dispute Settlement Centre and organising sessional mediators who has a wealth of knowledge. His name is Rocky Tregonning, and he is a valuable resource. There is also in Western Australia an Aboriginal mediation service already operating.

The CHAIR — Does that get a tick?

Ms CLARKE — Yes, and I understand that the community justice centres that operate in New South Wales and South Australia are based on that model, and they apply to non-indigenous people too. There are community justice centres in other states that already have a regionally based mediation service operating.

The CHAIR — Are there people in Victoria in the Indigenous community who have gone over and had a look at Western Australia?

Ms CLARKE — I would have to — —

The CHAIR — Maybe have a think.

Ms CLARKE — Rocky may know. There are a string of people who were in his role before him that would have great knowledge that he could link you in with, but not that I am aware. That does happen a lot. People go over from other states to pass on knowledge but also gather it about what things are working.

The CHAIR — If there are no more questions, we will wrap it up. Thank you very much, Greta, for coming and talking to us and for the submission and for the material, and this conversation is not over. We are going to be talking more. You will also get a copy of the transcript from Hansard.

Witness withdrew.