



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 Equal Opportunity Commission of Victoria in relation to EOCV Complaints Process Review: Some ideas for a framework – January 2007

Background

VALS has a number of ideas in relation to improving access to the civil justice system for Kooris. Many of these issues have been raised verbally with staff at the Commission or at Commission reviews. In the course of the recent Civil justice review we made a submission which highlighted some broader accessibility issues. We thought it may be useful to put these issues in writing as an aid to further discussion and collaborative work to improve services.

In summary VALS is interested in improving accessibility through:

- improved dialogue with key stakeholders,
- community legal education,
- improvements to existing service provision and
- systemic change particularly in relation to improved recognition of the importance of substantive equality.

Goals and Framework

As a preliminary step to discussing this topic it may be useful to suggest a draft framework that we might contribute to our discussions.

VALS EOC and other civil justice providers such as Consumer Affairs Victoria and the Dispute Settlement Centre have a common goal of providing people with access to justice and a common challenge to find new strategies which will better achieve that goal.

Achieving this goal should involve consideration of :

- formal and substantive equality
- demand for service and need for service
- costs and benefits
- predictability and flexibility
- opportunities and constraints of more collaborative approaches

This is not an exhaustive list nor are the terms used necessarily the most appropriate terms to describe the ideas. It is a list which may help us to discuss issues of common interest or common concern. Below are brief comments about these issues.

Formal and substantive equality

The ideas of formal and substantive equality are similar to those of equal process and equality of outcomes. The systemic discrimination research by Blagg suggested that several State government departments have little understanding of systemic discrimination and by implication a limited understanding of substantive equality. Formal and substantive equality is also similar to the distinction drawn between 'civil and political rights' and 'economic, social and cultural rights'. Some groups are preoccupied with winding back entitlements to formal equality, others argue that greater recognition of substantive equality is necessary and some argue that the dichotomy is not helpful. Larissa Behrent in 'Achieving Social Justice' uses the terms 'difference blind liberalism' and 'multicultural liberalism' to discuss different ideas of formal and substantive equality. She argues that both ideas are useful and can complement each other.

Substantive equality can be defined extremely broadly and there will always be differing assessments of what substantive equality means, how important it is and what is required to achieve it. Whatever definitions and assessments are made there needs to be some operational and practical implementation plan if substantive equality is to be better understood and better respected. How and where substantive equality should be sought is a strategic matter for discussion unless we take the view that it is not important or too difficult. While Attachment One includes some further comments about this issue including comment from the Court Challenges Program Canada and Omar Swartz.

On a small scale the VALS-police youth cautioning and diversion project is an attempt to introduce a more substantive equality dimension in relation to Koori youth in the justice system.

The project has been designed to link community expertise and police expertise in solving problems with the rate of Koori cautions and the effectiveness of cautions. This has resulted in protocols which introduce a reverse onus arrangement where police have to justify why they don't use a caution, clearer processes in relation to who provides a caution, encouragement to consider involving another Koori person where the parents are not available and recognition that venues outside a police station may be better places to issue a caution and trying to ensure that referral to local service providers is made as effective as possible.

Where the young person is unable to receive a caution because they are not answering questions the police can suspend the interview and advise the young person to get legal advice and return in a few days.

Demand for service and need for service

'Demand for service and need for service' could alternatively be called 'reactive' and 'proactive' service provision. Eg where need data as defined by survey, research or other indices could be considerably at variance with demand eg some groups are under represented compared to what might be expected the mix between reactive and proactive service provision may be altered. Where effective demand appears to be low there are issues to consider as to whether the role of the organisations who can help is understood, whether the structure or model of service provision is understood and whether these services are

relevant or effective. Legal needs research by the NSW Law and Justice Foundation indicates that disadvantaged people are more likely to have a number of inter related problems and are less likely to consider using legal advice to help understand or help solve these issues.

Costs and benefits

Costs and benefit considerations are a central issue in planning budgets and in targeting new funds or collaborative initiatives. Cost benefit analysis is often either not done or done in a perfunctory manner. However the time frame, nature of the problem, problem definition and who is consulted about the costs and benefits can dramatically affect the estimates of costs and benefits associated with maintaining or changing service provision.

Predictability and flexibility

Predictability and flexibility are to some extent in conflict. The more straight forward and inflexible the process or policy is the more predictable and the greater certainty that people can have about using services or programs and sometimes about outcomes. On the other hand the greater the flexibility the more opportunity there is to consider urgency, difference, systemic effects and the possibility of win-win outcomes. However this makes it harder for people to be clear about how the system works and what result they can expect.

Opportunities and constraints of more collaborative approaches

Governments' interest in effectively protecting citizen rights is often partial, ineffective or non existent. Government interest in having a more informed citizenry or a more understandable system of justice is usually limited to a few high profile campaigns about 'tough new penalties'. The threat of terrorism has occasioned greater state power without effective checks and balances. Mistrust of culturally different groups has been encouraged by the Commonwealth Government making it more difficult to win acceptance of the importance of minority and disadvantaged groups' rights. In this challenging environment there is arguably a need to both reflect on what is happening and suggest improvements. Are there any activities or issues which could be used to build a greater sense of pride in our institutions which are trying to 'dispense justice'? Are there any steps that we could take or encourage other groups to take which might make protection of other peoples rights a slightly warmer issue. Could we do some scenario development about how substantive equality would look for a particular group or in relation to a particular issue or problem.

Given scarce resources and the difficulty of changing behaviour and attitudes there are potential benefits and synergies from a range of activities:

- collaboration on systemic changes
- clearer referrals,
- consultation about service flexibility and service models

The support of EOC, the Ombudsman, CAV, Dispute Settlement Centre and other to provide Community Legal Education in regional areas is one example of collaborative work although the lack of long term commitment and wavering support from several of the players highlights the challenge of such endeavours. Different organisational priorities and differing organisational roles will set limits on the opportunities to work on collaborative initiatives however it is vital to regularly review plans and issues.

Some common access issues which relate to the civil justice system generally and EOC are how to provide an affordable system, how to make the system easier to understand, how to ensure effective referrals, how to better respond to urgent matters and how to achieve systemic improvements.

The role of the Commission

There are two general problems we perceive with the role of the Commission. The Commission's broad role as advocate for rights protection including assisting people to make complaints can be at odds with the role of the Commission as a dispute resolution provider providing neutral conciliators.

We believe there is an important advocacy role for the Commission but this provides a challenge in implementing dispute resolution services when seeking to balance procedural fairness with substantive fairness. This involves for example trying to balance cultural accessibility factors with uniform service models and procedures.

Possible Improvements

VALS is not sure how the competing roles of the Commission can be resolved/managed but believe that it is an issue that deserves further discussion from the point of view of clients not having access to ongoing support through the complaint process and because the conciliation process and the conciliation model are not necessarily always the best model.

Conciliation as a hurdle to VCAT

The Commission's preferred model of dealing with complaints has been to mandate conciliation prior to referring a matter to VCAT.

While conciliation may be entirely suitable for some people some complainants report that conciliation takes too long or that they do not feel comfortable using conciliation. Some complainants want their matter to go to VCAT because they want to publicise what has happened. One difficulty we have highlighted is that the requirement to try conciliation prior to going to VCAT will for some people be a disincentive to proceed. It is also potentially time consuming and inflexible.

In cases where the complainant is dealing with a school or a hospital the conciliation process may simply be a fact finding exercise for the school or hospital. The wealthier party can then decide to offer very little at conciliation until the matter goes to VCAT. At VCAT mediation

may be attempted and a pre VCAT hearing offer of settlement may be made at the door of the tribunal.

In our submission about the civil law system we argued that the absence of a 'fast tracking to VCAT or the magistrate's court option' for matters can effectively operate as a disincentive for effective negotiation occurring. We have argued that particularly in matters which are urgent for the complainant to resolve the better resourced players will have no incentive to negotiate prior to conciliation and no incentive to reach settlement at conciliation when an offer could be made at some later time.

The Commission's fast tracking option

In recent years there has also been the adoption of a fast tracking model of dealing with complaints involving an element of outreach by the Commission.

The fast tracking model also may be useful but again this will be dependent on the issue and what the person complaining wants. We are not clear how the complainant will access legal advice in the fast tracking model. It is also not clear how the balance between Commission staff assisting and resolving the matter is managed in this option. VALS is not clear about what circumstances would indicate that a client should be referred to this option.

VALS believes that if the fast tracking model is continued it would be helpful to build in some process for providing legal advice to the person.

A Problem Solving Approach

VALS believes that there should be a clearer process for considering the options available to a person in the first incidence whether the person's first point of call is a legal service or the Commission. Material in the VALS Be Strong use your rights kit (copy attached) encourages people to talk to someone about an issue as soon as possible. It also points to different pathways that people might take. This is to help ensure that even if the law or the legal process is of no help or is too difficult that personal or political complaint options are considered. There is an assumption in this approach that the notion of seeking help or complaining are highly problematic and that clients may be sceptical about the value of doing anything. This broader problem solving approach was also included because we wanted to encourage a framework which would include a range of complaint/ service agencies hence discouraging a narrow or legalistic approach to problem solving.

Another part of the kit was a broad checklist to encourage a worker to assist a client to clarify what they wanted, consider the options and decide what they wanted to do. A framework like this may be useful to help guide EOCV and VALS to be clearer about referral options

Many of the people approaching the Commission have complaints that the Commission can not deal with. Many of the people who approach VALS have matters which we can do little about and/or require referral to another specialist service. In both these circumstances the primary focus of both our organisations will be on whether the client is eligible/ appropriate for assistance from us. A broader framework which conceptualises the issue as problem

solving takes account of the fact that a client approaches the Commission or the legal service with possibly only a vague idea or an inaccurate idea of what these organisations can achieve. The client wants advice or assistance in dealing with a problem. Legal needs research indicates that people most people give up on seeking help after three referrals. So the challenge of our combined efforts is to clarify not only the problem but clearly enough understand what the client wants so that if a referral is necessary it is an effective referral. Every so often we also need to review the effectiveness and comprehensiveness of the options that we have. For example should we be suggesting in some matters that a letter be written to the other party expressing concern or asking for some change in policy or an apology? Should we be thinking about referral to the dispute settlement centre as a quicker path way for some matters?

Looking at a particular area of complaints helps illustrate what this might look like in practice. Consider complaints by parents of bullying or school discrimination. These may be resolved by the parents being given advice about how to negotiate with the school. It may be resolved via a lawyer assisting with negotiation the school or it may be resolved via EOCV fast tracking conciliation, or normal conciliation or a VCAT hearing. This would be an interesting issue to pilot as its clearly a very important issue for young people and families.

Improving substantive equality

VALS submission on the civil justice system highlighted the lack of flexibility of the system, the lack of capacity to consider urgency and the cost factors which tended to exclude poor people alongside a virtual withdrawal of civil legal aid. The issue of substantive equality was examined by the systemic racism research by Harry Blagg and by research done for VALS by Michaela Bangard. The Blagg research suggested a lack of understanding of the concept of systemic discrimination. This implies that the idea of substantive equality is not understood or influencing policy. The Bangard research suggested that the Victorian Aboriginal Justice Agreement was being used by some State Government departments as a substitute for any substantive analysis of policy. The Bangard research also indicated that efforts in the UK and in Canada to tackle this issues had tended to focus only on altering the diversity of staff in departments. While this is a step forward if it is not allied to other steps it will only have a limited impact on the problems faced.

In the Health field there has been a move to use the concept of cultural security as a more holistic way of conceptualising the challenge of responding to cultural diversity. Cultural security is an approach which tries to consider the systemic and organisational values and practices which require rethinking, if services are to become more accessible. This is a more holistic approach than talking about cultural awareness training for example. VALS believes that the lack of sustained discussion and critique about improving substantive equality is a handicap to improved policy and resources to address this issue. As the number of people in government, universities and the community is quite small this is an area where there would be some synergies if some cross sectoral/cross department dialogue was fostered.

A necessary component of addressing this problem is a long term commitment to collaborative Community legal education. Ideally the collaboration is two fold involving a

range of service providers as well as a framework which values two way communication between Aboriginal service providers and community members.

The collaborative CLE model in place now in relation to civil law attempts to provide information as well as solicit community feedback on issues and provide information and referral about specific issues. There may well be many improvements which could be included however we believe the commitment to keep coming back to community organisations members is one important indicator of sustained interest in trying to provide better services and overcome a history of poor information and poor service availability.

Given the turnover of Aboriginal workers and non Aboriginal workers whose role is liaison with Aboriginal people a collaborative approach is the only way to ensure a capacity to keep providing a service without there being large gaps caused by delays in replacing staff.

There is also the practical reality of limited time by community members to spend becoming expert on the plethora of civil justice players. Greater collaboration and simplification by agencies working together helps to address this problem. Continued support from EOCV on this program would be helpful.

Attachment One

Formal and Substantive Equality

On the one hand there are moves to wind back entitlements to formal equality eg reverse onus laws overturning innocent until proven guilty, right to vote being removed from prisoners, right to legal advice and other denials of procedural fairness for terror suspects . On the other hand there are advocates for extending the implementation of substantive equality by for example better recognising the unequal position of the poor or of minority groups. Legislating to give greater effect to the United Nations Convention on economic social and cultural rights is another policy issue which would contribute to better recognition of substantive equality. Some writers argue that the separation of civil and political rights from economic, social and cultural rights is unhelpful as it tries to separate two sets of rights which are in practice quite interdependent.

Toward a Critique of Normative Justice: Human Rights and the Rule of Law*

Omar Swartz

Volume 20 #3

My sense of law school was that the professors and the majority of students, as well as the judges and Justices in the court cases we read, tended to assume a priori that the legal system is just and that any perceived flaw in the system is an anomaly to be redressed by further

law. This went unquestioned, although students read of many cases that codify social injustice. While students are encouraged to interrogate the reasoning of any specific ruling, they are discouraged from extrapolating to any larger critique of the system.

Simply, a substantive-equality approach requires that law promote equality and work toward a society of dignity and respect, and should therefore be remedial:

It recognizes that social inequality exists and must be changed, rather than assuming a neutral and equal social world and avoiding legal differentiation to preserve it. It is based on noticing the reality of inequality in order to end it, rather than on enforcing a "color blindness" and gender neutrality, which have often meant a blindness to the unequal realities of color and gender. This mandate is interpreted with a particular sensitivity to, and priority upon, eliminating the inequality of groups that have traditionally been socially disadvantaged.¹¹

Under this model, the law sets a floor below which no human can fall. To create this floor, the law needs to be active and progressive, not reactive and conservative. Substantive equality proceeds toward a vision of what human beings can accomplish once the barriers that prevent them from entering and competing in civil society as full-fledged members of the community have been removed:

This equality looks to "civil society" on the level of ordinary transactions and interactions: buying and selling, work and education and accommodations, home and the street, communications and insurance, as well as voting, elections, and juries.. It is rooted in everyday life, looking beyond the legal formalism of formal equality to social consequences.¹²

Socialism and Democracy Online

<http://www.sdonline.org/35/towardacrtique.htm>

Information from the Court Challenges Program Canada about equality and substantive equality

What is "equality"?

Section 15 of the Charter states that:


Every individual is equal before and under the law and has the rights to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

What does equality mean? People's understanding of this idea has changed and developed over the years. At one time, people believed that only certain people had the right to equality, such as men, adults, or landowners. Until recently, many people thought that equality meant getting the exact same treatment as other people. We call this approach "formal equality".

"Substantive" Equality

Now, the courts and many equality seekers have a broader view of equality, one that is often called "substantive equality". A substantive equality approach recognizes that patterns of disadvantage and oppression exist in society and requires that law makers and government officials take this into account in their actions. It examines the impact of law within its surrounding social context to make sure that laws and policies promote full participation in society by everyone, regardless of personal characteristics or group membership. Substantive equality requires challenging common stereotypes about group characteristics that may underlie law or government action as well as ensuring that

important differences in life experience, as viewed by the equality seeker, are taken into account. The Supreme Court of Canada recently affirmed its commitment to a substantive approach to equality in its unanimous decision in *Law v. Canada*. (From CCP web site)

<http://www.ccpcj.ca/e/about/about.shtml> 

About: CCP

Who We Are

The Court Challenges Program of Canada is a national non-profit organization which was set up in 1994 to provide financial assistance for important court cases that advance language and equality rights guaranteed under Canada's Constitution.

The Program has a volunteer Board of Directors responsible for making sure the administration of the Program runs smoothly. In addition, there are specialized, independent panels to make decisions as to which cases or projects will be funded and in what amounts. The Language Rights Panel and the Equality Rights Panel are made up of experienced and knowledgeable individuals with a history of involvement in equality or language issues and community organizations. (From the CCP website)
