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VALS Supplementary Submission to the Victorian Law Reform Commission in response to the Civil Justice Review - February 2007

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) would like to provide some further information to the Civil Justice Review expanding on some of the issues raised in VALS' Submission sent on 7 December 2006.

Review of Original Submission

Our submission emphasised our concern that the growth of regulations and legislation is not balanced with a concern about how difficult the system is for individuals to navigate and utilise. There are no effective curbs on the capacity of Government to increase the size and complexity of the Civil Justice System, which in turn reduces accessibility of the system.

A genuine commitment to simplify civil laws and the Civil Justice System would be an important start. A commitment to not make changes which would worsen the position of disadvantaged people seeking to use the system is one of the starting points we recommend. Proposed changes to the law or system should be assessed in terms of their impact on disadvantaged groups (ie: Koori Impact Statement) and should also consider legal aid (a legal aid impact statement). As the present level of provision of civil legal aid is largely limited to Community Legal Centres (CLC) the State and Commonwealth Government would have to make a commitment to start properly funding civil matters.

What this Submission adds to the Discussion

In this submission VALS will attempt to make the issue of accessibility of the Civil Justice System clearer and provide additional recommendations about directions for reform.

Below we have included a table which highlights some of the differences between the formal equality of a Civil Justice System and one which attempts to include substantive equality.

| Characteristics of Current Civil Justice System that reduces the accessibility of the System | Characteristics a Civil Justice System should exhibit in order to promote accessibility of the System |
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| <ul style="list-style-type: none"> • Enthusiasm to complicate the system through ongoing legislative change; • Economic rationalism; • User pays; • Neo-Liberalism; • Systemic disadvantage, such as disadvantaged people being priced out of the system; | <ul style="list-style-type: none"> • Equity (substantive equality); • Legal aid for urgent matters; • Streaming/fast tracking; • Flexibility; • Urgent Civil Law List which goes some way to acknowledging the measure of merit attributed to a case may be heightened if levels and types |

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|--|--|
| <ul style="list-style-type: none"> • A prejudiced notion of merit that favours cases involving large sums of money as opposed to smaller amounts of money (ie: merit is attributed to cases where the stakes are seen as higher in terms of monetary value); • Inappropriate notion that everyone is equal before the law and overlooking of the need for substantive equality (ie: affirmative action or special treatment); • Failure to consider impact of changes on disadvantaged people; • Too open to unfairness. | <p>of disadvantage are taken into account;</p> <ul style="list-style-type: none"> • Koori Civil Court; • Koori Support Worker; • People with Health Care cards, who have urgent matters, should not have to pay Court fees and should be quickly able to access assistance for transport, child care and interpreters; • People on the Urgent Civil Law List should be to benefit from access to Court employed experts. |
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Substantive equality reform of the Civil Justice System would encompass radical simplification and funds for wide ranging legal aid services, including test cases. However, some small concrete steps toward greater substantive equality are a necessity if the system is to become more accessible for disadvantaged people. Drawing an analogy with the health system we suggest that better recognition of people with urgent matters is necessary. We suggest some situations which would constitute urgency and recommend expanded availability of legal aid and an urgent civil court list.

Parallels to other systems

VALS wishes to draw parallels between the Civil Justice System and Health System in arguing for considering the overall effectiveness of the system and the need for an Urgent Civil Law List. The Health System includes primary health strategies which affect the overall accessibility of the Health System. In the legal context the equivalent of such useful strategies are Community Legal Education (both generic and those targeted at particular groups of people), together with better practice by legislators eg considering the downstream effects of legislation and complexity of the system.

At the hospital and General Practitioner (GP) level there is both a practice of extensive testing and diagnosis as well as urgent or emergency action (triage system). People who present at GPs or hospitals are not all routinely subject to all manner of threshold and merit tests if they are clearly in need of urgent treatment. There is little by way of parallel structures in the Civil Justice System. This could be partially rectified with the introduction of a Urgent Civil Law List and expanded access to legal aid for urgent matters.

The operation of the Energy Ombudsman embodies the principle of responding to urgency as they will usually assist a client to get reconnection of services and then investigate the underlying issues. Also, Project Magellan in the Family Court of Australia (the Court) and the Columbus Project in the Family Court of Western Australia are examples of improving the way the family law system handles certain issues eg by providing legal advice to both

sides and ensuring the availability of all relevant experts in family violence, and sexual assault cases).¹

Urgent Civil Law List

This submission provides more detail about how we believe accessibility can be extended and how this approach differs from proposals such as written pre court disclosure and compulsory mediation. We propose that the Civil Justice System better take account of urgent civil matters through the increased provision of legal aid for urgent matters, better support for disadvantaged people with urgent matters, and the creation of an Urgent Civil Law list made up of matters that are deemed urgent, are not able to be negotiated and consequently are fast-tracked through the Civil Justice System. This would be a step towards improved substantive justice and better deal with matters which are of high individual, social and economic significance.

Eligibility

VALS argues that the introduction of an Urgent Civil Law List would address the fact that some civil law matters are of such importance and urgency for Plaintiffs, and their families etc, that they should be fast-tracked through the Civil Justice System.

VALS classifies the following as matters that should be fast-tracked on the basis of urgency, although the list is not exhaustive: matters where there is, or risk of, school exclusion, homelessness, civil matters which will increase the likelihood of children and parents being separated for child protection reasons, serious illness or imminent death. Those who fall into the previous categories are likely to benefit from fast-tracked access to the Civil Justice System. Also, arguably a fast-tracked system will reduce complication levels and cost.

The provision of legal aid for urgent matters would increase the chances that successful pre-Court negotiation of these matters could be achieved. When lawyers are negotiating in relation to urgent matters there will be less motivation for the other party to stall the matter as both parties will be aware that a fall back position is to apply to have the matter heard on the Urgent Civil List.

The creation of an urgent list is a means of overcoming the injustice that a system which relies simply on paperwork, pre-Court discovery and compulsory mediation to ration use of court resources can provide. The urgent matters are matters which are likely to have a significant personal impact on people and a significant economic and social cost if not dealt with. The Urgent Civil Law List is not only applicable to Indigenous Australians, but members of the broader community who face urgent matters.

Health Care Card

¹ Attorney General's Department 'The Family Law Violence Strategy' February 2006 as at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FamilyLawViolenceStrategy.pdf/\\$file/FamilyLawViolenceStrategy.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FamilyLawViolenceStrategy.pdf/$file/FamilyLawViolenceStrategy.pdf)

We agree with the suggestion of the Federation of Community Legal Centre that people with Health Care cards, who have urgent matters, should not have to pay Court fees and should be quickly able to access assistance for transport, child care and interpreters.

Expert Panel

People on the Urgent Civil Law List should be to benefit from access to Court employed experts which would preclude the need for each side to seek their own expert reports. This is similar to the current Medical Panel which makes decisions in relation to percentage of injury. Perhaps the Expert Panel could be funded through a percentage of Court fees.

Koori specific suggestions

Perhaps in order to meet the particular needs of Indigenous Australians consideration should be given to a Koori Support Worker in a mainstream Civil Law Court.

Differences between the Urgent list and Non-Urgent list

Compulsory Mediation and extensive Pre-Court disclosure would not be consistent with speedy resolution of urgent matters. Again lawyers should be provided with legal aid and CLC's should be better resourced to advise people about how to participate in mediation and what the legal framework is around their problem. Mediation is an important possible path way to speedy resolution. Mediation should be a choice however in urgent matters it is important that it not become an opportunity to delay resolving a matter.

It is important that people receive legal advice prior to mediation particularly where one party is more powerful than the other.