ALRC 69
EQUALITY BEFORE THE LAW: WOMENS EQUALITY

PART II

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Commission Reference: ALRC 69 Part 2

The Law Reform Commission was established by the Law Reform Commission Act 1973 section 6 to review, modernise and simplify the law. It started operation in 1975.

Terms of reference

COMMONWEALTH OF AUSTRALIA

Law Reform Commission Act 1973

I, MICHAEL JOHN DUFFY, Attorney-General of Australia, HAVING REGARD TO:

(a) the principle of equality before the law;

(b) Australia's obligations under international law, including under

- articles 2 and 26 of the International Covenant on Civil and Political Rights to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in that Covenant and to the equal protection of the law;

  and

- the Convention on the Elimination of All Forms of Discrimination Against Women

in pursuance of section 6 of the *Law Reform Commission Act 1973*, HEREBY REFER to the Law Reform Commission the following matters:

(a) whether any changes should be made to any laws made by, or by the authority of, the Parliament of the Commonwealth of Australia, including laws of the Territories so made, and any other laws, including laws of the Territories, that the Parliament has power to amend or repeal;

(b) whether any additional laws should be made within the legislative power of the Commonwealth to effect change to the unwritten laws of Australia;

(c) whether any changes should be made to the ways these laws are applied in courts and tribunals exercising Commonwealth jurisdiction;

(d) the appropriate legislative approach to reforming that law; and

(e) any non-legislative approach

so as to remove any unjustifiable discriminatory effects of those laws on or of their application to women with a view to ensuring their full equality before the law.

IN PERFORMING its functions in relation to the Reference, the Commission shall:

(i) consult widely amongst the Australian community and with relevant bodies, and particularly with the Human Rights and Equal Opportunity Commission, the Affirmative Action Agency and the Sex Discrimination Commissioner;

(ii) consider and report on Australian community attitudes on difficulties associated with gender bias as it relates to women;

(iii) in recognition of work already undertaken, have regard to all relevant reports, including:

  — the National Strategy on Violence Against Women prepared by the National Committee on Violence Against Women;

  — the Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act 1975*;

- the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on its Inquiry into Equal Opportunity and Equal Status for Women in Australia, particularly as it relates to the *Sex Discrimination Act 1984*;

- the Australian Law Reform Commission's Report No 57 on *Multiculturalism and the Law*;

- the Australian Law Reform Commission's Report No 39 on *Matrimonial Property*; and

- the Review of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* by the Affirmative Action Agency; and

(iv) consider and report on the relevant law of any other country.

THE COMMISSION IS REQUIRED to make an interim report not later than 31 December 1993 and to make the final report not later than 30 June 1994.

Dated 8 February 1993

Michael Duffy

Attorney-General

Participants

The Commission

The Division of the Commission constituted under the *Law Reform Commission Act 1973* for the purpose of this reference comprises the following members of the Commission

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Commissioners

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Abbreviations

AAA	Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)
ABS	Australian Bureau of Statistics
AGPS	Australian Government Publishing Service
AIRC	Australian Industrial Relations Commission
ALRC	Australian Law Reform Commission
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
DDA	Disability Discrimination Act 1992 (Cth)
Family Law Act	Family Law Act 1975 (Cth)
Half Way to Equal	House of Representatives Standing Committee on Legal and Constitutional Affairs *Half way to equal: report of the inquiry into equal opportunity and equal status for women in Australia* AGPS Canberra 1992
HREOC	Human Rights and Equal Opportunity Commission
HREOCA	*Human Rights and Equal Opportunity Commission Act 1986* (Cth)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	Illawarra Legal Centre
ILO	International Labor Organisation
IRB	Immigration and Refugee Board (Canada)
Iredale Report	R Iredale, J Innes & S Castles *Serial sponsorship: immigration policy and human rights* University of Wollongong 1992
NCVAW	National Committee on Violence Against Women
NDVEP	National Domestic Violence Education Program
NSWLRC	New South Wales Law Reform Commission
OSW	Office of the Status of Women
QLRC	Queensland Law Reform Commission
RDA	*Racial Discrimination Act 1975* (Cth)
RDC	Race Discrimination Commissioner
RRT	Refugee Review Tribunal
SDA	*Sex Discrimination Act 1984* (Cth)
SDC	Sex Discrimination Commissioner
STAW	Stopping Violence Against Women Community Education Program
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
VLRC	Victorian Law Reform Commission
Vienna Declaration	Vienna Declaration and Program of Action, World Conference on Human Rights 1993

Summary of recommendations

4. An Equality Act

Recommendation 4.1

The law should guarantee that everyone is entitled to equality in law.

Recommendation 4.2

Equality in law should be protected through an ordinary Act of Parliament. The entrenchment of the Equality Act in the Constitution should be the long term goal.

Recommendation 4.3

The Equality Act should define 'equality in law' to include equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms.

Recommendation 4.4

The Equality Act should provide that any law, policy, program, practice or decision which is inconsistent with equality in law on the ground of gender should be inoperative to the extent of the inconsistency.

Recommendation 4.5

The Equality Act should require that in assessing whether a law, policy, program, practice or decision is inconsistent with equality in law regard must be had to

- the historical and current social, economic and legal inequalities experienced on the ground of gender
- the historical and current practices of the body challenged and the extent to which those practices have contributed to or perpetuate the inequalities experienced
- the history of the rule or practice being challenged.

Recommendation 4.6

The Equality Act should apply for the benefit of both women and men.

Recommendation 4.7

The Equality Act should recognise that violence is an integral part of the inequality of women in Australia. The Act's objects clause should include the objective that the law respond more effectively to violence against women, as defined in the Declaration on the Elimination of Violence Against Women.

Recommendations 4.8

The functions of the SDC in SDA s 49 and of HREOC in HREOCA s 11 should include powers, where the SDC or HREOC as the case may be considers it appropriate to do so,

- to initiate a challenge under the Equality Act
- to intervene in a matter where the Equality Act is relevant and where leave of the court is granted.

This would include proceedings involving issues arising under CEDAW or the Declaration on the Elimination of Violence Against Women.

5. The impact of an Equality Act on government

Recommendation 5.1

The Equality Act should apply to all laws and levels of government, Commonwealth, State and Territory and local.

Recommendation 5.2

The Equality Act should provide that legislation is to be given a meaning consistent with the Equality Act, wherever possible. This meaning is to be the preferred meaning.

Recommendation 5.3

The Equality Act should contain a provision which requires later inconsistent Commonwealth legislation to derogate expressly from the operation of the Equality Act to be operative. A derogation from the operation of the Equality Act should be reviewed after five years, or any lesser period declared in the legislation. The results of the review should be tabled in Parliament.

Recommendation 5.4

The terms of reference of the present Senate Standing Committee on the Scrutiny of Bills should be extended to include the scrutiny of bills for compliance with the Equality Act.

The Equality Act should contain a provision that requires the Attorney-General to report on the compliance of a government bill with the Equality Act on the introduction of that bill to Parliament. The Attorney-General should be required to report on bills introduced by private members as soon as practicable after their introduction.

Recommendation 5.5

In challenging a law or government action a person or group should be able to seek remedies available for judicial review, such as those available under the AD(JR) Act, for an infringment or a likely infringement of the Equality Act.

The fact that a law or practice is found to be inconsistent with the Equality Act should not, of itself, give rise to a right to damages.

The Equality Act be relied on in existing causes of action, whether the other party is governmental or a private person or entity. This existing cause of action may itself give rise to a claim for damages.

6. The impact of an Equality Act on courts

Recommendation 6.1

The proposed Act should apply the right to equality to acts done:

- by the legislative, executive or judicial arms of the Commonwealth, States or Territories; or
- in the performance of any public function, power or duty conferred or imposed on any person or body by law.

7. Hearing women in courts and tribunals

Recommendation 7.1

In ALRC 27 the Commission recommended that:

- Any person should have standing to initiate public interest litigation unless the court finds that, in instituting the proceeding, he or she is 'merely meddling'. There should be a number of statutory elaborations:

- Personal stake. A personal stake in the subject-matter or outcome of the proceedings should be a sufficient, but not a necessary, condition of standing.

- Ability to represent the public interest. Standing should be denied to a plaintiff who has no personal stake in the subject-matter of the litigation and whose manner of presenting the issues betrays a clear incapacity or unwillingness to represent the public interest adequately in conducting the case.

- Presumption of standing. There should be a presumption that the plaintiff has standing unless the court is satisfied that the person is 'merely meddling'.

- Application generally needed. The court should not deny standing unless one of the parties makes an application to dismiss the case for lack of standing. However, where the plaintiff has no personal stake in the subject-matter of the litigation, such an application should not be necessary if the court finds that the plaintiff lacks the motivation and capacity to conduct the case adequately.

The provisions proposed in ALRC 27 to give effect to this recommendation should be enacted.

Recommendation 7.2

The provisions proposed in ALRC 27 regarding intervenors and friends of the court should be implemented in effect codifying the circumstances in which the court would grant leave to intervene or to participate as a friend of the court.

The federal parliament should enact provisions to guide courts in the exercise of their discretion regarding participation by intervenors and friends of the court for the purposes of promoting women's right to equality in any court or tribunal exercising federal jurisdiction. This could be done:

- in the proposed EqualityAct; or

- in the proposed Standing (Federal and Territority Jurisdiction) Act; or

- by enactment of legislation specifically for this purpose.

The legislation should provide that

- a person or organisation should be entitled to apply to participate in proceedings to argue an important issue of law or matter of public interest, concerning women's equality, on the basis that the parties to the proceedings are unable or unwilling to put those arguments or represent those interests

- the court should be required to give reasons for the exercise of its discretion to grant or refuse leave to participate

- the court should not be able to reject the application for leave to participate as an intervenor or friend of the court without, if necessary, hearing argument and evidence on the merits of the application

- leave to participate as an intervenor or as a friend of the court should not be granted if, in the opinion of the decision maker,

(a) he argument or evidence proposed to be presented by the person is frivolous, vexatious, misconceived or lacking in substance;

(b) he person's participation in the proceeding is likely to delay unduly or prejudice the administration of justice; or

(c) he person's participation in the proceeding is likely to cause unreasonable hardship to any party

The legislation should provide that

- where the costs indemnity rule operates a friend of the court should be immune from an adverse costs order

- in recognition of the fact that participation for the purpose of advocating for women's equality is in the public interest, where the costs indemnity rule operates, the court or tribunal should have discretion to grant an intervenor immunity from an adverse costs order, notwithstanding that the intervenor has all the privileges of being a party to the proceeding

- when participation by an intervenor or a friend of the court may result in adding to the costs of one or more of the original parties to the proceeding, the court should have discretion to make an order that leave to participate is conditional on those additional costs being met by a person other than the original party

- the enacted provisions should apply in all civil cases

- the enacted provisions should only apply in criminal cases in appeals from conviction and in stated cases following acquittals.

Recommendation 7.3

Establish a women's equality advocacy fund

A national fund should be established under the National Women's Justice Program (NWJP) to promote the development of more appropriate legal responses, under both statute law and case law, to women's needs and perspectives through advocacy in courts and tribunals and other forums.

Funding by the women's equality advocacy fund may include:

- funding, through general grants, one or more women's advocacy groups to advocate, and to assist litigants to advocate for women's interests before federal courts and tribunals and in other forums as a party, the representative of a party, an intervenor or a friend of the court

- partially or totally funding, on a case by case basis, individuals and groups to conduct or to intervene in cases which affect the rights of women

- where participation by an intervenor or a friend of the court, which was funded directly or indirectly by the fund, results in an original party to the proceeding incurring additional costs, reimbursing that party for those additional costs

- funding women's advocacy and other groups and individuals to undertake research or community education projects which complement the fund's purpose of promoting women's equality through advocacy

- providing special funding from time to time to projects which promote women's equality rights through advocacy in courts and tribunals and other forums.

8. Legal education

Recommendation 8.1

Tertiary legal education

1. Law schools should ensure that the curriculum includes content on how each area of the law in substance and operation affects women and reflects their experiences. The curriculum includes the core curriculum and elective curriculum.

2. Law schools should ensure that feminist legal theory is offered in separate elective subjects or in elective subjects that deal with legal theory.

3. The Department of Employment, Education and Training (DEET) should assess the incorporation of the experiences and perspectives of women in the law school curriculum as part of its annual quality evaluation of universities.

4. All law schools should encourage staff members to exchange information and advice on the incorporation of the experiences and perspectives of women in the content of all subjects.

5. All law schools should ensure that in recruiting new staff selection criteria assess an applicant's awareness of gender issues as applicable to the subject area to be taught.

6. Law schools should ensure that all aspects of tertiary legal education, including assessment tasks and course material, employ gender inclusive language and avoid sexist stereotypes of the roles of women and men in society.

Recommendation 8.2

Practical legal training

1. All practical legal training, whether in the form of courses or articles of clerkship, or a combination of these, should be required to include content on the experiences and perspectives of women.

2. In practical legal training courses simulated training, hypothetical cases and trials should avoid the use of gender specific language and avoid stereotyping the roles of women and men.

3. The Law Council of Australia should monitor the Department of Employment, Education and Training gender awareness project for the curriculum of the law schools as a model to set up a similar project for practical legal training courses.

Recommendation 8.3

Continuing legal education

Each State and Territory professional legal association should ensure that continuing legal education (CLE) subjects include material on the experiences and perspectives of women. Subjects offered as CLE should include

(a) material on the experiences and perspectives of women in each area of law

(b) subjects that directly relate to and impact on women, as areas of special study

(c) subjects which relate directly to the workplace practices of law firms, for example, courses on EEO in law firms, sex discrimination and sexual harassment.

Recommendations 8.4

Accreditation

1. In those jurisdictions where accreditation is available, all practitioners seeking accreditation should have to complete courses that include material on the perspectives and experiences of women in the area of law in which accreditation is sought.

2. Accreditation should be offered in areas of law that are of obvious concern to women, such as domestic violence, sexual assault, discrimination law and family law.

9. Women in the legal profession

Recommendation 9.1

The SDC should provide education programs to law firms about their obligations towards their employees under the *Sex Discrimination Act 1984* (Cth), and encourage through education programs employees to use the complaints process.

If the SDC is given an investigative role, as recommended in Part 1 of this report, she or he should investigate the apparent lack of compliance with anti discrimination laws in the legal profession.

Recommendation 9.2

Professional associations should

- lay an educative role on the obligations of legal firms under SDA
- be supportive of complainants
- collect information on and monitor the career patterns and experiences of women lawyers
- encourage increased compliance with affirmative action obligations
- promote women's full and equal participation on their governing bodies, councils and committees
- develop codes of conduct dealing with sex discrimination, including sexual harassment, in consultation with the SDC
- develop model equal employment policies and promote their benefits to the profession
- provide employers with interviewing guidelines
- establish complaints mechanism, for example, through the appointment of equal opportunity officers or safe counsel or senior counsellors

Recommendation 9.3

An advisory commission should be established to advise the Attorney-General on suitable candidates for judicial office.

Recommendation 9.4

Federal judges should be able to be appointed on either a full-time or part-time basis.

Recommendation 9.5

Selection criteria for judicial appointment should be identified and publicised.

11. Women and unpaid work: farm women - a case study

Recommendation 11.1

The Standing Committee of Attorneys-General should endorse uniform national legislation to implement the Commission's recommendation in ALRC 32 that 'the law should regard loss of capacity to perform unpaid housework as a primary economic loss to the person injured. Accordingly, in association with abolition of the loss of consortium action, legislation should be enacted enabling negligently injured people to claim compensation for the loss of capacity to perform unpaid housework.'

Recommendation 11.2

Judicial gender awareness programs should include information about the nature and amount of unpaid work in the community and the 'significant roles which rural women play in the economic survival of their families'.

Recommendation 11.3

The NWJP should undertake a community education program specifically targeted at rural women. This program should aim to impart information on a wide range of legal topics including commercial responsibilities, insurance and property settlements in family law.

13. Sexually transmitted debt

Recommendation 13.1

Section 1.3 of the Code of Banking Practice should be amended to ensure that

(a) s 17 of the Code will be binding between a guarantor and a bank from the date on which the bank publicly announces that it adopts the Code

(b) the dispute resolution principles set out in s 20 of the Code will also be binding between the bank and the guarantor as if the guarantor were a 'Customer' for the purposes of that section.

Recommendation 13.2

Section 17 of the Code should be extended to apply to all guarantees given to secure financial accommodation or facilities in circumstances that could result in sexually transmitted debt.

Recommendation 13.3

The Board of the Australian Banking Industry Ombudsman

(a) should authorised the Ombudsman to deal with all complaints involving sexually transmitted debt

(b) should authorise the Ombudsman in particular to deal with all complaints where a bank is seeking to enforce a guarantee secured by the guarantor's principal place of residence or a third party mortgage over the mortgagor's principal place of residence

(c) should ensure those authorities apply regardless of the amount of the debt and of whether the debt was initially or primarily owed by an incorporated body or an individual

(d) should, if necessary, impose a cap on awards that may be made by the Ombudsman in relation to such complaints, where the complaint involves a principal place of residence the maximum award should be the greater of $100 000 and the market value of that residence.

Recommendation 13.4

The following sentence should be added to s 17.5 of the Code of Banking Practice:

> Where a Bank requires a guarantee to be secured by the guarantor's principal place of residence, the Bank may only accept that guarantee and security if the prospective guarantor has obtained independent financial and legal advice.

Recommendation 13.5

Section 17 of the Code of Banking Practice should require a Bank, before accepting a guarantee, to conduct a separate interview between an officer of the Bank and the prospective guarantor at which the nature and extent of the guarantor's liability is fully explained. The Bank must be satisfied on reasonable grounds that the guarantor understands and accepts the guarantee and its possible consequences, and consents fully and freely.

Recommendation 13.6

The National Women's Justice Program should fund the provision by specialist women's legal services or other appropriate services of financial and legal advice to women guarantors where the guarantee is, or is to be, secured over the guarantor's principal place of residence.

14. Women in remote communities: Norfolk Island - a case study

Recommendation 14.1

Domestic violence legislation should be enacted as a matter of urgency. This legislation should enable the Court of Petty Sessions to issue protection orders where the complainant or her family fears violence or intimidation from her partner or from another person. Actions should be able to be commenced by police on behalf of the complainant. Under the legislation, police should be able to pursue applications for orders even where the complaint is withdrawn if they suspect or believe that a domestic violence offence has been committed or is likely to be committed. The legislation should make stalking an offence. Orders made under the legislation should be enforceable in all Australian jurisdictions. If necessary, funding should be provided as part of the NWJP to expedite the drafting process to enable a Bill to be introduced into the Norfolk Island Legislative Assembly as soon as possible. The legislation should be clearly explained to all residents.

Recommendation 14.2

The *Gun Licence Ordinance 1958* (NI) should be repealed and replaced by legislation based on the *Firearms Act 1989* (NSW).

Recommendation 14.3

A low cost telephone counselling service should be provided for women on Norfolk Island. Consideration should be given to funding this service as part of the NWJP.

Recommendation 14.4

A community drop-in centre should be established. The centre should provide a venue for the distribution of information about general community services both on the Island and on the mainland. It should also provide a venue for the provision of free or assisted legal advice. The centre should be funded jointly by the Commonwealth and the Norfolk Island Government as part of the NWJP and any legal aid scheme established on the Island.

Recommendation 14.5

A low cost telephone legal advice service should be established. It should be funded, administered and staffed as part a legal aid scheme for Norfolk Island.

Recommendation 14.6

The Family Court Counselling Service should visit Norfolk Island on a regular basis. Registrars should also visit the Island regularly to conduct Order 24 conciliation conferences. Judges of the Family Court should visit the Island on a regular basis but less frequently than the counselling and conciliation services. Telephone and video link-ups between the Court and Norfolk Island should be established during periods when the Court and counselling services are not visiting.

Recommendation 14.7

A legal aid scheme should be established for the residents of Norfolk Island. When developing guidelines for the allocation of funds, policies should reflect the importance to women of legal aid funding for family and civil law matters.

Recommendation 14.8

The Norfolk Island Government should establish a community legal education program to inform members of the community about legal rights and remedies under relevant Norfolk Island and Commonwealth law. In particular, programs should be established on the criminal law, immigration law, employment law and social services law. There should also be an education program about the *Sex Discrimination Act 1984* (Cth) and other legislation administered by the Human Rights and Equal Opportunity Commission.

Recommendation 14.9

The *Social Services Act 1980* (NI) should be amended to provide a sole parent's benefit.

Recommendation 14.10

Arrangements should be made to enable the Administrator of Norfolk Island to act as agent for the lodgment of complaints under legislation administered by the Human Rights and Equal Opportunity Commission.

1. The reference

Background to the reference

The reference

1.1 The Prime Minister, the Hon Paul Keating MP, announced the reference to the Australian Law Reform Commission on 10 February 1993 as part of the Government's *New National Agenda for Women*. The terms of reference were given to the Commission by the then federal Attorney-General, the Hon Michael Duffy MP, on 8 February 1993.

The terms of reference

1.2 The terms of reference require the Commission to consider whether laws should be changed or new laws made to remove any unjustifiable discrimination with a view to ensuring women's full equality before the law. They also require consideration of non-legislative approaches to ensuring women's equality. The Commission is to take into account Australia's obligations under international law. As a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Australia has undertaken to pursue 'by all appropriate means and without delay a policy of eliminating discrimination against women'.[1] As a party to the International Covenant on Civil and Political Rights (ICCPR) Australia must guarantee men and women the equal enjoyment of human rights without discrimination and equality before the law. The terms of reference are set out at the beginning of this report.

Scope of this report

Improvements to existing laws and procedures

1.3 The terms of this reference and the response to issues raised have required the Commission to consider necessary improvements to promote equality for women within the existing legal system and more fundamental changes that need to be made to the structure of the legal system. Despite some improvements in the last 10 years, women in Australia still experience widespread and serious inequality. The extent of women's inequality is discussed in Part 1 of this report.[2] This inequality is reflected in and reinforced by gender bias in the legal system. Addressing specific issues will not solve the problem unless that underlying bias is also addressed. Solutions to women's inequality can only be found if the engineering - that is, specific laws and practices - and the architecture - that is, the whole of the law and the legal system - are reviewed and, where necessary, reformed. The challenge is to make the laws and their application more equitable. Part 1 of this report examined specific areas of the law. This second part of the report is about the architecture of the legal system.

Content of this part

1.4 ***Gender bias in the law.*** The term 'gender bias' is often misunderstood and applied in different ways. In chapter 2 gender bias is explained and some examples of gender bias in common law and statute are examined. The persistence of gender bias in the law calls for a better understanding of equality and a new approach to ensuring women's equality in law.

1.5 ***The meaning of equality.*** In its previous reports, the Commission dealt with equality in terms of equal access to justice. In chapter 3 of this part, the Commission discusses alternative approaches to equality and explains the definition of equality it adopts.

1.6 ***Equality Act.*** The Commission recommends an Equality Act to give parliaments, governments and courts guidance on community expectations of law, policy and programs. The Act would provide a standard against which government and individual actions could be judged. The Act is discussed in chapters 4, 5, and 6.

1.7 ***Putting a gender perspective before courts and tribunals.*** Chapter 7 explains the current arrangements in Australia and overseas for commencing court proceedings and for intervening in court proceedings by

parties who are not directly involved in the dispute. Greater use of intervention is a way of allowing the reality of women's lives to come before, and be understood by, the courts. It would complement an Equality Act by encouraging the courts to develop the law in ways that promote equality.

1.8 ***Legal education and the legal profession.*** The education of lawyers about gender issues, in law schools and in their professional life, is vital to equality for women before the law. The Commission recommends improvements in legal education in chapter 8. It also recommends in chapter 9 reforms in the legal profession to ensure a better service to women clients, compliance with the law and effective protection of the principle of equality.

1.9 ***Economic life.*** Women's inequality in economic life has a direct relationship with legal principles which fail to give due value to unpaid work and make assumptions about women's dependence. In chapters 10, 11, and 12 the Commission examines specific instances of that inequality - as it affects women who work on farms, who become liable for 'sexually transmitted debt' and who receive social security.

1.10 ***Women in remote communities.*** The problems of women in remote communities are often more serious than those of women in other areas and yet they are often unacknowledged. In chapter 13 the Commission examines problems the women of Norfolk Island encounter in dealing with the legal system.

1.11 ***Reporting on submissions.*** Submissions responding to the reference cover a very wide range of topics. The Commission was not able to deal with them all in the time available. Chapter 15 provides an overview of the main concerns in submissions that have not been discussed in detail elsewhere in the report.

The context

The Discussion Paper (DP 54)

1.12 ***Overview.*** DP 54 was published in July 1993.[3] It contained a discussion of gender bias, discrimination and the legal protection of equality. It covered a wide range of topics including access to justice, family relationships and marriage, economic life, employment, participation in public life and the legal profession. In choosing those topics the Commission relied on the provisions of CEDAW. DP 54 asked a series of questions and invited responses from the public.

1.13 ***Responses to DP 54.*** The Commission received an unprecedented public response to DP 54. Approximately 630 submissions have been received of which 280 were presented at oral hearings.[4] Many submissions were made on behalf of, or described the experiences of, large numbers of women. In terms of the number of people represented, this reference probably sets a record for the Commission. Submissions came from all parts of Australia and from a wide range of individuals and organisations. Most submissions were from individual women who describe their experiences with the law. Others were from legal practitioners and academics, community based organisations and many others including government and non-government agencies. The major issues raised were

- women's access to justice particularly in the context of violence against them
- women's legal rights in family life and relationships and the problems of enforcing those rights
- women's participation in the legal profession
- legal rights to social security
- the position of women in employment and in the unpaid workforce
- media portrayals of women.

The Commission received a small proportion of submissions from men. These mainly concerned aspects of family law, such as custody and maintenance, and sentencing in criminal proceedings.

The nature of the submissions

1.14 Much of the evidence received by the Commission is anecdotal, although in many cases it has been verified by court transcripts or other documents. Some evidence was drawn from studies or surveys or has been supported by them. In some cases the anecdotal nature of the evidence has prevented the Commission from quantifying the problems revealed but the complaints have been so serious that in themselves they warrant a response. Many of the experiences described and viewpoints expressed were ones seldom heard in the legal community. For this reason the Commission has reproduced many excerpts from them. Some submissions are confidential either because they were given at private hearings or because the author requested that her or his name not be released. In virtually all cases, however, the names and addresses of those making submission were given to the Commission. The submissions are confidential, not anonymous. Most of these confidential submissions deal with domestic violence, sexual assault, or concern the experiences of women lawyers, or contain material that under the *Family Law Act 1975* (Cth) cannot be identified. In all circumstances the reasons for confidentiality are apparent. Members of the Commission have been conscious that these women have real fears of retaliation and respect their courage and generosity in speaking out for the benefit of other women.

The Interim Report (ALRC 67)

1.15 ***Overview.*** In March 1994 the Attorney-General, the Hon Michael Lavarch MP, tabled in Parliament the Commission's Interim Report on this reference.[5] ALRC 67 dealt with the most urgent problem raised in submissions, the failure of the legal system to give women protection and redress where they have been subjected to violence from their partners or ex-partners. It outlined the links between violence, access to justice and inequality before the law. It documented women's experience with the legal system in different regions of Australia and concluded that there was a problem of access to justice for women throughout Australia. The report found that, while different laws have different effects on women, there is a need for overall improvement. The operation of the law is the product of men's ideas and actions and largely remains in the control of men. The Commission reported that the needs of women, where they differ from men's, are still not being fully met by the system. ALRC 67 made recommendations in critical areas:

- development of the law
- community legal education
- legal advice and referral
- legal representation
- research and data collection
- court processes and facilities.

1.16 ***National Women's Justice Program.*** ALRC 67 recognised that women's lack of equal access to justice was a national issue and required a national response. It recommended the establishment of a National Women's Justice Program (NWJP) to coordinate reforms necessary to ensure women's equality before the law. It recommended a four year program administered through existing administrative structures at federal, State and Territory levels, with special funding by governments at both levels. Key elements of the program are

- measures to increase women's access to legal representation in court proceedings
- an additional women's legal service in each State and Territory
- legal resource and advocacy centres for Aboriginal and Torres Strait Islander women as pilot programs for an initial three year period

- strategies by legal aid commissions, women's legal services and other funded community legal services to ensure that they respond to the needs of women of non-English speaking backgrounds
- limited additional funding to existing services in identified high need areas to increase non English speaking women's access to justice
- a toll free telephone legal advice and referral service for all women in Australia
- community legal education
- test cases funding
- promotion and co-ordination of research and data collection
- implementation of the Commission's recommendations in *Multiculturalism and the law*
- initiatives to address the needs of women attending courts and tribunals
- court charters in federal courts and tribunals and other courts exercising federal jurisdiction to promote a better client focus in the delivery of court services, with special attention to the needs of women and child carers.

1.17 ***Response to the Interim Report.*** There was a lengthy debate on the Commission's Interim Report when it was tabled in Parliament.[6] Many parliamentarians expressed concern about the extent of violence against women and the inequality of women before the law. The recommendations in ALRC 67 on the NWJP have been strongly supported in the community. Many people appreciated the direct quotes from women contained in the Report. Others objected to the Commission presenting only one side of each story. The Commission received further comments and submissions and requests for more detailed information about some aspects of the program. It responded to those in Part 1 of this report. The Access to Justice Committee gave in principle support for the Commission's recommendation of a NWJP.[7] It recommended a national strategy for improving access to justice to attempt to achieve equality of access to legal services, national equity, and equality before the law.

Many other studies affecting women and the law

1.18 The commencement of this reference coincided with a period of exceptional public concern for, and media interest in, women's justice issues. This has continued throughout the Commission's work. Studies on gender bias have been completed and others begun at different levels of government. In all this activity the ALRC has been both catalyst and beneficiary. Major initiatives on behalf of women in both the public and private sector are listed in the Interim Report and Part 1 of this report.[8] Of particular importance in this reference was the work of the House of Representatives Standing Committee on Legal and Constitutional Affairs which reported in 1992 in *Half way to equal*.[9]

Other developments

1.19 Two other significant issues were drawn to the Commission's attention following the release of the Interim Report. The first issue concerned justice for women on farms, which was referred to the Commission by the Attorney-General in June 1994. It is reported on in chapter 11. The second issue was the position of women in remote communities. The report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Islands in the Sun*, was drawn to the Commission's attention. The Commission decided to visit Norfolk Island to investigate the legal status of women in that particular remote community. The choice of Norfolk Island was influenced by its status as a separate self-governing territory whose jurisdiction exceeds those of other Australian States and Territories.

Final Report Part 1

1.20 ***Overview.*** Part 1 of the final report was released in July 1994 by the Attorney-General, the Hon Michael Lavarch MP, and the Minister Assisting the Prime Minister on the Status of Women, the Hon Dr Carmen Lawrence MP. That report expanded on the access to justice issues discussed in the Interim Report and made recommendations in additional areas.

1.21 ***Findings of fact.*** To develop its recommendations the Commission investigated the current social, economic and political status of women in Australia. Part 1 of this report documented the main findings which were a basis on which conclusions were made about the impact of the legal system and individual laws on men and women.[10] Among the most notable findings were that

- women are on average poorer than men and have less access to financial resources
- women contribute to the economy through unpaid work to a much greater extent than men
- women who work in the paid workforce do much more of the unpaid work in the home than men
- women have a much greater chance of being financially dependent on another person or on the State than men
- almost all sole parents are women
- women are significantly poorer after separation and divorce than men
- Aboriginal and Torres Strait Island women have less access to indigenous legal services than indigenous men
- women's paid work patterns are different from those of men, often including a significant period of time out of the paid workforce for child rearing
- many women are subjected to violence in the home but that is generally not the experience of men
- women are more likely to be sexually abused (as children and as adults) than men
- women in political life and in the legal profession are greatly under-represented in policy and decision making
- the high level of gender segregation in the workforce harms women.

1.22 ***Legal system's response to violence.*** Part 1 of this report found that the legal system fails to deal effectively with violence perpetrated by men on women. The system itself contributes to the subordination of women. It is important that decision makers understand how violence interacts with the law and with women's lives. Sometimes violence is clearly identifiable. Often it is hidden, but influential, in directing a woman's actions or affecting the way the law operates in relation to her. The Commission suggested that all federal Acts, regulations, policies and programs be analysed to determine their adequacy as a response to the prevalence of violence against women in Australia. The Commission chose, in the time available, to analyse in Part 1 of this report two areas of federal law, family law and immigration, because they were identified in submissions as needing reform. It recommended amendments to the *Family Law Act 1975* (Cth) and the *Migration (1993) Regulations* and changes to immigration procedures.

1.23 ***Access to justice: legal aid.*** Part 1 of this report identified legal aid as an area where the Commonwealth has a responsibility to pursue equality for women. It recommended that the Commonwealth take a more directive role in determining legal aid priorities in the interests of women. In particular the Commonwealth should ensure that the needs of applicants in family and civil matters are adequately met. The Commission recommended that the Attorney-General's Department undertake a detailed examination of legal aid legislation and guidelines to determine the most appropriate way to achieve this change in priorities, to ensure that applicants in criminal, family and civil matters are accorded a minimum level of legal

protection and assistance. The Commission recommended that Legal Aid Commissions thoroughly evaluate the gender implications of the alternative dispute resolution processes and adopt best practice guidelines. Legal aid guidelines in all jurisdictions should specifically state that culture and language difficulties affecting an applicant's capacity to cope with the legal system should be considered in determining priority for legal aid.

1.24 ***Access to justice: specialist women's legal services.*** The Commission recommended in Part 1 of this report that part of the NWJP funding should be provided for an additional women's legal service in each State and Territory. Funding should include a separate component for programs to assist women of non-English speaking background and women in rural areas. The NWJP should fund specialist legal services for Aboriginal and Torres Strait Islander women in areas where the local indigenous women indicate a need for such a service.

1.25 ***Access to justice: court support schemes.*** The Commission recommended that the NWJP should provide funds to expand existing court support schemes and to establish new schemes. The various legal professional bodies should take an active role in these schemes through encouraging members to participate on a pro bono basis.

1.26 ***Access to justice: interpreters in legal processes.*** The Commission affirmed its recommendations on interpreters in its report *Multiculturalism and the law*. In matters involving domestic violence a woman of non-English speaking background should have a statutory right to appropriate interpreting services when giving evidence and to understand the whole proceedings. The Family Court should include in its policy guidelines on interpreters a requirement that its clients be informed of their right to an interpreter and the availability of free interpreting services provided by the court. The Commission recommended training interpreters to an accredited level of competency. All interpreters should receive gender awareness training and interpreters working within the legal system should be accredited as specialised legal interpreters. The Federal Police and State and Territory police services should adopt clear policy guidelines requiring the use of interpreters for women of non-English speaking background in cases of sexual assault or domestic violence. Police standing orders should be amended to give effect to this requirement. The Commonwealth, through the Standing Committee of Attorneys-General, should encourage the States and Territories to enact legislation to protect the right of women of non-English speaking background to an interpreter throughout the investigation process where they have been the target of sexual assault or domestic violence.

1.27 ***Access to justice: child care at courts.*** The Commission recommended that all courts exercising federal jurisdiction should provide access to child care facilities, either on site or through arrangement with a local child care centre. Facilities should include full time, affordable child minding services, play areas and suitable toilet and changing facilities. Funds should be provided for capital works to address existing deficiencies on the basis of need. When new courts are built or old ones refurbished, child care facilities should be included.

1.28 ***The Sex Discrimination Act 1984 (SDA).*** The principal existing federal legislation dealing with equality for women is the *Sex Discrimination Act 1984* (Cth). The Commission explained why it is inadequate to ensure equality for women before the law. It recommended amendments to that Act to strengthen its operation:

- a general prohibition of discrimination in accordance with CEDAW article 1

- a simpler definition of indirect discrimination which lists the factors to be considered in determining reasonableness in the circumstances and makes it clear that the respondent must prove, on the balance of probabilities, that the condition or requirement imposed or proposed to be imposed is reasonable in the circumstances

- a power for the Sex Discrimination Commissioner, of her own motion, to investigate conduct that appears to be unlawful under Part II of the SDA

- a power for the Minister to formulate standards to further the objectives of the SDA

- a power for the Sex Discrimination Commissioner to report to the Attorney-General on investigations into organisations that fail to comply with standards

- a prohibition of discrimination against an individual on the basis of the identity of a spouse or other person in a relationship with that individual

- the amendment of section 33 providing for temporary special measures

- a power for the Sex Discrimination Commissioner to make a declaration that a measure is a special measure for the purpose of the SDA

- a power to join complaints of discrimination under separate federal acts to ensure consideration of the interrelation of complaints and an appropriate remedy if substantiated

- a power for the Human Rights and Equal Opportunity Commission (HREOC) to assist a person who wishes to make a complaint under the SDA to formulate the complaint and put it in writing

- a power for the Sex Discrimination Commissioner to publish, or otherwise make available, a public register of settlements reached in conciliation

- a power for the Sex Discrimination Commissioner to refer a matter directly to hearing where the respondent is a repeat discriminator

- a requirement that in making awards of damages for discrimination the HREOC and the Federal Court should have regard to awards made at common law or under statute as compensation for loss, injury or damage of a comparable nature and they should specify these factors in reasons.

The Commission also recommended the repeal of four exemptions in the SDA:

- s 13 which exempts the instrumentalities of States and Territories

- s 38 which exempts educational institutions established for religious purposes

- s 39 which exempts voluntary bodies

- s 42 which exempts sport.

1.29 ***Violence and family law.*** The Commission made a number of recommendations in Part 1 of this report on family law and violence. It recommended a series of amendments to the *Family Law Act 1975* (Cth) including

- in considering custody and access orders the court must take into account the need to protect the child from abuse, ill treatment or exposure or subjection to violence or other behaviour, in relation to the child or another person, which physically or psychologically harms the child

- violence should be taken into account in determining whether to require separate representation of children

- a child abducted from an overseas country should not be returned if there is a reasonable risk that to do so will endanger the safety of the child or the parent who has the care of the child[11]

- where the court is considering making an order that the parties attend counselling it shall take into account any allegations of violence or reluctance of a party to attend because of violence and the need to ensure the protection of a party.

The Commission also recommended

- training family court personnel in the dynamics of family violence

- improved procedures to ensure appropriate counselling where there is a history of violence

- that the Family Court or any court exercising Family Court jurisdiction under the *Family Law Act 1975* (Cth), when making orders for custody and access, take into account the existence of protection orders made under State or Territory legislation so as to ensure that the protection of women and children is not compromised

- that the recommendations in the Commission's report *Matrimonial property*,[12] that a rule of equal sharing should be the starting point in distribution of property, be adopted and that any formulation of circumstances in which the Court should depart from equality as a starting point should include a reference to the impact of violence on past contributions and on future needs

- that the recommendation in the Commission's report *Multiculturalism and the law*,[13] that the law relating to property disputes arising from de facto relationships should be uniform throughout Australia, be adopted.

1.30 ***Violence against women and immigration law.*** In Part 1 of this report the Commission recommended that violence against women be taken into account in developing and applying immigration law and procedures. It recommended

- training about the nature and effects of domestic violence to assist decision makers

- extension of the grant of permanent residency to temporary entrants who are subjected to domestic violence

- extension of the domestic violence provisions to include cases where there is evidence of violence or a real risk of violence by the sponsor against a child of the woman.

The Commission is concerned about serial sponsorship[14] and recommended that the Department of Immigration and Ethnic Affairs ensure, as a matter of priority, that data on previous sponsorships by an individual are collected and available to all posts from a centralised database. It recommended amendment of the *Migration Act 1958* (Cth) to allow the department to investigate spouses and fiances who sponsor immigrants and, where there is at least one prior sponsorship, any record of violence including personal protection orders and whether he has any criminal convictions for offences of personal violence. Where a prospective sponsor's record shows past violence or previous sponsorships, that information should be drawn to the attention of the applicant by a departmental officer in an individual interview in an appropriate manner.

1.31 ***Violence and women's refugee status.*** The Commission recommended guidelines for refugee decision-makers on the appropriate treatment of cases involving

- persecution of women by assault, sexual torture or sexual harassment arising from military or government officials or from private citizens

- persecution arising out of cultural practices or attitudes to women

- gender-based persecution arising out of social policies set by governments

- other instances of gender-based persecution

- the application of principles of state protection to these kinds of persecution.

It recommended a range of other measures to ensure equlity for women seeking refugee status.

1.32 ***Violence and criminal law.*** The Commission recommended that in the development of the uniform criminal code women's perspectives should be actively sought. This should include consultation with appropriate experts on those issues and re-examination of proposals on self-defence and provocation.

1.33 ***Violence monitoring unit.*** A Violence Against Women Unit should be established within the human rights area of the federal Attorney-General's Department. Its role should include annual reporting on the implementation of the National Strategy on Violence Against Women, the development and promotion of minimum standards to be met by service providers and through State and Territory legislation, and the promotion of a 'best practice' model for dealing with violence against women in the home.

1.34 ***Responses to Part 1.*** When Part 1 of this report was tabled and released the Attorney-General and the Minister Assisting by the Prime Minister on the Status of Women indicated that the Commission's recommendations would be considered in the context of the government's proposed access to justice statement late in 1994. The Commission's recommendations were discussed and endorsed, in part, by speakers at an Access to Justice Forum on 22-23 August 1994. On 29 July 1994 the Prime Minister announced that some of the Commission's recommendations on amendments to SDA would be included in a package of amendments accepted by the Government:

- inserting a preamble incorporating a general prohibition on discrimination and a statement proclaiming the equality before the law of women and men
- proscribing of discrimination on the grounds of potential pregnancy and removal of reasonableness as a defence to direct discrimination on the grounds of pregnancy
- extending the definition of the proscribed ground of marital status to cover the identity or occupation of the complainant's spouse
- simplifying the definition of indirect discrimination and shifting the onus to the respondent to justify the reasonableness of a discriminatory requirement
- confining the defence forces exemption to combat duty only
- moving the 'special measures' provision out of the exemptions Division of the Act and re-defining and relocating it in Part 1 dealing with the definitions of discrimination

Consultations

1.35 In preparing this report the Commission has contacted many organisations and individuals who made submissions to discuss further issues they raised. The Commission has also consulted with government departments, legal centres, judges, legal practitioners and academics, regulatory bodies of the legal profession, health and community workers, non-government organisations, representatives of the banking industry, and women's groups. Commission members and staff have participated in many seminars and conferences on women and the law. The Commission thanks all those who have generously given their time to assist the work. In particular, the Commission thanks the Faculty of Law, University of Technology, for releasing Dr Rowena Daw to work on this reference.

2. The gender of law

Introduction

2.1 ***This chapter.*** The Commission's terms of reference require it to 'report on Australian community attitudes on any difficulties associated with gender bias'. More recently the Senate Standing Committee on Legal and Constitutional Affairs requested the Commission to consider gender bias in the substance of the law. This chapter explores how gender has influenced the development of the law. Examples are given from submissions to the Commission, from cases, and from academic research.[15] The conclusions of this chapter are central to this report.

2.2 ***An issue of equality.*** The discussion paper (DP 54) said

> To the extent that it exists in the Australian legal system, gender bias should be regarded as a form of discrimination, systemic in nature which prevents women from enjoying full equality before the law, equality under the law, equal protection of the law and equal benefit of the law.[16]

Some laws which manifest gender bias are directly or indirectly discriminatory. In this chapter however the focus is on systemic discrimination. In Part 1 of this report systemic discrimination was described as practices absorbed into the institutions or structure of society which have a discriminatory effect.[17] The concept of systemic discrimination emphasises the most subtle forms of discrimination.[18]

What is bias?

2.3 The Senate Standing Committee on Legal and Constitutional Affairs report on *Gender bias and the judiciary* describes gender bias as stereotyped views about the proper social role, capacity, ability and behaviour of women and men which ignore the realities of their lives and result in laws and practices that disadvantage women.[19]

Law reflects the values of lawmakers

2.4 It is now increasingly acknowledged that the law is not a body of value free principles. Both judges and parliamentarians, as lawmakers, must make decisions about which needs the legal system will try to satisfy, which values will be endorsed by laws and which interests will be protected by laws. All of these decisions must be made by individuals who do not occupy a neutral position, but necessarily have a point of view. The law inevitably reflects the values, concerns and interests of the present and past lawmakers.

> When judges fail to discuss the underlying values influencing a judgment, it is difficult to debate the appropriateness of those values. As judges who are unaware of the original underlying values subsequently apply that precedent in accordance with the doctrine of *stare decisis*, those hidden values are reproduced in the new judgment - even though the community values may have changed.[20]

Women have been absent from lawmaking

2.5 The participants in the process of lawmaking as judges in courts, lawyers arguing cases, members of parliament and public servants drafting and enacting legislation have overwhelmingly been men.[21] In the process of lawmaking women's voices have been largely absent. The result of this longstanding exclusion of women from law is that the legislation and case law used by lawyers and judges has been developed by men, with their problems and concerns in mind, and they reflect men's perspectives on the world.[22] This includes their perspectives on women and women's roles.

Failure to accommodate social change

2.6 A different source of gender bias arises because the common law and often statutes are developed gradually over years and tend to reflect the values at the time of their initial formulation. Some current laws have as their underlying rationale values and beliefs about women's roles that are no longer generally accepted in Australia.[23]

> Judges must grapple with matters arising from significant shifts in social attitudes and expectations, as well as major technological change, all of which affect both women and men, but not necessarily in the same ways. There may thus be difficulties in applying apparently neutral legal principles and concepts to women's experience when, historically, these principles are based on a male experience of a social world from which women were excluded.[24]

An issue of fairness

> Women lack the confidence which, as citizens, they are entitled to have in the fairness of our major legal institutions.[25]

2.7 The fact that women have been excluded from the law making process[26] and the profound changes over time to women's and men's roles[27] impose a particular responsibility on the lawmakers, both judges and parliamentarians, to examine the implications of that change for the development of the law.

> The judges in modern society are not potentates: they are rather servants, servants of the people in the highest and most honourable sense of that term. The judge has a task, a more important task than ever before. It is precisely because of the importance of this task that the judge is expected to perform it well and efficiently, to be responsive and responsible.[28]

> We expect a great deal from our judges - we expect them to be objective, knowledgeable, independent, discerning, practical, sensitive and above all, we expect them to be fair. We expect this because judges have such an important and crucial role in society. They make decisions which affect peoples lives, their livelihoods, their safety and their humanity.[29]

Justice Gaudron has said:

> In a society such as ours where change is constant, where society is transforming itself and its institutions, those who practice the law and those who administer and enforce the law must look beyond their own life experiences if they are to know and accept the different perspectives of those who now invoke the law's protection or who answer to it for their acts and omission. They must look beyond their own life experiences if they are to administer equal justice.[30]

The inadequacy of the law's response to women's experiences, needs and perspectives is fundamentally an issue of fairness. For that reason, the law's inability to ensure equality and justice for women challenges the very basis of the legal system. Bias is whatever prevents the legal system being fair.

Gender bias has been recognised in the law

Academic and legal analysis

2.8 A large body of legal scholarship now documents the gender bias of law. Increasing awareness of the hidden gender bias in many of our laws is beginning to have an impact in the community[31] and in some Australian courts. In courts it tends to be confined to particular areas of law such as those relating to violence against women and family law, for instance, the obtaining of restraining orders.[32] In recent years feminist legal analysis has been directed to the 'hidden gender' of other laws that while gender neutral on their face, have a disadvantageous impact on women. In these less obvious areas such as tort, tax, company law and industrial law, a single gender outlook has affected the development of the law.[33] A detailed discussion of the body of jurisprudence is beyond the scope of this report but may be found in textbooks, monographs and articles published in Australia and overseas.[34] That many laws are gender biassed is now accepted internationally and is seen as a basic human rights issue. The recent United Nations World Conference on Human Rights stressed the importance of working to eliminate gender bias in the administration of justice.[35]

The North American experience

2.9 Concern by women lawyers and judges has led to studies of gender bias in the courts in the United States and Canada.[36] In 1982 in New Jersey, a task force appointed by the Chief Justice of the State Supreme Court investigated whether biases and stereotypes based on gender affected the court's application of laws or decisions.[37] The findings of that task force led other states to establish similar inquiries. In Canada widespread activity to identify gender bias has been continuing since 1989.[38] Various methods have been used to test for gender bias: surveys of judges and lawyers; individual and group interviews; public hearings and panel discussions; examination of court records; structured observation of courtroom and in-chambers proceedings; written submissions; regional and state wide bar association meetings; analysis of substantive

law, both statute and common law; and reviews of legal and academic literature on gender issues.[39] The results produced were consistent for many jurisdictions across the United States and Canada.[40] They revealed gender bias as a pervasive systemic problem[41] which affects their decision making in cases coming before them.

The Australian experience

2.10 ***Identifying gender bias.*** There have to date been no comparable studies of the Australian judiciary but many comparisons can be made between Australia and North America. There is growing acknowledgement that some judges in Australia still adhere to traditional views about the roles of women and men in society.[42] Several courts and tribunals have begun to implement judicial education programs. The Family Court of Australia and the federal Administrative Appeals Tribunal have taken a lead in this regard.[43]

2.11 ***The Commission's work: Discussion Paper 54.*** In the DP the Commission raised the issue of gender bias generally and in the contexts of economic life, employment, family life and relationships, violence against women, immigration and other issues. Many submissions were received. During the course of the reference gender bias has come under scrutiny in government bodies and courts throughout Australia.

2.12 ***The Senate Committee Inquiry on Gender Bias.***[44] The gender bias inquiry by the Senate Standing Committee on Legal and Constitutional Affairs reported in May 1994. It had been established following widespread media coverage of comments by a number of judges in sexual assault cases. It received submissions from almost all federal, State and Territory Courts, as well as from legal professional bodies and the community. To respond to its terms of reference, it conducted a survey of sexual assault cases and received evidence of cases, particularly from South Australia and Western Australia. The Committee concluded:

> To the extent an impression has been created that the publicised comments are in some way typical of overt prejudice on the part of the judiciary as a whole, it is a false impression ... However, the evidence has led the committee to conclude that a problem exists that is wider than a handful of cases.[45]

> The Committee considers that a significant number of the cases examined demonstrate the resilience in some jurisdictions of certain unconscious beliefs and stereotypes in cases of alleged sexual assault. The belief that women, for various reasons, concoct incidences of sexual assault still seems to be common among some judges. By adhering to these traditional statements, the rationale for which other judges have questioned, judges are potentially influencing the outcome of cases.[46]

2.13 ***The Taskforce on Gender Bias (WA).*** The Chief Justice of the Supreme Court of Western Australia submitted to the Senate Standing Committee that 'he had been convinced ... that there is a need for all judges, himself included, to be made aware of unconscious bias in decision making and of bias in the substantive law in its application to women'. He established a Taskforce to investigate gender bias in Western Australia.[47] The Taskforce found that 'systemic gender bias existed within our whole legal system', as shown by women's unequal access to justice and the system's lack of sensitivity to women's needs.[48]

2.14 ***Data Collection.*** Media interest in 1993 and 1994 largely focused on comments made by judges in criminal trials. This led to a debate about whether gender biassed attitudes were widespread. It has been difficult to reach firm conclusions owing to the practical difficulties of obtaining and analysing court records.[49] Gender bias could be more effectively detected and addressed if better information were available on the results of trials. Australian courts have had very rudimentary data collection systems but there have been serious efforts in recent years to provide computer based information services to monitor sentencing patterns, assessments and awards of damages and other results of proceedings. Such data should be collected so that information about gender is easily available. Analysis of the data could be undertaken annually and be made public so that courts are more accountable for their activities. In its Interim Report the Commission called for data collection to be enhanced through the National Women's Justice Program.

How gender bias works

Unquestioned assumptions can produce bias

2.15 Gender bias can affect the drafting of legislation by parliamentarians and the development of legal principles by judges. It can affect the treatment of women and their experience in the court process. This can happen consciously or unconsciously. Gender bias in the legal system can be unconscious, based upon attitudes and stereotypes that have not been actively questioned, rather than on deliberate decisions.

> For effective reform, the focus should not be on what some individual judges have said on particular occasions, but on gender bias in the legal system itself. Bias of any sort can arise in statute law or in decisions of appellate courts, particularly outdated decisions which no longer reflect community standards but which have not yet been challenged. It may be inculcated through the law taught in law schools. It may be reinforced through attitudes prevalent at the Bar. It may reveal itself in resort to antiquated and inappropriate gender myths and stereotypes when judges sum-up to juries. It is a real, significant, but largely unconscious problem.[50]

Bias in the courts and tribunals

2.16 ***The role of judges.*** Gender bias can affect the treatment of women and their experience of the court process[51] and it can lead to unfair results. Deciding a case in the courtroom involves settlement of the dispute between the parties and a decision about the application of a law. Judges have the ultimate control over this process. They determine what evidence can be given under the rules of evidence. They may direct barristers on how to present their cases. They can affect the performance of witnesses and the views of a jury through their demeanour or their behaviour. Where there is a jury, their summing up has a great effect on the jury's final decision. Although the courts have a system of appeal, the conduct of the original trial and the decision of the court at first instance may in fact be the end of a matter.[52] A right of appeal to a higher court is not always available or the exercise of the right might simply cost too much. Women, who on average have less access to financial resources than men, may be disproportionately excluded by the high costs of legal, particularly appeal, proceedings by this.[53] Although tribunals are more informal than courts, similar issues arise in their operation.

2.17 ***Credibility***. Gender bias may include a lack of credibility given to women as witnesses. In submissions to the Commission women repeatedly claim that they lack credibility in the courtroom.[54] Their experiences ranged from being humiliated or patronised to being disbelieved or simply not understood. This was seen to relate to their gender.

> *Whilst the veteran is living the wife rarely gets the opportunity to give evidence ... When she does she is usually patronised, blamed for wanting him to be sick. Her evidence is discounted*.[55]
>
> *I feel I have become a liability for my family because I tried as a woman to handle this matter, when in fact my husband would have been much more successful because he would have been at least acknowledged by being male*.[56]

Bias in law

2.18 ***Stereotyped assumptions affect lawmaking***. Courts and parliamentarians may use stereotyped notions or assumptions about what is expected behaviour by women and men and what their roles are. The cohabitation rule in social security law, for example, demonstrates a belief that women are expected to be dependent on men and men are expected to support women.[57] Other examples are the belief that a woman's sexual experience is relevant in a rape trial,[58] that when a woman says no, she means yes,[59] or that women provoke domestic violence.[60] The effect of these stereotypes can be aggravated by other factors such as age or cultural backgrounds. For example, the first part of this Report discussed the stereotypes applied to women of non English speaking background.[61] In submissions to the Commission, older women report that participants in the legal system held demeaning opinions about them.[62]

> *The Magistrate ... turned to [the defendant] and said 'a lot will depend on you as you are dealing with*

two elderly ladies and it is said they get more eccentric as they get older'.[63]

2.19 ***A case history.*** In a recent South Australian case, a 16 year old girl was injured in a car crash. Her injuries were so severe as to make it impossible for her to work. Her family ran a plumbing business in which she had already taken a small part. Her older brothers were all qualified tradesmen and the trial judge had made the assumption that the young woman would follow her mother's role as the effective business manager of the concern. The Full Court[64] had

> considerable difficulty with His Honour's view that she ... would take her mother's place and receive remuneration through a share of the profits. Although the business has expanded considerably it now has to provide income for the respondent's three brothers. None of them are married and two were living at home with their mother at the time of the trial.

This observation perpetuates the family breadwinner notion of wage fixing. It proceeds on the footing that a young man will marry and have to support a family single-handedly with the corollary presumably being that a young woman will marry and be supported. The Full Court saw young men needing more income than young women. This view had a significant impact on the award reducing it by $150 000.[65]

2.20 ***Devaluing women's contribution.*** Gender bias can include laws and decisions that devalue the social contribution of women. Unpaid work is sometimes regarded as being of little value.

... (T)he respondent [husband] paid the petitioner [wife] for any work she did for him in the way of correcting manuscripts and proof-reading, etc. (ie about $30.00 per week housekeeping money.) Whilst she used this money for household purposes, it came in the first place from the respondent's earnings. Accordingly, it can fairly be said that almost the whole of the respondent's earnings were produced as a result of his own efforts.[66]

This attitude has been reflected in various areas of the law, such as family law, tort law and equity. Gender bias has also been said to arise in custody decisions. For instance, one submission to the Commission claimed that Family Court judges sometimes underestimate the complex tasks involved in child rearing and assume too readily that one custodian can be easily replaced by another.[67] This might arise when the court orders a child's custody to be changed from the mother to the father if, in fact, the father's new partner will take on the child caring role. The assumption that one 'primary care giving' parent can replace another appears to undervalue the role of carer and ignore the skills and experience of childrearing. Gender bias arises in devaluing skills involved in women's unpaid and paid[68] labour.[69]

2.21 ***Failure to acknowledge women's perspectives or experience.*** Part 1 of this report discussed the significant variance in the political, social and economic status of men and women in Australian society.[70] Gender bias may be expressed in the law when it fails to take into account the fact that women's experiences are different in some respects from those of men. This is another way to explain the failure of the law to provide proper regard to the role of unpaid work. This can include a failure to understand underlying disadvantages. For example, the law of provocation has used male experiences as its basis and until recently has not acknowledged that women's experience of violence might be quite different to that of men. The courts may fail to understand how the experience of being financially dependent on a man may affect a woman's behaviour[71] or how a sole parent may need to adopt certain strategies to survive. According to the findings of one submission to the Commission[72] the judge may ascribe self-seeking motives to women who are in fact sacrificing their interests to those of their spouse or child or, as other submissions complained, because the judge simply could not comprehend the life experience and view point of a woman who was poor, and had young children to support.[73] The law may also fail to develop the concepts that relate to a woman's experience.[74] When these attitudes permeate the law they produce inequality.

Final report Part 1

2.22 In Part 1 of this report the Commission documented gender bias in family law.[75] It arises through the Family Court's failure to grasp the full relevance of violence against women in family disputes or indeed to

see it at all in some contexts. This might mean that the Family Court could order joint counselling when it is inappropriate or give a father access to a child when to do so would expose the mother and the child to serious harm. Submissions to the Commission report gender bias in the reluctance of law enforcement bodies, judges or police, to treat violence as a crime in the way that violence between men would be treated. In the case of refugee law gender bias was seen to originate in the International Convention in which refugee is defined in a way that is typically directed at men and tends to exclude persecution experienced by women. It was shown that the Australian immigration program goes some way to redressing that imbalance by its intake of women into other immigration programs. The Commission also addressed the issue of gender bias in the delivery of legal aid. The Commission reported on the present allocation of legal aid funding which unintentionally favours male applicants and the likely impact of the High Court decision in *Dietrich v R*[76] to increase the share of legal aid money that goes to men. The Commission made many recommendations for changes to law and practice in all these areas.

This report

2.23 The remaining sections of this chapter will focus on a more defined examination of a small number of examples of laws which are not obviously discriminatory but can be shown to be gender biassed in their impact. A more extensive examination of gender bias will be undertaken in later chapters. In particular, Chapter 13 will look at the situation of women who guarantee the borrowings of others, usually their male partner. This issue illustrates the difficulty the law has in dealing with transactions that are not conducted at 'arm's length'. Women are either typecast as passive and stupid, and for that reason relieved of liability for the loan, or their dependency is ignored, and they are treated the same as any other guarantor with the consequence that they lose their home. The chapter on farm women further illustrates the difficulty that our legal system has in taking into account unpaid work. Throughout the Report most examples have been chosen because the Commission received submissions claiming that the law had been unjust.

Exposing gender in some areas of law

Reasonableness

2.24 ***The reasonable man.*** A fundamental legal concept is the standard of reasonableness, which is the conduct of the 'reasonable man'.[77] Part 1 of this report discussed this concept in the context of defences in criminal law.[78] In the case of *R v Lavallee* where Ms Lavallee was being tried for the murder of her boyfriend who had abused her for many years, Justice Wilson commented:

> If it strains credulity to imagine what the ordinary man would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'.[79]

2.25 ***The reasonable person.*** Recently, as part of the general shift toward using gender neutral language, some courts have referred to the 'reasonable person'.[80] A number of commentators have questioned whether the substitution of the 'reasonable person' for the well-known reasonable man has had any effect in changing the content of the standard involved.[81] The reasonable person seems to have inherited all the male perspectives, experiences and views of the reasonable man.

2.26 ***The reasonable woman?*** Some recent decisions in sexual harassment cases have instead used a standard of a 'reasonable woman' to judge whether a particular woman has made out her claim of sexual harassment.[82] It has also been suggested that this standard be used to assess the defendant's conduct in torts cases.[83] In *Hall v Sheiban*[84] Justice Einfeld considered an allegation of sexual harassment by a nineteen year old woman against her sixty-five year old employer.

> I cannot believe that the respondent was serious or that the complainant would have taken him seriously. Clearly, a reasonable woman ... would not have done so ... Women with the normal experiences ... know very well the various ways in which men occasionally behave ... the statements clearly do not amount to sexual harassment.[85]

On appeal the full federal court disagreed with his assessment of what a reasonable woman would feel.

> The Commission's robust view of women's level of tolerance for harassment is not supported by the academic literature which points to common responses of anger, upset, confusion or sense of isolation following experiences of sexual harassment.[86]

In one comment on an early example of the reasonable woman standard, an American torts professor suggested:

> A reasonable woman standard may ... create the perception that the law allows 'special' treatment for women - that it lets them off the hook with regard to expected normal, human (that is 'male') behaviour. There is then a danger that stereotypes will proliferate of women as more sensitive, in need of special treatment, not reasonable like men, and not able to 'take it' according to the prevailing standards of the workplace. Rather than create a special standard for women ... we must constantly question and challenge the inclusiveness of the model underlying the assessment of the reasonable person.[87]

The distribution of property on divorce

2.27 ***Introduction.*** The Family Court has power to alter property interests between the spouses on the breakdown of a marriage.[88] In so doing, it takes into account the past contributions (financial and non-financial) to the property and to the welfare of the family, and it takes into account future needs of the parties. In considering future needs it may consider a wide range of factors.[89] While the Family Court has attempted to recognise the role of homemaker in 'a substantial way' it is well-known that the wide discretion left to the court in making property orders can mean that non-financial contributions of women's unpaid work are undervalued.[90]

2.28 ***Unequal living standards.*** After separation a wife and husband often have very unequal living standards. One party may take on principal responsibility for the care of the children. The circumstances of the relationship may have affected one party's earning capacity. In this regard women are disadvantaged more than men.[91] The present law does not deal clearly with this problem. A transfer of resources, property or income could help to balance the living standards of the parties after separation. A number of submissions illustrate the disadvantages women face in property settlements.

> *A maximum of fairness would suggest that both parties could expect an equal standard of living with equally good financial prospects for the future. It is certain that this in fact was the intention of the Family Law Act. Judge XX awarded the husband a standard of living six times better than that awarded to the children and me! He ignored the fact that the husband had access to the major financial assets (and had disposed of them), that the husband had received most of the chattels of the marriage, that the husband could expect a very generous pension on retirement whereas I would have nothing ... It follows that having been put in a hopeless financial position where I was expected to pay off the husband's debts, pay huge legal fees and maintain a home at the same time for at least five school age children, plus pay school fees, dental, medical etc on $43/person (a sum below the Henderson Poverty [line] for a family of six) and having received no share in the family assets other than about half the value of the family home, I naturally felt extremely distressed ... As I was willing (and the husband was not) to care for the children, it was not just to financially disadvantage me for this decision, which was in the interests of the greater community as well. On the marriage, I had given up the opportunity of pursuing a career and earning a high income; of having surplus money for investments; of enjoying an affluent lifestyle with paid holidays and of having superannuation for my retirement. I surrendered all these benefits and dedicated myself instead to raising a large family, believing the marriage to be a joint project. The marriage then having broken down by the husband's decision, I was not then in a position to pick up an unencumbered lifestyle. I still had the six children to care for as I was not prepared to abandon them. The small amount of capital I received, as my share of the jointly owned family home, could not be used for income-producing investments or for my own enjoyment, but had to provide accomodation for the children and myself. The husband was not willing to support the children financially ... I had to go into debt to supply the children with basic necessities.*[92]

Submissions call for legal principles to ensure equality of results for men and women, rather than division into equal shares. A focus on contributions to the marriage fails to take proper account of the

disadvantageous financial effects of marriage on women[93]and the standard of living they can attain after separation.

> *A home maker after giving most of her life to caring for a family raising child-ren, cleaning the home etc, should not be the one to end up losing her home with no chance of buying another ... Both parties should end up in a more equal in their position*.[94]

2.29 ***Responding to women's needs.*** This is one example of where the gendered impact of the law needs to be clearly examined and rules devised to take account of principles of gender equality. In Part 1 of this report the Commission recommended the implementation of its earlier Matrimonial Property Report.[95]

2.30 ***Matrimonial Property Report.*** This report[96] proposed a system of dividing property which involved a fair sharing of the economic hardship resulting from the breakdown of the marriage.[97]

> All the evidence leads to the conclusion that equal sharing of property at the end of a marriage is not necessarily fair sharing. A just sharing of property should be based upon a practical rather than a merely formal, view of the equal status of husbands and wives within marriage ... Thus, a just sharing of property should take into account any disparity arising from the marriage in the standards of living reasonably attainable by the parties after separation.[98]

2.31 ***Further reforms.*** Further reforms to property provisions of the *Family Law Act 1975* (Cth) are due to be introduced into Parliament in 1995. The Joint Select Committee Report,[99] the Government response to it,[100] and the recently circulated draft clauses[101] do not clearly address this issue. All these documents provide that equal contribution (and therefore equal shares) should be the starting point for, rather than the legal basis of, property settlements.[102] The circumstances in which the Court may depart from equal shares are different from and narrower than those in the *Matrimonial Property* Report. For instance the *Matrimonial Property* Report provides for the adjustment of the shares on account of a disparity between the standards of living reasonably attainable by the parties on separation if that disparity is attributable to the earning capacity having been affected by the responsibility for childcare and household management.[103] By contrast the proposed amendments refer only to future needs, restating some of the grounds in s 75 of the existing Act. In the enhanced status the draft clauses give to financial and property agreements between the parties they will, given the clear evidence of women's unequal bargaining power in family law matters,[104] take the law even further from an equality of result for men and women.

2.32 ***Inequity in superannuation.*** Superannuation has been a source of difficulty, inconsistency and injustice for women in family law. As superannuation has been held not to be property within the meaning of the *Family Law Act 1975* (Cth), the Family Court cannot direct that it be divided between parties.[105] However, it is a financial resource of the contributing partner and can be taken into account when dividing other assets of the parties.[106] The Court has had difficulty determining the value of this financial resource. Up to five different methods have been identified.[107] There is still no certainty as to the correct approach.[108] In part, the confusion stems from the fact that the law regarding superannuation has undergone considerable changes in recent times.

> There are other external factors which have had an influence upon the shape of superannuation benefits. These take place without consideration of the impact of those changes upon treatment of superannuation benefits. The consequence is that this Court is rather shooting at a moving target in this area as it continues to attempt to squeeze into a particular definition or concept a very important but changeable right.[109]

This lack of certainty causes particular hardship for non-contributing spouses, usually female partners, on separation. They do not have a clear basis on which to conduct their negotiations and may feel obliged to allow the status quo to remain. Many are unaware of their entitlement to have superannuation taken into account in property settlement.[110] Courts do not regard caring for children as a contribution to the other spouse's superannuation fund.[111] Submissions argue that a woman who cares for children of a marriage enables her former spouse to continue with his employment and contribute to his own superannuation fund. They point to the unfairness of lack of access to the non-custodial parent's superannuation.[112]

> *Both within and without of the marriage I was performing the role of caregiver to the children while my ex-husband was free of all responsibility ... so although I was not acting as a wife in the years*

> *after the divorce I was still very much part of his life providing the care his children required. I feel that ... I should be eligible to share in a percentage of that retirement income acquired both during the marriage and after it ended.*[113]

There has been considerable comment on this issue but little activity.[114] A government working party has now been established to consider more equitable ways of dividing superannuation on marriage breakdown.[115] It is proposed that the superannuation provisions will be included in a new draft of Part 8 of the Family Law Reform Bill to be prepared in late 1994. The fact that these issues are being addressed five years after the commencement of compulsory award-based superannuation indicates that women's concerns have not been treated as an integral part of the superannuation system.

The undertaking of unpaid work

The nature of 'work'

2.33 Work is generally analysed in law in terms of labour law, the law that regulates work in the marketplace, ie paid work, usually outside the home. But women's work takes a variety of forms in a variety of places, both inside and outside the home. Significantly, many areas of legal doctrine fail to treat as work the many tasks that women do for which they may not receive remuneration, despite research showing that women, including those in the paid workforce, continue to do the bulk of the work in the home.[116] Issues of unpaid work will be discussed at greater length in Chapter 11. Two examples of the way in which the way in which unpaid work is underrated by the law occurs in the law of trust and with respect to compensation for personal injuries.

The law of trusts

2.34 ***Introduction.*** The *Family Law Act 1975* (Cth) and the de facto relationships legislation in some States and Territories[117] give the courts the power to alter property interests on the breakdown of a heterosexual relationship. However some relationships are not covered by this legislation,[118] and sometimes property interests must be determined at times other than on the breakdown of the relationship.[119] In this case those interests must be determined by the law of trusts. This illustration will demonstrate that trust law still values financial contributions to property more highly than non-financial contributions, and sometimes refuses to recognise non-financial contributions at all. As women are more likely to make non-financial contributions than men,[120] trust law's preference for financial contributions operates in favour of men.

2.35 ***Registration is not a complete solution.*** Normally the owner of property is the person who is registered at a central registry. However, when the property is a family home, this registration does not always reflect the expectations of either or both parties to the relationship. For example, particularly amongst older couples, it is common for the man to be the registered owner, even though both regard the property as owned jointly. If a person has an interest in land but is not registered as an owner, then that person must rely on the courts to declare that he or she has an equitable interest. The courts can make this declaration on the basis of an express, resulting or constructive trust.

2.36 ***A recent case.*** A recent case before the New South Wales Court of Appeal,[121] concerned Margaret Moate, who was married for sixty years. During the marriage she worked on the building site during the construction of a family home, contributed the proceeds of a substantial inheritance towards the improvement of the home, and provided domestic services to her husband. She died shortly before her husband and left all her property to her brother. Her brother asked the court to declare that Mrs Moate had an equitable interest in half of the family home.

2.37 ***Resulting trust.*** The law of resulting trusts allows a court to declare an equitable interest when a person provides some or all of the purchase money for property, but is not registered as a legal owner.[122] In these circumstances a court will presume that the parties intended that the unregistered person would have an interest in the property, unless there is evidence that the money was intended to be a gift. The plaintiff in the case under discussion argued that Mrs Moate's provision of money and labour should give rise to a presumption that the parties intended that she would have an interest in the property.

2.38 ***Love and affection.*** All of the judges in the Court of Appeal agreed that Mrs Moate did not acquire an interest in her family home under the law of resulting trusts, because there was not sufficient evidence that the parties intended that she would have an interest.[123] The court will not rely on the fact that a wife has contributed money toward household expenses and performed domestic labour to raise a presumption that the parties intended that she should have an interest in the property.[124] Sheller JA said that '(t)he explanation of Mrs Moate's conduct subsequently [her performance of domestic labour] is more likely to be found in natural love and affection'.[125] Similarly, Samuels A-JA commented that 'the kind of things that Margaret did were done because they were the tasks which she had undertaken as her share of the marriage and did so without regard to whether or not these efforts would entitle her to any equitable share in the house in which they lived'.[126] Further, Sheller JA said that to raise a presumption that the parties intended the wife to have an interest, there must be conduct 'on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house'.[127] It has been pointed out that this test makes it almost impossible for a woman to rely on her performance of domestic work to raise a presumption that she was intended to have an interest in the home.[128] A more appropriate test would be 'did the woman expect that she would share in any property that was acquired during the course of the relationship?'[129]

2.39 ***Contribution at date of acquistion.*** Samuels A-JA went on to add that a resulting trust requires a financial contribution at the date of the acquisition of property.[130] Since Mrs Moate's financial contribution was after the home was purchased, she failed on this count as well. Neither financial or non-financial contributions made after the initial transfer of the property will be considered in determining the interest of the contributor. This is somewhat artificial in light of the common Australian pattern of small deposits and very long mortgages.[131]

2.40 ***Non-financial contributions not recognised.*** Samuels A-JA also pointed out that the doctrine of resulting trusts is restricted to financial contributions.[132] Domestic labour provided for the benefit of a wage-earner is not regarded as a contribution to the acquisition of property. On this point, Samuels A-JA said that:

> During almost the whole of their lives together, Margaret kept the house and George went to work. This is still not an entirely heterodox division of domestic functions and was far from unconventional during the late 30's ... Whether or not the way in which they lived together is desirable or is fair to the aspirations of women, or anything else of that kind, it was not unusual and her adherence to it does not distinguish Margaret as some kind of social heroine. More to the point ... it does not of itself entitle her to any equitable interest in her husband's property.[133]

2.41 ***Constructive trust.*** The old constructive trust doctrine required a plaintiff to show that the parties had a common intention that both parties would have an interest in the property, that the unregistered party acted upon this intention to her detriment, and that it would be unconscionable for the registered party to refuse to recognise the unregistered party's interest. Under this doctrine, Mrs Moate would fail because the court did not recognise that the parties had a common intention that she would have an interest. However the new constructive trust doctrine[134] does not require a common intention, but will be imposed when it is unconscionable for the registered owner to refuse to recognise the unregistered party's interest. It is not clear in what circumstances this refusal will be unconscionable. The plaintiff in Mrs Moate's case argued that it would be unconscionable for Mr Moate's estate to deny that Mrs Moate had an interest in her home after sixty years of domestic contributions.

2.42 ***The majority response to the 'new constructive trust'.*** Both judges in the majority refused to find that Mrs Moate had an equitable interest, but they did not reach this conclusion in precisely the same way. Sheller JA held that, regardless of the nature or value of Mrs Moate's contributions, it would not be unconscionable for Mr Moate's estate to retain the entire property on Mrs Moate's death.[135] In contrast, Samuels A-JA used a Canadian authority[136] to add a new pre-condition that the contribution of the unregistered partner must be causally related to the acquisition, maintenance or improvement of the property.[137] He held that Mrs Moate's domestic contributions did not meet this test. While Samuels A-JA says that either financial or non-financial contributions will be considered,[138] it is clear that domestic contributions are not regarded as contributing to the acquisition, maintenance or improvement of the property.

2.43 ***A dissenting voice.*** Kirby P, in the minority, held that it would be unconscionable for Mr Moate's executor to deny Mrs Moate's interest in the property. He noted the previous judicial decisions that acknowledge the economic value of domestic assistance,[139] and that allow non-monetary contributions to be

taken into account.[140] He held that it would be unconscionable for Mr Moate's estate to take the entirety of the property, in disregard of Mrs Moate's wishes as expressed in her will.[141] Kirby P argued that

> love and affection are all very well. But in the past, such emotions have often been used as a cloak to hide the proper claims of women on the assets of men.[142]

2.44 ***The gender in trusts.*** This example illustrates that trust law is not yet capable of recognising the contributions of women. The doctrines devalue domestic labour and ignore financial contributions made to the acquisition of property if they are not made before the exchange of title deeds. Commentators have expressed hope that the 'new constructive trust' will prove to be more responsive to the situation of women.[143] However these hopes have not yet been fulfilled.

Compensation for personal injuries

2.45 ***Different types of injuries.*** People are injured in their daily lives in different ways. The law provides remedies and compensation for certain kinds of injury at common law or under various statutory schemes, such as motor vehicle accident schemes, workers' compensation, sporting injuries schemes and crimes compensation.[144] While personal injury compensation laws are gender neutral in that the same rules apply to men and women, they do not necessarily have an equal impact on men and women. Gender differences might manifest themselves in one of a number of ways.

2.46 ***Gender differences in experience of personal injury.*** Overseas studies have found that women are less likely to contemplate the possibility of a legal remedy for their injuries, less likely to seek legal advice when they have a potentially compensable claim and less likely to recover damages for their injuries.[145] Even when women recover damages, the amount they receive is likely to be less than the amount a man would receive for a similar injury.[146] Women are also more likely to be the carers of people who suffer injuries.[147]

2.47 ***Gendered nature of injuries.*** The nature of injuries typically suffered by women and men might in some respects be qualitatively different.[148] Men experience the highest rate of injuries on the roads and at work, while women are more likely than men to suffer injuries in 'other situations', which include leisure or sporting activities, domestic accidents and criminal assaults.[149] Young men in particular, between 17 and 25 are disproportionately likely to be killed or seriously injured in motor vehicle accidents[150] and through participating in other risk taking behaviours.[151] Compensation for injuries arising from motor vehicle accidents and, to a lesser extent, compensation for other risk taking behaviours is more readily available than compensation for the kinds of injuries women are more likely to suffer. This is because they are backed up by compulsory insurance schemes.[152] Women disproportiontely suffer injuries in the home, such as a burn while cooking or a back injury while cleaning, where there is no-one to whom to attribute fault. Or they may be injured in their homes through the negligent or intentional conduct of someone who lives in their household and household insurance policies may exclude coverage for injuries in those circumstances.[153] Until recently, most crimes compensation schemes expressly took into account whether the victim was living in the same household as the offender and some did not allow recovery in those cases.[154]

2.48 ***Gender bias in damages assessment.*** The assessment of damages for personal injury raises a number of gender issues.[155] These include undervaluing loss of earning capacity damages for women through assumptions about women's lack of attachment to the paid labour market.[156] This will be discussed in more detail in Chapter 12.

Gender and contract law

2.49 ***Introduction.*** In this example, the apparently gender neutral operation of contract law is examined in relation to independent contractors. An independent contractor is engaged under a contract for services. Examples of workers engaged under this type of contract include the plumber who goes to a home to unblock a drain, and the physiotherapist who treats members of the public. Many female independent contractors, including outworkers in the textile industry, experience poor pay and working conditions.[157] It is argued that the needs of male independent contractors have been given priority over the needs of female independent contractors in the development of the law in this area.[158]

2.50 ***Employment law distinguishes between independent contractors and employees.*** In contrast, an employee works under a contract of service. Employees, unlike independent contractors, are entitled to sick pay, annual leave, long service leave, parental leave, superannuation and workers compensation. Employees can also take advantage of laws providing for termination and redundancy, and laws prohibiting unfair dismissal. Courts have attempted to distinguish between these two types of contracts for the performance of work[159] by using the control test,[160] the requirement of personal service test[161] and the integration test.[162] However it has been argued[163] that because these tests do not sufficiently distinguish between independent contractors and employees, the distinction is illusory,[164] and is maintained for the purpose of excluding certain workers from some benefits.

2.51 ***Reclassification of contractors as employees.*** There has been some reclassification of independent contractors as employees,[165] for the purpose of extending benefits to those workers. However, in deciding whether a worker is an employee or a contractor, the courts have asked whether the worker works at home or away from home.[166] A worker working away from home is more likely to be regarded as an employee. This test is gender biassed because most male contractors (transport and building workers, gardening contractors) work away from home, while most female contractors (family day care workers, clothing outworkers and private domestic workers) work at home.[167]

2.52 ***Statutory protection for contractors***. Industrial relations legislation in NSW, Queensland and South Australia allows independent contractors to claim protection from unfair contract provisions. In NSW these provisions have been used most heavily by transport workers, probably because transport workers are the only major group of independent contractors who may join unions in NSW. Federal legislation now allows independent contractors to become members of unions. This seems to recognise the difficulty for non-unionised workers in ascertaining and enforcing their rights. Because female independent contrators are more likely to work from home, they are more isolated from other workers and rarely join unions.[168] Labour regimes that rely on worker action to claim protection against unfair contract provisions will benefit men more than women.[169] The federal legislation also specifically excludes contracts for the performance of work 'for the private or domestic purposes of the other party to the contract'.[170] As much of this work is performed by women this exclusion has a discriminatory effect.[171]

2.53 ***Award coverage for contractors***. There are two common approaches to legal protection of workers, award coverage and judicial or other review of the terms of labour contracts. For isolated and disadvantaged workers, award coverage is preferable to the right to have contract provisions reviewed, because an award protects without requiring organisation on the part of workers. In NSW, the *Industrial Arbitration Act (1940)* allows the making of common rules for specified types of independent contractors. This is similar to award coverage. However, the independent contractor categories specified are those numerically dominated by men.[172] Women independent contractors are left vulnerable.

2.54 ***Laws tend to confirm the status quo***. If the provisions of a contract are reviewed under the federal legislation, a number of matters are to be considered.[173] One submission argues that the aim of the legislation is to preserve the status quo by preventing the replacement of employees by contractors.[174] It would be difficult to use the provisions to question current arrangements. Similarly, the *Lavarch Report* recommends that homebased workers be covered by the awards that apply to 'workers conducting similar work within regulated workplaces'. This recommendation would benefit some women but not those who do not do work similar to that done in the 'outside' workplace, which remains the standard.[175]

The need to incorporate women's experience into the law

2.55 ***Limitation of actions.*** Limitation periods are the time limits imposed by law in which a civil claim for damages may be brought. For lawyers, limitation periods are day to day legal practice issues and are apparently prosaic and gender neutral. Until recently, the law considered that a cause of action arises when the damage occurs, whether or not the person knows of the injury.[176] This caused obvious difficulties in relation to latent injuries, such as mesothelioma and pneumoconiosis. By the time a worker in a dangerous dusty environment knew of an injury, it was too late to bring an action because the limitation period, usually somewhere between three and six years, had elapsed. Legislation in the various Australian States and Territories now provides for a limited extension of time. For some types of actions, generally 'personal injuries consisting of disease or disorder' arising from 'negligence, nuisance or breach of duty', time begins to

run only when the person knew, or sometimes, ought to have known that they had been injured by the defendant.[177] The time period, however, is often shorter than the original time limitation.

2.56 ***Childhood sexual abuse***. This reform has been quite effective in dealing with dust diseases and other work-related injuries. However, it has proved less helpful in responding to claims for damages for childhood sexual abuse. Childhood sexual abuse is a harm suffered principally by girls, usually from a member of their family.[178] Many women do not realise that they have been abused as children until well into adulthood. The abuse of power by a family member in the private sphere both is more complicated from a psychological viewpoint and is generally clouded by a veil of secrecy which does not apply to work injuries. It may take a victim some years to acknowledge the abuse, and then take further time to connect current symptoms with that abuse, especially if the victim has been working hard, consciously or unconsciously, for years to repress it. In some Canadian jurisditions limitation periods have been abolished for sexual abuse victims.[179] Two overseas examples demonstrate the difficulty of applying limitation concepts developed for other injuries to sexual abuse.

2.57 ***Stubbings v Webb.*** A woman made a claim against her step-father and step-brother for damages flowing from sexual abuse in childhood.[180] The law allowed her to claim damages within five years of reaching her majority. However this date had already passed. The law also also allowed her to make a claim for certain categories of injuries within three years of knowledge of the damage.[181] However the court held that sexual abuse was in the legal category of a trespass to a person and did not fit into any of the categories covered by the law.[182] Consequently the target of sexual assault was left without any legal remedy. Rape was not a 'breach of duty' within the terms of the statute because, as Lord Griffiths said 'If I invite a lady to my house one would naturally think of a duty to take care that the house is safe but would one really be thinking of a duty not to rape her?'[183]

2.58 ***Court's lack of understanding.*** Even if sexual assault had been included in the categories covered by the law, the court did not accept that the plaintiff had known about her injury for less than three years before commencing her claim.

> In the present case the principal argument in the Court of Appeal focused on whether or not [Ms Stubbings] knew she had suffered significant injury over three years before she commenced her action ... The respondent's case was that although she knew she had been raped by one appellant and had been persistently sexually abused by the other she did not realise she had suffered sufficiently serious injury to justify starting proceedings for damages until she realised that there might be a causal link between psychiatric problems she had suffered in adult life and her sexual abuse as a child. The Court of Appeal accepted this argument ... If it was necessary to decide the point I should not have found it easy to agree with the Court of Appeal. Personal injury is defined ... as including 'any impairment of a person's physical or mental condition' and I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury.[184]

Lord Griffiths did not refer in his judgment to any expert evidence about the experience of survivors of sexual assault, or their ability to identify their experiences as a legally recognised injury. His judgment reflects his own difficulty in understanding the plaintiff's situation and denies the plaintiff recovery because of his lack of understanding.

2.59 ***Supreme Court of Canada.*** A Canadian court came to a different decision in *M (K) v M (H)*.[185] The appellant, who was a victim of incest, brought an action for damages against her father for abuse perpetrated by him against her from the time she was 8 until she left home at 17. She was successful in the Supreme Court of Canada where the issue of her equality rights was raised. That court had the benefit of intervention from the Women's Legal Education and Action Fund (LEAF), a feminist litigation organisation,[186] and considered an extensive body of expert evidence about child sexual assault in making its decision. The Supreme Court held

> the issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility of her childhood abuse, for it is then that she realises the nature of the wrong done to her.[187]

> The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and her injuries.[188]

2.60 ***'Breach of fiduciary duty'?*** The Canadian Court also held that child sexual assault could probably be characterised as a breach of fiduciary duty. The underlying concept behind breach of fiduciary duty is an

abuse of power. Since many women are harmed because of their lack of power in a gendered society, this category of law seems to capture that experience more readily than, for example, the more traditional categories of negligence or intentional torts. The Supreme Court of Canada stated

> It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship. Indeed, I can think of few cases that are clearer than this. For obvious reasons, society has imposed upon parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation. Equity has imposed fiduciary obligations on parents in contexts other than incest, and I see no barrier to the extension of a father's fiduciary obligation to include a duty to refrain from incestuous assaults on his daughter.[189]

The Supreme Court drew on traditional equitable principles but applied them to a new fact situation. A fiduciary is someone who is in a position of trust. Breach of fiduciary duty has traditionally been applied to financial relationships. However it is an apt description of the abuse perpetrated by someone who uses power (and breaches a position of trust) to abuse someone sexually.[190]

Reproduction and related issues

2.61 One final example of the gender in the law concerns reproduction. Several submissions dealt with this issue.[191] In relation to a woman's decision as to whether to have an abortion, Justice Wilson, then of the Supreme Court of Canada said:

> It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience ... but because he can relate to it only by objectifying it ... [T]he history of the struggle for human rights from the eighteenth century on has been the history of men ...[192]

LEAF was confronted with the difficult task of finding relevant legal concepts in which to describe the harm suffered by a pregnant woman whose full-term foetus died during birth due to the negligence of two midwives.

> Had women not been excluded from participation in the legal system, the unique relationship between the woman and her foetus and the experience of pregnancy in the life of a woman - hardly new facts - might have engendered their own fundamental legal concepts and doctrines, as elaborate as, for example, the doctrines dealing with the legal relationship between partners in a commercial venture or between employer and employee.[193]

Sterilisation, particularly in the context of young women with disabilities who have high support needs, is another matter relating to reproduction that has confronted Australian courts in recent years.[194] The decisions involve the courts having to confront menstruation, as well as fertility control. In one of the reported decisions, where an application had been made to the Family Court for the sterilisation of a young woman for 'menstrual management purposes', Cook J said:

> It is obviously a matter of concern that a woman, whether young or old, may well suffer distinct embarrassment and emotional trauma if, unable to manage menstruation, sudden bleeding takes place in a public, or even private situation. Our society is full of taboos, and attitudes and perceptions about menstruation is not the least of such taboos.[195]

Legal issues arising from reproduction raise concerns uniquely applicable to women. They indicate the difficulty of fitting women's experiences into a legal system designed to respond to men. The examples discussed earlier in this chapter illustrate a related, but distinct phenomenon: the gendered effects of what are otherwise apparently gender neutral doctrines.

3. Understanding equality

Introduction

3.1 This chapter discusses the need for a comprehensive legal response to women's inequality. It examines three different approaches to the concept of equality and their implications for women's equality before the law. It presents case studies which illustrate the application of the different approaches. It concludes with the Commission's views on a practical approach to equality and explains how it would apply to the law's treatment of women.

The need for a contemporary approach to equality

Women's inequality

3.2 ***Social inequality.*** Part 1 of this report documented the unequal position of women in Australian society. It discussed

- women's relative poverty and inequality in the work force in terms of pay, status and conditions
- how women's contribution to the economy in the form of unpaid work is undervalued
- women's lack of personal security because of male violence against them
- women's lack of direct political power and of general power in decision making
- women's precarious position as social security recipients, particularly as sole parents
- women's problems in obtaining access to financial resources
- the role of the media in reinforcing demeaning images and stereotypes of women
- recent evidence that the position of women is not improving.

3.3 ***Inequality in the law.*** This evidence is a backdrop to the evidence of women's unequal treatment before the law.

- Women face more difficulty than men in obtaining legal advice and legal representation: legal aid is less available for their legal problems; they are not equally served by general legal services; court facilities and processes do not take account of their needs.
- The law does not adequately protect women from the violence they suffer from men. This creates and perpetuates inequality. Women under the threat of violence cannot find out about their legal rights, or enforce them, from a position of equality.

The systemic nature of inequality

3.4 Submissions received by the Commission and recorded in Part 1 of this report show that women's inequality is a systemic problem, not confined to only part of the law or of the legal system. The courts, the police and the law itself generally do not respond adequately or appropriately to women's needs or recognise and give due weight to women's experiences.[196] Chapter 2 of this part of the Commission's report indicates the systemic nature of gender bias in the content of the law and how it denies women equality in law.

What a practical approach must do

3.5 ***Provide a systemic response.*** The systemic nature of women's inequality calls for a systemic response. It is too widespread for a case by case approach to be either effective or cost efficient. Women, courts, law and

policy makers need a means to identify and overcome inequality. The concept of equality must address the structural basis of women's inequality. It cannot be satisfied with a mere absence of formal discriminatory or unequal treatment of women and men. It must be able to promote understanding of how the disadvantages suffered by women are created and maintained. It must be capable of exposing the relationship between social inequality and the law.

3.6 ***Respond to women's situations as a whole.*** The approach to equality must also be capable of addressing the diversity of women's experiences. It must be able to identify and respond to particular experiences of inequality, including the experiences of women who are from indigenous and non-English speaking backgrounds, women who have a disability or who live in isolated areas or who are elderly. In this way it must permit a response to situations of inequality that arise from gender and one or more other factors.

Approaches to equality

Introduction

3.7 ***Contemporary approaches.*** This section examines three contemporary approaches to equality and inequality in laws, policies and programs:

- 'formal equality', that is, gender neutral treatment
- the 'differences approach' which recognises that the experiences and requirements of women differ from those of men
- the 'subordination approach' which identifies injustice arising out of the unequal distribution of power between women and men.

Formal equality or gender neutral treatment

3.8 ***Treating everyone the same.*** One approach, known as formal or rule equality, sees equality as a matter of gender neutral treatment. Formal equality requires simply that women and men be treated exactly the same in all circumstances. This approach denies that there are any important, immutable differences between women and men.[197] It assumes that the creation of a level playing field, of itself, will achieve equality. It has been useful in combating some of the most overt examples of discrimination against women, such as denying women the right to vote or barring women from entry to professions or excluding married women from permanent employment. It is simple to understand and apply: no law may validly distinguish between women and men in any way.[198]

3.9 ***Deficiencies.*** The formal equality or gender neutral treatment approach has some important deficiencies in areas where women have been subjected to long term disadvantage.

- First, women and men have not historically been treated identically. Treating them exactly the same now may only reinforce the disadvantage that has flowed to women from past different treatment.
- Second, this approach takes the treatment of men as the yardstick for equality. It ignores difference even where it is relevant. It uses male experience and a male perspective as the benchmark without questioning that standard. This disadvantages women who do not conform to male-defined norms or who, for example, cannot or do not pursue career paths that resemble those of men. Women risk losing further ground when they fail to live up to the male standard.
- Third, this model has nothing to offer where there is no comparable male experience on which to base women's claim to identical treatment. It cannot respond to structural disadvantages faced by women. Indeed, it may further entrench those disadvantages. Unequal gender relations thrive when the rhetoric of gender neutrality denies their existence.[199]
- Finally, this model cannot accommodate the notion of indirect discrimination, recognised, for example, in the *Sex Discrimination Act 1984* (Cth) (the SDA).[200] Indirect discrimination occurs when a

rule or practice appears to apply to women and men in the same way but has the effect of imposing on women a burden that men do not face or an unreasonable requirement that men can meet more readily. In other words, proscribing indirect discrimination recognises that sometimes treating women and men identically can result in discrimination against women.

Anti-discrimination legislation on the whole takes a formal equality approach. However, it implicitly recognises the limitations of this approach and the need to move beyond it, for example, to prohibit indirect discrimination.

3.10 ***Submissions.*** A number of submissions criticise the formal equality approach and point to its inherent inadequacies as a model to achieve equality. They note that many laws and policies that rely on the model of gender neutrality 'are in fact gender blind', that is, the laws and policies ignore gender as a relevant characteristic.[201] Submissions suggest that the notion of formal equality is in fact a fiction as it ignores the social, historical and economic context in which women and men live.[202] It wrongly assumes that women and men start from the same position.[203] The male view of reality is not challenged or even questioned by this model of equality.[204]

The differences approach

3.11 ***Women's experiences are different.*** A second approach to equality recognises that women do not necessarily have the same experiences as men. It acknowledges women's differences from men. This approach suggests that women and men should not be treated identically in all circumstances and that women's differences from men need particular recognition. This differences approach legitimises laws and policies which apply specifically to women because of biological or socially constructed differences. Recognising differences between women and men, such as the capacity to bear children, can sometimes promote women's equality; for example, it assists in the provision of employment-related benefits such as maternity leave.

3.12 ***Deficiencies.*** While the difference approach has been of some benefit to women in some areas, it has also operated to entrench their inequality.

- First, differences between women and men have often been used to justify less favourable treatment for women. The difference approach seems to assume that differences between women and men will always justify different rules. In this way, women can be further disadvantaged because discriminatory practices will be justified by resort to women's differences from men. For example, this approach has been used to exclude women from certain jobs, such as in the lead industry[205] or as a prison guard.[206]

- Second, the differences approach can be used as little more than a variant of the formal equality or gender neutrality approach.[207] Both approaches use men as the benchmark. One requires women to be the same as men while the other stresses women's differences from men. Neither challenges male experience or characteristics as the standard from which women are measured. Emphasising women's similarity to or difference from men has the effect of distracting attention from the major issue of systemic inequality between women and men.[208] It can entrench the dependency notion.

Difference as such has not led to inequality for women but, rather, differences between women and men have been relied on to disadvantage women.[209] The disadvantage to which legal recognition of gender difference has led is the focus of the third approach, the subordination or dominance approach.

Subordination or dominance approach

3.13 ***Inequality in the distribution of power.*** The subordination or dominance approach analyses inequality not as an issue of whether women are the same as men or different from men but as the consequence of the relative distribution of power between women and men.[210] Its central issue is to address the fact that the sexes are not equal. It looks at laws, policies and practices to determine whether they operate to maintain women in a subordinate position. It resists the view that law is a neutral, dispassionate institution containing rational principles. The reality is that it is as 'irrational subjective concrete and contextualised as it is rational objective abstract and principled'![211] To apply this understanding of equality it is necessary to engage in

careful analysis of the reasons for a particular law or practice, including its historical origins and its current social and economic effects on women.

3.14 ***Focus on effects on women.*** This approach asks whether differences in treatment or in social conditions have led to women's inequality. It does not focus on whether some differences between women and men justify different treatment but instead looks at the effects on women of a particular legal rule or practice. For example, the fact that women and men have different reproductive capacities should not of itself lead to women's lesser social status and limited access to paid work opportunities. However, most jobs have not been designed to take account of child care responsibilities. Because caring for children has been seen as a woman's role, the effect has been to deny women appropriate work opportunities. This in turn has led to women occupying a subordinate position in the workforce. The subordination or dominance approach is concerned not so much with equal opportunities as with equal results.

3.15 ***Identifying harm or detriment.*** The subordination approach asks whether a practice or rule has harmed women or has been detrimental to them by obstructing the achievement of equality in a particular context. In some circumstances, it is convenient to assess this harm or detriment by examining the comparative situation of men. To this extent, in practice it might appear to be similar to the other models of equality, in that it too uses male experience for comparison. However, the subordination approach uses a different methodology from the other two models. It is less concerned with formal or abstract notions of rights or formal similarities or differences between women and men, and more with power imbalances between women and men.

3.16 ***Submissions.*** DP 54 asked how equality should be defined.[212] Most submissions that respond to the question endorse the subordination approach.[213] One comments that this approach represents the 'most practical and potentially effective' approach to equality.[214]

> *If gender and equality are approached as issues of power rather then merely of difference then the legal response to issues affecting women would be substantially different. The legal response would focus on the subordinating effects of laws and practices, and ask, what do women experience as the effects of these practices and laws. If differences are identified as the justification for the laws and practices then those differences would be examined to ascertain their meaning within a culture that has historically oppressed women. The focus then would be one of striving to redress the power imbalance between women and men*.[215]

Another submission says

> *Equality needs to be defined in terms of outcomes, that is, there needs to be a broad definition of equality which overcomes the limitation of formal equality before the law and its lack of recognition of historical and cultural factors which produce unequal results.*[216]

The approaches to equality in cases

Introduction

3.17 Three significant cases under anti-discrimination legislation illustrate the practical applications of these approaches to equality. They also indicate the different results that the different approaches can produce.

The Proudfoot case

3.18 ***Introduction.*** A challenge to women's health services by three men can illustrate the different understandings of gender equality and their implications.[217] The case was brought under the *Sex Discrimination Act* 1984 (Cth) (SDA) which provides remedies for discrimination in particular areas of public life.[218]

3.19 ***The challenged health services.*** On 20 April 1989, the then Prime Minister announced the establishment of a National Women's Health Program. It had five 'key action areas':

- improvement in health services for women
- provision of health information for women
- research and collection of data on women's health
- training of health care providers
- women's participation in decision-making on health.[219]

It also had a particular focus on the health needs of women 'most at risk - ageing women, women isolated by geography or non-English speaking or Aboriginal background, women with a disability'.[220] In response to this program, the ACT Board of Health and the Commonwealth funded the Canberra Women's Health Centre which is 'an incorporated voluntary agency providing information, education and referral services for women', although it provided no clinical services.[221]

3.20 ***The basis of the challenge.*** In 1990, three men, Dr Proudfoot, Mr Smith and Dr Henderson, challenged these women's health programs. They claimed that the programs discriminated against them and were therefore unlawful under the SDA. Dr Proudfoot and Mr Smith challenged any health service directed to only one sex, unless it was for sex-specific services, for example pregnancy. They said the services discriminated against all men in the ACT. Dr Henderson appeared to be complaining about the failure to direct sex-specific services to men as well as women or 'the alleged imbalance between the [health] services provided for women and those provided for men'.[222] Although there was some difference in the formulation of their complaints, the complainants' approach can perhaps best be characterised as a strict equal treatment approach: unless the services provided to men are exactly the same as the services provided to women, then there is discrimination against men.

3.21 ***The decision.*** The complaints were heard by the Human Rights and Equal Opportunity Commission (HREOC). HREOC was required to decide the case in accordance with the provisions of the SDA. It decided that under the SDA the health care services provided especially for women *did* discriminate against men. However, the services were saved by the exemptions provisions in the SDA from a finding that they were unlawful. They were either services which could only be provided to members of one sex (the s 32 exemption) or were 'special measures', services that had as one of their purposes 'to ensure that persons of a particular sex . . . have equal opportunities with other persons' (the s 33 exemption). On this basis HREOC decided that the services were not unlawful.

3.22 ***The approach of HREOC: the initial finding of discrimination.*** HREOC 's initial finding was that under the SDA the provision of women-only health services discriminated against men. In making this finding HREOC applied a strict equal treatment analysis. It had been argued that the male complainants suffered no disadvantage because the ACT Board of Health provided a generalist medical service (to women and men) at eight locations in the ACT, where the waiting time for an appointment was considerably less than the six week waiting period at the Women's Health Service. HREOC found that, even if there was no detriment to men in their inability to use the limited Women's Health Service, the mere denial of that benefit was enough to attract a finding of discrimination under the SDA. HREOC found that men would be excluded from the women's health services and that

> the mere fact that one person is refused a service while another person of a different sex is provided that service necessarily identifies less favourable treatment in respect of the provision of that service.[223]

This approach to discrimination does not take account of any difference that might exist between the health needs of women and those of men. It simply says that, if different services are available to women and men, there is discrimination under the SDA. HREOC *did* find that women and men have different health needs, taking account of the social and economic situation of women. HREOC made the following findings of fact in relation to women's health needs:

> [W]omen are significantly disadvantaged in their personal well-being and hence in their health. There are many socio-economic pressures - poverty, child care, single parenthood, lower wages, domestic violence, depression, drug addiction, etc - quite apart from child bearing and menopause which impact on the health of a significant number of women in Australia.[224]

It also found that 'the male model is dominant both in medical education and in practice'.[225] However, despite this, HREOC's initial conclusion was that to provide specialist services for women to redress these inequalities was discrimination under the SDA. It decided that, to assess whether women and men were in 'circumstances that are the same or are not materially different' as required by the legislation, the SDA required that differences 'referable to gender', that is, differences which occurred merely because of being a woman or a man, had to be excluded.[226]

3.23 ***The approach of HREOC: the subsequent finding of 'special measures'.*** HREOC decided that it could not take the difference in the health needs of women and men into account in considering whether there was discrimination. To do so, it held, would make irrelevant the provisions in the SDA which allowed for 'special measures' to redress inequality.[227] Under the SDA the question of special measures is considered after the question of whether there is discrimination. It presents special measures as discriminatory but lawful. Therefore, HREOC considered, a narrow approach, that is, formal equality or gender neutral treatment, should govern the initial question whether something is discriminatory or provides less favourable treatment. The inquiry into women's health status came only after an initial finding that the Women's Health Program was discriminatory.

3.24 ***An alternative approach.*** The concept of discrimination in CEDAW involves not merely different treatment, but rather imposing or maintaining a disadvantage. HREOC's interpretation of the SDA was not consistent with CEDAW. Under the subordination approach, the difference in the health needs of women and men would be taken into account as a threshold question. Women-only health services treat women and men differently but, given the nature of health services generally available, men are not disadvantaged by or because of them. Applying this approach in the Proudfoot case, there would be no finding that establishing women's health services discriminated against men.

3.25 ***ALRC recommendations in Part 1 of its report.*** Part 1 of this report recommended that the SDA be amended to ensure that special measures are not treated as a form of discrimination. They would be considered as part of the threshold consideration of whether there is discrimination at all. The Prime Minister recently announced that this recommendation would be implemented.[228]

The Wardley case

3.26 On occasions Australian courts have recognised difference but still found discrimination. On other occasions they have not. In one of the earliest Australian discrimination cases, Deborah Wardley challenged Ansett Airlines' refusal to employ her as a pilot.[229] The Victorian Equal Opportunity Board found that Ansett had excluded Ms Wardley because she had indicated an intention to have children and therefore airline regulations would have required her to be out of the workforce for substantial periods of time. The Board accepted an argument that discrimination because of potential pregnancy was discrimination because of sex. It did not accept that Ms Wardley's capacity to become pregnant placed her in a materially different situation from that of a man. The refusal to employ her was therefore unlawful discrimination. This decision reflected a formal equality approach but it permitted appropriately different results. Ms Wardley had not been treated on the same basis as a male applicant would have been treated. A woman's child bearing capacity was not relevant to the decision whether to employ but it was a difference to be acknowledged. It could lead to a result different for her than for a man, namely, a lengthy absence from work. To refuse on that basis to employ her, however, was discriminatory and unlawful.

The lead case

3.27 The lead case shows how the differences approach can be applied to justify the exclusion of women. In 1992 Mt Isa Mines challenged an attempt by the National Occupational Health and Safety Commission (NOHSC) to develop a lead standard that did not discriminate against women in employment.[230] Unacceptable levels of lead could interfere with reproductive capacity and damage foetuses and breastfeeding babies. The lead industry had therefore excluded women from employment, at least in high

lead areas. HREOC had been negotiating for some time with NOHSC to develop regulations that both protected the safety of all workers and did not discriminate against women. Mt Isa Mines challenged this approach. The Federal Court at first instance rejected the view that discrimination because of pregnancy, or potential to become pregnant, was discrimination against women. Instead, it held that any attempt to exclude women from the lead industry would be discrimination on the basis of health, which is not unlawful under the SDA.[231] Specifically, the court found that 'a woman who was seeking to become pregnant or a woman who was pregnant or a woman who was breastfeeding a child' was not in the same or similar circumstances to those of a man in the lead industry.[232] This aspect of the decision was rejected by the Full Federal Court on appeal. The Full Court accepted that discrimination on the basis of pregnancy (or the capacity to become pregnant) was sex discrimination.[233] The law could properly take account of women's situation.

What the cases show

3.28 These case studies show that inequality arises in different ways. Sometimes it can be quickly identified by applying formal equality principles. At other times a more detailed analysis is required, such as an analysis founded on the differences approach or the subordination approach. All three approaches have something to offer, depending on the circumstances. For example, formal equality was particularly useful in the past where the law denied women basic legal rights on the same basis as men. It lay behind the 1972 Equal Pay decision.[234] Although that decision has not led to women earning on average as much as men, it has improved the situation for women and provided an important symbolic victory for women.[235] [40] The differences approach has justified provision for maternity leave. The SDA is based upon the formal equality approach and to a lesser extent the differences approach. It is effective in responding to the more blatant instances of discrimination against women. The cases show, however, the inadequacy of existing anti-discrimination legislation to address the more systemic aspects of women's inequality identified through the subordination approach. For that, something more is required.

The Commission's approach

3.29 To achieve equality for women the law must be capable of responding to the situation and experiences of women. This requires the starting point to be the effects of a law, policy or program and its social context. For that legal analysis must move away from principles that require a superficial comparison with men to a more substantive understanding of equality as a response to economic, social and political disadvantage of women. The next chapter discusses how the law can provide a more comprehensive response to women's inequality based upon the subordination approach.

4. An Equality Act

Introduction

4.1 In this chapter the Commission recommends a federal Act to guarantee equality and discusses how this Act might work to assist women.[236] It describes how it could be implemented and recommends a series of provisions it should contain. An Equality Act would ensure that women's rights are fully acknowledged and protected in law. It would be a means by which women could challenge laws, procedures and practices that create or perpetuate inequality. It would affect the interpretation and development of the common law. Its underlying goal is to assist in transforming legal concepts to make them more responsive to the needs and concerns of women. These issues are discussed in this chapter and the following three chapters.

International obligations require a systemic response

The discussion paper

4.2 DP 54 asked how effective current laws are in ensuring human rights for women in Australia and in implementing fully Australia's international human rights obligations.[237] Most responses to this question considered that current legislation is not very effective at all.[238]

CEDAW

4.3 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[239] requires that the principle of the equality of women and men be embodied in national constitutions or other appropriate legislation and that 'through law and other appropriate means, the practical realisation of this principle' be ensured.[240]

> States parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.[241]

The *Sex Discrimination Act 1984* (Cth) was the Commonwealth's first response to CEDAW but it does not comprehensively address Australia's obligations under the Convention.[242]

Other international obligations

4.4 The International Covenant on Civil and Political Rights (ICCPR) provides that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.[243] Australia is required to prohibit discrimination and provide effective protection against it. The ICCPR also requires Australia to ensure the equal rights of women and men to the enjoyment of the rights set out in the Covenant, to adopt legislative or other measures necessary to give effect to those rights and to ensure that there are effective remedies for violation of those rights.[244] The main legislative response to the ICCPR is the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOCA) which provides limited protection for human rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires Australia to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights set forth in the Covenant.[245]

The present law is inadequate

Limitations of the Sex Discrimination Act

4.5 Part 1 of this report recommended a series of reforms to improve the effectiveness of the *Sex Discrimination Act 1984* (Cth) (SDA).[246] Some of these recommendations have already been accepted by the federal government.[247] However, the SDA, like other anti-discrimination laws at federal, State and Territory level, remains only a partial response to women's legal inequality.

- The SDA addresses only individual acts of discrimination within specified fields of activity for which a person may make a complaint.[248]
- It has a limited understanding of equality. It does not take account of the historical and contextual framework of disadvantage.
- It is unable to address the issue of violence against women as discrimination other than within the framework of sexual harassment.[249]
- It is unable to challenge directly gender bias or systemic discrimination in the content of the law.
- It concentrates on the treatment of individuals rather than the effects of laws.
- It cannot strike down rules or laws.
- It exempts areas from its operation.
- Its protection is only activated by making a complaint.

One submission says,

> *The right to freedom on the grounds of sex and sexual freedom cannot be protected by anti-discrimination legislation alone. There is a need to enshrine protection for women on the basis of gender in legislation other than anti-discrimination legislation.*[250]

Amendments to the SDA, as recommended in Part 1 of this report, can improve its effectiveness. However, even an improved SDA will be unable to address fully issues of women's inequality.

Limitations of the common law

4.6 The common law does not provide sufficient protection of fundamental rights and freedoms, even though some argue that it does.[251] The Constitutional Commission stated that 'faith' in the protection afforded by the common law as a safeguard of rights and freedoms 'is misplaced'.[252] The failure of the common law to protect human rights adequately has been demonstrated in the cases brought against the United Kingdom under the European Convention for the Protection of Human Rights and Fundamental Freedoms.[253] The UK has been cited before the European Court of Human Rights more often than other European nations for alleged infringements of human rights. In a number of those cases, actions that were lawful under the English common law were found to violate fundamental human rights.[254] The High Court is increasingly willing to interpret the Australian Constitution and the common law consistently with recognised rights.[255] However, there are limits to the ability of the judiciary to protect individual rights in the face of express legislation to the contrary or in the absence of a constitutional basis for doing so. Further, in general the judiciary has been reluctant to change or adapt common law rules to make them more appropriate to the community's contemporary concerns and values.[256] Many women believe that the law and the judiciary are unable to appreciate fully or acknowledge their experiences.[257]

The importance of statutory rights for women

4.7 The common law has generally been less effective than statute law in recognising and protecting women's rights.[258] A former Sex Discrimination Commissioner has commented:

> The first lesson is that women have had to rely on statutes for protection because the common law has generally failed to provide equal rights for them. For example, it is only by statute that married women have been able to hold separate property....Although most cases of...blatant discrimination in the common law have been removed by statute, discrimination in the treatment of women still exists. New language in a [statute] would signal a break with the past history of the courts' failure to support women.[259]

Recommendation

4.8 The common law is insufficient and unreliable in protecting women's rights. Existing statutes have provided important gains for women but they have failed to redress basic causes of inequality. Present law is inadequate. Something more is required to ensure women's equality in law.

Recommendation 4.1

The law should guarantee that everyone is entitled to equality in law.

Mechanisms for a guarantee of equality

Overseas approaches

4.9 ***Introduction.*** Every democratic, industrialised country except Australia has legal protection of rights, including the right to equality, of one kind or another.[260] This section discusses the approaches in some of these countries.

4.10 ***The Canadian approach.*** In Canada the right to equality is entrenched in the constitution, in s 15(1) of the Charter of Rights and Freedoms.[261] The equality right is not limited to the ground of gender but is defined with a non-exhaustive list of grounds.

> Every individual is equal before and under the law and has the right to the 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 of physical disability.

Prior to the adoption of the Charter there was an equality guarantee in the *Canadian Bill of Rights 1960*. This was an ordinary Act of Parliament. It was not entrenched. It provided for the right to equality in terms of 'equality before the law' and the right to the 'protection of the law'.[262] The *Canadian Bill of Rights 1960* is said to have had only a slight impact.[263] The Charter, by contrast, has the authority and effect of a constitutional provision. It binds all organs and levels of government. It invalidates inconsistent federal and provincial laws, policies and practices[264] and sets out a range of rights and freedoms. Its effectiveness has been enhanced because the equality provision built upon the experience under the *Canadian Bill of Rights 1960*.[265] The rights and freedoms articulated in the Charter are subject to reasonable limits in a free and democratic society[266] and derogation from them is possible.[267] The Charter also provides that measures designed to redress disadvantage do not infringe the right to equality.[268] Many of the Provinces in Canada have also enacted human rights codes.[269]

4.11 ***United States of America***. The United States also has a constitutional Bill of Rights. Like Canada's Charter, the Bill of Rights is a paramount law which invalidates inconsistent laws, policies and practices. The equal protection clause in the US Constitution has been used to strike down laws that discriminate against women.[270] However, the US Supreme Court's interpretation of the provision has been conservative and the provision has not had the broad effect that the Canadian equality guarantee has had.[271] Attempts to bring in an Equal Rights Amendment which would have prohibited States or federal government from denying or abridging equality of rights 'on account of sex' have not succeeded.[272]

4.12 ***United Kingdom and other European nations***. International treaties provide effective guarantees of equality for women in the United Kingdom and most other European nations.[273] The European Convention on Human Rights contains an equality guarantee which is enforceable through the European Court of Human Rights. Decisions of that Court are binding on European nations which must ensure compliance with the obligations under the Convention and the decisions of the Court. The United Kingdom has been the subject of a number of adverse findings from the Court and has altered its laws, policies and practices to comply with them.[274] Other equality obligations arise as a result of the Treaty of Rome establishing what is now the European Union. The European Union has begun to play a major role in the development of employment discrimination law in the Member States of the Union. Article 119 of the Treaty of Rome provides that each Member State must ensure observance of the principle of equal pay for equal work.[275] This provision covers all the compensation an employee receives and indirect as well as direct discrimination. It has been held to

impose positive obligations to introduce job evaluation principles that are themselves non-discriminatory.[276] The obligations under the European Convention on Human Rights and under the Treaty of Rome and later European Union treaties, laws and directives provide a basis for legal guarantees of women's equality in European nations.

4.13 ***Germany.*** Germany also takes a constitutional approach to the protection of rights, through its Basic Law. Article 3 of the Basic Law guarantees equal rights to men and women. That provision permits differences in treatment that are 'natural', that is, that can be justified on biological grounds or that are permitted as functional differences. Functional differences are narrowly construed. Many decisions of the Constitutional Court have struck down provisions that discriminate directly and indirectly against women.[277]

4.14 ***New Zealand.*** New Zealand enacted a non-entrenched Bill of Rights by Act of Parliament in 1990.[278] It was originally intended to be an entrenched law but it was not finally enacted in that form.[279] New Zealand does not have a written constitution. Because the Bill of Rights is an ordinary statute it can be amended or repealed at any time. It also has a limited effect on other Acts passed by parliament. No provision of any other enactment may be held impliedly repealed, revoked, invalid, ineffective or declined to be enforced by a court for non-compliance with the Bill of Rights.[280] However the Bill of Rights can be the basis for a challenge to actions not governed by legislation, for example, executive actions of the government or public servants.[281] The Bill of Rights does not affect private actions.[282] Section 19(1) of the Bill of Rights provides for the right to freedom from discrimination on a range of grounds, including sex. It recognises that measures taken to assist or advance disadvantaged persons or groups do not constitute discrimination.[283]

Possible Australian approaches

4.15 ***The discussion paper.*** There have been several previous attempts at the federal level to protect human rights through a constitutional or statutory Bill of Rights.[284] These generated some controversy which has continuing influence.[285] DP 54 asked whether there should be a constitutional or statutory guarantee to protect the right to equality against laws or government actions which discriminate against women.[286] Most responses to this question agreed that there was a need to protect equality but they differed on how it should be effected. Some submissions were opposed to both forms of protection of rights and freedoms. They asserted that international conventions do not represent concepts that should be applied in Australia and that the recognition of these conventions in domestic law infringes the democratic process.[287] This was a minority opinion. The majority of submissions favoured constitutional or legislative protection of equality.

4.16 ***A constitutional guarantee of equality.*** Most submissions supported the entrenchment of an equality guarantee in the Constitution, either on its own or as part of a Bill of Rights.[288] Constitutional entrenchment has obvious advantages. A constitutional guarantee would signify the importance of the principle of equality. As part of the Constitution the guarantee could not be easily amended or repealed, unlike an ordinary Act of Parliament. There are, however, formidable obstacles to amending Australia's Constitution.[289] The Constitution can only be amended through a referendum with the support of a majority of voters nationally and in a majority of States.[290] Australia's record of changing its Constitution through this process is poor.[291] Without support from both major political parties a referendum is likely to fail.[292] The Commission supports constitutional entrenchment of an equality guarantee but recognises the difficulty in achieving this. A constitutional guarantee of equality may be found by the High Court. Recently the High Court has identified certain implied rights in the Constitution,[293] but not an implied equality right.[294] The Commission considers that guaranteeing equality requires a more direct approach.

4.17 ***A statutory guarantee of equality.*** Many submissions supported a statutory guarantee of equality.[295] Although the Commission considers constitutional entrenchment to be the ultimate goal, it recommends, at this stage, an equality guarantee enacted in an ordinary Act of Parliament. Enacting the guarantee in an ordinary Act of Parliament 'would have the advantage of allowing the defined rights and freedoms included in the legislation to be tested in practice before being included in entrenched Constitutional provisions'.[296] For example, the drafting of the equality provision in the Canadian Charter of Rights and Freedoms built on the experience of the equality provision in the Canadian *Bill of Rights 1960*.[297] The Office of the Status of Women stated that constitutional entrenchment should be seen as a

> long-term goal only, and one which should be considered only after enactment of Commonwealth legislation containing an equality clause.[298]

Protecting equality in an ordinary Act of Parliament may also facilitate constitutional amendment. After a period of time an equality law would become better understood by all members of the community. Judicial decisions would enable people to see how it might support the democratic process. As understanding develops, a successful referendum may be more likely. A statutory guarantee can be a step towards an effective constitutional provision.

Constitutional validity of an Equality Act

4.18 ***International obligations.*** Under the Constitution the Commonwealth has power to enact an Equality Act. The constitutional validity of the Act would derive from the external affairs power,[299] because it would implement Australia's obligations under CEDAW, ICCPR article 2 and 26 and ICESCR.[300] The Equality Act need not implement precisely the terms of the international instruments on which it relies for constitutional validity: but it must be 'appropriate and adapted' to give effect to the terms of the relevant international instruments.[301]

4.19 ***Partial implementation.*** The Equality Act only implements part of Australia's obligations under the ICCPR and CEDAW. This does not affect the validity of the Act as an exercise of the external affairs power, provided the Act is consistent with the terms of the treaties.[302] The High Court has held that federal legislation which only partially implements an international treaty is a valid exercise of the external affairs power.

> Where a treaty obligation gives rise to a legislative power in the Commonwealth to perform the obligation fully and the Commonwealth chooses to exercise the power only to a limited extent, the validity of the law it chooses to make is not affected by its failure to exercise its powers and to perform Australia's obligations more fully.[303]

Recommendation 4.2

Equality in law should be protected through an ordinary Act of Parliament. The entrenchment of the Equality Act in the Constitution should be the long term goal.

Guaranteeing equality in law

The legal definition of equality in law

4.20 ***A broad approach.*** Chapter 3 discussed a number of approaches to equality. It indicated the need for a comprehensive approach to a systemic problem. The legal definition of equality in the Equality Act should respond to this need. The Canadian Charter of Rights and Freedoms provides the most comprehensive definition.[304] It presents an approach to equality based on equality before the law, equality under the law, equal protection of the law and equal benefit of the law.[305] The different terms represent different orientations to equality that together provide more comprehensive coverage. This definition has been tested in Canadian courts for nearly a decade,[306] and since 1989 a more progressive approach has emerged.[307] The Canadian legal system is similar to the Australian. Therefore, if the Equality Act were similarly expressed, Canadian jurisprudence would assist Australian parliaments, governments and courts in applying it. The Equality Act should, if necessary, also enable a wider response to inequality in order to address it more effectively. Equality in law should include the Canadian approach but not be limited to it. It should also, for example, reflect the provisions of CEDAW by including the full and equal enjoyment of human rights and fundamental freedoms.

Recommendation 4.3

The Equality Act should define 'equality in law' to include equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms.

4.21 ***Overriding inconsistent laws and actions.*** The Equality Act should apply to acts of government and the performance of public functions, powers and duties. It would therefore enable challenges to laws and government policies, programs, practices and decisions.[308] It should override inconsistent laws and actions. It

should apply to all areas of government and to all levels of government.[309] It should be possible to challenge laws and actions by seeking a declaration or an injunction from a court and through the ordinary range of administrative law remedies.[310]

Recommendation 4.4

The Equality Act should provide that any law, policy, program, practice or decision which is inconsistent with equality in law on the ground of gender should be inoperative to the extent of the inconsistency.

4.22 ***The context of inequality - Canadian experience.*** The recommended definition of equality requires a focus on the results or effects of a particular law or action, rather than on how women are treated. Results and effects must be analysed in context, not in the abstract. Equality provisions in overseas constitutions and legislation do not expressly require the examination of context. In Canada, the courts first interpreted the constitutional guarantee as requiring a formal equality or gender neutral approach.[311] In this way its application increased women's inequality. In 1989 the Canadian Advisory Council on the Status of Women published a report on the first three years experience of the equality provision.[312] This report revealed that, in the first three years, women had minimal access to the protection offered by the Charter.[313] Women had brought few cases under the equality guarantee and the cases that were brought by men tended to challenge legislative provisions that had been introduced which assisted women, for example sexual assault legislation, welfare benefits for single mothers and unemployment insurance pregnancy benefits.[314] The early years of the Charter equality provision did not promote an understanding of systemic inequality or disadvantage. The courts have recognised this. In the absence of legislative guidance on how to interpret and apply the guarantee, they have developed their own requirements to ensure that inequality is examined in context.[315]

4.23 ***The importance of context.*** Examining context helps to determine whether the challenged law or action contributes to securing or hindering equality and whether it promotes or violates the entitlement to the full and equal protection of human rights and fundamental freedoms, including the right to participate fully in the social, economic and political life of the community. A contextual provision in the Equality Act would overcome the problems identified in the early use of the Canadian equality provision.[316]

Recommendation 4.5

The Equality Act should require that in assessing whether a law, policy, program, practice or decision is inconsistent with equality in law, regard must be had to

- **the historical and current social, economic and legal inequalities experienced on the ground of gender**
- **the historical and current practices of the body challenged and the extent to which those practices have contributed to or perpetuate the inequalities experienced**
- **the history of the rule or practice being challenged.**

4.24 ***A general guarantee of equality?*** The Equality Act recommended by the Commission provides a remedy only for inequality on the ground of gender. The right to equality in international human rights law is not so restricted. The ICCPR recognises a general right to equality without discrimination 'on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[317] The Commission's terms of reference relate solely to women's equality. Recommending a general guarantee to implement Australia's international human rights obligations more fully would be outside its terms of reference. However the Commission acknowledges the strength of arguments for a general equality guarantee. Indeed a general guarantee would provide extra assistance to many groups of women. Part 1 of this report described how the disadvantage of many women is compounded by factors such as race and ethnic background, religion and sexual orientation.[318] Although the Commission considers it inappropriate in this reference to recommend a general guarantee, it draws this issue to the Government's attention in considering this report.

Benefiting women and men

4.25 ***The principle of equality in international conventions.*** In recommending legal protection of equality on the basis of gender the Commission has had to consider whether the provision should be for the benefit of women alone or for the benefit of both women and men. The human rights conventions to which Australia is a party declare the equality of all people, both women and men. Although CEDAW is concerned with the specific problem of women's inequality and discrimination against women, it was introduced into an environment where the general principle of equal rights and freedom from discrimination was already recognised in major international instruments such as the ICCPR.[319] CEDAW recognises that overcoming discrimination against women requires something more than a basic principle of equality and non-discrimination.[320] It obliges governments to take special measures to advance women's equality, rather than simply prohibiting discrimination. It also requires governments to act against private discrimination. CEDAW's goal is to ensure that women achieve de facto equality with men in all public and private fields.[321] It also requires States Parties[322] '[t]o embody the principle of the equality of men and women in their national constitutions or other appropriate legislation'.[323]

4.26 ***An issue for women and men.*** The equality of all persons is a fundamental ethical and legal principle. It is applicable to all and cannot logically be confined to any one group. Equality should be able to take into account measures that assist both women and men.

4.27 ***Goal is to address the disadvantage of women.*** Women in Australia have longstanding experiences of inequality and disadvantage in the content and application of the law. The Equality Act should therefore be directed primarily towards their needs. Its object should be to assist women to overcome inequality and disadvantage. This object should be central in defining the scope of the Act. This does not mean that men should be denied recourse to the Act.

4.28 ***Recommendation.*** Equality is one of the bases of human rights law. It should not be compromised. Although the main objective of the Equality Act should be to advance women's equality, the very nature of equality is that it includes everyone, women and men. It should not be guaranteed for women alone. Men should not be excluded from raising equality rights where relevant. The definition of equality in the Act has been formulated to require a substantive understanding of the experience of inequality. The Commission has also recommended a specific provision to ensure that the social context is taken into account when the court decides any case in which equality rights under the Act are pleaded. This will ensure that measures to overcome inequality or disadvantage are not undermined. It will also prevent the Act from being used by men to cause further disadvantage to women. In this way an Equality Act benefiting women and men can still address the specific gendered experiences of women.[324] The Act recognises and responds to the present relationship between women as a group and men as a group.

Recommendation 4.6

The Equality Act should apply for the benefit of both women and men.

4.29 ***Broader interpretation.*** Equality protection for women alone could reinforce existing gender stereotypes[325] and make standards applicable to men the norm for comparison.[326] It could lead to a limited and narrow interpretation of equality. The courts may consider it inequitable to adopt an expansive view of equality for women that goes beyond the equal treatment model unless the law has general application. A gender specific Equality Act may operate to foreclose more substantive interpretations. An Act for women only creates a sex-based distinction and sex-based distinctions often work against women. On the other hand an Act that can be relied on by women and men and that places inequality in the context of disadvantage may have the effect of opening up new opportunities to advance women's status.

4.30 ***Men's use of the Act.*** Women may derive benefit from men's ability to use an Equality Act. Important Canadian cases that have benefited women have been brought by men.[327] Men's cases also provide opportunities for women's views to come before the courts. For example, the landmark Canadian case *Andrews* was brought by a man and did not concern equality on the ground of sex. However, it provided an opportunity for LEAF, a women's advocacy group, to intervene to submit that the Supreme Court should 'formulate statements about the nature of equality rights embodied in the Charter which would have an

enormous impact on women and their Charter rights'.[328] A majority of the Court accepted LEAF's interpretation of inequality as a systemic problem. The decision in *Andrews* improved the understanding of equality.[329]

The effect of an Equality Act

4.31 ***Introduction.*** The Equality Act will be a positive legal provision to override laws, policies and practices which disadvantage women and to ensure that the courts interpret and apply all laws consistently with women's legal right to equality in all fields of activity. It will impose positive obligations on legislatures, governments and courts to advance women's equality. It will also be a negative check on laws, policies, programs, practices and decisions.

4.32 ***Preparing and enacting legislation.*** The Equality Act will be a guide to those preparing and enacting new legislation and amending existing legislation. Parliaments will use it to scrutinise proposed legislation. Ministers will ensure that the laws they propose are consistent with it. Public servants will take it into account when advising Ministers about new legislation. The effect of the Act on the law making process in described in chapter 5.

4.33 ***Preparing and implementing policies and programs.*** Governments set policies and develop programs within the framework of laws passed by parliaments. These policies and programs are implemented by public servants. The Equality Act will override policies and programs that are inconsistent with it. It will require governments and public servants to develop and implement policies and programs consistently with it. The effect of the Equality Act on governments is discussed in chapter 5.

4.34 ***Interpreting, applying and developing the law.*** Courts interpret and apply the law, both statute law made by parliaments and common law developed by the courts themselves. The Equality Act will ensure that courts take women's right to legal equality into account when doing this. It will require courts to interpret and apply the law consistently with it wherever possible and to the greatest extent possible. It will also require that courts develop the common law in accordance with it. The effect of the Equality Act on the courts is discussed in chapter 6.

4.35 ***Affirmative action.*** The Equality Act will impose positive obligations. It will require affirmative action to be taken in some circumstances. This is recognised by the UN Human Rights Committee in its general recommendation on the interpretation of the right to equality in the ICCPR.

> (T)he principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.[330]

There is provision for affirmative action in CEDAW.[331]

4.36 ***Public and private litigation.*** The Equality Act will affect both claims against governments and claims against private individuals, though in different ways. The Act itself will be a basis for court action against governments and other public sector organisations. They will be required to act in accordance with the Act and any inconsistent actions will be open to challenge in the courts, through declaratory and injunctive remedies and other administrative law remedies.[332] The Act itself will not be a basis for action against private individuals or organisations. However, a party with an existing cause of action will be able to raise the Equality Act to support the case. For example, a party in a negligence case could cite the Act when arguing whether certain behaviour is reasonable or what damages should be awarded. This is discussed further in chapter 6.

4.37 ***Standing and intervention.*** The full potential of the Equality Act will be realised only if women and their advocates are able to bring their views and arguments to the courts. Court rules presently restrict those who can commence legal proceedings or intervene in legal proceedings. These rules mean that women's experiences and perspectives often do not come before the courts. This limits the opportunities for the courts to develop the law to take better account of women's needs. The Equality Act should assist in enabling women's views to come before the courts. It will require broader rules of standing to commence proceedings and of intervention. This is discussed further in chapter 7.

Interpreting the statute

Objects clause

4.38 The Equality Act should contain an objects clause which states the purpose of the Act. It should set out the aims, goals and visions of the Act. The objects clause should

- declare that women have a right to equality in law
- express the government's commitment to achieving women's equality
- recognise and affirm Australia's commitment to implementing the provisions of CEDAW
- state that the Act aims to address, so far as it is possible, violence against women as it is defined in the Declaration on the Elimination of Violence Against Women
- recognise and acknowledge diversity among women
- recognise the importance of and promote the use of special measures as a means of assisting women to secure equality
- promote recognition and acceptance within the community of the principle of the equality of women and men.[333]

Identifying violence as an equality issue

4.39 Violence against women has been a major issue addressed in the Commission's work on women's equality.[334] Violence violates, undermines and negates equality. The law's failure to deal effectively with men's violence against women denies women the equal protection of the law and the equal enjoyment of human rights and fundamental freedoms. Violence against women is a matter of international concern. It has been the subject of attention in the United Nations General Assembly, which adopted the Declaration on the Elimination of Violence Against Women in December 1993,[335] and in the Committee on the Elimination of Discrimination Against Women, which adopted a General Recommendation on Violence Against Women in 1992.[336] It is defined by the Declaration on the Elimination of Violence Against Women as

> any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[337]

Submissions to the Commission pointed out that violence against women directly relates to the inequality of women[338] and that the definition of equality must be able to encompass legal and other responses to violence against women.[339] The Equality Act should recognise the role that violence plays in creating and maintaining the unequal status of women.

Recommendation 4.7

The Equality Act should recognise that violence is an integral part of the inequality of women in Australia. The Act's objects clause should include the objective that the law respond more effectively to violence against women, as defined in the Declaration on the Elimination of Violence Against Women.

Extrinsic material

4.40 ***Use of extrinsic material.*** A broad approach to equality will require the courts to consider a range of material about women's perspectives and experiences. Courts may refer to extrinsic material as aids in interpreting legislation. Extrinsic material is defined in the *Acts Interpretation Act 1901* (Cth) as any material that does not form part of the Act that is capable of assisting the court in either confirming or ascertaining the

meaning of the provisions of the Act where there is ambiguity.[340] The *Acts Interpretation Act 1901* (Cth) requires that the provisions of an Act be interpreted and constructed in such a way that it promotes the 'purpose or object underlying the Act', whether or not that purpose or object has been expressly stated in the legislation.[341] This is known as a purposive approach. Under the Equality Act, the court may use extrinsic material to confirm the ordinary meaning of a provision by taking into account the context, purpose and object of the Act, or to determine the meaning of any provision that is ambiguous or obscure or where the ordinary meaning is 'manifestly absurd or is unreasonable'.[342]

4.41 ***Relevant extrinsic material.*** Extrinsic material may include any matters not forming part of the Act but published with it, relevant reports of a Law Reform Commission or Royal Commission, the explanatory memorandum, any relevant report of a committee of parliament, any international convention or instrument referred to in the Act, any speech made in either House of Parliament relating to the Bill, any document that is declared by the Act to be a relevant document or any relevant material recorded in Hansard.[343]

4.42 ***This report.*** The Commission's reports on women's equality before the law will be important extrinsic material to aid in the interpretation of the Act.[344] The conduct of this reference, the content of the reports and their recommendations are relevant to the interpretation of an Equality Act. This work can be very important for women, as the courts have tended to deny or ignore the contextual framework of the experience of discrimination. The reports discuss the prevalence of violence against women, the fact that women still receive significantly lower wages compared to men, the nature of Australia's highly gender segregated workforce, the incidence of sexual harassment in employment and other aspects of women's situation. They provide clear direction and explanation to the courts on the perspectives and experiences of women and the inequality that the Act is intended to address.

4.43 ***Explanatory memorandum.*** The explanatory memorandum accompanying the Equality Act should refer to this report and its analysis of the historical and current situation of women. It will explain the purpose of each provision in the Act.[345] In this way the context of women's historical disadvantage and subordination can be read in conjunction with the Act. The explanatory memorandum should also recognise the diversity among women and the fact that this diversity determines the different ways in which women may experience discrimination and disadvantage.[346]

4.44 ***International instruments referred to in the Act.*** The Equality Act should refer to CEDAW, the ICCPR, the ICESCR and the Declaration on the Elimination of Violence Against Women. These instruments will then be considered aids to the Act's interpretation.[347] This is important to support the statements of fundamental principle of the equality of women and men and the right of women to be free from violence in all its forms. These international human rights instruments could be schedules to the Act.

4.45 ***Data on and analysis of the situation of women in Australia.*** Applying the Equality Act with its broad concept of equality will at times require extensive data and analysis. The Australian courts, like their British counterparts, are less used to examining statistical and other data in reaching decisions[348] than are the courts of North America. The extent of the analysis required will vary according to the circumstances of each case. In many cases, a simple formal equality analysis will quickly identify an apparent inequality for women. In other cases, other simple approaches may establish a prima facie case of disadvantage or inequity. In some cases, however, the courts will be required to accept statistical and other data and undertake detailed analysis to determine whether there is inequality and how it should be addressed. For example, a court in Germany was called on to determine whether different aged pension ages for women and men infringed the constitutional equality guarantee. The court examined statistics of women's employment patterns over a 20 year period and predictions for the future. It decided that women in 10 years would no longer need extra protection under the aged pension provisions.[349] In applying the Equality Act courts should be able to take judicial notice of previous evidence of disadvantage so that information gathering requirements can be kept to a minimum.

Relationship with existing anti-discrimination legislation

Complementing existing approaches

4.46 Existing anti-discrimination legislation plays an important role in promoting women's equality. Part 1 of this report makes recommendations to improve the effectiveness of the SDA.[350] Even with these amendments the SDA would have limitations.[351] The Equality Act will go beyond existing anti-discrimination laws and also will complement them. It will provide in some instances an alternative method to address inequality. This complementarity is also seen in the Canadian legal system as Canada has both a constitutional guarantee of equality, in the Charter of Rights and Freedoms, and anti-discrimination legislation, generally known as human rights legislation, federally and in the provinces.[352] The Equality Act will not displace the SDA. The two laws will operate side by side in their own spheres. State and Territory anti-discrimination laws should do the same.

Operation of State and Territory anti-discrimination legislation

4.47 The *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth) both provide for the continued operation of State and Territory anti-discrimination legislation. For example the *Racial Discrimination Act 1975* (Cth) provides:

> This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.[353]

This provision was inserted in the Act in 1983 in response to a decision which invalidated a provision of the *Anti-Discrimination Act 1977* (NSW).[354] The provision prevents a finding of inconsistency between State and federal law on the basis that the federal law intends to cover the field to the exclusion of the States and Territories. However it does not provide protection to State and Territory legislation which is directly inconsistent with the federal law.[355] A similar provision should be inserted in the Equality Act to ensure the continued operation of federal, State and Territory anti-discrimination laws which further the objective of the equality of women and men.

Influencing anti-discrimination cases

4.48 Litigation under the Equality Act could provide a better understanding of equality and discrimination issues arising under anti-discrimination legislation. In Canada cases decided under the equality guarantee have had a positive influence on the approach taken in subsequent cases brought under the Provincial human rights codes.[356] For example, two significant decisions under the *Manitoba Human Rights Code*, *Brooks*[357] and *Janzen*[358] drew on the analysis in *Andrews*.

> The *Brooks* and *Janzen* decisions are positive and important legal victories for women in Canada. Although neither were Charter cases, they further developed the approach to discrimination articulated in *Andrews* and revised legal doctrine that previously reflected only male-defined norms.[359]

Expanding the roles of the SDC and HREOC

4.49 ***Introduction.*** Expanding the roles of the Sex Discrimination Commissioner (SDC) and the Human Rights and Equal Opportunity Commission (HREOC) would enhance the effectiveness of the Equality Act. They could use the Act either to commence proceedings or to intervene in a case. This would be a new role for the SDC and could benefit her in her administration of the SDA. It could lead to significant changes in the court's interpretation of the SDA and its application.

4.50 ***SDC could commence an action on her own initiative under the Equality Act.*** The SDA should give the SDC power to initiate a challenge under the Equality Act. At present only HREOC can commence cases to promote and protect human rights. The SDC cannot do so herself. If an Equality Act issue arises, even under the SDA, the SDC, as one of the seven members of HREOC, would be required to recommend to HREOC as a whole that it commence action.[360] HREOC has responsibilities under a number of laws and has limited resources. It is difficult for it to pursue every case arising under every one of its Acts. Giving this power directly to the SDC will avoid potential conflicts of priority and encourage more direct approaches to

resolving conflicts. The power could be used by the SDC to challenge laws, policies or actions which she considers contravene the Equality Act. Using the Equality Act to clarify the scope and operation of the SDA may well be a powerful tool for the SDC in advancing the protection against discrimination afforded under the SDA.

4.51 ***Intervenor role for HREOC and the SDC.*** HREOC has a function to intervene in proceedings concerning human rights issues where it considers it appropriate and is granted leave of the court.[361] 'Human rights' is defined in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) as the 'rights and freedoms recognised in the (ICCPR), declared in the Declarations or recognised or declared by any relevant international instrument'.[362] HREOC should have a broader power to intervene under the Equality Act. A useful model is the existing intervention provision in the SDA. It should be able to intervene to argue an issue concerning the equality of women and men as provided in CEDAW and the Declaration on Violence Against Women.[363] The SDC herself does not have any intervention powers, not even under the SDA. She should have direct authority to intervene in cases where she considers the Equality Act relevant and is granted leave of the court to do so.

Recommendations 4.8

The functions of the SDC in SDA s49 and of HREOC in HREOCA s11 should include powers, where the SDC or HREOC as the case may be considers it appropriate to do so,

- **to initiate a challenge under the Equality Act**
- **to intervene in a matter where the Equality Act is relevant and where leave of the court is granted.**

This would include proceedings involving issues arising under CEDAW or the Declaration on the Elimination of Violence Against Women.

5. The impact of an: Equality Act on government

Introduction

5.1 This chapter examines the impact of an Equality Act on the past and future work of governments, and in particular on the laws they make. It examines the relationship between the Act and State and Territory governments. It identifies the role of the Act as a rule of construction and a means of obtaining a declaration that a law is invalid. Finally, it discusses remedies that the Act will provide.

Binding all levels of government

Federal, State and Territory laws contribute to inequality

5.2 Submissions received by the Commission describe the experience of women in their dealings with federal, State and Territory governments and legal systems. They show wide variation in respect for principles of equality in different areas of Australia. For example, submissions reveal inequality in family law, immigration, social security and taxation which are subjects of federal laws. Submissions reveal inequality also in the criminal law, in the law of torts, in amounts awarded in crime compensation, assessment of damages and conditions in prisons, all of which are State and Territory issues. A number of States and Territories recognise this and have considered or are considering legislation to protect equality and other rights.[364]

The rights of the States

5.3 ***The rights and obligations of State and Territory parliaments.*** The Constitution sets out the powers that are exercisable by the Commonwealth. The powers of the States are concurrent with these and the States also exercise residual powers. Where there is an inconsistency between a Commonwealth law and a State law the Commonwealth law will prevail as a result of the operation of s 109 of the Constitution. The powers of the Territories are granted by federal legislation. Other federal legislation can override inconsistent Territory legislation at any time. Inconsistency may arise in three situations. First, where simultaneous obedience to both the Commonwealth law and the State or Territory law is impossible. Second, where one law takes away a right or privilege conferred by the other. Third, where the State or Territory law deals with matters that the Commonwealth law was intended to deal with exclusively.

5.4 ***The Commonwealth may not interfere with the functioning of a State.*** The power of the Commonwealth is limited in the extent to which it can interfere in the functioning of the States. This limitation is implied from the Constitution, rather than contained expressly within it. The federal parliament may not make a law that impedes the ability of a State to govern to such an extent that its functioning as a State is endangered.[365] A law that attempts to do so will be invalid.[366] There are few decided cases on this prohibition, and it is not clear how extensive the prohibition is. However it is not enough that the Commonwealth law merely adversely affects the State in the exercise of a governmental function.[367]

5.5 ***The effect of the Equality Act on States.*** It is possible that essential organs of State government would be affected by an Equality Act. It could have an impact on the legislation of States, the process of appointment of State public servants, and the way State courts perform their role. However the impact of the Act would be primarily on the exercise of State powers, which are not protected, rather than on the functioning of the essential organs of government which are protected.

All governments should respect rights and freedoms

5.6 All Australian governments should respect human rights. The Constitutional Commission stated that the rights and freedoms it recommended should apply to all levels and all spheres of government. There is 'no point in erecting a constitutional fence to exclude governmental intrusions on those rights and freedoms if that fence is a barrier only against the Commonwealth'.[368] The Constitutional Commission stated that a focus on State rights is both misplaced and misconceived and that a Bill of Rights would not operate to alter the balance of government powers between the States and the Commonwealth. Furthermore, to exempt the

States suggests 'that there is some immutable federal principle which ordains that States shall be accorded a facility to impair the protected rights and freedoms which is not accorded to the arms of the national government'.[369] Both the Constitutional Commission and the Law Reform Commission reject the existence of such a principle.

Recommendation 5.1

The Equality Act should apply to all laws and levels of government, Commonwealth, State and Territory and local.

Relationship with other federal legislation

Introduction

5.7 The legislation of Federal Parliament would be affected by an Equality Act. The Act would be applied to interpreting other legislation, including prior legislation. Subsequent legislation would be required to comply with the Act. These issues are discussed in this section.

The Equality Act as a rule of construction

5.8 The Equality Act should operate as a rule of construction. In interpreting laws, courts would then be required to seek an interpretation consistent with the Act so far as possible. In this way the principle of equality would be advanced in legislation. Such a rule of consutruction may also have the effect of saving the operation of legislation that may otherwise be held inconsistent with the Equality Act. The Act should provide that where an enactment can be given a meaning consistent with the Equality Act then that meaning will be preferred. A provision of this kind does not infringe the doctrine of separation of powers as it does not dictate to the courts how they should carry out their functions but rather serves to indicate to the courts the intention of Parliament in enacting an Equality Act.[370] Examples of such an interpretive provision can be found in the *New Zealand Bill of Rights 1990*, the draft Australian Bill of Rights Bill 1984 and the Australian Bill of Rights Bill 1985.[371] An interpretive provision, based on the model in the draft Australian Bill of Rights Bill 1984, could read:

> *Notwithstanding anything in any other law relating to the construction and interpretation of legislation, in the interpretation of -*
>
> *a) a provision of a Commonwealth enactment*
> *b) a provision of a State enactment; or*
> *c) a provision of a Territory enactment,*
>
> *a construction of the provision that would result in the enactment not being in conflict with equality in law, or that would further the objects of this Act, shall be preferred to any other construction.*[372]

The Equality Act should also require an interpretation consistent with equality in law to be preferred in the construction of an Act, Commonwealth, State or Territory, or of an Ordinance of a Territory, that authorises the making of an instrument.[373]

A husband and wife on divorcing after 20 years of marriage have a family property dispute under s 79 of the Family Law Act. The matrimonial home is owned by the husband and he alone is entitled to superannuation. The Act requires the court to make an adjustment that is 'just and equitable' taking into account the contribution of each party to the marriage. The Equality Act could be relied on to support the view that the homemaker's contribution should be assessed equally with the breadwinner's financial contribution. An argument based on the Equality Act would also assist the courts in arriving at fair methods of dealing with superannuation.[374] This would acknowledge that equal contribution to all the assets includes superannuation which was part of the earnings of the marriage. At the end of the marriage the spouse who did not accrue the superannuation has lost an expectation of a future retirement income which must be fully compensated.

Recommendation 5.2

The Equality Act should provide that legislation is to be given a meaning consistent with the Equality Act, wherever possible. This meaning is to be the preferred meaning.

Prior inconsistent federal legislation

5.9 The Equality Act should have the effect of repealing earlier inconsistent federal legislation. Normally, if the Federal Government makes a law that is inconsistent with an earlier federal law, the earlier law is impliedly repealed by the later law.[375] However, courts are reluctant to find that a later law has impliedly repealed an earlier one, and if it is possible to allow both laws to persist, the courts will prefer this construction.[376] In addition, a general law, such as an Equality Act, will not be held to impliedly repeal a specific law in the absence of express words.[377] The court will assume that the specific law is intended to address a special case and to act as an exception to the general law. An express provision should be included in the Equality Act to the effect that the Act is intended to repeal earlier inconsistent legislation, including specific legislation. This provision could be worded as follows:

> This Act is intended to repeal any inconsistent legislation that has been passed by the Commonwealth Parliament. In particular, this Act is intended to repeal specific provisions that are inconsistent with this Act, and such provisions are not to be regarded as exceptions to this Act.

Later inconsistent federal legislation

5.10 ***Introduction.*** The effect of the Equality Act on later federal legislation is more complex. As a general rule a parliament cannot validly enact laws which would bind a later parliament. This means that later legislation normally overrides earlier inconsistent legislation. The desired policy however, is that the Equality Act should operate notwithstanding later inconsistent legislation to the extent that this is possible for an ordinary Act of Parliament. To achieve this goal there should be mechanisms in the Act which limit the extent to which it can be impliedly repealed by subsequent legislation. There are two ways to achieve this, a derogation provision and a scrutiny mechanism.

5.11 ***A derogation provision.*** It may be possible to insert a provision in the Act that permits later federal legislation to override the Act only if the later federal legislation expressly provides this. This is known as a derogation provision.[378] Examples of derogation provisions can be found in the Canadian Charter of Rights and Freedoms, the Human Rights Bill 1973 (Cth), the draft Australian Bill of Rights Bill 1984 (Cth) and the Australian Bill of Rights Bill 1985 (Cth).[379] It is possible for legislation to provide that subsequent legislation must follow a particular manner and form if it is to override that existing law.[380] There are limits on the extent to which this may be done. The derogation provision in the Australian Bill of Rights Bill 1985 (cl 12) required that a subseqent Act intending to prevail over the Bill of Rights must use 'express words of clear intendment'. It did not require any particular method or format to be followed. It provided for the Bill of Rights to be inoperative to the extent of the inconsistency and for the length of time of the inconsistency if a subsequent Act did not derogate from its operation. If a subsequent Act did not employ 'express words of clear intendment' then that Act would be inoperative to the extent of the inconsistency and for the length of time that there is an inconsistency. A derogation provision included in the proposed Equality Act would require the Federal Parliament to state expressly in subsequent legislation if it intended to prevail over it.[381] The formal process of express derogation to make the Equality Act inoperative would establish a system of public accountability. Making the legislature consider the impact of legislation on women is in itself a desirable outcome.[382]

5.12 ***Operation of the derogation provision.*** A derogation provision should set out how an inconsistency between the Equality Act and the subsequent federal legislation should be resolved. The derogation provision should operate as follows:

- If the later legislation contains a specific provision that the Equality Act is not to apply to that legislation or any part of that legislation then the Equality Act is inoperative to the extent of any inconsistency and for the period of the inconsistency.

- If the later legislation is silent as to the Equality Act and is challenged under it and found inconsistent then the later legislation is inoperative to the extent of any inconsistency and for the period of the inconsistency.

Under a derogation provision both the Equality Act and the subsequent legislation are valid laws but only one is operative for the period in which an inconsistency exists.

5.13 ***Validity of a derogation provision.*** There are constitutional limits on the degree to which a parliament can prescribe manner and form requirements but the precise nature of those limits have not been tested.[383] However, it is argued that a derogation provision of the kind proposed would be valid.[384] Such a provision does not bind a later parliament but simply requires it to state its aim explicitly.[385] It may be that a clear intention to override the Equality Act, not made by way of an express statement, would be held by the court to be sufficient. The Senate Standing Committee on Constitutional and Legal Affairs considered the validity of a derogation provision in the context of a Bill of Rights.[386] It decided that although it was desirable to have a derogation provision it was inappropriate that a Bill of Rights should be a test case on its consititutional validity. It stated that it should be the practice of government to use an express declaration to override the provisions of a Bill of Rights. However, it did not consider it 'desirable' that a Bill of Rights should become a test case for an express declaration provision. As a result, the Committee concluded that a Bill of Rights should operate as a 'strong rule of construction'. It should only be displaced where there is a clear intention, express or implied, to do so and it should be the practice of Parliament to make an express declaration with a sunset clause.[387] The Human Rights Bill 1973, the draft Australian Bill of Rights Bill 1984 and the Australian Bill of Rights Bill 1985 adopted a similar approach.[388] The explanatory memorandum to the Australian Bill of Rights Bill 1985 states:

> while a future Parliament may derogate from the...[Australian Bill of Rights], it cannot do so by accident and it cannot do so in secret. Any derogation would have to be exposed to full parliamentary and public scrutiny.[389]

Furthermore, Parliament can repeal the Equality Act by explicitly stating that it is to do so.

5.14 ***A derogation to the Equality Act should be re-considered after five years.*** The Canadian Charter of Rights and Freedoms provides that derogation from the operation of the Charter may be made and is effective for five years.[390] A derogation may be re-enacted.[391] The benefit of time limiting the derogation is that a government must reconsider the need to make part of the Charter inoperative and must make publicly known that it intends to derogate from provisions contained in the Charter again. The time limit provides a useful focus to governments to examine how they can create laws which do not infringe the rights and freedoms contained in the Charter. A time limit on a derogation from the Equality Act may prove beneficial in the same way. It need not operate to repeal law, however. The objectives of re-consideration can be met by requiring in the Equality Act that the responsible Minister review any derogation from the Act after five years and report to parliament on the conclusions of the review.

Recommendation 5.3

The Equality Act should contain a provision which requires later inconsistent Commonwealth legislation to derogate expressly from the operation of the Equality Act to be operative. A derogation from the operation of the Equality Act should be reviewed after five years, or any lesser period declared in the legislation. The results of the review should be tabled in Parliament.

Inconsistent State and Territory legislation

5.15 The proposed Equality Act should apply to federal, State and Territory and local levels of government.[392] State laws, whether passed before or after the federal Equality Act, which cannot be given a meaning consistent with it would be invalid as a result of the operation of the Constitution.[393] The Northern Territory and the Australian Capital Territory should be treated as if they were States.[394] Their legislation would be affected in the same way as State legislation.

A man and woman marry and live together for 40 years. They have three children. The wife performs the homemaker role, the husband is the breadwinner. They own a house and furniture provided from his earnings during the marriage. The house is in the man's name. The man dies leaving all his property, including the house and all other assets, in his will to his favourite daughter. Because of the principle of testamentary freedom the wife has no right to his property unless she can make a claim under testator's family maintenance or family provision laws.[395] These in general require her to prove that he did not make 'adequate' provision for her 'proper' 'maintenance and support',[396] which as 'a wise and just man' he should have done knowing her circumstances.[397] For cultural and historical reasons, where property is not jointly owned the male spouse has been more likely to have legal title to it.[398] However, statistically, women outlive men and are therefore more likely to need inheritance rights. The wife is also likely to have made non-financial contributions rather than financial contributions and therefore to have limited rights of ownership in equity.[399] Moreover, she may by marriage have reduced her earning capacity[400] to contribute to the welfare of the family. With an Equality Act, in a claim under State or Territory testator's family maintenance laws, the woman could argue that the principles of 'proper maintenance and support' as a 'wise and just' testator should be interpreted to include recognition of her unpaid contributions to the property and her expectations based on her long term equal partnership with him and compensation for any loss occasioned by her marriage.[401]

Scrutiny of bills and regulations

A duty to scrutinise new laws for their effect on and consistency with the Equality Act

5.16 All existing and proposed legislation should be scrutinised for consistency with the legal guarantee of equality. The proposed Equality Act should operate as a guiding mechanism in the development of laws. It should also encourage governments to be more aware of measures in addition to the Equality Act which are necessary to advance the equality of women. Ideally it should have an effect at all levels of law making: in the cabinet process, in the parliamentary party process, in parliamentary committee, including the Senate Standing Committee on Scrutiny of Bills, and in the Parliament. It should encourage governments and policy-making bodies to establish appropriate consultation processes with women before proposed legislation is drafted. The impetus for wider consultation with women's groups will allow views of groups such as older women, Aboriginal and Torres Strait Island women, non-English speaking background women, rural women, lesbians, women sex workers and women offenders to be considered.[402]

5.17 ***Uniform Criminal Code.*** The Criminal Law Officers Committee,[403] which has representatives from federal, State and Territory governments, in developing a uniform criminal code considered the general principles of criminal responsibility including the circumstances in which a person should not be held criminally responsible for a crime.[404] The commentary in the Committee's report does not discuss the relevance of proposed defences to women's actions. If the Committee had been required to consider the proposed definitions in the light of an Equality Act it would have taken a broader approach to take account of women's experiences.

5.18 ***'Sudden or extraordinary emergency'.*** The Committee proposes that where a person has committed an offence in response to circumstances of 'sudden or extraordinary emergency' she or he should not be held to be criminally responsible.[405] The defence is to apply where the person reasonably believes that circumstances of a sudden or extraordinary emergency exist, that committing the offence is the only reasonable way of dealing with those circumstances and the conduct is a reasonable response to those circumstances.[406] The Committee did not consider how this defence is relevant to women, particularly those who have killed their violent partners. The Committee states that the necessity and the response are subject to an objective test. A woman may be in a violent relationship from which she has no reasonable prospect of release. For her the question of what is a sudden or extraordinary emergency cannot be considered in isolation from the series of events of which the event in question is a part. An objective test which excludes consideration of these factors or which ignores the circumstances of the relationship in deciding whether a response is 'reasonable' may not provide a woman who kills or injures her violent partner access to this defence. One submission to the Commission suggests that this provision holds some possibilities for women depending upon the

interpretation of 'emergency' and 'reasonable person'.[407] An Equality Act would ensure, first, that these issues are addressed in the process of law-making and, second, that the law is interpreted by the courts in a way consistent with the Act.

Present procedure and regulations for scrutiny of bills

5.19 The Senate Standing Committee on Scrutiny of Bills currently scrutinises bills for provisions 'which trespass unduly on rights or create ill-defined powers'.[408] DP 54 commented that it could also scrutinise bills for gender bias.[409] It asked whether the Senate Standing Committee on Scrutiny of Bills or another parliamentary committee should be required to scrutinise legislation for gender bias.[410] A number of submissions supported the idea of a committee to scrutinise bills for gender bias and gender implications.[411] One submission stated that this process would operate as a type of 'Gender Impact Statement...that formally analyses the impact, both direct and indirect on women and men of every piece of law drafted by a government department'.[412] An Equality Act would provide any committee that scrutinises bills with a concrete focus for their scrutiny. Simply requiring a committee to consider the impact of a proposed law on women will not necessarily assist them in detecting gender bias. The Commission considers that at present the Senate Standing Committee on Scrutiny of Bills is the most effective committee to carry out this function. It has established terms of reference to which the principle of equality could be added.

The Attorney-General should report on the consistency of legislation with the Equality Act

5.20 The *New Zealand Bill of Rights Act 1990* requires the Attorney-General to bring to the attention of Parliament on the introduction of a bill or as soon as practicable after its introduction[413] any provisions that appear to be inconsistent with the *New Zealand Bill of Rights Act 1990*. This process is seen as an improvement on the scrutiny of bills process previously employed in New Zealand, as it will ensure that the rights set out in the *New Zealand Bill of Rights Act 1990* are considered in the legislative process as guidelines to the making of laws.[414] This process is intended to 'alert' members of Parliament at the earliest posible stage that there are or may be inconsistencies in the bill so that parliament can then make a 'conscious choice...rather than an inadvertent oversight' whether to implement, amend or reject the proposed legislation.[415] In this way the relationship between a proposed bill and the equality guarantee in the *Bill of Rights* must be examined at the earliest possible stage. The Queensland Electoral and Administrative Review Commission (EARC) similarly recommended that the Attorney-General should report to Parliament on any bill inconsistent with its proposed Bill of Rights for Queensland.[416] A submission suggested, in discussing the need to scrutinise bills for gender bias and impact, that a gender 'impact statement' be developed at the initial stage of a bill's introduction to parliament as a method of scrutinising proposed legislation for its impact on human rights.[417]

Recommendation 5.4

The terms of reference of the present Senate Standing Committee on the Scrutiny of Bills should be extended to include the scrutiny of bills for compliance with the Equality Act.

The Equality Act should contain a provision that requires the Attorney-General to report on the compliance of a government bill with the Equality Act on the introduction of that bill to Parliament. The Attorney-General should be required to report on bills introduced by private members as soon as practicable after their introduction.

Effect on government policies and programs

Requiring the development of policies and programs that promote and protect women's equality

5.21 The Equality Act will require governments to develop laws, policies and programs that advance the equality of women. Governments will have to consider and respond to women's needs and experiences. Departmental officers will gain an understanding of gender bias. Such understanding should lead to closer scrutiny of departmental policies and programs. For example, the anomalies in immigration and refugee law and practice, discussed in the first part of this Report,[418] may be avoided. Similary, anomalies in health, education and employment law and practice would be scrutinised. The Act will support programs that

promote women's equality, such as the National Women's Justice Program recommended by the Commission. It will also provide a basis for laws that defend women's equality.

Butler was charged with a number of offences under the Canadian *Criminal Code*, namely the selling, possessing and exposing to public view of obscene material.[419] Butler challenged the constitutionality of those provisions of the *Criminal Code* on the basis that they infringed his Charter right to freedom of expression.[420]

The leading judgment considered the aims and objectives of the legislation and discussed in detail the provisions of the *Criminal Code* which prohibit obscene material.[421] The court considered that the aim of the provision was to protect society from harm. It concluded that material which sexual activity is combined with violence or crime or material which portrays non-consensual sex creates an environment which may harm women and children. Material considered obscene within the terms of the *Criminal Code* provision is material which dehumanises, degrades or potentially victimises women.[422] Obscene material may have the effect of making women feel targeted by the message of the material and may have a negative impact on attitudes to, and stereotypes about, women.[423] The prohibition in the *Criminal Code* 'seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other'.[424]

The Supreme Court of Canada held that, although the provisions of the *Criminal Code* infringed the Charter right to freedom of expression,[425] they must be considered a reasonable limit in a free and democratic society and therefore valid.[426]

The Charter equality guarantee[427] was not specifically relied on in this case. However, the Supreme Court specifically referred to the enjoyment of equality by women.

[D]egrading or dehumanizing materials place women...in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings.[428]

Overriding inconsistent policies and programs

5.22 One of the main objectives of the Equality Act would be to challenge policies and practices that violate the right to equality. It should override customs and practices that are inconsistent with it, to the extent of the inconsistency.[429] For example, policing programs that fail to give adequate attention to domestic violence would be required to acknowledge and protect women's rights.

Affecting both the public and private spheres

5.23 Confining challenges under the Equality Act to government actions, broadly defined, does not mean that its effect is solely in the public sphere. Government activity affects private life. For example, some organisations that are not strictly public (private nursing homes and private educational institutions) receive public funds and are governed by regulations. Any activity that falls under these regulations and that is contrary to the Equality Act could be challenged indirectly by a challenge to the regulation. Further, what is identified and categorised as either public or private has often been defined by 'state action'.[430] For example, the state plays a part in defining and entrenching traditional male and female roles.[431] This can be seen in the cohabitation rule in the *Social Security Act 1991* (Cth) which assumes that women are dependent on their partners.[432] Another example is that only particular types of family formations are recognised by law and different levels of protection are afforded to those that are recognised.[433] The Equality Act could be used to test measures based on these legally enshrined stereotypes of male and female roles.

Remedies

Introduction

5.24 A litigant can challenge administrative action by seeking a prerogative writ including certiorari, mandamus and prohibition and by relying on statutory remedies provided in the *Administrative Decisions (Judicial Review) Act 1977* (Cth). These remedies should also be available under the Equality Act.

Remedies under the AD(JR) Act

5.25 The AD(JR) Act provides a framework for the type of remedies that would be sought against a law or government action which violated the Equality Act. The AD(JR) Act provides a procedure for an order of review of an administrative action. It provides remedies generally corresponding to prohibition, certiorari, injunctive relief, declaratory relief and mandamus.[434]

> On an application for an order of review in respect of a decision, the Court may, in its discretion, make all or any of the following orders:
>
> a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;
> b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit;
> c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
> d) an order directing any of the parties to do, or refrain from doing, any act or thing, the doing or refraining from the doing, of which the Court considers necessary to do justice between the parties.[435]

The Commission proposes that these remedies should be available for a violation or proposed violation of the Equality Act. All of these orders will be useful remedies.

Challenging laws

5.26 A person or group whose right to equality has been infringed by a law should be able to apply to a court of appropriate jurisdiction for a declaration that the law is in conflict with the Equality Act and therefore inoperative. A declaration is a judicial pronouncement of the legal position of the parties. Declaratory relief is important because it defines the 'limit of executive powers or functions'.[436] A declaratory order is a particularly useful mechanism for seeking a decision as to the legality of a law.[437] It is a very flexible remedy in its scope and applicability to many situations. It is able to provide anticipatory relief and offers a speedier process of resolution than other forms of litigation.[438] A declaration that a law is invalid or inoperative[439] to the extent that it is in conflict with the Equality Act may lead the Court to

- declare the legislation inoperative or invalid in its entirety. A court will strike down the legislation in its entirety when it considers that the law as a whole is inconsistent with the Equality Act or that the legislature would not have enacted the law without the offending provision.

- declare an offending provision inoperative or invalid. Declaring a particular offending provision inoperative or invalid and retaining the operation of the remainder of the legislation is known as severing the provision.

- declare that the benefits of the legislation should be extended to accord with the principle of equality in a process known as 'reading in'. Reading in is an important remedy because it recognises that a law may infringe the Equality Act not only because of what it provides but also because of what it has excluded.[440] It has the effect of extending the reach of the law rather than limiting it and denying coverage to all groups.[441]

Challenging an action

5.27 A person or group whose right to equality is about to be infringed by an action of a public official should be able to ask a court for an order preventing the action. Such an order would be analogous to the writ of prohibition, which directs an official not to continue with the proposed action. The equivalent in the

AD(JR) Act would be the court's power under s 16(1)(d) to direct a party 'to refrain from doing, any act or thing'. If the action that infringes the right to equality has already occurred, the person or group should be able to obtain an order that the action is invalid, analogous to the writ of certiorari. In the AD(JR) Act this is expressed as the power to make an order 'quashing or setting aside the decision'.[442] A person challenging an action is likely also to challenge the policy behind the action or the law that gives the official the power to do the action.

Challenging inaction

5.28 Where a non-discretionary duty imposed on a public official or body by law, has not been performed, a court may make an order for mandamus. Mandamus compels the performance of a public duty conferred on a public officical or body by statute.[443] The High Court has jurisdiction to order mandamus[444] and the Federal Court has parallel extended jurisdiction in the *Judiciary Act.*[445] This order is translated into AD(JR) Act.[446] The Federal Court has stated that this provision confers power on the court, in an appropriate case, to order a decision maker to decide a matter in a particular way.[447] It is irrelevant whether the decision maker is a Minister or other public official.[448] However, if there is any residual discretion to be exercised then it is more appropriate for the court to order the decision maker to reconsider the decision according to law.[449] Mandamus is a useful order in the context of a matter brought under the Equality Act as it enables the court to direct the public official or body to decide a matter in a particular way which accords with the guarantee of equality.

Challenging policy

5.29 When a decision is taken under a government policy or program the decision can be challenged as being inconsistent with the Equality Act. This challenge will involve an examination of the policy or program itself. The court or tribunal could find the policy or program unlawful because of the Equality Act. Any actions performed in pursuance of the policy would also be unlawful.

Jurisdiction

5.30 The model set out in the draft Australian Bill of Rights Bill 1984 is a useful one to follow. It provides that if a person believes that her or his right under the Bill of Rights has been infringed or is likely to be infringed by a federal, State or Territory law, that person can apply either to the Federal Court or the Supreme Court of that State for a declaration that the law is in conflict with the Bill of Rights.[450] The Equality Act could contain a similar mechanism. If the equality issue arose in a court exercising federal jurisdiction it would be dealt with in that court. If the question of the validity of State or Territory law arose, and this question was categorised as a constitutional matter, the special provisions of the *Judiciary Act 1903* (Cth) would apply. The Commonwealth and State Attorneys-General would be notified and the case could be removed to the Federal Court or the High Court.[451]

Orders made as a result of a violation of the Equality Act

5.31 ***Formulating effective orders.*** The declarations, injunctions and other forms of relief ordered by a court enforcing the Equality Act will need to be designed to take account of several factors, including

- the particular inequality found by the court
- the factors giving rise to that inequality
- the objectives of the law or administrative action (or inaction) that is challenged, and 5.40
- the guidance that the court's order will give to the executive on how to implement the requirements of the Equality Act in other areas.

5.32 ***Analysis required.*** Deciding remedies will require detailed analysis. Inequality can arise through a complex matrix of historic, economic and other factors, and the impact of the law on that matrix needs to be identified and remedied. The Equality Act should provide relief not only from laws that create inequality but also from laws that reinforce or exacerbate it. Until the case law develops, the analysis may be laboured. As

in any area of law, as precedent is created and lawyers become familiar with the process, the application of the law will be easier.

5.33 ***Goal to eliminate inequality.*** An effective remedy must address the factors which give rise to the inequality and must protect and promote the objectives of the challenged law or action to the extent that they are not inconsistent with the Equality Act. The function of the Act should not be confined to striking down laws or actions. It is possible to consider the need to ensure equality before the law by extending benefits to those who do not at present enjoy those benefits rather than denying the benefit to all.[452] Orders made under the Equality Act may be either positive or negative. It is likely that in many cases equality will not be achieved simply by, for example, immedately prohibiting the challenged action. Instead a more effective remedy might be, for example, for the Court to guide the Minister in the proposal for an administrative program in a way that takes into account and addresses its unequal impact. Orders of that kind will need to be informed by detailed submissions from the parties. If the court holds that the equality guarantee has been violated, it may then be appropriate to defer orders until the parties have had time to consider and negotiate appropriate relief. As there are likely to be public interest considerations, it may also be appropriate to give standing to relevant interested parties to make submissions on possible orders. The court might also wish to impose reporting requirements and deadlines in the order.

Raising the guarantee in other actions for remedies

5.34 The general principle is that damages are not available for an unconstitutional action, that damages only arise where the violation 'results in the commission of a recognised legal wrong'.[453] However a plaintiff may, in an action for damages under a recognised cause, rely on the Equality Act. For example, a plaintiff in an action in tort or contract may be able to raise the Equality Act.[454] The traditional legal remedy would then be considered within the framework of equality and damages would be available where the action is successful. The Equality Act would therefore operate to throw a different focus on the application and interpretation of the law. Similarly, it could be raised in private actions, in support of either side of an existing cause of action whether under statute or common law. The Equality Act could affect the way in which existing causes of action are applied and the award of damages in such actions.

Recommendation 5.5

In challenging a law or government action a person or group should be able to seek remedies available for judicial review, such as those available under the AD(JR) Act, for an infringment or a likely infringement of the Equality Act.

The fact that a law or practice is found to be inconsistent with the Equality Act should not, of itself, give rise to a right to damages.

The Equality Act may be relied on in existing causes of action, whether the other party is governmental or a private person or entity. This existing cause of action may itself give rise to a claim for damages.

6. The impact of an Equality Act on courts

Introduction

6.1 The Equality Act would have an impact on the operation of the courts. In the Act, Parliament would be setting the standards of justice for the courts to follow. This could change both the consciousness of the courts and their application of the law. It may, for instance, require the courts to consider more sociological and statistical evidence in deciding upon issues that affect women and men as groups. The Equality Act would provide a new basis to challenge government actions[455] and require the law to be interpreted in private actions by reference to the principle of equality. This chapter discusses the impact of the Equality Act in the courts. It looks at the role of the courts and how the Equality Act would affect that role. It gives examples of how the Act could work. It also examines the effect of the Act on private litigation.

Role of the courts

Interpreting and applying existing law

6.2 ***Introduction.*** Women are disadvantaged in the gendered nature and application of the law. Many examples of this are given throughout this report.[456] The ability to challenge gendered laws and practices would enhance equality in the law. The Canadian Charter of Rights and Freedoms has been relied on in cases concerning family law, employment law, personal injury law, human rights law, prison law and laws concerning reproductive autonomy.[457] The Charter has been more successful in doing this since the Andrews case.[458] The equality provision in an Australian Equality Act would have similar uses in Australian courts.

Recognition of pay equity

Under 'pay equity' or 'comparable worth' principles skills and qualifications are assessed and compared across different occupations and valued accordingly.[459] The principle of comparable worth has been relied on in a number of overseas jurisdictions to identify sex discrimination in wages.[460] It is an important way in which the work women perform in the paid workforce can be valued on a non-sexist basis.[461]

The Australian Council of Trade Unions (ACTU) initiated a test case in the context of nurses' wages to establish whether the notion of 'comparable worth' came within the recognised principle of 'equal pay for work of equal value'.[462] The ACTU argued that nursing was a traditionally female occupation and as a direct consequence the work performed had been undervalued. The Industrial Relations Commission (IRC) rejected the notion of comparable worth stating that it would be confusing and that it would 'strike at the heart of long accepted methods of wage fixing in this country and would be particularly destructive of the present wage fixing principles'.[463] It held that comparable worth had no role to play in applying the 1972 decision on equal pay for work of equal value.

An Equality Act would require a broader view of equal pay. If women discriminated against in their pay had the benefit of the Equality Act they could bring into evidence historical and comparative data showing that the low rate of pay was not an accident but a remediable product of social history. Despite the amendments to the Industrial Relations Act adopting the ILO equal pay conventions,[464] an Equality Act could play a role in securing recognition of the principle of pay equity.[465] The IRC would be required to consider whether awards comply with the right to equality.

6.3 ***Sentencing offenders.*** With an Equality Act women before the court in criminal matters would be accorded treatment consistent with their right to equality. While it has been suggested that women are generally given lighter sentences than men are given for similar crimes, they nonetheless can suffer discrimination as offenders. Submissions comment on the sentencing of women and the location and conditions of women's prisons.[466] Women are a much smaller proportion of the prison population than men. They are generally sentenced not for violent crimes but for property, social security, prostitution and drug offences.[467] Women are generally not considered high risk inmates, yet they tend to be imprisoned in maximum security prisons as these prisons are the only ones available. This has consequences for contact

with their families, particularly with their children for whom the prison would be particularly frightening. Distance from the family may also make visits impossible.[468]

Considering the availability of prison facilities when sentencing

A Canadian woman whose driving ability was impaired by alcohol was involved in an accident in which she injured two men on a motorcycle.[469] The woman pleaded guilty. The judge initially considered that a short prison sentence would be appropriate and recommended that the woman be placed on the temporary absence program to allow her to continue her employment. However, the judge was informed by the woman's lawyer that the closest prison for women was 200 kilometres away. This distance meant that the woman would not be able to serve an intermittent sentence and retain her current employment as ordered by the judge. If the accused person had been a man the orders of the judge would have been of benefit to him, as there are men's prisons located closer to employment. Because of the equality guarantee in the jurisdiction, the judge considered that the proposed sentence would have denied the women the equal benefit and protection of the law.[470] The location of the women's prison meant that the woman would be unable to have the benefit of the temporary absence program. As a result the judge considered that, given this discriminatory circumstance, the appropriate sentence would be a fine and community service as a condition of probation.

Developing common law

6.4 The Equality Act would also affect the development of the common law. For example, it could be used to modify the manner in which violence is usually addressed by the law and to challenge the adequacy of the protection the law and government officers provide.[471] It could promote the reinterpretation of traditional legal remedies and in general provide innovative solutions[472] to the absence of women's perspectives in areas of the common law. It could challenge the law's presumptions and stereotypes about women. The following examples are from decided cases in North America.

Developing tort law: the example of negligence

A serial rapist was operating in a small, defined geographic area of Toronto, Canada over a one year period. The rapist had attacked a number of white, single women who lived alone in second or third storey balconied apartments. These facts were known to the police. 'Jane Doe', a single woman living alone in a balconied apartment in that part of the city, was raped at the end of this period.

She sued the police, arguing that they owed her a duty of care which they breached in failing to warn her of the risk to which she was exposed. She argued that the police knew or ought to have known that she was a likely victim.[473] The police argued that the exercise of police powers in an investigation is discretionary. They also argued that there is a duty of care to protect against sexual assault only when a person is in the care and custody of the police.[474]

In addition to suing for negligence, Jane Doe also argued that her right to equality was violated by the decision of the police not to warn her about the danger.[475] She argued that the police

> identified [her] as a likely target, [but] they specifically decided not to warn her or other women similarly situated of their potential danger, for reasons which included the belief that such warning 'would cause hysteria on the part of the women and would alert the suspect to flee and not engage in further criminal activity'. If she had been warned...she could have taken steps to ensure her safety; and if properly informed of the circumstances of the prior assaults, in which the assailant did not kill his victims, her fear for her life while he was in her apartment would have been less intense.[476]

The police argued in response that there was no breach of the right to equality because there can be no comparison to men since men are generally not victims of this type of offence.[477] The court rejected this argument. 'The fact that men are generally not subject to this type of crime cannot be determinative.'[478]

> The police applied to the court to have her actions struck out, but the court decided that there was enough merit in the arguments of Jane Doe for the case to proceed. By linking her negligence action with the claim that her equality rights were infringed, Jane Doe gave the court an opportunity to rethink issues fundamental to negligence law, such as proximity and reasonable foreseeability. This has arguably extended the understanding of negligence. The court [may have] decided not to dismiss her negligence claim precisely because it was argued in the context of an equality guarantee.[479]

Another example arose in the City of Torrington in the United States of America.

> A woman sued the City of Torrington, USA, for the failure of the police to respond to her complaints about threats made by her estranged husband to her and her child and the failure of the police to arrest her husband.[480] The City of Torrington asked the court to dismiss the woman's case.
>
> The woman argued that her constitutional rights had been violated by the failure of the police to perform their functions or to perform them in a proper and adequate manner.[481] She argued that the police had adopted a policy of not responding to domestic violence cases and that this was discriminatory. The woman claimed that over a period of eight months the police had failed to protect her from her estranged husband's violent actions and that they had failed to take any action to arrest him.
>
> On an application to dismiss the claim, the court decided that the evidence suggested the city officials and the police had adopted an administrative policy discriminating against women and that this violated the Constitution's equal protection clause. The court referred to statistics which illustrated the gendered impact of domestic violence.[482] The court considered that the city officials and the police were under an 'affirmative duty' to protect women in domestic violence situations.[483] 'Failure to perform this duty would constitute a denial of equal protection of the laws.'[484] The court held that the City of Torrington's motion to dismiss her claim should not be allowed and that the action should proceed.[485]

Under the proposed Equality Act a similar complaint by a woman could come before the court as an action in mandamus to compel the police to provide protection.

Considering broader issues

6.5 ***Women's experience.*** Arguments based on the Equality Act should encourage the courts to consider more fully the situation and experience of women which at present are often missing from the law.[486] The requirement to consider broader equality issues may open the way for additional or expert evidence to validate those issues.[487] The courts may consider broadening the notion of expert so that women's experiences are more adequately taken into account.[488] The arguments and evidence may then be substantially different, and the courts would decide cases within a broader context.

6.6 ***New information.*** The Equality Act would require the courts to consider evidence, such as historical, social science and statistical evidence in appropriate cases. It is not new for Australian courts to consider these forms of evidence although their use of them is concentrated in particular areas of the law such as discrimination and medical malpractice cases.[489] The use of statistical evidence, particularly in indirect discrimination cases, is widely accepted[490] but it may be difficult where this evidence has never been compiled or where the evidence currently available is of limited use as the sample is small. There is a need for a more consistent and comprehensive compilation of statistics.[491] This happens in the area of employment with the obligation of certain employers to make reports under the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth). Some cases brought under the Equality Act will require more than statistical evidence to substantiate a case. For example, some cases may require historical and social evidence.[492] The Equality Act could require sociological evidence in areas of the law where judges have normally relied on their own judgment as human beings. One way expert evidence can come before the courts in equality cases is through the increased use of intervention, appearance by women's legal services and test case litigation.[493] In American jurisdictions there is a longer tradition of judges consulting non-legal materials as part of their own research and of citing these materials in their judgments.

6.7 ***Effects on court proceedings.*** The Commission recognises that there is potential for the nature and amount of evidence in equality cases to protract court proceedings and lead to an increase in legal costs. In other areas of law where cases give rise to voluminous evidence, such as Trade Practices, Planning law and Administrative law, procedures have been adopted to control the evidence. Approprate provisions will be needed in the Equality Act to address this issue. Approprate rules of court will be needed to ensure there are no excesses. For example, written briefs could be required. Another option is to have courts accept expert testimony on the status of women from the Sex Discrimination Commissioner.

Self protection at night

In a recent case the NSW Court of Appeal considered whether a woman carrying a spray can of formaldehyde was guilty of an offence under the *Crimes Act 1900* s 545E. That section provides that it is an offence to possess a thing not being a firearm that is capable of discharging an irritant liquid chemical.[494]

The woman argued that she had a 'reasonable excuse' for carrying the can or in the alternative that she was carrying it for a lawful purpose, namely self-defence.[495] The Court of Appeal equated 'reasonable excuse' with 'reasonable apprehension of imminent attack or imminent danger'. Her argument that the possession of the can was for self-defence purposes was rejected on the basis that she had not proved that she had a reasonable apprehension of imminent harm. The woman argued that she was fearful because of an earlier attack against her and her husband. The Court of Appeal considered that, as that attack had happened some years previously, there was 'no evidence that there was any rational fear of another attack'.

There was no discussion in the judgment of the prevalence of violence against women or more significantly the effect of the fear of violence on the behaviour and activities of women. For example, many women walking alone at night often experience an underlying and persistent fear of violence that limits their freedom of movement.[496] Under an Equality Act these factors could have been raised before the court, though the decision would not necessarily have been any different. The woman could have submitted that the court's understanding and approach to what amounts to a 'reasonable apprehension of imminent harm' was inconsistent with her right to equality.

The Equality Act and private litigation

Introduction

6.8 Traditionally, Bills of Rights have been interpreted as providing a right of action against governments. The major role of an Equality Act is its use in challenging governmental activity and laws and thereby assisting women to secure equality. Nevertheless, there are arguments for considering extending the reach of an Equality Act to private actions. In this section, the Commission examines the recommendations of the Constitutional Commission, Canadian practice and the advantages and disadvantages of a guarantee applying to both government and private bodies.

Possible approaches

6.9 ***The Constitutional Commission.*** The Constitutional Commission recommended that the rights and freedoms it proposed should be guaranteed in the Constitution, should only be available to test acts done

- by the legislative, executive or judicial arms of the Commonwealth, States or Territories; or
- in the performance of any public function, power or duty conferred or imposed on any person or body by law.[497]

Under this provision private persons and bodies would be bound when they exercise public functions, powers or duties 'conferred or imposed by or pursuant to law'.[498] All actions that can be characterised as governmental should be able to be challenged.

> The guarantees should...operate as inhibitions not merely on the exercise of legislative powers, prerogative powers and judicial powers, but also on those of the activities of governments which are carried out under, and depend for their legal effect on, the institutions of private law. There is, in our view, no defensible basis for differentiating between, say, discrimination on the ground of sex in the exercise of statutory discretions to grant subsidies, and discrimination on the ground of sex in decisions regarding employment and promotion within a government-owned company incorporated under general companies legislation.[499]

In short, the Constitutional Commission proposed that the notion of government action should be interpreted in the widest sense.

6.10 ***The Canadian Charter of Rights and Freedoms.*** The Charter of Rights and Freedoms, which is entrenched in the Canadian Constitution, applies to the Parliament and Government of Canada in 'respect of all matters within the authority of Parliament' and to the legislature and government of each province in 'respect of matters within the authority' of that legislature and government.[500] There has been debate as to the precise scope of the Charter guarantees and about what matters are sufficiently 'public' to be subject to it.[501] However the Canadian courts have made it clear that the Charter applies only to government activity.[502] They have also adopted a restricted approach to what amounts to government activity, the wording of the Charter itself being limited to executive and legislative activity.[503] Although the Charter does not apply to the judicial branches of government, the courts have expressed a commitment to developing the common law to accord with the rights and freedoms articulated in the Charter.[504]

Addressing private actions through other proceedings

6.11 ***Actions pursuant to a law.*** In principle, there is a case for extending the operation of the Act to found a cause of action against a private individual or body.[505] Full equality for women is more likely to be achieved if all actions of private entities not acting in any governmental capacity were covered directly by the Equality Act. A breach of the Act could, for example, give rise to a new cause of action against private agencies and individuals. The Commission doubts that there would be widespread community support for this step, which would be costly to Australian industry and business. There are deeply embedded gendered attitudes and practices in Australian society that will not immediately change.[506] It is unrealistic to expect private parties to be able to alter attitudes and practices to comply with the Equality Act in all their activities at this stage. Public opinion might more readily accept the extension of the Act to the private sector after its impact is better understood. Protection against acts of discrimination by private persons or entities can be dealt with to some extent in other legislation such as the SDA.[507] That legislation would provide protection on a more extensive basis if the exemptions were removed and the recommendations in ALRC 69 implemented. The principal focus of the Equality Act should be ensuring equality in public sector activity.

6.12 ***Private proceedings.*** While it is not proposed that the Equality Act should create a new private cause of action, it should be available to support existing causes of action. The Senate Standing Committee on Constitutional and Legal Affairs recognised the role for a Bill of Rights in private actions. It suggested, for example, that if, in a private action, evidence was obtained by a party in a manner incompatible with the Bill of Rights, then the other party could argue that the evidence is inadmissible as contrary to the Bill of Rights.[508] A person with an existing cause of action should be able to argue that a particular law or application of law is incompatible with equality and should therefore be reinterpreted or overruled. Failure to apply the equality principle could be a ground of appeal. This would be consistent with the duty of lawyers and courts to apply equity and fairness in decision making. In this way the Equality Act will necessarily have a direct if limited impact on the conduct of private actions.

6.13 ***Uncertainty about the application of the Act.*** The Commission has been told that the Equality Act will cause uncertainty in the private sector. As has been explained above, the Act does not give a private right of action. It can only be used in the context of another claim being made in court. There will be no immediate impact on business. As the courts interpret the Act, precedents will develop over time which will need to be understood by the private sector. This already occurs in relation to all other areas of law including the Sex Discrimination Act. To assist business in understanding the operation of the Act, the Sex Discrimination Commissioner could issue guidelines explaining the impact of decisions. Similarly, Trade Associations and other organisations can provide advice.

Recommendation

6.14 The main role of the Equality Act would be its potential as a basis for challenge to government laws, policies and public actions in the broadest sense. Clearly discrimination persists in the private, non-government sphere. However, in view of the innovative nature of the Act proposed, the Commission considers it preferable to confine it to the public sphere, broadly defined, so that its effectiveness can be assessed. This approach was adopted by the Senate Standing Committee on Constitutional and Legal Affairs in considering a Bill of Rights in 1985. It stated that the question of whether a Bill of Rights should be applicable against the actions of private persons or entities could only be considered when a period of time had elapsed after its introduction.[509] The Commission supports the approach adopted by the Constitutional Commission.[510] The Equality Act should give rise to a new cause of action only in relation to acts of government and the performance of public functions, powers and duties. Its availability would turn on whether the power, function or duty is a government one. It should only arise in private litigation to support or oppose a claim under an existing cause of action.

Recommendation 6.1

The proposed Act should apply the right to equality to acts done:

- **by the legislative, executive or judicial arms of the Commonwealth, States or Territories; or**
- **in the performance of any public function, power or duty conferred or imposed on any person or body by law.**[511]

7. Hearing women in courts and tribunals

Introduction

This chapter

7.1 In this chapter the Commission explains the current law of standing and the problems with it, the current role of women's advocates, overseas experience with intervention, and reforms to enable women to be heard in courts and tribunals in order that new perspectives may be put before the courts and areas of gender bias addressed. The need for this is apparent from previous chapters.[512]

7.2 ***Role of the courts.*** The right of standing in civil proceedings is the right of a party to be considered an appropriate party to instigate the particular proceedings.[513] Intervention is the ability to appear in court to assist the court with submissions and possibly evidence. Here, it concerns the right of women to assist the court by appearing as intervenors or friends of court, thereby allowing advocates on behalf of women's voices to be heard. Friends of the court are known technically as 'amicus curiae'.[514] As developers of common law and interpreters of statute law, the courts have a major influence on the content of law, particularly at the appellate level. Many common law principles affect everyday interactions. Many statutes contain broad principles of law and judges are given wide discretion in interpreting and applying them to the cases before them.

7.3 ***Historical absence of women in courts.*** A body of case law is built up through legal argument and judicial reasoning in response to inter party disputes. Contributors to the development of case law include litigants, public prosecutors and police officers, lawyers who formulate arguments and often decide which evidence to present to court, judges, magistrates and tribunal members who assess the evidence and legal arguments, make decisions and write judgments. Men have been the principal participants in these processes and apparently gender neutral law tends to reflect the experiences, perceptions and demands of men.

7.4 ***Strategies for reform required.*** The fairness of the legal system is compromised when the substance of law does not reflect women's experiences. The increased participation of women in the legal process may stimulate new ways of thinking but it is doubtful whether it could readily alter gender bias which is built into the nature and operation of law. Regardless of the tentative moves towards the increased participation of women in the law, immediate strategies are required to develop a legal system which reflects 'an integrated and balanced view of human experience'.[515] This requires judges to be informed of issues and perspectives of which they may otherwise have been unaware in the cases before them.

7.5 ***Obstacles to women's participation.*** Courts develop the law on the basis of the cases brought before them. If there is no suitable case or if the right arguments are not put to the court, then there can be no impact on the law. The task of bringing women's perspectives into the courts cannot reasonably be left to individual women as private litigants.

> *Many women have insufficient funds to mount a legal challenge to practices or rules that disadvantage them; or, if they do have funding, they may be wary of entering the adversarial arena of the legal system, fearing that they are likely to be treated unequally ... Alternatively, a case which raises issues of considerable relevance to women may simply have no woman participant, and thus no way for women's experiences to be put before the Court.*[516]

There are a number of reasons why arguments might not be put to courts. Departing from traditional practices in courts might produce an unsympathetic response and be detrimental to the case. Raising new and unfamiliar arguments might be risky and costly for the individual litigant. New arguments take up court time. The parties may fear alienating the judge or prejudicing the success of other arguments before the court. Besides, the issue that raises concern about gender bias may be only peripheral to the case. It is not reasonable to expect litigants to carry the burden of presenting arguments beyond the strict requirements of their case. Further, putting the 'right' arguments about gender bias requires an understanding of the relevant

issues and the ability to put this to the court in an appropriate context. This may be beyond the capacity of the average litigant and indeed many lawyers.

7.6 ***Women's advocates in court.*** One way to overcome these problems is to make it more possible for advocates for women's interests to initiate or participate in proceedings of a public interest nature or to appear in proceedings between private litigants as intervenors or as friends of the court. These methods of participation allow interest groups to present arguments to the court which may otherwise not be heard.[517]

Reforms needed

7.7 To encourage women's advocates in their attempts to have women's perspectives put before courts it is necessary to address two issues, the reform of the law of standing and intervention and the relative lack of public funding for public interest advocacy. This chapter makes recommendations on these issues.

Current law

The law of standing: initiating proceedings

7.8 ***Current law.*** The law of standing requires an appropriate person to initiate proceedings. When the person seeking to commence proceedings is doing so either on behalf of others or in the 'public interest', that person generally has to demonstrate a 'special interest' in the subject matter of the proceeding.

7.9 ***What is 'the public interest'?*** There is no definitive formulation of what constitutes 'the public interest'. Public interest litigation is any proceeding that, regardless of the private rights involved, also involves issues that are important to the public at large or to a section of the public.[518] There is a public interest in classifying uncertain laws and removing manifest unfairness from law. However, the public interest is not a unitary or constant thing. It is any interest which is worth protecting for social and economic reasons. Accordingly, minority or sectional interests are considered to be public interest causes because modern, democratic society is supposed to protect minorities. Courts have a role in considering their views.[519] Public interest litigation helps the law to serve a wide range of groups.

7.10 ***What is a 'special interest'?*** The nature of a 'special interest' is uncertain and varies according to the circumstances of the case.[520] It is at least an interest going beyond the interests of ordinary members of the public. It is not sufficient that the person has a genuine concern about, say, upholding a particular law. The person must demonstrate a special connection with the subject matter of the case. Generally, the interest does not have to be a legal interest or involve property or possessory rights.[521] However, it has to be more than a 'mere intellectual or emotional concern'.[522] It is unclear to what extent the plaintiff's interest must exceed that of other people. One view is that a special interest must be more than the interest possessed by 'a diverse group of Australians associated by some common opinion on some matter of social policy which might equally concern any other Australian'.[523] Another view is that '[i]t is enough that the plaintiff's interest, even if many others have it, is not the same as that of members of the public generally'.[524]

7.11 ***Uncertainty for equality advocates.*** An advocate for women's interests seeking to establish that a federal law violates the equality principle[525] may have standing if the second interpretation of the term 'special interest' was favoured, but would be unlikely to have standing on the first interpretation. It is unsatisfactory to have the scope of this important representative role uncertain.

7.12 ***ALRC 27 recommendations.*** In 1985 in ALRC 27, the Commission recommended that the artificial difference between special interest and public interest be removed. It recommended that any person should have standing to initiate public interest litigation unless the court finds the person is 'merely meddling', that is, interfering in matters in which she or he has no legitimate concern.[526] The Access to Justice Advisory Committee (AJAC) report recommended that the Commonwealth consider implementing the Commission's recommendations and commented that:

> [The Commission's] recommendations appear to us to be sound, with a sensible balance between protecting the courts from wasting time with baseless actions while allowing individuals and groups with a real interest in a matter to be heard by the courts.[527]

Under the *Land and Environment Court Act 1979* (NSW) s 123(1) any person may bring proceedings for an order for breach of the Act whether or not any right of that person has been or may be infringed.[528] It has recently been said that 'fourteen years of open standing provisions in the Land and Environment Court has produced little more than a modest flow barely wetting the wellies'.[529]

The law relating to intervenors and friends of the court

7.13 There are two well established procedures by which persons other than the original parties may participate in a case: either as an intervenor or as a friend of the court. Each has advantages and disadvantages for the public interest litigant. The origin of the friend of the court is quite different from that of the intervenor. The court has an inherent power to appoint a friend of the court to assist it in the administration of justice.[530] The court has no inherent power to allow the participation of an intervenor.[531] An intervenor can take a major role in litigation and in the adversarial system it is the parties' right to control the litigation. The power to allow intervention only arises by statute or by court rules.

Current law: participation by intervenors

7.14 A right to intervene in litigation may be available as of right or permitted by leave of the court. It may apply to all issues before the court or it may be limited to certain issues.[532] An intervenor becomes a party to the proceedings, and has the duties and privileges of a plaintiff or a defendant. That is, the intervenor may file pleadings, lead evidence, cross examine witnesses, present arguments and appeal against decisions. An order for costs may be made against or in favour of an intervenor. Intervention in federal courts and tribunals is provided for in a number of statutory provisions.[533] These Acts grant a broad discretion to the court or tribunal to grant leave to an intervenor to appear.[534]

Current law: participation as a friend of the court

7.15 ***Friend of the court.*** A friend of the court is a creation of common law and has not been given statutory recognition in Australia. The role of a friend of the court has traditionally been 'confined to assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked'.[535] For instance in *Bropho v Tickner*[536] the Ballaruk people sought to be joined as a party before the Federal Court. Justice Lee refused the application for joinder but gave leave to a representative of this group of Aboriginal people to appear as a friend of the court. In recent years in Canada and the United States friends of the court have been increasingly permitted to perform an interest advocacy function, particularly in public interest litigation.[537]

7.16 ***Not intervenors.*** In Australia friends of the court are not parties. They are usually limited to the presentation of an argument by a written brief although at the court's discretion an oral argument may be permitted. Friends of the court may not file pleadings, call or examine witnesses or lodge an appeal. They may be permitted to tender evidence, usually for the sake of completeness but not where the evidence is complex and controversial.[538] The main advantage of participation as a friend of the court is that argument in the form of written briefs, with the flexibility to permit oral argument, need not take up court time and increase the parties' costs. Furthermore, a friend of the court is not subject to an adverse costs order. For these reasons friend of the court status has been seen as useful for public interest groups and was particularly favoured in submissions as a means of presenting womens' perspectives to courts.[539]

7.17 ***Within the inherent power of the court.*** The court has a virtually unlimited discretion to allow a friend of the court to take part in proceedings provided that the interests of the parties are not prejudiced. The practice has traditionally been rare in Australian courts although there are some important exceptions.[540] The bodies which have been granted friend of the court status in courts exercising federal jurisdiction have tended to be government representatives or well established public interest groups.

7.18 ***Recent refusal of application.*** As the Commission was completing this report an application was made to the High Court by a public interest group for leave to intervene as friend of the court. The case involves the validity of sections of the *Racial Discrimination Act 1975* (Cth)[541] that provides a scheme for the registration of determinations of the Human Rights and Equal Opportunity Commission in the Federal Court.[542] There are similar schemes in the *Sex Discrimination Act 1984* (Cth) and *Disability Discrimination Act 1992* (Cth). The registration of a determination in a race discrimination case was challenged. The Public

Interest Advocacy Centre (PIAC), an independent, non-profit legal and policy centre with considerable experience in discrimination cases, applied to appear as a friend of the court. PIAC had support for its application from four major community organisations with an interest in the issue, including the Women's Electoral Lobby and the Association of Non-English Speaking Background Women of Australia. The High Court denied PIAC leave to intervene.

7.19 ***Importance of the case for women.*** Women use the dispute resolution mechanisms provided by HREOC more than men because it is more accessible to them than the court system. HREOC has expertise in sex discrimination, cases are presented in a relatively informal setting and there is a possibility of assistance for unrepresented parties. Since women are poorer and find courts intimidating it is understandable that they prefer to use a body like HREOC. Registration of determinations of HREOC provides a mechanism for enforcement.

7.20 ***Contrast with Canadian approach.*** The High Court's denial of leave can be contrasted with the approach taken by the Canadian Supreme Court. It granted leave to LEAF leave to intervene in the *Andrew's* case, which involved a claim of denial of equality on the analagous ground of citizenship.[543]

7.21 ***Implications of the High Court approach.*** The High Court did not give reasons for its decision although the case is a landmark case of constitutional significance. One reason for the refusal may be that the Attorney-General was seen by the Court as protecting the public interest. The Attorney-General is expected to be able to separate competing public interests in the issue such as protection of revenue, defence of the actions of a Commonwealth statutory authority and support for the right of disenfranchised Australians to access to dispute resolution. The Attorney-General is generally represented in the High Court by the Solicitor-General, who it appears, will be regarded as representing the interests of women. Therefore the Commission recommends that the Solicitor-General and officers of the Attorney-General's Department who advise him be trained in gender bias and awareness of gender issues. The unit administering the National Women's Justice Program should assist by providing information about the reality of the lives of women who are being represented in court in this way.

7.22 ***Friends of the court as interest advocates.*** The participation of public interest groups as friends of the court is an expansion of the traditional friend of the court role. These advocates not only provide the court with relevant information but also argue for the public interest. Serving the public interest may require participation by a wider range of advocates. In particular, there is a need for advocates able

> *to critically examine unstated assumptions about women and to facilitate the evolution of a new awareness of gender issues amongst those who implement and interpret the law*.[544]

Reforming the current law

7.23 Current law in Australia is unhelpful to the public interest advocate as the rules of standing are unclear. The Commission has previously reported that the law of standing 'is confused, unclear and restrictive',[545] and courts have expressed dissatisfaction with it.[546] In ALRC 27, the Commission recommended that the rules be simplified and liberalised. It proposed the enactment of the Standing (Federal and Territory Jurisdiction) Bill to govern standing, intervenors and friends of the court in federal courts and tribunals.[547] The issue was raised in DP 54 and was supported in submissions.[548] Chapter 4 has stressed the importance of extending the concepts of standing to initiate proceedings under the proposed Equality Act.[549] The rules of standing should be simplified and the rules for intervention expanded and clarified.

Role of women's advocates

Independence of the court maintained

7.24 More liberal use of intervenors and friends of the court enables a diverse range of relevant views to be heard by the courts in an efficient manner.

> *The aim . . . is not to present decision makers with a 'politically correct' women's agenda, but to inform the decision making process about women's interests, defined in the broadest possible way. Courts are always forced to choose between a variety of arguments . . . the addition of a further view point, or more than one if different women take different views, should not be at all prohibitive to the use of the [friend of the court] procedure in a system which thrives on such dissension.*[550]

Presenting factual material, analysis and argument of women's perspectives and experiences to a court does not compromise the independence of the court. It is not sought to impose a 'feminist agenda on the courts, but to assist in providing a knowledge base from which justice can be better administered with the objectivity, fairness and impartiality that are the goals of the legal system'.[551]

Particular role of women's advocates under the Equality Act

7.25 A statutory right to substantive equality requires the court to consider the content of that right when the provision is relied on in litigation. Unlike the right to identical treatment, the meaning of the right to substantive equality must be determined contextually. This requires analysis of social, economic and legal issues. Courts can benefit from the expert analysis that specialised equality advocates can provide.[552]

Existing Australian practice of advocates for women's interests

7.26 ***Industrial relations.*** Advocates on behalf of women have, on rare occasions, been permitted to intervene in matters before courts and tribunals in Australia. Women's groups have intervened in proceedings before the Industrial Relations Commission.[553] Advances in wage relativities have come about only where women's groups have intervened.[554] For instance, the achievement of the female basic wage in the 1949-50 Basic Wage case was due to the intervention of women's organisations.[555] Similarly in the 1969 and 1972 Equal Pay cases[556] the principle of equal pay for equal work was established and in the 1974 National Wage Case the minimum wage was extended to women. Other interventions include the Nurses' Case[557] and a series of national wage cases. Most recently during the Industrial Relations Commission's review of national wage case principles in 1993, women's groups intervened to argue for the retention of principles which promote equality in enterprise bargaining.[558]

7.27 ***Other cases.*** Outside the specialised area of industrial relations where intervention from interest groups is normal practice there are only rare examples of this practice in the courts.[559] The Public Interest Advocacy Centre appeared before the Full Federal Court in a case concering women's employment in the lead industry. PIAC appeared as a friend of the court to explore issues critical to women's employment, public health and the lead industry which may not otherwise have been drawn to the Court's attention.[560] In a recent case before the Childrens' Court of Victoria[561] a group called Women Lawyers against Female Genital Mutilation was granted friend of the court status in an action between a father and the Department of Health and Community Services. The Department was seeking care and protection orders against the father because of physical abuse by the father. The Women Lawyers group had obtained evidence that the alleged abuse included infibulation of the girls. This was not being put to the court by either party. They sought leave to intervene on the ground that they had relevant information that would otherwise not come before the court. Its appearance informed the court and the parties of the facts about female genital mutilation.[562]

Existing equality advocacy groups

7.28 There are at least two groups of women's equality advocates in Australia, the Women's Legal Action Fund in Victoria and Women Advocates for Gender Equity (WAGE) in NSW. Both are groups of volunteers aiming to support the promotion of women's equality through test case litigation and other forms of advocacy. Both of them are currently seeking funding. In its submission to the Commission, WAGE lists issues on which it believes courts could benefit from the intervention of women advocates, including

> *Women's health*
> *Global settlements (arising from intra-uterine device and silicone implant litigation) where the implications for women plaintiffs are not fully represented and critical health issues remain*

unresolved.

Violence against women
Consistently reminding the courts of the extent to which persistent violence on women precipitates alleged criminal conduct in response highlighting the need for judicial acceptance of the battered woman syndrome, self defence, provocation and duress.

Migrant and indigenous women
Failure to present and recognise the specific cultural and gender related experiences of these women.

Girls
Challenging the stereotypes which prevail particularly in the welfare and criminal jurisdictions.

Industrial relations
Raising issues of equity in relation to superannuation and the potentially detrimental effects of enterprise bargaining agreements.[563]

Intervention in Canada and the United States

The law

7.29 ***A greater role.*** In the United States and to a lesser extent in Canada intervenors and friends of the court play a greater role in public interest advocacy than in Australia. The role is continuing to expand. The transformation of the role of friend of the court has been described as 'a natural extension of its traditional metamorphosis in the English common law'.[564] In Australia, courts are now experiencing similar pressures and are demonstrating a preparedness to acknowledge the social context in which many legal decisions are made.[565]

7.30 ***United States law.*** In the United States both intervenors and friends of the court are given statutory recognition under the Supreme Court Rules. A brief for written or oral argument as a friend of the court (called amicus briefs) may be filed in the United States Supreme Court without the leave of the court if all parties consent.[566] If all parties do not consent, leave of the court must be sought. A study of the use of these briefs in the United States Supreme Court found that, despite the increasing workload of the Court, the Court rarely denies an interest group leave to participate. The study interpreted this as indicating that the judges saw amicus briefs as a helpful source of information.[567] Amicus briefs commonly present either public interest or special interest arguments[568] most frequently by written submissions.[569] Intervention is also increasingly used as a vehicle for public interest concerns in United States courts although not as commonly as the friend of the court procedure.[570]

7.31 ***Canadian law.*** The Rules of the Supreme Court of Canada provide for intervention.[571] A Canadian Supreme Court 'intervenor'[572] may participate by leave of a judge and with such rights and privileges as the judge determines.[573] The submission of the intervenor needs to be 'useful to the court and different from those of the other parties'.[574] Unless otherwise ordered by a judge, the intervenor may not present oral argument.[575] The common practice in the Supreme Court of Canada is to allow intervenors to submit a written brief[576] of up to 20 pages and oral argument of up to 20 minutes.[577] Intervention with full party rights is not provided for in the Canadian Supreme Court rules.[578] Other Canadian jurisdictions deal with intervention differently.[579] Intervention is used less extensively in Canada than in the United States, but its use by public interest organisations is increasing.[580]

Women's Legal Education and Action Fund (LEAF)[581]

7.32 ***Advocating women's interests.*** In Canada, the Women's Legal Education and Action Fund (LEAF) is a national legal organisation set up to argue test cases for women's equality rights, particularly under the provisions of the Canadian Charter of Rights and Freedoms. Its involvement in cases takes various forms: intervening as a friend of the court,[582] working with the litigant and her legal representative to incorporate an equality analysis into the case, raising funds to assist the litigant in bringing the case. LEAF also sometimes sponsors cases, for example, by entering into an agreement with the litigant and her lawyer for LEAF to

cover the cost of disbursments and work with the litigant and the lawyer to incorporate an equality analysis into the case.[583] Since its establishment in 1985, LEAF has been involved in over 100 cases and made some major contributions to the development of Canadian case and statute law. The following examples of LEAF's participation in cases before the courts illustrate the organisation's role in the development of law.[584]

7.33 ***What constitutes consent to sexual acts?*** *R v Mason* [585] dealt with the definition of consent in criminal law. Mason was charged with sexually assaulting his step-daughter. At trial he was convicted and sentenced to prison. He appealed and the Nova Scotia Court of Appeal overturned his conviction on the basis that, in the circumstances of the case, the step-daughter's silent submission to the sexual acts amounted to consent. The prosecution appealed to the Supreme Court of Canada and LEAF was granted leave to intervene. LEAF argued that consent must be interpreted in a manner consistent with protecting women's equality.[586] In particular, LEAF opposed the interpretation of tacit submission as consent.[587] In a unanimous decision, the Supreme Court overruled the Court of Appeal decision and held that lack of resistance must not be equated with consent. Consent to sexual activity was also at issue in *Norberg v Wynrib*[588] in which a patient brought an action against a doctor for battery, negligence and breach of fiduciary duty for demanding sexual contact in exchange for drugs to which she was addicted. LEAF intervened in the appeal to the Supreme Court of Canada which decided that, in cases of sexual assault, consideration of the power relationship between the parties is critical to distinguishing between forced submission and consent to sexual activity.[589] The majority of the Court held that the woman patient did not consent.

7.34 ***Placing spousal support in a social context.*** *Moge v Moge* involved a dispute over spousal maintenance.[590] Mr and Mrs Moge had three children and separated after 26 years of marriage. They divorced seven years later. During the marriage Mr Moge was employed as a welder and Mrs Moge worked in the home and as a cleaner in the evenings. After the divorce Mr Moge paid maintenance for the support of Mrs Moge and the one remaining dependent child. Nine years after the divorce Mr Moge applied to terminate all support payments. The trial judge terminated spousal support, on the basis that Mrs Moge had had adequate time to become financially self-sufficient. Mrs Moge appealed. The case was heard in the Supreme Court of Canada and LEAF was granted leave to intervene as a friend of the court. The case turned on the interpretation of a statutory provision listing four objectives of spousal support orders.[591] One of these objectives was to promote the economic sufficiency of each spouse. Mr Moge based his final appeal on this objective. LEAF argued that the objective of self-sufficiency should not be given greater weight than the others, namely, recognising the economic advantages and disadvantages that have flowed to the spouses from the marriage, recognising the financial consequences that have flowed from the care of children of the marriage and relieving any economic hardship that has flowed to either spouse from the marriage. LEAF argued that the court must consider all these factors in light of the social context in which marriages break down.[592] The judgment referred to social data and expert commentary on the different social reality for women and men following divorce.[593] After considering all four of the stated objectives of the legislation, the court concluded that Mrs Moge had been substantially economically disadvantaged as a result of her contribution to the marriage. In particular, the majority judgment states:

> [t]he diminished earning capacity with which an ex-wife enters the labour force after years of reduced or non-participation will be even more difficult to overcome when economic choice is reduced, unlike that of her ex-husband, due to the necessity of remaining within proximity to schools, not working late, remaining at home when the child is ill, etc. The other spouse encounters none of these impediments and is generally free to live virtually wherever he wants and work whenever he wants ... studies are beginning to provide reasonable assessments of some of the disadvantages incurred and advantages conferred post divorce ... judicial notice should be taken of such studies.[594]

The Supreme Court of Canada unanimously dismissed Mr Moge's appeal and affirmed the order for $150 spousal support a month for an indefinite period.

7.35 ***Birthing and parenting - leave entitlements.*** LEAF intervened in *Schachter* which involved a challenge to an entitlement to 15 weeks' paid leave for mothers, but not for fathers, around the time of the birth.[595] The argument that mothers and fathers should be entitled to the same leave at the time of the birth of their child was based on the assumption that mothers and fathers are similarly situated at this time. The court was presented with evidence of an official government report that mothers used the 15 weeks leave mostly for parenting rather than coping with the physical strains of the late stages of pregnancy, birth and its aftermath and that fathers would do the same. If this were the case, the denial of leave to men could not be justified. LEAF adduced evidence of

> [t]he reality ... that one of those parents, the woman, must also cope with the physiological aspects of the pregnancy, the birth itself, the establishment of breastfeeding, and the changes attendant on the end of the pregnancy. The mother does child care while experiencing these, and this makes her experience of parenting qualitatively different from that of the male, who does not undergo the physiological aspects of the childbearing year.[596]

When this evidence was put to a witness during cross-examination by LEAF,

> he acknowledged that the official, published 'finding' about using leave for parenting purposes had not been based on any data about user practices; it had simply been the result of intuition on the part of the report writers.[597]

The court accepted the father's right to parenting leave and also accepted LEAF's argument that the biological mother requires additional leave to cope with the physiological effects of late pregnancy and birth.[598]

Providing for women advocates - reforms

The Commission's previous recommendations on intervenors and friends of the court: ALRC 27

7.36 The Commission's report S*tanding in public interest litigation* (ALRC 27) dealt with intervention. The proposed Bill provides a single rule for the exercise of the court's discretion to permit intervention in federal courts and tribunals.[599] It recommends that the court should take into account the type of interest the potential intervenor claims in the subject matter of the proceeding when determining whether to grant leave to intervene. In particular, it specifies that a broader interest than a 'proprietary, material, financial or special interest' in the proceedings should suffice but does not define that broader interest. The proposed Bill also gives statutory recognition to the court's discretion to grant leave to a friend of the court to make submissions.[600] The Bill would clarify the law and encourage courts to adopt a more consistent and reasoned approach. Statutory recognition of the court's discretion should encourage a broader exercise of that discretion, and promote public interest intervention. The Commission affirms its recommendations in ALRC 27.[601]

Options for further reform

7.37 ***Extending the recommendations in ALRC 27.*** The recommendations in ALRC 27, while helpful, are insufficient to achieve the aims of the Equality Act. Because of the systemic and often unconscious nature of gender bias some judges may not see as relevant the perspectives that women's groups might seek to put before the court and they may refuse leave to participate.[602] More specific guidance should be given to courts. Legislation should make clear that any person or organisation should be entitled to apply to participate in proceedings to argue an important issue of law or public interest concerning women's equality, when the parties to the proceeding are unable or unwilling to present those arguments.

Mechanism for reforms

7.38 Chapter 4 foreshadowed the need for groups with an interest in women's equality under the proposed Equality Act to have standing to initiate proceedings under the Act and to intervene or participate as friends of court in any federal court or tribunal where an issue of women's equality is relevant. The Act could contain provisions reforming the law of standing and intervention for the purposes of the Act. Another option would be to include a specific provision for intervention in the interests of women's equality in legislation on standing which implements ALRC 27. The legislation should refer expressly to actions under the Equality Act. A third option is to enact legislation to provide specifically for advocates for women's equality to have the right to apply as friends of the court or as intervenors in all federal courts and tribunals.

Content of reforms

7.39 ***A right or discretion to intervene.*** It has been argued that to ensure that women's advocates could intervene effectively there should be a right to intervene rather than a discretion in the court to permit intervention. According to this view the onus should be on the court to provide reasons why intervention sould not be granted. However, in the Commission's view this could be too onerous for the courts and lengthen the conduct of proceedings. This would increase the cost of justice. The court should retain its discretion to grant leave to participate as an intervenor or as a friend of the court. There should, however, be

a right to apply to the court to be heard. The court should not be able to reject the application for leave to participate without, if necessary, hearing argument and evidence on the merits of the application and without giving reasons for its decision.

7.40 ***The threshold interest.*** There should be a statutory threshold that defines the type of interest needed to exercise the right to apply to intervene. The interest should be broader than a special interest as understood under current standing law. The interest should not be restricted to proprietary, material or financial interests. It should encompass a genuine concern about the potential effects of any decision in the proceeding on matters of public importance or public interest relating to women's equality. The interest need not be different from the interest of any other person. A legitimate interest in the subject matter of the proceeding should suffice. It should be required that the parties to the proceedings should be unable or unwilling to put those arguments or represent that interest.

7.41 ***Grounds on which leave may be refused.*** The court or tribunal must have the power to refuse leave to an intervenor or a friend of the court in circumstances where the participation is likely to prejudice the administration of justice, is likely to cause unreasonable hardship to any party or is vexatious. The court's exercise of this discretion will involve balancing considerations. In determining whether to grant leave to a third party to appear, the court necessarily engages in balancing the right of persons or groups to have their interests represented against the disadvantage to other parties that may be caused by any delay or additional costs. Further, the court balances the need to serve the public interest in justice being done and being seen to be done against the public interest in the expeditious administration of justice. These factors are more relevant to participation by an intervenor than a friend of the court.

7.42 ***Reasons for exercise of discretion should be given.*** Under the present law, since the court's discretion to refuse leave to an intervenor or a friend of the court is unfettered, the judge need not give reasons for the decision. There is little prospect of successfully appealing a decision for which reasons are not given. Further, when reasons are not given the decision provides no guidance to future applicants or decision makers as to how the law is to be interpreted and applied.[603] In keeping with the requirement that courts and tribunals exercise their discretion in accordance with legislative guidelines, reasons for the exercise of the discretion should be given.

7.43 ***Terms of a grant of leave to appear.*** Canadian and American practice demonstrates great flexibility in some jurisdictions to permit participation on a range of terms. They can include rights to present evidence, to call and examine witnesses, to make oral submissions and to initiate an appeal. The proposed provisions should give the Australian courts and tribunals similar powers.

7.44 ***Costs.*** Meeting the costs resulting from intervention is of particular importance to advocates for women's equality and other matters of public interest who use the courts. Here, it is a question of balancing the interests of justice against the consequences to the parties. In some cases, the interests of justice would be best served by granting an intervenor immunity from an adverse costs order in recognition of the public interest role of equality advocates. The court has a discretion on awarding costs. The participation by an intervenor, though in the public interest, may result in one or more of the original parties incurring additional costs. In these cases justice may require that the court make an order as to costs. In particular, the court should be able to make an order as a condition of approving the intervention, that any additional costs resulting from the participation should be met by a person other than the original party. This condition could be satisfied by the applicant, the NWJP equality advocacy fund or some other body such as a Legal Aid Commission undertaking to reimburse an original party for any additional costs.[604]

Intervention in action

7.45 ***Distinction between intervenor and friend of the court is maintained.*** The Commission considered whether there was a need for a new form of third party participation in litigation to provide more flexible procedures within which people are able to intervene in litigation. Under the reforms recommended the existing legal categories provide sufficient flexibility at this stage.

7.46 ***Intervenors and friends of the court in courts of first instance.*** Intervention can facilitate the administration of justice at trial and appellate level. Courts at first instance are tribunals of fact. A large part of the initial stage of any litigation is the process of sorting relevant from irrelevant facts. The facts presented

at first instance are generally those upon which the trial judge makes the findings of fact which form the basis for any subsequent reconsideration of the legal issues. Those findings of fact become the version of reality accepted by the court. The parties to the action have the greatest control over the facts tendered to the court. For example, as the legal representative of Jane Doe in *Jane Doe v Police Board of Commissioners (Metropolitan Toronto)*, LEAF was able to influence the structure of the case.[605] An intervenor can also make a significant contribution at trial level. The role of an intervenor at first instance is illustrated by LEAF's involvement in the case of *Schacter*.[606] Being granted full party intervenor status enabled LEAF to influence which facts informed the final decision, which issues were in dispute and what type and amount of relief was sought. Through cross-examination, LEAF was able to expose the stereotyped assumptions informing the evidence.[607]

7.47 ***Criminal cases.*** The Commission considers that there should be provision for intervention at first instance only in civil matters and not in criminal trials. Participation of third parties is not appropriate in criminal trials where due process demands the protection of defendants and of the integrity of the trial. Criminal matters have stricter rules of evidence and a higher standard of proof than civil matters. A criminal trial is properly a matter between the state and the defendant only.[608]

7.48 ***Intervenors and friends of the court in appellate courts***.[609] Appellate courts correct the errors of lower courts and establish principles for general application. The decisions of appellate courts are binding as precedents on lower courts. When new legal principles may be formulated, any person or group who is likely to be affected by the decision should be given an opportunity to be heard. It is especially important that women's views be heard at this stage of the court hearings in both civil and criminal matters. Although it is not appropriate that intervenors and friends of the court be allowed to participate in criminal trials, criminal appeals and stated cases following an acquittal are matters where legal principles, rather than the facts, are determined. It is appropriate for third party participation to be possible in these kinds of proceedings.

Recommendation 7.1

In ALRC 27 the Commission recommended that:

> ***Any person should have standing to initiate public interest litigation unless the court finds that, in instituting the proceeding, he or she is 'merely meddling'. There should be a number of statutory elaborations:***
>
> - ***Personal stake. A personal stake in the subject-matter or outcome of the proceedings should be a sufficient, but not a necessary, condition of standing.***
> - ***Ability to represent the public interest. Standing should be denied to a plaintiff who has no personal stake in the subject-matter of the litigation and whose manner of presenting the issues betrays a clear incapacity or unwillingness to represent the public interest adequately in conducting the case.***
> - ***Presumption of standing. There should be a presumption that the plaintiff has standing unless the court is satisfied that the person is 'merely meddling'.***
> - ***Application generally needed. The court should not deny standing unless one of the parties makes an application to dismiss the case for lack of standing. However, where the plaintiff has no personal stake in the subject-matter of the litigation, such an application should not be necessary if the court finds that the plaintiff lacks the motivation and capacity to conduct the case adequately***.[610]

The provisions proposed in ALRC 27 to give effect to this recommendation should be enacted.[611]

Recommendation 7.2

The provisions proposed in ALRC 27 regarding intervenors and friends of the court should be implemented in effect codifying the circumstances in which the court would grant leave to intervene or to participate as a friend of the court.[612]

The Federal Parliament should enact provisions to guide courts in the exercise of their

discretion regarding participation by intervenors and friends of the court for the purposes of promoting women's right to equality in any court or tribunal exercising federal jurisdiction. This could be done:

- **in the proposed EqualityAct; or**
- **in the proposed Standing (Federal and Territority Jurisdiction) Act; or**
- **by enactment of legislation specifically for this purpose.**

The legislation should provide that

- **a person or organisation should be entitled to apply to participate in proceedings to argue an important issue of law or matter of public interest, concerning women's equality, on the basis that the parties to the proceedings are unable or unwilling to put those arguments or represent those interests**
- **the court should be required to give reasons for the exercise of its discretion to grant or refuse leave to participate**
- **the court should not be able to reject the application for leave to participate as an intervenor or friend of the court without, if necessary, hearing argument and evidence on the merits of the application**
- **leave to participate as an intervenor or as a friend of the court should not be granted if, in the opinion of the decision maker,**

  (a) the argument or evidence proposed to be presented by the person is frivolous, vexatious, misconceived or lacking in substance;
  (b) the person's participation in the proceeding is likely to delay unduly or prejudice the administration of justice; or
  (c) the person's participation in the proceeding is likely to cause unreasonable hardship to any party

The legislation should provide that

- **where the costs indemnity rule operates a friend of the court should be immune from an adverse costs order**
- **in recognition of the fact that participation for the purpose of advocating for women's equality is in the public interest, where the costs indemnity rule operates, the court or tribunal should have discretion to grant an intervenor immunity from an adverse costs order, notwithstanding that the intervenor has all the privileges of being a party to the proceeding**
- **when participation by an intervenor or a friend of the court may result in adding to the costs of one or more of the original parties to the proceeding, the court should have discretion to make an order that leave to participate is conditional on those additional costs being met by a person other than the original party**[613]
- **the enacted provisions should apply in all civil cases**
- **the enacted provisions should only apply in criminal cases in appeals from conviction and in stated cases following acquittals.**

Funding women's legal advocacy groups

Funding test cases

7.52 ***AJAC.*** In October 1993 the Commonwealth Attorney-General and the Minister for Justice appointed an advisory committee, chaired by Ronald Sackville QC, to consider ways in which the legal system could be reformed to enhance access to justice and make the legal system fairer, more efficient and more effective. In May 1994 the committee released its report, *Access to justice: An action plan*.[614] One of its recommendations is that the Commonwealth establish a fund to provide assistance for test cases in the interests of disadvantaged groups and for large scale litigation involving many parties in different jurisdictions. It recommends that the fund be administered by an Australian Legal Aid Commission and that the Commonwealth negotiate with the States on appropriations for the fund. At the Access to Justice Forum held in Canberra in August 1994 the Minister Assisting the Prime Minister for the Status of Women referred to the committee's recommendation and the Commission's similar recommendation. She said that funding test cases would enable the law to become more responsive to the needs and experiences of women and cited the Canadian experience with test cases.[615]

7.53 ***Canada***. Government funding of LEAF has been crucial in enabling the organisation to make a valuable contribution to the development of law and the protection of women's equality in the courts.[616] LEAF's funding has always come from both public and private sources. LEAF began with a large donation from a private benefactor and today its main source of funding is private sponsors. The Secretary of State Women's Program provides LEAF with an annual grant to cover operating costs. From 1985 to 1992 a significant proportion of LEAF's legal work was funded by the federal Court Challenges Program. A less significant source of case work funding has been the Ontario Government's Litigation Fund. Government covered the cost of disbursements and enabled LEAF to pay lawyers at legal aid rates. In the 1992 federal budget funding for the Court Challenges Program was withdrawn. LEAF's activities have therefore been severely curtailed but it continues with the support of individual, corporate and union donors and *pro bono* work from lawyers. In response to public demand and in recognition of the contribution of funded advocacy to the development of more equitable laws, the current Liberal government has announced that the program will be reinstated. LEAF, along with others, is currently involved in negotiations with the government on the structure of the new program.[617]

Funding public interest advocacy of women's issues

7.54 ***Legal Aid.*** The Commonwealth provides an annual fund to finance special cases of Commonwealth interest[618] where legal aid is not available.[619] There are 22 Commonwealth Statutes and 7 non statutory schemes under which finance can be obtained. These cover a wide range of areas. The most directly relevant to particular women's issues are cases under the SDA and overseas custody cases. There are also non-statutory funding schemes that cover public interest and test cases. While the funds are targeted to parties rather than intervenors or friends of the court the guidelines for applicants do not preclude applications of this nature.

7.55 ***Women's advocates.*** Women Advocates for Gender Equity (WAGE) in Sydney and the Women's Legal Action Fund in Melbourne receive no significant funding. They are currently no more than small groups of volunteers seeking resources.

> *[T]he major stumbling block to the pursuit of our legal action, is funding. . . . The importance of considerable financial support is central to the success and the valuable results which groups like LEAF, WAGE and the Women's Legal Action Fund can achieve.*[620]

Financial support to assist women's advocacy groups to participate in relevant litigation is essential to achieve fully the goals of the Equality Act.

Advocacy outside the court room

7.56 ***Advocacy with government.*** The mere possibility of court action provides a useful means for women's advocates to pursue equality without having to commence litigation. In Canada, LEAF has argued issues outside the court room. For instance, in Ontario single parents are entitled to economic support on the condition that they live as single persons. LEAF challenged these regulations before a government committee, arguing that, although the provisions were framed in gender neutral terms, they were based on the erroneous assumption that women are economically supported by their male partners. On another occasion LEAF challenged Ontario's farm assistance programs for first time farmers, which prohibited spouses of farmers from applying. LEAF also took on the case of a woman who objected to the Manitoba public insurance scheme paying housewives lower disability pensions than it paid to others.[621] LEAF's negotiating power in these challenges to government agencies was founded on the potential for court action.

7.57 ***Law reform.*** Advocacy for women's equality can also occur in the law reform process. In *R v Seaboyer*; *R v Gayme* the majority of the Supreme Court of Canada found that the 'rape shield provisions' of the *Criminal Code,*[622]which protected the primary witness in a rape prosecution from being required to adduce evidence or undergo cross-examination on her past sexual conduct, violated the Charter.[623] Following the *Seaboyer* decision, LEAF, with other equality advocates, assisted in drafting new sexual assault provisions.[624] As a result, the preamble to the new provisions acknowledges that sexual assault against women and children is particularly prevalent and that evidence of the complainant's sexual history is rarely relevant and is inherently prejudicial.[625] Further, under the new provisions it is not a defence to a charge of sexual assault that the accused believed the complainant consented if the accused did not take reasonable steps to ascertain that she was consenting.[626]

7.58 ***Education and research.*** Advocates for women's equality have the expertise to educate the community and the legal profession about the meaning of equality in the law and about how to use the law to achieve and protect women's equality.[627] Women's advocacy and other groups and individuals need funding to undertake research or community education projects for purposes related to the promotion of women's equality through advocacy.

7.59 ***Targeted special projects.*** There are already many avenues through which law reform and advocacy for the public interest may be pursued.[628] Within these structures, more could be done to ensure that the issues relevant to women's equality are understood and incorporated into the law reform process or in advocacy. For example, lawyers or other specialists could be funded for a period to work within existing organisations as advocates for women's interests either by becoming an employee of the organisation or by secondment for the term of the project. In addition, independent groups or individuals are often able to construct quality projects for targeted purposes if funding is available. The NWJP could provide funding for independent projects for the promotion of women's equality through advocacy.

Recommendation 7.3

Establish a women's equality advocacy fund

A national fund should be established under the National Women's Justice Program (NWJP) to promote the development of more appropriate legal responses, under both statute law and case law, to women's needs and perspectives through advocacy in courts and tribunals and other forums.

Funding by the women's equality advocacy fund may include:

- **funding, through general grants, one or more women's advocacy groups to advocate, and to assist litigants to advocate for women's interests before federal courts and tribunals and in other forums as a party, the representative of a party, an intervenor or a friend of the court**

- **partially or totally funding, on a case by case basis, individuals and groups to conduct or**

to intervene in cases which affect the rights of women

- **where participation by an intervenor or a friend of the court, which was funded directly or indirectly by the fund, results in an original party to the proceeding incurring additional costs, reimbursing that party for those additional costs**

- **funding women's advocacy and other groups and individuals to undertake research or community education projects which complement the fund's purpose of promoting women's equality through advocacy**

- **providing special funding from time to time to projects which promote women's equality rights through advocacy in courts and tribunals and other forums.**

8. Legal education

Introduction

8.1 This chapter examines the formal education of lawyers, in law schools, practical legal training courses, continuing legal education and judicial education. Legal education is identified as both a source of and a solution to the inequality women experience before the law.

8.2 ***Gender bias in the law.*** Chapter 2 demonstrated that there is gender bias in the substance of legal principles and in the decisions of courts. Chapter 7 explained how legal principles are developed from arguments put by lawyers to judges. Legal principles also result from government officials and parliamentarians, academic lawyers and practitioners who draft statutes, regulations and by-laws. Legal education clearly has a critical role in helping future lawyers detect and eradicate gender bias from common law and statutes. It is timely to consider legal education in the context of current changes to the legal profession in Australia.

> *The gender bias present in Australia's legal system can, in part, be attributed to the sexist perspectives entrenched in our legal education. Gender bias in legal education breeds gender bias in lawyers and judges.*[629]

8.3 ***The importance of legal education.*** Submissions to the Commission reveal that women are dissatisfied with the service they receive from many lawyers.[630] They refer to lawyers' lack of expertise in the kinds of problems women present and to a failure to see how a woman's perspective may not be properly represented in traditional legal thinking and practice. They describe this as an issue in court cases and in legal practice generally.[631] Not all contentious matters end up in court, some are settled and others are mediated. Much of a lawyer's time does not involve a dispute between two sides but a problem which needs to be interpreted to a client and a solution found. In these cases knowledge of women's perspectives and of alternative dispute resolution processes, such as mediation and ability to communicate and to understand different situations and experiences are important. Legal education has a critical role to play in training lawyers who can serve all clients, women as well as men.

8.4 ***The nature of legal education.*** Legal education is the foundation of every lawyer's function and performance in the legal system.[632] Legal education is a life long process, involving formal education, the actual performance of legal work, the example of fellow practitioners and self instruction.[633]

> [Legal] education and skills training must continue throughout their professional lives ... [I]t is important to see law school education, post law school practical and other training, in-service training, law firm and other 'on the job' training and continuing education, as well as post graduate education at a tertiary institution, as part of a total package which contributes to the development of knowledge, skills, professional standards and, where desirable, specialisation.[634]

8.5 ***The goals of legal education.*** DP 54 outlined the goals and visions for legal education and the legal profession. The desired goals are that all people who administer the legal system, magistrates, judges, solicitors, barristers and court staff, take account of the needs of women and that the perspectives of women are included in the shaping of legal concepts and doctrines.[635] This requires education for all members of the profession, irrespective of their gender, about women's issues.[636] Chief Justice Malcolm of the Supreme Court of Western Australia emphasised that gender awareness education should not be limited to the judiciary, but should extend to all members of the profession:

> The judiciary, the profession and all who work in the courts need to be aware of and understand the hidden or unconscious gender bias in the law and the administration of justice so that it can be consciously and conscientiously eliminated and avoided.[637]

This goal will in part be achieved by a system of legal education that addresses the concerns of women and recognises the challenges feminists make about the law and the proposals for change that they suggest.

I would envisage that courses would be designed to broaden the understanding of participants so that they can gain an insight into the lives and experiences of those who are not middle-class, Anglo-Saxon males. I would hope that such education would challenge the participants to realise that many of the principles embodied in the law that are lauded as 'neutral' and 'value-free' are in fact values and viewpoints that benefit a particular (minority) class of people in society (usually middle-class, Anglo-Saxon males) and do not sufficiently take account of the needs and experiences of many other social groups.[638]

The law school

Introduction

8.6 In Australia law schools see their primary task as training lawyers for legal practice.[639] Law school provides the foundation of knowledge a student will use to practise as a lawyer. To some degree, it will also mould the attitudes of a student towards the law. For this reason the law school environment contributes to the training of lawyers. The Commission surveyed law schools in Austalia to gauge the extent to which feminist legal theory and women's perspectives were incorporated into their curricula.[640] There appears to be a change occurring in legal education. However, law schools differ considerably in their ethos and in the extent to which they have adopted policies to address discrimination and gender bias.

The experiences of women at law school

8.7 Women represent approximately 50% of students studying law in Australian universities[641] and 35% of legal academic staff.[642] The Commission received many submissions from women describing their experiences at law schools.[643] Three submissions contain the results of student surveys conducted in their law schools.[644] Most submissions report a degree of systemic discrimination against women in law school.[645] Staff members and students[646] use sexist comments and stereotypes in class examples and examination questions,[647] and the experiences and perspectives of women are lacking in course materials and textbooks.[648] Submissions describe conflict in the manner in which legal disputes are traditionally resolved. They also describe a perception that women are not listened to in classes or that their comments are not attributed the same weight as male students.[649] This experience of alienation is compounded for those women who experience disadvantage for other reasons, for example, Aboriginal and Torres Strait Islander women, women from non-English speaking backgrounds, lesbians and women with disabilities.[650] However, other submissions comment that they perceive little direct discrimination in law schools and that most academic staff are sensitive to gender issues and attempt to use gender-inclusive language.[651] One submission suggests that the situation experienced by women is far worse in the profession itself than at law school.[652]

Freedom of students and staff to raise feminist issues in the classroom

8.8 Published accounts by academic staff and students describe their difficulties in teaching feminist legal courses and raising feminist issues in law classes.[653] Submissions make similar points.[654] The survey from the Australian National University found that 65% of respondents considered that they could be stigmatised for offering a feminist viewpoint in law classes.[655]

After only one class [on domestic violence, of which there were to be two]... several of the boys in the group complained to other students about having to sit through 'all this feminist shit' instead of doing 'proper law'.[656]

We are aware that, in the past, female law students who voiced objections to areas of the law which reflected gender or other biases (eg the legal fiction about terra nullius) were ridiculed by staff and other students, and told that they were being 'emotive'. The very strong message was that if women would become more objective (like lawyers or men), they would see that the law was true and just (and not that it also produced inequities).[657]

8.9 ***Treatment of female staff by students.*** Women academic staff, and particularly those who present a feminist perspective in law classes, may be subject to adverse reactions from male students[658] and may be treated less seriously than their male colleagues.[659]

> *The behaviour of some male students towards [a young woman academic] was astounding. One student used to sit in class with sun-glasses on ... to, in his words, 'stare at her tits'. His whole demeanour towards her reeked of the fact that he could not cope being in a less powerful position (as a student) than a young, attractive woman.*
>
> *It is my experience that women staff members have to prove themselves in a way that male staff members do not. Men can be incompetent, incoherent and disorganised in their lecturing style and students will not necessarily conclude that they do not know their substantive law. Women staff however, if they seem anything other than totally organised, are instantly branded as unintelligent and ignorant. Many women staff at the [law school] come under heavy criticism from students that male staff are spared.*[660]

Effect of the lack of senior women academics on the education of law students

8.10 In 1993 women represented 35% of total academic staff in Australian law schools.[661] However, they are concentrated in tutorial and lecturer positions while men dominate the positions of associate professor and professor.[662] Few women occupy the managerial positions of dean or head of department in law schools. This reduces the contribution women are able to make in the formulation of academic policies. One submission comments that the distribution of women academic staff has serious implications for students in reinforcing notions of women's inferior position in professional life.[663] Statistical evidence from the United States of America has found that women law students participate more often in classes conducted by women professors.[664] It means that women students lack role models or mentors in senior positions.[665] The Canadian Bar Association in its report on gender equality in the legal profession recommended that law schools and law societies establish programs or forums to facilitate contact between women in the profession and women law students 'to allow for greater communication and sharing of information regarding the position of women in practice'.[666] In Australia the University of Newcastle takes an active role in providing women law students with appropriate role models by inviting prominent women in the profession to speak to law students.[667] Similar events have been held in other law schools.

Other areas of concern raised in submissions

8.11 In submissions women law students raise other issues. These include the lack of availability of part time courses, lack of availability of child care facilities, difficulties posed by the timetabling of classes after 5 pm,[668] timetabling exams during the school holiday period[669] and the difficulty women students have in getting involved as student representatives or on student bodies as a result of family responsibilities and the resulting lack of extra time.[670] These factors may also present difficulties for women members of the academic staff. Submissions also describe discrimination in the attitude of some judges encountered in mooting competitions,[671] and report that sporting events connected with the law school exclude women.[672]

The content of education in law schools

Introduction

8.12 This part of the chapter proposes changes to the content of courses in law schools. These changes will raise gender awareness among students and help identify and reduce gender bias in the law. There are two components: the introduction of feminist legal theory as a subject in the law curriculum and the integration of the experiences of women into the content of courses.

> *It is essential to the equal participation of women in the legal profession that training at law schools reinforces within course content the importance of gender awareness and discrimination issues. If students are exposed to the importance of equality before the law in its various forms, the legal profession is likely to benefit from educated individuals who have an understanding of gender politics*

and the means to put this knowledge into constructive use in practice as legal professionals ... Gender plays a very important part in the legal system, and the language used in the law obscures this. Gendered experiences should be recognised (such as the male creation of law and the historical female exclusion from it) while women need to be recognised as participants or potential participants and litigants when current events are being discussed. All legal questions and strategies raise questions of power and the language used in this law course both reinforces and obscures the inequities between men and women as well as having 'a limiting and perverting effect on intellectual inquiry'.[673]

Nature of legal education in law schools

8.13 ***General approach.*** The teaching of law categorises subjects as discrete areas of knowledge. These boundary lines are arguably structured around and reflect the experiences of men's lives.[674] Most law schools operating in Australia today incorporate critical and theoretical perspectives into their law courses although the manner and the extent to which it is done varies considerably.[675] In a survey of 13 Australian law schools a majority stated that they aimed to 'promote an understanding of the relationship between law and society' and approximately half referred to the need to promote analytical and critical skills.[676] Some law schools have always encouraged a contextual approach and some have taken up this approach to demonstrate feminist perspectives.

8.14 ***Compulsory and elective subjects***. To satisfy the requirements of a Bachelor of Laws (LLB) degree awarded by a university students must complete a number of compulsory subjects, known as the core curriculum, and a number of other subjects on the basis of choice, known as the elective curriculum. Courses offered in the elective curriculum tend to involve a more detailed examination of a subject or part of a subject offered in the core curriculum or an area of study not taught in the core curriculum.[677] The core curriculum and the elective subjects offered vary in different law schools.[678] The law schools value and foster this diversity.[679]

The core curriculum

8.15 ***Content of the core curriculum.*** The core curriculum is intended to provide the law student with a basic knowledge of the law, its techniques and institutions.[680] There has been considerable debate about the content of the core curriculum[681] but in recent years there have been moves towards making the academic training of lawyers more uniform throughout Australia, partly because of legislation to enable lawyers to practise in any Australian jurisdiction.[682] To this end a core curriculum for purposes of admission to legal practice has been devised.[683] Eleven subject areas have been identified in the uniform admission rules. They are now part of the detailed admission rules within each State and Territory. The Law Council of Australia has recently proposed that the LLB program in law schools should in future be accredited by a committee to ensure compliance with the admission requirements.[684] It is also proposed that the committee have a function to review the 'prescribed areas of study' over time.[685] The eleven prescribed subjects are:

- criminal law and procedure
- torts
- contracts
- property (including torrens land)
- equity (including trusts)
- administrative law
- federal and state constitutional law
- civil procedure

- evidence
- professional conduct
- company law.[686]

8.16 ***Concern about the uniform admission rules and the content of legal education.*** The uniform admission rules appear to be in direct conflict with the movements in legal education over the last decade towards diversity[687] and the inclusion of critical and theoretical dimensions in legal education.[688] There has been no mention in the uniform admission rules of jurisprudence or legal theory as a separate subject or the necessity for theoretical content in understanding the law and its practice.[689] There is also concern about the subjects that are omitted from this list, such as family law, labour law, consumer law, welfare law and human rights law.[690] These general criticisms apply with particular force in two main ways to the education of lawyers about the perspectives and experiences of women. First, the failure to include legal theory in the list means that the theoretical perspective of feminist jurisprudence is absent. Second, the absence of family law, a subject which provides particular scope for women's perspectives and experiences to be explored, leaves a particular gap in the knowledge a student will acquire.

Including feminist legal theory and women's perspectives in legal education

8.17 ***Feminist legal theory.*** As in other areas of jurisprudence there are numerous strands of feminist legal thought and argumentation.[691] The important common thread among the different theories is that they challenge dominant assumptions held by law and aim to develop alternative 'conventions which take better account of women's experiences and needs'.[692] Like some other strands of legal theory, feminist legal theory also challenges the traditional nature of legal reasoning and provides insights into solutions and new approaches. In general terms feminist legal theory questions the claim of the law to be rational, objective and neutral.[693] Applying feminist legal theory leads to a re-examination of traditional subjects, their content and assumed boundaries. It redefines the law, changing its emphasis, correcting bias and including new material that will demonstrate the law's particular application to women.[694]

> *[I]f feminist jurisprudence is taught in all stages of a law degree lawyers cannot go on to build a career in ignorance without the knowledge of women's valuable contribution to society.*[695]

> *The integration of feminist jurisprudence into core subjects would heighten awareness of the issues affecting women amongst all law students.*[696]

8.18 ***What is the role of feminist legal theory in legal education?*** Feminist legal theory could be taught as part of a course in jurisprudence or law in society or as a subject in its own right. Feminist legal theory has developed insights and perspectives that should also be relied on in teaching individual subject areas such as torts and contracts.[697] Studies by feminist legal theorists have helped to reveal the systemic gender bias of law.[698] This work is not confined to areas where it is expected that women encounter the law, for example, family law or the law of sexual assault, although these are areas where feminists have done particular analysis.[699] The work also covers areas of law generally assumed to have no gender implications.[700] It challenges existing legal theories, laws and methods of legal education and aims to develop legal tools to match the reality of women's lives.[701] If the experiences and perspectives of women were part of law school education then lawyers, women and men, would be better able to understand the law itself and serve their women clients more effectively.

> *It is not asking a lot for ... students to learn more about half the population, surely this will make them better lawyers.*[702]

8.19 ***Submissions.*** DP 54 asked whether feminist legal theory should be included in the core curriculum. Most submissions answer in the affirmative.[703] One submission argues that the inclusion of feminist jurisprudence in the core curriculum recognises it as a legitimate and intellectually challenging area of

theoretical thought and that relegating feminist theory to the elective curriculum allows students to dismiss the material as insubstantial.[704] Submissions emphasise the need for feminist perspectives to be included in first year subjects, so that

> *Students are not ... inculcated with the idea that law comprises an abstract body of neutral rules from the outset. To be effective, it is essential that such a subject be taught at the beginning of a law course.*[705]

Another submission comments that teaching feminist legal theory in the law school contributes to a more favourable environment for women students.[706] Submissions nominate subject areas that are in 'dire need' of input from feminist legal theorists, for example:

- criminal law, family law, constitutional law, introduction to law and evidence[707]
- trusts and property law.[708]

> *[A] torts teacher could use the feminist perspective to challenge students to critically examine what the law of torts seeks to achieve, how torts relates with other areas of the law and the students' own conceptions of justice. A feminist perspective may be introduced into areas such as the concepts of a duty of care and the reasonable man and tortious remedies in both statute and common law. Similarly a feminist perspective could be introduced into criminal law in dealing with such topics as domestic violence.*[709]

One submission expresses concern about making compulsory material that has a 'strong ideological perspective' but sees scope for an elective subject dealing with feminist legal theory.[710] In a survey conducted by students at the University of Tasmania, 75% of students responding stated that feminist legal theory should not form part of the core curriculum as this would perpetuate and entrench gender differences.[711] 18 women members of the Queensland Bar were also divided about whether it should be in the core curriculum.[712] Submissions support the need for subjects that deal with feminist legal theory in a more extensive and detailed manner than would be possible in the core curriculum.[713] It is important that offering feminist legal theory as an elective subject is not a substitute for dealing with it in the core curriculum. Elective subjects are offered in the final years of a law degree, and are self selected. They are not encountered by all students. Submissions comment that electives that deal with feminist legal theory tend to be taken by the 'converted' and are effectively marginalised by other students.[714] In this way information about the experiences and perspectives of women may never affect how a student considers the law and how a practitioner views women as subjects of the law.

> *[I]t is possible that the existence of a specialised course in law and feminism can lead an institution to think that it now has 'gender equality' and thereby ignore the implications of feminism on the rest of what is taught.*[715]

8.20 ***A number of law schools include a feminist perspective in the curriculum.*** Most law schools now include feminist legal theory in the curriculum[716] or in elective subjects.[717] For example, at Adelaide University feminist legal theory has been included in various subjects. In human rights law it shows how human rights have traditionally been defined in terms of men and do not 'easily assist women'.[718] Industrial law has a focus on the work women perform, particularly in the context of part time and casual labour and discrimination in the workplace. The criminal law course exposes the law's treatment of women's credibility and the ineffectiveness of the law to protect women.[719] A number of law schools report that feminist legal theory is taught as an elective subject in its own right.[720] Additionally a number of individual academics and law schools have taken steps to integrate the experiences and perspectives of women into the whole law curriculum. For example, a submission from a Professor of Law describes how she integrates feminist legal theory in the subjects that she teaches, for example in foundation of legal studies, which is an introductory law subject.[721]

Recent initiatives

8.21 ***DEET.*** The Department of Employment, Education and Training (DEET) conducts annual quality evaluation of all universities. Part of that evaluation should assess the incorporation of the experiences and perspectives of women in the law school curriculum. DEET has provided money from the National Priority Reserve Fund for a project to address the need for gender inclusive curriculum material for use in core undergraduate law courses.[722] The project aims to assist law schools to obtain appropriate curriculum materials and to ensure that 'all law subjects include feminist perspectives'.[723]

> The primary aim of this project is to ensure that law students are made aware of or at least gain an appreciation of, the inadequacy of existing legal principles and structures when considering the reality of women's lives.[724]

DEET has engaged consultants to develop and provide curriculum materials in three key thematic areas: violence, work and citizenship. These materials will cut across the traditional boundaries of teaching and defining law into contained subject areas. Gender-inclusive materials relevant to the core curriculum subjects are to be devised and collated on the basis of these themes. Suggested core curriculum areas are contract, property, torts, evidence, procedure, litigation, equity and criminal, constitutional and administrative law. DEET considers that the preparation of these curriculum materials will 'contribute towards the elimination of discrimination and gender bias' experienced by women working in the profession and women encountering the law as clients.[725] The Committee of Australian Law Deans has supported the project.

8.22 ***Western Australian Taskforce on Gender Bias.*** The Western Australian Chief Justice's Taskforce on Gender Bias recommended that feminist legal scholarship be included in all introductory core subjects.[726]

> [The Subcommittee] ... is of the view that an understanding of feminist legal scholarship constitutes fundamental and essential knowledge necessary to equip any students undertaking law studies ... it [is] essential that law students and others taking law units understand that the bulk of legal scholarship represents a male perspective.[727]

In more general terms the taskforce also recommended that feminist legal theory be 'integrated' into all core and elective subjects 'where appropriate'.[728]

Implementing change

8.23 ***The Commission's approach.*** The experiences and perspectives of women should be included in all aspects of the law school curriculum.[729] This includes subjects that form the core curriculum and subjects that are offered as electives. It is important that the experiences and perspectives of women be integrated into law subjects and not treated in such a way that they appear to be tacked on to the subject matter.[730] By integrating the experiences and perspectives of women in law courses women are seen as subjects of the law. Law schools should also either offer feminist legal theory as an individual elective subject or ensure that feminist legal theory is included in legal theory subjects.

8.24 ***Role of the Committee of Australian Law Deans.*** The Committee of Australian Law Deans plays an important role in legal training in tertiary institutions. It discusses issues of educational policy and relations with government and the practising profession. Meetings of the Committee provide an occasion for disseminating information and course materials among the various faculties.[731] The Committee has supported the current DEET project and is represented on the body supervising it. The Law Deans should continue to develop awareness of gender issues and the incorporation of the experiences and perspectives of women in the curriculum.[732]

8.25 ***Ensuring academic staff are aware of feminist issues in legal education.*** Some members of the academic staff may be unable to incorporate the experiences and perspectives of women in courses in an effective manner.[733] Feminist legal theory has only become an accepted area of knowledge in recent years. Many legal academics may have trained before this time and never encountered it.[734] Nonetheless, there is now a considerable collection of academic writing that examines traditional subject areas from a feminist perspective and introduces new material of relevance to women's issues or experience. Staff need to be encouraged and assisted, for example, through seminars, guest lectures and study leave, to acquaint themselves with this literature. The DEET project is important in helping to fill this need.

8.26 ***Selection of staff.*** Law schools should develop selection criteria that assess applicants' awareness of gender issues. Selection criteria could require applicants to demonstrate their understanding of gender issues in the subjects in which they specialise. An Equal Employment Opportunity (EEO) officer should be involved in drawing up appropriate selection criteria and in providing appropriate training for members of selection committees. Where an EEO officer is part of the selection process she or he may be well equipped to monitor whether these issues are clearly considered. The Committee of Australian Law Deans should support these initiatives.

8.27 ***Eliminating gender-specific language and stereotypes in law schools.*** CEDAW requires States Parties to

> [t]ake all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:
> ...
> c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education ... in particular the revision of textbooks and school programmes and the adaptation of teaching methods.[735]

This should be understood as requiring the use of gender inclusive language. Gender inclusive language plays an important role in including both women and men in the consideration of the law and eliminating stereotypes. All tertiary institutions have a policy of using gender-inclusive language.[736] However, the existence of a policy does not necessarily mean that it is always implemented. Submissions suggest that many lecturers appear to be unaware of the policy.[737] A useful review of the course materials used by the faculty of law at the Queensland University of Technology in 1993 found that

> *a minority of materials [used] language ... responsibly and [made] excellent attempts...at implementing a regime of inclusive language ... [T]he majority raised cause for concern. The inequities which were identified included the following:*
>
> - *the use of male pronouns in an exclusive context by the author/s of the materials (eg he, his, him);*
> - *the use of gender-exclusive terms by the author/s of the materials (eg draftsman, landlord);*
> - *the use of male pronouns in an exclusive context in quotations extracted from materials;*
> - *the casting of women in stereotypical roles and inactive and minor roles;*
> - *the consistent under-representation of women in seminar materials.*
>
> *Three thousand one hundred and ninety (3190) examples of inequitable language were identified.*[738]

One submission describes discussions with a sub-dean of a law school to ensure the use of gender inclusive language.

> [The Sub-Dean] ... said it would take too much extra time to say 'he or she' in lectures and resources were already limited. He dismissed a suggestion that the 'universal' pronoun could be alternated between *lectures* with 'he' being used one week and 'she' the next. The Sub-Dean said that this was [a] ridiculous suggestion because there is no historic or conventional use of 'she' meaning 'he or she'.[739]

8.28 ***Including women in hypotheticals.*** A common form of assessment at law school involves the use of a hypothetical problem. A hypothetical problem provides a scenario in which a number of characters are involved. It generally requires the student to provide legal advice to one or more characters in the problem. Hypothetical problems may also be used in classes to explain legal principles. One submission comments that most of the examples used in law classes are about men and how men use the law, not how women use

the law or the inherent discrimination of the law.[740] A submission from a group of law students examines a number of law examination papers.[741]

> ***eg Contract Law,* examination *paper***
> *The 1992 exam paper had 14 roles: 9 (64%) men, 4 (28%) women, and 1 character of unassigned gender. Three out of the four women were ballerinas.*
>
> **eg Criminal Law, examination paper:**
> The 1992 exam paper had 13 characters, only one of whom, a room maid, was female.
>
> ***eg Introduction to Law, tutorial and examination questions:***
> 17 tutorial and exam problems yielded 56 occupations or roles, only four of which were clearly occupied by women. Eighteen were gender neutral and one was gender inclusive (ie 'he' or 'she'). The four occupations or roles that were described as female were 'air hostess', 'actress', 'daughter' and 'secretary'. The 33 occupations given to men included solicitor, professor, chief justice and factory owner. In only one case is the women the 'active' participant around whom the problem revolves. This is the 'air hostess' who unsuccessfully tries to divert a pilot from the proper route and who may have breached a statute. The 'actress', 'daughter' and 'secretary' play ancillary roles in their scenarios.
>
> **eg Civil Procedure, examination questions:**
> In every exam since 1989, where an exam question has indicated a person's sex, that person has always been male.
>
> **eg Family Law, examination question:**
> [The question concerned the separation of John and Sandra] and their subsequent relationships with Prudence and with 'X'. Prudence is John's new partner; 'X' is Sandra's. 'X' is a woman. The lesbian is not acknowledged as a person. The homosexual couple then leaves the children with their grandmother for two months while they fly off to the Golf Coast. The couple is then doubly deviant - firstly in a sexual sense, then in a maternal sense. The 2-month sojourn with the grandmother is not described in terms of John's abandoning them, although he too is a parent.[742]

8.29 ***Recognising women in texts and course materials.*** The presentation and content of legal casebooks or textbooks has been examined by feminist academics.[743]

8.30 ***Case study of labour law text***. The review suggests that students or readers of these texts are not receiving a comprehensive account of labour law and issues relating to that subject.

> A review of three casebooks on labour law revealed that these texts fail to consider women as a part of that subject.[744] The assumptions underlying labour law replicated in these texts assist in marginalising and according no value to the work women do.
>
> In general the review found that the three texts consider the male worker to be the focus of labour law in that the worker described seems to be a full time employee with a continued attachment to the workforce. This does not necessarily reflect the experiences of women; it does not take account of the fact that work patterns other than full time work are a major method in which women engage in paid work. Such an approach does not take account of the fact that the greatest growth in employment has occurred in the area of part time work, and that this part time work raises a number of issues relating to working conditions and benefits.[745] The focus of the texts has the effect that any type of work other than full time is viewed as a deviation from the norm.[746]
>
> The texts are shown to take little account of women as workers. This is evidenced by the fact that most discussion of women where it exists is likely to be relegated to footnotes, and there is little discussion of sexual harassment.[747] Further, the texts do not consider the relationship between paid and unpaid work, an issue of particular concern for women given the disproportionate amount of work they undertake in the home.[748] The texts fail to discuss adequately issues surrounding union

membership for women, the implications of the definitions of employee and independent contractor,[749] the predominance of women under State awards, the position of outworkers and the problems surrounding the current provision of maternity leave.[750]

Women are discussed in the texts where it is expected that women appear in work; in the discussion on equal pay and sex discrimination legislation.[751]

The texts under review consistently use gender inclusive language in the text and commentary. However, the review suggests that this positive aspect of the texts is weakened by the reliance on case extracts that are 'decidedly sexist'.[752] The review suggests that other cases should have been selected or that the use of gender specific language in the extracts should be acknowledged in the commentary. There may also be problems with the manner in which the texts allocate characters for women in hypotheticals.[753]

The effect of the approach taken in the texts is that they 'further entrench ... assumptions' about women and work, about the division between the public and private spheres and fail to consider the role of labour law in creating disadvantages for women in work, paid and unpaid.[754]

The work of feminist legal scholars in analysing textbooks in this manner illustrates how texts ignore or marginalise women. A number of submissions comment that textbooks and course materials use sexist language and stereotypes.[755] Submissions argue that this must be removed or amended or where it is included it should be opened up for critical comment and evaluation.[756] One submission refers to the positive impact of ensuring that more appropriate texts are selected as teaching sources. Such texts would depict women in positions of power, address women as readers, select case law that deals with the experiences of women and use gender inclusive language.[757]

Recommendation 8.1

Tertiary legal education

1. Law schools should ensure that the curriculum includes content on how each area of the law in substance and operation affects women and reflects their experiences. The curriculum includes the core curriculum and elective curriculum.
2. Law schools should ensure that feminist legal theory is offered in separate elective subjects or in elective subjects that deal with legal theory.
3. The Department of Employment, Education and Training (DEET) should assess the incorporation of the experiences and perspectives of women in the law school curriculum as part of its annual quality evaluation of universities.
4. All law schools should encourage staff members to exchange information and advice on the incorporation of the experiences and perspectives of women in the content of all subjects.
5. All law schools should ensure that in recruiting new staff selection criteria assess an applicant's awareness of gender issues as applicable to the subject area to be taught.
6. Law schools should ensure that all aspects of tertiary legal education, including assessment tasks and course material, employ gender inclusive language and avoid sexist stereotypes of the roles of women and men in society.

Practical legal training

Introduction

8.31 After the completion of an undergraduate law degree a graduate is required to undertake practical legal training (PLT) to be eligible for admission to practice. The form of practical legal training varies. It may consist of a course offered by an educational institution (known as a practical legal training course, PLTC), a period of articles in a law firm or a combination of these.[758] This section considers the education students receive in undertaking practical legal training for admission to practise law.

Purpose of practical legal training

8.32 PLT is intended to provide a graduate with the basic skills necessary to engage in and conduct legal work in a competent manner as a newly admitted solicitor.

> The aim of practical training ... is to train solicitors who are able to perform professionally and competently legal work in specified fields, and who are able to quickly develop new competencies in response to client and employer needs.[759]

PLTC does this by offering training through simulations of aspects of legal practice. For example, the courses simulate interviews with clients, handling files, advocacy, legal drafting, letter writing, legal accounting, conveyancing and professional responsibility and ethics.[760] Articles of clerkship are intended to provide a graduate with training through experience in employment in legal practice. The nature of the training received is dependent upon the employment the articled clerk obtains.

Uniform requirements for practical legal training

8.33 ***The content of PLT.*** The Consultative Committee of State and Territorial Law Admitting Authorities[761] has developed a principle by which to be granted an unrestricted practising certificate[762] a person must have

- completed the academic requirements of the Uniform Admission Rules[763]
- completed the equivalent of two years of full time practical experience, including at least one year in supervised practice
- completed the practical training requirements.

The practical training requirements comprise twelve areas of skills that are generally to be completed by a graduate in a PLTC or in an articled clerk position.[764] The areas of practice are:

Legal profession

- ethics and professional responsibility
- trust and office accounting

Professional skills

- work management
- legal writing and drafting
- interviewing
- negotiation and dispute resolution
- legal analysis and research
- advocacy

Practice areas

- litigation
- property practice
- wills and estate management

- commercial and corporate practice

8.34 ***The implementation of the uniform standard for practical legal training.*** In considering the implementation of the uniform standard for PLT admitting authorities need to consider its impact on women. Some forms of practical legal training may disadvantage women, for example, the articling system in Western Australia.[765] Disadvantage is also possible in any practical component the satisfaction of which is determined by the profession.[766] It is important that a graduate be able to complete their training with as wide a range of employers as possible. For example, the new course structure to be introduced in New South Wales provides that graduates may satisfy their practical employment experience with a sole practitioner, a law firm, a government, semi-government or corporate legal office or a community legal centre recognised by the Practical Experience Committee. Practical experience may also be undertaken with a non-legal organisation or office, where the employer and the graduate make an application to the Practical Experience Committee setting out the legal experience that will be gained in that employment.[767] The Commission's view is that the Law Council of Australia, in its proposal for a National Accreditation and Standards Committee should ensure that the difficulties faced by women in satisfying the practical legal training requirements, particularly in terms of supervised employment and articles, are addressed.

Concern about gender awareness in practical legal training courses

8.35 ***Gender education in PLT.*** Many submissions emphasise the need for gender education throughout the legal profession.[768] The few submissions that directly address practical legal training identified two concerns.[769] First, the content of PLTC should take account of women as clients and not rely on gender stereotypes and gender specific language. Second, practical requirements, whether as articles or PLTC, should not disadvantage or restrict the entry of women to the profession. There are difficulties in devising a PLTC to cover a range of basic skills within a short period of time. However, how a solicitor views women as clients and the provision of legal services to women is integral to a lawyer's competency. It is of concern that family law practice has been omitted from the list of skill areas to be completed in practical legal training. The inadequacy of lawyers' skills in this area, particularly in the context of domestic violence, is highlighted in submissions.[770] One PLTC has already been criticised for failing to provide information about obtaining an injunction or restraining order in its treatment of family law 'current matters'.[771]

8.36 ***Deficiencies in PLT affect women clients***. Submissions describe areas in which the skills of lawyers are inadequate.[772] These skills relate to all three requirements of the uniform practical training standard. They relate primarily to interviewing skills (ability to communicate, use of interpreters, awareness of cultural issues) and ethics and professional responsibility (providing advice to clients on the legal system and their rights, listening to the client, acting on the client's directions). They are particularly significant for women clients. For instance, many lawyers lack sensitivity in handling some family law matters and domestic violence.[773]

> *[W]e receive many complaints that solicitors and barristers do not listen to women. Some women are told by their legal representative not to mention the domestic violence in their affidavit as the 'judge won't like it'. Women often feel they have no control over what is presented to the courts by their legal representatives.*[774]

The Women's Legal Resources Centre, Sydney states that part of its work is explaining to women the legal process 'which has not been previously explained' by their own solicitor.[775] Submissions point out that lawyers need training in culture and gender awareness in dealing with and advising clients.[776]

> *A Turkish woman went to see a solicitor with her daughter. Both had been abused by the son in law. The solicitor communicated only with the daughter who spoke English. The women wanted an intervention order. The solicitor did not assist her. 'I would have liked the solicitor to talk to me and ask me what I wanted to do, but she did not.'*[777]

Negotiation and dispute resolution is a practical legal training requirement. More education and training is required in this area especially since the trend is to encourage alternative dispute resolution in many areas of law. Lawyers must understand the problems for women in having unequal bargaining power with men in family law and commercial matters, particularly where there has been domestic violence and the mediation is with the perpetrator.[778] Lawyers need to be educated about whether to advise a client to participate in mediation, when to recommend against it and whether to recommend that mediation be discontinued.[779] Submissions comment that lawyers are not trained in or made aware of the nature of domestic violence.[780]

8.37 ***The inclusion of gender awareness in PLTC.*** Gender awareness material could be developed for inclusion in PLTC. A useful model to follow will be the DEET project for the undergraduate law school curriculum. The Commission suggests that the Law Council of Australia monitor the DEET project and consider sponsoring a similar project for PLTC.

8.38 ***Gender inclusive language.*** PLTC needs to ensure that all staff and guest speakers use gender-inclusive language and do not rely on stereotypes concerning the roles of women and men.[781] Not all PLTC have policies on the use of gender inclusive language.[782] One submission describes an experience in the Legal Ethics course offered by the Solicitors and Barristers Admission Board, NSW:

> *When our lecturer said 'I apologise if I say anything sexist, but I'm too old to change' I knew I was in the right course. When he later used the analogy 'it's like a Playboy without a centrefold - no satisfaction' to explain a case, I knew that were I to practise as a barrister, there was a strong possibility that I would one day walk into a court room and gun down the judge and male barristers out of pure frustration.*[783]

Concern about employment as part of practical legal training

8.39 Requiring practical experience, whether as articled clerks or in supervised employment, as a requirement for admission to practise may disadvantage women.[784] Under these systems, the individual graduate must find a position with a legal firm or other recognised legal practice. The profession has a major role in determining who becomes eligible for admission.

> It is possible that, with the scarcity of apprenticeships, new lawyers from disadvantaged sectors of the community may have less chance of gaining entry to the market.[785]

The history of women's exclusion from the legal profession makes them likely to fall within a 'disadvantaged sector'.[786] The negative impact will be greater for women who experience other disadvantages, such as older women, Aboriginal and Torres Strait Islander women, non-English speaking background women and lesbians who attempt to enter and practise in the legal profession.[787] The increasing number of law graduates entering the employment market will increase the competition for articled and supervised employment positions. The Commission received a detailed submission from a group of women in Western Australia concerning the requirement to complete a period of articles to be eligible for admission.

> *... the articled clerk system used in Western Australia as a method for qualifying law graduates to enter the legal profession is unfair to women and should be abandoned ... Where a woman is arbitrarily excluded from completing any part of a course of education that is essential to gaining qualifications in her chosen profession, we believe that she experiences sex discrimination. The responsibility for this crucial link from training to employment in our law school is not in the hands of the university but is exercised by the profession. And we believe there is a potential for unequal selection with no accountability ...*[788]

The submission detailed the particular difficulty mature age women are experiencing in Western Australia in gaining an articled clerk position.[789]

Concern about the introduction of upfront fees for PLTC

8.40 There are proposals to introduce upfront fees for practical legal training courses at a number of tertiary institutions.[790] This is a consequence of the change in policy by the Department of Employment, Education and Training earlier this year which allows fees to be charged for professional courses. In a recent report, the Council of Australian Postgraduate Associations Incorporated (CAPA) identified significant changes in the profile of postgraduate students since the introduction of fees.[791] Students are now more likely to have a high income (over $40 000) or an employer paying for the course. Most students who satisfy these criteria are men.[792] CAPA concludes that fees 'discriminate against lower income groups, Aboriginal and Torres Strait Islanders and especially women'.[793] Whether the results of these studies would be replicated for PLTC is uncertain. For example one study indicates that more women than men who study law come from higher income backgrounds.[794] The introduction of fees is likely to act as a barrier to access for women who experience other forms of disadvantage such as Aboriginal and Torres Strait Islander women.

Recommendation 8.2

Practical legal training
1. All practical legal training, whether in the form of courses or articles of clerkship, or a combination of these, should be required to include content on the experiences and perspectives of women.
2. In practical legal training courses simulated training, hypothetical cases and trials should avoid the use of gender specific language and avoid stereotyping the roles of women and men.
3. The Law Council of Australia should monitor the Department of Employment, Education and Training gender awareness project for the curriculum of the law schools as a model to set up a similar project for practical legal training courses.

Continuing legal education

Introduction

8.41 ***What is continuing legal education?*** Continuing legal education (CLE) is offered to practitioners in all jurisdictions.[795] It is education undertaken after admission to practice and not part of a degree.[796] The main providers of CLE are the professional associations of each State or Territory, the practical legal training institutions and the universities. CLE is also conducted by other organisations, for example other lawyers' associations, accountancy firms, government departments or 'in-house' in the larger law firms. CLE is voluntary in all States and Territories except New South Wales.[797]

8.42 ***Purpose of CLE.*** Most CLE courses are directed towards updating and informing the practising profession of recent developments in the law and forthcoming changes to the law.[798] The Law Council of Australia identifies five aims of CLE:

- to foster the development and knowledge of legal skills so that members of the profession deliver a high quality service
- promote a spirit of continuing learning
- assist in the mastering of new areas of law
- update lawyers about developments in the law
- 'generally [to] enable lawyers to maintain and improve the level of competence within the profession'.[799]

8.43 ***Nature of CLE courses.*** Professional associations offer courses on the basis of demand and an assessment of the needs of the profession. Courses tend to primarily deal with commercial issues although they also cover other issues, such as family law, domestic violence, sexual assault and discrimination law.

The experiences and perspectives of women in CLE

8.44 ***CLE should address gender issues.*** CLE has an important role in ensuring the equality of women in two main respects. First, it is one way to ensure that practitioners gain information and knowledge about assisting women as clients and ensuring that the experiences of women are taken into account by the legal system. Second, it is an important tool in ensuring that women working in the profession are treated equally; it provides a mechanism to update women after a career break and to inform members of the profession about discriminatory practices.

> *Education for the profession is a higher priority than the judiciary as the profession must raise the arguments first.*[800]

8.45 ***Some gender awareness in CLE.*** In responses to the ALRC questionnaire all State and Territory law societies state that part of their CLE program contains material to raise awareness of legal issues particularly affecting women.[801] Some of the professional associations qualify this statement, for example, stating that such material was included 'where appropriate'[802] or that they included 'some' material.[803] However, it has been argued that the inclusion of gender awareness material in CLE programs has been 'largely ... overlooked', in terms of being both absent or insufficient.[804]

> It is not only judges who have missed out on a gender-inclusive LLB [Bachelor of Law] curriculum during their undergraduate lives; the vast majority of the current practising profession has as well.[805]

8.46 ***Support for gender awareness content in CLE.*** Submissions support CLE including courses on gender awareness and discrimination.[806] A number of submissions do not make specific reference to CLE but emphasise the need for education on gender issues for the entire profession.[807] This necessarily includes CLE. One submission comments on the need for training on gender issues for practitioners 'to make them aware that they are in fact harming the profession by their conduct'.[808] The Ministry for the Status and Advancement of Women NSW in its submission to the Senate Standing Committee on Legal and Constitutional Affairs recommended that CLE include a compulsory gender awareness component.[809]

8.47 ***CLE projects that address gender issues.*** A number of current education projects specifically address gender issues for members of the profession. For example, the New South Wales Department of Public Prosecutions (DPP) operates education programs for practitioners on dealing with witnesses in sexual assault cases and on the conduct of those cases. This education program has been allocated points for the purposes of the mandatory CLE system in NSW. HREOC has conducted seminars at the College of Law as part of its provision of CLE on sexual harassment and the nature of the discrimination law jurisdiction.

Role of CLE in assisting women lawyers

8.48 ***Role of CLE in facilitating career breaks.*** CLE could play a vital role in updating a practitioner who is re-entering practice after a career break, for example, after maternity leave. These practitioners should have access to information that assists them to return to the workforce with up-to-date legal skills. CLE could also provide current fact sheets to practitioners while they are on a career break. Employers should recognise these techniques as cost efficient methods of retaining experienced staff and enhancing their skills. The Queensland Law Society Inc in its submission to the Commission reports that part of the functions of the Gender Equity Committee is to investigate the use of CLE to assist practitioners who have been on career breaks.[810]

8.49 ***CLE should also be directed to the working environment and practices of lawyers.*** CLE may also be directed towards the actual conduct of legal practice and how lawyers treat their colleagues and other members of staff. Submissions to the Commission give examples of discriminatory behaviour and sexual harassment that should not occur in any workplace.[811] Discriminatory practices affect both women staff and women clients. CLE should include matters directly related to the treatment of women lawyers by highlighting what constitutes discriminatory behaviour and discriminatory working environments and how to correct or avoid them. CLE courses may consider practice management issues and this information should be considered part of a best management or best practice policy.

8.50 ***Report of the Law Society of British Columbia Gender Bias Committee.*** The Law Society of British Columbia conducted an intensive study of gender bias in the law and the legal system. The Committee found that discrimination and sexual harassment were problems for women working in the profession and recommended that CLE address these issues by providing courses on the nature and consequences of sexual harassment. The Committee recommended in-house seminars, educational videos for in-house use and special courses for policy advisers on discrimination in workplace practices.[812] Education through CLE and practical legal training, was also recommended on issues affecting gay and lesbian lawyers.[813]

Recommendation 8.3

Continuing legal education
Each State and Territory professional legal association should ensure that continuing legal education (CLE) subjects include material on the experiences and perspectives of women. Subjects offered as CLE should include
a) material on the experiences and perspectives of women in each area of law
b) subjects that directly relate to and impact on women, as areas of special study
c) subjects which relate directly to the workplace practices of law firms, for example, courses on EEO in law firms, sex discrimination and sexual harassment.

Accreditation of specialists in areas of legal practice

8.51 ***The accreditation system.*** Accreditation is a procedure by which a legal practitioner, with expertise in a particular field, may apply to the professional association to become known as a specialist in that area. It is currently available in New South Wales, Queensland, Victoria and Western Australia[814] but only in certain areas of legal practice.[815] In general to attain accreditation a practitioner must have practised for a number of years,[816] a substantial proportion of the practitioner's work must have been concentrated in the area in which accreditation is sought and the practitioner must provide references which attest to skills and competence and must undertake various assessment procedures.[817]

8.52 ***The benefits of accreditation.*** In an increasingly complex legal market, accreditation is a valuable source of information for consumers and for practitioners intending to refer a client to a specialist lawyer.[818] Accreditation also benefits practitioners by allowing them to promote themselves as having specialised knowledge.[819] It encourages them to increase their competency and effectively market their skills. It may also have the effect of improving the quality, speed and cost of legal services.[820]

8.53 ***Risk of restraining competition.*** There has been concern that accreditation schemes may create cliques in the legal market by restricting competition, thus increasing the cost of legal services to the consumer.[821] It has also been said that they 'will tend to operate unfairly against women lawyers, lawyers from minority groups and potential clients on low incomes'.[822] However, the Access to Justice Advisory Committee, having examined this issue, reported that the benefits of accreditation schemes outweigh these concerns.[823]

8.54 ***Areas of practice in which a practitioner can gain accreditation.*** The areas of practice in which a practitioner may gain accreditation as a specialist are currently limited.[824] In determining what areas may be added to the schemes consideration is given to the following factors:

- whether it is an identifiable area of practice to consumers
- whether there is a need for specialist identification in that area
- whether the area is one that fosters specialisation
- whether the method of accreditation is a worthwhile process as a reference tool in that area of practice.[825]

8.55 ***An accredited practitioner should be aware of gender issues.*** All legal practitioners need an awareness of gender issues to be able to deliver legal services in an effective, skilled and competent manner. A

practitioner who wants to promote herself or himself as a practitioner with specialised expertise in an area of legal work should be required to show an ability to provide an effective and responsive legal service to all clients, women and men. The process of assessing an applicant for specialist accreditation should include examination of the applicant's awareness of gender issues in the particular area of specialisation.

8.56 ***Accreditation in areas of obvious importance to women as clients.*** Accreditation is already available in some jurisdictions in the area of family law. There is a need, however, for accreditation to be available in other areas of legal practice, for example, domestic violence, sexual assault and sex discrimination law.[826] This need is demonstrated in the submissions to the Commission which describe the difficulties women experience in gaining appropriate advice about matters in these areas.[827] The system of accreditation, with the advertising and information possibilities that accompany it, can assist women as consumers of legal services to locate a practitioner with knowledge and competency in that area of legal work. In this way accreditation can play an important role in assisting women to gain access to the legal system.

Recommendations 8.4

Accreditation

1. In those jurisdictions where accreditation is available, all practitioners seeking accreditation should have to complete courses that include material on the perspectives and experiences of women in the area of law in which accreditation is sought.

2. Accreditation should be offered in areas of law that are of obvious concern to women, such as domestic violence, sexual assault, discrimination law and family law.

Judicial education

Introduction

8.57 DP 54 and the Interim Report referred to the important role judges and magistrates have in the process of the law.[828] The comments and treatment described in submissions and in recent media reports are evidence of gender bias in its most obvious, identifiable form and are a consequence of a legal system with systemic gender bias.[829] To develop the law to be more responsive to women, judges and magistrates need to be aware of the realities of women's lives. Gender education programs for the judicary and magistracy are part of an integrated approach to increasing judical awareness. Other approaches discussed in this report include changes to judicial selection procedure[830] and bringing women's experiences into the court room through changes to the rules of standing allowing for intervenors and *amicus curiae*.[831]

8.58 ***Support for education from the judiciary.*** The desirability of judicial education, generally, has been supported by the Hon Sir Anthony Mason, Chief Justice of Australia who stated:

> Judicial education should extend to aspects of the interaction between law and society ... If judges formulate and apply the rules of the common law, as they unquestionably do, the better fitted they will be to discharge their task. The need to maintain judicial independence is no argument against the desirability of judges becoming better informed about the interaction of law and society.[832]

One submission from a judge, while concerned that the independence of the judiciary not be compromised, welcomes gender awareness training.

> *ACT Judges have been willing, even enthusiastic, to participate in AIJA pro-grams in the past. I have no reason to doubt that they will be active supporters of such programs in the future, including gender awareness programs.*[833]

Submissions

8.59 ***Support for judicial education.*** Many submissions call for judicial education on gender issues[834] to ensure that the legal profession is responsive to women's needs.[835] Several submissions call for judges to be

educated in the use of expert evidence, particularly in relation to the long term effects of physical and mental abuse.[836]

> *The education of the judiciary should focus on such things as: women's own stories, social attitudes to women, the extent and diversity of violence towards women, the real danger women face, discrimination, cultural diversity, and the emotional, economic and physical impact of violence on women.*[837]

> *[Domestic Violence Resource Centre] would envisage content to include: gender bias in the law and in its administration generally; violence against women in all its forms; the impact of violence on women as victims and offenders; the impact of inequality on women's lives; effective legal responses to violence against women; appropriate sentencing practices, amongst other issues.*[838]

A number of submissions comment on the need for judicial education in dealing with discrimination complaints.[839]

Reports that emphasise the need for judicial education

8.60 ***Senate Standing Committee on Legal and Constitutional Affairs.*** The Report by the Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* was released in May 1994.[840] Most submissions to the inquiry proposed reform in two broad areas: changes to the process of judicial selection and initiatives in judicial education.[841] The report canvassed a range of concerns about judicial education. These include:

- whether this education is necessary and/or sufficient
- whether it should be voluntary or mandatory
- the implications of education for judicial independence
- the content of education programs, in what manner should the content be determined
- who should undertake the teaching and who should manage the programs.[842]

The Committee expressed its support for voluntary continuing professional development and education for judges and magistrates. It recommended that the Australian Institute of Judicial Administration (AIJA) as the 'pre-eminent national body' should be 'entrusted with the task of judicial education' and should receive adequate funding to develop specific programs to address gender awareness.[843]

8.61 ***Western Australian Taskforce.*** The Report on Gender Bias in Western Australia, by the taskforce established by Chief Justice Malcolm, was released in June 1994.[844] It made recommendations on the appointment of the judiciary and judicial education. It recommended that judges and magistrates upon appointment be provided immediately with educational materials on their functions, including materials on avoidance of gender bias, and that a program be established for current and prospective judges and magistrates to receive continuing education on gender issues.[845]

8.62 ***Access to Justice Advisory Committee.*** The Access to Justice Advisory Committee (AJAC) Report[846] recommended that education on gender and cultural awareness should be expanded. It also highlighted the rather ad hoc nature of judicial education in Australia compared to the United States, Canada and the United Kingdom[847] and recommended that the Commonwealth should consider establishing an independent national judicial education centre.[848] In the view of the committee AIJA is primarily concerned with judicial administration although its focus may be expanded to include education. It expressed the view that an 'important matter' such as judicial education should be dealt with by a body solely concerned with that issue.[849] Pending the establishment of a national judicial education centre AJAC emphasised the importance

of governments maintaining and, where possible, enhancing their support for the programs offered by the AIJA and other judicial education programs operating or being developed in their State.[850]

Australian judicial education projects

8.63 ***Australian Institute of Judicial Administration.*** The Australian Institute of Judicial Administration (AIJA) established a Gender Awareness Committee in 1992. In March 1993 the Committee recommended that the AIJA conduct education on gender issues nationally. The AIJA is currently developing a pilot program for judges and magistrates in Victoria. It has conducted consultations with women's organisations and legal services to collect material and illustrations for use in gender awareness education programs. The AIJA and the Judicial Commission of NSW are conducting an education program to assist new judges and magistrates in the 'transition to the bench'.[851] A week long program was conducted in October 1994 of which a day was allocated to the discussion of gender issues. Orientation programs for new judges should include information on gender issues.[852] The Judicial Commission of NSW already conducts orientation and mentoring programs for new magistrates.[853]

8.64 ***Judicial Commission of NSW.*** The Judicial Commission provides education for judges and magistrates in NSW on a range of topics.[854] It has provided local court magistrates with education on domestic violence and on women and the law.[855] It is suggested that there has been an improvement in the attitudes of magistrates displayed in these matters.[856]

8.65 ***Family Court of Australia.*** The Family Court of Australia has been funded by the federal Government to develop a gender awareness program.[857] Several projects have been conducted by the Family Court to promote gender awareness in the judges and other decision makers. For example, a three day program was conducted in Queensland in April 1994 for the judges, magistrates and registrars of the Family Court. A day was also allocated to the discussion of family violence at this year's Judges' Conference.[858]

8.66 ***Other projects.*** A number of other projects are taking place in courts and tribunals across Australia.[859] For example

- The Western Australian Supreme Court has established a gender bias task force and is developing a judicial education program.[860]

- The Victorian County Court in conducting its annual residential seminars covers topics that deal with the experiences and perspectives of women. For example, the law and history of sexual assault, the impact of crimes, and the manner in which sexual assaults are investigated and prosecuted are discussed.[861]

- The Federal Court of Australia has appointed a Gender Issues Committee, comprised of three judges, to consider a range of matters including the development of a gender awareness program.[862]

- In Queensland the Director of the Women's Policy Unit and Women's Advisor to the Premier reports in her submission that funds have been allocated to 'develop and conduct training for magistrates on domestic violence. The training will focus on the nature of domestic violence rather than the legislation'.[863] The submission also reports that the Domestic Violence Policy Unit is currently developing a training proposal with representatives from community based organisations and the Chief Stipendiary Magistrate. This training is to be conducted in three locations in Queensland in March-April 1994.

- The Human Rights and Equal Opportunity Commission (HREOC) is developing an education and information program for HREOC tribunal members, lawyers and parties. The project aims to explain the procedures of this jurisdiction.[864]

- The Administrative Appeals Tribunal in October 1994 conducted a five day program of training for its tribunal members. Approximately two days was allocated to the consideration of cultural and gender issues. The issues were addressed separately as well as the manner in which they intersect.

Overseas experience

8.67 Programs developed in Australia will benefit from the experiences of judicial education programs developed overseas. For example, a key element in the program run by the Westen Judicial Education Centre in Canada is peer leadership.[865] Judges are trained by credible people outside the judiciary and are then encouraged to participate and take responsibility for their own continuing education and to lead other judges. As a result of this the broader community is able to participate and contribute to the quality of the education and delivery of justice.[866]

The Commission's approach

8.68 There has been considerable activity in the area of gender awareness education programs for the judiciary since this reference commenced.[867] The Commission supports these programs and for this reason does not make recommendations on judicial education. There is a need however, to ensure that the programs are co-ordinated and adequately funded.

9. Women in the legal profession

Introduction

This chapter

9.1 Women make up 50% of law school graduates,[868] and 25% of the legal profession as a whole.[869] However, women leave the profession at a much higher rate than men,[870] and they are clustered in the lower ranks of the profession.[871] This chapter will examine the reasons for the present situation of women lawyers, including discrimination, sexual harassment, and structural and cultural barriers. It will recommend that lawyers' professional associations take a more active role in changing the work practices and culture of the profession.

Discrimination in private practice

9.2 The Commission received submissions from women lawyers working in all areas of the profession, including government and public service, private law firms, community legal centres, universities and women at the bar.[872] It appears that women in private legal practice as barristers or solicitors, whether in small suburban or country firms, or large international firms, were at greater risk of experiencing discrimination than those working in the public sector or the universities. These women also have the most limited avenues for redress. Many submissions to the Commission from these women were made in confidence because women were fearful of the effect on their career of speaking publicly. Lawyers in private practice are the point of most direct contact with the general community. This chapter will focus on the experiences of women in private practice.

The profession is unrepresentative

9.3 Submissions commented on the absence of women in the legal system.[873] Women felt excluded by the all-male environment of the law.[874] It was argued that it is important for the legal profession, especially the judiciary, to be seen to be representative.

The legal profession at a time of change

9.4 The legal profession is facing a time of unprecented changes. Mutual recognition legislation will increase the mobility of lawyers between States and Territories. The Trade Practices Commission has recommended the application of competitive conduct rules, which will modify the operation of some professional rules and provide national regulation of legal practice.[875] The Access to Justice Advisory Committee has endorsed this approach and has recommended the establishment of a national advisory council to make recommendations on measures to achieve uniform regulation.[876] Both these bodies recognise that the administration of the legal system is a matter of national significance.

> The goals of access to services, national equity and equality before the law require action throughout Australia if they are to be achieved.[877]

In this context of change there are both new opportunities for and new barriers to women in legal practice.

Discrimination

Direct discrimination

9.5 ***Discrimination is illegal.*** Discrimination against women in employment is prohibited in all States and Territories of Australia.[878] Anti-discrimination legislation covers recruitment, including the questions asked in employment interviews, promotion, pay, working conditions and sexual harassment. Employers are liable if they expose employees to sexual harassment by colleagues. Women lawyers report that some employers fail to comply with anti-discrimination laws.[879] Discrimination, and sexual harassment in particular, discourages women from expressing feminist perspectives.[880] In one submission, a woman describes her own experience of seeking equal wages and promotion. She had been with the firm for over six years.

For over six years I have been employed as a Law Clerk. I am 52 years of age and have been a legal secretary for many years for solicitors, barristers, and as an Associate to a Supreme Court Judge. In 1987 I decided to study law. I have just completed my final examinations as a correspondence student, after four and a half years study with the [Solicitors Admission] Board. I am hopeful of being admitted as a solicitor next month.

The wage I earned as a Law Clerk was less than that earned by the male Conveyancing Clerks, and my wage did not increase as I successfully passed examinations. At my staff reviews in March/April 1993 I raised the issue of inequality *between male and female staff, and asked what criteria was used in assessing a person's worth to the firm, and what I had to do to improve my performance to be able to earn an equivalent wage to that earned by my male counterparts. As I was one of the highest fee earners in the firm, was a good ambassador, and had built up a wide client base which brought a great deal of repeat business to the firm, I was becoming frustrated as to what else I should be doing to be recognised for the effort I was putting into my job.*

I was not given a satisfactory answer to my question, the Managing Partner and Office Manager who interviewed me became quite angry that such an issue should be raised. The Office manager told me quite clearly that what they paid other staff members was 'none of my business', if I was not happy with my wage I should look elsewhere for employment, I was being paid what I was worth, and my problem with male/female inequality was so great that I 'should seek counselling'.

Since that time there has been a dramatic change in attitude toward me, I have been put under a great deal of pressure and stress. … my employment was terminated. The only reason given to me was that it was obvious that I was unhappy, it was recognised that to rectify the problem attitudes within the firm had to change, but this was not contemplated, and it would better for all if I left.[881]

9.6 ***Full-time employment.*** Submissions say that legal firms often have only tokenistic regard to anti-discrimination laws in recruitment and promotion. They report that women are asked inappropriate questions at interviews,[882] overlooked for promotion,[883] and not remunerated on an equal basis.[884] One submission refers to questions about child care arrangements in an interview for a magistrate's position.[885]

My own personal experience of direct discrimination came initially with my employment in a major Sydney law firm. At the time of being engaged as a solicitor in the commercial division I was interviewed by no less than six partners as well as the human resources manager on no less than three occasions. My thoughts at the time were that this seemed to be an unusually drawn out process considering that I was not being engaged as an associate nor was there any discussion about future prospects as a partner. ...

On joining the firm I was quickly informed by a number of fellow practitioners that the reason I had been subjected to such an intensive interview process was that there was some dissension among the senior partners about engaging a working mother. At the time I had a one year old child and this was known to the partners before the first interview.

I am told concerns were openly expressed by the partners as to my ability to apply myself to the job because of the fact that I had a child. There was a perception that I would be unwilling or unable to apply the level of diligence expected by the firm to the job. Yet I had held a full time and extremely demanding position as Corporate Lawyer/Company Secretary of a [large] organisation both before and after the birth of my child and was in that position at the time of my interview.[886]

9.7 ***Summer clerkships.*** An employment program, known as the summer clerkship program, is conducted in all States of Australia. University students in their second last year are employed during the three month summer break from university. Gaining a summer clerk position is regarded as one of the best methods of securing employment on the completion of a law degree, and there is intense competition for the positions. A survey of Australian National University students raised concern about the nature of the questions asked of women applicants in interviews for employment as summer clerks.

[There] is a very real difference between the types of questions asked of male and female interviewees. A great number of respondents reported that part of [the interview] involved being questioned about their future reproductive and child rearing plans.

Women who discussed the various interviewing styles with their male counterparts discovered the male applicants were generally asked 'conversational' questions, particularly about sporting interests and were rarely, if ever, asked to discuss their reproductive plans.[887]

A former student of the University of Tasmania reported similar problems in interviews for summer clerkships.

Last year a firm of solicitors ... undertook interviews for Summer Clerkships jobs ... (A student) was asked:

What does your husband think of you working so far from home?
What does your husband do?
How will he cope with you being away?
What are your plans for having a family?
When she answered 'I have no plans' to the last question the partner cross examined her 'What do you mean you have no plans? Surely you must have some plans'.

Every women I spoke to was asked about their child-rearing plans, their boyfriend or husband and other assorted irrelevant questions.

I spoke with the man who was offered the job. He was not asked what his child-rearing plans were, whether he had a girlfriend or what his feminist views were.[888]

In a survey conducted at the University of New South Wales for a submission to the Commission students were asked about summer clerkship interviews.[889] 19% of women students indicated that they had been asked inappropriate questions in the interviews. The most common question identified as inappropriate was whether the applicant had any intention of having children in the future. This question was asked of 27% of women but only 3% of the men interviewed. A submission from Western Australia highlights the problems facing older women in gaining a summer clerkship position.

I turned up for the interview [for a summer clerk position at a large firm], my name was called out and I went forward to the interviewer and the interviewer's body language changed dramatically. And the person said: 'Oh dear, there has been a dreadful mistake, I thought you were one of our clients'. And I said: 'Oh no, I have a letter here which says I can apply for an interview.'

And when I went in and I was interviewed the person said to me: 'Look your experience is wonderful, you work for a community legal centre, perhaps that's where you should stay; this firm does not really - would not really interest you, you would feel dreadfully uncomfortable here, you would be made to feel that way'. And when I said: 'Oh look, surely if I am like one of your clients - the similar age to one of your clients perhaps they would feel very comfortable with me'. And the answer was: 'No look, I am terribly sorry, I have been told to select only for young male applicants; I can let some females through but, you know, it is not your group ...'[890]

9.8 ***Sexual harassment.*** Submissions report that some women lawyers are disadvantaged by sexual harassment.[891] Sexual harassment is unlawful and is an important obstacle to women's equal participation in the legal profession.[892] A survey of summer clerks from ANU law school reported instances of sexual harassment by supervising partners.[893] In a submission to the Western Australian Chief Justice's Taskforce on Gender Bias the WA Women Lawyers' Association documented six cases in both large well known firms and smaller places of employment. All but one of the cases resulted in the woman leaving her employment.[894] Feminist Lawyers, a Victorian group, has collected reports of discriminatory treatment, most involving sexual harassment.[895] A survey of staff employed at the Legal Aid Commission of Victoria indicated that 'unwelcome remarks and jokes of a sexual/sexist nature' were frequently encountered.[896] The

NSW Law Society policy on Equal Employment and Promotion states that sickness and absenteeism are often related to harassment and discrimination in the workplace.[897] One submission reports sexual harassment by a male colleague and says that it was common for jokes or anecdotes of a sexual nature to be told to demean women.[898] No Australian surveys of women lawyers have asked questions about the experience of sexual harassment.[899] Canadian studies point to the need for such a study.

> Two Canadian law societies, British Columbia and Alberta, asked respondents whether they had experienced or observed sexual harassment in the professional setting in the previous two year period. They found that one third of women and 10% of men had experienced or observed women lawyers being subjected to unwanted sexual advances, and two thirds of women and one third of men had observed or experienced unwanted comments, teasing or jokes of a sexual nature against women lawyers.
>
> A Quebec survey revealed that 15% of female members of the Quebec Bar had been or were victims of sexual harassment.[900]

9.9 ***Promotion and advancement.*** Some submissions suggest that the current disparity between men and women in positions of influence will be corrected as increased numbers of women move through the profession.[901] However, statistical evidence indicates that equal numbers of women in law schools and greater numbers entering the junior ranks of the profession will not automatically lead to women reaching senior levels of the profession. Women have made up half the law graduates in Western Australia for the last ten years, but only make up 26% of lawyers holding practising certificates and 6% of all partners in law firms.[902] The percentage of partners in New South Wales who are women remained static between 1990 and 1993, despite the steadily increasing rate of graduates who are women.[903] Similarly in Victoria, the proportion of partners in law firms who are women remained constant between 1980 and 1989 while the proportion of women who are solicitors increased from 12% to 20%.[904] In South Australia, the number of women obtaining partnerships in law firms over the last decade has actually decreased.[905] A survey of 1992 South Australian graduates revealed that mature age women presently face the heaviest discrimination, with only 13% obtaining employment by July 1992, compared to 28% of mature aged male graduates and 70% of male graduates under 30.[906] The belief that gender equality will be attained simply by allowing women to 'work their way through the system' is misplaced. Discrimination against women is not an historical event but a present reality.

Indirect discrimination

9.10 ***Introduction.*** A policy may be gender neutral in appearance but have different effects on women and men.[907] Indirect sex discrimination is the unreasonable application of a requirement that can be met by people of one gender more often or more easily than by those of the other. Submissions point out that, even though direct discrimination is not always apparent, there are structural and cultural barriers to women's advancement in the legal profession.[908] These barriers are usually the result of expectations about behaviour and career patterns that do not take into account the position of workers with family responsibilities. Because most labour in the home is performed by women, a failure to take family responsibilities into account discriminates aginst women. The *Sex Discrimination Act 1984* (Cth) (SDA) is to be amended to prohibit all discrimination on the ground of family responsiblities.[909] While it is not yet clear what type of behaviour will contravene this new prohibition, in other jurisdictions it has been held to be discriminatory to refuse unreasonably to allow a worker to work part-time[910] or to give part-time workers access to severence payments[911] or redundancy payments[912] or to allow flexible working hours to accommodate child care needs.[913]

9.11 ***Inflexible work practices.*** Submissions report that the working conditions of private practice are designed for a full time breadwinner with a partner undertaking household work.[914] Conditions have been slow to adapt to the needs and circumstances of workers with family responsibilities.

> *Employers often expect that staff lawyers will work from 8.00am till late 6 days a week. This model assumes someone is at home preparing meals, looking after the kids, shopping, doing housework and minding the children. If women still shoulder these responsibilities they are seen as 'unprofessional'*

because they have to leave at 5.00pm to collect their children from childcare and are not available to work at weekends.[915]

... it's true that women are earning less, few are partners, most have family responsibilities, and the firms give little help in this regard. Most women cope by simply doing everything - this operates as a brake on their chances of advancement - they simply haven't the time to do all the additional work that personal advancement demands.[916]

Several submissions report that long hours are not necessarily related to volume of work but the need to be seen to be present in the office.[917] A submission from the Law Society of New South Wales notes that it is necessary to ascertain whether 'the real needs of clients' can only be fulfilled by long and inflexible hours.[918] There is a high attrition rate for women solicitors in the first five years of practice.[919] This indicates that women are pursuing careers in the public sector, community services and non-legal professions and at home.

9.12 ***Part-time work.*** Like many working parents, some women lawyers would like to have the option of part-time work. However part-time work is not often available. When it is offered, submissions report that the undue emphasis placed on the total revenue brought into the firm by each worker contributes to a hostile environment for part-time workers.[920] Regardless of high productivity on days worked, part-time workers are made to feel unwelcome and are less likely to be promoted than equally qualified full time workers. Submissions suggest that reluctance to accommodate women's demands for parental leave and flexible working conditions is not driven by client demands. They call for part-time work to be more available.[921]

[A] female practitioner ... asked to work a four day week. ... There was considerable resistance to allowing her to work a shorter week and it was only agreed on condition that she would work additional hours during each working day to make up for lost time. This practitioner was also expressly told that while she worked a four day week there was no prospect of her advancement to associate level or beyond.

Some of the arguments that were given to that female practitioner when resisting her request for a shorter working week were that she would not be able to service the clients as they would expect and therefore she would have to be excluded from some of the major matters that would normally have requested her skills.

During the twelve months or so this practitioner worked in a part time capacity, I saw a number of instances where the partners complained directly to her about her lack of availability on that one day a week and there were constant threats she would be required to work a five day week.

Over the same period of time I had contact with this particular practitioner's clients since I had agreed that I would assist her by answering her phone in her absence and dealing with any queries from those clients. My experience was that the clients readily accepted the fact she worked a four day week, the instances in which they required assistance on her day off were few. On the occasions those clients did ring and ask for that particular practitioner on being told it was her day off would invariably respond by saying that they would wait to talk to her on her return.To my knowledge the clients made no complaint to the firm about the fact that she was not available to service their needs five days a week.

While I recognise that there are some clients that require a practitioner to be available around the clock and in some instances there is necessity to handle things urgently, often those time frames are imposed by the members of the profession rather than clients themselves.[922]

9.13 ***Maternity leave.*** Access to maternity leave varies among the States and Territories of Australia. In Victoria, lawyers have a statutory right to twelve months unpaid parental leave.[923] In South Australia, the Salaried Solicitors Award has provision for maternity leave. New South Wales lawyers are expected to be soon covered by an award with maternity leave provisions.[924] Employed solicitors in Western Australia have a statutory right to up to twelve months unpaid parental leave.[925] In other jurisdictions, lawyers have no legal

entitlement to maternity leave and it is a matter for negotiation between employer and employee. The federal government has recently published a discussion paper on paid maternity leave, but no decision has been made.[926] Even where employed solicitors have a legal entitlement to maternity leave, many hesitate to enquire about it or take it, fearing that their employer will interpret the request as indicating a lack of commitment to the firm.[927] Where there is no entitlement, some firms do not allow maternity leave.[928] Others have no maternity leave policy and grant leave in an inconsistent and unpredictable manner.[929] Lesbians are particularly disadvantaged by highly discretionary approaches to maternity leave.[930]

9.14 ***Other family friendly initiatives.*** Workers with family responsibilities could be better accommodated in law firms without reducing the level of service to clients. Initiatives such as work-based child care and working from home will assist workers to combine paid and unpaid work. However law firms are apparently slow and reluctant to adopt these options.[931] There is a need for change in smaller firms where the majority of women lawyers are employed.

> *Some law firms are now seeking to prevent the 'brain drain' of talented women solicitors who leave the firm to start a family and for whom the inflexibility of the working environment makes combining a career in private practice with a family virtually impossible. Women must be involved in designing workplaces that meet the needs of women ... Using tools such as facsimiles, mobile telephones, pagers, laptop computers and telephone link-ups with the firm's data base, more flexible methods of working could be developed.*[932]

One submission states, 'nothing short of a virtual legal revolution is needed'.[933]

9.15 ***The requirement to keep chambers***. In Victoria and South Australia barristers are required to keep chambers. In other States there is no compulsion but it is extremely difficult for barristers to practice without keeping chambers in the Central Business District. Keeping chambers is the largest business cost of a barrister's practice. Submissions report that this requirement discriminates against those barristers, mostly women, who wish to practise part-time or to work from home.[934] Most bar associations prohibit practising in partnership and as employees. The removal of these restrictions would allow the development of more flexible work patterns for barristers, which would benefit both women and men with family responsibilities.

> *There are particular advantages to women in abolishing the restrictions on business forms for barristers ... Certainly there would be an increase in the number of women advocates if the requirement that barristers must practise as sole practitioners was abolished. Why? Because the current rigidity makes it difficult for women to achieve the goals of flexible hours and a steady and regular flow of income.*
>
> *If women were permitted to be employees of a partnership of barristers then they would be able to utilise their advocacy skills and achieve excellence without the constant uncertainty about regularity of income.*
>
> *The low numbers of women at the Bars, and the fact that those in practice tend to be junior in status is testament to the fact that there is economic discrimination against women operating in the form of restrictive practices.*[935]

9.16 ***Productivity costs of indirect discrimination***. The high attrition rates of women solicitors cause productivity losses to employers as well as personal costs to the solicitors involved. The Equal Opportunity Committee of the Law Society of New South Wales has stressed 'the advantages from a business perspective, of maintaining a highly skilled and harmonious workplace'.[936] Recruiting and training a solicitor can cost between $20 000[937] and $100 000.[938] In other industries, the loss of a skilled employee with eight years' experience has been estimated to cost $65 000.[939] Generally, the cost of replacing an experienced employee is around 93% of the annual salary.[940] Some firms are now offering both paid and unpaid maternity leave, to preserve their investment in human capital.[941] Enterprise bargaining has proved useful in improving conditions for some women working in the public service.

9.17 ***A model for enterprise bargains.*** In the Office of the Director of Public Prosecutions (NSW), a recent enterprise bargain contained provision for

- up to six years' career break
- employees on career break to be kept informed of office news and legal developments through staff bulletins
- employees on career break to have access to training, such as conferences
- part-time work where practicable (detailed Manager's Guidelines have been provided as to the circumstances in which part-time work is practicable)
- paid family emergency leave.[942]

The ODPP regards these provisions as contributing to the productivity of the enterprise by ensuring that experienced solicitors remain with the Office and remain up-to-date.[943]

9.18 ***A benchmark for working conditions.*** Enterprise bargains such as this one demonstrate that family-friendly work arrangements are possible. They also create a benchmark for working conditions which private firms may have to emulate or see experienced and skilled solicitors leave for the public service.[944]

Systemic discrimination

9.19 ***Introduction.*** Systemic discrimination refers to practices that are absorbed into the institutions of the legal profession and have a disparate impact upon women. It is difficult to address systemic discrimination using the SDA.[945]

9.20 The masculine culture of the legal profession. A recent survey by the Law Society of NSW described the culture of the legal profession.[946]

> The legal profession is undeniably a male dominated environment. This is so at all levels of practice. Law firms have a specific culture which is complex but which represents the ideals, customs, personalities, backgrounds, relationships and skills of their membership. That culture reveals itself in terms of the practices and values it develops in its members, including management style, forms of communication, ethics, reward systems, promotional criteria and performance standards. It also influences its ability to respond effectively to social and economic change.
>
> Recruitment, selection and promotion within the existing culture of the profession can present particular problems for female practitioners. Assessment of merit and suitability may be consciously or unconsciously influenced by conformity to accepted stereotypes relating to social and educational background, by established networks of patronage and by accepted views of what constitutes commitment to the demands of the organisation.[947]

9.21 ***Masculine culture excludes women lawyers.*** Submissions report that women lawyers find the culture of the legal profession hostile and exclusive.[948] In a survey of female third year students at the University of Tasmania, 60% of respondents said they 'sometimes' see the legal profession as 'an exclusive boys' club.[949] This affects their willingness to stay in the profession, and their likelihood of advancing to senior levels of the profession.[950]

> *Law is still a hostile environment for women, much of the atmosphere is still like an old boys club, and it is social customs and habits which exclude women as much as sexist attitudes.*[951]

> *... there are still too few female mentors and role models and there is still a prevailing 'male' culture in the law, which looks for and expects aggression, competitiveness and toughness from practitioners, without asking whether those qualities actually result in a better outcome. There is also still a great deal of sexism, particularly of the sort which values and understands women in reference to benchmarks which are seen as universal when they are only male.*[952]

In a survey of 40 of the 41 women practising at the NSW Bar in 1982, 31 reported that they were treated prejudicially by other barristers.[953] Women report numerous individual experiences of being forced to conform to masculine defined codes of conduct which exclude them from equal participation with men. This includes firms adopting unwritten 'feminine' dress codes.[954] Lesbians report that they feel obliged to conceal their sexuality, out of fear of discrimination, harassment and stereotyping.[955] Women have been deterred from social activities because of sexist conversation or boys' club rules.

> *... these barristers I worked with ... regularly had a lunch date every week. One day, a colleague from another floor brought a woman barrister with him from his floor. There was a worried huddle. A woman, what were they to do? I watched with some interest. Surely, he would support his friend and insist she be allowed to join the group. But no. He without embarrassment, told her she wasn't welcome and she returned to her chambers.*[956]

One woman tells of her treatment by the partners of her firm after being raped.

> *... I was warned by another employee that the firm was losing patience with me. The partners (again, all male) took the view that after three or four months I should be 'putting it all behind me' and getting on with my life. I resigned from my job to avoid being asked to leave. There was no discussion of other options, including leave of absence, and it did not occur to me at the time that I might have other options.*[957]

Women bringing feminist viewpoints into the workplace feel ostracised.[958] Submissions argue that women should not be required to adopt the prevailing male patterns of behaviour to advance in the legal profession.[959]

9.22 ***Women clients affected by masculine culture.*** Several submissions report that the masculine culture of the legal profession affects the service offered to women clients. The Commission has already reported on submissions indicating that women find the male domination of courtrooms intimidating[960] and that women's experiences have been trivialised and their credibility questioned.[961] Other submissions report an emphasis on manipulating the system and prolonging proceedings, which they attribute to a male culture.[962]

9.23 ***Segregation in practice.*** Surveys in New South Wales, Victoria, and South Australia have reported that women lawyers are segregated in areas of law which are traditionally seen as 'female'.[963] Submissions also make this point.[964] In 1990, the Law Institute of Victoria survey noted that women are less likely to be practising in business law, criminal law or civil litigation, and more likely to be practising in constitutional/administrative law and family law.[965] However, more recent research in Victoria indicates that female lawyers are now evenly spread throughout legal practice but that male lawyers are more concentrated in the relatively high status areas of commercial and property law.[966] A South Australian survey reported that women lawyers had been treated as suitable for family law rather than commercial law.[967] A Western Australian report said the women are 'less likely to practise in the commercial area of law and are most likely to be channelled into family or welfare areas'.[968] Segregation in the legal profession reflects the experience of women in the workforce generally,[969] in that the areas of employment dominated by women are characterised by lower status and pay.[970] Segregation also affects women's ability to reach the senior ranks of the profession as the areas in which women tend to practice command lower fees, and promotion is based, in part, on fee-earning capacity.[971]

> *Some women have escaped the stereotype and work in 'male' areas - conveyancing, civil, criminal - but it's noticeable that, with few exceptions - their escape from Family Law hasn't helped them to achieve partnership status.*[972]

Reluctance to use legal remedies

9.24 Australian anti-discrimination legislation places the burden on the person discriminated against to make a complaint and prove that the discrimination occurred. In Part 1 of this report the Commission referred to the difficulties of a complaints based process.[973] Most women who make complaints under the Sex Discrimination Act are young and employed in low status positions.[974] Professional women rarely use the legislation because of a fear of victimisation and a negative impact on their career.[975] Submissions indicate that women lawyers are particularly affected by fear of being victimised in future employment situations because of the closed nature of the legal profession. Submissions also suggest that legal remedies for discrimination and sexual harassment are infrequently used by women lawyers.[976]

> *In private practice I have experienced discrimination personally and have also seen discrimination practised against other female practitioners. However, there is a general reluctance on the part of female practitioners to take any of the remedial actions available to them under the legislation. The reason generally given is that in the legal profession 'word passes quickly' and a concern is expressed if they were to make such claims the prospects of being employed elsewhere in the profession would be prejudiced.*[977]

Role of Sex Discrimination Commissioner

9.25 The Sex Discrimination Commissioner (SDC) has very limited power to investigate discriminatory practices without a complaint having been laid.[978] Part one of this report recommended that the SDC be given a wider investigative role.[979] If this recommendation is adopted it would be appropriate for the SDC to initiate an investigation into the practices of law firms. The SDC should be actively involved in educating law firms about their obligations and actively encourage employees to use the complaints process.

> **Recommendation 9.1**
>
> **The SDC should provide education programs to law firms about their obligations towards their employees under the *Sex Discrimination Act 1984* (Cth), and encourage through education programs employees to use the complaints process.**
> **If the SDC is given an investigative role, as recommended in Part 1 of this report, she or he should investigate the apparent lack of compliance with anti discrimination laws in the legal profession.**

Role of professional associations in overcoming discrimination

Self-regulation

9.26 ***The present.*** The legal profession is partly self-regulatory. Laws in each State and Territory of Australia[980] impose upon the legal profession the obligation to determine entry standards,[981] make rules as to conduct,[982] and investigate complaints.[983] That is, the profession itself, through its regulatory bodies, controls entry to the profession through the issue of practising certificates and the imposition of educational and competency standards. It organises the profession, for example, by separating practitioners in some jurisdictions into solicitors and barristers, controls the organisation of legal practices and by defining 'legal work' (which is reserved to lawyers under legislation) reserves certain work to the profession. Professional associations also co-ordinate practical legal training, continuing legal education and specialist accreditation. Each State and Territory in Australia has a law society (for solicitors) and a bar association (for barristers). Many of the recommendations in this chapter are addressed to lawyers' professional associations, because they exercise significant influence over the legal profession.

9.27 ***The future***. The regulation of the profession is currently in transition.[984] This offers the profession a unique opportunity to ensure that the concerns of women lawyers are addressed in new regulatory mechanisms. The profession should also be alert to the possibility that increased competitive pressures on the

profession is likely to have a disproportionate impact on the most disadvantaged members of the profession, including some women. The adoption of the Commission's recommendations would mitigate this impact.

A greater role in eliminating discrimination

9.28 ***The responsibilty of professional associations.*** Equality for women cannot be achieved using anti-discrimination and affirmative action legislation alone. Submissions call for professional associations to become more involved in the elimination of discrimination against women.[985]

> *... the most appropriate means of implementing change is through the relevant professional regulatory bodies ...*[986]

> *There is an urgent need for professional associations such as the Law Society to take the lead in promoting women's participation in the profession by acting to address gender issues. Professional associations should take the initiative by ... development of equal opportunity and sexual harassment policies and procedures.*[987]

Some professional associations rely on the existence of women lawyers' associations to deal with women's issues.[988] This approach indicates a belief that women's issues are not the concern of the professional associations but should be handled by the women lawyers themselves. Since women lawyers are a part of the profession, their difficulties should be the responsibility of professional associations.

> *Discrimination in the legal profession must be defined and treated as a problem of the profession rather than a problem of the women who suffer its consequences.*[989]

Professional associations should undertake a number of initiatives to improve conditions for women in the profession.

9.29 ***Data collection.*** DP 54 and Part 1 of this report referred to data showing that women are not progressing through the ranks of the legal profession in proportion to their numbers.[990] Women do not become partners at the same rate as men, and they are more likely to leave the profession than are men.[991] These statistics are important for obtaining a clear understanding of the extent of gender bias within the profession. As the bodies responsible for lawyers, professional associations should also take responsibility for collecting this information.[992] Many have begun to do so, while others lag well behind.

- In 1993 the Law Society of New South Wales published a survey which examined the progression of women solicitors, the rate at which they become partners and the reasons for their continuing high attrition rate.[993]

- The Victorian Law Institute has also published an examination of the career patterns of law graduates, including issues of part-time work, reasons for discontinuing legal practice and the relationship between career and personal commitments.[994]

- In 1994 the Law Institute distributed a survey to identify the childcare problems experienced by lawyers, the impact these problems have on their work and the child care options that may assist in overcoming these problems.[995] The Victorian Law Foundation is beginning a research project *Facing the future: gender, employment and best practice issues for law firms*.

- In 1990 the Equal Opportunity Committee of the West Australian Law Society commissioned a study of the career patterns and aspirations of female lawyers.[996] The survey was largely concerned with the barriers faced by women lawyers who wished to combine a career with a family.

- The ACT Law Society is presently seeking financial support to conduct a survey of women in the profession.

- The NT Law Society does not collect information on the number of women practising at senior levels of the profession, and has not indicated any intention to do so.

- Tasmanian Law Society and Queensland Law Society collect information on number of women practising at senior levels but apparently have not published any qualitative analysis of career patterns of women lawyers.

- The South Australian Law Society does not collect information on the number of women practising at senior levels of the profession. However it has indicated an intention to conduct a survey of women lawyers in the near future.

9.30 ***Women's committees.*** Some professional associations have demonstrated their commitment to women lawyers by forming committees to address gender issues.

- The Western Australian Law Society has had an Equal Opportunity Committee since 1990.

- The NSW Law Society established an Equal Opportunity Task Force in 1992, which became a permanent Equal Opportunity Committee in 1993.

- In Victoria, a public forum on Women in the Law in November 1993 led to the establishment of the Women in the Legal Profession Working Party, with project groups on flexible work practices, parental responsibilities, harassment and discrimination policies, and country women solicitors.

- In the ACT, a meeting of women lawyers led to the establishment of the Gender Equity Forum of the Law Society in 1994. The Forum has committees to examine parenting, career structures, and the judicial system.

- The Equity Committee of the Queensland Law Society and the Women Lawyers Sub-committee of the South Australian Law Society were established in 1994.

- The Law Council of Australia established a Working Group on Career Paths for Women in 1994.

- 9.31 ***Women's participation on governing bodies.*** Submissions report that women who are willing to take on the responsibility of an official position have been discriminated against both directly and indirectly.[997]

> *The Victorian Bar Council Rules provide that Bar Council membership is weighted in favour of the longest practising barristers: of 21 positions, 11 are reserved for persons in practice for at least 15 years, and 6 are reserved for persons in practice for at least 6 years. Since most women barristers are relative newcomers, these rules indirectly discriminate against women.*[998]

At present, women are under-represented on governing bodies of all professional associations.[999] One submission argues that the participation of women on these bodies will increase with time.[1000] Others point out that for women with families the double burden of paid and unpaid work means that they do not have time to take on further unpaid work in the governing bodies.[1001] If the professional associations are to be truly representative of the profession, more women must be elected to their governing bodies and the needs of women serving on these bodies must be considered. In Western Australia, the Report of the Chief Justice's Taskforce on Gender Bias recommended that the Law Society of Western Australia and the Western Australian Bar Association 'take the lead in promoting women's participation in the profession by ensuring women's full and equal participation in their councils and committees'.[1002] The Queensland Law Society's Equity Committee has as one of its functions assisting with ensuring gender balance on every Law Society committee. No other law society has an equal opportunity or affirmative action policy for positions on their governing body. The Australian Labor Party has recently introduced a quota for women politicians. It may be necessary for law societies to consider whether quotas would assist in ensuring women's equality in the legal profession.

9.32 ***Model office policies***. Professional associations can encourage the profession to fulfil its responsibilities by educating its members on their responsibilities under anti-discrimination legislation.[1003] Professional associations can assist by preparing model office policies on sexual harassment, part-time work, maternity leave and the elimination of gender bias from promotion decisions and work practices.[1004] When the Equal Opportunity Task Force of the Law Society of NSW questioned law firms on their employment and promotion policies in 1992, it received several expressions of interest in information or draft guidelines to assist firms. The Task Force responded by developing an Employment and Promotion Policy, which promotes the appointment of an Equal Opportunity Officer, flexible working hours, child care, and avoiding stereotyping 'female' areas of law (such as family law). The Equity Committee of the Queensland Law Society has as one of its functions the preparation of policies on discrimination, harassment, parental leave and career break schemes. The Law Institute of Victoria's Women in the Legal Profession Working Party reports that it is developing a policy statement on flexible work practices, including guidelines on special leave, parental leave, leave without pay, flexible hours, job sharing, working from home, part time work, sick leave and children. In encouraging the adoption of flexible policies, professional associations can advise firms that the policies

- help the legal profession serve the community by reflecting the diverse character of the community
- ensure that discriminatory practices are not taking place and that firms are acting in accordance with anti-discrimination legislation
- reduce staff turnover, sickness and absenteeism, which are often related to inflexible work practices and sexual harassment.[1005]

9.33 ***Interview guidelines.*** Professional associations could promote compliance with anti-discrimination legislation by preparing, publishing and promoting the adoption of interview guidelines.

> *In Canada, concerns raised by students about the recruitment process for articles led to the adoption of interview guidelines by the University of Victoria in 1991.*[1006] *The policy was also adopted by the University of British Columbia and was circulated to the Law Society, the Canadian Bar Association and the Vancouver and Victoria Bar Associations. The policy details the manner in which particular questions may be perceived as discriminatory and biased and how to avoid the use of such questions. This policy was commended by the Law Society of British Columbia as a 'very positive development for students and the legal profession'.*[1007] *The Canadian Bar Association also commended this policy and recommended in its report on gender equality in the legal profession that guidelines on the interviewing process should be developed. Such guidelines should include a statement of principles and examples of questions which can and cannot be asked.*[1008]

The Women Lawyers' Association of New South Wales has suggested that law firms establish objective criteria for recruitment and promotion, ask questions that are relevant to the criteria, ask each applicant the same questions and have a mixture of men and women on the selection panel.[1009] The Western Australian Law Society has recently vetoed a proposal by the Equal Opportunity Committee to include interview guidelines in articled clerkship program materials.

9.34 ***Codes of conduct.*** DP 54 suggested that professional associations could adopt codes of conduct dealing with sex discrimination, including sexual harassment and stereotyping of women lawyers.[1010] These codes of conduct would have the status of professional rules and the usual sanctions for breach of a professional rule would apply. A number of submissions agree with this proposal.[1011] While discrimination and harassment are already unlawful, including these issues in the rules of the profession emphasises that sexist behaviour is also unprofessional conduct. Inclusion also gives women lawyers an alternative avenue of redress and is in keeping with the ethos of self-regulation. The Law Council of Australia's Working Group on Career Paths for Women in the Law has indicated that it will be developing a code of conduct addressing discrimination against women, among other issues. Currently there is no provision for discrimination in the rules of professional conduct of any Australian jurisdiction except Western Australia. In Western Australia discrimination is dealt with in Professional Conduct Rule 18.5:

> A practitioner shall not discriminate against any practitioner by reason of colour, race, ethnic or national origins, sex, marital status or religious beliefs of that other practitioner.

Experience in Western Australia indicates that setting standards will do little unless it is accompanied by a commitment to enforce the standards.[1012] The role of professional associations is to promote standards within the profession including the elimination of sexual harassment and discrimination. It urges professional associations to adopt codes of conduct on women's equality and appropriate mechanisms for complaint handling. Compliance with the law should be one of the profession's priorities.

9.35 ***Complaints procedures: safe counsel.*** A significant problem for women lawyers and summer clerks who have been the target of discrimination and sexual harassment is their lack of access to confidential advice, support and counselling. Professional associations could establish confidential procedures for dealing with complaints of sexual harassment and sex discrimination.[1013] This could include an office of 'safe counsel' within law societies.[1014] A safe counsel is an officer who is responsible for hearing complaints of discrimination and advising the complainant of both legal and non-legal remedies. The officer could act as an advocate for the complainant in negotiations with the person responsible for the discrimination. If the complainant prefers to remain anonymous, the officer could contact the firm and advise that concerns are held about its practices. This would protect the complainant from retaliation. The Canadian Bar Association has suggested that an office of safe counsel would assist in developing understanding about patterns of discrimination, by encouraging the reporting of discrimination and enabling the collection and analysis of complaints.[1015] In 1992 the Equal Opportunity Committee of the New South Wales Law Society recommended that the Society appoint an Equal Opportunity Officer, but this recommendation was not acted upon.

9.36 ***Complaints procedures: senior counsellors.*** Rather than creating a specialised officer for women lawyers' complaints, professional associations could consider adapting their existing complaint and counselling procedures to meet the needs of women better. The Victorian Law Institute has established a network of senior counsellors, drawn from both young and old, male and female members of the profession. The senior counsellors originally provided advice on the more traditional professional conduct issues, but have more recently begun to deal with sexual harassment and discrimination complaints. This approach has the advantage of recognising harassment and discrimination as problems for the profession, and not only for women. On the other hand, it may be difficult to ensure that all counsellors have expertise in handling these types of complaints.

9.37 ***Monitoring compliance with anti-discrimination laws.*** The role of professional associations in collecting data has already been discussed in the context of understanding the extent of gender bias in the profession.[1016] The Law Society of British Columbia has suggested that professional associations conduct surveys of the experiences of students and graduates in interviews for summer clerkships, articles and employment. The profession could monitor the compliance of its members with anti-discrimination laws and assess the degree to which gender bias plays a role in hiring and employment decisions.

9.38 ***Encouraging compliance with affirmative action laws.*** In Part 1 of this report the Commission referred to the important role affirmative action plays in the prevention of anti-discrimination practices and the advancement of women.[1017] Currently most women lawyers are unprotected as they are employed in firms with less than 100 employees.[1018] Research suggests that the large firms ensure minimal compliance with their obligations to eliminate discrimination against women.[1019] One Melbourne firm was recently named in Parliament for failing to comply with affirmative action legislation.[1020] Firms fail to acknowledge that there is a problem. Professional associations should advise their members on their obligations under affirmative actions laws and actively encourage compliance.

> None of the(ir) strategies/objectives admit to any discrimination ... They are indefinite in nature and the main form of action articulated is 'to review' or 'to consider'. The Firms' objectives and strategies are general in nature and do not appear to relate to any specific findings in the Firm that it has some apparent and previously undetected discriminatory practices. This is hardly surprising given that the Public Report merely requires the business entity to indicate whether it has ensured that women are not discriminated against and from what perspective...It is highly unsatisfactory that it is possible for an employer to remain blind to the real statistical picture, assert a position of non-discrimination and thereby satisfy their legal obligations.[1021]

Recommendation 9.2

Professional associations should

- **play an educative role on the obligations of legal firms under SDA**
- **be supportive of complainants**
- **collect information on and monitor the career patterns and experiences of women lawyers**
- **encourage increased compliance with affirmative action obligations**
- **promote women's full and equal participation on their governing bodies, councils and committees**
- **develop codes of conduct dealing with sex discrimination, including sexual harassment, in consultation with the SDC**
- **develop model equal employment policies and promote their benefits to the profession**
- **provide employers with interviewing guidelines**
- **establish complaints mechanism, for example, through the appointment of equal opportunity officers or safe counsel or senior counsellors**.

Judicial selection procedures

Women not represented in judiciary

9.39 ***Present situation***. Over 90% of all federal judicial offices are held by men. Of the High Court's seven judges, only one, Justice Gaudron, is a woman. She is the only woman ever appointed to the High Court. Only 17 out of 230 other federal, State and Territory superior court judges are women. There are only four women among the 34 Federal Court judges. Of the 52 Family Court judges, seven are women. There are six women among the 144 State and Territory Supreme Court judges, and none among the Supreme Court judges in Victoria, Tasmania or Western Australia.[1022]

9.40 ***Need for more women judges.*** The Attorney-General released a discussion paper on judicial appointments in September 1993.[1023] It said that 'the fact that men of Anglo-Saxon or Celtic background hold nearly 90% of all federal judicial offices indicates some bias in the selection process, or at least a failure of the process to identify suitable female and persons of different ethnic backgrounds as candidates'[1024] The Attorney-General's discussion paper divided the arguments in favour of the appointment of more women judges into two. The first argument calls for more women judges to increase public confidence in the judiciary. The community cannot be expected to respect a judiciary that is drawn from a narrow sector of society and does not represent the diversity of the community.[1025] The second argument relies on the potential of women judges to bring different perspectives, experiences and methods to their work. Women judges may be able to help eliminate gender bias in the law by using their understanding of women's experiences in their decision making.[1026]

Selecting appropriate judges

9.41 ***A judicial commission.*** Submissions to the ALRC support a judicial commission as the preferable method of judicial selection,[1027] as do several reports from overseas jurisdictions.[1028] The Commission supported this model in its submission in response to the Attorney-General's discussion paper. This model has the advantage of a high degree of independence from the political process, and can therefore enhance the independence and impartiality of the judiciary. An advisory commission also offers the best chance of achieving greater diversity on the bench. It has the advantage of providing a forum for increased consultation within the community about who should be appointed as judges. Increased consultation is likely to identify candidates who may not otherwise have been identified and will promote a judiciary more reflective of the

diversity of Australian society. The membership of the advisory commission should reflect the ethnic and cultural makeup of the community and there should be a balance of women and men on it.

Recommendation 9.3

An advisory commission should be established to advise the Attorney-General on suitable candidates for judicial office.

9.42 ***Part-time appointments.*** The Commission also favours part-time appointments of judicial officers, to enable women and men to take proper account of their family responsibilities.[1029] Some tribunals already have part-time members.[1030] There seems no constitutional or other obstacles to part-time judicial appointments, and no compelling administrative argument against it.

Recommendation 9.4

Federal judges should be able to be appointed on either a full-time or part-time basis.

9.43 ***Selection criteria.*** A highly discretionary approach to the selection of judges may produce gender bias.[1031] The criteria on which judges are selected are not made public. The Lord Chancellor's Department in the United Kingdom has recently published a public consultation paper which proposes that judicial vacancies will be advertised, job descriptions prepared and selection criteria identified.[1032] The first job advertisements appeared recently. The proposed selection criteria include legal knowledge and experience, intellectual and analytical ability, sound judgement, decisiveness, communications skills, authority, integrity, fairness, understanding of people and society, sound temperament, courtesy and humanity, and commitment.

Recommendation 9.5

Selection criteria for judicial appointment should be identified and publicised.

10. The economic life of women

Introduction

10.1 This chapter provides an overview of women's economic life. It introduces the following three chapters which are linked by the themes of dependence and the undervaluing of women's work. These themes are major areas of concern in submissions received by the Commission. DP 54 called for contributions on the nature of women's involvement in economic life. It asked questions about women's unpaid work, social security, retirement income, women and credit and women and taxation. Constraints of time have prevented the Commission from undertaking an exhaustive treatment of these topics.[1033] Instead, the following three chapters single out three areas of particular community concern: unpaid work, social security and sexually transmitted debt.

Dependency

The economics of dependence

10.2 ***Economic realities.*** Part 1 of this report noted that fewer women earn income than men and generally speaking those women who are earners earn less than men. Women are more likely than men to be single parents. Many more women than men take time out of the workforce or work part time because of child care responsibilities. In some social groups the accepted norm is that married women do not enter the paid workforce. Women still have difficulty in obtaining credit.

> For most women as individuals, marriage is economically damaging. The act and consequences of marriage seriously inhibit the capacity of women to maintain and develop their value in the job market. This occurs in many ways: the presence or expectation of children and lack of alternative childcare limit women's time and choices of occupations; the primacy given to the huband's career often leads to women giving up opportunities for promotions and seniority or giving up their jobs when the husband's job requires relocation; the responsibilities of housework ... will often limit her capacity for overtime, for further study, for out-of-work socialising and travel.[1034]

For all these reasons women have a higher level of financial dependence than men on the state or on their partners.

10.3 ***Economic dependence.*** Women's role in economic life raises important issues of women's equality in the law. Central to this role is the concept of dependence. The woman who, without a wage, nurtures children and maintains a household is dependent on her partner or the state for income. The woman who guarantees her partner's borrowings may well do so because she is dependent on him, or the business that he runs, for her and the family's maintenance. The woman recipient of social security who is denied a benefit by the state because of the workings of the *Social Security Act 1991* (Cth) (SSA) may be forced into dependence on another person.

10.4 ***Dependency persists.*** Work performed outside the home has been assessed as having economic value and work performed at home as having none. As the main performers of that domestic work, women have become financially dependent. This is so even if the domestic work is of exactly the same kind as that done outside the home. If a person is paid to wash the neighbours' clothes or look after their children the work has economic value but if a woman performs these tasks for her own family it is called a labour of love.[1035] While the number of women in work has increased greatly over the last 50 years, that growth has been largely in part time and casual employment where, despite recent improvements, pay and conditions still do not match up to comparable full time work.[1036]

> For the woman in part-time employment, the dependency myth ensures that the part-time work is seen as trivial, of little moment (rather than the hard work it really is, with inadequate return), and thus not worth any proper assessment.[1037]

The law and dependency

10.5 ***Law's role in reinforcing dependence.*** Women's dependence is reflected in social, economic and legal policies that, in some cases, work to the detriment of women. Laws may reinforce dependence, or by failing

to take it into account the law may not provide appropriate remedies for the disadvantaged woman. The historical underpinnings of dependence are deeply rooted. The nineteenth century English jurist Blackstone said that: 'In law husband and wife are one person, and the husband is that person'. While this proposition is outmoded, it indicates the completely dependent position which married women once occupied in the law and which still underpins parts of the common law.

10.6 ***Public and private spheres.*** Academic writers trace women's dependence to the division of industrial society into home-based and work-based labour that was a product of the industrial revolution. This division of labour also brought about the dichotomy between the private and public spheres.[1038] The public/private dichotomy expresses the idea that the State should confine its activity to certain aspects of social life, the 'public' sphere. Other aspects of social life are a matter of individual choice and should be left free from State regulation. This dichotomy is said to be at the heart of women's dependence.

> The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is all about.[1039]

The State's role in defining and shifting the boundaries has not been neutral.

> At present the State is ostensibly neutral to the sexual division of labour, seeing it largely as a matter of individual choice. It is not until women become dependent on the social security system that they are exhorted, or coerced, to become financially self-sufficient. In practice, however, the policies of the state force women into (at least partial) financial dependence on men. The breadwinner/dependant spouse relationship is a natural consequence of the lower wages available to women, the structure and organisation of the paid work-force and the limited availability of support for those who wish to combine child-rearing with wage-earning. But, because the decision to remain at home to care for children continues to be treated as a 'private' decision, there has been a reluctance to adopt policies which would avoid women from becoming dependent in the first place.[1040]

The public/private distinction is reflected in much of the law, explaining the law's failure to regulate a range of activities that are deemed domestic. For instance, the woman who signs a guarantee as a result of a 'private' relationship may not be well served by a law that only deals with 'public' commercial dealings. In this way women can be denied equality in the law.

10.7 ***Need for flexibility.*** The challenge for law makers and for society generally is to create conditions which foster independence[1041] and yet are flexible enough to recognise that some women are financially dependent and must be afforded appropriate protection.

Two legal issues requiring attention

10.8 ***Sexually transmitted debt.*** Chapter 13 discusses recent cases involving women who give mortgages over their property to guarantee the debts of others. These guarantees are given because of some emotional attachment to the principal debtor, often a husband or son, and not for commercial reasons. While the scope of the chapter is narrow, the issues are also relevant to a wider range of financial dealings. The growing financial independence of women has not always been matched by a corresponding growth in the provision of information or in the establishment of procedural systems that adequately protect women who rely solely on their partners for their financial guidance. These problems may also affect women as joint borrowers, silent partners and non-participating company directors.

10.9 ***Social security.*** Chapter 12 deals with the payment of benefits to women under the *Social Security Act 1991* (Cth) (SSA). The underlying assumptions of the SSA are based on social models of the nuclear family which submissions argue are inappropriate and out of date.

> *The rationales that inform the Social Security Act are the notions of the dependent woman partner, the sexual division of labour and the intra-family sharing of income. These rationales are discriminatory. They have reinforced the dependence of women and the sexual division of labour and so contributed to the structural discrimination against women.*[1042]

These assumptions mean that the SSA may be in breach of the *Sex Discrimination Act 1984* (Cth)(SDA) were it not exempt from the SDA. The chapter examines the submissions to the Commission describing the Act's effects on the proposed reforms to the Act. It raises issues relevant to the repeal of the exemption.

Devaluing women's contribution

10.10 Those whose work is deemed to have no direct economic value are likely to have their contribution to family and society devalued. This reinforces their dependence. Many submissions to the Commission comment on this issue.[1043] Some submissions argue that a proper valuation of women's unpaid work should give women with children a choice whether or not to enter the paid work force.[1044]

> *Unless value is given to work in the home it will remain unrecognised and under valued and in many cases 'undone'.*[1045]
> *Speaking for myself how could it be that my two days per week at [work] counted as proper work, and the other 5 days looking after my children and running their household for them and my husband did not?*[1046]
> *I ask: is this work [in the home] of a trivial nature? Are we going to continue to regard this work as 'invisible' and consider it an integral part of a wife's role; thus ignoring its value in labour market terms?*[1047]
> *Women's unpaid work in the home and in the community definitely is not fully recognised. That work keeps the nation going.*[1048]
> *Work in the home must be recognized as work, by the formation of a list of tasks, duties, competencies and skills. The establishment of an award would be ideal, but let us deal in possibilities. As a forerunner of an award, there should be drawn up a list of the duties and tasks of (1) housework and (2) child care - the basic requirements, nothing fancy and nothing particularly skilled ... A widely accepted list of tasks of housework and basic child care would encourage several things to happen:*
> *(1) the recognition of housework and child care as work, rather than love;*
> *(2) the negotiation between partners or within a family about who does which task, and the fair and equitable sharing of these tasks;*
> *(3) an understanding among those who usually don't do some or all of the tasks (often but not always men) that they have to be done and take time and attention;*
> *(4) the beginning of a general social recognition that housework and child care are work and need to be paid for.*[1049]

Chapter 11 deals in particular with the experiences of women on farms. Their circumstances highlight the general problem of women's unpaid or undervalued work. The chapter explains the discriminatory outcomes of the failure to accord women's work its proper value and suggests that unless and until the estimated 2.5 billion hours of unpaid work performed annually by women at home and in the wider community are valued,[1050] the importance of their contribution to society will remain unrecognised and their labour will remain invisible.[1051] Chapter 11 also considers ways in which, in other contexts, the law could give greater recognition to the value of unpaid work.[1052]

11. Women and unpaid work: farm women - a case study

Introduction

This chapter

11.1 In this chapter general issues of unpaid work and the application of those issues to farm women will be addressed. The chapter investigates the way courts have treated unpaid or gratuitously performed work when assessing compensation for personal injury. It recommends ways to enhance the status of unpaid work in the law.

Submission to Attorney-General

11.2 In June 1994 the Attorney-General received a submission from the Convenor of the Women in Agriculture 1994 International Conference seeking a fresh approach to the way farming women are treated in the law. The submission expressed particular concern about the impact that the categorisation of farming women as 'non productive "sleeping" partners' had on the award of damages in negligence cases. The Attorney-General asked the Commission to consider the issue in this report. In doing so the Commission concluded that the problems of farm women are in large measure the problems of unpaid workers generally although there are some additional difficulties affecting farm women alone.

CEDAW

11.3 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires that

> States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy.[1053]

Compensation for personal injury

Assessing damages

11.4 ***The general law.*** When people are sick or injured and unable to perform their usual daily activities they need income and, in some cases, they need someone else to do their tasks. Those who are in paid employment may be eligible for sick leave and workers' compensation. Self-employed people such as farmers may take out disability insurance to ensure that they receive income in the event of an accident and can hire someone to replace them but it is unusual for all the partners in a farm business to take out adequate insurance.[1054] People who are not insured may have to rely on social security payments. A person who is injured due to the negligence of another may be entitled to damages by way of compensation.[1055] The person may also be required by the Department of Social Security to pursue any right to compensation as a condition of receipt of the pension or allowance.[1056]

11.5 ***A case study.*** One of the sources of the discontent expressed to the Attorney-General was the following case study.

> At approximately 10.30pm on Friday 20th July 1984, I was asked by my husband to run him back over to the paddock that he was sowing crop in to pick up the farm truck and bring it home ... Whilst doing the return trip home again at around 11pm I was involved in a crash with a semi trailer. I was in hospital for three months and suffered ... a permanent injury to my right arm which renders that arm useless ...The semi-trailer would not admit negligence and my husband engaged a local solicitor who in due course referred me to a QC ...who told me it was a shame that I didn't work in a chocolate factory as then I could have sued for loss of wages but being a farmer's wife I was termed a "sleeping partner"... I wondered how many other farmers' wives realised that in the eyes of the law they were seen as non-productive even though they contribute considerably to their farms.[1057]

'Sleeping partner' is not a legal concept in the law of partnership, tort or tax. The term implies that the person makes a negligible or silent contribution to the day to day running of the partnership. This woman was advised to settle her case for $200 000. She considers this amount inadequate.

Damages awards

11.6 ***The awarding of damages in general.*** Damages are awarded by courts on a 'once and for all' basis as a lump sum meant to cover all past and foreseeable future losses. The sum has a number of different components which are called heads of damage and represent particular types of loss. They fall into two broad categories, pecuniary and non-pecuniary. Non-pecuniary losses include such items as pain and suffering and loss of enjoyment of life (amenities). Pecuniary losses include such items as medical expenses, loss of income and loss of earning capacity. Loss of income is calculated by establishing what earnings were lost prior to the award of damages and what earnings will be or may have been lost in the future.

11.7 ***Loss of future earning capacity.*** A person is entitled to recover for any reduction in their capacity to earn due to the accident.[1058] Assessing the loss of future earning capacity can be relatively simple if the person is a wage earner with a settled job and few or predictable chances of promotion. But in many cases the calculation is not so simple. For example, if an injured person is in partnership the basis of economic loss has proved difficult to formulate. The compensation could reflect the loss to the injured person alone, so that, if she or he receives only a small proportion of the profits, that is the extent of the loss. Alternatively the compensation could reflect the loss of the person's contribution to the partnership and the consequent loss of profit to the partners as a whole.[1059] This issue has not been definitively settled and the law continues to be decided on a case by case basis.

11.8 ***Compensation for sleeping partners***. It is the way that courts have assessed the loss of future earning capacity that has given cause for concern for farming women and women generally who are non-active or sleeping partners.

> Where in a husband and wife partnership the non-active partner is injured, the damages recoverable will not amount to half the profits of the partnership, since obviously no such loss has been incurred.[1060]

11.9 ***Compensation for unpaid workers.*** Courts encounter different problems when assessing the future earning capacity of a tort victim who is an unpaid worker. The victim may be very young and therefore the calculations will have to rely on averages and informed estimates. The victim may have had fluctuating earnings requiring the court has to assess the victim's likely future success or failure.[1061] An area of considerable difficulty is the way in which the economic capacity of those who work for no financial reward is assessed and compensation awarded. What value should be put on work in the home including the job of caring for children and how should the law assess the loss of someone who loses her capacity to perform it? In some cases,[1062] when a woman has lost the capacity to do her unpaid work, the loss has been characterised as a loss of amenity, that is, a loss of the satisfaction of providing services, rather than a loss with direct financial consequences. This removes work done in the home from the economic sphere and places it in the pastime category.[1063] This is clearly unsatisfactory. For example, in *Burnicle v Cutelli*[1064] Justice Reynolds said

> To quantify the injured housewife's loss of capacity to perform the work voluntarily for the benefit of others by the measure of the value of those services if performed by a third party may be a convenient and simple way to do so but it does not seem to accord with established principle or to be a satisfactory way of assessing what is reasonable.[1065]

Some judges, however, take a broader approach.[1066]

11.10 ***Compensation paid to a third party for services gratuitously provided.*** In *Griffiths v Kerkemeyer*[1067] the High Court held that in a negligence action a successful plaintiff in need of continuing care may claim compensation for the value of that care regardless of whether it is being provided on a commercial basis or gratuitously by a spouse or family member.[1068] That case concerned a man being cared for by his fiancee. However, the principle has been weakened by later judgements and by legislative changes in different States.[1069]

11.11 ***Gratuitous services valued by reference to commercial rates.*** Because tort law has more readily accommodated actual losses, the principle established in *Griffiths v Kerkemeyer* has been considered problematic: how could it be that a tort victim could receive compensation for something that was costing him nothing? In the recent case of *Van Gervan v Fenton,* the majority of the High Court commented that the

> true basis of a *Griffiths v Kerkemeyer* claim is the **need** of the plaintiff for those services and that the plaintiff does not have to show ... that the need is productive of financial loss[1070] (emphasis added)

The tortfeasor takes away the choice of the injured party to pay for the required services or have them performed voluntarily and transforms it into a need to have them performed.[1071] The High Court majority also decided that the relevant way to value this care was not the wages actually foregone by the carer but the reasonable commercial cost of the services she provided. In other words, the court settled on a way in which the unpaid services should be valued - not by calculating what Mrs Van Gervan lost in wages that might otherwise have been earned outside the home but by assessing the market value of the services she provided. In *Griffiths v Kerkemeyer* and *Van Gervan v Fenton* it was a man's loss and his need for the services that were being compensated. In this context the courts found a way to value unpaid work.

11.12 ***A double standard?*** Currently there is a discrepancy between the compensation received by those who are paid for the work they do and those who are not. When a wage earner is incapacitated to the extent of needing full-time care, as was Mr Van Gervan, he is compensated both for the loss of his wages **and** for the cost of his care. If a woman who works solely in the home is injured and requires full-time care, she too may receive *Griffiths v Kerkemeyer* damages for the cost of her care but she would probably not be compensated for her capacity to earn an income. This is so despite the fact that in a different context (for instance if she were the care giver under the *Griffiths v Kerkemeyer* formulation), that work would be given an economic value. This seems inconsistent. Just as the wrongdoer, by causing the injury, has taken away the victim's choice to pay or not to pay for the services provided to him at home, so too the choice to work for money or not has been taken from the victim's career. The fact that she may formerly have provided gratuitous services to her family is not determinative of her future earning capacity.[1072]

11.13 ***Past practices.*** Where a tort has taken away a woman's capacity to undertake domestic work, there is a loss to the family; services that had been gratuitously performed before the injury, may now have to be paid for. In the past, in some circumstances, these losses were usually compensated for by the common law actions of consortium and servitium. These were actions available only to a husband or to the master of a servant. These actions have been considered by a number of law reform agencies around the world[1073] including the English Law Commission.[1074] There is no doubt that these actions are anomalous and anachronistic; they 'equate a wife to an indentured domestic servant - which she is certainly not'.[1075] In many jurisdictions[1076] the actions have now been abolished while in others a formal equality has been achieved by opening the action to wives as well as husbands.[1077] This may be of limited benefit to women as it is seldom husbands who are providing extensive gratuitous domestic services.[1078]

How to provide value to unpaid work

11.14 ***No wages, no value?*** The issue of economic capacity in damages cases should be set in the broader context of the way in which domestic work is seen generally. The same service provider, who may be using the same sorts of organisational or budgetary skills, gets paid when she is out of the home but not when she is at home. Many women see this as an injustice and say so in their submissions.

> *The basic tenets of the structure of 'economics' ... are fundamentally discriminatory against women because these male-created economic systems do not give any economic value to the work of women.*[1079]
>
> *Women in the home economy are economic contributors and society and the law must recognise this in practical terms.*[1080]
> *Education is required to srop the community assumption that if the home is not well run it is a woman's fault. It is the family's.*[1081]
> *Society will only value the work of the mother and home maker when it is given economic rewards and the same esteem as other careers.*[1082]

The High Court too has recognised the issue. In *Singer v Berghouse*, Justice Gaudron said that

> [t]he tendency of the courts to overlook or undervalue women's work, whether in the home or in the paid work force, has often been remarked upon ... To my mind, that is what is involved when a wife gives up paid employment to be with and to look after her husband.[1083]

11.15 ***Gender-biased assumptions about women's lives.*** Undervaluing work at home arises from the assumption that a woman's life will follow the path of dependence on a man.[1084] This assumption affects damages assessments in other ways too. However, there have been alternative judicial views. In *GIO v Mackie*, Justice Clarke of the NSW Court of Appeal acknowledged 'marked changes in society' and declined to follow what he considered to be outdated views of women and marriage.[1085]

The impact of traditional principles on farm women

The nature of women's work on farms

11.16 Traditionally, male farmers expect their wives to be responsible for domestic work and child care so that they can get on with the 'actual farming'. Women in agriculture have been seen as 'farmers' wives' helping out by performing 'back-up services' such as driving to town to get a part for machinery or shifting machinery from one paddock to another.[1086] This perception has served to undervalue or misinterpret the work of women. The rural crisis in many cases has expanded the role of women on farms. Tasks previously done by hired labour are now being performed by women family members.[1087] Farm women are

> a tremendous, unseen, unrecognised force. They contribute a tremendous amount to the wealth, the stability and economic success of the farm. Added to that they contribute a tremendous amount to the community, to their schools and their organisational skills...mostly it is unrecognised.[1088]

Most family farms are run as partnerships and women on farms are therefore not usually paid as employees. There are many reasons for this, not the least being the tax advantages. Although people on the land can see and appreciate the work done by women, their contribution is not properly valued in economic terms.[1089]

Farm business or home work?

11.17 Farm women as litigants in negligence actions are likely to experience all the difficulties of unpaid workers when seeking compensation. There may also be additional problems. For example, the lines of demarcation in work may be far harder to draw on a farm. When the meals are being prepared for family, cooking would generally be seen as a domestic activity, but farm women often cook for both family and employees to eat together. Looking after working dogs or feeding chickens and collecting their eggs can be both domestic functions and commercial ones. Feeding calves or discussing financial strategies can also be domestic and commercial. These examples illustrate how difficult it can be to separate purely domestic activities from money making ones. It is difficult to define which part of a farm woman's life is devoted to the successful running of a business concern and which to the smooth running of a family. When a farm woman is injured and has to explain her contribution to the business partnership, the complexities are enormous.[1090]

Responding to the needs of unpaid workers

Legislative reform

11.18 ***State issues.*** Essentially, two issues have been canvassed in this chapter: the way in which unpaid work is treated when assessing damages in personal injury cases and the way in which that problem is magnified for women working on farms. These issues are mainly within State and Territory jurisdiction. They are governed by different statutes including those about the award of damages generally[1091] and those designed to modify the common law in particular situations.[1092]

11.19 ***ACT law reform.*** In the ACT these problems have been dealt with by adopting recommendations of the ALRC in its report, in 1986, on the action of consortium in ACT law.[1093] The Commission found the action to be 'a quaint hangover from the past' and recommended its abolition. However, the Commission

recognised that this left a gap in the law. It made further recommendations to extend tort liability to include 'liability for damages for the loss of capacity to do work in connection with a household'.[1094] With the exception of the proposed method of valuing unpaid household work, the Commission's recommendations were enacted in the ACT in 1991 following a further report by the ACT Law Reform Committee.[1095] No other Australian jurisdiction has enacted similar legislation. In the view of the Commission uniform national legislation should be introduced to implement the principle that the law regard loss of capacity to perform unpaid housework as a primary economic loss to the person injured.

Recommendation 11.1

The Standing Committee of Attorneys-General should endorse uniform national legislation to implement the Commission's recommendation in ALRC 32 that 'the law should regard loss of capacity to perform unpaid housework as a primary economic loss to the person injured. Accordingly, in association with abolition of the loss of consortium action, legislation should be enacted enabling negligently injured people to claim compensation for the loss of capacity to perform unpaid housework.'

The Family Law Act

11.20 ***Recognition of unpaid work.*** One submission reports that

> *farms are frequently not in the woman's name and the woman's unpaid work is inadequately recognised in property distribution ... Local lawyers are reluctant to act for women in rural areas because the lawyers tend to be tied up for generations with the man's business and his general farming property.*[1096]

The *Family Law Act 1975* (Cth) (FLA) s 79 provides for the recognition of the 'non-financial contribution' to acquisition, conservation or improvement of property when the court makes a property division on marriage breakdown.[1097] Amendments to the FLA in 1983 created a separate provision for the contributions of homemaker and parent to the welfare of the family. The effect of these amendments is to eliminate the nexus between the homemaker's contribution and the acquisition of assets. Previously that nexus was established principally by the argument that the partner doing the unpaid work freed the other partner to go out and earn money. The 1983 amendments represent a significant philosophical shift by giving the homemaker role an intrinsic economic value. Another provision is particularly important in the case of farming properties. Section 79(4)(d) requires the court to consider the effect of any proposed order on the earning capacity of either party to the marriage.[1098] Husbands regularly argue that dividing a farming property would harm their earning capacity. This view was acknowledged in early cases in which the Family Court accepted the principle that land used for production of income is in a different category from land that simply provides a place for the family home.[1099] However, in the *Lee Steere* case the Family Court held that farming properties do not give rise to special considerations.[1100]

11.21 ***In the Marriage of Lee Steere.*** When the parties were married in 1975 the husband brought into the marriage a farming property transferred from his father and an interest in an adjoining property. The wife brought about $2,000 into the marriage. Throughout the marriage the husband ran the farm which was only marginally viable. Farming was the only livelihood that the husband knew. The wife assisted the husband on the farm when needed and assumed the responsibility for rearing the three children and running the home. The court rejected a view that farming properties were a special case.

> That would seem to imply that unlike the situation where suburban homes are the subject of proceedings, orders should never be made which of necessity require the sale of farming properties. Such an approach would confine the wife's entitlement to such amounts as the farmer/husband could raise by way of sale of minor assets or by way of mortgage which would not affect the viability of the farm. If the farm is of considerable value as regards land but offers little by way of cash flow, as may often be the case, a farmer's wife would only receive a fraction of what the suburban housewife would be entitled to receive by reason of her contribution and need in a comparable case. Such a result would hardly be described as just and equitable to the wife.[1101]

The Full Court pointed out that s 79(4)(d) would clearly be a relevant consideration where the only or major asset available for the division between the parties is the asset from which one of the parties derives his or her livelihood, whether it is a business, a professional practice or a farm. The Full Court also pointed out, however, that this consideration is 'not an absolute factor'.[1102] It is only one of several matters to be considered in arriving at an order which in all the circumstances is just and equitable.

> Paragraph (d) [of s79 (4)] is ... mainly relevant to the question of the ways and means in which the entitlement of a party can be met. It may be that in certain cases the destruction of the business can be avoided by allowing the payment of the order in instalments or to postpone it for a period ... provided this can be done without injustice to the applicant ... But if ... injustice can only be avoided by the same and division of the business property, then this must be done.[1103]

11.22 ***Amendments to the Family Law Act.*** The federal Parliament's Joint Select Committee on the Family Law Act recommended that farming properties should be treated separately under the Act.[1104] The government in its response rejected that recommendation but accepted that a general provision was needed to cover properties and business. Accordingly the current draft bill provides for 'the need to retain property as an income producing asset'. This would appear to reinstate the position prior to *Lee Steere* and would be a retrograde step. The Commission accepts the reasoning of the Full Court of the Family Court in *Lee Steere*'s case and considers that the Act already provides for consideration of farming properties. The Commission urges the Attorney-General's Department to reconsider its position on this amendment.

11.23 ***Submission's comment.*** A submission told the Commission has commented that

> *[t]he complaints which the Joint Select Committee have sought to mollify with their recommendations [88 and 89] seem to wish to reassert the outmoded supremacy of financial contributions and the subjugation of other factors to the importance of retaining the farm as an income product unit for the future needs of the separating family (which arguably means retaining the substance of the farmer's livelihood).*
>
> *However, non-financial contributions by homemakers and parents in the 1980s were recognised as having value and contributions of substance. Most farming communities in any other context would hardly argue against the justice of such a development. But grain prices and more recently wool prices have slumped and the rural economic environment can no longer absorb even 'just and equitable' property orders while retaining the farm through further borrowing. It is undeniable that times are very tough on the land. Query, however, whether such circumstances should justify tampering with the property provisions of the Family Law Act, particularly when the proposed reforms are already incorporated as existing considerations taken into account when property orders are made. To do so creates a precedent dictated by the the loudest voices and in this case places the burden of recessionary times on farming wives and children. Any attempts to amend the Family Law Act as the Joint Select Committee recommendations 88 and 89 propose should be vigorously resisted.*[1105]

Judicial Awareness[1106]

11.24 In *Lee Steere,* the Full Court of the Family Court said

> In the case of a farmer's wife that contribution to the totality of the farming assets is generally more significant than that of the suburban housewife. The wife who helps on the farm is obviously much more directly involved than the wife who may occasionally entertain her husband's clients or customers.[1107]

Whatever observations might be made about the Full Court's impression of 'suburban housewives', it clearly recognises the importance of farming women's contribution to running the farm. This recognition should be standard. Judges in all jurisdictions should be aware of the role of women on farms and in small family businesses.[1108]

Recommendation 11.2

Judicial gender awareness programs should include information about the nature and amount

of unpaid work in the community and the 'significant roles which rural women play in the economic survival of their families'.[1109]

Bureaucratic initiatives

11.25 *Half way to equal* recommended that a rural women's section be established in the Office of the Status of Women (OSW).[1110] This has not been implemented but other initiatives have been undertaken in conjunction with the Coordination and Liaison Section of OSW. For example, the annual Australian Agricultural and Grazing Industries Survey (AAGIS) this year included questions specifically aimed at investigating the status of women in Australian broadacre farming industries. It has 16 questions about the hours worked on and off the farm and about income derived from farm and non-farm work. It will enable regional comparisons to be made. Further, reporting requirements in departmental annual reports now include a statement on the impact of policy on women. The Annual Report of the Department of Primary Industry and Energy will report on the impact of government policy on rural women. The Commission endorses these initiatives as a means of collecting more data on the status of rural women. It is not possible to formulate relevant and effective policy without specific data. The AAGIS survey and reporting requirements are important steps towards the regular collection of that data. The Commission suggests that the National Women's Justice Program, recommended in ALRC 67, should monitor the AAGIS work to ensure data on rural women is incorporated in justice strategies.

Community education programs

11.26 If people are not aware of their rights they cannot exercise them. Women on farms and women in the country generally must be aware of the obligations imposed and protections provided by the law. For example, if women in farming families become partners in the family business they need to be fully informed of the legal requirements of their status. Farming women also need to be aware of the importance of arranging their own disability insurance when they are not employees and therefore not covered by workers compensation. Information about and awareness of the legal position is important in the country because in many cases there are practical difficulties in obtaining independent legal advice. In small towns and isolated areas, there may only be one or two solicitors and, if they are already acting for a husband, there are few avenues open to a woman to obtain professional independent advice.[1111]

Recommendation 11.3

The NWJP should undertake a community education program specifically targeted at rural women. This program should aim to impart information on a wide range of legal topics including commercial responsibilities, insurance and property settlements in family law.

Valuing unpaid work

11.27 ***A change of perception.*** Change in the way unpaid work is valued is also required. DP 54 canvassed several options.[1112] Submissions take up the suggestion that unpaid work in the home be included in the National Accounts.[1113] This would give recognition to work in the home, recognition it is not presently accorded. Information about the national economy undervalues the significance of unpaid work.

> [T]he commonsense, or informal, notion of a housewife is a woman who does not work; this involves a conception of work as something undertaken in return for a wage and the related notion that unpaid domestic labour is not real work. These ideological conceptions are formally incorporated into economic discourse as shown by the definition of GDP (Gross Domestic Product), the total value of goods, services and products produced in the economy, which does not include household labour. The informal definition of housework then is reproduced in formal institutions and in so doing acquires greater legitimacy.[1114]

11.28 ***Collection of unpaid work statistics.*** The United Nations System of National Accounts, - which determines how national accounts figures are collected and determined, - was reviewed over recent years. The proposition that the estimated value of unpaid work should be included in GDP was rejected but the review recommended that 'satellite accounts' should record the value of unpaid work in a way consistent with collection of data on the market economy.[1115] The Australian Bureau of Statistics (ABS) has conducted

experimental work to include unpaid work in the National Account figures. In 1990 it published an Information Paper that suggested several different ways in which work in the home could be measured economically.[1116] The various different methods produced different results but the proportion of domestic work in Gross Domestic Product (GDP) was assessed between 47% and 62%. The ABS has recently published the results of its 1992 survey.[1117] On its preferred method, there has been a slight rise in the value of all unpaid work relative to GDP since the last survey. Although the proportion of unpaid work done by women has fallen by 3%, women still perfom 65% of all unpaid work. The Commission recognises the value of the ABS's work and endorses its continued efforts to produce internationally standardised figures as frequently as data and resources permit.

11.29 ***Income splitting.*** Recognising the value of work in the home in the National Accounts has more symbolic than practical significance. In the long term, it may produce a change in the way the community perceives that work but it will not of itself provide financial reward for those doing the work. Another option canvassed in DP 54 was that of income splitting. This would produce an immediate benefit for some members of the community and it would recognise the value of people staying at home in a more substantial way than the present dependent spouse rebate (DSR). There was no unanimity on this topic. One submission says that taxation must be based on the individual, as using the family as a taxation base 'will not benefit most women'.[1118] Another says that income tax splitting is realistic but would 'encourage financial dependence usually by the female of the house'.[1119] But others saw income splitting as encouraging women to stay at home if they wish.

> *We believe that if there is only one wage earner due to the spouse's family commitments, there should be income splitting. The paltry $20 odd rebate is an insult.*[1120]
>
> I*ndividual taxation and social security payments have gradually disadvantaged middle income, married families with children at home to such an extent that it is now economic to 'live in sin'. The DSR is not equal to two thresholds ... Income splitting would demonstrate to men how valuable wives are and restore the self-esteem of women more than any other reform.*[1121]
>
> *Agree that the tax system should allow income splitting at least under the $100 000 combined income. Partners do pool resources and liabilities but we insist that women be subservient. How relevant is this to the twenty-first century?*[1122]

11.30 ***The French tax model.*** A few submissions adopt the general principle of income tax splitting but put forward more elaborate schemes. The French tax system was singled out as particularly beneficial.[1123] A family of two parents and two dependent children with one income of $30 000 would have a net benefit of $1379 a year under the French scheme.[1124] This model overcomes some of the problems usually associated with income splitting.[1125]

11.31 ***Problems with tax splitting.*** Despite the simplicity of its operation, income splitting is problematic. It unduly benefits high income earners, giving them another means to minimise their taxation liability. It may disadvantage low income earners unless benefits such as additional family payment are maintained. There is no benefit for single parent families or single income families with two adults.

12. Social security

Introduction

This chapter

12.1 This chapter documents problems for women highlighted by submissions on the *Social Security Act 1991* (Cth)(SSA) but does not offer a comprehensive review of the Act. That would duplicate much of the effort which must be expended in the forthcoming review of the exemption of the SSA from the *Sex Discrimination Act 1984* (Cth)(SDA). The chapter describes the relationship between the SDA and the SSA. It then discusses women's dependency, especially in the context of the recent changes to social security payments. It examines the question of the cohabitation rule and the effect of poverty traps. The Commission had the benefit of consultations with the Department of Social Security (DSS) in preparing the chapter. The department has made two submissions one of which is appendix 4 to this report.

Women and social security

12.2 ***Payments to women.*** Many women rely on social security during significant periods of their lives.[1126] This stems from their difficulties in participating fully in the paid workforce, their family and other caring responsibilities and their consequent lack of superannuation leading to a greater reliance on social security in old age. About 2.3 million Australian women are currently receiving a pension or allowance from the Department of Social Security (DSS).[1127] For many women, this regular payment provides economic independence, however limited, for the first time in their lives.

12.3 ***Submissions.*** The Commission received submissions from individual women on their experiences of the social security system, and from lawyers and welfare rights and legal centre workers on legal issues affecting women in social security law.[1128] These submissions raise three major issues:

- the assumption of dependency
- the application of rules regarding sole parent pension
- the impact of new social security schemes and poverty traps

Since the publication of the DP, there have been significant changes in the way in which social security payments are made.[1129] Submissions do not reflect these changes. Submissions point to women's struggle to survive on an inadequate pension.[1130] Yet there is a widely held view that women use the social security system to support a lifestyle which is leisurely. Sole parents are seen as a drain on the social security system because the care of children is not seen as work nor as contributing to the economic environment.[1131]

> *Amanda has three children under 12 years of age. She is on the waiting list for public housing. Currently she pays $120 per week rent. Her only source of income is her sole parent pension. She feeds her children before herself, particularly on off pension weeks. Her health has deteriorated, resulting in periods of hospitalisation, and the resultant anxiety regarding inadequate child care during these periods. Amanda is a proud woman who 'dislikes asking for handouts' and worries constantly about how she will make ends meet. She frequently walks her youngest child to school to save bus fares and when she does present for income support (as it is clearly not emergency relief) walks in excess of six kilometres to the agency in the Western Suburbs.*[1132]

Social security and the Sex Discrimination Act

Exemption from the SDA

12.4 The SSA is exempt from the operation of the SDA.[1133] The Attorney-General is required by law to review the operation of the exemption before 1 June 1996 and make a recommendation as to whether the

exemption should be lifted.[1134] The SSA broadly expresses eligibility for payments in gender neutral terms. Any departure from this norm is justified on the basis that special needs are being met. Payments under the SSA which impact differently on men and women include payment of the Age Pension to women at an earlier age, payment of Family Payments to the primary care giver, usually a woman, and payment of Widow B and Wife Pension. The Act also distinguishes on the grounds of marital status in the payment of Wife Pension, Widow B Pension, Widow Allowance, Partner Allowance, Parenting Allowance and Sole Parent Pension (SPP) and in the difference between married and sole rates of pensions and allowances and in the joint income and assets test. There may also be indirect distinctions where rules impact differently on women and on men. The main reason for payments that differentiate between men and women is the desire to target payments to those most in need.

Distinctions and discrimination

12.5 Submissions look at the extent to which provisions in the SSA which distinguish between women and men are discriminatory in their effect.[1135] The issue is not clear cut. Distinctions that address inequality and disadvantage are not necessarily in breach of the SDA, nor after the proposed amendments to the Act[1136] will they be discriminatory, if they can be justified as 'special measures' to promote equality.[1137] For many women, financial dependence and responsibility for the care of children are social realities. Ignoring these realities by refusing to distinguish between men and women may well work to the disadvantage of women. For example, before recent changes to the age pension women were eligible at the age of 60 and men at 65. The age disparity recognised and sought to provide for the assumed dependent lifestyle of women and their low employment prospects. The gradual removal of the age difference will remove a particular distinction but may not adequately address the needs of older women.[1138] In consultations the DSS said that the department aims to be responsive to community needs rather than to prescribe social norms.

Removing the exemption

12.6 Submissions express differing views on the SDA exemption. They reflect the complex relationship between the social and economic situation of women and legal principle that is involved in assessing whether the exemption should be removed. On the one hand the removal of the exemption in the SDA is argued to be important step towards recognising the equal and independent status of women.

> *The danger of maintaining the exemption and failing to intervene in the 'private arena' of the family, is that it appears that the government is actually intent on maintaining the status quo and that equality principles do not apply to the private arena and hence there is no real commitment to substantive equality....The Social Security system can be seen to play a positive role in conjunction with the SDA in the ultimate removal of gendered power imbalances of our society if it is expressed as embodying a recognition of the subordination of women.*[1139]

On the other hand its removal may fail to address issues of substantive inequality.

> *In the long term, the removal of the exemption needs to be assessed in terms of its ability to effect significant changes for women ... the abolition of sole parent pensions for women with children 16 years or over, in 1987 was justified and sold to the community as a means of increasing women's participation in the work force and 'consistent with equality of treatment of women and men'... symbolically the removal of the exemption has the potential to influence and inform community attitudes about discrimination. However we do not accept this as a means of ensuring women's right to an adequate minimum income under the SSA.*[1140]

Women may be further disadvantaged

12.7 If the exemption were removed, distinctions between women and men in the SSA would have to be reviewed. There could be an increase in testing women applicants for and recipients of social security payments to determine whether they are seeking or undertaking paid work to determine their eligibility for

payment. Eligibility for payment may have to be redefined and other payments not based on sex or marital status introduced. Some submissions argue that an immediate total removal of the exemption would benefit men rather than remove disadvantage to women.[1141] They say that phasing out the Wife Pension, announced in the 1994-95 Women's Budget Statement, will disadvantage women by failing to recognise that they are more likely to be providing care for families and undertaking home duties and that their prospects are low-paid employment or the need for other benefits such as unemployment payments. Removing all distinctions may require other changes.

- Sole Parent Pension (SPP) might no longer be lawful as it could discriminate on grounds of marital status.

- Family Payment and Additional Family Payment may no longer be paid to the female partner of a couple but might be split equally between the couple, ignoring the fact that women are overwhelmingly the primary carers of children and have costs associated with that role.

- The Jobs Employment and Training scheme aimed at assisting single women back into the workforce might be abandoned.[1142] Alternatively it may be made generally available to all social security recipients and fail to address the special difficulties of single women re-entering the workforce.

> *Although the SSA embodies official expectations which discriminate against women, removing them at present would not on its own alter societal expectations. The exemption should thus be maintained at present but on the understanding that it is there not to avoid applying equality principles to the 'private sphere', but rather because of present structural inequalities.*[1143]

Reviewing the SDA exemption

12.8 ***The Commission's view.*** Removing the exemption may have no significanct effect at all. Different social security provisions for women and men may be justified under the SDA as special measures to promote equality. The exemption may serve no useful purpose. However in principle there would be one advantage in its removal in that all programs would need to be assessed by reference to the SDA and either justified as a special measure or modified to accord with it.

12.9 ***The process of review.*** The Department of Social Security and the Sex Discrimination Commissioner are establishing a process to review the exemption and advise the Attorney-General. The ALRC will play an advisory role as part of the steering committee for the review and will make available to it non-confidential submissions on the removal of the exemption and the discrimination women experience under the SSA.

The assumption of dependency

Introduction

12.10 ***Assumption of women's dependency.*** Traditionally, the SSA has made assumptions about the dependent role of women, the supporting role of men and the sharing of income to support the family unit. Many submissions say that these remain the most important issues of discrimination affecting women's eligibility to receive an independent benefit.[1144] Submissions concerning the age pension describe the apparently unfair impact this can have.

> A woman works all her life and pays income tax along the way. Her first husband dies and she later marries again. When it comes to retirement, the second husband refuses to pool income because he feels obligated to provide for a son and daughter of a previous marriage. The woman nonetheless has her eligibility for an age pension determined on the basis of the assets and income of her husband because the SSA assumes that a woman is dependent on her spouse and that there will be a sharing of income. She may be ineligible for the age pension or eligible for only a reduced pension. Her lifelong financial independence is not recognised.[1145]

The federal government is aware that 'Social Security arrangements for unemployed people still largely reflect [conditions] in the 1940s'. The provisions of the SSA assume that 'only one person in a couple will be actively looking for work with the other partner, usually the wife, economically dependent on her partner'.[1146]

Reforms

12.11 ***Updating the SSA.*** In a significant move away from these traditional assumptions, the federal government is attempting to make the SSA more appropriate to women's current and future situations. The proposals for reform outlined in the *Women's Budget Statement* and *Working Nation* will facilitate a system in which women are treated as individuals and entitled to individual payments.[1147] Couples on low incomes will no longer be assessed as a couple but will have their entitlement to an allowance assessed individually. The changes are to be implemented in two stages. Stage one in September 1994 introduced the Partner Allowance. Although very little will change in the assessment of entitlement, both partners in a couple who are currently on or eligible for the married rate of Job Search, Newstart, Sickness Allowance or Special Benefit will obtain, in their own right, half of the married rate allowance. This is an initial step in recognising women's separate economic identity.

12.12 ***Second stage.*** The second stage of the reform package commences on 1 July 1995. This will see a change in the way the income of couples is assessed. It aims to recognise each individual's entitlement to allowance and provide a greater incentive for both partners to look for employment by increasing the amount that can be earned without losing all entitlement to the allowance.[1148] The present Partner Allowance will be gradually phased out and instead payments to couples will be made in the following ways:

- members of a couple who are under forty years of age or have recent workforce experience and have no children will be required to claim income support payment, such as Job Search, Newstart, Sickness Allowance and Special Benefit in his or her own right and fulfil the eligibility tests

- partners with children below the age of 16 years will be eligible to receive a Parenting Allowance

- partners who are forty years and over and have no workforce experience will be entitled to the Partner Allowance and have no obligation to seek work but they will retain the right to qualify for unemployment payments in their own right.

The reforms are consistent with a desire to reflect changes in the labour force participation of women. They represent a significant move for the social security system away from the traditional assumption that women are dependent on their partners while recognising caring and family responsibilities. The Commission welcomes this initiative.

12.13 ***Partner allowance***. The Sex Discrimination Commissioner sees separate assessment, payments of allowances and activity testing for couples under forty as 'a welcome and progressive step'.[1149] However, she identifies problems facing women recipients under the new reforms. The Partner Allowance provides for women partners aged forty years and over to qualify for an allowance on the basis of their husband's entitlement. They will not be obliged to look for work. This recognises the discrimination affecting older women in the labour market who have little or no work experience. However, provisions might still be discriminatory under the SDA on the ground of marital status if there were no exemption for the SSA.[1150]

> *Under the proposed partner allowance, a woman over forty who is a spouse will not have to pass a work test in order to receive an allowance, but one who is a single person will only be eligible for Job Search Allowance or New Start Allowance, and thus be required to actively seek work in order to receive an equivalent allowance from the Government.*
>
> *The concept of the Partner Allowance is strongly based on the premise of a one income family and is based on dependency. In most cases, ... it will be women who will be receiving the Partner Allowance.*
>
> *The message to older women is clear - don't bother. Essentially this is a continuation of the current practice of not encouraging (or even actively discouraging) registration by older women, which is*

discriminatory in its effect. To write women off from the labour market at forty perpetuates discrimination against women. It appears to contradict other government policies such as the phasing out of the Widow B pension, and the foreshadowed raising of the pension age for women, which have the effect of encouraging older women into the labour market. It also contradicts the government's moves towards self funded retirement and could result in the increasing impoverishment of older women, by restricting their ability to acquire adequate income and superannuation benefits to finance their old age.[1151]

12.14 ***Parenting and Home Child Care Allowance.*** DSS sees its role as providing income support and meeting existing needs within the Australian community. The Parenting Allowance, for those whose primary activity is looking after dependent children, 'recognises the financial contribution of those who care for children, providing an independent source of income for the partner caring for children' and an 'increased choice for parents balancing work and family responsibilities.'[1152] Until 1 July 1995, Home Child Care Allowance (HCCA) will operate in tandem with the Parenting Allowance. Thereafter, it will be paid only as Parenting Allowance. HCCA represents the government's response to the proposal in *Half way to equal* that the dependent spouse rebate be phased out and paid direct to the home maker.[1153] HCCA recognises the financial independence of women by paying the allowance direct to the carer but as with all social security payments, it is intended as income support and not a wage for employment. The SDC expressed concern at

any implied support for the view that mothers should be in the home, not in the paid work force and the implications of extended periods of absence from the work force. The amount of money paid is not enough to turn full time parenting into a high status job.

It is necessary that women on this parenting allowance should be eligible to apply for income support and labour market assistance in their own right if that is the option they choose ... They should have access to employment assistance and training programs on a voluntary basis and they should be provided with child care assistance in order to participate in these as in the present JET schemes.[1154]

The cohabitation rule

Introduction

12.15 The new reforms do not affect the eligibility tests and procedures for recipients of the Sole Parent Pension (SPP). The experiences of women receiving this pension are the main focus of most submissions on social security.[1155]

... insofar as men on sole parent pension are subject to the same rules as women are, they suffer the same discrimination but the attitudes which shaped the provisions of income support to parents with responsibility for children arose out of the beliefs about women and their place in society. It is these attitudes, which are still prevalent and which determine both the legislation and the interpretation in Courts and Tribunals, that we believe need to be clearly identified if women are to be accorded a place of equal worth and value in our society.[1156]

Sole Parent Pension

12.16 ***Eligibility for a pension.*** A woman is eligible for a Sole Parent Pension (SPP) if she is not a member of a couple and has a dependent child under the age of 16 years.[1157] If the woman is deemed to be in a 'marriage-like relationship' then it is assumed that the male partner will financially support her and his or her child. Submissions point out that, despite considerable changes to the eligibility criteria for the sole parent payments, this assumption remains.

... eligibility has been defined from the point of view of the applicant's partner not from the point of view of the applicant's need. The position from which entitlement to income starts is that if there is a man available to support a woman and her children, it is his responsibility to do so. Of itself this may not reflect an underlying belief that women are the property of men, but it is not until the point at

which the man fails to support a woman that the State steps in. The State steps in at the point at which it can be said that there is not, or is no longer, a relationship of marriage, or akin to marriage, between a man and a woman or in other words when he no longer owns her and therefore cannot be expected to take responsibility for her.[1158]

A 'marriage like' relationship

12.17 The 'cohabitation rule' determines whether any claimant of an allowance or pension under the SSA is in a 'marriage-like' relationship. It sets the rate at which most pensions and allowances are paid. However, in the case of SPP cohabitation is the critical factor, and subject to specific scrutiny, because living in a 'marriage-like' relationship precludes eligibility for SPP. The rule as it applies to claimants and recipients of SPP requires that when certain 'trigger' events occur, the department will investigate all the circumstances of a relationship to see if a marriage-like relationship exists.[1159] If a recipient of SPP lives in the same house as a person of the opposite sex for a period of at least 8 weeks and one of a number of triggers specified in the SSA[1160] is met, a review of living arrangements can be conducted. The circumstances of the relationship, including the financial arrangements, the nature of the household, the nature of their commitment to each other and any sexual relationship, must be considered to establish whether the recipient is entitled to the SPP.

The state will step in to become the economic provider only if she has no man to provide for her; the cohabitation rule allows the state to step out of this role when a woman is deemed to be living with a man in a marriage-like relationship. In this way, the cohabitation rule explicitly emphasises that the state is 'taking over responsibilities properly belonging to men'.[1161]

The short period within which a marriage like relationship can be found to exist is different from the test for de facto status that operates under other legislation.[1162] The Commission was told that this inconsistency can cause particular problems for sole parent pensioners.

A woman sole parent pensioner living with a person on Austudy wanted to declare that she was in a de facto relationsip. However, her partner was not entitled to receive an allowance for her as a dependent spouse. The Department of Education and Training did not consider that they were living in a de facto relationship because they had not lived together for two years yet, the DSS deems them to be in a de facto relationship and no longer recognises her as a sole parent. She has a small child, cannot afford child care, so working is not an option.[1163]

The assumption that a marriage or marriage like relationship will provide equal financial support for both parties is inaccurate. Submissions from welfare centres told of their experience of helping women who were not being supported by their male partners despite the assumption and their partners' ability to do so. They had also received calls from men criticising the assumption.

A caller complained that his wife had worked, contributed equally to the household repayments and house expenses, yet when she was unable to work because of ill-health she was not entitled to sickness benefits. This was a denial of her role and their partnership as equals.

A man rang to criticise the fact that his wife did not recieve a pension in her own right. His superannuation payments were assessed as her income. He pointed out that he could well refuse to share any of his superannuation with her.[1164]

The onus of proof

12.18 What constitutes a 'marriage-like relationship' is complicated, technical and confusing. Women's rights organisations submit that, once the department determines that the relationship exists, it is effectively up to the woman to disprove it. For this reason, they say, women most often accept the DSS assessment.[1165] Submissions also report that departmental investigations can be humiliating experiences for some women.[1166] According to the DSS once a marriage-like relationship is found and a decision is made to cancel the payment, the recipient has 14 days in which to lodge an appeal. She can continue to receive the pension and

gather supporting material until the appeal is heard. Where she voluntarily surrenders the pension, payment is suspended and the recipient given time to reconsider. If she decides to pursue her claim for the pension she must lodge her claim within 14 days.

> *Cathy is a sole parent pensioner with four children. She separated from her former husband some months ago, but has always encouraged him to keep in contact with the children. Cathy was visited by a field assessor and another person from the department. The interview that took place was extremely detailed and distressing. It was repeatedly inferred that Cathy was hiding something. The field assessor threatened to cut off her pension on several occasions. He also said that if she appealed against the decision there was no guarantee she would get it back. The field officer indicated to Cathy that as her husband was on good money he should be made to support her ... Cathy made a request to look at the documents that were sent to the department about her situation. She was told by the officer that she could only look at them if she brought her husband into the interview at the DSS. Cathy's distraught state when she attended the community legal centre for legal advice cannot be overstated. She felt that she had been treated like a criminal and was upset at the constant inference that she was lying.*[1167]

The DSS argues that a review of procedures for SPP was undertaken and changes made in 1990 to create a more structured and objective decision making process. Cases such as Cathy's should no longer occur. Submissions argue that the DSS's scrutiny of the cohabitation rule in the case of SPP recipients is more rigorous than for recipients of other pensions and allowances. This may be because of the nature of the pension and assumptions amongst the community and departmental officers about the stereotyped 'proper' role of women.

No right against supporting partner

12.19 Once the 'marriage-like relationship' has been found, the law assumes that the sole parent is no longer a single person and will be supported by her partner in the 'marriage-like relationship'. In many circumstances and in most jurisdictions, the woman in such a relationship does not have an enforceable right to be supported by the man with whom she is cohabiting. However, she is denied a benefit on the basis of their cohabitation, a circumstance in which the SSA presumes his support for her. The SSA recognises a marriage-like relationship, rather than an assessment of the need of the recipient, as a basis for withdrawing a Sole Parent Pension. In *Re Tang*[1168] the Administrative Appeals Tribunal held that 'it is untenable to argue that it is necessary to detect an obligation on the man to support his 'de facto' wife, when the law quite clearly states that there is no such duty *per se* within marriage'. *Tang* concerned the cancellation of a widow's pension, a situation in which there is no obligation to support. There is an obligation to support within marriage, when one partner has the care of a dependent child.[1169] The Federal Court in *Lambe v Director of Social Services*[1170] took a similar approach.

Poverty traps

12.20 Poverty traps arise when the social security system and the tax system do not create any incentive for people to improve their financial status by supplementing their social security income with wages.[1171] Most employment activity affects the pension rate and the entitlement to some associated benefits provided by State or local government. The amount of money that can be earned before a pension is affected is very low. The costs of working such as travel, clothing and child care coupled with a system that taxes income at the same time as it reduces pension can leave a social security recipient in a worse financial position than if she or he did not work. The reforms to be implemented in July 1995 will go some way to addressing this problem by reducing the income taper for recipients of allowances from 100% to 70%.[1172] [47] This means that for for every dollar earned, a recipient of an allowance will lose only 70 cents of allowance and will be thereby be able to earn more than they do now without losing all of their entitlement. A review of the provisions relating to pensioners' earnings, which are more generous than for recipients of allowances, is currently underway.

Conclusion

12.21 ***Simplification of programs.*** The Commission analysed the Social Security system to understand the submissions it has received. It has concluded that the legislation is in need of review. It appears that various pensions and allowances have been grafted onto the existing legislation at different times to meet the needs of particular interest groups or particular policy changes without any attempt at consistency across payment types. The Commission understands that a payments structures review in the department is to rationalise and simplify the legislation and remove anomalies between programs. The Commission welcomes this review. The Commission makes no recommendation in relation to women and the SSA.

12.22 ***Forthcoming review of the SSA.*** The Commission welcomes the review of the SDA exemption which is being co-ordinated by the SDC. In light of evidence received the Commission sees the need to reconsider the current interpretation of the cohabitation test. The rule as applied to sole parent pensions would appear to be an inaccurate guide to real need and thus to perpetuate dependency. This issue should be considered as part of the review of the exemption. Other related issues raised in submissions such as the assumption of dependency and poverty traps need to be considered. There is also need to recognise the financial situation and experiences of women and to address women's entitlement to independent income.

13. Sexually transmitted debt

Introduction

The focus of this chapter

13.1 This chapter focuses on one issue involving women and debt, 'sexually transmitted debt'. In particular the chapter looks at the problems faced by women guarantors who mortgage their share in the family home as security for their guarantee. These secured guarantees are often given for reasons of dependence or emotional ties, rather than as an 'arm's length' commercial transaction. The consequences if they are enforced are traumatic and can be unjust. Guarantees secured over the family home are not the only kind of financial transaction where issues of dependence and emotional ties are significant for women. Many of the considerations that are important for women guarantors apply equally to other financial dealings involving women in circumstances in which they have no effective decision making power. The discussion in this chapter is an illustration of the kinds of disadvantage women can face in economic dealings generally.

An example of gender bias

13.2 The law in this area is seemingly gender neutral but in fact has a much greater impact on women than on men. A number of submissions drew the Commission's attention to this issue.[1173] Community consultations revealed it is a widespread problem.[1174] It has been raised before the courts in a number of recent cases.[1175] The issue involves both common law and statute as well as the practices of lending institutions.

The structure of this chapter

13.3 This chapter first describes the nature of the sexually transmitted debt and how it affects women. It then discusses the way the courts have responded to the issue and outlines relevant recent developments in statute law and industry practice. The chapter concludes with recommendations for further reform.

The meaning of sexually transmitted debt

Definition

13.4 The key feature of sexually transmitted debt is the relationship of dependence and the emotional ties that dominate the transaction. These are often found, for example, in wife/husband, parent/child and de facto relationships. The dependent party in the relationship accepts responsibility for the other party's debt primarily because of that relationship. If the other party becomes unable or unwilling, for example, through bankruptcy or divorce, to meet the debt, the dependent party is liable for the debt. In that way the debt is 'transmitted' to the dependent party. A useful generic definition of sexually transmitted debt is

> the transfer of responsibility for a debt incurred by a party to his/her partner in circumstances in which the fact of the relationship, as distinct from an appreciation of the reality of the responsibility for the debt, is the predominant factor in the partner accepting liability.[1176]

Wide range of relationships

13.5 The term 'sexually transmitted debt' has become widely used and will be used throughout this chapter. However, the same situation can arise in a wider range of relationships than that of simply sexual partners. One submission to the Commission preferred the term 'emotionally transmitted debt' because the common factor is that a person, usually a woman, has found herself responsible for the commercial debts of her partner, her former partner, her son or someone else to whom she is emotionally attached.[1177] She may become primarily responsible either by agreeing to be a joint borrower while not herself gaining from the loan. She may be a silent partner or silent director in a family business or a family company while having no effective control over the business and being excluded from participating in it. She may become secondarily liable for the loans of others by becoming guarantor for a loan to a primary borrower. In some, but not all, circumstances the woman has no possibility of direct personal benefit from the loan. However, the crucial

issue in every case is whether the relationship leads to the partner accepting liability that the partner would not otherwise have been asked to accept. The consequences for the woman are the same whether the financial arrangement is a guarantee, a joint borrowing or a borrowing by a partnership or company in which the woman is a silent member.

> *In 1989, I signed an overdraft secured on our house for my husband's business of $15 000 with the [bank]. It was later extended to $40 000. I also signed unknowingly an 'all moneys' clause which obliged me to repay any other borrowings incurred by my husband. At no time was I advised of the substance of that obligation by the bank or of its existence.*
>
> *My husband's business got into financial difficulties and I was forced to repay to the bank a sum of approx $90 000 covering all his other debts that I did not know about.*[1178]

Gough v Commonwealth of Australia[1179]

13.6 ***The facts.*** *Gough v Commonwealth of Australia* is typical of cases of sexually transmitted debt.

- A husband and wife were directors of a tyre wholesale-retail business. There was no real dispute that Mrs Gough's 'education was limited and her experience of life relatively unsophisticated' and there was evidence that she had little or no input into the running of the business. Mr Gough was Mrs Gough's second husband. She brought into the marriage an unencumbered house which was used as the matrimonial home. The tyre business got into difficulties and an injection of funds was sought and obtained from the Commonwealth Bank on the security of a mortgage over the matrimonial home. Mrs Gough said that the mortgage was executed over drinks at her home on a Sunday. The bank disputed that this was the only encounter between herself and the bank. However, the responsible bank officer doubted that he had invited her to obtain independent legal advice. Mr Gough gave evidence that his wife 'would just sign (the mortgage) because I would just ask her to sign'.

13.7 ***The judgment.*** The court held on appeal that the contract was not 'unjust' within the meaning of the *Contracts Review Act (1980)* NSW and that the bank could enforce the guarantee and take possession of the home. The different reasoning of the three judges of the Court of Appeal indicates the courts' difficulties in applying existing doctrines to these cases. The court focused on one of the criteria for assessing unjust contracts specified in the *Contracts Review Act (1980)* NSW - whether or not and when independent legal or other expert advice was obtained by the party seeking relief. Mrs Gough had not obtained independent advice.

- Justice Mahoney saw the dangers in stereotyping people to a degree where a lender is obliged 'as a general rule' to look behind the appearance of a transaction to examine the personal motives that underlie it. He rejected the contention that there is a duty upon a financier to have a woman with whom it proposes to contract independently advised as to the economic wisdom of the transaction which she has, with her husband, decided to enter into. He considered that such a contention would mean that a financier approached to lend money on the security of a wife's guarantee is acting unconscionably within the Act if he does not ensure that the woman involved takes independent advice that - as is suggested in this case - she should not enter into the transaction at all. He further considered it too great an imposition on lenders to expect them to investigate the state of affairs between a married couple to assess whether independent advice was required.

- Justice Meagher found, among other things, that the bank was not put on any special notice because, although Mrs Gough was not 'extremely sophisticated or well lettered', she was 'no gaping rustic'.

- Justice Kirby, who dissented, considered that 'the whole circumstances of the case cried out for independent advice which the bank could [not] have given Mrs Gough. . . a clear ruling of this Court would establish a principle that would encourage the provision of independent legal or other advice as, (in my view) the Act contemplated'.

The impact of sexually transmitted debt on women

Guarantor versus lender

13.8 In the case of a secured guarantee given by a woman over the family home sexually transmitted debt becomes an issue of the woman guarantor against the lender precisely because the primary debtor, for example, the husband, is not able or available to meet the debt. A particular problem arises where the debtor spouse goes bankrupt, disappears or refuses to pay the money. Both the lender and the woman would have legal claims against the husband but the guarantee is being enforced only because the available assets of the husband are insufficient to meet the debt. It would be fruitless for either the lender or the woman to try to recover anything from the husband. The lender will therefore seek to enforce the guarantee and the woman will resist enforcement by trying to set aside the guarantee.

The nature of the woman's consent

13.9 ***The quality of consent varies.*** In assessing these cases a key factor is the quality of the woman's consent. This can vary from fully informed and whole-hearted consent through vague and trusting to being deliberately misled or overborne. In the most extreme cases there may even be violence, either physical or psychological.[1180] A woman who has either not fully understood the transaction or been deliberately misled by her partner may be shocked when she learns that the lender is seeking repayment of the whole of the original debt or, failing that, a possession order for her home. Many of the recent cases have arisen in these circumstances.

13.10 ***Not arm's length transactions.*** A woman's decision to guarantee her partner's loan is likely to be influenced more by emotional ties than arm's length commercial judgment. It is particularly important to take into account emotional and physical pressure.

> Although the extent to which creditors or the courts can protect people from themselves is limited, it is important to recognise that while providing information may reduce the number of operative misrepresentations, it is unlikely to dispel ongoing private emotional pressure, ranging from physical abuse to the more subtle 'if you love me you will do this for me'. In many cases, the reality is that, for the sake of the marriage, the wife will feel that she has no choice but to sign, whatever she is told.[1181]

This conclusion is borne out by a recent survey by a private researcher in the United Kingdom. She reports

> regardless of how sample members described their family financial decision-making, all perceived their power over financial decisions regarding their spouse or partners' business as being minimal, even though 11 sample members (all female) had worked for the business at some stage (although invariably for no pay or for wages below the tax threshold). The business was invariably regarded as the debtor spouse or partner's business. The majority of sample members said that the male in the household was the main breadwinner for most of the relationship (16 out of 22). This pattern was consistent with the tendency for women in the sample to work part-time after the birth of the first child, with a resulting reduction in their earnings.[1182]

Injustice suffered by women

13.11 Australian case law suggests that women rather than men are at risk of injustice from sexually transmitted debt. One submission to the Commission reviews relevant reported Australian cases over the last 8 years and identifies 18 cases in which women had assumed liability for the debts of others, usually their husbands,[1183] but none in which husbands had guaranteed the debts of their wives.[1184] In these cases the women were in relationships in which they were dependent on or controlled by men. While it was impossible to draw any direct conclusions from these cases there were some common features.

> *These factors: women's role as carer; interrupted work patterns; dependency and/or control; and the lack of business experience and education are usually interrelated. A woman may see her role as primary caregiver to the children of the relationship; she therefore interrupts her work pattern to care for those children; this reinforces her dependency upon her partner; and precludes her from actively participating in business matters (because she does not see her role as active business participant and because she is largely occupied with domestic duties).*[1185]

Studies on money and marriage in Australia and England have, according to one source consistently found that, particularly in middle and high income households women are less likely to have financial control and power if they do not earn an income.[1186]

A range of issues

13.12 These cases arise in the courts initially as vexed questions of competing claims for justice: on the one hand, the protection of the commercial interests of lenders and their shareholders against, on the other hand, the injustice that would be suffered by the woman. But there are other policy issues involved as well, including

- the fairness of a strict enforcement of written contracts
- the extent and nature of duties owed by lenders to guarantors
- the economic and social effects of making the family home unavailable (or of limited use) as security for borrowings
- the importance of quick and efficient financial systems
- the extent to which the protection of women amounts to judicial and legal paternalism
- the financial and personal control exercised by some men over their partners
- the need to take account of differences between domestic and arm's length transactions
- the need to protect an individual or family from homelessness.

Persistent problem

13.13 There have been developments and initiatives over the last 10 years which should help, to some extent, to identify and reduce the injustices created by sexually transmitted debt but it remains a persistent problem. For example, from 1990 to 1994 the Australian Banking Industry Ombudsman received 675 written complaints relating to guarantees, over half of which involved women guarantors.

Legal responses

A frequently litigated area

13.14 Over the last decade the courts both within and outside Australia have had to deal with many cases on guarantees. The House of Lords commented that it was a 'problem which has given rise to reported decisions of the (UK) Court of Appeal on no less than 11 occasions in the last eight years'.[1187] The President of the NSW Court of Appeal opened his judgment in *Gough's* case by observing that 'once again the Court has before it an appeal involving a claim by a female spouse for relief'.[1188] Social factors have been said to be particularly relevant to the spate of cases in recent years.[1189]

Avenues of legal redress

13.15 A woman who wishes to resist enforcement of a guarantee might seek to have it set aside

- through the equitable doctrines of unconscionable conduct and undue influence
- through the doctrine of *Yerkey v Jones*[1190]
- through statutory remedies such as in the *Contracts Review Act 1980* (NSW).

Case law demonstrates that these remedies do not adequately address the problem. This section examines the effectiveness of these remedies.

Unconscionable conduct

13.16 ***The principle.*** Broadly speaking, the equitable principles relating to unconscionable conduct will allow a contract to be set aside which has been made in circumstances where there is an unequal bargaining power between the parties and the stronger party has known of a special weakness or disability in the weaker party's position and has taken advantage of it.

13.17 ***Special disability.*** The leading Australian case on unconscionable contract is *Commercial Bank of Australia v Amadio.*[1191] This case involved two elderly migrants who were asked by their son to execute a mortgage over their home to secure an overdraft to his company. The majority in the High Court decided that the inequality of bargaining power, the questionable way in which the parents' signature was elicited and the parents' age and lack of knowledge of English amounted to unconscionable dealing. The Court referred to the need for there to be a special disability.

> Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity and good conscience that he should do so.[1192]

There is no definitive list of special disabilities but they include illiteracy, lack of education and sickness. Although *Blomley v Ryan*[1193] identifies 'sex' as one of the circumstances 'adversely affecting a party', it is most unlikely that sex of itself would still be ranked with 'poverty ..., sickness, infirmity of body or mind, drunkenness, illiteracy or lack of education'.

> In the year 1985 it seems anachronistic to be told that being a female and a wife is, by itself, a sufficient qualification to enrol in the class of persons suffering a special disadvantage. ... That being a female spouse should place a person shoulder to shoulder with the sick, the ignorant and the impaired is not to be tolerated.[1194]

13.18 ***Knowledge of the lender.*** The doctrine focuses on the conduct and 'conscience' of the stronger party. For a guarantee of a borrowing to be set aside the lender must have known or ought to have known of the other party's special disability.[1195] This requirement has frequently proved to be the most difficult element for a guarantor to prove.[1196] If the duties of lenders do not require them to take positive steps to protect third party guarantors, a lender will usually have little difficulty in arguing it would be unreasonable for a court to fix it with knowledge of the disability.

13.19 ***Few successful applications for women.*** The doctrine of unconscionable conduct has seldom led to guarantees given by women being set aside. The only successful cases have showed some supervening disability such as a medically certified condition[1197] or blatant misconduct by the bank.[1198] Proving blatant misconduct is difficult and rare.[1199]

Undue influence

13.20 ***The doctrine.*** The doctrine of undue influence is related to, but not the same as, the principles relating to unconscionable conduct.[1200] Essentially, undue influence arises when a person is put under such pressure that his or her will is overborne so that it is 'no longer her own'. The law presumes undue influence in certain kinds of relationships. The beneficiary of a transaction then has to prove that there was no undue influence. One of these relationships is that between a client and a solicitor. So, for example, if a client were to transfer a block of land to her solicitor, the solicitor would have to prove that no undue influence had been brought to bear. The law does not presume that transactions between spouses are affected by undue influence. The spouse seeking to set aside a transaction therefore has the difficult task of proving that her or his will was overborne. In the past, for a transaction to be set aside for undue influence, it must have been to the clear disadvantage of the plaintiff.[1201]

13.21 ***The lender's knowledge.*** As with unconscionable conduct, a guarantee will be set aside for undue influence only if the lender could not in good conscience enforce the transaction in the circumstances, including both its own conduct and the conduct of the borrower. This is difficult to establish. It usually turns on whether the lender knew or should have known about the relationship between the borrower and the

guarantor, and the effect of that relationship or other conduct of the borrower on the guarantor.[1202] The courts have generally approached this issue by concentrating on specific knowledge about the transaction that might be imputed to the lender in the particular circumstances of the transaction. The courts have tended not to rely upon, or to impute to the lender, more general knowledge of the unequal and dependent relationships that give rise to many of the guarantees. In practice therefore the doctrine has not adequately recognised the position of women in Australia.

The principle of Yerkey v Jones

13.22 ***The decision.*** *Yerkey v Jones*[1203] established a principle of law that applies specifically to married women. A wife, who came into a second marriage as the outright owner of her own house, mortgaged that house to secure the purchase by her husband of a poultry farm business. The business failed and the lender sought to enforce the security. Justice Dixon stated this principle

> If a married woman's consent to become a surety for her husband's debt is procured by the husband and, without understanding its effect in essential respects, she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima facie right to have it set aside.[1204]

If there is any doubt and the lender has relied on the husband to arrange the guarantee, the onus or duty will be on the lender to show that the guarantee was fairly and freely given.[1205]

13.23 ***Comparison with unconscionable conduct and undue influence.*** The principle in *Yerkey v Jones* differs from the doctrines of unconscionable conduct and undue influence by removing the need for the guarantor to prove the lender's actual or imputed knowledge of the borrower's conduct or of the nature of the relationship between the guarantor and the borrower. Under *Yerkey v Jones* if a lender relies on the husband to arrange the guarantee the lender will take the guarantee subject to 'any invalidating conduct on the part of the husband even if the creditor be not actually privy to such conduct'.[1206] The lender cannot isolate itself from the conduct of the husband towards the wife. However, the principle has a narrow application because the primary loan which the wife is guaranteeing must be made in very large measure to the husband alone. Joint borrowings or loans to a company of which the wife is a director or shareholder will not attract the benefits of the principle.[1207]

13.24 ***Current status of Yerkey v Jones.*** As a High Court decision *Yerkey v Jones* applies in all Australian jurisdictions. However, in a recent case in the New South Wales Court of Appeal,[1208] it was called into question and not applied. Its current status under Australian law is therefore uncertain.

13.25 ***Legal debate about the principle.*** The difficulties the courts have had in applying the law to sexually transmitted debt are well illustrated by the debate in England and Australia about *Yerkey v Jones*. It is clearly an important remedy for married women but it assumes a relationship of dependence simply on the status of marriage. It is not based on and it inhibits a more developed understanding both of the broad features of social inequality in Australia and of the diversity of the experiences of women in Australia. These shortcomings were identified in the *O'Brien* case in England[1209] which has in turn been considered in the *Akins* case in New South Wales.

13.26 ***O'Brien case.*** In 1994, the House of Lords handed down two decisions dealing with the principle in *Yerkey v Jones* which sought to 'restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible'.[1210] Lord Browne-Wilkinson found the principle in *Yerkey* to have 'obscure and possibly mistaken foundations'.[1211] He rejected the notion that married women should enjoy a special equity or right when they stand surety for their husbands' loans. Instead, he attempted to balance the vulnerability of a trusting guarantor against the practical problems of financial institutions. He propounded a broader proposition.

> Where one cohabitee has entered into an obligation to stand as surety for the debts of the other cohabitee and the creditor is aware that they are cohabitees: (1) the surety obligation will be valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor; (2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor will be fixed with constructive notice of the surety's right to set aside the transaction; (3) unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety (at a meeting not attended by the principal

> debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice.[1212]

Cohabitee includes de facto and gay or lesbian partners.[1213]

13.27 ***An Australian response to O'Brien.*** The NSW Court of Appeal in *Akins v National Australia Bank* [1214] considered the approach of the House of Lords in *O'Brien* but did not adopt it. Nonetheless, the Court of Appeal found that the House of Lords criticism of some of the old cases on which the *Yerkey* doctrine was based was of 'such compelling force' that 'the special rule [in *Yerkey*] should no longer be applied and that the principles discussed in *Amadio* should be applied to the resolution of a case such as the present'.[1215]

13.28 ***Higher standard of protection in UK.*** The protection afforded cohabitees in England is now greater than they enjoy in NSW and possibly in Australia generally. The protection once given to married women is now lost. The duties cast on lenders in the United Kingdom are not restricted to married women, are directed towards prevention of improper conduct and address the protection of rights.

> [I]n order to avoid being fixed with constructive notice [of undue influence or misleading conduct] a creditor can reasonably be expected...to insist that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice.[1216]

This is without question a higher standard for cohabitees than is required in Australia under *Amadio* principles.

13.29 ***The implications for women.*** The result of this legal debate is, for women in Australia, quite unsatisfactory. The principle of *Yerkey v Jones* is narrow and outmoded but nonetheless it is an important remedy for married women. If the approach in *Akins* is applied generally in Australia *Yerkey v Jones* is no longer available. However, the protection it provided has not been replaced by a more appropriate form of protection. Women are required instead to rely on the doctrines of unconscionable conduct and undue influence which, as discussed above, do not easily or adequately recognise the experiences and position of women in Australia.

13.30 ***Continuing uncertainty.*** The position is as yet far from certain. In *Teachers Health Investments Pty Ltd v Wynne*[1217] a decision later than *Akins,* Justice Hunter decided that there was conflicting authority from the NSW Court of Appeal and that *Yerkey* was still binding until overruled by the High Court. He commented that '[t]he decision in *Barclays Bank* affords no basis for destruction of the *Yerkey* principle ... it too provides a form of relief like *Yerkey* which does not depend upon unconscionable or unconscientious conduct on the part of the creditor in the case of cohabitees.'

Contracts Review Act

13.31 In New South Wales the *Contracts Review Act (1980)* gives the court a discretion to set aside a contract where the contract was unjust in the circumstances relating to the contract at the time it was made. The court is required to have regard to the public interest and to all the circumstances of the case. There is a non-exclusive list of factors to which the court must have regard, these including

- any material inequality in bargaining power
- whether or not independent legal or other expert advice was obtained
- whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief by (among others) any person to the knowledge of any other party to the contract.[1218]

This remedy is broad enough to recognise the experiences and position of women but in practice has been applied more narrowly. Courts have tended to focus attention on whether or not independent legal advice was obtained.[1219] Independent legal advice is only a partial response to the issues raised by sexually transmitted debt and is of varying value.[1220]

Developments in industry practice

The finance industry is seeking to respond

13.32 Banks and other lenders are aware of the need to respond more adequately to the injustices created by third party guarantees and sexually transmitted debt. In the last 5 years there have been reports highlighting these injustices and recommending reform. There have been developments in consumer credit legislation and a new Code of Banking Practice has been prepared. The industry has established an Australian Banking Industry Ombudsman to assist in its self-regulation, and it has taken steps to improve its lending procedures and practices. The Commission welcomes these developments and initiatives. Although they have generally not been directed specifically at sexually transmitted debt, they allow the finance industry to be more responsive to the issue. More specific reforms are recommended later in this chapter.

Recent reports

13.33 ***The Martin Report.*** In 1991 a House of Representatives committee chaired by Stephen Martin MP produced a report into banking and deregulation.[1221] It found that

> [i]t is disturbingly common for banks to obtain guarantees from relatives or friends of business proprietors in relation to business borrowing in circumstances where the potential guarantor has no knowledge of the financial position of the business, no ability to obtain that knowledge and thus no capacity to assess the risk that the guarantee will be called upon.[1222]

The Committee recommended that the use of unlimited guarantees be proscribed, that there be a clear code of practice established and that full disclosure be made about the primary borrower to the potential guarantor even if this meant a revision of the *Privacy Act 1988* (Cth).

13.34 ***Multiculturalism report.*** The Commission's report *Multiculturalism and the law* also examined the question of guarantees.[1223] It recommended that

- credit providers must inform guarantors of the reason why a guarantee is required
- lenders should inform the guarantor of relevant facts
- the *Privacy Act* should be amended to enable this disclosure
- guarantee contracts should contain large print warnings of the consequences of the primary borrower's failure to meet the obligations under the loan agreement.

The Government has not yet responded to these recommendations.

Consumer Credit Code

13.35 A national uniform Consumer Credit Act is currently being considered by the States and Territories. The *Consumer Credit (Queensland) Act 1994* has recently been passed in Queensland and it is intended to be used as template legislation in other States and Territories. The direct effect of the proposed national legislation on sexually transmitted debt will be limited because it will generally only affect credit provided 'wholly or predominantly for personal, domestic or household purposes'.[1224] This excludes credit provided for business purposes, which is generally the type of credit relevant for sexually transmitted debt. Nonetheless, the legislation may have important secondary effects. Disclosure of relevant information is an important element of the procedures involved in extending consumer credit. The legislation does not require independent advice, although the absence of independent legal advice may enable a court to re-open a transaction.[1225] If these procedures are adopted for consumer loans, similar systems may apply to loans not directly regulated by the Act.

The ABA Code of Banking Practice

13.36 ***Industry standards.*** In response to the Martin Report and in recognition of international practice,[1226] the Australian Bankers' Association (ABA) has produced a Code of Banking Practice. The Code is an

important statement of the minimum standards expected of banks and has the advantage of reflecting to a large degree the best practice of banks. It has been described as not so much a document for change as a clarification of existing procedures.[1227]

13.37 ***Legal status.*** The Code is not law and is to be read subject to the current law.[1228] However, it will be able to have some legal force because, from the date that a bank publicly announces that it adopts the Code,[1229] that bank will be contractually bound by the Code in respect of any 'banking service' it provides to a customer.[1230]

13.38 ***Principles relating to guarantees.*** The principles in the Code that relate to guarantees recognise that they require special procedures. Those principles include

- the limitation of the guarantee to a fixed amount
- provision by the bank to the guarantor of a warning of the guarantor's potential liability
- provision by the bank of information concerning the primary borrower, with the permission of the borrower
- conditions that if the borrower fails to give such permission the bank may only go ahead with the express agreement of the guarantor
- a recommendation by the bank that the guarantor seek independent legal advice.

13.39 ***Need for clarification and extension.*** To address adequately the injustices arising in relation to sexually transmitted debt, the Code needs to be both clarified and extended. This is required in three areas:

- to clarify that the Code is binding in relation to guarantors
- to extend the Code to cover sexually transmitted debt fully
- to extend the requirements relating to independent advice.

13.40 ***Binding in relation to guarantors.*** The Code only has contractual force in relation to a 'banking service' provided to a 'customer'. As a guarantor may not be a 'customer' and may not be receiving a 'banking service' from the bank, the principles relating to guarantees in s 17 of the Code may not be binding between the guarantor and the bank.

Recommendation 13.1

Section 1.3 of the Code of Banking Practice should be amended to ensure that
a) s 17 of the Code will be binding between a guarantor and a bank from the date on which the bank publicly announces that it adopts the Code
b) the dispute resolution principles set out in s 20 of the Code will also be binding between the bank and the guarantor as if the guarantor were a 'Customer' for the purposes of that section.

13.41 ***Covering sexually transmitted debt.*** The Code does not fully cover sexually transmitted debt.

- It is directed at banking services acquired by an individual 'wholly and exclusively for his or her private or domestic use'. This is reflected in the definition of 'Customer' in s 1.1. The principles relating to guarantees are not expressly limited to guarantees given as security for financial accommodation provided for a person's private or domestic use but, given their context, that limit may be implied into any interpretation of s 17.
- In addition, s 17 of the Code is not expressed to specifically apply to guarantees securing any financial accommodation or facility provided to a corporation of which the guarantor is a director, secretary or member[1231] or certain trustees.[1232]

- These limits would exclude a significant proportion of the instances of sexually transmitted debt. Although the impact on the woman usually concerns her private and domestic affairs, for example, the family home, the debt is often secured for commercial purposes, for example, for the husband's business or by family companies, trusts or businesses. The hybrid private/commercial nature of sexually transmitted debt warrants a special extension of the Code to address the issue.

One way of defining those circumstances for the purposes of the Code would be to extend s 17 to guarantees given to secure financial accommodation or facilities provided by a bank where

- the guarantor is an individual

- the debtor is also an individual or is a business vehicle, for example, company, trust or partnership, operating for the benefit of that individual, either alone or jointly with one or more of the guarantor and any other person, called the 'other person' and

- the bank knows or ought to know that the guarantee is being given primarily because of the social relationship or emotional ties between the guarantor and the other person

regardless of whether the financial accommodation or facilities are provided for private, domestic or commercial uses or purposes.

Recommendation 13.2

Section 17 of the Code should be extended to apply to all guarantees given to secure financial accommodation or facilities in circumstances that could result in sexually transmitted debt.

13.42 ***Independent advice.*** A third area of recommended amendment of the Code concerns the procedures for ensuring that guarantors receive appropriate independent advice. This raises broader and more complex issues and is discussed below as part of a broader reform package.

The Australian Banking Industry Ombudsman

13.43 ***Complaints resolution.*** In 1990, the ABA set up the Australian Banking Industry Ombudsman (ABIO). The ABIO is funded by the banking industry but is structured to preserve its independence. It provides an important alternative dispute resolution mechanism. It is a free service with easy access through a toll-free telephone number. The ABIO is able to hear and investigate complaints informally and flexibly, to mediate disputes and to encourage settlements that promote fairness and good banking practice.

13.44 ***Restrictions on scope of work.*** In 1993-94 the ABIO dealt with 3 115 complaints but over a quarter were outside its terms of reference. The terms of reference exclude complaints about guarantees of debts owed by incorporated bodies and complaints where the amount of any award would be more than $100 000. These are considerable constraints on the jurisdiction of the ABIO when dealing with sexually transmitted debt. They exclude debts arising out of loans to family companies and complaints where the amount of the guaranteed debt being challenged is more than $100 000. These limitations have been recognised. The former chairman of the ABIO Council, Sir Ninian Stephen, suggested that these restrictions on the ABIO's jurisdiction be reviewed.[1233] An extension of the jurisdiction would provide a valuable alternative for women who believe that the enforcement of a guarantee would be unjust.

13.45 ***Extension of jurisdiction.*** In the Commission's view there are advantages in extending the ABIO's jurisdiction to cover all sexually transmitted debt, regardless of the technicalities of how the debt is incurred or the amount of the debt. The flexible and informal procedures of the ABIO will allow the potential injustice to be more fully understood and a fair, practical resolution to be reached more quickly than through the courts. Dispute resolution procedures of that kind would be useful for all cases of sexually transmitted debt but are particularly necessary where enforcement is sought against the guarantor's home. The Commission recognises that in framing the ABIO's jurisdiction the Board may wish to identify the potential exposure of the banks clearly. Although it will not cover all cases of sexually transmitted debt, the value of the guarantor's home would be a useful indicator for this purpose.

Recommendation 13.3

The Board of the Australian Banking Industry Ombudsman
a) should authorise the Ombudsman to deal with all complaints involving sexually transmitted debt
b) should authorise the Ombudsman in particular to deal with all complaints where a bank is seeking to enforce a guarantee secured by the guarantor's principal place of residence or a third party mortgage over the mortgagor's principal place of residence
c) should ensure those authorities apply regardless of the amount of the debt and of whether the debt was initially or primarily owed by an incorporated body or an individual
d) should, if necessary, impose a cap on awards that may be made by the Ombudsman in relation to such complaints, where the complaint involves a principal place of residence the maximum award should be the greater of $100 000 and the market value of that residence.

Independent advice

A protective mechanism

13.46 One of the main techniques developed over the last decade to protect third party guarantors is the use of independent legal advice. This has been encouraged by the rulings in cases on unconscionable conduct, such as *Amadio's* case. In recent years many banks have changed their lending procedures to include recommending and in some cases requiring independent advice as part of their standard practice. This approach is reflected in s 17.5 of the Code of Banking Practice. However, it relates only to legal advice, and not financial advice. The ABA is currently negotiating to formalise the procedures for independent legal advice. In particular the ABA and the Law Institute of Victoria have recently announced a joint initiative to standardise the form of certificates of independent legal advice.

Is it effective?

13.47 Consultations and submissions to the Commission suggest that while independent legal advice can be useful there are considerable limits on its effectiveness. In fact, in some cases it can be counter-productive. Legal advice is generally of secondary value. The focus should be on independent financial advice. In addition, for women, if the advice is to have any real prospect of preventing the injustices of sexually transmitted debt arising, a number of prerequisites must be met.

- The advice must focus on the real circumstances of the woman's position and draw clearly to her attention the actual risks and the practical impact of the transaction. Simply going through a checklist of the legal provisions in the documents will rarely be of assistance.

- The advice must be independent and accessible. This means it must be available for a reasonable price, and for some women must be available through a free service. It must also be available, as *independent* advice, where the woman can easily go or at least where she can easily make contact. There is a developing network of financial counsellors in Australia, and there are also some consumer credit centres.[1234] However, getting access to independent financial and legal advice can be difficult, particularly in rural and remote areas.

- The lender must be diligent in satisfying itself that the third party guarantor has really been given an opportunity to make an informed and unpressured assessment of the transaction. This requires the lender not only to be conscious of these prerequisites but also to make sure that it allows sufficient time for the guarantor to consider the transaction. In addition, the lender's own procedures will need to go beyond simply sighting certificates or signed documents. Otherwise there is a risk that the process will become purely formal, offering no real opportunity for the woman to avoid the transaction where it is unjust.

Under certain circumstances independent legal advice can make a woman's situation worse. For example, if the relationship is characterised by domestic violence and the borrower is anxious to receive the loan as soon as possible, the woman is unlikely to be able to refuse to sign the guarantee even if she has been advised that

it subjects her to significant risks. In those circumstances a certificate of independent advice that can be relied upon by the bank to enforce the guarantee makes the injustice suffered by the woman worse. It does not remove it. The advice would only be useful if it offered real financial alternatives for the bank and the borrower to consider.

Duties of lenders and advisors

13.48 One of the main unresolved issues in relation to independent financial and legal advice is the effect it should have on the duties and liabilities of lenders and advisors. For example,

- should lenders be able to rely entirely on a certificate of independent advice to defeat any claim by the guarantor that the guarantee was unjust or affected by unconscionable conduct or undue influence?

- should lenders have a duty to give any advice to the guarantor?

- should the independent advisor be liable to the lender if, for any reason, the court does not enforce a guarantee even though a certificate of independent advice was given?

13.49 Lenders must retain some responsibility for assessing the position of the woman as third party guarantor. However, the precise nature of the duties and liabilities of lenders and advisors are issues that go beyond the scope of this report. They will need to be considered further as part of a broader review of the law on the banker-customer relationship.

The Commission's view

13.50 Although there are unresolved issues in relation to independent advice, in the Commission's view independent financial and legal advice that satisfies the prerequisites above could assist women to avoid sexually transmitted debt. However, it is not appropriate to require a guarantor to obtain independent financial and legal advice in every case. In many cases this would simply impose extra costs and delays without any benefit. As an interim measure, a more limited requirement in relation to guarantees secured by a guarantor's principal place of residence is appropriate. These are a special case. If they have to be enforced the consequences can be particularly unjust. From a practical point of view they also have the advantage of being easily identifiable. This requirement should be included in the Code of Banking Practice so that its practical implications can be developed in the context of that Code.

Recommendation 13.4

The following sentence should be added to s 17.5 of the Code of Banking Practice:
Where a Bank requires a guarantee to be secured by the guarantor's principal place of residence, the Bank may only accept that guarantee and security if the prospective guarantor has obtained independent financial and legal advice.

Separate bank interview

13.51 Independent advice should not be conclusive in relation to any challenge. It should not relieve the bank entirely of its own responsibility to assess the position of the woman as third party guarantor, nor should it preclude a court, or other reviewing agency, from considering all the relevant circumstances. It is particularly important for the bank to conduct a separate interview with the prospective guarantor as part of its procedures.

Recommendation 13.5

Section 17 of the Code of Banking Practice should require a Bank, before accepting a guarantee, to conduct a separate interview between an officer of the Bank and the prospective guarantor at which the nature and extent of the guarantor's liability is fully explained. The

Bank must be satisfied on reasonable grounds that the guarantor understands and accepts the guarantee and its possible consequences, and consents fully and freely.

Specialist services

13.52 To be effective a requirement for independent advice must also be matched by the availability of services which can provide that advice. In the first part of this Report the Commission recommended the setting up of women's legal services to provide specialised advice to women. In some cases it may be appropriate for credit advice to be provided to women through these centres. Alternatively it could be provided through community legal centres or financial counselling services. Funding for the initiative should be provided through the National Women's Justice Program. As a practical measure to enable the costs of this initiative to be budgeted, the funding should be limited to advice on guarantees secured by the guarantor's principal place of residence.

Recommendation 13.6

The National Women's Justice Program should fund the provision by specialist women's legal services or other appropriate services of financial and legal advice to women guarantors where the guarantee is, or is to be, secured over the guarantor's principal place of residence.

Applying the Equality Act

The need for a broader approach

13.53 The recommendations in this chapter have focused on specific, practical measures that will help to reduce the incidence of sexually transmitted debt: clarifying and extending the Code of Banking Practice, extending the jurisdiction of the Australian Banking Industry Ombudsman; and developing a practice of effective independent advice complemented by separate bank interviews and specialist women's services. Nonetheless the issue is broader. Sexually transmitted debt is an example of gender bias in the law. The basic problem is that the relevant doctrines of law and the way in which they have been applied do not adequately respond to the injustices faced by women.

Equality Act response

13.54 ***A more sophisticated approach.*** The Equality Act will enable the courts to address that broader, systemic issue and to develop the law appropriately, by encouraging more sophisticated analysis of the nature of domestic relationships. In particular, judges should recognise the realities involved in relationships characterised by power imbalances usually in favour of the man. In the guise of fairness or equality some cases have treated women as less capable than men. On the other hand, some cases which examine the domestic relationship treat the spouses as if they were on an equal commercial footing. In a paper submitted to the Commission the view was expressed that

> *... courts should look at the relationship itself and not the gender of the party seeking to have liability set aside to determine whether the consent was freely given and, in turn, whether the contract should be upheld ... by accepting that domestic relationships carry some inequalities which often affect women to their detriment, and applying this to the facts in each case, decisions are less likely to be seen as interfering in the accepted concepts of contract law such as certainty and sanctity of contractual relations.*
>
> *... [T]here is a fine line to be followed, between treating women as needing the paternalistic protection of the law and completely ignoring the inequalities in personal relationships, so that future decisions can be made on contracts entered by one spouse with or for the benefit of the other that recognise true equality for women.*[1235]

Other lenders

13.55 Ideally, the broader, more sophisticated approach allowed by the Equality Act would allow the principles of conduct proposed for banks to extend to other lenders. Banks are the main lenders involved in sexually transmitted debt but they are not the only lenders. Building societies, credit unions and other non-bank financial institutions also need to be aware of the issues relating to sexually transmitted debt and to develop procedures to avoid the injustices it creates. Laws of general application to lenders that are consistent with equality will require banks and other lenders equally to address the issue.

Other credit issues

13.56 Other types of financial transactions also raise issues of equality. For example, one submission to the Commission refers to a transaction where the lender would only provide credit to two persons jointly even though the credit was chiefly for the benefit of only one of them.

> *A young and inexperienced woman was signed as a co-borrower on a finance company loan to purchase a vehicle for use by her partner.. . At no time was the woman involved in the negotiations to purchase the vehicle. She was requested by the car salesman and her partner to sign papers. No explanation of the contents of the documents were provided nor was she advised to read the documents or allowed time to do so. She believed that she had signed the documents as a witness ... [A]t no time did she possess a driver's licence.*[1236]

Women who are non-participating company directors encounter similar problems. The Victorian Attorney-General has observed that

> [w]omen in the community who have no knowledge of business affairs, no control over the running of the business, and little or no information about its financial position, are putting themselves in a position of considerable risk. As non-participatory directors, they can be faced with financial ruin if the business fails. ... The wife often feels it is her duty to be a part of her husband's business affairs and sign documents and so on. Women in this position often do not stand to gain much benefit for the risks they run, and it is difficult to gain relief in the courts.[1237]

It is beyond the scope of this report to analyse those transactions. This requires a full review of the legal relationship between banker and customer, as recommended by the Martin Report.

This type of transaction or practice may be able to be challenged under the Equality Act and over time, it should enable the courts to develop the law in relation to those transactions.

14. Women in remote communities: Norfolk Island — a case study

Introduction

Women in remote communities

14.1 As part of this inquiry into women's equality before the law, the Commission is interested in the experiences of women living in rural and remote communities. As the Commission noted in its Interim Report, women in these communities represent a significant proportion of the Australian population.[1238] They often lack access not only to specialised services such as women's legal resources centres and women's refuges but also more general community services such as health care, counselling and education. Difficulties caused by this lack of services, in particular legal services, are often compounded in situations of domestic violence when there are only one or two lawyers to service an entire community and they are already acting for the husband. In these circumstances, women may not have access to any legal or support services at all.[1239]

Women on Norfolk Island - a case study

14.2 ***Norfolk Island is remote.*** This chapter explores these themes in greater detail by focusing on the experiences of women in one particular remote community - Norfolk Island. The choice of Norfolk Island as the subject of a case study of remote women's equality before the law was motivated primarily by the island's geographical isolation. Situated off the far north coast of New South Wales approximately 1,700 kilometres east-north-east of Sydney, the Island has 1,912 residents, of whom about 1,478 reside permanently on the Island. The remainder are temporary residents and usually live on the Island for periods of less than 3 years.[1240] Among those ordinarily resident on the Island, there are roughly equal numbers of women and men. 56% of women who are ordinary residents work in the paid workforce, 40% are unpaid workers.[1241] The only regular access to and from the Island is by air. Appendix 3 contains more information about the island.

14.3 ***Requirement to review the laws of the territories.*** The other major reason for selecting Norfolk Island relates to the Commission's statutory functions. The *Law Reform Commission Act 1973* (Cth) requires the Commission to review laws of the Commonwealth and laws of the territories that the federal Parliament has power to amend or repeal, with a view to making recommendations for reform.[1242] The laws governing Norfolk Island, an external Territory, come within the range of laws that the Commission is required to review. The Constitution preserves the Commonwealth's responsibility for all Territories, both internal and external.[1243] The Commission is conscious that federal Parliament, through the enactment of the *Norfolk Island Act 1979* (Cth), has devolved most of its legislative powers to the Norfolk Island Legislative Assembly, thereby enabling the Island to be mostly self-governing. Recommendations made later in this chapter respect and take account of Commonwealth responsibilities and the powers of the Norfolk Island Legislative Assembly. They also take account of the unique legal regime which applies to the Island.[1244] Ultimately, the Commonwealth bears responsibility for ensuring that the human rights of all people on Norfolk Island are protected and promoted, regardless of the arrangements for the administration of the Territory and its legal regime.

14.4 ***Relevance of this case study to other remote communities.*** Recommend-ations made in this chapter concerning laws peculiar to Norfolk Island may not have any direct relevance to other remote communities where different laws apply. However, the remoteness of Norfolk Island and its small population are features of many other small isolated communities around Australia, including island communities in the other external territories such as the Cocos (Keeling) Islands and Christmas Island and mining communities on the Australian mainland. It was not possible for the Commission, within the scope of this reference, to visit and meet with most of these communities. Nevertheless, many of the more general recommendations and the discussion which precedes them will be relevant to these communities.

The Commission's approach

14.5 Representatives of the Commission visited Norfolk Island and met with the Administrator and Official Secretary, members of the Norfolk Island Government and other members of the Legislative Assembly, court officials and officers in the Norfolk Island public service responsible for the administration of laws relevant to this inquiry.[1245] The Commission also met with members of the Domestic Violence Strategies Group.[1246] Prior to the visit, the Commission placed advertisements in the *Norfolk Islander*, the Island's local newspaper, inviting members of the community to meet and speak with its representatives. The Commission made arrangements for both public and private hearings. A number of private hearings were conducted with Norfolk Island residents - both women and men - during the visit. However, no one wished to give evidence at a public hearing. The recommendations in this chapter are based upon an evaluation of the submissions taken at the private hearings, submissions received after the Commission's visit, views expressed by participants of the Domestic Violence Strategies Group, views expressed by members of the Norfolk Island Government and other officials and independent research carried out by the Commission.

Violence against women

Culture of violence and repression

14.6 ***'Domestic violence is alive on Norfolk Island.'***[1247] Most of the evidence taken by the Commission related to violence against women. The Commission consistently heard from a range of sources that some women are regularly subjected to violence and intimidation by their partners and other members of the community. The violence and intimidation manifests itself in various ways including beatings, stalking, crank phone calls, burglary, trespassing, preventing access to homes and sexual harrassment. One woman described her experience and general attitudes towards violence which prevail on the Island.

> *My first experience was about 'x' years ago [when I experienced] violence within my home. I didn't think there was anywhere I could go in those years because it was pretty much accepted then that violence within the home was a daily occurrence. When you saw someone with a black eye it was all kept quiet. I don't know whether it's because we're in an isolated place or whether it's a bit the Polynesian-cum-Bounty mutineer-type attitude but there very much is still that attitude. It's quite common. Don't let them tell you it's not common 'cause it still is.*[1248]

Another woman described her experience as follows:

> *I have been in a domestic violence situation. I was married ... I actually left [my husband] twice. The first time, domestic violence in my home was getting pretty bad and went to a solicitor and [was] sent me up to the hospital to get my bruises and everything put on file and ... when I finally did leave my husband there was a lot of ganging up and I had phone calls every half hour. I had my [premises] broken into and [things] were taken ... Then I called the police and they couldn't do much about it ... I had people coming around my place at night and they couldn't do anything about that.*[1249]

14.7 ***Incidence of domestic violence.*** A recent study of domestic violence on the Island found that it is very difficult, if not impossible, to establish accurately the incidence of violence on Norfolk Island in any quantitative sense.[1250] There are several possible reasons for this. First, the Commission did not have available to it comprehensive police statistics on incidents of violence, threats of violence or harrassment. One submission suggested that these statistics are unlikely to reveal the true incidence of violence because some victims may be unwilling to file a complaint with police.[1251] Even when they do, they are sometimes reluctant to proceed with any formal criminal action, preferring instead to report assaults, for example, as 'getting kicked by a cow' or 'falling down stairs'.[1252] This may be because the police, the alleged victim and the alleged perpetrator are all known to each other, making the violence more difficult to deal with. Similar considerations were found to operate in other small communities on the mainland.[1253] The lack of reporting may also be due, in part, to an attitude of pride; complaining to the police and resulting litigation may be viewed as an invasion of privacy. Notwithstanding the difficulty of accurately determining the incidence of

domestic violence on Norfolk Island, submissions and other evidence presented to the Commission suggest an alarming disregard for women's human rights. An atmosphere of fear and secrecy prevailed among those women who were willing to make submissions. The fear and lack of privacy inspired by this culture of violence was asserted as an explanation for the lack of attendance at the Commission's public hearings.

14.8 ***Attitudes towards violence.*** Submissions suggest that the prevalence of domestic violence is based on patriarchal notions of society. Submissions assert that attitudes towards violence are based on the belief that the man is master of his house and that the law does not extend to private or domestic situations.[1254] They explain that these attitudes contribute to a lack of respect for the authority of the police and a general lack of regard for the law. These submissions are consistent with a recent finding that 'large sections of the community considered that domestic violence was justifiable in the home'.[1255] One women of Pitcairn descent who was born and has lived on the Island for most of her life, states

> *... I think gender bias is ... promoted or generated by the actual social environment here in the Island. There is an imbalance between the number of males and females ... residing on the Island and it's been as high as two to one in favour of males at various times ... I think the whole structure of the society has promoted traditionally men or male domination on the Island and I think that's been reflected right through the whole society. It's been experiences since my childhood right up to the present date that ... the male side of things has been very predominant; if the female didn't appear in the traditional role of the female, she was ousted ... and someone else would take her place ... Also, looking on reflection to my parents' family and going back its more or less a traditional role and Norfolk has even been termed as 'Man's Paradise'.*[1256]

14.9 ***Current legal remedies against domestic violence.*** All mainland States and Territories now have laws which make provision for the issue of protection orders by Magistrates' or Local Courts in circumstances where a person fears violence from her spouse or another person.[1257] All enable applications for orders to be made by the person in fear of violence or by police. Complaints must be proved to the standard of the 'balance of probabilities'. Though there are differences between jurisdictions, all relevant pieces of legislation also give legislative guidance to what types of prohibitions and restrictions may be specified in an order. There is no equivalent law for Norfolk Island. Women who fear violence on Norfolk Island may seek an order under the *Crimes Act 1900* (NSW) s 597 that a person who is threatening violence be placed on 'recognizance to keep the peace'. A similar order may be sought under the *Court of Petty Sessions Ordinance 1960* (NI) s 102. These provisions allow orders to be made in circumstances of domestic violence. However, they differ in several important respects from the legislation applying in mainland States and Territories.

- There is no provision for applications to be made by anybody other than the person fearing violence. Police may therefore not apply for a recognizance order on behalf of the person fearing violence.

- There is no express legislative direction that complaints are to be proved to the standard on the balance of probabilities. In these circumstances, the Court of Petty Sessions must therefore be satisfied 'beyond reasonable doubt' - a much higher and more onerous standard - that the complainant is in fear and has a just and reasonable cause to be in fear.

- The only sanction under these provisions is for the defendant to be placed on a bond. There is no legislative guidance regarding prohibitions and restrictions to be imposed by orders. Prohibitions and restrictions permitted in other jurisdictions include

  — prohibiting or restricting approaches by the defendant to the protected person

  — prohibiting or restricting access by the defendant to any specified premises occupied by the protected person, including a place of work

  — prohibiting or restricting the possession of all or any specified firearms by the defendant

  — prohibiting or restricting specified behaviour by the defendant which might affect the protected person.

- There is no legislative guidance as to what types of considerations the court should take into account when deciding what types of prohibitions or restrictions to impose. In other States and Territories, the court must consider the accommodation needs of the relevant parties and the needs of any children involved.

Women who fear violence on Norfolk Island may also seek an injunctions under the *Family Law Act 1975* (Cth) s 114 and traditional equitable remedies for injunctive relief. These traditional remedies are only available from the Supreme Court of Norfolk Island.[1258] They require violence, or threatened violence, to be treated as civil assaults. Unlike the domestic violence legislation now in force in all other States and Territories, the common law of equitable remedies also imposes a very high standard of proof when it comes to proving threatened assault.

14.10 ***Operation of the rule of law?*** Several submissions suggest a general disregard for the operation of the rule of law. It would appear that one factor contributing to this type of attitude is a general lack of knowledge about the status of Norfolk Island law. There seems, for instance, to be much confusion about trespassing laws. In large part, this is due to the history of the Island and the complicated nature of the Island's legal regime. This regime, described more fully in Appendix 3, includes Acts passed by the Norfolk Island Legislative Assembly, ordinances made by the Governor-General, Acts of Federal Parliament, Acts of the New South Wales Parliament[1259] and Imperial law. Another example of the confusing status of the Island's laws was the legal debate between counsel for the accused and a magistrate during a committal proceeding in a recent rape case.[1260] The leniency which, according to submissions, appears to characterise the Court of Petty Sessions' approach to summary criminal matters contributes to the lack of respect for the operation of the law.[1261] This may be due to the physical inability to detain people in police custody (due to antiquated detention facilities) or a general reluctance, perhaps due to a lack of resources, on the part of the court's administration, to pay to transfer prisoners to mainland correctional facilities.[1262]

> *I've yet to know what the laws are on the Island ... Inevitably [persons convicted of offences] just get a rap over the knuckles ... They [the Island Administration] don't send them off the Island 'cause it's expensive to lock them up. In a way, the locals laugh about what they can get away with ... There is no fear of the law ... They have this disregard for the law ... because nobody seems to know what it is.*[1263]

14.11 ***The alcohol and firearms factor.*** The Commission also heard that the level of violence is exacerbated by an apparently high incidence of alcohol abuse and a high gun ownership.[1264] The firearm registration legislation simply provides for the registration of weapons and does not in any way attempt to regulate the suitability of owners.[1265]

> *I have a friend that has been in an alcoholic situation where she's physically abused and her main fear is her husband has firearms and all her family here do have firearms at home and one of the threats that she has constantly got is that she'll be shot. Whether it's just an emotional threat or not, firearms are in the home ... I think you'll find from the statistics that there are quite a few firearms on Norfolk Island.*[1266]

Responding to domestic violence

14.12 ***Difficulty of escape.*** Women living in isolated communities who find themselves in violent situations may have little or no access to appropriate services such as legal aid and counselling. Lack of access to financial resources may further impede their ability to escape violence. Submissions and other evidence suggest that these problems affect women living with domestic violence on Norfolk Island. The Commission was told, for example, that women who experience violence and who have children who were born on the Island have much difficulty leaving the Island with their children. The Commission was also informed (but has been unable to confirm) that custody orders have never been issued permitting children born on the Island to be removed to the mainland, even in circumstances of violence.[1267] Women have even been advised to go off the Island to have their children to prevent the children becoming Islanders.[1268]

14.13 ***Extended family network.*** Norfolk Island officials and other members of the community explained that, where there are no formal services available to help people in need, the community joins together as part of an 'extended family network', providing emergency accommodation or donations of money or food as necessary.[1269] Submissions and other evidence suggest that this informal assistance may not always be available to some women who suffer from domestic violence. Without either formal or informal services in such a remote environment, these women may have nowhere to turn.

> *... [for women] who can see no other alternative except to leave the marriage if he won't stop drinking, for example, there's no legal aid available to them. They can't afford to go anywhere to get help. So they finally book into counselling just to see what their options are and there are no options to give them other than can you go away to a safe place. Where do you send them to cool off? There's no refuge. And even if you tried to smuggle them into safe places here, there's no way - people will have seen us coming here [to the private hearings] this morning. It's incredible, the grapevine system. The women and the men who get beaten here on the Island need to have a place. I don't care if it's a local or a non-local. They know they're safe to go and talk but as soon as someone sees you or hears about it they just clam up.*[1270]

14.14 ***Police response.*** Members of the Australian Federal Police on secondment to Norfolk Island and many other members of the community say that the police are hamstrung in their ability to respond appropriately to violence.[1271] They express feelings of helplessness due to inadequate laws and a lack of knowledge of the status of the laws. One woman sums up the constraints on the police:

> *They [women experiencing violence] are not strong enough as one to stand up against the 'closing of the ranks' so you've got to be able to stand up and be alone 'cause you are ostracised ... You live in such traumatic conditions that there is no bonding. There is no one actually here to gather you [women] together and give you guidance. You don't have the direction ... [It's a problem of] isolation. Once you start gathering yourself together or getting your strength together to actually get support - legal support - it's non-existent ... I feel that if you are having problems there's not much assistance available - immediate assistance available - from the actual police here ... They are very emotionally supportive but not in action.*[1272]

The Commission did not detect any general reluctance on the part of police to treat domestic violence as a criminal matter, although others make comments to this effect.

> *There is a distinct reluctance on the part of the police ... to get embroiled in what they consider to be disputes of an essentially civil character. They tend to regard anything to do with family law as being of that ilk.*[1273]

14.15 ***Response by the courts.*** Several submissions suggest that the Island's lay magistrates may need training in ways of dealing with evidence of domestic violence when it is presented in court. The Commission has not had the opportunity to raise these concerns directly with the local magistrates. However, one woman describes her experience of a contested custody matter in the Magistrates Court.

> *[T[here were two [local] magistrates ... I felt there was prejudice ... because I was actually wanting to leave the Island with my son but that went against me and I felt that the domestic violence didn't even rate; it wasn't even brought into account ... It didn't make any difference at all in the end.*[1274]

14.16 ***Domestic Violence Strategies Group.*** In recognition of the lack of domestic violence legislation, the prevalence of violence against women and the general lack of facilities for coping with it, a Domestic Violence Strategies Group (DVSG) has been established at the initiative of the Minister for Health and Education, the Hon Nadia Lozzi-Cuthbertson, OAM, MLA. Led by the Minister, the DVSG is comprised of

a wide range of community representatives, including members of the police service, magistrates, clergy, health workers and counsellors. It is helping to prepare a draft domestic violence bill. It is also working on a community education/information dissemination campaign aimed at raising the level of community awareness about the seriousness of domestic violence. Finally, it hopes to develop a system which will enable community service providers, such as counsellors and hospital workers, to provide an integrated response to victims of domestic violence.[1275]

Options for dealing with domestic violence on Norfolk Island

14.17 ***Introduction.*** The Commission has serious concerns about the level of violence against women on Norfolk Island and the lack of means for women to address violent situations. Redress needs to be provided in two forms. The first is crisis support services to enable victims to escape violent situations and find protection quickly and easily. The second is to ensure that the law is accessible and provides appropriate legal remedies for victims of violence. There should also be appropriate support services such as counselling and health care. The remainder of this section discusses the elements of a comprehensive response to domestic violence on Norfolk Island.

14.18 ***Integrated service provider response.*** The DVSG is developing an integrated service provider response system as a way of dealing with violence once it has occurred. The primary aim of this system is the development of 'effective liaison between the various groups and workers throughout the community who are involved in domestic violence work'.[1276] The intended outcomes of the network are:

- to enhance information sharing within and between services responding to domestic violence and ensuring that all members receive information on new initiatives within the domestic violence area
- to provide the opportunity for members to get support and to share information about their work to enhance consistency and quality service responses among member organisations
- to promote community awareness and education by acting as a media contact point
- to explore innovative ways of responding to domestic violence
- to act as a consultative body and play an active role in keeping domestic violence on the social and political agenda.

In pursuit of these outcomes, the DVSG aims, among other things,

- to ensure workers receive appropriate training in intervention strategies and self-care
- to provide intervention counselling and referral which reflects the clients' needs
- to monitor the development and implementation of the proposed legislation
- to develop and maintain a comprehensive resource library relevant to domestic violence.

The Commission supports these strategies and objectives. It welcomes in particular, proposals for training for police and members of the legal profession on the proposed domestic violence legislation. This model could be adopted by other remote communities.

14.19 ***Refuge accommodation.*** One of the issues being discussed by the DVSG at the time of the Commission's visit was the provision of emergency accommodation for women who need to escape violence. Some people with whom the Commission spoke suggested that there should be a designated women's refuge. However, the consultant and the DVSG appear more inclined towards the establishment of a series of safe houses. It is envisaged that, under this system, houses will be designated as 'safe houses' for a limited period of time. The location of each safe house will be kept secret by the police, the coordinator of the safe house system and residents at each safe house. Members of the DVSG consider this approach preferable to having a permanent women's refuge because under this system perpetrators will not know the victim's location. The

Commission makes no comment about the type of refuge system which should be implemented; this is a matter for Island residents and those expert in the provision of this type of service. However, it strongly supports the provision of refuge accommodation for women who experience violence in a way which protects their safety and prevents further violence.

14.20 ***Domestic violence legislation.*** The Commission also supports the work of the DVSG on the preparation of domestic violence legislation. The Commission has not seen a draft of this legislation but understands that it is based on the ACT and Queensland legislation.[1277] In keeping with domestic violence legislation in mainland States and Territories, the legislation should state that complaints are to be proved on the balance of probabilities. This reduces the evidential burden on victims making protection easier to obtain. The legislation should also give some guidance on which types of prohibitions and restrictions can be imposed by protection orders and what types of considerations the Court of Petty Sessions should take into account when deciding what prohibitions or restrictions to impose. Importantly, the legislation should also enable police to make applications for protection orders on behalf of the person fearing violence. There is merit in enabling police to pursue an application for a protection order where the officer suspects or believes the a domestic violence offence has been committed, or is likely to be committed, even if the complainant seeks to withdraw the complaint before the action is commenced.[1278] This may help to prevent applications being withdrawn on the basis of pressure brought to bear by perpetrators on victims. It is also essential that orders are portable to other Australian jurisdictions[1279] and that stalking is clearly defined as an offence under the new legislation. Passage of the legislation will be an important and symbolic recognition by the Island's legislature that violence, particularly violence against women, is a problem warranting urgent attention. The Commission has been informed that delays in the introduction of the legislation have been caused by a lack of legislative drafting services.[1280] Passage of the Bill is a matter of the highest priority. If necessary, funding should be provided for legislative drafting services through the NWJP.

Recommendation 14.1

Domestic violence legislation should be enacted as a matter of urgency. This legislation should enable the Court of Petty Sessions to issue protection orders where the complainant or her family fears violence or intimidation from her partner or from another person. Actions should be able to be commenced by police on behalf of the complainant. Under the legislation, police should be able to pursue applications for orders even where the complaint is withdrawn if they suspect or believe that a domestic violence offence has been committed or is likely to be committed. The legislation should make stalking an offence. Orders made under the legislation should be enforceable in all Australian jurisdictions. If necessary, funding should be provided as part of the NWJP to expedite the drafting process to enable a Bill to be introduced into the Norfolk Island Legislative Assembly as soon as possible. The legislation should be clearly explained to all residents.

14.21 ***Domestic violence and the courts.*** In Part 1 of this report the Commission made several recommendations for changes to the *Family Law Act 1975* (Cth) designed to correct deficiencies.[1281] If implemented, these changes will extend to Norfolk Island and will thereby require the Court of Petty Sessions to take violence into account when making orders in family law matters.[1282] Judicial officers also need other assistance. The Commission fully supports the gender-awareness programs being conducted for members of the judiciary in other jurisidictions. Members of the magistracy on Norfolk Island would also benefit from these courses.

14.22 ***Gun control laws.*** The possession of guns on Norfolk Island is regulated by the *Gun Licence Ordinance 1958* (NI) (the Ordinance). The regulatory regime established by this legislation provides for the licensing of firearms. Under s 5(1) of the Ordinance, a member of the Police Force may grant a gun licence if:

- he thinks fit[1283]
- the applicant is aged 18 years or over, and

- the applicant produces the gun to the member of the Police Force to whom the application has been made.

Section 6 empowers the relevant executive member[1284] to cancel a gun licence where the licence holder is convicted of an offence under the Ordinance or under another law which is punishable by imprisonment. Otherwise, the legislation makes no attempt to restrict the issue of licences. It establishes a firearm registration system, not a firearm holder licensing system. There are no statutory obligations on police officers to inquire whether the applicant has a criminal record or to assess whether the applicant will use firearms responsibly. A police officer's discretion to issue licences 'as he or she thinks fit' is an unfettered discretion. Persons with a propensity for violence may be considered unfit to hold a licence and denied one on this basis.[1285] However, the Commission is unaware what use, if any, has been made of this power. The Commission strongly recommends amendment of the Ordinance to require licence applicants to be properly assessed. The New South Wales and Australian Capital Territory gun laws provide good models for these amendments.

- ***Firearms Act 1989* (NSW).** The *Firearms Act 1989* (NSW) ('the NSW Act') provides that a person shall not possess or use a firearm unless authorised to do so by a licence or a permit.[1286] Licence applications are determined by the Commissioner of Police.[1287] The legislation sets out conditions for several types of licenses including government pistol licences, business pistol licences, club pistol licences and shooter licences.[1288] By doing so, the legislature enables licences to restrict the purposes for which firearms can be used. Applicants subject to an apprehended violence order must not be issued with a licence — the Commissioner has no discretion in these circumstances.[1289] The Commissioner also has power to issue a firearms prohibition order where a person is perceived, on the basis of a public interest test, not to be fit to have possession of a firearm.[1290] Where a licence has been issued and a prescribed member of the Police Force becomes aware that the licence holder has been charged with a domestic violence offence within the meaning of the *Crimes Act 1900* (NSW), or the police officer has reasonable cause to believe that the licence holder has committed or has threatended to commit a domestic violence offence, then the licence must be suspended.[1291] Licences and permits are automatically revoked if the holder becomes subject to a firearms prohibition order or an apprehended violence order.[1292]

- ***Weapons Act 1991* (ACT).** The *Weapons Act 1991* (ACT) ('the ACT Act') regulates the use and possession of firearms in a similar way to the NSWAct by establishing a system for the registration of prohibited weapons, dangerous weapons and restricted weapons and the licensing of weapon holders.[1293] Unlike the NSW Act, the ACT does not provide clearly that a licence must be suspended if the holder has been charged with a domestic violence offence or a police officer reasonably believes that the holder may commit a domestic violence offence, nor does the ACT Act provide that a licence will be automatically revoked if the holder becomes the subject of a protection order.

The Commission is informed by the Norfolk Island Government[1294] that a new Gun Control Bill has been drafted and is based on Tasmanian legislation. The Commission has not seen a copy of this draft legislation. The *Guns Act 1991* (Tas) is an improvement on the *Gun Licence Ordinance 1958* (NI) because it establishes a regime for the assessment of licence holders. However, like ACT legislation it does not provide for suspension and revocation of firearm licences in circumstances of domestic violence. When preparing the proposed domestic violence legislation, the Norfolk Island Government should consider incorporating provisions for this purpose into the Gun Control Bill. The NSW Act provides a good model for these provisions.

Recommendation 14.2

The *Gun Licence Ordinance 1958* (NI) should be repealed and replaced by legislation based on the *Firearms Act 1989* (NSW).

14.23 ***Other ways of addressing domestic violence.*** A toll-free telephone link to mainland Australia for counselling and legal advice services would enable quick access to independent information and advice while allowing victims to maintain their anonymity. A legal advice line is discussed at paragraph 14.30. There is currently no facility for toll-free telephone access between Norfolk Island and mainland Australia.

However, the Commission is informed that a link has been agreed to in principle and is being established by Telstra.[1295] A counselling line could supplement the crisis-support strategies being implemented by DVSG. Funding could be provided as part of the NWJP and calls could be handled, for example, by the ACT Domestic Violence Counselling Service or another existing mainland service. Measures would need to be taken, when establishing these services, to ensure that calls could not be overheard, traced or intercepted.

Recommendation 14.3

That a low cost telephone counselling service be provided for women on Norfolk Island. Consideration should be given to funding this service as part of the NWJP.

Access to justice

Introduction

14.24 ***Lack of access to legal resources.*** The Interim Report[1296] and Part 1 of this report[1297] discussed women's access to legal services, in particular, access to legal aid, women's legal services and court support programs. A majority of submissions express the view that women do not have adequate access to legal resources and information. These concerns are echoed by women on Norfolk Island. They complain of a lack of access to information about laws. This is due, in part at least, to the many sources of law which apply to Norfolk Island.[1298] Submissions and consultations also suggest a lack of access to legal advice and legal aid. They suggest that, when legal advice is given, it can be inaccurate or of poor quality. This too was found in other parts of Australia.

14.25 ***Scope of this section.*** This section discusses women's access to justice on Norfolk Island as it relates to access to legal services. It also discusses women's access to the Family Court. Many other issues arise in the access to justice context including the adequacy of the Island's administrative law regime, regulation of the legal profession and the use of court charters. The Commission is unable to discuss them in any great detail. The issues will, however, be dealt with in the context of the Government's response to the AJAC report.

Access to legal services

14.26 ***Availability of legal services.*** There are currently three legal practitioners residing and working on Norfolk Island. All are men. Two of the three practitioners are solicitors and work out of the same firm; the other is a barrister and retired Family Court judge. Several other solicitors visit the Island on a regular basis. The Commission met with the solicitors residing on the Island and a solicitor whose practice is based in Sydney but who regularly visits the Island. Several private hearings conducted by the Commission also dealt with women's access to the legal profession.

14.27 ***What the submissions said.*** The submissions discuss general issues concerning access to legal advice. One woman says that she was denied access to legal advice. She submits that access to legal services

> *[is] very strongly gender biased in favour of the male ... [Women] are made to feel like second-class citizens [when going for legal advice]. I'll give you an example. Perhaps in a divorce base or a custody case or in a property settlement case, the male will go to the solicitor first and you [women] have got no options here. You are very restricted in who you can use. Whichever one goes to [the solicitor] first, that's it.*[1299]

She suggests that men usually get access to legal services first, thereby preventing access by their spouses, because the marriage breakdown is planned well in advance by the husband, sometimes with advice from a solicitor. Another submission suggests that solicitors who live on the Island generally only act for husbands.[1300] he problem of inaccurate information having been given in the past was also raised.[1301]

Improving access to legal services

14.28 ***Introduction.*** Women requiring legal services often cannot obtain advice locally and cannot wait for visiting solicitors to arrive. Nor can they afford the expense and time involved in travelling to the mainland to retain solicitors and access the court. There is a pressing need not only for greater access to legal services but to general legal community information as well.

14.29 ***Community drop-in centre.*** One way of ensuring Norfolk Island residents have quick access to legal information and advice is to establish a drop-in centre similar to a community legal centre.[1302] Like other community legal centres in cities and regional centres throughout Australia, which are funded primarily through the legal aid commissions in each State and Territory, it could provide free advice sessions and could act for women and men in both civil and criminal matters, provided the relevant means test is satisfied. The centre would also provide a venue for the distribution of information about general community services both on the Island and on the mainland. Ideally, the centre would be staffed by a solicitor with experience in family law and domestic violence matters, some financial expertise[1303] and a good general knowledge of other community services. In accordance with views expressed by women on the Island and women in other small communities, it would be advantageous but not essential to have a woman solicitor available on the Island. The centre could be funded jointly by the Norfolk Island Government and the Commonwealth as part of the NWJP and any new legal aid scheme. Establishing such a centre is problematic, however.

- ***National equity.*** First, a centre would be expensive to establish and would give the small number of residents of Norfolk Island a relatively higher level of free or assisted legal services than would be available to other Australians, including those in other small, remote communities.[1304]

- ***Accessibility***. Second, women on the Island may be reluctant to visit a centre. A number of participants at the DVSG meeting expressed the view that women would be concerned about being seen going to the centre. This concern could be addressed by placing this service with a wide range of other community services and activities, so that women could attend without being stigmatised.

- ***Staffing.*** Third, staffing and running the centre would be onerous. The need for a person with wide qualifications as a solicitor and community worker, and wider issues of remoteness, would make the position difficult to fill.

- ***Commonwealth funding.*** The fourth problem bears on more general issues about financial relations between the Commonwealth and Norfolk Island. These issues are discussed in detail at para 14.63ff.

The Commission acknowledges that these problems pose significant obstacles to the successful establishment of a drop-in centre. However, it is of the view that a facility of this type is needed to service the community of Norfolk Island.

Recommendation 14.4

A community drop-in centre should be established. The centre should provide a venue for the distribution of information about general community services both on the Island and on the mainland. It should also provide a venue for the provision of free or assisted legal advice. The centre should be funded jointly by the Commonwealth and the Norfolk Island Government as part of the NWJP and any legal aid scheme established on the Island.

14.30 ***Telephone advice service.*** Another way of providing legal services to women on Norfolk Island is a telephone advice service. This is suggested by several people with whom the Commission spoke during its visit, including members of the DVSG. A telephone advice service would enable women and men living on Norfolk Island to receive free legal advice with complete anonymity. It could be administered by a mainland legal aid commission (for example, the Australian Capital Territory Legal Aid Commission (ACTLAC)) and staffed by a duty solicitor working on the mainland. When coupled with a visiting solicitor service, a telephone advice service could work well.[1305] It has the advantage of enabling quick access to legal services. Funding could be negotiated as part of the inter-governmental legal aid funding agreement between the Commonwealth, the Norfolk Island Government and, if relevant, the participating legal aid commission.[1306]

Recommendation 14.5

A low cost telephone legal advice service should be established. It should be funded, administered and staffed as part of a legal aid scheme for Norfolk Island.

Access to the Family Court

14.31 ***Introduction.*** Women in remote areas such as Norfolk Island experience difficulties in accessing all types of services, including courts. For example, in Norfolk Island, the Supreme Court sits once every six months on the Island, although it may sit at other times in Sydney, the ACT and Victoria for civil matters. Lack of access to courts presents considerable barriers to justice. Submissions and other evidence say that one of the most significant barriers to accessing justice on Norfolk Island is the lack of access to the Family Court.

14.32 ***Court of Petty Sessions has a limited jurisdiction.*** The *Family Law Act 1975* (Cth) ('the Act') extends to Norfolk Island.[1307] However, the Family Court does not visit the Island regularly. The last time a Family Court judge heard matters on Norfolk Island was early in 1993. The Court of Petty Sessions of Norfolk Island is a court of summary jurisdiction and is therefore empowered to deal with ancillary matters arising under Part VII of the Act (for example, child custody and access) where the respondent does not seek an order different from the applicant, or if he or she does, the parties consent to the matter being determined by the court of summary jurisdiction. The Court of Petty Sessions may also hear applications under Part VIII (for example, property settlements and spousal maintenance) where the value of property does not exceed $20 000 and the matter is uncontested. Where different orders are sought by the applicant and the respondent and the matter is contested, the Court of Petty Sessions is required to transfer the proceedings to the Family Court or the Supreme Court of Norfolk Island.[1308] Courts of summary jurisdiction are authorised to hear proceedings in respect of matrimonial causes except proceedings for a decree of nullity,[1309] applications for declarations as to the validity of a marriage or declarations as to the validity of a dissolution or annulment.[1310] This means that they can hear, among other things, applications for injunctions under s 114 of the Act.[1311] Contested divorce applications cannot be heard by a court of summary jurisdiction and must be transferred to the Family Court or the Supreme Court of Norfolk Island.

14.33 ***Lack of access to Family Court counselling and conciliation services.*** In 1992-93, only 19% of all applications made under the *Family Law Act 1975* (Cth) were listed for defended hearings before a judge.[1312] The majority of all other applications were determined through the assistance of the Family Court counselling, conciliation and mediation services. Residents of Norfolk Island do not have access to these services. There is no counselling service for child custody and access matters nor is there anybody trained in conducting Order 24 conciliation conferences for property settlements. The Commission is informed by the Norfolk Island Government that one resident on the Island is a trained Family Court mediator.[1313]

14.34 ***Problems caused by lack of access to the Family Court.*** The high proportion of matters which are resolved through the counselling and conferencing services suggest that Norfolk Islanders' lack of access to these services significantly impairs their ability to resolve their family law disputes by agreement without proceeding to fully defended hearings. In the event that disputes cannot be resolved in this way and need to be contested, Islanders are further prevented from accessing justice because contested matters cannot be heard on the Island unless matters are transferred to the Supreme Court of Norfolk Island under the cross-vesting legislation. Parties must travel to the mainland if they want access to the Family Court in these circumstances. This is expensive and extremely time consuming. Women who lack financial independence or who otherwise find it difficult to leave the Island are therefore prone to becoming trapped in their relationships. Lack of immediate financial relief is exacerbated by the fact that the child support scheme does not extend to Norfolk Island. This is because income earned by Island residents on the Island is exempt from Commonwelath taxation.[1314] do not apply. Women with children who cannot seek spousal or child maintenance because it is contested and who cannot receive child support payments are therefore often left in poverty because of uncertainty about sole parents' benefits on Norfolk Island.[1315]

In January 1989, following experiences of violence perpetrated by her husband and the breakdown of her marriage, one woman residing on Norfolk Island decided to seek legal advice with a view to

obtaining a divorce and orders for custody of her three children and a property settlement. She described her experience with the legal system and her inability to access financial resources in the following terms.

I had nowhere to go. My career was tied up with my husband, like a lot of women on Norfolk Island, because it was a family business where the finances were basically held by the male. [I] couldn't go to the bank and get a bank loan ... Island land ... is kept in trust for them [the males] so the wife works and builds the house on the land with the husband, and when she leaves she doesn't own anything ... [T]he common practice here is that nobody owns anything ... Everything is in trust - everything belongs to someone else - to avoid any marital problems. So the wife, if she's got children, has nowhere to go ... A lot of Island mothers are kept here because the threat is that they [the fathers] will stop the children leaving the Island ... [T]he children are accepted as Islanders but the wives aren't. It's incredible but that's the way it works. The wife basically has to go and leave the kids because financially she can't take them.
I was actually in that position myself. I couldn't leave. I had no house to rent. I phoned [a solicitor on the Island]. [He] was already working for my husband. [He] was the only choice of lawyer. [He] advised me to speak to [a solicitor on the mainland] who works in family law ... I actually made a trip to Brisbane. I had to pretend I was doing something else. I had to sidetrip down to Sydney - my husband didn't know I was going. [The solicitor] told me my only option was to leave. But I couldn't leave because I had no resources, no social security, no finance at all because my money was caught up with my husband and I had ... young children. [He said] he couldn't help me until I did. Well, to me that wasn't an option ...
By that time I was feeling I didn't have very many choices at all. There was no solicitor available to me on the Island. It was only when I mentioned to friends ... [that] one had a ... friend in Sydney, and she phoned him, and that was when I got into the hands of the high flyers and that was very scary because I didn't have anything, but of course they could see the dollar signs ... Once you get onto the roller coaster you can't get off ...
[My husband] still manages to live quite well without paying me any maintenance ... My house is very much mortgaged to the hilt to pay off [the lawyers]. I have tried every avenue to get justice. I'd say it is because I live on Norfolk Island I don't have access to legal aid, to social security, other lawyers. Every time you do something you end up getting on a plane on borrowed money or money that you really can't afford to be spending, going to Sydney for the next round.[1316]

Improving access to the Family Court

14.35 ***Cross-vesting legislation.*** There are several options for improving women's access to the Family Court and its counselling and mediation services. Several submissions suggest that, because the Supreme Court visits the Island more regularly than the Family Court, it could be vested with jurisdiction to hear family law matters. It is asserted that this would give residents of Norfolk Island greater access to the Court in contested matters. Under the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) the Supreme Court of Norfolk Island already has jurisdiction to hear matters arising under the *Family Law Act 1975* (Cth), provided that certain conditions are fulfilled.[1317] Even if these conditions are met, it is questionable whether access is sufficiently increased. The Supreme Court only sits once every six months on the Island. It seems unlikely that this will meet the needs of Norfolk Islanders for Family Court judicial services. The second and more fundmental problem with this approach is that it does not address the need for Family Court counselling and conciliation services.

14.36 ***Increasing visits by the Court and the counselling service.*** The more obvious solution would seem to be for judges of the Family Court, counsellors from the Family Court Counselling Service and Registrars to visit Norfolk Island on a regular basis. The high rate at which matters are resolved by the counselling and Order 24 conciliation conferencing services suggests that these services should visit more regularly than the judges, perhaps every 2 months. This would help to ensure that applications are, as far as possible, determined by agreement without going to defended hearings. Where matters are contested, regular visits by the Court, say every 4 months, would provide an opportunity for these to be heard. The precise timing of visits by the counselling service and the Court should be based on need and determined by reference to comprehensive statistics, including statistics on applications made under the Act. While the Commission appreciates that visits may present funding difficulties, it wishes to emphasise the importance of enabling

residents of Norfolk Island, like other Australian residents, to access these services. This model could be adopted for other remote Australian communities.

14.37 ***Other ways of improving access to the Family Court.*** In addition to regular visits by the Court and the counselling service, there could be toll free telephone access to the counselling service and also, possibly, teleconferencing link-ups with members of the Court. These types of links have proved very successful in remote Aboriginal and Torres Strait Islanders communities in outback Australia (although they have not been used in relation to the resolution of matters arising under the *Family Law Act 1975* (Cth)). Access to principal relief (for example, divorces) could be enhanced by empowering the Court of Petty Sessions to deal with applications for dissolution by consent of the parties.

> **Recommendation 14.6**
>
> **The Family Court Counselling Service should visit Norfolk Island on a regular basis. Registrars should also visit the Island regularly to conduct Order 24 conciliation conferences. Judges of the Family Court should visit the Island on a regular basis but less frequently than the counselling and conciliation services. Telephone and video link-ups between the Court and Norfolk Island should be established during periods when the Court and counselling services are not visiting.**

Access to legal aid

14.38 ***Earlier recommendations.*** In Part 1 of this report, the Commission discussed women's access to legal aid. The Commission emphasised the importance of legal aid in promoting women's equality before the law. It found that the policy of giving priority to criminal matters disadvantages women because women are more likely to be affected by family and civil laws for which there is significantly less assistance available. The Commission recommended that the Commonwealth should take a more directive role in determining legal aid priorities in the interests of women and, in doing so, it should ensure that the needs of applicants in family and civil matters are adequately met.[1318] It also supported the recommendation by the Access to Justice Advisory Committee that a Commonwealth legal aid body, the Australian Legal Aid Commission, be established.[1319]

14.39 ***Legal aid is unavailable in Norfolk Island.*** Legal aid is currently unavailable on Norfolk Island. Submissions say that this seriously impedes women's access to legal services. One woman describes her inability to gain access to local legal services

> *I ended up representing myself in court doing all my own legal court work ... I was denied legal advice ... I went to one solicitor on Norfolk Island and he just didn't want to help ... and there was no other available solicitor; there was nobody else I could go to for legal advice ... I was left in the position where either I would be eaten alive or I would defend myself.*[1320]

In her opinion, the lack of access to local legal services was not compensated for by visiting services because

> *[t]hey only appear on Norfolk Island at certain times and the times were definitely wrong. They weren't here. They weren't available.*[1321]

Improving access to legal aid

14.40 ***Enhanced need for legal aid in remote comunities.*** In a remote community such as Norfolk Island, legal aid services perform two functions. First, legal aid provides extra legal services such as advice and representation from duty solicitors. This is important when for one reason or another, existing services are inaccessible. Legal aid also increases accessibility to legal services for people who lack financial means to access existing legal services. The Commission was told that the local legal practitioners on Norfolk Island are often prepared to pursue matters on behalf of impecunious clients by negotiating payment in instalments

over an extended period of time.[1322] This legal assistance is commendable. However, in light of comments made in several submissions about women's access to local practitioners, the Commission doubts that it is adequate to meet the needs of Norfolk Island women. It cannot do the work of a government-funded legal aid scheme where legal aid is made available on the basis of clear and identifiable means and merit criteria.

14.41 ***Establish a legal aid scheme.*** Residents of Norfolk Island, irrespective of their remoteness, should be entitled to the same level of services as other Australians, including access to legal aid services. This could be achieved with or without the establishment of a community legal resources and drop-in centre. The issues are what form the legal aid scheme should take and who should pay for it. The Commission is aware that the Executive Director of the ACT Legal Aid Commission (ACTLAC)[1323] recently visited the Island to inquire into the options for establishing of a legal aid scheme.

14.42 ***Who should pay?*** The legal aid needs of Norfolk Islanders currently amount to between $20 000 and $25 000.[1324] Two other external territories - the Cocos (Keeling) Islands and Christmas Island - have legal aid schemes funded entirely by the Commonwealth through the Department of Environment, Sport and Territories.[1325] These schemes are administered by the Legal Aid Commission of Western Australia. These territories are in a different situation from Norfolk Island. Income earned on Christmas Island and the Cocos (Keeling) Islands is subject to Australian taxation laws but income earned on Norfolk Island is not. The Commonwealth should not be the sole contributor to the Norfolk Island legal aid scheme unless Commonwealth taxation laws apply to Norfolk Island. Funding could be provided jointly by the Commonwealth and Norfolk Island Governments on the basis of an intergovernmental agreement, similar to those for the States and internal territories. Funds could also be provided from interest earned by trust fund accounts of solicitors practising on the Island.

14.43 ***Form of a legal aid scheme.*** The form which the legal aid scheme takes is important because it bears directly on the degree to which legal services are accessible to women on Norfolk Island. Some of the options being considered by ACTLAC include a traditional government assistance program administered by and under ACTLAC guidelines. Local solicitors could act as agents for ACTLAC and undertake legally aided work on a referral basis. ACTLAC duty solicitors could also visit the Island on a regular basis. These visits could coincide with those of visiting magistrates and judges to give women greater access to litigation assistance. However, a duty solicitor service that visits, say, every 3 months would not, by him or herself, address the need for quick access to legal services or the need for non-litigation legal services. The establishment of a drop-in centre and a low cost telephone advice service would help to fill this need. The Commission makes no recommendation about how a legal aid scheme should be administered. These matters are being examined by ACTLAC and the federal Government. However, the Commission strongly recommends that a legal aid scheme be established. Once established, the allocation of the Norfolk Island legal aid budget should reflect the importance to women of legal aid funding for family and civil law matters.

Recommendation 14.7

A legal aid scheme should be established for the residents of Norfolk Island. When developing guidelines for the allocation of funds, policies should reflect the importance to women of legal aid funding for family and civil law matters.

Other ways of improving access to justice

14.44 ***Community legal education.*** Women on Norfolk Island and the community as a whole need adequate information about the law, including the types of legal remedies available in particular situations. This need for legal information is in addition to the need identified by the DVSG for increased awareness of available support services for victims of domestic violence. In particular, community legal education programs should provide information about rights and benefits under the social security, immigration, employment and criminal laws. There should also be an education program about the *Sex Discrimination Act 1984* (Cth) and other legislation administered by the Human Rights and Equal Opportunity Commission.

Recommendation 14.8

The Norfolk Island Government should establish a community legal education program to inform members of the community about legal rights and remedies under relevant Norfolk Island and Commonwealth law. In particular, programs should be established on the criminal law, immigration law, employment law and social services law. There should also be an education program about the *Sex Discrimination Act 1984* (Cth) and other legislation administered by the Human Rights and Equal Opportunity Commission.

14.45 ***Continuous monitoring of laws.*** There are serious deficiencies in the laws of Norfolk Island which affect women directly: lack of domestic violence legislation, confusion about whether sole parents are entitled to a benefit under the *Social Services Act 1980* (NI) and lack of a proper licensing system for firearm holders. Other aspects of Norfolk Island law may also be discriminatory. Several submissions suggest that Norfolk Island laws should be monitored and subject to continuing law reform and that this task should be undertaken by an independent Commonwealth authority such as the Commission. The Commission considers that Norfolk Island laws would benefit from this. It acknowledges that it may be an appropriate body for this role and notes that it is committed to examining relevant Norfolk Island laws in the context of each of its current and future references (for example, review of the *Freedom of Information Act 1982*).

Social security-making provision for sole parents

Introduction

14.46 The overriding concern of the Commission in this reference is to ensure that women - including women living in remote communities - have proper access to, and are equal before, the law. Whether they are living in isolated communities or in large population centres, law and practice should ensure that women's rights are respected and that they have access to all the services and benefits to which they are properly entitled. One of these benefits is social security.

Social security on Norfolk Island

14.47 ***Benefits available under the Social Services Act 1980 (NI).*** Norfolk Island has its own social security system established by the *Social Services Act 1980* (NI) ('the SSA'). The SSA provides the following types of benefits: age benefits; invalid benefits; widowed persons' benefits; orphans' benefits; handicapped children's benefits; special benefits; and supplementary benefits. Only permanent residents are eligible to receive these benefits.[1326] Residents must satisfy specific criteria before qualifying to receive a benefit.[1327] Unlike the federal social security regime administered under the *Social Security Act 1991* (Cth), there is no specific provision under the SSA for the payment of a sole parents' pension or benefit to residents of Norfolk Island.[1328] The existing benefits make some provision for financial support for parents with children. However, these seem to depend on the resident otherwise qualifying for a widowed persons' benefit, an age benefit or an invalid benefit. Sole parents, whether divorced or never married, do not meet these criteria on the face of the legislation. Like the federal social security legislation, the SSA is exempt from the operation of the *Sex Discrimination Act 1984* (Cth).

14.48 ***The special benefits provision.*** During consultations, the Commission was informed by officers of the Norfolk Island public administration that benefits have been paid in the past to sole parents under the special benefits provision of the SSA.[1329] The statutory criterion for this benefit is 'suffering hardship'. The Commission was informed that this criterion has traditionally been interpreted to mean financial hardship not personal hardship caused, for example, through domestic violence. The decision whether the benefit is to be granted lies with the relevant Minister of the Legislative Assembly personally. The Minister is advised by the Social Services Board comprising two other members of the Legislative Assembly and three other members of the community. The officers said that the special benefits section makes adequate provision for the needs of sole parents.

14.49 ***Submissions.*** Submissions suggest that there is little information about the availability of the special benefit for sole parents. According to one submission, women who do not work are sometimes informed by their husbands that they are not entitled to any social security benefits because they are designated to be earning half the husband's income.[1330] This lack of information and the uncertainty of a favourable outcome

under the 'special hardship' criterion are a considerable barrier to women with children leaving (violent) relationships and living independently. Submissions also advocate a proper administrative review system to ensure objectivity in the decision-making process.[1331] Concerns about the decision-making process were expressed during debates in federal Parliament following the introduction of the *Norfolk Island Bill 1979* (Cth). Mr Innes[1332] said:

> The Islanders have said that pension payments must be as of right and that they should not be in the current untenable position whereby needy residents must go cap in hand to the administration and prove their need. That is a situation where payment is dependent upon officialdom's grace and favour. This situation is not satisfactory; it is not human; and it is not benevolent.[1333]

The Commission shares these concerns.

Improving access to social security on Norfolk Island

14.50 First, women living on Norfolk Island are denied benefits ordinarily available to other Australians. They lack information about what benefits are available. Second, there is a lack of well defined criteria for assessing how decisions should be made regarding some benefits (especially the special services benefit). Third, the failure of the legislation to provide specifically for sole parents reinforces notions of the dependence of women upon their husbands. The Commission strongly recommends that the SSA be amended to provide a sole parents' benefit on criteria similar to those in the *Social Security Act 1991* (Cth). The Commission also notes that the exemption of the SSA from the operation of the SDA must be reviewed before 1 June 1996.[1334] In this context, it draws the situation on Norfolk Island to the attention of the federal Parliament and the Sex Discrimination Commissioner.

Recommendation 14.9

The *Social Services Act 1980* (NI) should be amended to provide a sole parent's benefit.

Immigration

Introduction

14.51 Australian citizens or permanent residents are entitled to live in whichever State or Territory they choose except Norfolk Island. Migration to and from Norfolk Island is controlled by the Island itself under the *Immigration Act 1980* (NI) ('the Act'). The *Migration Act 1958* (Cth) does not extend to Norfolk Island. Under the Act, the Norfolk Island Government may issue visitor permits (VP), temporary entry permits (TEP) and general entry permits (GEP), subject to applicants meeting any criteria specified in the Act.[1335]

Temporary entry permits

14.52 ***What the Act says.*** Temporary entry permits (TEP) are granted for periods not exceeding one year. The relevant Minister[1336] may then extend a permit holder's stay by a period not exceeding one year. There is no restriction on the number of times a TEP can be extended. Under the Act, the Minister, when deciding whether or not to grant a TEP, must consider

- whether there is available employment for the applicant
- whether the applicant has the qualifications necessary to carry on the business or profession specified in the application
- whether the business or profession is already sufficiently provided for in Norfolk Island
- the character of the applicant
- whether, if the applicant entered or remained in Norfolk Island, any facility would be likely to be subject to an undue burden

- the health of the applicant
- whether the applicant holds a ticket for travel from Norfolk Island.

Under the Act, the Minister may impose conditions on a TEP holder which are considered, in his or her opinion, to be beneficial to Norfolk Island, including requiring the permit holder to:

- be employed by a particular employer and in a particular class of employment
- work in a particular business or profession
- undertake scientific, historical or cultural activities or studies.

Breach of a condition has the effect of automatically deeming the permit to be cancelled 14 days after the breach has occurred.[1337]

14.53 ***What the submissions say.*** According to submissions, a condition of entry for TEP holders is that their spouses may not work on the Island.[1338] The stated rationale for this policy is to enable preference for employment to be given to residents. TEP holders can apply to have this condition deleted.[1339] The Norfolk Island government states that

> If the spouse of a temporary entry permit holder does not propose to work during their residence in Norfolk Island their TEP is drafted to reflect that fact. Howver if any TEP indicates a wish to work at the time of granting of the TEP (or later), it is amended.[1340]

There is no restriction on change (apart from a minor administration fee) and the immigration records show that atleast 1 000 TEPs held by spouses of employed TEPs have been amended in this manner since the current Act was passed. According to one submission, however, applications to vary a TEP to alllow a spouse to work are not granted. If this assertion is true, then this practice may be in breach of the SDA.[1341] Although on its face this condition applies equally to women and men, its effect may be to disadvantage women if the spouses of most TEP holders are women. Since the SDA applies on Norfolk Island and indirect discrimination is prohibited under the this Act, this practice may be in breach of federal law. In light of the conflicting evidence about this practice, the Commission draws no conclusion about the impact of the TEP conditions upon women.

General entry permits

14.54 ***What the Act says.*** Under the Act, general entry permits (GEPs) may be granted for a period of 5 years and 6 months. Upon expiry, this period may be extended at the discretion of the Minister. When deciding whether or not to grant a GEP, the Act requires the Minister to consider

- the applicant's reasons for wishing to live on Norfolk Island
- the applicant's intentions with respect to his [sic] livelihood in Norfolk Island and whether they are likely to be realised
- the character of the applicant
- the health of the applicant
- the financial position of the applicant
- whether the applicant has a special relationship with Norfolk Island.[1342]

The Norfolk Island Government may fix a quota on the number of GEPs to be issued and also apply conditions to the grant of a GEP. The Act does not specify what types of conditions may be imposed on GEPs. It simply states that the Immigration Committee (comprising between 3 and 5 members of the Legislative Assembly, excluding the Minister, and one non-member) may set out any conditions to which a

permit should be subject[1343] and that a GEP may be granted subject to such conditions as are specified in the permit.[1344] Breach of a condition carries with it the same sanction as breach of a TEP condition, that is, automatic revocation within 14 days of the breach.

14.55 ***What the submissions say.*** Submissions report that where the holder of a GEP is part of a family, a condition is imposed requiring the family to stay together.[1345] They suggest that the reason is to ensure that the Norfolk Island Government does not have to provide social security payments to individual members of the family in the event that the parents dissolve their marriage and the family breaks up. If this submission is true, then this condition particularly discriminates against women who are the victims of domestic violence. When combined with the uncertainty of independent financial support for sole parents, the condition doubly contributes to women being forced to stay in violent relationships. The Norfolk Island Government states that this assertion that conditions are imposed in GEPs requiring families to stay together is 'wrong'.[1346]

> There are numerous examples of GEP holders in de jure or de facto marriages who part, or children of those marriages, who leave the family home to live elsewhere on the Island. Such occurrences have no effect on the immigration status of the GEP holders.[1347]

Again, in light of the conflicting evidence, the Commission draws no conclusion about whether in fact conditions on GEPs discriminate against women.

14.56 ***More general concerns.*** Other criticisms of the Norfolk Island immigration regime raised questions about the objectivity of the decision making process but were not gender related. Interestingly, the House of Representatives Standing Committee on Legal and Constitutional Affairs heard similar criticisms during into inquiry into the legal regime of Norfolk Island. It

> received trenchant criticism on the operation of the Norfolk Island Immigration Act, particularly insofar as it may affect the ability of a Norfolk Island resident to dispose of real estate in the Territory. Much of the criticism appears to relate to the objectivity of the decision making process and delays in the appeal process.[1348]

The Committee recommended extending the operation of the *Administrative Appeals Tribunal Act 1975* (Cth), the *Ombudsman Act 1976* (Cth) and the *Freedom of Information Act 1982* (Cth) to an appropriate range of decisions of the Norfolk Island Government and Administration, but only as an interim measure. It urged the development by the Norfolk Island Government of an independent Administrative Review Tribunal. The federal Government's response tabled in March 1991, noted that the Norfolk Island Government is committed, as a matter of high priority, to the establishment of an Administrative Review Tribunal. This tribunal has not yet been established. However, the Commission is informed that the Administrative Review Bill 1994 (NI) is currently with the Administrative Review Council for its comments.[1349]

Preventing discrimination under the Norfolk Island Immigration Act

14.57 The general, wide-ranging criticisms about the lack of objectivity in the decision-making process is of concern to the Commission. It suggests that the *Immigration Act 1980* (NI) or the process by which it is administered requires a more fundamental review than the Commission has been able to undertake in its inquiry into women's equality before the law on Norfolk Island. The Commission suggests that the immigration regime applying to Norfolk Island should be examined with a view to ensuring its consistency with internationally accepted principles governing the development of immigration rules, for example, human rights, maintenance of public health and safety and preservation of public order.

Employment

Regulation of working conditions

14.58 Employment in the Norfolk Island public service is regulated by the *Public Service Ordinance 1979*. This Ordinance sets terms and conditions for public servants and is administered by the Minister for Health and Education. All other employment on Norfolk Island is regulated by the *Employment Act 1988* (NI). This is a detailed law which provides for

- setting minimum wages and conditions
- compensation for work-related accidents
- safe working practices
- conciliation, adjudication and review of employment-related complaints (for example, wrongful dismissal).

Neither the *Employment Act* nor the *Public Service Ordinance* provides specifically for maternity or paternal leave. However, as a matter of practice, unpaid maternity leave is provided to officers in the Norfolk Island public service.[1350] In 1991 the Department of Industrial Relations commented that the *Employment Act 1988* (NI)

> creates the first formal system for dealing with industrial relations and employment matters ... [It] represents a significant step forward with regard to the protection of the Norfolk Island workforce; it is recognised that the legislation is significantly different in some respects from that generally applying on the mainland but is considered to be appropriate at this stage for Norfolk Island.[1351]

Equality for women in employment

14.59 ***Participation rates for women on Norfolk Island.*** In 1991 slightly over half the women[1352] ordinarily residing on Norfolk Island (56.0%) were employed in a job or business. This compares favourably with the labour force participation rate for women in the mainland States and Territories at that time (51.5%). Most (77%) of these women worked in only three areas, as sales (21.5%) or clerical work (27.6%) or the sport and recreation (that is, the hotel) sector (28.2%). In comparison, only 53.4% of women engaged in employment in mainland States and Territories were employed in these types of positions. Just over half of the remaining women ordinarily resident on the Island stated that their usual major activity was home duties.

14.60 ***What the submissions say.*** In several submissions women say that they had been the victims of, or were otherwise aware of, sexual harrassment in the workplace.[1353] However, no complaints of sexual harassment from women on Norfolk Island have ever been lodged with the Sex Discrimination Commissioner (SDC). The Commission was told that employment opportunities on Norfolk Island are generally very scarce.[1354] The Commission was also informed that the minimum wage is very low, that employers in the hotel sector sometimes use gender as a job selection criterion by specifically requesting women and that there is a lack of objectivity in the complaints review procedure.[1355]

The Commission's views

14.61 ***Making HREOC more accessible to women on Norfolk Island.*** The Commission is concerned that women are possibly being sexually harassed in the workplace but that complaints are not being lodged with the SDC. Complaints under the SDA may not be going forward because of a lack of knowledge about the Act and the remedies under it. In addition, the Human Rights and Equal Opportunity Commission (HREOC) may not be sufficiently accessible to people on Norfolk Island. Fear among women in the Norfolk Island community may deter them from using formal complaints mechanisms. One submission asserts that the SDC and the SDA could become more accessible if there was an independent authority on the Island acting as agent or contact point for HREOC. It suggests that the Office of the Administrator perform this function.[1356] The Commission agrees with this suggestion.

Recommendation 14.10

That arrangements should be made to enable the Administrator of Norfolk Island to act as agent for the lodgment of complaints under legislation administered by the Human Rights and Equal Opportunity Commission.

14.62 ***The employment legislation.*** Submissions report that the minimum wage may be too low and that the administrative review procedure relating to employment related complaints is less than satisfactory.[1357] The

Employment Act 1988 (NI) is currently under review by the Norfolk Island Government.[1358] These concerns should be taken into account in this review process.

Relations between the Commonwealth and Norfolk Island

Current arrangements

14.63 Unlike the States and internal Territories, Norfolk Island is not provided with Commonwealth funding on the basis of formulae determined by the Council of Australian Government and the Grants Commission. The Island does, however, receive some funding from the Commonwealth. This allocation funds the Office of the Administrator and the Kingston and Arthur Value Historic Area conservation project.[1359] Commonwealth funds are also provided to operate and maintain the meteorological and ionospheric stations, to manage the National Park (through the Australian Nature Conservation Agency), to provide fisheries surveillance and to provide medical evacuations to the mainland by the Royal Australian Air Force in emergency situations. In addition, some court costs are borne by the Commonwealth, the Australian Federal Police provides police services (70% of the cost is met by the Norfolk Island government) and Telstra operates a cable station on the Island as part of the ANZCAN cable network.[1360] ther than the Commonwealth funding, the Island is self-funding. It does not receive any overseas aid and generates most of its income through the tourism trade.

Inquiry into the legal regimes of the external territories

14.64 ***Commonwealth funding policy.*** The question whether the Commonwealth should provide funding to the Island and, if so, to what extent, was discussed by the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) in its 1991 report on the legal regimes of Australia's external territories and the Jervis Bay Territory, *Islands in the Sun*. The Committee recommended that the Commonwealth adopt an increasing cost recovery approach to funding for Norfolk Island. The Committee stated,

> the Commonwealth should not reduce the level of services or expenditure to the Island, but rather that the Commonwealth adhere to its undertaking to ensure that Norfolk Islanders receive equivalent benefits, rights and protection under the law as other citizens of the Commonwealth of Australia.[1361]

The Norfolk Island Government submitted that there should be a staged reduction of the level of services and expenditure by the Commonwealth. In its response to the Committee's report, the federal Government agreed with the Committee's recommendation that the Commonwealth adopt the principle of increasing cost recovery. However, in doing so, it noted

> Commonwealth outlays will decrease as more responsibilities devolve to the Norfolk Island Government under the service delivery approach adopted by the Norfolk Island Government and the Commonwealth.[1362]

14.65 ***Taxation and social services.*** Among other things, the Committee also considered whether the Commonwealth's income tax regime and social security regimes should be extended to Norfolk Island. The Committee concluded that so long as there is an adequate level of social services provided by the Norfolk Island Government, then Commonwealth income tax laws should not apply. It

> acknowledged that the Norfolk Island Government is generally acting with goodwill in safeguarding the interests of Norfolk Island in terms of revenue raising and the provision of social services.[1363]

The Committee balanced this against the proviso that it was

> anxious to ensure that adequate benefits and services are available to the people of Norfolk Island.[1364]

The Committee recommended that the Commonwealth Grants Commission undertake a review of living standards, social security provisions and the economic base of Norfolk Island. The Government declined to follow this recommendation, saying that there are adequate review mechanisms in relation to the Island's progress towards internal self-government.[1365]

Effect of the Commission's recommendations on current funding arrangements

14.66 The provision of additional Commonwealth resources may be inconsistent with the Government's current policy of adopting an increasing cost-recovery approach towards Norfolk Island. However, the level of services and benefits available to the residents of Norfolk Island, especially women, is unacceptably low compared to those available to women and men living in mainland Australia. The Committee's recommendation and the Government's response regarding taxation and social services benefits were both dependent on an adequate level of services and benefits being provided by the Norfolk Island Government. In light of the Commission's findings regarding the lack of legal and support services available to Islanders, the Commission suggests that consideration again be given to reviewing the living standards and economic base of Norfolk Island. The Commission also suggests that, as far as is relevant, the federal Government give further consideration to extending Commonwealth income taxation and social security arrangements to Norfolk Island.

15. The future: other issues raised in submissions

Introduction

15.1 This chapter reports on submissions on issues in DP 54 that have not been covered elsewhere in this report.[1366] It points to future action that should be taken or is planned. The topics covered reflect the matters about which submissions indicated there was wide community interest or cause for concern. In two particular areas, gay and lesbian issues and sex workers, the Commission has recommended that further work be undertaken. The Commission does not make any direct recommendations about any of the topics concerned because more research than can be undertaken in this reference is required. In some areas, work is underway in other bodies and it would be a duplication of effort for the Commission to undertake separate research. There are four major sections:

- political life
- work
- sex workers
- family life and relationships

Political Life

Introduction

15.2 CEDAW provides that women should have the right to participate in political life on equal terms with men.[1367] Women should be active participants in the law-making processes in parliaments, courts, tribunals, the legal profession, government and community groups. At the federal level, women presently make up 10.2% of the House of Representatives and 22.4% of the Senate.[1368] There are 31 members of the federal ministry, three are women. There is one woman in Cabinet among 19 ministers and two women in the shadow cabinet.[1369] Across all State and Territory parliaments there are 618 parliamentarians, 16% of whom are women.[1370] Women are Governors in two States.[1371] A woman heads only one government, that of the ACT. The first woman was chosen to head a government in May 1989.[1372] Only three States or Territories have had women as Premiers.[1373] The exception is Norfolk Island where three of the seven members of the Legislative Assembly are women. In local government there are 8535 elected officials of whom 20.2% are women.

Importance of women's participation

15.3 Women are under-represented at all levels of decision making in government, in political parties and in senior levels of the public service, at both State and federal level. The importance of women's involvement in the political process is addressed in many submissions.

> *It is important for women to gain greater representation in the political field for several reasons. Firstly, they can provide a female voice in debates and policy making. Secondly, they are more likely than the male-stream politicians to support policies which seek to end discrimination of oppressed and minority groups in society. Thirdly, they provide role models for girls and women not only in the political arena, but in other areas of public life from which women have been excluded. Fourthly, the presence of women helps to break down the 'boys club' atmosphere of parliament. Fifthly, the only way for a feminist perspective on democracy to emerge is for feminists to become participants in political discussion. Finally, women perceive themselves as bringing a greater generosity to politics, thus breaking down the notion that politics is a selfish business.*[1374]

Submissions report that women's under-representation is a result of the male culture that prevails in politics and of electoral laws and the system of single member electorates. Both culture and system need to change to make political life more accessible and responsive to women.[1375]

Masculine culture

15.4 ***Disadvantages for women.*** The masculine culture associated with political life disadvantages women in a number of ways.

> *A traditional route into politics has been through the professions, such as law, medicine, teaching, and journalism as well as through the trade unions. Because women have had difficulty breaking into the upper echelons of these worlds, additional structural barriers are placed in their way. Women face problems in dealing with the factionalism of the party. Factions revel in the party political strategy of conflict - from the preselection process, to the floor of parliament. A danger for women is that in order to satisfy their faction's policies they can end up denying their feminism, thus becoming a token parliamentary woman. In addition, the conflict-based system works against women because they are socialised to be a peacemaker and consensus finder, thus increasing their discomfort in conflict politics.*[1376]

Responsibility for child care is a significant barrier to a woman's progression to and within politics. For example, federal parliament has no on-site child care facilities. Parliament often has unpredictable sitting hours, making it hard to organise time with children and child care needs. At the pre-election stage, women candidates seeking election often do so in marginal seats. A candidate is expected to work hard, especially at night, at the grass roots level, and women with child care responsibilities find this difficult. The informal power structures associated with political life, such as drinks after work, formal dinners and sporting events, disadvantage women who have the care of children.[1377] The submission from the Women's Electoral Lobby calls for a review of the terms and conditions of parliamentarians, including travel arrangements and access to child care, to ensure that women are fully able to participate in political life.[1378]

Party procedures and the electoral system

15.5 ***Preselection procedures.*** Political party preselection and parliament are exempt from anti discrimination laws. These procedures are seen by women attempting to enter politics as preserving male political power-broking.

> *Political party preselection procedures vary from party to party, from time to time and still allow for the play of personal whim and prejudice. The system of political patronage, where powerful party officers and Parliamentarians provide men, usually young, with positions within the party structure, effectively advantages such men in preselection. Anecdotal evidence indicates that the preselectors still feel free and safe asking questions of female candidates which would be discriminatory in law if they arose in any other pre-employment job selection situation.*[1379]

Submissions liken the process of selecting candidates to other employer-employee relationships, with the political party and, if the candidate is elected, the State as the respective employers. Glass ceilings are seen as applying in political life as they do in corporations.[1380] The Women's Electoral Lobby in some States favours, as a short term measure, amendments to the *Sex Discrimination Act 1984* (Cth) (SDA) and various State anti-discrimination laws to make discrimination in political party preselection procedures and in appointments to public office unlawful. It also points out the need to redress systemic discrimination. In Part 1 of this report the Commission recommends changes to the SDA to give the Sex Discrimination Commissioner power to investigate systemic discrimination. This might assist women in politics.

Changes and solutions

15.6 ***Recent changes.*** The ALP national conference in Hobart in September 1994 decided to introduce a quota of women candidates of 35% of winnable seats by 2002. The Liberal Party does not support quotas but supports more women in parliament. The Liberal Women's Forum encourages women to run as candidates for state and federal seats.

15.7 ***Electoral laws and community of interests.*** Under the *Commonwealth Electoral Act 1918*[1381] proposals for the redistribution of electorates involves giving due consideration to 'community of interests' including economic, social and regional interests. It could be argued that women form a social 'community of interest'.[1382] The operation of single member electorates in all Australian lower houses, except for Tasmania's House of Assembly has served systematically to exclude women. This has led to the suggestion that every seat have both a man and a woman member.[1383]

15.8 ***Proportional representation.*** Submissions argue that single member electorates disadvantage women and that proportional representation would ensure the election of a large number of women. This is already evident in Australia: women elected by a form of proportional representation account for 22% of Senators, but only 8% of members of the House of Representatives. Western democracies with some form of proportional representation elect more women than those with single member constituency systems.[1384] In proportional representation political parties are more likely to put forward a gender-balanced ticket. Women are not in such direct competition with men as they are in single member constituencies.[1385] Submissions call for investigation into more favourable electoral mechanisms to enable the election of a more representative number of women.[1386]

15.9 ***Quota systems.*** Submissions generally support some form of quota system with the eventual aim of women forming half the number of all parliamentarians.[1387] Submissions point to the success of quota systems in other democratic countries.[1388] One submission describes the introduction of quota systems in Norway.

> *There have been no problems finding able female candidates, the female share has increased without expelling male members, and the quota system for representation of both sexes was 'little by little approved of in the Norwegian society in general' as the basic condition for an acceptable nomination process and a 'natural part of our equal rights policy'.*[1389]

Other issues raised

15.10 ***Public office.*** Submissions advocate the need to address the level of female membership on public Boards and Committees.[1390] There are no requirements or guidelines to encourage the selection and assessment of suitable women although the federal government has committed itself to women comprising 50% of all members of government boards by 2000.[1391]

> *Before Ministers make appointments they should have to show they consulted widely for suitable appointees including women. This would include obtaining names from listings held by the Office of the Status of Women. The present system whereby appointments are made appears to be very subjective. There are no guidelines or procedures which must be followed and this allows Ministers to appoint men from a very narrow, known base with little or no account being taken of skills, knowledge or aptitudes. When asked to appoint women many Ministers claim that they know of no women suitable.*[1392]

15.11 ***Local government.*** Although women's participation level in local government is higher than at State and federal levels, local council culture is described by the Women's Electoral Lobby as old fashioned, male dominated and an undesirable working environment for women.[1393] One submission recommends that federal grants to local governments be conditional upon councils undertaking and implementing effective equal opportunity programs and policies.[1394] Federal grants made to the States, which are in turn allocated to local

government, could also be tied in this way. In 1991, South Australia passed amendments to the Local Government Act which placed an obligation upon local councils to develop and implement EEO policies. It also established a Local Government EEO Advisory Committee to provide detailed feedback on a confidential basis to each council on its situation and indicates areas which need further improvement. This practical example should have a significant impact on the position of women in local government.

15.12 ***Honours system.*** Recognition of women's participation in public life is important in providing role models for younger women, encouraging women to assume responsibilities as citizens, acknowledging the contribution and disproportionate involvement of women in voluntary, unpaid work and enhancing the credentials of individual women. Women and migrants have historically fared poorly in honours awards such as the Order of Australia. The federal government has established a committee to report to the government on whether the current honours system meets the needs of modern Australian multicultural society.[1395]

15.13 ***Women's involvement and further change***. One submission argues that women themselves must continue to be a driving force and continue to put pressure on political parties and politicians if their right to bear office is to be recognised.[1396] To date, there has been much talk about encouraging women to become involved but little strategic change to allow this.

> *Unfair bias, undemocratic monopolisation of public office by men, inequalities that are perpetuated by neglect and distortion on the community of interest of women and the under representation of women are not issues that loom very large in the concerns of party political brokers and gatekeepers. In the competitive hurly-burly of political life, even tokenistic consideration of unequal status of women seems to be rare. The reality is that we cannot rely on the good will of powerful men to redress these matters. We must begin to analyse the legal avenues we might use for redress.*[1397]

At a recent conference a delegate described a possible challenge to electoral systems that deliver unrepresentative legislatures under Articles 25 and 26 ICCPR using the First Protocol procedure.[1398]

Participation in the paid workforce

Introduction

15.14 Submissions to the Commission about work and employment constituted just under ten per cent of the total number of submissions.[1399] Some were extremely comprehensive[1400] and several provided valuable insights into individual employment experiences.[1401] Both DP 54 and the Interim Report presented detailed information about the position of women in paid employment and the barriers to their equal participation with men. From the many issues raised in the DP the following emerged as the key areas of concern[1402]

- women's double burden[1403]
- child care
- working hours
- superannuation
- pay and bargaining issues.

Child care

15.15 The quality, affordability and availability of child care are important issues for women in paid work. Most submissions are in favour of the extension of child care facilities, although some express misgivings.

> *Encouraging young married women to place their children in child care and return to work as soon as possible will only exacerbate our already high unemployment rate ... We are totally opposed to*

child care subsidies.[1404]

Women's Action Alliance believes that increasing the supply and affordability of child care services is not a just and equitable course for the government to pursue.[1405]

The majority of submissions, however, strongly support child care programs. There are varying opinions on the present system, from those who support it to those who believe that there should be a radical overhaul.

Ideally the cost of child care should be borne by the community in the same way that state education is provided. Childcare workers should be employed by the state.[1406]

[T]he present government's policies, as implemented by the Children's Service Program, have made substantial progress towards the aims [of supply, quantity and affordability].[1407]

Quality affordable workplace child care as a right is another vital means through which both parents could exercise their responsibilities and still be participants in the workforce.[1408]

15.16 ***Tax deductibility.*** Several submissions also recommend that child care expenses should be tax deductible[1409] or that a system of tax rebates be introduced. The Taxation Institute of Australia argues that, far from costing the Commonwealth money, deductibility or rebates would in the longer term be revenue positive because they would attract new workers into the labour force and encourage longer working hours among those already in work. Both of these factors would mean the generation of greater amounts of taxable income. There is no specific deduction provision for child care expenses in the *Income Tax Assessment Act 1936* (Cth). Tax payers can only rely on the general deductions provision to claim child care expenses.[1410] The traditional and still prevailing view is that child care expenses are not deductible under this provision.

In *Lodge v Federal Commissioner of Taxation,*[1411] Justice Mason found that, although child care expenditure for the taxpayer was 'an essential prerequisite of the derivation of income',[1412] it was not relevant or incidental to the actual income earning activity. It was expenditure of a private or domestic nature.

The Taxation Institute argues that because child care expenses are so closely connected to the earning of income that there is no sound reason, except tradition, why child care expenses should not be deductible.[1413] However, it is known that tax deductibility is of greatest benefit to high earners.

15.17 ***Assisting the most disadvantaged***. The present structure of financial assistance for child care is based on income-tested fee relief. Fee relief schemes benefit low paid and unemployed workers more directly than either tax deductibility or tax rebate schemes. The Sex Discrimination Commissioner endorses this structure in her submission.[1414] Clearly, detailed research into the financial and social implications of any change to the present system would be necessary if the current system were to be reviewed.

15.18 ***Location and opening times of child care centres.*** A number of submissions address flexibility as an important criterion in the provision of child care places. Inflexible child care hours limit the employment opportunities of the caring parent.

[T]here are anomalies between the length of shift a person might work and the amount of time a child can be left in care. Further problems arise because the span of standard working hours is now changing.[1415]

Women need access to affordable quality childcare in both their local communities and in their

> *workplaces. Different women have different needs and preferences. Childcare must be flexible and cover the hours worked by women: this also includes care for children of school age.*[1416]

15.19 ***Advisory service.*** The federal government has sponsored the establishment of a free advisory service to employers to facilitate effective child care arrangements. The Work and Child Care Advisory Services operate in Melbourne, Sydney and Brisbane. On request, the services will investigate the child care needs of particular enterprises. This may involve a recommendation to lease places in a community based system or the establishment of a work based care centre. Although this is an important step towards meeting real needs, it does not of itself increase the number of child care centres with flexible hours. Centres that are able to offer flexible hours remain rare primarily because it is difficult to establish financial viability for a relatively small number of places.

15.20 ***ALRC 70.*** the Commission recommended that there be provisions in the new child care legislation enabling flexibility in the hours of operation of child care facilities.[1417] The Minister should be able to waive or vary funding conditions that may inhibit the provision of services to parents whose work or study patterns are different from the general pattern. The Commission also recommended a broader definition of work and better planning to meet community needs.[1418]

Working hours

15.21 ***Part-time work.*** Women's participation in the labour force has increased so that women now represent 41.9% of the total workforce.[1419] But this growth is largely explained by the increased number of part-time jobs[1420] which are overwhelmingly done by women.[1421] Women form the majority of part-time and casual workers.[1422] Because of their family responsibilities and because flexible child care is limited, many women take on part-time work. For some this is an attractive option. For others it is the only option.

> *Part-time work allows married women to combine caring duties at home with labour force participation offering in most cases a source of independent income, a sense of personal identity and maintenance, or development of skills and experience.*[1423]

However, the Commission was told of continuing problems associated with part-time work. For instance, submissions call for part-time jobs to be given permanent status after a qualifying period[1424] so that the work should have the benefits and protections of full-time workers. The Department of Industrial Relations reports that the union movement is now more supportive of this policy.[1425]

15.22 ***Part time work seen as 'women's work'.*** One submission argues that, consistent with past practice, part-time work is still constructed in the arbitration system as women's work. Many awards do not provide for work that is other than full-time and permanent. Where part-time work is introduced into traditional male industries it is often for a limited period only, as an extraordinary response to extraordinary economic conditions. The need to protect the wages of the full-time earner from erosion through part-time work is still an acceptable argument to the Industrial Commission.[1426] Department of Industrial Relations however reports that this is now changing.

15.23 ***Casual work.*** In casual work, wages may be increased by a loading, ostensibly to offset the disadvantages of casual work, but this increase may not compensate adequately for the loss of benefits (such as sick pay, vacation and long service leave) which permanent employees enjoy.[1427]

> *[M]any women work as casuals and ... any legislation which introduces provisions for maternity, paternity or family leave should ensure that the criteria for eligibility do not discriminate against women because they happen to be employed as casuals ... [I]n any legislation seeking to extend rights to women in the paid workforce a more appropriate definition of "continuous service" would include service under a series of contracts thus ensuring that there is no discrimination by exclusion of women who are employed as casuals.*[1428]

15.24 ***Redundancy provisions.*** Typically, a woman's participation in the workforce is more interrupted by periods of unpaid work than a man's although overall it may be as long as the average man's working life. Most awards provide benefits in the event of redundancy which increase in proportion to the employee's length of service. The provisions therefore offer most to those workers who have had a long term and continuous place in the paid workforce and little to those who have worked for a number of short periods or part time. Casual workers get nothing, even if they have worked full time for an extended period.

> *The rationale ... is undeniably to support and reward the worker as 'breadwinner'; redundancy payments were from the beginning created as a compensation to workers for their loss of expectation of a lifelong career.*[1429] *There are many reasons which could suggest the need for different rules. In the case of redundancy, for instance, it is certainly arguable that a more important consideration is the protection of those who because of their shorter attachment to the paid workforce are less able to find alternative employment and hence more vulnerable.*[1430]

15.25 ***A barrier to career advancement.*** Training and promotion go hand in hand with what is perceived as commitment to the job and commitment is often seen as a willingness to work long hours and unscheduled overtime and to do other domestically disruptive tasks.

> *Jenny's partner applied to change to permanent part-time work. He had to argue his case over and over, and it was indicated that he wouldn't be able to get a promotion while he worked part-time.*[1431]

> *The fact that part-time workers have family responsibilities is used to separate them out as workers with family as their primary commitment, in contrast to those whose primary commitment is to their work. Only the latter are seen as career-oriented. So the part-timers are falsely seen as low commitment, high turn-over workers.*[1432]

> *Opportunity for promotion could be enhanced by part-time options in senior and middle management.*[1433]

This correlation of part-time or casual work with lack of commitment is a severe drawback for women in their career aspirations. It may amount to indirect discrimination under the SDA.[1434] The Sex Discrimination Commissioner doubts that current provisions 'provide sufficient overall protection for all workers, men and women', who take on the double burden of work and family responsibilities.[1435] The Equality Act would help to fill the gap left by the SDA through its ability to challenge practices that are based on outdated assumptions about the role of men and women.

15.26 ***ILO 156.*** There have clearly been large labour market changes in the last 20 years. But social attitudes to work have not changed as quickly.

> *Women's employment prospects have been severely limited by attitudes and practices of employers regarding gender roles and a lack of commitment to structuring employment practices to take into account family and caring responsibilities ... The traditional image of a male breadwinner with a wife at home is no longer the norm.*[1436]

The Commonwealth has responded to these changes through the adoption of International Labour Organisation (ILO) Convention 156 *Workers with Family Responsibilities.* Under the Convention it is

> an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination, and to the extent possible, without conflict between their employment and family responsibilities.[1437]

The Government ratified the Convention on 30 March 1990. It has amended the SDA to proscribe dismissal from employment on the ground of family responsibilities[1438] and the *Industrial Relations Act 1988* (Cth) so that the Australian Industrial Relations Commission must take account of ILO 156.[1439] Further legislative amendments are proposed including scheduling ILO 156 to the SDA and the extension of the prohibition of discrimination in employment on grounds of family responsibility to all forms of discriminatory behaviour, not just dismissal. The ALRC has made a submission to the Legislation Working Group of the ILO 156 Interdepartmental Committee, set up by the Commonwealth Government, and endorses the view that legislation is required to implement fully the provisions of ILO 156. If the amendments to the SDA prove insufficient, some more comprehensive legislative program may have to be undertaken.

> Obviously, legislation can only go part of the way to changing attitudes about workers with family responsibilities and their commitment to work. However, legislation can be seen as tangible evidence of a public commitment to change and, through an enforced change of behaviour, to an eventual change in attitude.[1440]

The Work and Family Unit of the Department of Industrial Relations has

> *commenced an information dissemination program encompassing information and best practice examples on a wide range of flexible working arrangements which can be introduced at individual workplaces, including permanent part-time provisions, career break schemes and flexi-time provisions.*[1441]

15.27 ***Paid maternity leave.*** Few Australian women, apart from some public sector employees, are entitled to paid maternity leave although most have access to unpaid parental leave.[1442] When ratifying the Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW), Australia made a specific reservation on this point. A number of submissions recommend that the reservation be withdrawn and that paid maternity leave be available to all women workers in Australia.[1443] The question of how to fund this is also addressed. Most countries with paid maternity leave have a national insurance scheme but in Australia any payment, other than directly by the employer, would have to be made through the social security system which is funded out of general revenue. The consensus of submissions is that the burden should not fall on the employer as this would mean a significant additional cost for employing women workers, making it less attractive for employers to give women jobs.[1444] The National Council for the International Year of the Family has recommended that an allowance be paid to a parent for 12 weeks following the birth or adoption of a child.[1445] In addition, the National Women's Consultative Council has argued that

> [t]he introduction of paid maternity leave in Australia would have economic and social benefits. It would encourage women's attachment to the labour force, allow an increased retention of experienced and skilled workers and thereby increase the potential for more productive and competitive workplaces, and would also promote equal employment opportunity.[1446]

Superannuation

15.28 The issue of retirement income is particularly important for women. On average, women live longer than men and therefore are more likely to spend more of their last years alone.[1447] Current government policies are aimed at retirement income being provided by superannuation funded by the employer or the employee or a combination of both, rather than by the government through Age Pensions.[1448] The problem for women is that the superannuation system is geared to the typical working pattern of a man not a woman. The greatest benefit is derived by those who work full-time and continuously over an extended number of years. This is not a typical working pattern for women.[1449]

> *Superannuation is, for most women a double edged sword. Superannuation schemes have not taken into account the pattern of women's working lives. Even if women can access a scheme, an adequate retirement benefit cannot be accumulated from intermittent poorly paid work. Women in this position can least afford to forgo current income to contribute to a scheme.*[1450]

15.29 ***A priority area.*** Women's economic security in retirement has been identified as a priority area for the Office of the Status of Women (OSW). A number of governmental initiatives have improved the superannuation position for women in the past few years.

- The Superannuation Guarantee Charge has dramatically increased the number of women in superannuation schemes so that now 78% of all working women have some superannuation.[1451]

- All benefits to the value of the Superannuation Guarantee Charge must now be vested.

- A special trust account administered by the Australian Tax Office now addresses the problem of the accounts being eroded by fees and charges and capital protection of accounts under $1 000; women's fragmented work patterns mean that women are more likely to have small and multiple accounts.

- The general exemption of superannuation funds under the *Sex Discrimination Act 1984* (Cth) has been limited.[1452]

- Those temporarily out of the workforce, for example, to care for young children, may now continue to make contributions to their superannuation funds.

15.30 ***Issues still to be resolved.*** Despite these improvements, the task of making superannuation an effective and adequate means of support for retired women is not complete. A survey by the Retirement Incomes Modelling Task Force of the Department of the Treasury revealed that on average women have less than half the superannuation benefits of men.[1453] It also concluded that, even with the Superannuation Guarantee arrangements, women might still only accrue around half the superannuation benefits of men because of differences in average earning levels and workforce participation patterns.[1454] Further research is required into the likely development of women's work patterns - whether the current predominance of women in casual and part time work will continue or whether there will be a shift towards more full time continuous work for women.

15.31 ***Taxation.*** As superannuation is a form of enforced saving, the taxation implications must be properly addressed if inequities, perceived or real, are to be minimised. A contributor remarked that

> *If it is the government's intention to encourage savings by the current tax concessions for superannuation, there is little incentive for those on low incomes to save. The system is in fact unfair and regressive in its impact, as well as forgoing public revenue which could be used to raise the level of age pension expenditure.*[1455]

15.32 ***Relationship between superannuation and the age pension.*** Although the proportion of women with superannuation coverage is increasing, it is likely that many will still receive at least some part of their retirement income as the Age Pension. Projections by the Economic Planning Advisory Commission indicate that by 2051 around 75% of those aged over 65 will still be eligible for at least a part Age Pension.[1456] There have been suggestions that the superannuation system and the Age Pension need to be better integrated so that people can prepare adequately for retirement. Furthermore, both systems have been subject to a number of changes in recent years, with consequent community concern about retirement income.[1457] These problems are particularly acute for those who have not had a full time career spanning three or four decades.

15.33 ***Superannuation and marriage breakdown.*** When a marriage fails and there is a division of matrimonial property, superannuation frequently presents a problem. There is no settled way of determining the value of the superannuation even if the court can determine the extent of each partner's contribution.[1458] The Government is continuing to consult with relevant bodies to find the most equitable way of dealing with this problem.[1459]

15.34 ***The Senate Select Committee on Superannuation.*** The Senate Select Committee on Superannuation (SSC) is currently inquiring into and reporting on matters relating to the Superannuation Guarantee arrangements. One of the terms of reference is the impact of the Superannuation Guarantee Charge on

women, and on casual and part-time employees. The SSC is required to report on or before 28 February 1995 on:

> (1) the adequacy of current retirement incomes policy arrangements in meeting the needs of those members of the community, in particular women, whose participation in the workforce falls outside the traditional 30 to 40 year working life pattern
>
> (2) steps which could be taken to address any deficiencies identified in paragraph (1), including the advisability of implementing the following policies:
>
> (a) initiatives to address equity issues which arise during the contributions and benefits phases of the retirement incomes cycle, and
>
> (b) providing superannuation support for those members of the community who experience broken labour force participation and/or are in receipt of social security payments
>
> (3) the implications of the Government's decision to progressively raise the pension age for women from 60 to 65
>
> (4) any other relevant matters, including measures which, if implemented, would enhance the capacity of Australians to save for retirement.

The SSC is inviting submissions on these matters.

Pay and bargaining issues

15.35 ***Segregated workforce.*** Australia has the most highly sex segregated work force in the OECD. There is no sign that this is diminishing.[1460] Women's occupations are concentrated in sales, clerical and caring professions such as community services.[1461] Gender segregation also occurs within occupational groupings.[1462] Some submissions express the view that gender segregation in the work force should be broken down because it results in unfair treatment of women and because economic cycles have an uneven impact on different sections of the workforce.[1463] However, another approach was taken by the Adelaide Coordinator of WEL.

> *We have been trying to desegregate the workforce for 20 years and the work of Dr Sheila Rimmer at LaTrobe shows that the best way for women to get decent money and respect in the job they do is for us to concentrate on bringing full money and respect to the work women do now - child-rearing, nursing, teaching, librarianship, waiting, cleaning and cooking. These jobs need to be revalued, rather than us busting ourselves to get women into jobs where they have to suffer the hostility of men. What's wrong with a gender segregated workforce? - unequal levels of pay and respect and valuing.*[1464]

15.36 ***Pay parity.*** One problem with gender segregation arises from the difficulty in comparing unlike jobs and the skills needed to do them. If they are not compared in accordance with an empirical standard, one group may be exploited relative to the other. The principle of equal pay for work of equal value has been in operation since the Equal Pay cases[1465] but the more complex notion of comparable worth or pay parity has never been fully implemented. A number of submissions comment on the problem of evaluating skills.

> *Because the issue of skills recognition is a particularly difficult one and one which is deeply embedded in the culture of work, it needs to be addressed on a number of different levels. Funding more applied research in the area would be one way of identifying structures and mechanisms which work against women's skills being recognised and valued fairly. Creative methods of information dissemination would be needed to ensure that findings and strategies were circulated to the groups with the ability to bring about change.*[1466]

> *Competency based training and workplace skills assessment is the ideal opportunity to put equal value on skills whether they are held by women or men.*[1467]

Gender sensitive skills audits and job evaluations are required in order to avoid reproducing the bias in favour of male jobs. Women workers may need specific training in order to recognise and evaluate their own skills and press their case.[1468]

Special bias-free tools need to be scientifically developed to conduct skills audits and job evaluations.[1469]

The National Women's Consultative Council is of the view that the institution of a Work Skills Enquiry by the Government would be a step towards the proper assessment and remuneration of women's work.[1470]

15.37 ***ILO Convention 100.*** The recent amendments to the *Industrial Relations Act 1988* (Cth) incorporate a number of ILO conventions into Australian law.[1471] Among these is ILO 100, the *Convention on Equal Remuneration for Men and Women Workers for Work of Equal Value*. This will allow the opinions of the ILO Committee of Experts to be taken into account in future wage cases concerning equal pay. Although the Convention only requires measures to 'promote objective job appraisal'[1472] the Committee has endorsed comparable worth.[1473] This has not yet been tested but if successful would allow for the principle of comparable worth to be used in skill evaluation and wage setting in the Australian Industrial Relations Commission (IRC).

15.38 ***Codes of practice.*** The Sex Discrimination Policy Unit of HREOC has undertaken a project to develop a set of codes to assist employers and unions to ensure that

- equal remuneration for work of equal value is introduced and/or maintained in their workplace
- organisations and unions are provided with a checklist of what equal remuneration means and how it might apply to their organisation or workforce.

The codes will include a definition of equal remuneration for work of equal value, data on similar codes produced overseas, case law and precedents from relevant jurisdictions and techniques for reviewing remuneration policies and practices.

15.39 ***Enterprise bargaining.*** Industrial relations reforms have also extended enterprise bargaining in Australia. There is concern that this will disadvantage women, although there is a view that the process also has potential benefits for them.[1474]

Women are likely to experience greater disadvantage in wages and conditions under workplace bargaining than they did under the centralised wage fixing system. Most women workers do not have the same bargaining power as the majority of male workers.[1475]

We believe that women should have the right to bargain on their own behalf, in groups, and be entitled to some form of education in the process, assistance to develop negotiation skills and to have the right to choose their own advocates if they so desire.[1476]

Many women have very good bargaining skills. There will always be some women and, for that matter some men, who would not have skills in this area. This is one area where such skills should be taught.[1477]

Tests for productivity in service and non-manufacturing industries will need to incorporate tests for complexity of function performed, client satisfaction and qualitative measures of outcomes. If this challenge can be met, women workers may in the long term reap both the benefits of more flexible

working conditions and more equitable remuneration.[1478]

The Australian Industrial Relations Commission (AIRC) is obliged to protect the interests of those who are covered by an agreement but whose interests may not 'have been sufficiently taken into account'.[1479] There is also provision under the SDA for discriminatory awards to be referred to the AIRC by the SDC.[1480]

15.40 ***Women and trade unions.*** The ACTU has pledged that half its executive will be female by 1999 but its performance overall and that of State and Territory councils and of major unions is not exemplary. In South Australia, where the only substantial research as been carried out, only 7% of state secretaries, the top executive job, are women.[1481]

The biggest hindrance [to women in these unions] is the culture of the union movement which men use to denigrate women and exclude them. Women are frequently seen by men as not capable of doing the job.[1482]

[A]wards are very much precedent based and it has been men's work that has been valued and men's unions and employers that have set the standards and thereby created the precedents that women have had to follow. This can be seen by the heavy domination of women in casual work and the poor industrial protection these workers have.[1483]

Sex Workers

Introduction

15.41 The Commission received submissions from prostitutes' collectives in five States/Territories and from individual sex workers, legal centres and others.[1484] These submissions demonstrate that sex workers suffer discrimination in their work and in their lives.Attempts at reform have only partly succeeded.[1485]

15.42 ***The nature of sex work.*** Most sex workers are women.[1486] Work varies in its form from street soliciting, private work from home, escort agencies, brothels and massage parlours. There are popular perceptions that most women in the sex industry are recruited by pimps, are involved in illegal substance abuse and are responsible for the spreading of STDs and AIDS into the community as a whole. Studies and recent inquiries into prostitution prove that these are misconceptions.[1487]

Many community and government organisations assume that we only enter the industry due to the pressure of pimps or drugs. They don't realise that we are independent people making our own choices ... Many women are empowered by the work and for the first time gain economic independence.[1488]

Women enter the sex industry for a number of reasons. This type of employment may be an alternative to the sole parents' pension or other types of social security. It is a viable means of income for a number of tertiary students whose costs are much greater than is recognised by Austudy. Some women with qualifications find that the sex industry provides them with a greater income than as a working woman in their chosen profession. Many women do not stay in the sex industry for a long time; they may only work irregularly to pay pressing debts.[1489]

Legal regime

In Australia there has been a demand for prostitution since the earliest days of colonial settlement but the women who have met that demand have been stigmatised and punished.[1490]

15.43 At present in Australia the legal regime governing prostitution varies significantly from State to State.[1491] The most basic division is between those States that continue to criminalise most forms of

prostitution,[1492] and those States and Territories who have enacted reforms to reduce criminalisation.[1493] The greatest discrimination occurs in the former jurisdictions. All of these States make it an offence to live on the earnings of prostitution, to keep a brothel or permit premises to be used as a brothel, to procure and to solicit for the purposes of prostitution. Of the States which have decriminalised prostitution to some extent the ACT has made the most radical reforms to remove the criminal law from almost all activities except street soliciting; Victoria has a system of regulation through planning and licensing laws; NSW and NT retain a range of criminal offences. With the exception of ACT, sex workers are regulated by the criminal law in the types of work they are able to engage in.[1494] While the issues differ across jurisdictions according to particular laws, sex workers report common experiences of discrimination as a result of the still substantial criminalisation.Problems include harassment by police, discrimination in employment, lack of credibility in the criminal justice system and in the community generally.

Criminalisation of prostitution

15.44 ***Criminalisation discriminates against women.*** Sex work has been stigmatised through criminal sanction, but it has never been prohibited outright.

> *For a long time the law has been a tool by which women's sexuality has been controlled. It has served to divide women themselves according to good or bad behaviour. The gender bias found within the legal structures has established certain codes of behaviour for women and advocates punishment for those who violate these codes. Sex work has been perceived as deviant female behaviour due to popular notions that female sexuality is passive or non-existant ... Hence certain types of behaviour against sex workers are tolerated by the legal system.*[1495]

Criminal sanctions have been based on the need to control corruption. In some States, the strengthening of criminal sanctions has been used to attempt to dismantle the industry. This has occurred in Queensland with the passing of the *Prostitution Regulation Act 1993* (Qld) which made prostitution illegal in all forms except as a single operator. This legislation contradicted recommendations made by the Queensland Criminal Justice Commission in its inquiry into prostitution.[1496] Submissions report that the result of this policy is widespread abuse and discrimination.[1497] Criminal regulation in most states has ensured state control over women such that they are usually denied any control over their working conditions.

> *There is a need to explore beyond the so called moral issue of sex work. We can also no longer concentrate our efforts on dismantling the sex industry. Women engage in sex work for all types of reasons. The law as it exists only disempowers them; it certainly does not deter prostitution related activity. It is under these conditions that the fundamental human rights of sex workers need to be acknowledged and protected. Sex work needs to be legitimated as an occupation, not defined as a disease or type of deviant behaviour.*[1498]

Sex workers face direct discrimination in the law in some States that criminalise their activity but not that of the clients. So for instance in Western Australia, South Australia and Tasmania it is not an offence for the client to offer to pay for sex services but it is an offence for the sex worker to offer to provide it.[1499] In other jurisdictions the offence of soliciting applies to both parties.[1500]

Practical effects of criminalisation

15.45 ***Violence.*** The high risk of violence against sex workers is said to be a direct result of criminalisation as many women are forced to work underground and in isolation.[1501] One submission reports on the Queensland *Prostitution Laws Amendment Act 1992*.[1502] The Act only permits private work, which is the single operator from home or doing out-calls to a client's home or hotel. In some locations this private work is also regulated or prohibited. The law was enacted despite the Queensland Criminal Justice Commission which recommended a legalised cottage style industry similar to that in Victoria.[1503]

> *The murder of a young woman on the Gold Coast this year is the most tragic example of the way the*

prostitution laws in Queensland can force sex workers into dangerous working conditions ... she'd recently moved to this State, and was duly informed that private work was the only way to work legally in Queensland criminal law. She expressed dismay at this, she had only worked in establishments in her home State and felt that that was safer and that's why she chose to work in establishments. Melissa Ryan was murdered on her first private out-call to a client's motel on the Gold Coast. Queensland Minister Mr Braddy has tried to blame the victims of attacks, their choice to work in what he calls 'a sleazy dangerous industry'. Sex workers are not sleazy, they are women who have the right to protection from violence like any other woman and the PLAA is making the sex industry more dangerous for women.[1504]

Submissions report a reluctance on the part of sex workers to report assaults and sexual violence because of fear of prosecution for illegal activity. This reluctance is also due to the systemic lack of credibility of sex workers at all levels of the criminal justice system.[1505]

The police and judicial systems do not provide recourse for sex workers. In the majority of states police have the power to use the law to their discretion, sex workers are arrested but their clients, men, are not. Workers will not report assaults..Acts of violence towards sex workers are seen as `part of the job' and disregarded to all intents and purposes by the judicial system.[1506]

15.46 ***Poverty.*** Submissions argue that criminal sanctions create a cycle of poverty.[1507] Workers fined for illegal prostitution often have no alternative but to return to prostitution to pay the fine. Workers who fail to pay fines for illegal prostitution are often imprisoned. Women released from prison have little alternative to resuming work on the street to meet their needs, at least initially.

15.47 ***Police violence.*** Submissions report that sex workers are reluctant to report violence because, in the experience of some, police are perpetrators of violence. In all States, it is an offence for both sex workers and clients to loiter or solicit in a public place for the purposes of prostitution. However workers are the most often charged.

Street workers bear the brunt of all police/legal action against sex workers because of their visibility and illegality. Police are able to arrest sex workers even if there is no complaints of their behaviour; sitting in restaurants, using ATM's ... there is also a real risk of verbal abuse from patrol cars. Workers also report having been strip-searched in public and being exposed to internal searches without consent by officers of the opposite sex. There have been incidents where the presence of safe sex materials on a suspected worker has been perceived as evidence of prostitution related offences.[1508]

15.48 ***Lack of credibility in the legal system.*** Submissions report that sex workers are given no credibility in the legal system because their work has been labelled as deviant by the law.Their lack of credibility affects them as women in all kinds of court actions and undermines the criminal law's effectiveness in controlling corruption.

There are ample examples in law where evidence of a prostitute is deemed questionable by virtue of her profession. Petty criminals and their bosses are granted some immunity from the law because prostitutes have this reluctance to be a witness and therefore demeaned in a court of law. Prostitutes are also reluctant to report questionable characters to the authorites for fear of not being taken seriously.[1509]

15.49 ***Legal system tolerates violence against sex workers.*** Submissions argue that the legal system tolerates violence against sex workers because of the assumption that sex work is a high risk industry and that sex workers should be used to violence.

> *... to condone violence against a certain class of women does nothing to challenge the assumptions such as `She was asking for it'. The legal system endorses violence against workers as it reinforces their vulnerability through their criminality. All women are susceptable to rape, and there needs to be a recognition that prostitution laws make sex workers particularly easy targets for violence, not the existence of the sex industry itself.*[1510]

Submissions refer to the failure 'to recognise the trauma caused by sexual assault, assuming that chaste women would suffer more than a prostitute when raped'.[1511]

Discrimination

15.50 ***Employment status.*** Sex work is only marginally defined as employment by the legal system, to the extent that all prostitution businesses, whether legal or illegal, must pay taxation. Sex workers are denied most of the protection other workers take for granted. Even where sex work is regulated as an industry, as in Victoria, through planning and licensing laws, workers' rights are still disregarded.[1512]

> *The criminalising of prostitution forces prostitutes to work outside the mainstream. Prostitutes are therefore doubly disadvantaged because they do not get services other workers take for granted like immunisation, workcover, superannuation, long service leave and also face heavy fines and risk imprisonment ... The criminalising of prostitution means by default prostitutes have no human rights in respect of their right to work.*[1513]

> *Sex workers are not covered by industrial awards, workers compensation and other benefits most workers receive ... Some employers of sex workers have no regard to privacy and confidentiality laws. Adjusting to flexible hours, out of hours child care, illness, mental and physucal health are often ignored by employers of sex workers. Some employers impose fines if they are late or do not turn up for a shift ... While businesses are taking tax from their workers, they are not always paying the tax to the Tax Office. Workers are very annoyed that this is allowed to go on for too long without prosecuting.*[1514]

15.51 ***Discrimination by other institutions.*** Submissions report that sex workers face discrimination by lending institutions when applying for credit.[1515] Prostitutes feel they either are unable to state their employment on loan or credit card applications or, when they do, are told that this is not a legitimate occupation.

> *... in the area of banking and finance there is a lot of discrimination against workers. A woman who had been working legally in the sex industry had been banking her earnings and paying tax for about ten years, banking with a particular branch of a particular bank. Upon applying for a credit card recently she was told by the bank manager that her application was refused due to the nature of her occupation. The woman immediately contacted the SQWISI (Self Help for Queensland Workers in the Sex Industry) and was informed of her rights under the Anti-Discrimination Act. She advocated for herself at the bank and was successful in obtaining credit services, however, many workers are not in the position to be assertive about their rights and suffer discrimination without redress on a regular basis.*[1516]

Submissions also state that sex workers are refused health insurance and workers compensation insurance by companies. This is due to the belief 'that sex workers, women, are irresponsible, riddled with disease and bound to be bashed regularly'.[1517]

15.52 ***Role of prostitute collectives***. Sex workers depend on prostitute collectives in each State for information on health, welfare and legal advice. The role of the collectives is made more difficult by criminal sanctions against sex work.

For example in Queensland

... under the current laws the provision of health and welfare information is made extremely difficult due to the isolation and invisibility of an increasing number of private workers and the prohibition of advertising. SQWSI which is the Self Help for Queensland Workers in the Sex Industry - a health and welfare support group for workers in the sex industry - now has to rely heavily on the word of mouth to promote its services, instead of being able to readily locate and educate workers.[1518]

... in South Australia, prostitutes' self-help groups are denied the right to form an incorporated body which would allow them affective use of the law for reform of the law through direct participation, organised action and consultation.[1519]

Addressing the experiences of sex workers

15.53 Submissions call for the repeal of all laws regarding prostitution except those relating to violence, coercion and the exploitation of minors. One submission suggests that federal guidelines are necessary and would be welcomed by sex workers.[1520] The issues involved concern discrimination against women and other human rights such as rights to privacy and to work. The Commission recommends that the Human Rights and Equal Opportunity Commission investigate and report on the desirability and content of guidelines to protect the human rights of sex workers.

The sex industry is just that, an industry that should be regulated like any other related service industries ... Any problems with the industry could be regulated by laws used to control other related industries such as taxation law and occupational health and safety.[1521]

Family life and relationships

Matters previously covered

15.54 DP 54 discussed the current laws on family relationships. The Commission received many submissions on this topic.[1522] Some issues have already been addressed in Part 1 of this report.[1523] Part 1 of this report also reiterates the Commission's previous recommendation that there should be uniform laws throughout Australia to protect the property rights of de facto partners.[1524] This was supported by submissions.[1525] Some submissions[1526] support the role of the Family Court in property disputes between de facto spouses. The question of protection for de facto couples is under consideration by the Standing Committee of Attorneys General. Chapter 11 of this Report addresses the issue of matrimonial property disputes involving farming properties.

15.55 ***Property division.*** Another major issue of concern, that of the unfair result of division of property in family matters, is raised briefly in chapter 2 of this report. The main theme of numbers of submissions is the inequality of bargaining power women face in property proceedings because typically their husbands are in control of the finances of the marriage. Women are unaware of the extent of the finances and unable to prevent the husband from hiding assets.[1527]

It was shown that my husband was not disclosing his true financial position since a large amount of money from his work and later from his X business (in which I was a partner) was taken by him overseas. His lifestyle could not have been maintained on the level of income he declared to the Court. He failed to show where his extra income came from, yet this was not taken into account by the Court in arriving at the property settlement. The Court should endeavour to trace funds transferred overseas by a partner in marriage for the purposes of avoiding the inclusion of these funds in a property settlement. This should be supported by the Government by way of treaties with other countries.[1528]

Submissions say that the law and procedures are inadequate to prevent these abuses of the law.

> *Currently property procedure increases costs and protracts proceedings. Women commonly do not have access to finances immediately upon separation, still less information about the extent of finances. Yet they are required, typically as the initiating applicant, to frame an application dealing with all aspects of matrimonial property. Once the application is started, the applicant has to begin the expensive and frustrating process of wading through the procedural mire to discover the extent of the other party's assets and to verify the scant information that he may provide. You can't rely on the Court's power to order costs for obstruction and delay as a disincentive - given the statutory presumption in s.117 that each party should bear their own costs, often the court treats this type of evasion as par for the course, or the husband is not financially perturbed by the risk of costs.*
>
> *Form 17 (Financial Statement) ... leaves the impecunious wife only with the option of accepting the husband's statement as to the extent of their assets and financial resources or taking more expensive and protracted procedures such as subpoenas or discovery ... there should be a system whereby after property applications and cross applications are filed ... a mutual discovery and inspection of all relevant documents procedure would take place within 14 days. This proposal is analogous to civil procedure in Supreme Courts where failure to give discovery exposes the defaulting party to have their action or defence struck out by the court. Further each party must file an offer of settlement within a further 14 days from the inspection. This overcomes the present problem for the impecunious applicant of waiting for a conciliation conference date before being advised of the other party's attitude to settlement. In the present scheme it is in the interests of the party with control of the assets and finances to stall settlement and the usual court delays assist and conceal this practice.*[1529]

Some submissions complain about the extent of discretion in the Family Court in property division matters.

> *In property (and Stage 1 maintenance) matters, the present extent of discretion causes uncertainty, which in turn polarises parties, hinders early settlement, and increases costs. It enables the party in control of the assets and finances to protract the dispute and withold financial relief to the party in need.*[1530]

15.56 ***Proposed reforms.*** Proposed amendments to the *Family Law Act 1975* (Cth) in of the Family Law Reform Bill 1994 are of concern to the Commission in regard to their unequal impact on women. Stage 1 amendments deal with parenting rights and obligations, stage 2 with matrimonial property disputes. In the greater status they give to agreements which parties themselves draw up they fail to protect women adequately from unequal bargaining power in negotiating such agreements. These agreements do not appear to be subject to the same degree of control and protection as maintenance agreements under present law.[1531] Property agreements for property acquired by one party during the marriage are of particular concern. The Commission urges the government to reconsider the reforms in light of its report on Matrimonial Property (ALRC 39) and this report. The Commission intends to send a submission to the Attorney-General on these issues and other matters raised elsewhere in the report.

Other issues concerning family law and relationships

15.57 ***Gay and lesbian rights.*** The problems confronting lesbians are the subject of numbers of submissions.[1532] They cover many issues including lack of protection under anti-discrimination laws, discrimination in employment, lack of recognition in family law and in adoption rights, lack of protection from anti-gay violence, lack of recognition of gay relationships in such diverse areas as inheritance, taxation, superannuation and immigration. The issues are clearly wide ranging and raise serious concerns. They are often similar to those of gay men. The Commission has not been able to consider these issues in this reference. It suggests that the Attorney-General might consider a further reference to the Commission to report on legal issues affecting gay men and lesbians.

15.58 ***Abortion.*** A number of submissions observe that DP 54 did not directly seek contributions on the issue of abortion.[1533] The submissions mostly oppose the current structure of abortion laws in Australia. Two central arguments are put forward:

- that the inclusion of abortion in criminal codes and crimes acts is inappropriate
- that abortion laws are contrary to CEDAW in that the laws are discriminatory and therefore contrary to Article 1 and they contravene Article 16 (1)(e) which states that women should have the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

> *Without full control of their fertility women can not truly exercise their fundamental freedom to participate in all society's facets, be it in a political, economic, social, cultural, civil or any other field.*[1534]
>
> *Abortion is a simple medical procedure. To categorize it as a crime, ie lump it in there with rape, murder, assault, robbery etc, is a blatant example of the psychological oppression of women, and it is to be abhorred.*[1535]
>
> *Reproductive freedom is essential for women to achieve equality in Australian society and for them to enjoy fully their human rights and fundamental freedoms.*[1536]

One major submission from WA documents the sad, often humiliating and frightening experiences of women undergoing illegal abortions.[1537]

15.59 ***MCCOC.*** In 1990 the Standing Committee of Attorneys-General (SCAG) recognised that continued inconsistency in criminal law could not be justified. In response to this recognition, SCAG formed a committee of officers from every jurisdiction to advise their respective Attorneys-General on criminal matters. This committee is now known as the Model Criminal Code Officers Committee (MCCOC). Its long term objective is the production of a Model Criminal Code which all Australian jurisdictions could adopt. The MCCOC is addressing the subject of abortion in its forthcoming Issues Paper on fatal and non-fatal offences against the person. This will be released in December 1994 and will invite comment and submissions. A final report will then be issued in the middle of 1995. The Commission supports the work of the MCCOC as an important step toward the harmonisation and reform of Australian criminal law.

16. Minority view with respect to certain aspects of the Equality Act[1538]

16.1 The timetabling for this report was especially tight. This proved particularly difficult for us[1539] as part-time Commissioners with our other work responsibilities. However, as an understanding of the meaning of gender bias and equality in law is central to this reference, we have focussed our attention on these notions. In the following sections we discuss our understanding of gender bias and explain why, in our view, an equality guarantee should apply only to women, and not to both women and men. This is the major point of disagreement between us and the majority of the Commission.

The understanding of 'gender bias'

16.2 When this inquiry commenced early in 1993 there was considerable public and media comment on 'gender bias' in the law.[1540] Yet little discussion took place of what that term implies about the law. This section examines more closely the concept of gender bias in law. It discusses the meaning of 'bias' as a legal concept, and raises questions about the meaning of 'gender'. It suggests that the law's underlying concepts, some of which have been used unquestioningly for many years, might play a part in perpetuating women's lower status.

16.3 Chapter 2 of this report has referred to a number of examples of legal doctrine that appear gender neutral but in practice have a discriminatory impact on women. These include the concept of reasonableness, which has largely taken account of men's experiences, and has left women's experiences, particularly when they are targets of violence, out of account. Much of the legal discussion and analysis of 'labour law' fails to include women's unpaid work and marginalises (and undervalues) the paid work that women generally do. The time limits within which a civil legal claim can be pursued seem particularly unsuitable for adults who have been sexually abused as children, and most victim/survivors of sexual abuse are women. The following discussion, rather than focussing on substantive legal doctrine, examines the process of legal decision-making and how judging might be gendered.

16.4 ***Gendered assumptions.*** In law, as in other contexts, the word 'gender' is used to refer to women. The word does not tend to appear in an all-male context, the gender of the participants there being apparently invisible. Similarly, the issue of race is only ever raised in the context of people who are not white. This suggests that there is an original, seemingly neutral, category made up of the 'people like us',[1541] white men who are entitled without question to be decision-makers and judges and who are not seen as having a perspective of their own.

16.5 ***Biased justice.*** 'Bias' is a term that connotes some deviation from what is presented as an otherwise objectively ascertainable correct or neutral position. In administrative law, bias is a ground for judicial review of a decision. It is one of the two arms of natural justice or procedural fairness: people have a right to be heard in a case that affects them, and have a right to be heard by an 'unbiased' decision-maker. To be biased is not to conform to the expected, accepted standard of fairness, or to create in the mind of the observer a reasonable apprehension of failing to so conform.[1542] The underlying rationale of the bias rule is said to be that 'justice should not only be done, but be seen to be done'. Therefore, if fair-minded people would reasonably apprehend or suspect that the court or tribunal has prejudged a case, the bias rule is infringed.[1543]

16.6 The assumptions underlying 'gender' and 'bias' indicate that a case can be made for the proposition that judging is, or is at least perceived as, a white male activity. This is illustrated by the following examples.

16.7 ***A pregnant tribunal.*** In 1989 a Melbourne solicitor sought judicial review of a planning tribunal decision on the novel ground that 'the tribunal was pregnant'. He argued that the tribunal breached the rules of natural justice or procedural fairness - in particular, the bias rule - in that the tribunal member made a decision in favour of rebuilding a nursing home while she was pregnant.

16.8 He alleged that the tribunal member, five months pregnant at the time of her decision, 'suffered from the well known medical condition 'placidity' which detracts significantly from the intellectual competence of all

mothers to be'. In his affidavit, the applicant stated: 'Had I become aware of Ms S's pregnancy during the course of the hearing, I would have immediately suspected a likelihood of bias or incompetence'. Eventually he withdrew his application, but not before lodging an opinion from a well-known medical expert that a pregnant woman 'no longer has the clarity of mind and precision of thought she had before pregnancy'.[1544]

16.9 ***A jury of one's peers.*** In a criminal trial in Queensland, a District Court judge agreed to a request from a man charged with a criminal offence that no women jurors be empanelled since, he claimed, 'As a Christian man it's against my religious beliefs to be judged by women, as is specified in the Bible. It's an abomination of God. Man has been given the responsibility, and therefore I need men to sit on the jury for me.'[1545]

16.10 Whilst these two cases are extreme examples of the belief that 'judging' is an inherently male activity, they are part of a long line of cases that have challenged women's role as legal decision-makers on the basis of the bias doctrine.[1546] Interestingly, black men (and black women) judges in the United States have also been subject to similar challenges.[1547]

16.11 ***Having an opinion.*** In Australia, in 1969, a male industrial commissioner was challenged for bias on the basis of having indicated a belief in the principle of equal pay for women and men.[1548] Twenty years later, the chair of the Australian Broadcasting Tribunal was challenged under the bias ground of the rules of procedural fairness, inter alia, on the basis that she may have discussed a matter with her husband, also a lawyer.[1549]

16.12 In 1993, a Canadian law professor who held a part-time appointment as a human rights adjudicator was successfully removed from a sex discrimination case for bias because she had been one of 120 complainants in a systemic discrimination case against a university. More problematically, comments in the decision suggest that her experience in the area of sex discrimination law was itself almost a sufficient ground for removal.[1550]

16.13 ***What is 'an opinion'?*** It has been suggested that the process of reasoning involved in cases like this is as follows: while women are women and blacks are blacks, white men are just 'regular people'. Therefore it is possible to imagine, and argue, that blacks and women are biased, while white males are not.[1551] As one male African-American judge who was asked to stand aside from a discrimination case commented, 'black lawyers have litigated in the federal courts almost exclusively before white judges, yet they have not urged that white judges should be disqualified on matters of race relations'.[1552]

16.14 We know of no formal court challenge to a judge or other decision-maker, in Australia or elsewhere, on the basis that he was white and male and had constrained his decision-making by the adoption of a white male perspective.

16.15 ***Women judges and female plaintiffs.*** In 1990 Justice Bertha Wilson, then a member of the Supreme Court of Canada, gave a speech entitled: 'Will Women Judges Really Make a Difference?'[1553] In the course of her speech, dealing with the notions of bias and neutrality, she stated:

> If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human.[1554]

There was enormous publicity about her speech including calls for her resignation on the grounds that she was 'biased'. The argument seemed to be that by her mere suggestion that women on the bench might make a difference, Justice Wilson was 'playing politics and not being impartial'.[1555]

16.16 The assumption of maleness as benchmark also underlies the reference to 'women judges' and 'female plaintiffs'.[1556] Referring to a judge as a woman judge implicitly distinguishes her from the norm and reinforces the underlying assumption that judges are men and judging is a male activity: 'The working image of a 'Judge', as opposed to 'Justice', has been that of a white man.' Women were not permitted to practise law until well into this century. It is no surprise then that there are very few women judges in Australia; in 1993, a total of 6% of judges on superior courts were women.[1557] And it cannot be assumed that as more women graduate from law schools, they will inevitably swell the senior ranks of the profession, including the judiciary.[1558] It is essential that there are more women judges, but this of itself will not bring about equality

for women in law. Because of the long-standing exclusion of women from law, the substantive legal doctrines we use on a day-to-day basis were developed by men, with their problems and concerns in mind, and reflect men's perspectives on the world.[1559]

16.17 ***Wider than the criminal law.*** The Senate Committee on Gender Bias and the Judiciary, discussed in Chapter Two of this report, clearly recognised that bias against women in law is both prevalent and extends beyond bias in sexual assault law. It also recognised that it extends beyond judges' personal political opinions. While less obvious in other areas of law, such as tort, tax and company law, gender nonetheless operates to structure people's dealings with the law right across the legal system in a way which can well be described as 'bias' in its more general sense.

16.18 ***Gender bias and equality.*** One way to respond to gender bias in law is through fostering a better understanding of the meaning of equality in law. The preferred understanding of equality is outlined in Chapter Three; this is one informed by a 'subordination analysis', or an analysis based on an understanding of power and disadvantage. One way to give effect to this understanding is through an equality guarantee.

16.19 ***The equality guarantee.*** We accept the general direction of the proposal contained in Chapter 4. Legislation that is separate from anti-discrimination legislation, dealing more fundamentally with equality in law, could be a powerful force to advance women's equality. We also agree generally with the recommendations as to how it would operate, although, unlike the majority, we think the equality guarantee should extend in full to actions in the so-called private sphere (discussed further below). We endorse, in particular, that part of the majority's definition of equality which insists on turning to the context of a law or practice to decide whether there is a real or practical inequality.

Public or private?

16.20 The majority has recommended that the equality guarantee could be used to challenge 'government laws, policies and public actions in the broadest sense'. The majority recognises that much of the inequality women experience is through the actions of private individuals or bodies. However, the majority takes the view that, given the innovative nature of the proposed equality guarantee, it should not be 'available to challenge private actions if it is the only legal breach or remedy identified'. Rather, in relation to private entities, it can only be used as an additional argument if a person already has a cause of action: 'A person with an existing cause of action could argue that a particular law or application of law is incompatible with equality and should therefore be reinterpreted or overruled'. In our view, a failure to extend the equality guarantee fully to the 'private', non-governmental sphere would offer a very limited form of redress for the systematic inequality faced by women in Australia.

16.21 ***International obligations.*** The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which would provide the constitutional foundation for an equality guarantee, extends to the implemenation of equality rights in all fields, public and private. Article 1 provides:

> ... the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field.

In our view, it is appropriate and desirable to implement CEDAW in Australian law to the fullest extent possible. Hence, we recommend that the equality guarantee extends in full to the so-called private sphere, that is, to non-governmental actors, and thus that a breach of an equality guarantee could found a cause of action independently of any other legal claim against, say, an individual and could lead to an award of damages. In our view, the promotion of equality in the non-governmental sphere is a pre-requisite to the achievement of women's equality in law.

16.22 ***The major disagreement.*** The basic disagreement between us and the majority of the Commissioners is whether the guarantee of equality should apply 'for the benefit of both women and men' or for the benefit of women only. In our view, an equality guarantee should apply only for the benefit of women. Hence our preferred starting point is an Act, a Status of Women Act which states that

> Every woman has the right to equality in law.

Our reasons for so recommending are discussed below.

Symbolic and practical advantages in the legislation directly identifying the problem

16.23 As the establishment of this reference acknowledges, women do not fare well in the Australian legal system. Women are inadequately represented in decision-making roles within the legal system. Moreover, both the common law and statutory law have developed in ways that ignore or devalue women's experiences. Men as a group have been advantaged by the law. One way to respond to this gender bias in our legal system is to propose the creation of a legislative guarantee of women's equality. This would have greatest impact if it clearly defined the problem to be dealt with: women's inequality in the legal system. It would make a strong symbolic statement about the imbalanced nature of the legal system and the government's determination to redress it. Practically, it would provide a remedy for women in particular cases of inequality.

16.24 ***Consistency with the subordination approach.*** Legislation that unequivocally recognises that the central issue in gender equality is the power imbalance between women and men, rather than mere differences between them, is most consistent with the subordination approach to equality outlined in Chapter 3 of this report.

16.25 ***The importance of accurate naming.*** If the problem of women's lack of equality in law is recognised by name in the title and body of the legislation, we not only accurately label the problem but allow it to be properly addressed. Naming a problem accurately assists in its resolution. For example, the development of a legal remedy for sexual harassment contributes to the recognition of the problem, in the community discussion of what the problem was, and in the development of both legal and non-legal strategies to address it. As has been pointed out, 'sexual harassment, the event, is not new to women. It is the law of injuries that it is new to'.[1560] In our view, the identification of the problem of inequality for women in the law will increase our capacity to address it.

16.26 ***Other forms of discrimination experienced by men.*** While men may be discriminated against in some circumstances, this is in almost all cases not because of their gender or sex, but because of some other characteristic that manifests disadvantage in our society. For example, Aboriginal men are disproportionately likely to be imprisoned. However, this is not because they are men - as is demonstrated, if by nothing else, by the fact that Aboriginal women are also much more likely than white women to be imprisoned - but because of their race.[1561]

16.27 ***Existing remedies available.*** To the limited extent that men are discriminated against because of their sex (rather than, say, their race or their disability), they are able to make a claim under the Sex Discrimination Act (SDA). Although the ALRC has suggested in Final Report Part 1 that this Act embodies only a limited understanding of equality, and applies in limited areas (largely the so-called public spheres of work, accommodation, provision of goods and services), the ALRC argued that it remains an important tool for individuals to pursue claims of discrimination. Some of these individuals will be men.

16.28 Indeed, if a gender-neutral approach is to be pursued, as the majority recommends, it would seem more appropriate to amend the Sex Discrimination Act (SDA), rather than to introduce new legislation. This could contain the new, contextualised definition of equality, and further efforts could be made to remove or appropriately limit the exemptions under that Act. However, if our focus is on women's inequality, we need a different, more specific, legislative response.

16.29 ***Consistency with international obligations.*** Women's experience of inequality in law has been recognised by the international community. CEDAW was adopted in recognition of the fact that women's interests could not be dealt with without especially drawing attention to them. Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) deal with non-discrimination on the basis of sex, but, as the preamble to CEDAW makes clear, they have not been adequate to address women's inequality. CEDAW, then, is a recognition of the particular nature of discrimination against women. The success of the Convention is based on its sex-specificity; its force would be totally dissipated if it were gender-blind or gender-neutral. The majority of the Commission recognise that CEDAW was designed to respond to 'the specific problem of women's inequality and discrimination against women'. However, they note that it was enacted in the context of a general (and gender-neutral or gender-inclusive) recognition of equal rights contained in the ICCPR. In our view, Australia is in a precisely parallel situation. As noted

above, the SDA gives a cause of action to both women and men who have been discriminated against because of their sex. In our view, it is now appropriate to have an equality right directed solely to women; to those people in our society who are overwhelmingly more likely to experience inequality because of their sex than men.

16.30 ***An unnecessary additional platform for challenges to women's programs.*** One disadvantage of a gender-neutral Act, applying equally to women and men, is that it would allow and indeed encourage further legal challenges to women-only programs or services that were designed in order to address some of the well-documented legal disadvantages experienced by women.

16.31 ***A women only Act is likely to be interpreted broadly.*** It is argued by the majority of the Commission that a women-only equality guarantee could lead to 'a limited and narrow interpretation of equality'. It is difficult to find evidence for this proposition. The risk that a women-only guarantee would be interpreted narrowly seems no greater a risk than that a gender-neutral Act would be used to attack programs designed to redress women's disadvantage.

16.32 ***Gender-neutral provisions do not necessarily work for women.*** The majority of the Commission argue that sex-based distinctions do not necessarily work in favour of women. We cannot disagree. But we can equally assert that gender-neutral provisions also do not necessarily work for women. The 'persons cases' illustrate well how gender-neutral provisions can be interpreted in ways that do not benefit women. Earlier this century, a series of cases involved attempts by women to participate in a variety of forms of public activity such as the professions (including law) and their entitlement to be elected to public office. In Western Australia, for example, the Legal Practitioners Act 1893 entitled a 'person' to apply to be admitted to legal practice. But when Edith Haynes applied to be admitted to practice, after passing her examination in 1904 (and serving a period of time as an articled clerk, with the permission of the Barristers Board), that board refused to admit her. She then applied for a writ of mandamus to compel the Board to do so but the WA Supreme Court decided that she was not a 'person' within the meaning of the Act.[1562] And, as has been described in Chapter 2, The Gender of Law, much of the gender bias that still exists in law arises from (or under) gender-neutral provisions. In any event, the proposed Status of Women Act bears no resemblance to sex-based distinctions that were designed to exclude women.

16.33 ***Will women intervening in 'men's cases' be of use to women?***It is argued by the majority that the Women's Legal Education and Action Fund (LEAF), a Canadian feminist litigation organisation, was able to intervene in *Andrews*, the case in which the Supreme Court of Canada developed a contextualised understanding of equality.[1563] The Court relied on LEAF's argument, and the majority suggests that this demonstrates the value of a generally applicable equality guarantee. As the majority notes, *Andrews* was not a case about sex discrimination or discrimination against men on the ground of sex. Rather, it was a case about discrimination on the ground of citizenship/residence. A feminist litigation organisation in Australia, provided it was granted standing, could as easily intervene in such a case whether there was a gendered or a gender-neutral Act. Indeed, under an equality guarantee that applies to men as well as women, such organisations may well be required to intervene in 'men's cases' to defend programs specifically designed to redress women's disadvantage.

16.34 ***Who can use a Status of Women Act?*** The majority of the Commission state that '[i]f men could not make direct use of an equality guarantee, they would be less likely to advocate for equality for women'. We disagree. As we have argued above, naming the problem - that women, because of their sex, experience inequality - on the face of any equality guarantee is more likely to lead to an increased recognition of the real harm to which the legislation is addressed, and therefore lead both women and men to advocate for women's equality. Under our proposed legislation, men or groups of men, provided they were concerned with equality for women, would have standing in the same way that women or groups of women would have standing.

Differences Amongst Women

16.35 ***Directed to all women.*** It is important to emphasise that the proposed SWA should apply for the benefit of all women in Australia, not just white Anglo-Celtic women.

16.36 Women experience inequality in a variety of ways. The Interim Report showed that a person's experience as a woman is coloured by her race, her sexuality, by any disability she may have, and so on.

Commonwealth laws address the question of discrimination on the separate grounds of race, sex and disability.[1564] But how do these laws work together when a woman's experience of discrimination is not unequivocally because of her sex or her race or her disability, but rather is the outcome of the intersection of two or more of these factors? Not only may discrimination law be unable to deal effectively with these intersecting characteristics, but, as the following examples illustrate, women's broader encounters with the law may well vary depending on one or another of these characteristics.

16.37 In some circumstances, the additional basis for discrimination will fundamentally transform the nature of the legal dispute. When we hear about a custody dispute, we generally think about it as a dispute between a mother and a father. But as is infamous in our Australian history, the policy of taking Aboriginal children away from their families meant that for an Aboriginal woman, the dispute was more often with the state than with a man.[1565]

16.38 In other circumstances, the extra 'disadvantage' may amplify, rather than transform, the nature of a woman's disadvantage when she encounters the legal system. Many women spoke at the public hearings or wrote to the Commission about their experience of violence and the inadequacy of legal responses. For Aboriginal women, that experience of violence is exacerbated by their distinctive experience as Aborigines. For example, particular concerns were expressed about police responses to Aboriginal women and it was pointed out that Aboriginal women do not even have access to the Aboriginal Legal Service (ALS) when they are abused by an Aboriginal man since the ALS will not act for both parties when they are Aboriginal. It is therefore is far more likely to be acting for the man.[1566]

16.39 While women experience disadvantage flowing from their distinctive reproductive capacities, young women with intellectual disabilities are more likely to be exposed to the risk of sterilisation than women without that disability.[1567]

16.40 Lesbians have told the Commission that violence directed at lesbians is different from the violence heterosexual women experience and is also different from violence directed against gay men.

> Lesbian women may be subject to violence or abuse from people they know, and this bears similarity to the experiences of heterosexual women. But this does not epitomise the major experiences of anti-lesbian violence, as lesbians are still more likely than heterosexual women to experience stranger violence.
>
> In other words the unique status occupied by lesbian women in a heterosexist culture suggests that anti-lesbian violence is not simply the result of anti-homosexual sentiment. Violence against lesbians can be understood as a form of social control and retribution for women who refuse to conform to a conventional 'feminine' gender role, a role which presupposes heterosexuality and reproduction. For many lesbians the existence of racist and ageist attitudes are equally important in understanding experiences of hostility and aggression.
>
> A strong belief in the sexual entitlements of heterosexual men and the subordinate status of women in our society appears to motivate some men to attack lesbian women on the basis of the woman's apparent rejection of her 'appropriate' role; thus, anti-lesbian violence can be seen to be a punishment for sexual autonomy.[1568]

These examples indicate that we cannot assume that all women will encounter legal problems in the same way. It seems clear that neither the 'sameness' nor 'differences' approach, described in Chapter 3, has been able to take account of these multiple experiences of women. It remains to be seen whether other approaches, such as an equality guarantee for women, that assess equality in context, can do so. A pre-condition of the success of a new approach to equality is its ability to encompass these intersecting manifestations of disadvantage. Just because the experience of disadvantage arises from being a woman with a disability, an Aboriginal woman or a lesbian, does not mean that gender disappears from the analysis. The violence lesbians experience is not just to do with their sexuality but also to do with the fact that they apparently reject the 'appropriate role' for women and are punished for their sexual autonomy. This is part of the disadvantage women experience because they are women and must be able to be encompassed within any guarantee of equality for women.

Appendix 1: Provisions of Standing Bill

The following is an extract from the Law Reform Commission Report No 27 *Standing in Public Interest Litigation.*

A BILL

FOR

An Act to make provision for more liberal rights of standing and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title

1. This Act may be cited as the Standing (Federal and Territory Jurisdiction) Act 1985.

Interpretation

2. In this Act, unless the contrary intention appears-

"enactment" means-

(a) an Act;

(b) an Ordinance of, or an Imperial Act or an Act of a State in its application in, a Territory other than the Northern Territory or Norfolk Island;

(c) an instrument (including a rule, regulations and a by-law) in force under an Act or an Ordinance as mentioned in paragraph (b); or

(d) a provision of an Act, of an Act or Ordinance as mentioned in paragraph (b) or of an instrument as mentioned in paragraph (c),

but does not include any of the applied provisnions as defined by section 3 of the *Commonwealth Places (Application of Laws) Act 1970;*

"plaintiff", in relation to a proceeding, means a person seeking relief in the proceeding;

"State enactment" means-

(a) an Act of a State or an Imperial Act in its application in a State;

(b) an Act or Ordinance of the Northern Territory or of Norfolk Island or an Imperial Act in its application in either of those Territories;

(c) an instrument (including a rule, regulations and a by-law) in force under an Act or Ordinance as mentioned in paragraph (a) or (b); and

(d) a provision of such an Act, of an Act or Ordinance as mentioned in paragraph (b) or of an instrument as mentioned in paragraph (c).

Proceedings to which this Act applies

3. (1) Subject to sub-section (3), this Act applies to the following proceedings:

(a) a proceeding in any court-

(i) in respect of a matter arising under the Constitution, or involving its interpretation, or arising under an enactment; or

(ii) against the Commonwealth, a person being sued on behalf of the Commonwealth or an officer of the Commonwealth,

to the extent that the relief sought in the proceeding is by way of a declaration, an injunction or a prerogative writ (including a writ of *certiorari,* a writ of prohibition, a writ of *mandamus,* a writ of *habeas corpus* and a writ of, or an information of, *quo warranto);*

(b) a proceeding in any court (other than a court exercising jurisdiction under a law in force in the Northern Territory or Norfolk Island), to the extent that the relief sought in the proceeding is by way of an injunction or a declaration, being relief for which, apart from this Act, a proceeding may, at the time when the proceeding is commenced, be commenced and maintained by the Attorney-General;

(c) a proceeding in any court, to the extent that the relief sought in the proceeding is provided for-

(i) by an enactment specified in Schedule 1 or 2; or

(ii) by an enactment that declares the relief to be relief to which this Act applies.

(2) A reference in sub-section (I) to relief by way of a declaration, an injunction or a prerogative writ includes a reference to relief (by whatever name called) in the nature of a declaration, an injunction or a prerogative writ, respectively, and provided for-

(a) by an enactment that commences after the commencement of this Act; or
(b) by a State enactment,

in substitution for, or as equivalent to, that relief.

(3) This Act does not apply to a proceeding begun before the commencement of this Act.

Territories

4. This Act extends to each external Territory.

Act to bind Crown

5. This Act binds the Crown in right of the Commonwealth, of each of the States, of the Northern Territory and of Norfolk Island.

Standing, &c., of Attorneys-General, &c.

6. This Act does not affect-

(a) the standing of the Attorney-General or of the Attorney-General of a State or of the Northern Territory to commence and maintain a proceeding;

(b) the power of an Attorney-General referred to in paragraph (a) to authorise a person to commence and maintain a proceeding as relator;

(c) where an enactment authorizes a person to commence and maintain a proceeding or to apply for particular relief-the right of the person to commence and maintain the proceeding or to apply for the relief;

(d) where a person has been authorized to commence and maintain a proceeding as relator-the standing of the person to commence and maintain the proceeding; or

(e) the operation of an authority (by whatever name called) given by the Attorney-General or by the Attorney-General of a State or of the Northern Territory to a person to act as relator in a proceeding.

Act not to affect other laws

7. This Act does not affect-

(a) the operation of a law relating to the jurisdiction of a court;

(b) the powers of a court in relation to a proceeding that is oppressive, vexatious, frivolous or an abuse of the process of a court; or

(c) the operation of a law relating to vexatious litigants (however described).

Standing to bring proceedings

8. (1) In relation to a proceeding to which this Act applies, the principles and rules of the common law and of equity the operation of which determines the standing of the plaintiffto bring the proceeding are abolished.

(2) Subject to the succeeding provisions of this section, every person has standing to commence and maintain a proceeding to which this Act applies unless the court, on application, finds that, by commencing and maintaining the proceeding, the plaintiffis merely meddling.

(3) The plaintiff shall not be taken to be so meddling by reason only that-

(a) the plaintiff does not have a proprietary interest, a material interest, a financial interest or a special interest in the subject-matter of the proceeding; or

(b) the interest of the plaintiffin the subject-matter of the proceeding is no different from the interest of any other person in that subject-matter.

(4) In a proceeding concerning the performance or purported performance of a duty, or the exercise or purported exercise of a power or function, that is imposed or conferred for the benefit of a person or persons other than the plaintiff, the court shall, in determining whether the plaintiff is so meddling, take into account, to the extent that it is practicable to do so, the wishes and interests of the person or persons in relation to the proceeding.

(5) Without limiting the operation of sub-section (4), where the plaintiffdoes not have a proprietary interest, a material interest, a financial interest or a special interest in the subject-matter of the proceeding, then, in determining whether the plaintiffis so meddling, the court shall take into account the question whether the plaintiff is able to conduct the proceeding as plaintiff adequately and, if the court finds that-

(a) the plaintiff is manifestly unable to conduct the proceeding as plaintiffadequately; and

(b) because of that inability, the conduct of the proceeding by the plaintiff would, or could reasonably be expected to, cause or result in harm to a person's interest (of whatever kind) in the subject-matter of the proceeding,

the court shall find that the plaintiffis so meddling, whether or not an application as to the plaintiff's standing has been made.

(6) The question whether the plaintiff has standing to commence and maintain a proceeding shall not be determined as a preliminary or interlocutory matter in the proceeding unless-

(a) a preliminary or interlocutory application as to the plaintiff's standing has been made; and

(b) the court is satisfied, in the circumstances, that it is proper to determine the question of the plaintiff's standing as a preliminary or interloclltory matter.

(7) Where, in relation to a proceeding to which this Act applies, an enactment provides that an act is to be or may be done by a specified person for the purposes of conducting the proceeding as plaintiff, the act may, if the proceeding is commenced under this Act by some other person, be done by that last-mentioned person instead of the person so specified.

(8) The preceding provisions of this section do not limit any discretion that the court has to refuse relief, but the court shall not refuse relief by reason only that-

(a) the plaintiffdoes not have a proprietary interest, a material interest, a financial interest or a special interest in the subject-matter of the proceeding; or

(b) the interest of the plaintiffin the subject-matter of the proceeding is no different from the interest of any other person in that subject-matter.

Intervention

9. (1) At any stage of a proceeding to which this Act applies, the court may direct that notice of the proceeding be given to the Attorney-General or to any person specified by the court.

(2) The Attorney-General, or the Attorney-General of a State or of the Northern Territory, may intervene in a proceeding to which this Act applies, whether or not notice of the proceeding has been given under subsection (1).

(3) Any other person may, with the leave of the court, intervene in a proceeding to which this Act applies.

(4) The leave may be given on such terms as the court thinks fit.

(5) In determining whether to grant leave, the matters that the court shall take into account include-

(a) whether the person has a proprietary interest, a material interest, a financial interest or a special interest in the subject-matter of the proceeding;

(b) if the proceeding concerns the performance or purported performance of a duty, or the exercise or purported exercise of a power or function, that is imposed or conferred for the benefit of some other person or other persons-the wishes and interests of that other person or those other persons in relation to the proceeding, to the extent that it is practicable to ascertain them; and

(c) whether the person is able to take part adequately in the proceeding as a party.

(6) Leave shall not be refused by reason only that-

(a) the person does not have a proprietary interest, a material interest, a financial interest or a special interest in the subject-matter of the proceeding; or

(b) the interest of the person in the subject-matter of the proceeding is no different from the interest of any other person in that subject-matter.

(7) Where a person intervenes as mentioned in sub-section (2) or (3), the person thereupon becomes a party to the proceeding.

(8) Where the Attorney-General, or the Attorney-General of a State or of the Northern Territory, intervenes as mentioned in sub-section (2), the orders as to costs that the court may make include an order for costs against that Attorney-General.

(9) The preceding provisions of this section do not affect any other right that a person has to intervene in a proceeding.

(10) In this section, a reference to a court includes a reference to a court hearing an appeal from a decision of some other court.

Amicus curiae

10. (1) At any stage of a proceeding to which this Act applies, the court may, on application, give leave to a person to make a submission orally or in writing to the court.

(2) Leave may be given on such terms as the court thinks fit.

(3) A person does not, by reason only that such a submission has been made, become a party to the proceeding.

(4) In this section, a reference to a court includes a reference to a court hearing an appeal from a decision of some other court.

Costs in relator proceedings

11. (1) This section applies in relation to a proceeding to which this Act applies where the Attorney-General or the Attorney-General of a State or of the Northern Territory has-

(a) authorized the plaintiffto bring the proceeding as relator; or

(b) commenced the proceeding on the relation of some other person.

(2) The power of the court to make an order for costs in the proceeding extends to making such an order against the Attorney-General concerned, whether or not that Attorney-General is a party.

(3) Where the court has made an order under sub-section (2), the court may, on the application of the plaintlff, order that, notwlthstanding any agreement to the contrary-

(a) the plaintiff is not liable to indemnify the Attorney-General concerned in relation to the liability of that Attorney-General under the order for costs; and

(b) any security for costs held by or for the benefit of that AttorneyGeneral is not enforceable.

(4) In determining whether to make an order under sub-section (2) or (3), the court shall take into account the extent and nature of the participation of the Attorney-General concerned in relation to the institution and conduct of the proceeding.

Abolition of maintenance

12. (1) Conduct (not being conduct that constitutes champerty) in relation to a proceeding-

(a) in a court exercising jurisdiction in a matter mentioned in section 75 or 76 of the Constitution; or

(b) in a court of a Territory other than the Northern Territory or Norfolk Island,

is not unlawful by reason only that it constitutes maintenance.

(2) A contract is not illegal, void or unenforceable by reason only that it relates to conduct of the kind referred to in sub-section (l).

(3) Sub-sections (I) and (2) do not apply in relation to anything done before the commencement of this Act.

Private indictments for Commonwealth or Territory offences

13. (1) Unless the contrary intention appears in the enactment creating the offence, where-

(a) a person (in this section called "the defendant") has been committed for trial in relation to an indictable offence, or an indictable offence triable before the Supreme Court of the Australian Capital Territory; and

(b) at the expiration of 3 months after the defendant has been so committed-

(i) an indictment in relation to the offence has not been filed; and

(ii) the Attorney-General, the Director of Public Prosecutions or a Special Prosecutor has not declined to proceed further in the prosecution under Division 2 of Part X of the Ju*diciary Act 1903,* the *Director of Public Prosecutions Act 1983,* the *Special Prosecutors Act 1982* or the *Australian Capital Territory Supreme Court Act 1933,*

any person may, after the expiration of the period referred to in paragraph (b), prosecute the offence by indictment in his or her own name.

(2) Sub-section (I) does not affect the operation of Division 2 of Part X of the Judiciary Act 1903, the Director of Public Prosecutions Act 1983, the Special Prosecutors Act 1982 or the Australian Capital Territory Supreme Court Act 1933.

Appendix 2: Provisions of Banking Code

Principles of conduct relative to guarantees contained in ABA Code of Banking Practice[1569]

17.0 Guarantees

17.1 This section shall apply to each guarantee and each indemnity (whether or not contained in a security) (called "guarantee" in this section 17) obtained from a third party who is an individual (called "the guarantor" in this section 17) for the purpose of securing any financial accommodation or facility provided by a Bank to any person (called "the borrower" in this section 17) other than

(i) a public corporation or any of its Related Entities;

(ii) a corporation of which the guarantor is a director, secretary or member or any of its Related Entities;

(iii) a trustee of a trust (including a discretionary trust) of which the guarantor or a corporation or a Related Entity that is referred to in paragraph (ii) is a beneficiary or one of a class of beneficiaries under the trust; and

(iv) a partner, co-owner, agent, consultant or associate of any of the guarantor, a corporation or Related Entity referred to in paragraph (ii) or a trustee referred to in paragraph (iii);

at the time the guarantee is obtained. The term "public corporation" has the meaning set out in section 9 of the Corporations Law.

17.2 A Bank may only accept a guarantee if the amount of the guarantor's liability is limited to, or is in respect of, a specific amount plus other liabilities (such as interest and recovery costs) that are described in the guarantee.

17.3 Before accepting a guarantee a Bank shall inform a prospective guarantor that the documents specified in section 17.4 (ii) and 17.6 will be provided to the prospective guarantor if the borrower consents. If the borrower does not consent, the Bank shall so inform the prospective guarantor and shall not accept the guarantee without the agreement of the prospective guarantor to proceed with the guarantee in the absence of such consent.

17.4 A Bank shall provide to a prospective guarantor

(i) a written warning about the possibility of the prospective guarantor becoming liable instead of, or as well as, the borrower, and

(ii) subject to obtaining the consent of the affected borrower, a copy or summary of the contract evidencing the obligations to be guaranteed.

17.5 A Bank shall recommend that a prospective guarantor obtain independent legal advice.

17.6 Subject to obtaining the consent of the affected borrower, a Bank shall send to a guarantor:

(i) a copy of any formal demand that is sent to the borrower; and

(ii) on request by the guarantor, a copy of the latest relevant statements of account provided to the borrower, if any.

17.7 A guarantor may at any time extinguish the guarantor's liability to a Bank under the aguarantee by paying to the Bank the then outstanding liability of the borrower to the Bank (including any future or

contingent liability) or any lesser amount to which the liability of the guarantor is limited by the terms of the guarantee or by making other arrangements satisfactory to the Bank for the release of the guarantee.

Appendix 3: Norfolk Island

Background information about Norfolk Island

Location

The Territory of Norfolk Island is comprised of Norfolk Island and the nearby Nepean and Phillip Islands. It is situated 1676 kilometres east-north-east of Sydney, approximately 890 kilometres north-east of Lord Howe Island and 1100 kilometres north-west of Auckland. Norfolk Island is about five kilometres wide and eight kilometres long. Its 32 kilometre coastline consists mostly of rugged cliffs except at Kingston in the south and Cascade in the north.

Historical background

Norfolk Island as a penal colony. Captain James Cook made the first recorded visit to Norfolk Island in 1774. It was uninhabited at this time. In 1788 the island came under the administration of the Colony of New South Wales (although it is unclear whether it was ever part of the Colony). From 1789 to 1814 the island was used as a penal colony and was occupied and cultivated by convicts. In 1814 the settlement was abandoned and the island deserted when convicts and soldiers were transferred to Van Diemen's Land (Tasmania) where a new penal colony was being established. The island was reoccupied as a penal settlement from 1825 to 1855. Between 1844 and 1855 the island was controlled by the Van Diemen's Land authorities.

Settlement by the Pitcairn Islanders. In June 1856, 194 descendants of the HMS Bounty mutineers were relocated from Pitcairn Island to Norfolk Island.[1570] On 31 October 1856 an Order in Council made by the Governor of the New South Wales Colony under the *Australian Waste Lands Act 1855* (Imp) proclaimed Norfolk Island to be 'a distinct and separate settlement' of the British Empire.[1571] In the following year the then Governor of New South Wales and of Norfolk Island, Sir William Denison, issued a set of laws and regulations to govern the settlement. In 1897 Norfolk Island became a dependency of the New South Wales Colony.[1572]

Norfolk Island becomes an Australian Territory. On 1 July 1914, the *Norfolk Island Act 1913* (Cth) came into operation. This Act had the effect of making Norfolk Island a Territory of Australia. The Governor-General was thereby enabled to make ordinances for the territory. By Proclamation issued on 23 December 1913, the 1897 laws of Norfolk Island were repealed and Imperial laws in existence as at 1828 were applied. This situation was reversed in 1957 by the *Norfolk Island Act 1957* (Cth) which had the effect of continuing in force all laws which applied immediately before the 1913 Proclamation was issued. However, the Norfolk Island Judicature Ordinance 1960 apparently nullified the effect of the 1957 Act when it reinstated English statutes in force in 1828 so far as they were applicable.

Norfolk Island becomes 'self-governing'. Following the report of the Nimmo Royal Commission into the administration of Norfolk Island,[1573] the Government introduced, and federal Parliament passed, the *Norfolk Island Act 1979* (Cth) ('the Act'). This Act established the Norfolk Island Legislative Assembly and Executive. The Legislative Assembly has wide powers to legislate for the peace, order and good government of the Territory of Norfolk Island. However, the Act preserves the Commonwealth's responsibility for Norfolk Island as a territory under its authority.

Norfolk Island today

Population. At the last census on Norfolk Island, taken on 6 August 1991, the Island had a total resident population of 1912 people, of which the majority (1478 persons or 64.7% of the total population) were permanent residents.[1574] The temporary or itinerant population, comprised mostly of persons holding temporary entry permits under the *Immigration Act 1980* (NI), was 434 persons (19.0% of the total population).[1575] In addition to the total resident population of 1912 persons, the island had a tourist and visitor population of 373 persons (16.3% of the total population).

Citizenship and demographic background. Residents of Norfolk Island do not necessarily hold Australian citizenship nor are they required to be permanent residents of Australia. At the time of the 1991 census, only 74.4% of the permanent population held Australian citizenship; the remainder were citizens of New Zealand or another country. Persons born on Norfolk Island are Australian citizens provided that one of their parents is an Australian citizen or permanent resident of Australia.[1576] In 1991 only 37.3% of the permanent population had been born on Norfolk Island; the majority of permanent residents were not born on the Island.[1577] Approximately 46% of the permanent population were of Pitcairn descent.

Economic activities. Tourism is the Island's major economic activity. Norfolk Island is host to between 28,000 and 30,000 arrivals each year. There is a small, growing trade in Norfolk Island Pine. However, the lack of a sheltered harbour and isolation have not permitted this and other industries, such as fishing, to be fully exploited. Consequently, the island is a net importer. In 1992-93, the Island's exports were valued at $1.7 million and its imports at $21 million.

Taxation. Australian income tax is not payable on income earned on Norfolk Island. Other federal taxes also do not apply. There is also no local income tax. However, a range of local, indirect taxes and fees are levied, including membership fees for the island's compulsory healthcare scheme[1578] and departure fees levied on persons leaving the island.

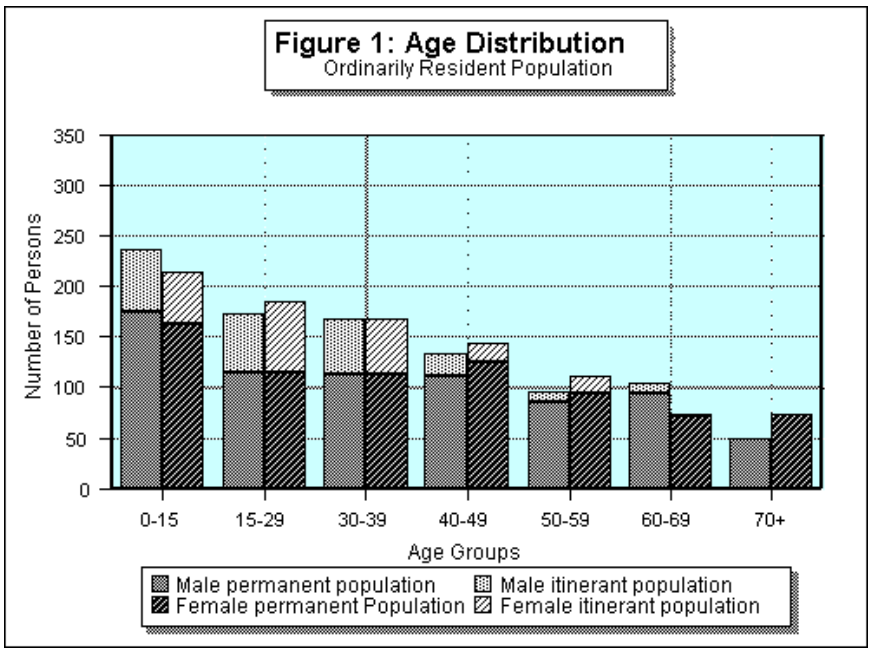
Women on Norfolk Island-statistical profile

Age distribution

In 1991, women made up just over half (742 persons or 50.2%) of the total permanent population on Norfolk Island[1579] and were exactly half of the itinerant population (217 persons).[1580] Table 1 and Figure 1 show the age distribution for women and men ordinarily residing on Norfolk Island at this time.[1581]

Table 1: Age Distribution of Norfollk Island Residents

Age Group	*No of Women (PP)*	*% of Women (PP)*	*No of Men (PP)*	*% of Men (PP)*	*No of Women (IP)*	*% of Women (IP)*	*No of Men (IP)*	*% of Men (IP)*	*Total*	*% of ORP*
Under 15	162	8.5	175	9.2	52	2.7	61	3.2	450	23.5
15-29	103	5.4	114	5.7	73	3.8	58	3.0	348	18.2
30-39	111	5.8	111	5.8	55	2.9	55	2.9	332	17.4
40-49	125	6.5	109	5.7	18	0.9	23	1.2	275	14.4
50-59	94	4.9	85	4.4	16	0.8	10	0.5	205	10.7
60-69	71	3.7	93	4.9	3	0.2	10	0.5	177	9.3
Over 70	73	3.8	48	2.5	0	0.0	0	0.0	121	6.3
Not stated	3	0.2	1	0.0	0	0.0	0	0.0	4	0.2
Total	742	38.8	736	38.5	217	11.3	217	11.3	1912	100.0

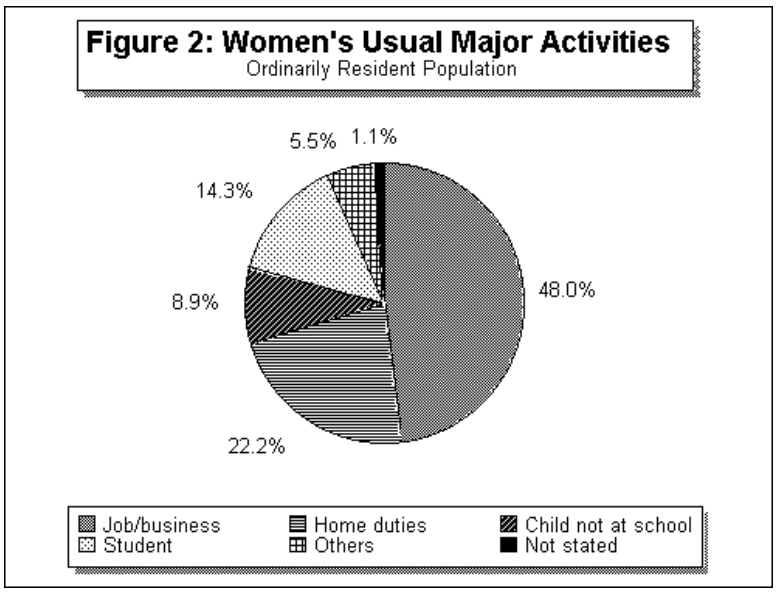


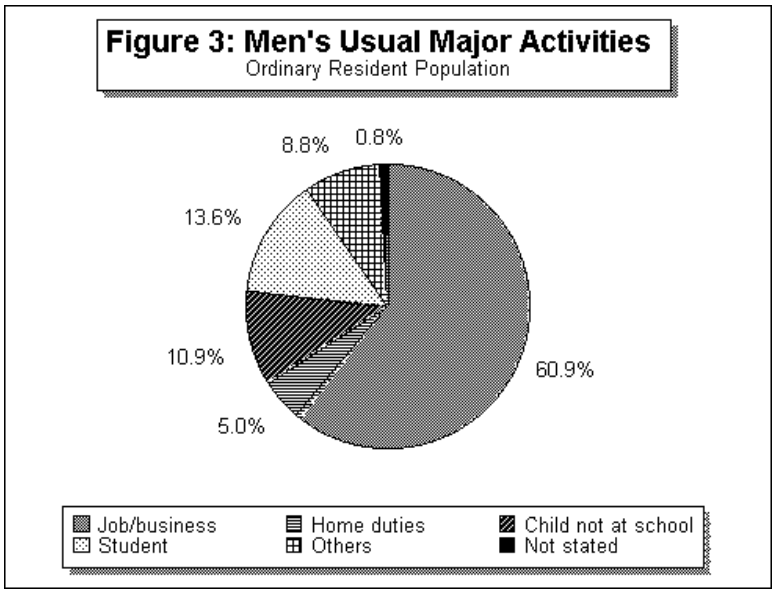
Usual major activities

The 1991 census of Norfolk Island also compiled statistics on the usual major activities of men and owmen on Norfolk Island. The categories of activity were as follows: working in job or business; unpaid home duties; child not at school; student (primary or secondary level); and others (including retired, unable to work, independent means). Table 2 and Figure 2 shows the breakdown of women in each area of activity for ordinary residents.[1582] Figure 3 shows the comparable breakdown for men.

Table 2: Usual Major Activities of Norfolk Island Residents

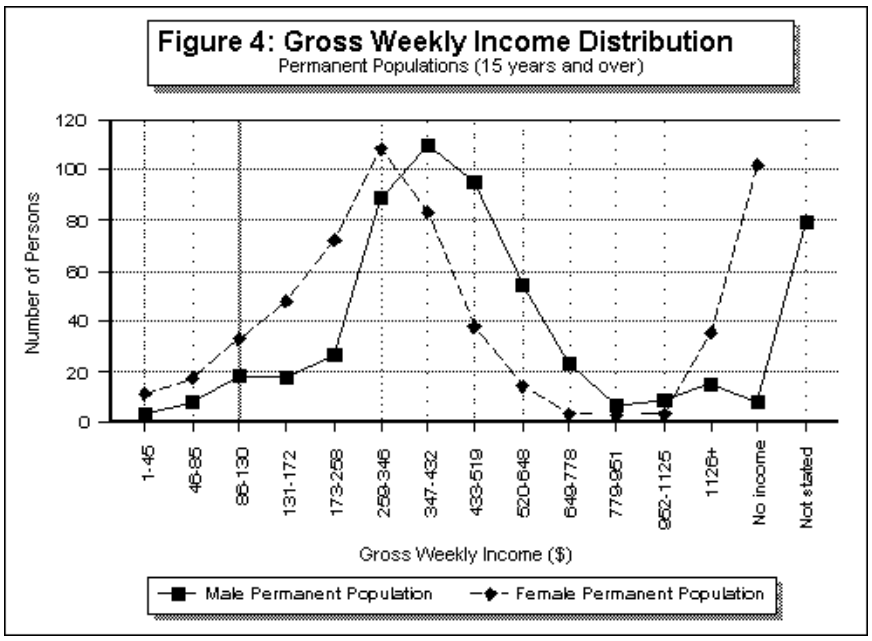
Activity	*No of Women (PP)*	*% of Women (PP)*	*No of Men (PP)*	*% of Men (PP)*	*No of Women (IP)*	*% of Women (IP)*	*No of Men (IP)*	*% of Men (IP)*	*Total*	*% of ORP*
Working in job	356	18.6	448	23.4	119	6.2	150	7.8	1073	56.1
Unpaid home duties	165	8.6	37	1.9	45	2.4	2	0.1	249	13.0
Child not at school	66	3.5	80	4.2	25	1.3	34	1.8	205	10.7
Student	106	5.5	100	5.2	26	1.4	28	1.5	260	13.6
Other	41	2.1	65	3.4	1	0.0	2	0.1	109	5.7
Not stated	8	0.4	6	0.3	1	0.0	1	0.0	16	0.8
Total	742	38.7	736	38.4	217	11.3	217	11.3	1912	100.0

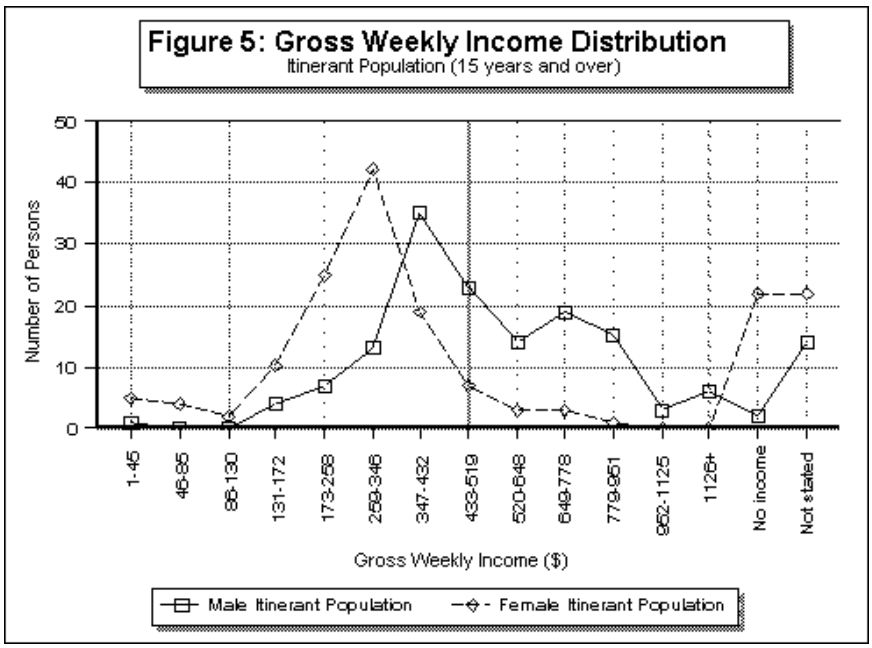




Income ranges

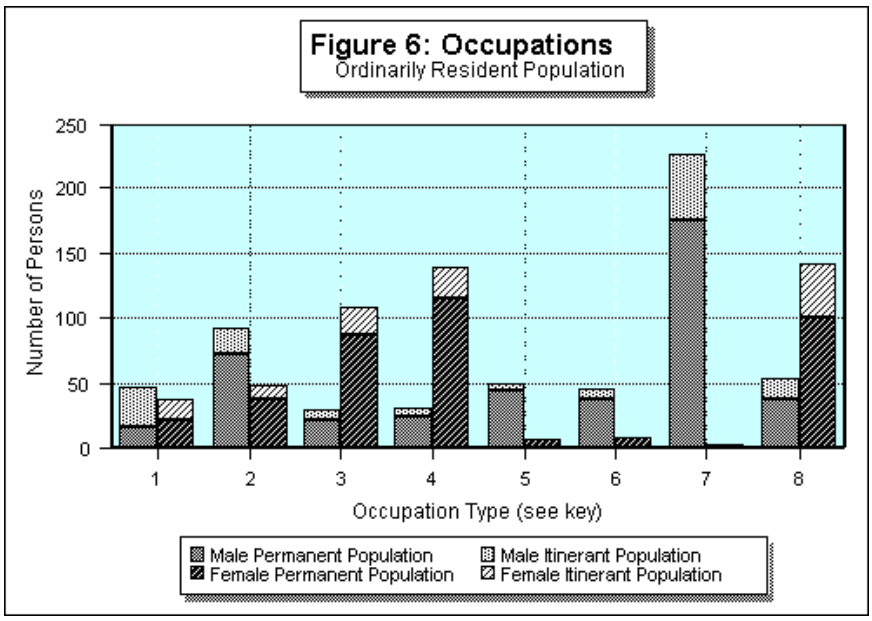
The census figures also show that, as a general trend, among those aged 15 and over who reside on the Island, either permanently or temporarily, women receive less income than men. Whereas a greater proportion of women had gross weekly incomes between $1 and $346, there was a proportionately greater number of men with gross weekly incomes in excess of $356. This was true of both the permanent and temporary populations. Interestingly, there were several income categories in which temporary residents did not register at all. The two income categories in which temporarily resident men did not register were relatively low ('$46-$85' and '$86-$130'). By contrast, the two categories in which temporarily resident women did not register were significantly higher ('$952-$1125' and '$1125 and over'). These figures are shown in Figures 4 and 5.





Occupations

Figure 6 illustrates that most women who were employed and ordinarily residing on Norfolk Island in 1991 were 'sales workers', 'clerical workers' or 'service, sport and recreation workers'. By contrast, most men were employed either as 'tradesmen, labourers' or in managerial and administrative positions. The number of men in managerial and administrative positions was almost twice the number of women employed in the same occupation.[1583] However, proportionally more women than men were employed as 'professional, technical and related workers'.[1584]



Key

1: Professional Technical and Related Workers
2: Administrative, Executive and Managerial Workers
3: Clerical Workers
4: Sales Workers
5: Farmers, Fishermen, Timber Getters and Related Workers
6: Workers in Transport and Communication
7: Tradesmen, Labourers
8: Service, Sport and Recreation Workers

Norfolk Island Government

Norfolk Island Legislative Assembly-composition. The Norfolk Island Legislative Assembly ('the Assembly') is now the main source of statute law for Norfolk Island. The Assembly is comprised of nine elected residents, of whom four hold ministerial offices.[1585] One of these Ministers acts as the head of the Norfolk Island Government.[1586] The Ministers, together with the Administrator, form the Island's Executive Council. General elections for members of the Assembly are held at least every three years.[1587]

Norfolk Island Legislative Assembly-powers. The Assembly has the power to make laws for the peace, order and good government of Norfolk Island. Subject to several express limitations,[1588] this is a plenary law making power. However, the Territory is not sovereign. The powers of the Assembly to legislate for the Territory of Norfolk Island are subordinate to the powers of the federal Parliament and the Governor-General to pass laws and ordinances for the Norfolk Island Territory under s 122 of the Constitution and s 37 of the Act respectively. Even though the powers of the Assembly are expressed in the same terms as the powers of State and internal Territory legislatures,[1589] the legislative capacity of the Norfolk Island Assembly is not restricted in the same ways as these other legislatures. For example, State and Territory legislatures are ordinarily not permitted to make laws about migration. This is not the case in Norfolk Island. Norfolk Island has its own immigration, taxation and social security regimes. It is also not constrained by the usual requirement, whether written or unwritten,[1590] that trade, commerce and intercourse between the States and the Territories shall be absolutely free.[1591]

Administrator of Norfolk Island. The Admininistrator of Norfolk Island is appointed by the Governor-General. Generally speaking, the Administrator is responsible for the same types of matters as the Governor of a State or Administrator of the Northern Territory, for example, the appointment of the Executive Council and the notification of legislation. The Administrator acts on the advice of the Executive Council when proclaiming legislation, the subject matter of which comes within Schedule 2 to the Act.[1592] The federal Minister has a power of veto over legislation passed by the Assembly, the subject matter of which comes within Schedule 3.[1593] The Governor-General has power, within prescribed time limits, to disallow any laws made by the Assembly.[1594]

Courts and tribunals

Introduction. Norfolk Island has a Court of Petty Sessions and a Supreme Court. It does not have a county or district court.

Court of Petty Sessions. The Norfolk Island Court of Petty Sessions was established under the Court of Petty Sessions Ordinance 1960. It sits monthly and at other times as and when needed and deals with summary criminal matters and civil matters where the amount of damages sought is $10 000 or less. It also exercises limited jurisdiction in family law matters. A right of appeal from the Court of Petty Sessions lies to a single judge of the Supreme Court of Norfolk Island and then to the full court of the Federal Court.[1595] Appeals to the High Court from the full bench are by special leave only. Appeals in family law matters lie to the Family Court. In 1992-93, 230 civil complaints were filed in the Court of Petty Sessions. Only 6 were heard. In its criminal jurisdiction, 107 informations were filed for the same period, of which 81 were heard. Four applications were filed in the Court's family law jurisdiction, of which 2 were heard. The Court has power to order that criminal matters be heard in the Australian Capital Territory where the Chief Magistrate is satisfied that the nature of the proceedings is such that it would be contrary to the interests of justice for the proceedings to be conducted in Norfolk Island.[1596] In determining whether the interests of justice require the proceedings to be transferred, the Chief Magistrate is to have regard to whether there is a real risk that the interests of the defendant would be prejudiced if the proceedings were to be conducted in Norfolk Island, the interests of the other parties (including witnesses) and any other relevant consideration. The Administration is obliged to meet the cost of ensuring that the defendant appears in the ACT. There is no similar provision for civil matters.

Supreme Court of Norfolk Island. The Supreme Court of Norfolk Island was established under the Supreme Court Ordinance 1960. It has unlimited jurisdiction and, like the Court of Petty Sessions, may also sit in the ACT. The Court may also sit in NSW and Victoria. The Court may make its own rules but where it does not the rules of the ACT Supreme Court apply. In 1992-93, 13 cases were listed in the Court. Of these, 5 were heard in Norfolk Island and 6 were heard in Sydney. The Court may hear civil matters on the Island or on the mainland. However, all criminal matters triable before the Supreme Court must be heard on the Island.

Current sources of law

Relationship between Acts of the Norfolk Island Legislative Assembly and federal legislation. Under s 122 of the federal Constitution, the federal Parliament retains authority to make laws for all territories, including Norfolk Island. This is a plenary law-making power.[1597] Successive federal Governments have allowed the Island a significant degree of autonomy. This is consistent with the recommendations of the Nimmo Royal Commission. Under s 18 of the Act, Acts of the Commonwealth Parliament do not apply to Norfolk Island unless expressed to do so. The *Sex Discrimination Act 1984* (Cth) expressly applies to Norfolk Island because s 9 provides that the Act applies throughout Australia, including external Territories. However, the *Affirmative Action (Equal Opportunity for Women) Act 1986* does not apply in Norfolk Island because the Governor-General has not made any regulations under the Act extending its operation to this Territory.[1598] Conflict between Commonwealth and Territory Acts is resolved in favour of the Commonwealth.[1599]

Ordinances made under the 1979 Act. Under s 27 of the Act, the Governor-General is permitted to make ordinances for Norfolk Island. In most cases, these ordinances must be introduced into, and approved by, the Legislative Assembly. However, where urgency requires, this requirement can be dispensed with.[1600] The Governor-General may promulgate an ordinance even if the Assembly rejects it if the Legislative Assembly's response is deemed to be unacceptable.[1601] Federal Parliament has an option to disallow ordinances.[1602] Conflict between ordinances and Acts of the Legislative Assembly is resolved in favour of the ordinance. However, conflict between ordinances and Acts of the federal Parliament is resolved in favour of the latter.

Ordinances made under the 1957 Act. After Acts of federal Parliament, ordinances of the Governor-General and Acts passed by the island's own Legislative Assembly, the next most important source of law is ordinances made by the Governor-General under the *Norfolk Island Act 1957*. Laws made under this Act remain in force until such time as they are amended or repealed by the Assembly or by an Act of the federal Parliament or a later ordinance of the Governor-General.[1603]

Laws made under the 1913 Act. Where there are no relevant federal or Legislative Assembly Acts or ordinances made under either the 1979 or 1957 Acts, then laws made prior to the commencement of the 1957 Act will have precedence. These include laws made under the *Norfolk Island Act 1913*.[1604] In the event that such a law were to apply, it would be necessary to update and ensure that these ordinances were not repealed or amended by later ordinances made under s 15 of the 1957 Act.

Consolidated laws and Imperial law. The consolidated laws issued by proclamation on 24 December 1913 are the next most important source of law. But for the Norfolk Island Judicature Ordinance 1960 they would have been the final source of law. However, the Judicature Ordinance had the effect of making the Island's legal regime subject to English statutes which were current in 1828 and which had been received in Norfolk Island in 1960. Finally, Paramount Acts of the United Kingdom Parliament, orders made under them and principles of common law and equity (where no statute applies) are also relevant when determining the law in Norfolk Island.

Reviews of Norfolk Island's legal regime

On 22 September 1988 the then Attorney-General, the Hon Lionel Bowen QC MP, requested the House of Representatives Standing Committee on Legal and Constitutional Affairs to inquire into the legal regimes of Australia's external territories.The Committee reported in March 1991.[1605] In relation to Norfolk Island, the Committee recommended, among other things, that the people of Norfolk Island should have the optional right to vote in federal elections (recommendation 39). It also recommended that lists or tables, showing exactly which Commonwealth Acts extend to Norfolk Island and which Imperial Statutes have been received, should be compiled and published and made generally available (recommendation 38). The Committee further recommended that the Commonwealth should continue to work closely with the Norfolk Island Legislative Assembly to ensure that all the industrial relations legislation of Norfolk Island be made consistent with Australia's obligations under International Labour Organisation Conventions (recommendation 43) and that the Department of Social Security should establish a formal review mechanism to monitor the adequacy of social security provision on Norfolk Island (recommendation 45). The federal Government accepted the Committee's recommendation that Norfolk Islanders be given the optional right to vote in federal elections and has amended the *Electoral Act 1918* (Cth) accordingly. It also accepted the Committee's recommendation concerning industrial relation legislation. However, it rejected both recommendations 38 and 45. Lack of resources was cited as the reason for not implementing recommendation 38. The Government stated that its right of veto under the Act already gives it sufficient power to monitor the social security legislation.

Appendix 4: DSS submission on sole parent issues

Ever since the introduction of widows pension in 1942 and with the further development of assistance to sole parents, the Department of Social Security has been required to make decisions about the 'single' status of persons in order to determine eligibility. Such decisions have been unavoidable given that separate and additional income support is available to people based on their single status.

For relationships other than legal marriages, this is a complex and sensitive area which has exercised the minds of policy makers since that time and has required the production of extensive guidelines and instructions for decision makers. With the advent of external review of departmental decisions by the Administrative Appeals Tribunal (AAT) in 1980, the AAT and Federal Court have also devoted considerable time to judgments in this area and departmental guidelines have been amended from time to time to reflect those judgments.

As one of the measures announced in the April 1989 Economic Statement, legislative changes were introduced with effect from 1 January 1990 concerning the factors in a relationship which must be considered in determining whether it is marriage-like. This involved the codification in the Social Security Act of the factors which had been identified by the AAT and endorsed in decisions of the Federal Court.

The changes were designed to provide a structured process for decision making which provided more certainty for clients and staff by moving to a forms-based, objective decision making process. The process aimed to be less intrusive while still guarding the integrity of the program.

The procedures which are now built into the claim and review forms mean that only certain questions can be asked of clients and that these are uniformly applied. The current procedure and wording of the questions used in the forms was developed in consultation with the Caucus Women's Committee and Welfare Rights groups.

The procedures also provide careful protection for clients in relation to appeals. If sole parents pension recipients appeal within a 14-day period against a determination that they are living in a marriage-like relationship, they are entitled to continued payment of sole parent pension until the matter is resolved.

From time to time there are issues raised in particular cases as to whether a marriage-like relationship exists. When considering the existence or otherwise of a marriage-like relationship, the tribunals and courts have been consistent on one point. That is that no single factor can be regarded as determinative in forming a view on the relationship. The presence or absence of any one factor does not show one way or the other whether a marriage-like relationship exists. The approach of looking at the relationship as a whole is reflected in the legislation and in departmental guidelines. With regard to financial support from one person for the other the AAT has said "we are of the view that it is untenable to argue that it is necessary to detect an obligation on the man to support his 'de facto' wife, when the law quite clearly states there is no such duty *per se* within marriage" (Re Tang).

There has been no indication in recent cases that the law is shifting away from this position and, as long as sole parent pension entitlement depends on marital status, the presence or absence of financial support is of no immediate relevance in determining eligibility for the payment. If the personal relationship between two parties is equivalent to marriage the claimant is to be treated as a member of a two-adult income unit. The economic relationship is only of some importance in providing evidence of the nature of the personal relationship.

It is also important to reflect that before the new procedures came into place, the issue of concern to women's groups and the Parliament related to the simplistic test that often applied in assessing marriage-like relationships, ie whether or not there was a sexual relationship. Clearly the department is now looking at much more complex analyses in determining whether or not a client is a member of a couple. The current arrangements in relation to testing marriage-like relationships have been progressive in ensuring that

departmental decision-makers have regard to a very wide range of factors rather than single issue factors such as sexual relationships.

When considering whether a sole parent pensioner is in a marriage-like relationship the process is as follows. If in the course of a review it is found that a sole parent pensioner is living with an adult of the opposite sex further questions are asked. The Social Security Act contains provisions to ensure that if a sole parent pensioner has shared accommodation with a non-blood relative of the opposite sex for at least eight weeks and at least one of the following 'triggers' is met a special review of living arrangements can be conducted to test continuing eligibility for pension:

- a child of both also living in the shared residence;
- joint ownership of the shared residence;
- joint long term lease of the shared residence, where the original duration fo the lease was at least ten years;
- joint assets with a total value of more than $4 000;
- joint liabilities totally more than $1 000;
- the person shave at any time been married to each other; or
- the persons have at any time shared a previous residence with each other.

In these cases the Review of Living Arrangements is issued. This form examines all aspects of the relationship between the two parties, in accordance with criteria laid down in the Act. In some cases, where accommodation has been shared for less than eight weeks or the triggers do not exist a review of living arrangements is still undertaken, using the Assessment of Living Arrangements form.

In forming a decision about whether a relationship is marriage-like all the circumstances of the relationship much be taken into account. Evidence relating to these factors is obtained through the forms mentioned above, from objectively verifiable facts and by interviewing the client. Broadly the factors are:

- financial aspects of the relationship;
- nature of the household;
- social aspects of the relationship;
- sexual relationship between the people; and
- nature of the people's commitment to each other.

The criteria used to determined whether a marriage-like relationship exists apply to all payments, not just sole parent pension, and enable the department to determine eligibility for that payment or the correct rate of payment which should be made.

Where a person ceases to qualify for sole parent pension, because they are in a marriage-like relationship, they may qualify for another payment as a member of a couple eg partner or parenting allowance.

Appendix 5: List of submissions

1. The SCARLET Alliance
2. Justice for Women Action Collective
3. Confidential
4. A Hughes
5. T Welter
6. Community Legal & Advocacy Centre, Fremantle
7. Independent Teachers' Federation of Australia
8. Confidential
9. W Varna
10. Whitford Women's Health Centre WA
11. Centre Against Sexual Assault Inc, Bendigo
12. J Hammond
13. Confidential
14. M Edwards
15. Confidential
16. K Wilson
17. E Burrell
18. P Ambikapathy
19. M Varnai
20. J Hansen
21. I Goldsmith
22. M Dietrich
23. JP McCarthy
24. JA Gardener
25. K Lesley
26. Telopea Family Resources NSW
27. Freedom From Violence Action Group Women's Electoral Lobby VIC
28. M Gleeson
29. P Prezzi
30. S Roach Anleu
31. C Pollard
32. Humanist Society of Victoria Inc
33. A Cox
34. T Clements
35. MP Garrett
36. M Loh
37. C Cleary
38. B Burns
39. L Warner
40. A Thacker
41. D Riley
42. M Wells
43. K Olsen
44. J Morgan
45. G Kelly
46. C Major
47. C Thompson
48. K Mack
49. Australian National Consultative Committee on Refugee Women
50. Confidential
51. N Kacowicz
52. E Burrell
53. A Jackson
54. S Clarke
55. P Easteal

56. A Hosken
57. J Walsh
58. National Committee to Defend Black Rights
59. Equal Employment Opportunity Unit, University of Newcastle
60. Prostitutes Association of South Australia
61. S Reynolds
62. S Thompson
63. English Department, Maroochydore State High School QLD
64. Anonymous
65. T O'Brien
66. MP Garrett
67. S Bacsi
68. R Friend
69. Equal Opportunity Office, University of Adelaide
70. J McLennan
71. PC Schaper
72. R Rana
73. Confidential
74. B Humphries
75. SM Jones
76. AJ Kenos
77. P Atkinson
78. Confidential
79. P Easteal
80. Australian Institute for Women's Research and Policy
81. L Savage, T White
82. Y Murray
83. Confidential
84. B Campbell
85. J D Duff
86. VA Cook
87. C Bray
88. FE Ollif
89. M Nouikov
90. A Constantinou
91. J Hannell
92. M Redfern
93. Older Women's Network, Canberra
94. LJ Nolan
95. V Mason
96. JF Laidlaw
97. Bunbury Community Legal Centre WA
98. Bunbury Domestic Violence Action Group WA
99. D Herbert
100. Confidential
101. Confidential
102. Confidential
103. Confidential
104. Confidential
105. Confidential
106. Confidential
107. Confidential
108. Confidential
109. Waratah Support Centre, Bunbury
110. L Yate, C O'Rielly
111. J Bleyerveld
112. S Robertson

113. Women's Electoral Lobby, Cairns
114. Tablelands Women's Centre, QLD
115. Confidential
116. Confidential
117. Women of Far North Queensland
118. R McBain
119. P O'Hara
120. J Hair
121. B Kelly, N Ahmat
122. Z Pobucky, C Almain-Leyson
123. Confidential
124. C Smyth
125. Confidential
126. Women's Health Centre, Rockhampton
127. G Mather
128. Confidential
129. Confidential
130. Confidential
131. Confidential
132. Confidential
133. Confidential
134. Confidential
135. Confidential
136. Confidential
137. Confidential
138. Confidential
139. Confidential
140. Confidential
141. Confidential
142. Victims of Crime Service Inc SA
143. S Anchor
144. E Ferriday
145. M Flynn
146. J Braithewaite
147. Endeavour Forum South West Region
148. Domestic Violence Advocacy Service, Sydney
149. S Owens
150. Women's Action Group NSW
151. Australian Federation of Business and Professional Women Inc
152. A Hoban
153. L Lucas
154. M Wilson
155. J Cradick
156. L Jackson
157. RJ Anderson
158. H Haddrill
159. Confidential
160. Women's Equal Opportunity Area, University of Queensland
161. Confidential
162. Taxation Institute of Australia
163. C Higginson
164. Prostitutes Collective of Victoria Inc
165. Bar Association of Queensland
166. The Law Society of NSW
167. Public Sector Union Queensland Branch
168. Confidential
169. L Stidwill

170. Norwood Community Legal Centre SA
171. Association for Services to Torture and Trauma Survivors Inc WA
172. Leichhardt Women's Community Health Centre Inc NSW
173. Presbyterian Women's Association of Australia
174. C Kennedy
175. N Roxon, K Walker
176. Confidential
177. MM Blake
178. Ms McClekot
179. R Wilkinson
180. RC Stevens
181. N Freeman
182. Upper Murray Centre Against Sexual Assault SA
183. Council of Australian Postgraduates Associations Inc
184. J Mulburn
185. Menstrual Management Research Team, Department of Social Work and Social Policy, University of Queensland
186. Gosnells District Information Centre Inc WA
187. Confidential
188. Confidential
189. T Lambert
190. Confidential
191. M Bayles
192. M Anderson
193. Gay and Lesbian Rights Lobby and the Lesbian and Gay Legal Rights Service, Sydney
194. The Vietnam Veterans Family Support Link Line NSW
195. Sisters-in-Law
196. Womens Health and Sexual Assault Education Unit NSW
197. Centre Against Sexual Assault, CASA House, Melbourne
198. Confidential
199. L Armytage
200. Australian Family Association
201. Confidential
202. Country Women's Association of NSW
203. Confidential
204. Confidential
205. Confidential
206. P Wright
207. Youth Legal Service, Perth
208. Children by Choice Association QLD
209. A O'Connor
210. A Chopra
211. S Blaikie
212. K Geiselhart
213. J Doust
214. T Brandrup
215. H Katzen
216. Western Suburbs Legal Service Inc VIC
217. Confidential
218. R Holloway
219. Confidential
220. G Barnes
221. M Clarke
222. R Owens
223. A Longworth
224. Confidential
225. Women's Abortion Campaign QLD

226. J Grbich
227. JT Carney
228. E Sitarenos
229. J Benson
230. Mental Health Legal Centre Inc VIC
231. Child Protection Services SA
232. B Kozyrski
233. C Kindleysides
234. W Welsh
235. L McKenzie
236. Legal Services Commission of SA
237. Logan Youth Legal Service, QLD
238. K Isaacs
239. Northern Community Legal and Welfare Rights Centre TAS
240. Welfare Rights and Legal Centre ACT
241. M Reynolds
242. Working Women's Centre NSW
243. Confidential
244. P Cowburn
245. G Corness
246. S Nord
247. Australian Women's Research Centre, Deakin University
248. A Cleland
249. Outer East Domestic Violence Outreach Service Collective Inc VIC
250. NSW Sub-Committee on Sexual Assault and People with an Intellectual Disability
251. Lesbian Legal Rights Group VIC
252. GL & LT McCulloch
253. Confidential
254. Women Lawyers Association QLD
255. Women's Lawyers Association NSW
256. Women's Legal Resources Centre, Sydney
257. J Brooke
258. Women Lecturers and Students of the Faculty of Law, University of Tasmania
259. J Abbott
260. J Skinner
261. D Ali
262. Confidential
263. Confidential
264. I Dunn
265. Confidential
266. R Walker
267. B Gaze
268. M Thornton
269. Confidential
270. A Vincent
271. KJ Uppgard
272. B Hatch
273. S Goiser
274. S Armstrong
275. North Queensland Combined Women's Service
276. S Gilmour
277. J Clark
278. C O'Connor
279. Central Coast Community Women's Health Centre NSW
280. Tasmanian Gay & Lesbian Rights Group
281. Women's Electoral Lobby Australia Inc
282. M Dando

283. CD Wilcock
284. Illawarra Legal Centre NSW
285. Women's Adviser's Unit South Australian Department of Labour
286. Women's Policy Unit and Women's Advisor to the Premier, Office of the Cabinet Queensland
287. Project for Legal Action Against Sexual Assault VIC
288. G Trifiletti
289. Community Legal and Advocacy Centre, Fremantle
290. R Martin
291. M Martin
292. R Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis
293. Confidential
294. Legal Aid Office ACT
295. Domestic Violence Resource Centre, Wooloowin QLD
296. L Intemann
297. M Mazaroli
298. Harvey Business and Professional Women's Club WA
299. Wesley Central Mission, Melbourne
300. ST Rohde
301. L Steer
302. B Oxenham
303. Older Women's Network Australia Inc, Sydney
304. Older Women's Network TAS
305. Confidential
306. Domestic Violence Legal Help, Darwin
307. Women's Electoral Lobby VIC
308. Co-ordinator, Women's Action Alliance Australia Inc
309. Doveton & District Legal Service VIC
310. Confidential
311. ACTU Queensland Branch
312. National Children's and Youth Law Centre
313. Confidential
314. J Lamprey
315. Women's Council, SA Liberal Party
316. Regular Defence Force Welfare Association ACT
317. J MacNee
318. Confidential
319. Women Incest Survivors Network NSW
320. A Dayman
321. Council of Adult Education, Melbourne
322. Social Security Working Group, Federation of Community Legal Centres Inc VIC
323. L Murphy
324. Queensland Law Society Inc
325. C Woods
326. R Gibson
327. I Shaw
328. T Jeffcoat
329. Mt Pritchard Family Resource Centre NSW
330. Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC
331. J Trutwein
332. Queensland Nurses' Union of Employees
333. C MacDonald, S Jackson, E Webb, F Martin, J Boland
334. SP Robson
335. Law Institute of Victoria
336. NSW Child Protection Council
337. Anti-Discrimination Commissioner QLD
338. Sex Discrimination Commissioner Cth

339. Council of Australian Postgraduate Associations
340. H Hoekman
341. Attorney-General and Minister for Women's Affairs VIC
342. National Women's Consultative Council NSW
343. S Carpenter
344. A Lucadou-Wells
345. Confidential
346. Confidential
347. J Blokland
348. Schools Curriculm, Department of Employment, Education and Training
349. Affirmative Action Agency Cth
350. Ministry for the Status and Advancement of Women NSW
351. Sutherland Shire Family Support Service NSW
352. L Santo
353. Privacy Commissioner NSW
354. Women's Law Collective, University of Melbourne
355. U Muller
356. M Hodgkinson
357. C Gellatly
358. M Wanjurri Nungala
359. Office of Women's Interests, Perth
360. Women's Legal Service Steering Committee WA
361. Women's Electoral Lobby, Perth
362. Marnja Jarndu Women's Refuge WA
363. H Andrews, Equal Opportunity Commission WA
364. Confidential
365. Confidential
366. Confidential
367. Confidential
368. Confidential
369. Confidential
370. Confidential
371. Confidential
372. Confidential
373. Women's Health & Counselling, Perth
374. Council for Civil Liberties WA
375. A Hindle
376. Supporting Our Sisters
377. N Hopkins
378. National Council of Women of Australia
379. Women's Legal Service Inc, Brisbane
380. R Neumann
381. Domestic Violence Resource Centre, Lutwyche QLD
382. Confidential
383. Confidential
384. Confidential
385. Confidential
386. Confidential
387. C Karp
388. Migrant Women's Emergency Service QLD
389. South Brisbane Legal Service
390. B Holmes
391. Bureau of Ethnic Affairs NSW
392. Confidential
393. Confidential
394. M Alston
395. Confidential

396. Confidential
397. Confidential
398. Confidential
399. A Kinnear, L Howard
400. F David
401. D Cass
402. G Horn
403. WISE
404. K Walker, M Stewart
405. A Guy
406. Confidential
407. Confidential
408. Confidential
409. Confidential
410. Confidential
411. Confidential
412. Confidential
413. Confidential
414. Confidential
415. Confidential
416. J Harrison
417. M McDonald, M Griffiths
418. Prostitutes Association of Northern Territory for Health, Education and Referral Inc
419. D Barclay
420. J Durling
421. M Bull
422. Domestic Violence Legal Help, Darwin
423. L Defrenne
424. J Kopal
425. Confidential
426. Confidential
427. Confidential
428. Confidential
429. Confidential
430. C Woodman
431. P Ditton
432. L Young
433. Central Australian Advocacy Service
434. K McNab
435. M Kennedy
436. H McDonald
437. Office for the Status of Women TAS
438. Confidential
439. Confidential
440. Confidential
441. Confidential
442. Confidential
443. M Court
444. D Childs
445. L Brady
446. D Port
447. National Council of Women, Launceston
448. R Tyler
449. O Inglis
450. L Van Zetten
451. F Layton
452. E Trigg

453. Domestic Violence Action Group, Port Lincoln
454. Port Lincoln Aboriginal Organisation
455. Confidential
456. Confidential
457. Confidential
458. Confidential
459. J Waters
460. A Caselyr
461. E Ling
462. Confidential
463. Confidential
464. Confidential
465. Confidential
466. DM Newton
467. CM Brazel
468. A McCleary
469. Adelaide Latvian Multinational Artists Society
470. L Johnson-Riordan
471. A Jackson
472. Victims of Crime Service, Adelaide
473. R McInnes
474. G Sutcliffe Huigol
475. Confidential
476. Confidential
477. Confidential
478. Confidential
479. Confidential
480. Confidential
481. Confidential
482. Confidential
483. Confidential
484. G Romeyko
485. J Van Den Berg
486. W Cato
487. Confidential
488. LG Viant
489. H Wardle
490. L O'Connor
491. Confidential
492. Confidential
493. Townsville Community Legal Service Inc
494. M Balgew
495. D Gray
496. P Cook
497. L Goodchild
498. North Queensland Combined Women's Service
499. Confidential
500. Confidential
501. Confidential
502. Confidential
503. Confidential
504. Confidential
505. Confidential
506. Confidential
507. Confidential
508. Confidential
509. Confidential

510. Commissioner for Equal Opportunity VIC
511. Feminist Lawyers, Melbourne
512. Federation of Community Legal Centres, VIC
513. M Morsan-Utto
514. S McGreggor
515. L Danaan
516. D Walsh
517. T Miskin
518. S Eastwood, L Jackson, S Warren
519. C Fagan, M Dimopoulos
520. National Women's Network of Disabled People's International, Australia
521. E Studer
522. C McDowell
523. N Yakimova
524. S McGregor
525. Confidential
526. Confidential
527. Confidential
528. Confidential
529. Confidential
530. Confidential
531. Confidential
532. Confidential
533. Confidential
534. Tasmanian Women's Consultative Council
535. Confidential
536. U Mawson
537. D McCulloch, K Conley, M Martinelli, M Mati, R Walsh
538. F McGrath
539. N Eason
540. Sexual Assault Referral Centre NT
541. National Conference of Community Legal Centres
542. Confidential
543. Office of the Status of Women Cth
544. T Jowett
545. P Lockwood
546. Women Into Politics, A Coalition of Women's Organisations
547. Women Advocates for Gender Equality, Sydney
548. Office of Indigenous Women, ATSIC
549. Confidential
550. Chief Justice Miles ACT
551. Aboriginal & Torres Strait Islander Corporation for Women QLD
552. Australian Consumers' Council
553. Confidential
554. A Scarff
555. Immigration Advice and Rights Centre, Sydney
556. K Thickens
557. L Spender, A Durbach, L Carner
558. Aboriginal Women's Legal Issues Group, Sydney
559. J Wilczynski
560. Ms Logan
561. J Ellenbogan
562. M Krnjic
563. Federation of Ethnic Communities' Councils of Australia Inc
564. Confidential
565. Confidential
566. L Farmer

567. A Lynch
568. L Ollif
569. Abortion Rights Network of Australia (ARNA) (M Kirkby)
570. L Wright, Women's Officer, Independent Teachers Federation
571. R Elion-Griffin
572. Confidential
573. Queensland Domestic Violence Council, Brisbane
574. C Dewberry
575. P Paget
576. Confidential
577. E Kullack
578. Confidential
579. R Hylton
580. Confidential
581. L Johnston
582. KJ Mazzarol
583. K Carrington
584. Confidential
585. Department of Immigration and Ethnic Affairs Cth
586. RG Willemsen
587. R Rubio
588. Legal Aid Commission of NSW
589. Australian Section of International Commission of Jurists
590. Darwin Homebirth Group NT
591. North East Centre Against Sexual Assault VIC
592. M Dimopolous
593. Abortion Law Repeal Association NSW
594. Confidential
595. JA Davies
596. National Council of Women of NSW Inc
597. Status of Women Commission, UNAA SA Division
598. Lone Fathers Association WA
599. L Savage
600. P Page
601. The New England Bankwatch Group, Armidale NSW
602. The Directors of the Legal Aid Commission's of Australia
603. A Dunne
604. Essendon Community Legal Centre Inc VIC
605. Confidential
606. Confidential
607. Attorney-General's Department, Cth
608. Amnesty International Australia
609. S Marchi
610. Confidential
611. C Hart
612. C Atieno
613. J Thompson
614. P Westwood
615. V Irwin
616. Department of Industrial Relations, ACT
617. P Parkes
618. Human Rights and Equal Opportunity Commission
619. P Baron
620. R Clifford
621. D Boniface
622. M Blackburn
623. Department of Social Security,Cth

624. Confidential
625. Confidential
626. Confidential
627. Confidential
628. Confidential
629. Confidential
630. Confidential
631. M Flynn
632. Confidential
633. U Jagose
634. Office of the Status of Women, Cth

Table of cases

Australia

Kovac v Kovac [1982] 1 NSWLR 656
Lambe v Director of Social Services (1981) 57 FLR 262
Lee Steere, in the Marriage of (1985) FLC 91-626
Leeth v The Commonwealth of Australia (1992) 174 CLR 455
Lipman v Lipman (1989) 13 Fam LR 1
Livesey v NSW Bar Association (1983) 151 CLR 288
Lloyd v Nelson (1985) 2 NSWLR 291
Lodge v Federal Commissioner of Taxation (1972) 128 CLR 171
Louth v Diprose (1992) 175 CLR 621
Mabo & Ors v The State of Queensland (1992) 175 CLR 1
Maiward v Doyle [1983] WAR 210
Maybury v Plowman (1913) 16 CLR 468
Minister for Immigration and Ethnic Affairs v Conygham & Ors (the Platters Case) (1986) 68 ALR 441
Morris v Wardley Australia Property Management Ltd NSW Court of Appeal unreported 17 December 1992
Mount Isa Mines v Marks and Ors (1992) EOC 92-420
Municipal Association of Victoria, Re (1991) 33 AILR 163
Murkin and Murkin (1980) FLC 90-806
Nagle v Rottnest (1993) 177 CLR 423; 112 ALR 393
National Bank of Australia v Akins NSW Court of Appeal unreported 5 August 1994
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1
Nolan v Westpac Bank (1992) 175 CLR 621, (1989) 51 SASR 496
Onus & another v Alcoa of Australia Limited (1981) 149 CLR 27
Oshlack v Richmond River (1994) 82 LGERA 236
P & C Cantrella Pty Ltd v Egg Marketing Board of NSW [1973] 2 NSWLR 366
P v P (1994) 120 ALR 545
Peters v Commonwealth Bank of Australia (1992) ASC 56 135
Private Hospitals' and Doctors' Nurses (ACT) Award 1972 (1986) 13 IR 108
Proudfoot and Ors v ACT Board of Health and Ors (1992) EOC 92-417
R v Commonwealth Conciliation and Arbitration Commission and Ors: Ex Parte the Angliss Group (1969) 122 CLR 546
R v A Judge of District Courts and Shelley, Ex Parte Attorney-General [1991] 1 Qd R 170
R v Davie unreported Morwell County Court 15 April 1993
R v Friend Norfolk Island Court of Petty Sessions, 24 May 1993
R v Maurice; Ex Parte Attoreny-General (NT) (1987) 73 ALR 123
R v Watson, Ex Parte Armstrong (1976) 136 CLR 248
Richardson v Forestry Commission (1987) 164 CLR 261
Robinson v Western Australian Museum (1977) 138 CLR 283
Rural Workers' Union v Mildura Branch of the Australian Dried Fruits Association (the Fruitpickers judgment) (1912) 6 CAR 62
Ryan v Hopkinson (1990) 14 Fam LR 151
Scott, in the Marriage of (1977) FLC 90-951
Sharman v Evans (1977) 138 CLR 563
Smyth, in the Marriage of (1977) FLC 90-282
Speering v Minister for Education (1993) EOC 92-513
Staples and McCall, Re (1989) 13 Fam LR 279
State Chamber of Commerce & Industry v The Commonwealth (the Second Fringe Benefits Tax Case) (1987) 163 CLR 329
State of Victoria v Commonwealth of Australia (the Payroll Tax Case) (1971) 122 CLR 353
Taikato v Regina NSW Court of Criminal Appeal (unreported) 6 April 1994
Tang, Re (1981) 3 ALN N83 (Note 49)
Teachers Health Investments Pty Ltd v Wynne NSW Court of Appeal unreported 18 August 1994
Teenager, Re a (1989) FLC 92-006
Tyson v Tyson unrported Family Court of Australia, Sydney No SY11276 of 1978
US Tobacco Co v Minister for Consumer Affairs and others (1988) 20 FCR 520
Van Gervan v Fenton (1992) 175 CLR 327
Veselinovic v Thorley [1988] 1 Qd R 191
Victoria v Commonwealth (the Payroll Tax Case) (1971) 122 CLR 353

Viskauskas & Anor v Niland (1983) 153 CLR 280
Warburton v Whiteley (1989) 5 BPR 11628
Wardley v Ansett Transport Industries (1984) EOC 92-002
Waters v Public Transport Corporation (1991) 103 ALR 513
Webber and Webber (1985) FLC 91-648
Wright v Rugby Council CITATION
Wynes v Southrepps Hall Broiler Farm Ltd [1968] ITR 407 (IT)
Yerkey v Jones (1940) 63 CLR 649

Overseas cases

Barclays Bank Plc v O'Brien [1993] QB 109
Barclays Bank Plc v O'Brien [1994] 1 AC 180
Blank v Sullivan and Cromwell 418 F Supp 1 (SDNY 1975)
BCCI v Aboody [1989] 2 WLR 759
Bliss v Attorney-General of Canada [1979] 1 SCR 183
Bombair v Harlow [1987] 7 WWR 55 (Sask Unif Fam Ct)
Bosch v Perpetual Trustee Co Ltd (1938) AC 463
Brooks v Canada Safeway [1989] 1 SCR 1219
Cartledge v Jopling [1963] AC 758
CIBC Mortgages v Pitt [1994] 1 AC 200
Cobb v Secretary of State for Employment and Manpower Services Commission [1989] ICR 506
Dothard v Rawlinson (1977) 433 US 321
Ellison v Brady 924 F 2d 872 (9th Cir 1991)
The Great Atlantic and Pacific Company of Canada Ltd v Ontario (Human Rights Commission) (1993) 109 DLR (4th) 224
Home Office v Holmes [1984] IRLR 299
International Union UAW v Johnson Controls 111 S Ct 1196 (1991) (USSCT)
Jane Doe v Police Board of Commissioners (Metropolitan Toronto) (1989) 4 CCLT 105; (1990) 72 DLR (4th) 580
JEB v Alabama ex rel TB 62 USLW 4219 (US 1994)
Janzen v Platy Enterprises [1989] 1 SCR 1252
Kowalska v Freie und Hansestadt Hamburg [1990] IRLR 447
Law Society of British Columbia et al v Andrews et al [1989] 1 SCR 143
Lloyds Bank v Bundy [1975] QB 326
M(K) v M(H) (1992) 96 DLR (4th) 289 (SCC)
Moge v Moge (1992) 99 DLR (4th) 456
Murphy v Bord Telecom Eireann, Case 157/86, 1 Common Mkt L Rep 879 (1988)
Norberg v Wynrib (1992) 92 DLR (4th) 449
Pennsylvania v Local Union 542, International Union of Operating Engineers 388 F Supp 155 (ED Pa, 1974),
Power v Moss (1986) 61 Nfld & PIER 5 (Nfld SC)
Public Service Alliance of Canada & Human Rights Commission v Canada (Treasury Board) (1991) 14(5) Canadian Human Rights Reporter D/341
The Queen & Canada Employment and Immigration Commission v Schacter & Ors [1992] 2 SCR 679 *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* [1980] QB 407
R v Butler [1992] 1 SCR 452
R v Inland Revenue Commissionersex parte National Federation of Self Employed and Small Business [1980] QB 407
R v Keegstra [1990] 1 SCR 1123
R v Drybones (1970) 9 DLR (4th) 437
R v Lavallee [1990] 1 SCR 852
R v Mortgentaler [1988] 1 SCR 30
R v Sussex Justices; Ex Parte McCarthy [1924] 1 KB 256
R v Wallace (1987) 30 CRR 5
Rabidue v Osceola 584 F Supp (1984); 805 F 2d 611 (6th Cir 1986)

Rathwell v Rathwell (1978) 83 DLR (3d) 289
Reed v Reed 404 US 71 (1971)
Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd (1986) 33 DLR (4th) 174
Stubbings v Webb [1993] AC 498
Thurman v City of Torrington 595 F Supp 1521 (1984)
Watches of Switzerland v Savell [1983] IRLR 141
Williams v Haugen [1988] 2 WWR 269 (Sask Unif Fam Ct)
Wilson v Medical Services Commission of British Columbia (1988) 30 BCLR (2d) 1 (CA)

Table of legislation

Commonwealth

Acts Interpretation Act 1901
Administrative Appeals Tribunal Act 1975
Administrative Decisions (Judicial Review) Act 1977
Affirmative Action (Equal Opportunity for Women) Act 1986
Citizenship Act 1948
Disability Discrimination Act 1993
Electoral Act 1918
Family Law Act 1975
Federal Court Act 1979
Freedom of Information Act 1982
Health Insurance Act 1973
Human Rights and Equal Opportunity Commission Act 1986
Industrial Relations Act 1988
Income Tax Assessment Act 1936
Judiciary Act 1903
Jurisdiction of Courts (Cross-vesting) Act 1987
Law Reform Commission Act 1973
Migration Act 1958
Norfolk Island Act 1913
Norfolk Island Act 1957
Norfolk Island Act 1979
Northern Territory (Self Government) Act 1978
Racial Discrimination Act 1975
Sex Discrimination Act 1984
Social Security Act 1991
Trade Practices Act 1975

New South Wales

Anti-Discrimination Act 1977
Contracts Review Act 1980
Crimes Act 1900
Crimes (Child Prostitution) Amendment Act 1988
De Facto Relationships Act 1984
Family Provision Act 1982
Firearms Act 1989
Land and Environment Court Act 1979
Legal Profession Act 1987
Motor Accidents Act 1988
Summary Offences Act 1988
Summary Procedure Act 1921
Supreme Court Act 1970

South Australia

Inheritance (Family Provision) Act 1972
Legal Practitioners Act 1981
Statutes Amendment (Law of Property and Wrongs)Act 1972
Summary Offences Act 1953
Wrongs Act 1936

Tasmania

Common Law (Miscellaneous Actions) Act 1986
Justices Act 1959
Legal Practitioners Act 1959
Police Offences Act 1935
Testator's Family Maintenance Act 1912

Victoria

Administration and Probate Act 1958
Credit Act 1984
Crimes (Family Violence) Act 1987
Criminal Injuries Compensation Act 1983
Employee Relations Act 1992
Equal Opportunity Act 1984
Legal Profession Practice Act 1958
Limitations of Actions Act 1958
Prostitution Regulation Act 1986
Real Property Act 1958
Transport Accidents Act 1986

Western Australia

Criminal Code Act 1913
Equal Opportunity Act 1984
Inheritance (Family and Dependents Provision) Act 1972
Justices Act 1902
Legal Practitioners Act 1893
Police Act 1892

Queensland

Anti-Discrimination Act 1991
Consumer Credit Act 1994
Criminal Code
Domestic Violence (Family Protection) Act 1989
Prostitution Laws Amendment Act 1992
Prostitution Regulation Act 1992
Queensland Law Society Act 1952
Succession Act 1981
Vagrancy Gaming and other Offences Act 1931

Australian Capital Territory

Crimes Act 1900
Discrimination Act 1991
Domestic Relationships Act 1994
Domestic Violence Act 1986
Family Provision Ordinance 1969
Legal Practitioners Act 1970
Magistrates Court Act 1930
Supreme Court Act 1933
Weapons Act 1991

Northern Territory

Anti-Discrimination Act 1992
De Facto Relationships Act 1991
Family Provision Act
Justices Act 1928
Justices Amendment Act 1989
Legal Practitioners Act

Norfolk Island

Court of Petty Sessions Amendment Act 1991
Criminal Law Amendment Act 1993
Criminal law Ordinance 1960
Gun Licence Ordinance 1958
Employment Act 1988
Evidence Amendment Act 1993
Evidence Ordinance 1960
Immigration Act 1980
Judicature Ordinance 1960
Public Service Ordinance 1979
Social Services Act 1980

Overseas

Canadian Bill of Rights 1960
Constitution Act 1982 (Canada) Part 1 Charter of Rights and Freedoms
Criminal Code (Canada)
Family Protection Act 1955 (New Zealand)
New Zealand Bill of Rights Act 1990
Unemployment Insurance Act 1971 (Canada)

Bills

Australian Bill of Rights Bill 1985
Draft Australian Bill of Rights Bill 1984
Family Law Reform Bill 1994
Human Rights Bill 1973

Bibliography

ALLARS M *Introduction to Australian administrative law* Butterworths Sydney 1990.

ALLEN A 'One law for all reasonable persons?' (1988) 16 *International Journal of the Sociology of Law* 419.

ALSTON M 'Women and the rural crisis 'in MA Franklin, LM Short, EK Teather (ed) *Country women at the crossroads* University of New England Press 1994.

ARMYTAGE L 'Judicial education on equality: with particular reference to gender and ethnicity' *Continuing Legal Education Association Annual Conference* Brisbane 1-3 September 1994.

ARONSON M & FRANKLIN N *Review of administrative action* Law Book Co Sydney 1987.

ASTOR H 'Feminist issues in ADR' (1991) 65 *Law Institute Journal* 69.

_____ 'Violence and family mediation: policy' (1994) 8 *Australian Journal of Family Law* 3.

AUSTRALIA. ACCESS TO JUSTICE ADVISORY COMMITTEE *Access to justice: An action plan* AGPS Canberra 1994.

AUSTRALIA. AFFIRMATIVE ACTION AGENCY *Annual Report 1993-4* AGPS Canberra 1994.

AUSTRALIA. ATTORNEY-GENERAL'S DEPARTMENT *Family Law Act 1975 Directions for amendment; Government Response to the report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975* A-G Canberra 1993.

_____ *Judicial appointments - procedure and criteria* Attorney-General's Department Canberra 1993.

_____ Discussion Paper *The treatment of superannuation in family law* AGPS Canberra 1992.

_____ LEGISLATION WORKING GROUP OF THE ILO 156 INTERDEPARTMENTAL COMMITTEE *Workers with family responsibilities - Discimination legislation - An issues paper* Attorney-General's Department Canberra 1993.

AUSTRALIA. CONSTITUTIONAL COMMISSION *Final report of the Constitutional Commission* Volume One AGPS Canberra 1988.

AUSTRALIA. CONSULTATIVE COMMITTEE OF STATE AND TERRITORIAL LAW ADMITTING AUTHORITIES *Uniform admission requirements: discussion paper and recommendations* April 1992.

AUSTRALIA. CRIMINAL LAW OFFICERS COMMITTEE OF THE STANDING COMMITTEE OF ATTORNEYS-GENERAL *Model Criminal Code Chapter 2: General principles of criminal responsibility final report December 1992* AGPS Canberra 1993.

AUSTRALIA. DEPARTMENT OF EMPLOYMENT, EDUCATION AND TRAINING *Consultancy brief: gender issues and the law school curriculum* DEET Canberra 1994.

_____ WOMEN'S BUREAU (1994) 15(1) Women and work.

AUSTRALIA. DEPARTMENT OF INDUSTRIAL RELATIONS WORK AND FAMILY UNIT *Strategy for implementing ILO convention 156* DIR Canberra 1992.

AUSTRALIA. DEPARTMENT OF THE PRIME MINISTER AND CABINET, OFFICE OF THE STATUS OF WOMEN *Women shaping and sharing the future: the New National Agenda for Women 1993 - 2000* OSW Canberra 1993.

AUSTRALIA. DEPARTMENT OF SOCIAL SECURITY *Annual report 1992-93* AGPS Canberra 1993.

AUSTRALIA. DEPARTMENT OF TREASURY RETIREMENT INCOMES MODELLING TASKFORCE '*The distribution of private sector superannuation assets by gender, age and salary of members*' Second annual colloquium of superannuation researchers May 1994.

AUSTRALIA. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, SEX DISCRIMINATION COMMISSIONER *Sex Discrimination Act 1984: future directions and strategies* AGPS Canberra 1993.

_____ 'Projects: Legal education to increase awareness' (1994) 1 *AGENDER: Sex Discrimination Newsletter* 5.

AUSTRALIA. JOINT SELECT COMMITTEE ON CERTAIN ASPECTS OF THE OPERATION AND INTERPRETATION OF THE FAMILY LAW ACT *The Family Law Act 1975: Aspects of its operation and interpretation* AGPS Canberra 1992.

AUSTRALIA. LAW COUNCIL OF AUSTRALIA *Blueprint for the structure of the legal profession: a national market for legal services* Law Council of Australia Canberra 1994.

AUSTRALIA. LAW REFORM COMMISSION Report 27 *Standing in public interest litigation* AGPS Canberra 1985.

_____ Report 32 *Community law reform for the Australian Capital Territory: second report Loss of consortium Compensation for loss of capacity to do housework AGPS* Canberra 1986.

_____ Discussion Paper 54 *Equality before the law* ALRC Sydney 1993.

_____ Report 57 *Multiculturalism and the law* ALRC Sydney 1992.

_____ Report 67 *Equality before the law: women's access to the legal system* ALRC Sydney 1994.

_____ Report 69(1) *Equality before the law: justice for women* ALRC Sydney 1994.

AUSTRALIA. MINISTER FOR SOCIAL SECURITY *Better incomes: Retirement income policy into the next century* AGPS Canberra 1992.

AUSTRALIA. PARLIAMENT, HOUSE OF REPRESENTATIVES 113 *Parliamentary Debates* 1523 (4 April 1979).

AUSTRALIA. PARLIAMENT, HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION *A pocket full of change* AGPS Canberra 1991.

_____ HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS *Half way to equal: Report of the inquiry into equal opportunity and equal status for women in Australia* AGPS Canberra 1992.

_____ HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS *Islands in the sun: The legal regimes of Australia's External Territories and the Jervis Bay Territory* AGPS Canberra 1991.

_____ SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS *A Bill of Rights for Australia? An exposure report for the consideration of senators* AGPS Canberra 1985.

_____ SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS *Gender bias and the judiciary* Senate Printing Unit Canberra 1994.

_____ SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS *The costs of justice: foundations for reform* AGPS Canberra 1993.

AUSTRALIA. PRIME MINISTER *Working nation: policies and programs* AGPS Canberra 1994.

_____ *Working nation: the white paper on employment and growth* AGPS Canberra 1994.

AUSTRALIAN BANKING INDUSTRY OMBUDSMAN LTD *Annual report 1992-1993* ABIO Melbourne 1993.

AUSTRALIAN BUREAU OF STATISTICS *Australian social trends 1994* ABS 4102.0 Canberra 1994.

_____ *Measuring unpaid household work: issues and experimental estimates* Cat 5236.0. AGPS Canberra 1990.

_____ *National health survey, Accidents Australia* Cat 4384.0 ABS 1989-90.

_____ *Persons employed at home in Australia* Cat 6275.0 ABS 1992.

_____ *Road traffic accidents involving casualties Australia 1989* Cat 9405.0 ABS 1989.

_____ *Road traffic accidents involving fatalities, December 1990* Cat 9401.0 ABS 1991.

_____ *1992 Unpaid work and the Australian economy: occasional paper* Cat 5240.0 AGPS Canberra 1994.

_____ *Women in Australia 1993.*

_____ *Year Book 1994* ABS Canberra 1993.

BAGNALL D 'He's (still) the boss' *Bulletin* 9 August 1994.

BAKER K (ED) *An Australian Bill of Rights: pro and contra* Policy Issues No 4 Institute of Public Affairs 1986.

BALKIN R & DAVIS J *Law of Torts* Butterworths 1991

BAXTER J *Work at Home* UQP 1993.

BAILEY PH *Human rights: Australia in an international context* Butterworths Sydney 1990.

BAILEY-HARRIS RJ 'Family Law: parties living in de facto relationships' (1990) 64 *Australian Law Journal* 365.

_____ 'Property disputes between de facto couples: is statute the best solution?' (1991) 5 *Australian Journal of Family Law* 221.

BANKS TL 'Gender bias in the classroom' (1988) 38 *Journal of Legal Education* 137.

BARTLETT KT 'Feminist legal methods' (1990) 103 *Harvard Law Review* 829.

BAYEFSKY AF 'Defining equality rights' in AF Bayefsky & M Eberts (ed) *Equality rights and the Canadian Charter of Rights and Freedoms* Carswell Toronto 1985.

BAYEFSKY AF & EBERTS M (ed) *Equality rights and the Canadian Charter of Rights and Freedoms* Carswell Toronto 1985.

BENDER L 'A lawyer's primer on feminist theory and tort' (1988) 38 *Journal of Legal Education* 3.

BERNS S 'Judicial paternalism and the High Court' (1993) 18 *Alternative Law Journal* 202.

BITTMAN M *Juggling Time* AGPS 1992.

BOTTOMLEY A, GIBSON S & METEYARD B 'Dworkin: which Dworkin? taking feminsim seriously' (1987) 14 *Journal of Law and Society* 47.

BOTTOMLEY S, CUNNINGHAM N & PARKER S *Law in context* Federation Press Sydney 1991.

BOWEN L 'Arguing for a Bill of Rights' in L Spender (ed) *Human rights: The Australian debate* Redfern Legal Centre Publishing Redfern 1987.

BOYLE C 'Review' (1985) 63 *Canadian Bar Review* 427.

_____ 'Criminal law and procedure: who needs tenure' (1985) 23 *Osgoode Hall Law Journal* 427.

BRERETON D 'Comparable worth concept rejected' (1986) 11 *Legal Service Bulletin* 87.

BRODSKY G & DAY S *Canadian Charter equality rights for women: one step forward or two steps back?* Canadian Advisory Council on the Status of Women Ontario 1989.

BROOKS A 'Myth and muddle: an examination of contracts for the performance of work' (1988) 11 *University of New South Wales Law Journal* 48.

BROUN D & FOWLER S (eds) *Australian family law & practice* CCH.

BURTON G 'Australian code of banking practice' *Banking Law and Practice Conference* May 1994.

CAHN N 'The looseness of legal language: the reasonable woman standard in theory and practice' (1992) 77 *Cornell Law Review* 139.

CANADIAN BAR ASSOCIATION *Touchstones for change: equality, diversity and accountability: report on gender equality in the legal profession* Canadian Bar Association Ottawa Ontario 1993.

CARLTON J 'Women in parliament' *Women in government seminar* Brisbane, 6 October 1993.

CASS B 'Rewards for Women's Work' in C Pateman and J Goodnow (eds) *Women social science and public policy* Allen and Unwin Sydney 1985.

CASSELLS J 'Damages for lost earning capacity: women and children last!' (1992) 71 *Canadian Bar Review* 445.

CCH INDUSTRIAL LAW EDITORS *Equal opportunity law and practice* CCH (Looseleaf).

CHARLESWORTH H 'The public/private distinction and the right to development in international law' (1992) 12 *Australian Yearbook of International Law* 190.

CHEN M 'Reforming New Zealand's anti-discrimination law' [1992] *New Zealand Law Journal* 137.

CHINKIN C 'Educating lawyers about mediation' (1992) 10 *Journal of Professional Legal Education* 43.

CHRISTENSEN S & JENKINS K 'Solicitors and parenthood' (1994) 68(8) *Law Institute Journal* (Vic) 689.

CLARE R & TULPULE A *Australia's ageing population* EPAC Background Paper No 41 AGPS Canberra 1994.

CLARKE GR & DAVIES IT 'Mediation - when is it not an appropriate dispute resolution process?' (1992) 3 A*ustralian Dispute Resolution Journal* 70.

COONEY S 'Gender and Judicial Selection: Should There Be More Women on the Courts?' (1993) 19 *Melbourne University Law Review* 20.

COX E 'Matrimonial property scuttled' (1985) 10 *Legal Service Bulletin* 192.

COX E, SITKA C & LINTJENS E *Purple postcards: Final report on concerns and solutions offered to the Australian Council for Women* Distaff Associates Sydney 1994.

CRANE BA & BROWN HS *Supreme Court of Canada Practice 1991-2* Thomas Professional Publishing Canada Scarborough 1991.

CRIMINAL JUSTICE COMMISSION *Regulating morality? An inquiry into prostitution in Queensland* 1991.

CZAPANSKIY KB & SINGER JB 'Women in the law school: it's time for more change' (1988) 7 *Law and Inequality* 135.

DALTON C 'Where we stand: observations on the situation of feminist legal thought (1987-88) 3 *Berkeley Women's Law Journal* 1.

DAVIES M & NAFFINE N 'Feminist issues in legal education' (1994) 16 *Law Society Bulletin* 18.

DAVIS P C 'Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style' (1991) 66 *New York University Law Review* 1635.

DAY S 'Impediments to achieving equality' In Martin SL & Mahoney KE (ed) *Equality and judicial neutrality* Carswell Toronto 1987.

DEMPSEY K 'The oppression of rural women in Australia' in MA Franklin, LM Short, EK Teather (ed) *Country women at the crossroads* University of New England Press 1994.

DICKENS BM 'A Canadian development: non-party intervention' (1977) 40 *The Modern Law Review* 666.

DISNEY J 'A better deal for clients' *28th Australian Legal Convention* Hobart 26-30th September 1993.

DUCLOS N 'Lessons of difference: feminist theory on cultural diversity' (1990) 38 *Buffalo Law Review* 325.

DUCLOS N & ROACH K 'Constitutional remedies as "Constitutional hints": A comment on R v Schacter' (1991) 36 *McGill Law Journal* 1.

EBERTS M 'New facts for old: observations on the judicial process' in R Devlin (ed) *Canadian perspectives on legal theory* Edmond Montgomery Toronto 1991.

ESPINOZA LG 'Constructing a professional ethic: law school lessons and lesions' (1989-90) 4 *Berkeley Women's Law Journal* 215.

EVANS R 'Fair and equal: facing up to gender bias' (1993) 67 *Law Institute Journal* 1130.

EVANS R 'Spouse directors run grave risks, report says' (1994) 68 *Law Institute Journal* PAGE.

EVATT E 'Eliminating Discrimination Against Women: the impact of the UN Convention' (1991) 18 *Melbourne University Law Review*, 435.

EQUAL OPPORTUNITY UNIT, UNIVERSITY OF TECHNOLOGY, SYDNEY *Language matters: guidelines for the use of non-discriminatory language at the University of Technology, Sydney* UTS Printing Services Branch Sydney.

FAIRLIE D President's message 'Funding a future for practical legal training' (1994) 32(9) *Law Society Journal* 2.

FAMILY COURT OF AUSTRALIA *Annual Report 1992-93*, 36-37.

FAMILY LAW COUNCIL *Choices: A paper on superannuation* Family Law Council 1992.

_____ *Sterilisation and other medical procedures* Discussion Paper October 1993.

_____ *Sterilisation and other medical procedures* Report October 1994.

FEHLBERG B 'The Husband, the Bank, the Wife and her Signature' (1994) 57 *Modern Law Review* 467.

_____ 'Money and marriage: "sexually transmitted debt"' unpublished paper Queens University Canada October 1994.

FINCH J & GROVE D (ED) *A Labour of Love: Women Work and Caring* Routledge London 1983.

FINLAY H, BRADBROOK A, BAILEY-HARRIS R *Family law; cases materials and commentaries* 2nd ed Butterworths 1993.

FINLEY LM 'Women's experience in legal education: silencing and alienation' (1989) 1 *Legal Education Review* 101.

_____ 'Breaking women's silence in law: the dilemma of the gendered nature of legal reasoning' (1989) 64 *Notre Dame Law Review* 886.

_____ 'A break in the silence: including women's issues in a Torts course' (1989) 1 *Yale Journal of Law and Feminism* 41.

FITZGERALD J 'The common law "reasonable man": misogynist or sensitive new age guy' *Access to Justice Forum* October 1994.

FITZGERALD P 'Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well-intentioned nonsense' (1992) 22 *Victoria University of Wellington Law Review* 135.

FORELL C 'Reasonable woman standard of care' (1992) 11 *University of Tasmania Law Review* 1.

FOUNDATION FOR WOMEN JUDGES *Judicial education: a guide to state and national programs* Foundation for Women Judges Washington 1986.

FRUG MJ 'Re-Reading Contracts: A feminist analysis of a contracts casebook' (1985) 34 *American University Law Review* 1065.

_____ 'Rescuing impossibility doctrine: A postmodern analysis of contract law' (1992) 140 *University of Pennsylvania Law Review* 1029.

FUDGE J 'The public/private distinction: the possibilities of and the limits to the use of Charter litigation to further feminist struggles' (1987) 25 *Osgoode Hall Law Journal* 485.

FUNDER K, HARRISON M & WESTON R *Settling down: pathways of parents after divorce* AIFS Melbourne 1993.

GAVISON R 'Feminism and the public/private distinction' (1992) 45 *Stanford Law Review* 1.

GAZE B & JONES M *Law, liberty and Australian democracy* Law Book Co Sydney 1990.

GEORGE J 'Developments in industrial relations and their effects on women', *Women Management and Industrial Relations Conference*, Macquarie University, 6 July 1994.

GERATHY L 'Yerkey v Jones revisited' (1993) 7 *Commercial Law Quartely* 16.

GIBSON D *The law of the Charter: equality rights* Carswell Toronto 1990.

GIBSON E 'Identifying bias in personal injury compensation' in Brockman J & Chunn D (ed) *Investigating gender bias: law, courts and the legal profession* Thompson Educational Toronto 1993.

GIFFORD D *Statutory Interpretation* Law Book Co Sydney 1990.

GILLIGAN C *In a different voice: psychological theory and women's development* Harvard University Press Cambridge Massachusetts 1982.

GOLDRING J 'Better legal education: an essential element for all' *28th Australian Legal Convention* Hobart 26-30th September 1993.

_____ 'The place of legal theory in the law school: a comment' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 159.

_____ 'The future of legal education: Doubtful assumptions and unfulfilled expectations' (1993) 11(2) *Journal of Professional Legal Education* 149.

GRAYCAR R 'Hoovering as a hobby: the common law's approach to work in the home' (1985) 28 *Refractory Girl* 22.

_____ 'Compensation for loss of capacity to work in the home' (1985) 10 *Sydney Law Review* 528.

_____ 'Before the High Court: women's work: who cares?' (1992) 14 *Sydney Law Review* 86.

_____ 'Legal categories and women's work: explorations for a cross-doctrinal feminist jurisprudence' (1994) 7 *Canadian Journal of Women and the Law* 34.

_____'Love's labour's cost: the High Court decision in *Van Gervan v Fenton*' (1993) 1 *Torts Law Journal* 122.

_____ 'Women's work: who cares?' (1992) 14 *Sydney Law Review* 86.

GRAYCAR R & MORGAN J *The hidden gender of law* Federation Press Sydney 1990.

GREAT BRITAIN. LAW COMMISSION Report 56 *Report on personal injury litigation - assessment of damages* HMSO London 1973.

GREAT BRITAIN. LORD CHANCELLOR'S DEPARTMENT *Developments in judicial appointments procedures* 1994.

GRIBBIN S 'Violence and family mediation: practice' (1994) 8(1) *Australian Journal of Family Law* 22.

HAMPTON B *Prisons and women* New South Wales University Press Kensington 1993.

HARRIS A ' Race and essentialism in feminist legal theory' (1990) 42 *Stanford Law Review* 581.

HARRIS D (et al) *Compenstaion and support for illness and injury* Clarendon Press Oxford 1984.

HARVEY R 'Equal treatment of men and women in the workplace: The implementation of the European Community's equal treatment legislation in the Federal Republic of Germany' (1990) 38 *American Journal of Comparative Law* 31.

HEAGNEY M *Even less rhyme or reason: A report on postgraduate courses for which Australian students are charged fees* CAPA Melbourne 1993.

HEPBURN S 'Equity and infatuation' (1993) 18(5) *Alternative Law Journal* 208.

HEPPLE BA 'Judging equal rights' (1983) 36 *Current Legal Problems* 85.

HOCKING B 'Feminist jurisprudence: The new legal education' (1992) 18 *Melbourne University Law Review* 727.

HOGAN M *Home is where the work is: a report on home based computer workers in the clerical industry in South Australia* Working Women's Centre Adelaide 1991.

HOTOP SD *Principles of Australian Administrative Law* Sixth Edition Law Book Co Ltd Sydney 1985.

HOUSEGO J 'Bankruptcy and family law: there is an equitable solution' (1992) 6 *Australian Journal of Family Law* 57.

HUNTER R *Indirect discrimination in the workplace* Federation Press Sydney 1992.

_____ 'Representing gender in legal analysis: a case/book study in Labour Law' (1991) 18 *Melbourne University Law Review* 305.

_____ 'The regulation of independent contractors: a feminist perspective' (1992) 5 *Corporate & Business Law Journal* 165.

HYNOUS A `A generic approach to intervention in administrative proceedings - increased participation and efficiency through regulatory reform'(1982) 28 *Wayne Law Review* 1427.

INGUILI E 'Transforming the curriculum: What does the pedagogy of inclusion mean for business law?' (1991) 28 *American Business Law Journal* 605.

INNES J ' Discrimination: The ACTU's comparable worth test case' (1986) 11 *Legal Service Bulletin* 86.

_____ 'Equal pay and the Sex Discrimination Act 1984' (1986) 11 *Legal Service Bulletin* 254.

IRONMONGER D (ed) *Household work* Allen and Unwin Sydney 1989.

JACKSON E 'Contradictions and coherence in feminist responses to law' (1993) 20 *Journal of Law and Society* 398.

JUSTICE *The judiciary in England and Wales* E & E Plumridge Ltd London 1992.

KENNEDY H *Eve was Framed: Women and British Justice* Chatto & Widens London 1992.

KIRK L Women in the legal profession (1994) 16(7) *Law Society Bulletin* 10.

KRISLOV S `The amicus curiae brief: from friendship to advocacy'(1963) 72 *The Yale Law Journal* 694.

KUTNER PB 'Damages for injuries to family members: does reform mean abolition?'(1993) 1(3) *Torts Law Journal* 231.

LAHEY KA & SALTER SW 'Corporate law in legal theory and legal scholarship: from classicism to feminism' (1985) 23 *Osgoode Hall Law Journal* 543.

LAW INSTITUTE JOURNAL 'Independent solicitors' certificates' (1994) 68 *Law Institute Journal* 907.

LAW INSTITUTE OF VICTORIA *Career patterns of law graduates* Law Institute of Victoria Melbourne1990.

LAW SOCIETY OF BRITISH COLUMBIA GENDER BIAS COMMITTEE *Gender equality in the justice system* Volume One Law Society of British Columbia Vancouver 1992.

LAW SOCIETY OF NEW SOUTH WALES *Getting through the door is not enough* Law Society of New South Wales Sydney 1993.

_____ *The professional program: A blueprint for the preparation for practice as a solicitor in New South Wales: As amended by the Council of the Law Society of New South Wales on 17 December 1992* Law Society of New South Wales Sydney January 1993.

_____ Specialist Accreditation Board *Specialist accreditation handbook: 1994 policy, procedures and regulations* Law Society of NSW Sydney 1994.

LUNTZ H *Assessment of damages for personal injury and death* 3rd ed Butterworths 1990.

MACKINNON CA 'Feminism, marxism, method and the state: toward feminist jurisprudence' in S Harding (ed) *Feminism and methodology* Indiana University Press Bloomington 1987.

_____ *Feminism unmodified: discourses on life and law* Harvard University Press Massachusetts 1987.

_____ 'Feminism in legal education' (1989) 1 *Legal Education Review* 85.

_____ 'Reflections on sex equality under law' (1991) 100 *Yale Law Journal* 1286.

MCCALLUM, MCCARRY, RONFELDT (EDS) *Employment Security* Federation Press Sydney 1994.

MCDONALD G 'Women and credit in the Australian banking industry' *Women and Cedit Conference* Melbourne 6 March 1991.

MCDONALD P *Settling up: property and income distribution on divorce in Australia* AIFS Melbourne 1986.

MCGARVIE RE 'The function of a degree: core subjects' (1991) 9 *Journal of Professional Legal Education* 11.

MCHUGH J `The law-making function of the judicial process' (1988) 62 *ALJ* 15.

MCINNIS C & MARGINSON S, Centre for the Study of Higher Education, University of Melbourne *Australian law schools after the 1987 Pearce report* Department of Employment, Education and Training, Higher Education Division, Evaluations and Investigations Program AGPS Canberra 1994.

MCKELVIE H 'It's time to educate' (1993) 18 *Alternative Law Journal* 137.

MACK K 'Gender bias and judicial education' (1993) 15 *Law Society Bulletin* 19.

MAHONEY K 'The legal treatment of spousal abuse: a case of sex discrimination' (1992) 41 *University of New Brunswick Law Journal* 21.

_____ 'International strategies to implement equality rights for women: overcoming gender bias in the courts' (1993) 1 *Australian Feminist Law Journal* 115.

_____ 'The constitutional law of equality in Canada' (1992) 44 *Maine Law Review* 229.

MALCOLM D, CHIEF JUSTICE OF WESTERN AUSTRALIA 'Women and the law: proposed judicial education programme on gender equality and taskforce on gender bias in Western Australia' (1993) 1 *Australian Feminist Law Journal* 139.

MALONEY M 'Women and the Income Tax Act' (1989) 3 *Canadian Journal of Women and the Law* 182.

MARLES V *Law firms and affirmative action* paper Master of Laws, University of Melbourne 1992.

MARTIN SL 'Some constitutional considerations on sexual violence against women' (1994) 32 *Alberta Law Revi*ew 535.

MARTIN SL & MAHONEY KE (ed) *Equality and judicial neutrality* Carswell Toronto 1987.

MASON SIR A `Changing the law in a changing society' (1993) 67 *Australian Law Journal* 568.

_____ 'The Australian judiciary in the 1990s' *Address to the Sydney Institute* 15 March 1994.

_____ 'The role of a constitutional court in a federation' (1986) 16 *Federal Law Review* 1.

MATHEWS J 'The changing profile of women in the law' (1986) 56 *Australian Law Journal* 634.

MATTILA J 'Gender discrimination in the legal profession - some dos and don'ts' (1992) 30 *Law Society Journal* 52.

MEAGHER R & GUMMOW WMC *Jacobs' law of trusts* Butterworths Sydney 1986.

MELHAM D 'Management of legislation in the House of Representatives' *Parliament and the Legislative Process* Australian Institute of Administrative Law Conference Lakeside Hotel Canberra, 2 June 1994.

MENKEL-MEADOW C 'Feminist legal theory, critical legal studies, and legal education or "the fem-crits go to law school"' (1988) 38 *Journal of Legal Education* 61.

MINOW M 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201.

MOORE JWM & KENNEDY JE *Moore's Federal Practice (2nd ed) Vol 3B* Mathew Bender New York 1993.

MOORE JWM, BENDIX HI, RINGLE BA & SHIREY K *Moore's Federal Practice (2nd ed) Vol 13* Mathew Bender New York 1993.

MORAN M 'Case comments: Jane Doe v Board of Commissioners of Police for the Municipality of Metropolitan Toronto' (1993) 6 *Canadian Journal of Women and the Law* 491.

MORGAN J 'The socratic method: silencing co-operation' (1989) 1 *Legal Education Review* 151.

_____ 'Equality rights in the Australian context: a feminist assessment' in Alston P (ed) *Towards an Australian Bill of Rights* HREOC and Centre for International and Public Law Canberra 1994.

MORGAN R 'Legal education watershed' (1992) 17 *Alternative Law Journal* 140.

MOSHER J 'Challenging limitation periods: civil claims by adult survivors of incest' (1994) 44(2) *Toronto Law Journal* 169.

MOSSMAN MJ 'Otherness and the law school: a comment on teaching gender equality' (1985) 1 *Canadian Journal of Women and the Law* 213.

MOSSMAN M J '"Invisible" Constraints on lawyers and leadership: the case of women lawyers' (1988) 20 *Ottawa Law Review* 567.

MOSSMAN M J 'Women lawyers in twentieth century Canada: rethinking the image of Portia' in R Graycar (ed) *Dissenting opinions: feminist explorations in law and society* Allen and Unwin 1990.

MULDOON P & SCRIVEN D `Intervention as added party: rule 13 of the Ontario Rules of Civil Procedure' (1985) 6 *Advocates' Quarterly* 129.

NAFFINE N *Law and the sexes: explorations in feminist jurisprudence* Allen & Unwin Sydney 1990.

_____ 'Possession: Erotic love in the law of rape' (1994) 57 *Modern Law Review* 10.

_____ 'Windows on the legal mind: the evocation of rape in legal writings' (1992) 18 *Melbourne University Law Review* 741.

NAPOLI J *Work and family responsibilities* CCH Australia Limited Sydney 1994.

NATIONAL COMMITTEE ON VIOLENCE AGAINST WOMEN *The effectiveness of protection orders in Australian jurisdictions* AGPS Canberra 1993.

NATIONAL COUNCIL FOR THE INTERNATIONAL YEAR OF THE FAMILY *The heart of the matter* AGPS Canberra 1994.

NATIONAL WOMEN'S CONSULTATIVE COUNCIL, *Paid maternity leave - a discussion paper on paid maternity leave in Australia* AGPS Canberra 1993.

NAYLOR B 'Pregnant Tribunals' (1989) 14 *Legal Service Bulletin* 41.

NEAVE M 'Resolving the dilemma of difference: a critique of "The role of private ordering in Family Law"' (1994) 44 *University of Toronto Law Journal* 97.

_____ 'The new unconscionability principle: property disputes between de facto partners' (1991) 5 *Australian Journal of Family Law* 185.

NELSON J *New directions for practical legal training in the nineties: An evaluation of the curriculum of the College of Law's PLT course and its relevance to student's work experiences in practice* A research project conducted on behalf of the College of Law, Centre for Publication and Information, College of Law Sydney 1988.

NEW JERSEY SUPREME COURT TASK FORCE *Women in the courts* First Year Report, New Jersey Supreme Court Task Force June 1984.

NEW SOUTH WALES. LAW REFORM COMMISSION Discussion Paper 30 *Review of the Anti-Discrimination Act 1977 (NSW)* Sydney NSWLRC 1993.

NEW SOUTH WALES SELECT COMMITTEE *Report of the Select Committee upon Prostitution* 1986.

NINTH CIRCUIT TASK FORCE ON GENDER BIAS 'Executive summary of the preliminary report of the Ninth Circuit Task Force on Gender Bias' (1992) 45 *Stanford Law Review* 2153.

O'CONNOR K & EPSTIN L 'Court rules and workload: a case study of rules governing amicus curiae participation' (1983) 8 *The Justice System Journal* 35.

O'DONOVAN K *Sexual divisions in law* Weidenfeld & Nicolson London 1985.

O'NEILL NKF 'The Australian Bill of Rights and the Supremacy of Parliament' (1986) 60 *Australian Law Journal* 139.

OLSEN F 'The family and the market: a study of ideology and legal reform' (1983) 96 *Harvard Law Review* 1497.

OTTO D 'A barren future? Equity's conscience and women's inequality' (1992) 18 *Melbourne University Law Review* 808.

OWENS R 'Women, 'atypical' work relations and the law' (1993) 19 *Melbourne Universty Law Review* 399, 411.

PALMER C, Forum: Specialist Accreditation 'New opportunities for professional development: an outline of the program' (1992) 30 *Law Society Journal* 32.

PALMER G *A Bill of Rights for New Zealand: A white paper* Government Printer Wellington 1985.

PEARCE D, CAMPBELL E & HARDING D *Australian law schools: a discipline assessment for the Commonwealth Tertiary Education Commission* Volume One AGPS Canberra 1987.

PEARCE DC & GEDDES RS *Statutory interpretation in Australia* Third Edition Butterworths Sydney 1988.

PENGILLEY W 'Bank mortgages - unjust contracts and "wives"'(1994) 10(4) *Australian and New Zealand Trade Practices Law Bulletin* 33.

PERKINS R, PRESTAGE G, SHARP R, LOVEJOY F (ed) *Sex work and sex workers in Australia* University of New South Wales Press, Sydney 1994.

PERKINS R 'Health aspects of female private prostitutes in NSW' *Report to the National Health and Medical Research Council* Canberra 1994.

POINER G 'Landscape with figures: femininity and rural views' in MA Franklin, LM Short, EK Teather (ed) *Country women at the crossroads* University of New England Press 1994.

QUEENSLAND. ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION *Report on review of the preservation and enhancement of individuals' rights and freedoms* EARC Brisbane 1993.

RAYMOND J *Social security review: bringing up children alone: policies for sole parents* Issues Paper No 3 AGPS Canberra 1987.

RAZACK S *Canadian feminism and the law: The Women's Legal Education and Action Fund and the pursuit of equality* Second Story Press Toronto 1991.

RHODE D 'Feminism and the state' (1994) 107 *Harvard Law Review* 1181.

RILEY J 'The property rights of home'makers under general law: *Bryson v Bryant*' (1994) 16 *Sydney Law Review* 412.

ROBERTSON D 'The lender-borrower relationship' (1991) 2 *Journal of Banking and Finance Law and Practice* 69.

ROGERS A 'Enlightened judgment puts the onus on the lender' *Financial Review* 18 November 1993.

RONALDS C *Affirmative Action and Sex Discrimination: a handbook on legal rights for women* Second Edition Pluto Press Sydney 1991.

ROSSER K 'Law and gender: the feminist project in action' (1988) 13 *Legal Service Bulletin* 233.

SAMPFORD C & WOOD D "Theoretical dimensions" of legal education: A response to the Pearce Report' (1988) 62 *Australian Law Journal* 32.

SARMAS L 'Storytelling and the law: a case study of *Louth v Diprose'* (1994) 19(3) *Melbourne University Law Review* 701.

SCHAFRAN LH 'Gender bias in the courts: an emerging focus for judicial reform' (1989) 21 *Arizona State Law Journal* 237.

SCHAFRAN LH & WIKLER NJ *Operating a taskforce on gender bias in the courts: a manual for action* The Foundation for Women Judges Washington 1986.

SCHIEL M '...And justice for all?' (1993) 67 *Law Institute Journal* 1021.

SCRIVEN D & MULDOON P `Intervention as a friend of the court: rule 13 of the Ontario Rules of Civil Procedure' (1985) 6 *Advocates Quarterly* 448.

SCUTT JA *Women and the law: commentary & materials* Law Book Co Sydney 1990.

SHEEHY EA 'Personal Autonomy and the Criminal Law: Emerging Issues for Women' Background Paper in R Graycar & J Morgan *The hidden gender of law* The Federation Press Sydney 1990, 40.

_____ 'Feminist argumentation before the Supreme Court of Canada in *R v Seaboyer; R v Gayme*: The sound of one hand clapping' (1991) 18 *Melbourne University Law Review* 450.

SHEPPARD NC 'Equality, ideology and oppression: women and the Canadian Charter of Rights and Freedoms' (1986) 10 *Dalhousie Law Journal* 195.

SMART C 'Law's truth/ women's experience' in R Graycar (ed) *Dissenting opinions: feminist explorations in law and society* Allen & Unwin Sydney 1990.

SMITH L 'An equality approach to reproductive choice: R v Sullivan' (1991) 4 *Yale Journal of Law and Feminism* 93.

SNEDDON M 'Unfair Conduct in taking Guarantees' (1990) 13 *University of New South Wales Law Journal* 302.

_____ 'Consumer guarantees: a proposal for reform' (1993) 4 *Journal of Banking and Finance Law and Practice* 92.

SPENDER L (ed) *Human rights: The Australian debate* Redfern Legal Centre Publishing Redfern 1987.

STANG DAHL T *Women's law: An introduction to feminist jurisprudence* Norwegian University Press Oslo 1988.

_____ 'Taking women as a starting point: building women's law' (1986) 14 *International Journal of the Sociology of Law* 239.

STEWART M 'Conflict and connection at Sydney University Law School: twelve women speak of our legal education' (1992) 18 *Melbourne University Law Review* 828.

TASSIE J *Out of sight, out of mind: outwork in SA* Working Women's Centre Adelaide 1989.

TEWS S 'Queensland Domestic Violence Regional Service' *Norfolk Island Project - Discussion Paper* (1994) 5.

THORNTON M 'Feminist jurisprudence: illusion or reality' (1986) 3 *Australian Journal of Law and Society* 5.

_____ 'The public/private dichotomy: gendered and discriminatory' (1991) 18 *Journal of Law and Society* 448.

_____ 'Portia lost in the groves of Academe wondering what to do about legal education' (1991) 34 *The Australian Universities' Review* 26.

THORNTON M 'Embodying the citizen' in Thornton (ed) *Fragile frontiers: feminist debates about public and private* Oxford University Press 1995 (forthcoming).

TOBIAS C 'Gender issues and the Prosser, Wade, and Schwartz Torts Casebook' (1988) 18 *Golden Gate University Law Review* 495.

TOOHEY J 'A government of laws, and not of men?' *Constitutional Change in the 1990's* Conference October 1992.

TORREY M (et al) 'Teaching law in a feminist manner: a commentary from experience' (1990) 13 *Harvard Women's Law Journal* 87.

TRINDADE F & CANE *The Law of Torts in Australia* OUP Melbourne 1985.

TWINING W 'Developments in legal education: beyond the primary school model' (1990) 2 *Legal Education Review* 35.

VICTORIA Legal and Constitutional Committee *Report on the desirability or otherwise of legislation defining and protecting human rights* Government Printer Melbourne 1987.

WALKER J *Australian prisoners 1992: Results of the National Prison Census 30 June 1992* Compiled on behalf of the Correctional Administrators, Australian Institute of Criminology Canberra 1993.

WARING M *Counting for nothing: what men value and what women are worth* Allen and Unwin Sydney 1988.

WEISBROT D *Australian lawyers* Longman Cheshire Melbourne 1990.

_____ 'Recent statistical trends in legal education' (1991) 2 *Legal Education Review* 219.

WELCH J 'No room at the top: interest group intervenors and Charter litigation in the Supreme Court of Canada' (1985) 43 *University of Toronto Faculty Law Review* 204.

WEST R 'The difference in women's hedonic lives: a phenomenological critique of feminist legal theory' (1987) 3 *Wisconsin Women's Law Journal* 81.

WIKLER N 'Exclusion of women from justice: emerging strategies for reform' in KE Mahoney and P Mahoney (ed) *Human rights in the twenty-first century: a global challenge* Nijoff Boston 1993.

WILCOX MR *An Australian Charter of Rights?* Law Book Co Sydney 1993.

WILDMAN SM 'The question of silence: techniques to ensure full class participation' (1988) 38 *Journal of Legal Education* 147.

WILSON B 'Will women judges really make a difference?' (1990) 28 *Osgoode Hall Law Journal* 507.

WINTERTON G 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167.

_____ 'The separation of judicial power as an implied Bill of Rights' *Future directions in Australian Constitutional Law* Manning Clarke Centre, Australian National University, Canberra 3-4 December 1993.

WRIGHT S 'A feminist exploration of the legal protection of art' (1994) 7 *Canadian Journal of Women and the Law* 59.

1 CEDAW art 2. See E Evatt 'Eliminating Discrimination Against Women: the impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435.
2 Australian Law Reform Commission Report 69(1) *Equality before the law: justice for women* ALRC Sydney 1994 (ALRC 69(1)) ch 2.
3 Australian Law Reform Commission Discussion Paper 54 *Equality before the law* ALRC Sydney 1993 (ALRC DP 54).
4 The Commission's reference on privacy is the only one to receive a higher number of submissions. However, those were received over a period of more than three years.
5 Australian Law Reform Commission Report 67 *Equality before the law: women's access to the legal system* ALRC Sydney 1994 (ALRC 67).
6 Hansard (H of R) No 5, 24 March, 2094-2108, 2147-2149, 2186-2197.
7 Access to Justice Advisory Committee *Access to Justice: an action plan* AGPS Canberra 1994, para 2.102.
8 ALRC 67 para 1.17-1.18; ALRC 69(1) para 1.10.
9 House of Representatives Standing Committee on Legal and Constitutional Affairs *Half way to equal: Report of the inquiry into equal opportunity & equal status for women in Australia* AGPS Canberra 1992. Hereafter referred to as *Half way to equal*.
10 ALRC 69(1) ch 2.
11 This may require an amendment to the Hague Convention Regulations.
12 Australian Law Reform Commission Report 39 *Matrimonial property* AGPS Canberra 1987 (ALRC 39).
13 Australian Law Reform Commission Report 57 *Multiculturalism and the law* ALRC Sydney 1992 (ALRC 57).
14 The sponsorship of more than one spouse, where one at least of the relationships breaks down because of domestic violence.
15 Ch 11 and 13 analyse in more depth two specific instances of gender bias that occur as part of economic life.
16 Australian Law Reform Commission Discussion Paper 54 Equality before the law Sydney 1993 (ALRC DP 54), para 3.41.
17 Australian Law Reform Commission Report 69(1) Equality before the law: justice for women ALRC 1994, para 3.29.
18 ibid, quoting Public Service Alliance of Canada and Human Rights Commission v Canada (Treasury Board) (1991) 14(5) Canadian Human Rights Reporter D/341.
19 Senate Standing Committee on Legal and Constitutional Affairs Gender bias and the judiciary Senate Printing Unit Canberra 1994.
20 Mason CJ 'The role of a constitutional court in a federation' (1986) 16 Federal Law Review 1, 5.
21 See ALRC DP 54, ch 6-7 for issues relating to participation.
22 See generally R Graycar & J Morgan The hidden gender of law Federation Press Sydney 1990, ch 1.
23 eg see the doctrine of *Yerkey v Jones* (1940) 63 CLR 649 discussed in ch 13; areas of industrial law still bear the imprint of the notion that men are 'breadwinners', women 'home makers' or secondary earners, despite the huge changes in married women's participation in the workforce over the last 40 years, and the numbers of families headed by women. Confidential *Submission 198*; A O'Connor *Submission 209*; M Clarke *Submission 222*; J Trutwein *Submission 331*.
24 Justice Deirdre O'Connor's submission to the Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* Senate Printing Unit Canberra 1994, para 1.50.
25 E Evatt *Speech (Mitchell Oration)* 23 September 1994.
26 ALRC DP 54, ch 6-7.
27 See House of Representatives Standing Committee on Legal and Constitutional Affairs *Half way to equal: report of the inquiry into equal opportunity and equal status for women in Australia* AGPS Canberra 1992, particularly ch 3 concerning participation in the paid workforce.
28 McLachlin J 'Role of judges in modern commonwealth society' (1994) 110 *Law Quarterly Review* 260, 264.
29 K Mahoney *Speech* 'Gender bias in judicial decisions' Supreme Court of Western Australia (August 1992).
30 Gaudron J 'Towards a Jurisprudence of Equality' Queensland Bar Practice Management Course 20 July 1994.
31 Access to Justice Advisory Committee *Access to justice: an action plan* AGPS Canberra 1994, para 2.16.
32 See ALRC 69(1), para 9.68-9.78.
33 See generally R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990.
34 See K Mahoney & S Martin (ed) *Equality and judicial neutrality* Carswell Calgary 1987; LM Finley 'Breaking women's silence in law: the dilemma of the gendered nature of legal reasoning' (1989) 64 *Notre Dame Law Review* 886; N Naffine *Law & the sexes: explorations in feminist jurisprudence* Allen & Unwin Sydney 1990; C Smart 'Law's truth/Women's experience' in Graycar (ed) *Dissenting opinions: feminist explorations in law and society* Allen & Unwin Sydney 1990; R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990; C MacKinnon *Feminism unmodified: discourses on life and law* Harvard University Press Cambridge MA 1987; C MacKinnon *Towards a feminist theory of the state* Harvard University Press Cambridge MA 1989; K O'Donovan *Sexual divisions in law* Weidenfeld & Nicolson London 1985; J Scutt *Women & the law: commentary and materials* Law Book Company Sydney 1990; C Smart *Feminism & the power of law* Routledge London 1989; T Stang Dahl *Women's law: an introduction to feminist jurisprudence* Norwegian University Press Oslo 1988. See also the heading `feminist jurisprudence' in the *Index to Legal Periodicals* and the *Current Law Index*.
35 Vienna Declaration and Program of Action Pt III s II.C.3.
36 N Wikler 'Exclusion of women from justice: emerging strategies for reform' in KE Mahoney & P Mahoney (ed) *Human rights in the twenty-first century: a global challenge* Nijhoff Boston 1993, 98-102.
37 New Jersey Supreme Court Task Force *Women in the Courts* The First Year Report June 1984.
38 In 1986 the Faculty of Law at the University of Calgary convened a national interdisciplinary conference, 'The Siasaino Judges to Equality Issues'. This was followed by the inclusion of gender, race and class bias issues in judicial continuing education programs throughout the country. The Manitoba Association of Women and the Law published a report, *Gender equality in the courts* in November 1988. In 1992, the task force of the Gender Bias Committee of the Law Society of British Columbia published *Gender equality in the justice system*, describing endemic bias in law and legal practice. The Western Judicial Education Centre has included gender and race issues in its meetings since 1989. Both the Canadian Judicial Council and the Canadian Judicial Centre have made available to Canadian judges written and video course materials dealing with bias issues.
39 K Mack 'Gender bias and judicial education' (1993) 15 *Law Society Bulletin* 19. Ninth Circuit Task Force on Gender Bias 'Executive Summary of the preliminary report of the Ninth Circuit Task Force on Gender Bias' (1992) 45(6) *Stanford Law Review* 2153.
40 LH Schafran 'Gender bias in the courts: an emerging focus for judicial reform' (1989) 21 *Arizona State Law Journal* 237; N Wikler 'Exclusion of women from justice: emerging strategies for reform' in KE Mahoney & P Mahoney (ed) *Human rights in the twenty-first century: a global challenge* Nijhoff Boston 1993, 95.
41 ibid. See also Wilson B 'Will women judges really make a difference?' (1990) 28 *Osgoode Hall Law Journal* 507, 512.
42 eg Gaudron J *Equality and gender* Conference Paper Sydney February 1992; Papers presented at the *Women & Law* Conference Deakin University Melbourne 9-10 June 1993.
43 See ch 8.
44 On 26 May 1993 the Senate referred the following matters to its Standing Committee on Legal and Constitutional Affairs for enquiry and to report:
(a) whether [then] recent publicity surrounding judicial comment in sexual offence cases is a proper reflection of a failure to understand gender issues by the judiciary; and
(b) the appropriate response to any such failure.

45 Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* Senate Printing Unit Canberra 1994, para 4.52.
46 id, para 3.33.
47 Chief Justice of Western Australia *Report of the Chief Justice's Task Force on gender bias* Perth 1994, 25.
48 id, 46-47.
49 Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* Senate Printing Unit Canberra 1994, para 3.35.
50 id, para 4.53.
51 For an account of the English criminal justice system see H Kennedy Eve was framed:Womenand BritishJustice Chatto and Windus London 1992.
52 One submission from the University of Newcastle analyses the recent Leigh Leigh murder case. The victim had been raped. The submission contrasts the sexism of the trial judge's remarks in sentencing the offender with the propriety of the Appeal Court Dr K Carrington, A Johnson *Submission 583.*
53 See ALRC 69(1), para 2.12-2.15.
54 Cases cited in Illawarra Legal Centre *Submission 284*; Vietnam Veteran's Family Support Link Line *Submission* 194; Confidential *Submission 83*; L Jackson *Submission* 156; U Mawson *Submission 536;* J Wilczynski *Submission 559*; Confidential *Submission 203*; Scarlett Alliance *Submission 1*; K Thickens *Submission 566*; Confidential *Submission 123*; Confidential *Submission 479*; Confidential *Submission 383*; Confidential *Submission 372*; Centre Against Sexual Assault Melbourne *Submission 157*; Women Incest Survivors' Network NSW *Submission 319*; Confidential *Submission 492*; N Yakimova *Submission 523*; Confidential *Submission 529*; Confidential *Submission 527.*
55 Vietnam Veteran's Family Support Link Line *Submission 194.*
56 Confidential *Submission 203.*
57 See ch 12.
58 In Norfolk Island a rape complainant's past sexual experience is still relevant and admissible evidence in the trial of her assailant. See ch 14.
59 See *R v Davie* (unreported), Morwell County Court, Bland J, 15 April 1993, 34-35.
60 See ALRC 69(1), para 9.3.
61 id, para 3.65.
62 eg Upper Murray Centre Against Sexual Assault *Submission 182*.
63 U Mawson *Submission 536*.
64 *Doherty v Footner* Supreme Court of South Australia, Full Court, unreported 29 April 1993.
65 The final award was $1 921 032 .40.
66 J Wilczynski *Submission 559.*
67 The submission was based on an examination of reported cases over 5 years. It said that while the character of new spouses was often discussed in court judgments these seemed to discount the question of which parent was or would be actually caring for the child on a day to day basis and which parent would build up the detailed knowledge of the child's personality, friends, interests, school matters. When the mother was in paid employment it was not recognised that she might continue to be primary caregiver and not share it equally with the father. R Clifford *Submission 620*.
68 See ch 15 para 15.36.
69 See ALRC DP 54, para 9.17.
70 ALRC 69(1) ch 2.
71 See ch 12.
72 P Baron *Submission 619.*
73 Confidential *Submission 629*; P Page *Submission 600.* In both of these cases there were grounds of appeal against the trial judge's decision. In one case the woman did appeal and won both in the Full Court and High Court.
74 See further para 2.55-2.61 and T Stang Dahl 'Taking women as a starting point: building women's law' (1986) 14 *International Journal of the Sociology of Law* 239.
75 ALRC 69(1) ch 9.
76 (1992) 177 CLR 292.
77 The apocryphal man on the Clapham omnibus, or his American cousin, 'the man who takes the magazines at home and in the evening pushes the lawnmower in his shirtsleeves': see L Finley 'Breaking the silence: including women's issues in a torts course' (1989) 1 *Yale Journal of Law and Feminism* 41, 58. See also the frequently cited AP Herbert, 'Fardell v Potts' in *Uncommon law: misleading cases on the common law* London Putnam 1927. In 'Fardell v Potts' the court decided that 'at Common Law a reasonable woman does not exist'. See also C Forell 'Reasonable woman standard of care' (1992) 11 *University of Tasmania Law Review* 1.
78 ALRC 69(1), para 12.2.
79 [1990] 1 SCR 852, 874.
80 eg Queensland Supreme Court *Bradbury v Horshall* (1988) A Torts Rep 80 67, 330.
81 eg L Finley 'Breaking the silence: including women's issues in a torts course' (1989) 1 *Yale Journal of Law and Feminism* 41, 57-65; L Bender 'A lawyer's primer on feminist theory and tort' (1988) 38 *Journal of Legal Education* 3; N Cahn 'The looseness of legal language: the reasonable woman standard in theory & practice' (1992) 77 *Cornell Law Review* 139. C Boyle has noted: 'Simply changing one's language does not necessarily reflect a change in perspective', in 'Criminal law and procedure: who needs tenure' (1985) 23 *Osgoode Hall Law Journal* 427, 433. For a related discussion, concerning the criminal law defence of provocation, see H Allen 'One law for all reasonable persons?' (1988) 16 *International Journal of the Sociology of Law* 419.
82 *Rabidue v Osceola* 584 F Supp 419 (1984); 805 F 2d 611 (6th Cir 1986) Keith J in dissent; *Ellison v Brad*y 924 F 2d 872 (9th Cir 1991); *Hall, Oliver and Reid v Sheiban* (1988) EOC para 92-227 and (1989) EOC para 92-250 on appeal.
83 C Forell 'Reasonable woman standard of care' (1992) 11 *University of Tasmania Law Review* 1.
84 (1988) EOC para 92-227.
85 id, at 77,144.
86 *Hall v Sheiban* (1989) EOC para 92-250, at 77,398.
87 LM Finley 'A break in the silence: including women's issues in a torts course' (1989) 1 *Yale Journal of Law and Feminism* 41, 64. See also L Bender 'An overview of feminist tort scholarship' (1993) 78 *Cornell Law Review* 575, 586-587.
88 *Family Law Act 1975* (Cth) s 79.
89 id, s 75(2).
90 *In the Marriage of Ferraro* (1993) FLC para 92-335, at 79,572.
91 P McDonald *Settling up: property and income distribution on divorce in Australia* AIFS Melbourne 1986, 127-128; K Funder, M Harrison & R Weston *Settling down: pathways of parents after divorce* AIFS Melbourne 1993.
92 Confidential *Submission 345.*
93 E Cox 'Matrimonial property scuttled' (1985) 10 *Legal Service Bulletin* 192.

94 J Hannell *Submission 91*.

95 ALRC 69(1), para 9.51-9.54.

96 Australian Law Reform Commission Report 39 *Matrimonial property* AGPS Canberra 1987 (ALRC 39).

97 This report receommended that the *Family Law Act 1975* (Cth) should be amended to introduce as a basis of the determination of spouses' shares in the value of the property of the marriage, a rule of equal sharing: id, para 363. The court would then be able to adjust the shares in order to take account of certain special circumstances. These circumstances would include

- a substantially greater contribution to the marriage by one party than by the other;
- actions of the parties in relation to property or child care after separation;
- that one party has the benefit of financial resources built up during the marriage;
- that one party brought property into the marriage or acquired it by way of gift or inheritance or compensation or damages: id, para 364.

It would also include an adjustment of share on account of diparities between the parties standard of living attributable to the future care of children or the effect of the marriage on future earning capacity.

98 id, para 273.

99 Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: aspects of its operation and interpretation* AGPS Canberra 1992.

100 Attorney-General *Family Law Act*, *Directions for Amendment* A-G Canberra 1993.

101 Draft circulated in August 1994. This is to be Stage 2 of the Family Law Reform Bill due to be introduced in Parliament in 1995.

102 Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: aspects of its operation and interpretation* AGPS Canberra 1992

Recommendation 74

74. Matters to be taken into account in exercising a discretion may include but should not be limited to:
74.1. the length of the marriage;
74.2. the care and control of children;
74.3. obligations incurred under the child support legislation;
74.4. the future needs of each spouse;
74.5. the financial impact on each of the parties;
74.6. the property brought into the marriage;
74.7. the home making and child rearing contribution; and
74.8. the financial contribution by each person.

103 [T]he court shall determine that those shares be varied as specified in the determination.
'(2) The matters referred to in paragraph (1)(f) are -
a) the responsibility of each party for the future welfare of the children of the marriage; and
b) the earning capacity of a party having been affected by the way in which either of the parties discharged the shared responsibility of the parties for -
(i) the welfare of the children of the marriage;
(ii) the management of the household;
(iii) the acquisition and management of income; and
(iv) the acquisition, management, conservation and improvement of property and financial resources.

104 ALRC 69(1), para 4.19-4.26, 9.58.

105 *Crapp and Crapp* (1979) FLC para 90-615; *Murkin and Murkin* (1980) FLC para 90-806; *Evans and Public Trustee for WA as Legal Personal Representative of Evans* (1991) FLC para 92-223.

106 See *Family Law Act 1975* (Cth) s 75(2)(f). See also *Crapp and Crapp* (1979) FLC para 90-615; *Bailey and Bailey* (1978) FLC para 90-424.

107 *Webber and Webber* (1985) FLC para 91-648, 79,695.

108 See CCH *Australian Family Law and Practice* para 38-515. Butterworths *Australian Family Law* 1482-4.

109 *Evans and Public Trustee for the State of Western Australia* (1991) 14 Fam LR 646 (Barblett DCJ & Fogarty J).

110 C Thompson *Submission 47.*

111 *Tyson v Tyson* (unreported) Family Court of Australia Sydney, No SY11276 of 1978, 22.10.93.

112 M Ierodiaconnou *Submission 354*; M Flynn *Submission 631.*

113 M Flynn *Submission 631.*

114 See ALRC 39; Australian Law Reform Commission Report 59 *Collective investments: superannuation* ALRC Sydney 1992; Attorney-General's Department Discussion Paper *The treatment of superannuation in family law* AGPS Canberra 1992; Family Law Council *Choices - a paper on superannuation* Canberra The Council 1992; Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of the Operation and Interpretation of the Family Law Act 1975* AGPS Canberra 1992.

115 The Government Response to the Joint Select Committee Report states:
Provision will be made for splitting the entitlement to superannuation of a contributing spouse as follows:

- superannuation will be dealt with as a separate and discrete asset;
- the asset will be distributed between the parties, upon breakdown of marriage, equitably by operation of law;
- the apportionment of the entitlement will be affected by reference to the period of cohabitation and the period of contribution to the fund; and
- the proposal is to be consistent with the retirement incomes policy.

A government working group will be established to develop a scheme within these parameters. Attorney-General *Family Law Act 1975: Directions for Amendment* AGPS December 1993.

116 See ALRC 69(1), ch 2; Australian Bureau of Statistics *Women in Australia* Cat No 4113.0 ABS Canberra 1993; Australian Bureau of Statistics *How Australians Use Their Time* Cat No 4153.0 ABS Canberra 1994; cf R Graycar `Legal categories and women's work: explorations for a cross-doctrinal feminist jurisprudence' (1994) 7 *Canadian Journal of Women and the Law* 34. For a recent discussion of the value of women's work looking at the world wide failure of governments to take account of women's contribution to gross national product, see M Waring *Counting for nothing: what men value and what women are worth* Allen & Unwin Wellington 1988. cf D Ironmonger (ed) *Households work* Allen & Unwin Sydney 1989.

117 *De Facto Relationships Act 1984* (NSW); *De Facto Relationships Act 1991* (NT); *Real Property Act 1958* (Vic) Part IX. Queensland has referred power over de facto relationships to the Commonwealth, accordingly the *Family Law Act 1975* (Cth) will be amended to cover people in de facto relationships living in Queensland.

118 There is no legislation covering property interests on the breakdown of de facto relationships in States other than the Northern Territory, New South Wales and Victoria. Even in the States with legislation de facto relationships of less than two years are not covered by legislation. No legislation covers property interests between homosexual partners.

119 In *Bryson v Bryant* (1992) 29 NSWLR 188, it was necessary to determine the interests of the parties to a marriage after the death of both spouses. It might also be necessary for a woman to assert her interests in the family home when her husband is declared bankrupt. See further J Housego 'Bankruptcy and family law - is there an equitable solution' (1992) 6 *Australian Journal of Family Law* 57.
120 See ALRC 69(1), para 2.6.
121 *Bryson v Bryant* (1992) 29 NSWLR 188.
122 R Meagher & WMC Gummow *Jacobs' law of trusts* Butterworths Sydney 1986, para 1210.
123 *Bryson v Bryant* (1992) 29 NSWLR 188, 199-200 (Kirby P), 215-216 (Sheller JA), 228 (Samuels A-JA).
124 id, 220-221 (Sheller JA), 227 (Samuels A-JA).
125 id, 220.
126 id, 229.
127 id, 220.
128 J Riley 'The property rights of home-makers under general law: *Bryson v Bryant*' (1994) 16 *Sydney Law Review* 412, 416.
129 ibid.
130 *Bryson v Bryant* (1992) 29 NSWLR 188, 227.
131 J Riley 'The property rights of home-makers under general law: *Bryson v Bryant*' (1994) 16 *Sydney Law Review* 412, 417. Riley notes that '(c)ommonly, family homes are initially acquired with a very modest deposit and a 30 year mortgage. Over the course of a marriage, the asset is often improved and extended dramatically'.
132 *Bryson v Bryant* (1992) 29 NSWLR 188, 227 Samuels A-JA.
133 id, 225.
134 As stated by the High Court of Australia in *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137.
135 *Bryson v Bryant* (1992) NSWLR 188, 222 Sheller JA. However Sheller JA did note that if Mrs Moate had died after her husband, he might have recognised an equitable interest because it would be unjust in these circumstances for Mr Moate's estate to retain the entire interest in the property: ibid.
136 *Rathwell v Rathwell* (1978) 83 DLR (3d) 289.
137 *Bryson v Bryant* (1992) 29 NSWLR 188, 230-231.
138 id, 231.
139 id, 203, citing *Hibberson v George* (1987) 12 Fam LR 725; *Lipman v Lipman* (1989) 13 Fam LR 1.
140 ibid, citing *Ryan v Hopkinson* (1990) 14 Fam LR 151; *Conn v Martusevicius* (1991) 14 Fam LR 751.
141 *Bryson v Bryant* (1992) 29 NSWLR 188, 204.
142 id, 204.
143 M Neave 'The new unconscionability principle - property disputes between de facto partners' (1991) 5 *Australian Journal of Family Law* 185; R Bailey-Harris 'Family law - parties living in de facto relationships' (1990) 64 *Australian Law Journal* 365. See also R Bailey-Harris 'Property disputes between de facto couples: is statute the best solution?' (1991) 5 *Australian Journal of Family Law* 221.
144 Often known as criminal injuries or victims' compensation.
145 The most comprehensive study of these phenomena to date is that by D Harris et al, *Compensation and support for illness and injury* Clarendon Press Oxford 1984, discussed in more detail below. See also E Gibson 'Identifying bias in personal injury compensation' in J Brockman and D Chunn (ed) *Investigating gender bias: law, courts and the legal profession* Thompson Educational Toronto 1993; H Luntz *Assessment of damages for personal injury and death* 3rd ed Butterworths Sydney 1990.
146 Law Society of British Columbia Gender Bias Committee *Gender equality in the justice system* Vol 2 Law Society of British Columbia Vancouver 1992, 6.16-6.32. See also J Cassels 'Damages for lost earning capacity: women and children last!' (1992) 71 *Canadian Bar Review* 445. See also R Graycar 'Compensation for loss of capacity to work in the home' (1985) 10 *Sydney Law Review* 528.
147 See R Graycar 'Women's work: who cares?' (1992) 14 *Sydney Law Review* 86; *Van Gervan v Fenton* (1992) 175 CLR 327; R Graycar 'Love's labour's cost: the High Court decision in *Van Gervan v Fenton*' (1993) 1 *Torts Law Journal* 122.
148 For example, men might be more likely to be injured through risk taking behaviours, while women might disproportionately suffer personal injury by way of intentional torts perpetrated against them: for example, assault and battery (trespass to the person), or by harms to their reproductive capacities through medical intervention and/or experimentation: see R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990 ch 12. See also L M Finley 'A break in the silence: including women's issues in a torts course' (1989) 1 *Yale Journal of Law and Feminism* 41.
149 D Harris et al *Compensation and support for illness and injury* Clarendon Press Oxford 1984, table 1.2 and see p 33. Comparable figure for Australia from the ABS 1989-1990 *National Health Survey, Accidents Australia* Cat No 4384.0 indicate that 47% of men accident victims and 37.7% of women accident victims suffered their accident at work or on the road; while 55.3% of female victims, compared with 48.1% of men, suffered injuries through sport, leisure, exercise or home-related injuries.
150 See Australian Bureau of Statistics *Road Traffic Accidents Involving Casualties Australia 1989* Cat No 9405.0; Australian Bureau of Statistics *Road Traffic Accidents Involving Fatalities, December 1990* Cat No 9401.0, 1991. These indicate that between 1987 and 1989, 21101 men aged 17-25 suffered injury by road accident, compared to 9980 women in the same age group. While for all age groups, the number of men killed in road accidents was higher than the number of women, for the 17-25 year old age group, more than 3 times as many men as women died (and for the age group 17-49, the number of men was double that of women).
151 eg diving into shallow water: see, eg *Nagle v Rottnest* (1993) 177 CLR 423; 112 ALR 393 (High Court). See the discussion of this case by S Berns 'Judicial paternalism and the High Court' (1993) 18 *Alternative Law Journal* 202.
152 It is also important to note that many of the things that happen to women are not readily perceived as injuries: see L Finley 'Breaking the silence: including women's issues in a tort course' (1989) 1 *Yale Journal of Law and Feminism* 41, for a discussion of the complex question of what is recognised as harmful. See also L Bender 'An overview of feminist torts scholarship' (1993) 78 *Cornell Law Review* 575. For a concrete example of this, see the 'discovery' of sexual harassment in the 1980's, as MacKinnon stated: 'Sexual harasment, the event, is not new. It is the law of injuries that it is new to law: C MacKinnon *Feminism Unmodified: Discourses on Life and Law* Harvard University Press Cambridge MA 1987, 103.
153 Some polices provide only for negligently caused injuries and exclude those incurred through intentional conduct while others expressly exclude recovery by members of the same household in both cases.
154 See, eg *Criminal Injuries Compensation Act 1983* (Vic) as originally enacted and compare the post 1988 amendments which provide that no award is to be made 'where the application is made in collusion with the offender' s 20(2)(d).
155 See sources cited notes 85, 86 and 92 above.
156 Compare the discussion by Cassels who points out that in damages assessments, 'it is frequently assumed that [women] would have left the workforce to assume family responsibilities and that this reduces their earning capacity': J Cassels 'Damages for lost earning capacity: women and children last!' (1992) 71 *Canadian Bar Review* 445, 450.
157 J Tassie *Out of sight, out of mind - outwork in SA* Working Womens Centre Adelaide 1989; M Hogan *Home is where the work is - a report on home based computer workers in the clerical industry in South Australia* Working Women's Centre Adelaide 1991.
158 A O'Connor *Submission 209*.

159 This phrase is used by A Brooks in 'Myth and muddle - an examination of contracts for the performance of work' (1988) 11 *University of New South Wales Law Journal* 48.
160 This test asks whether the employer/principal has the right to exercise control over how the work is done - if the answer is affirmative, then the contract is an employment contract: id, 50-51.
161 If the worker is obliged to do the work personally, and cannot engage someone else to do it, this indicates that the contract is an employment contract: id, 51-52.
162 If the person is working in a business on his/her own account, this indicates that the contract is not an employment contract: id, 53.
163 A Brooks 'Myth and muddle - an examination of contracts for the performance of work' (1988) 11 *University of New South Wales Law Journal* 48. See also R Hunter 'The regulation of independent contractors: a feminist perspective' (1992) 5 *Corporate and Business Law Journal* 165.
164 A Brooks 'Myth and muddle - an examination of contracts for the performance of work' (1988) 11 *University of New South Wales Law Journal* 48.
165 R Hunter 'The regulation of independent contractors: a feminist perspective' (1992) 5 *Corporate and Business Law Journal* 165, 168.
166 *Re Municipal Association of Victoria* (1991) 33 AILR para 163 cited in R Hunter 'The regulation of independent contractors: a feminist perspective' (1992) 5 *Corporate and Business Law Journal* 165, 168.
167 id, 173. 67% of people who work from home are women: Australian Bureau of Statistics *Persons employed at home in Australia* 1992 Cat No 6275.0.
168 id, 174.
169 See analysis of the use of various State unfair contract provisions by independent contractors: id, 175-177.
170 *Industrial Relations Act 1988* (Cth) s 127A (1) (a) (ii); R Hunter 'The regulation of independent contractors: a feminist perspective' (1992) 5 (2) *Corporate and Business Law Journal* 165, 185.
171 id, 186.
172 They include builders and door-to-door delivery and sales work: id, 175.
173 *Industrial Relations Act 1988* (Cth) s 127A (4): id,186.
174 ibid.
175 A O'Connor *Submission 209.*
176 *Cartledge v Jopling* [1963] AC 758.
177 eg *Limitation of Actions Act 1958* (Vic) s 5(1A) and (s 23A).
178 For a detailed account see Women Incest Survivors Network *Submission 319*; Confidential *Submission 515*.
179 J Mosher 'Challenging limitation periods: civil claims by adult survivors of incest' (1994) 44(2) *Toronto Law Journal* 169.
180 *Stubbings v Webbs* [1993] AC 498.
181 Negligence, nuisance or breach of duty.
182 *Stubbings v Webb* [1993] 1 All ER 322, [1993] AC 498.
183 id, 329. However, contrast this with the Court of Appeal decision in the same case, [1991] 3 All ER 949, where all three judges readily accepted that there had been a 'breach of duty'.
184 id, 328.
185 (1992) 96 DLR (4th) 289 (SCC).
186 See para 7.32-7.35.
187 id, 312.
188 id, 298.
189 id 323.
190 The Supreme Court of Canada in M v M built upon a judgment by McLachlin J in *Norberg v Wynrib* (1992) 92 DLR (4th) 449 where she described sexual abuse by a doctor of his patient as a breach of trust which constituted a breach of fiduciary duty.
191 Mental Health Legal Centre Inc VIC *Submission 230;* Australian Women's Research Centre, Deakin University *Submission 247;* Lesbian Legal Rights Group VIC *Submission 251.*
192 *R v Morgentaler* [1988] 1 SCR 30, 171-172.
193 LEAF Factum in *R v Sullivan and Lemay*, para XXIX, reproduced in L Smith 'An equality approach to reproductive choice: *R v Sullivan*' (1991) 4 *Yale Journal of Law and Feminism* 93, 118. This case is discussed more fully in ch 7.
194 See *Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218; *P v P* (1994) 120 ALR 545. See Family Law Council *Sterilisation and other medical procedures* Discussion Paper (October 1993) and Report (October 1994).
195 In *Re a Teenager* (1989) FLC para 92-006 at 77,231.
196 See Australian Law Reform Commission Report 67 *Equality before the law: women's access to the legal system* ALRC Sydney 1994 (ALRC 67), ch 2; Australian Law Reform Commission Report 69(1) (ALRC 69(1)) *Equality before the law: justice for women* ALRC Sydney 1994, ch 2.
197 EA Sheehy 'Personal autonomy and the criminal law: emerging issues for women' Background Paper in R Graycar & J Morgan *The hidden gender of law* The Federation Press Sydney 1990, 40.
198 ibid. Other advantages noted by Sheehy include that it is politically acceptable and falls squarely within a liberal political framework and it carries the important message that women should not be distinguished as 'other' by our society.
199 id, 41.
200 See ALRC 69(1), ch 3.
201 Confidential *Submission 198.*
202 Women's Electoral Lobby Australia Inc *Submission 281.*
203 J Doust *Submission 213.*
204 B Gaze *Submission 267.*
205 *Human Rights and Equal Opportunity Commission v Mount Isa Mines and Others* (1992) EOC para 92-420 (Davies J) cf *International Union UAW v Johnson Controls* 111 SCt 1196 (1991).
206 *Dothard v Rawlinson* (1977) 433 US 321 is a good example: women were excluded from jobs as prison guards on the grounds that they were susceptible to rape.
207 C MacKinnon *Feminism unmodified: discourses on life and law* Harvard University Press Cambridge Massachusetts 1987; C MacKinnon *Toward a feminist theory of the state* Harvard University Press Cambridge Massachusetts 1989.
208 See ALRC 69(1), para 3.29.
209 'Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power.': C MacKinnon *Feminism unmodified: discourses on life and law* Harvard University Press Cambridge Massachusetts 1987, 40.
210 It owes much to C MacKinnon's work on equality. See for example Chapter 2 'Difference and Dominance' in *Feminism unmodified: discourses on life and law* Harvard University Press Cambridge Massachusetts 1987.
211 N Naffine *Law and the sexes* Allen & Unwin Sydney 1990 quoting F Olsen *The sex of law - speech* UCLA Law School 1984, 12.

212 Australian Law Reform Commission Discussion Paper 54 *Equality before the law* ALRC Sydney 1993 (ALRC DP 54).
213 Gay and Lesbian Rights Lobby and the Lesbian and Gay Legal Rights Service, Sydney *Submission 193*; Confidential *Submission 198*; Australian Federation of Business and Professional Women Inc *Submission 151*; B Gaze *Submission 267*; Women's Electoral Lobby Australia Inc *Submission 281*.
214 Gay and Lesbian Rights Lobby and the Lesbian and Gay Legal Rights Service, Sydney *Submission 193.*
215 Women's Electoral Lobby Australia Inc *Submission 281.*
216 Sex Discrimination Commissioner Cth *Submission 338.*
217 *Proudfoot and Ors v ACT Board of Health and Ors* (1992) EOC para 92-417.
218 The SDA is discussed in detail in ALRC 69(1), ch 3.
219 See *Proudfoot and Ors v ACT Board of Health and Ors* (1992) EOC para 92 417, 78-978.
220 Prime Minister's foreword in report to Australian Health Ministers, 21 March 1989, cited in *Proudfoot and Ors v ACT Board of Health and Ors* (1992) EOC para 92-417, 78-983.
221 id, 78-979. Prior to the Commonwealth initiative, the Canberra Women's Health Service, established in 1987, operated part-time from two Canberra locations. It was funded by the ACT Board of Health and the Commonwealth. It provided some clinical services.
222 id, 78-979 and 78-978-9. Dr Proudfoot and Mr Smith also challenged the consultation process engaged in prior to the establishment of the program, because, according to Mr Smith it 'was directed to ascertaining the requirements of women only': id, 78-977.
223 id, 78-979.
224 id, 78-984.
225 id, 78-982.
226 This approach was endorsed by the Full Federal Court in *Human Rights and Equal Opportunity Commission v Mount Isa Mines and Others* (1993) EOC para 92-548.
227 It is to be noted that at an early stage of dealing with this complaint a staff member within HREOC had written to Dr Proudfoot saying that the NWHP was exempt under section 33.
228 Address to mark the 10th anniversary of the SDA, Sydney, 29 July 1994.
229 *Wardley v Ansett Transport Industries* (1984) EOC para 92-002. The case was in fact decided in 1979.
230 *Mount Isa Mines v Marks and Ors* (1992) EOC para 92-420 (Davies J).
231 id, 78-994.
232 ibid.
233 They dismissed the appeal on other grounds. See also *Commonwealth of Australia v HREOC and Ors (*1994) EOC para 92-566.
234 Commonwealth Public Service Association (Fourth Division Officers) v Public Service Board (1972) 147 CAR 172.
235 Prior to this, wages for men were explicitly structured around the idea of what a man needed to support his wife and children; wages for women were set on the basis that they had no dependants. See *Ex parte H V McKay* (the Harvester judgment) (1907) 2 CAR 1; *Rural Workers' Union v Mildura Branch of the Australian Dried Fruits Association* (the Fruitpickers judgment) (1912) 6 CAR 62 and B Cass 'Rewards for Women's Work' in C Pateman and J Goodnow (eds) *Women Social Science and Public Policy* Allen & Unwin Sydney 1985.
236 The Commission raised this proposal and invited submissions on it: Australian Law Reform Commission Discussion Paper 54 *Equality before the law* ALRC Sydney 1993 (ALRC DP 54), question 4.1.
237 id, question 3.1.
238 eg Confidential *Submission 78*; Sisters-in-Law *Submission 195*; Centre Against Sexual Assault, CASA House, Melbourne *Submission 197*; J Doust *Submission 213*; M Thornton *Submission 268*; WEL Victoria *Submission 307*; Women Incest Survivors Network *Submission 319*; Anti-Discrimination Commissioner QLD *Submission 337*; Sex Discrimination Commissioner *Submission 338*; Ministry for the Status and Advancement of Women NSW *Submission 350*. It was also pointed out that lesbian women in particular lack protection and laws that ensure equality: Tasmanian Gay and Lesbian Rights Group *Submission 280*.
239 Adopted by the UN General Assembly 18 December 1979 and ratified by Australia 28 July 1983.
240 CEDAW art 2(a).
241 CEDAW art 3.
242 It has been commented that the SDA only addresses particular aspects of gender inequality: C Ronalds *Affirmative action and sex discrimination: a handbook on legal rights for women* 2nd ed Pluto Press Sydney 1991, 9. See also Constitutional Commission *Final report of the Constitutional Commission* Volume 1 AGPS Canberra 1988, 9.447. See Australian Law Reform Commission Report 69(1) *Equality before the law: justice for women* ALRC Sydney 1994, ch 3 for discussion on the limitations of the SDA.
243 ICCPR art 26.
244 ICCPR art 2.
245 ICESCR art 3.
246 ALRC 69(1), ch 3.
247 PM Keating *Speech* Tenth Anniversary of the *Sex Discrimination Act 1984* (Cth), 29 July 1994, Sydney.
248 M Thornton *Submission 268*: 'It [the SDA] can only deal with harms of an individualised nature with a clearly identified plaintiff and defendant. The harms suffered by women are more deep-seated and more complex than that.'
249 Office of the Status of Women Cth *Submission 543.*
250 Gay and Lesbian Rights' Lobby & the Lesbian and Gay Legal Rights Service, Sydney *Submission 193*.
251 See discussion of these arguments and the limits of the common law in M R Wilcox *An Australian Charter of Rights?* Law Book Co Sydney 1993, 219-231; Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia? An exposure report for the consideration of senators* AGPS Canberra 1985, para 2.25-2.41; Queensland Electoral and Administrative Review Commission *Report on review of the preservation and enhancement of individuals' rights and freedoms* EARC Brisbane 1993, para 4.1-4.35.
252 Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.102.
253 The United Kingdom ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms on 18 March 1951. In December 1965 the United Kingdom agreed to have the European Court of Human Rights adjudicate individual complaints under the complaint procedure of the Convention, art 25: Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra, para 9.38.
254 Of the 57 cases in which a violation of the Convention was established in the period from 1953 to 1984, 18 involved the United Kingdom. This represents approximately one-third of the complaints found to constitute violations of the Convention. Furthermore, in 1985 of the 596 individual applications received, 112 were from individuals from the United Kingdom: id, para 9.39.
255 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Mabo & Ors v The State of Queensland* (1992) 175 CLR 1. See also Mason CJ 'The importance of judicial review of administrative action as a safeguard of individual rights' *Australian Bar Association Fifth Biennial Conference* July 1994; Toohey J 'A government of laws, and not of men?' *Constitutional Change in the 1990's* Conference October 1992.
256 M R Wilcox *An Australian Charter of Rights?* Law Book Co Sydney 1993, 223. Wilcox recognises that there has been a change in this attitude in recent times: id, 223-230. See also Gaudron J 'Towards a jurisprudence of equality' *Queensland Bar Practice Management Course*

20 July 1994 cited by Fitzgerald J 'The common law "reasonable man": misogynist or sensitive new age guy' *Access to Justice Forum* October 1994.

257 See also ALRC 67; ALRC 69(1); Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* Senate Printing Unit Canberra 1994. See ch 2 & 8 of this report.

258 See P H Bailey 'Why Australia needs a Bill of Rights' in K Baker (ed) *An Australian Bill of Rights: pro and contra* Policy Issues No 4 Institute of Public Affairs 1986, 6; M R Wilcox *An Australian Charter of Rights?* Law Book Co Sydney 1993, 219-223. By contrast, however, the common law, through *Griffiths v Kerkemeyer* (1977) 139 CLR 161, extended the concept of compensable loss for the benefit of women but this benefit has been withdrawn or restricted by statute.

259 Quentin Bryce, paper presented at the 'Bill of Rights for Queensland?' seminar conducted by the Queensland Electoral and Administrative Review Commission State Works Centre Brisbane 20-21 July 1992. See also Justice Evatt 'Foreword' in R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990, v-vii.

260 Noted by Mason CJ 'Address to Australian Bar Association' unpublished Townsville 11 July 1988.

261 *Constitution Act 1982* (Canada) Part I Charter of Rights and Freedoms s15.

262 *Canadian Bill of Rights 1960* s 1(b).

263 Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.45.

264 *Constitution Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 32.

265 See discussion of the development of the wording for Charter of Rights and Freedoms equality provision in AF Bayefsky 'Defining equality rights' in AF Bayefsky & M Eberts (ed) *Equality rights and the Canadian Charter of Rights and Freedoms* Carswell Toronto 1985, 3-38. See also comments made in *Law Society of British Columbia et al v Andrews et al* (1989) 56 DLR (4th) 1, 14-15 McIntyre J.

266 *Constitution Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 1.

267 *Constitution Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 33. Derogations are only able to made in respect of the rights and freedoms contained in s 2, s 7-15.

268 *Constitution Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 15(2).

269 Human Rights Codes are similar to anti-discrimination legislation in Australia.

270 The first landmark case was *Reed v Reed* 404 US 71 (1971).

271 See for an illuminating discussion on the limits of US practice C MacKinnon '*Reflections on sex equality under law*' (1991) 100 *Yale Law Journal* 1286; D Rhode 'Feminism and the State' (1994) 107 *Harvard Law Review* 1181.

272 H J Res 208, 92d Cong, 1st Sess, 117 Cong Rec 35, 326 (1971).

273 Some European countries, such as Germany and Italy also have effective constitutional protections of rights.

274 Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.41.

275 Treaty of Rome, 298 United Nations Treaty Series 3, Art. 119.

276 See discussion by R Harvey 'Equal treatment of men and women in the workplace: The implementation of the European Community's equal treatment legislation in the Federal Republic of Germany (1990) 38 *American Journal of Comparative Law* 31, 31-39.

277 The court has held invalid a law requiring employers to give women a day off a month for housework, to ease their double burden of work outside and inside the home. The court found the provision to be too broadly drafted because it found no functional difference between the typical single man and the typical single woman. It indicated that if the provision were to be confined to married women it might be valid: Judgment of 13 November 1979, 52 BVerfG 369.

278 *New Zealand Bill of Rights Act 1990*. See Mai Chen 'Reforming New Zealand's anti-discrimination law' (March 1992) *New Zealand Law Journal* 137; (May 1992) *New Zealand Law Journal 172* May (1992) 172.

279 G Palmer *A Bill of Rights for New Zealand: a white paper* Government Printer Wellington 1985.

280 *New Zealand Bill of Rights Act 1990* s 4.

281 M R Wilcox *An Australian Charter of Rights?* Law Book Co Sydney 1993, 214 fn 791.

282 *New Zealand Bill of Rights Act 1990* s 3.

283 *New Zealand Bill of Rights Act 1990* 19(2). Disadvantage is considered in terms of the enumerated grounds: colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

284 The Constitutional Conventions in the 1890's debated the entrenchment of rights and freedoms in the constitution similar to those in the USA. The Joint Parliamentary Committee on Constitutional Review 1959 received submissions which favoured the entrenchment of a charter of individual rights in the Constitution but this was rejected by the Committee. The Constitutional Commission 1988 recommended the entrenchment of a chapter on rights and freedoms in the constitution. A number of statutes, in the form of a Bill of Rights, have also been proposed: Human Rights Bill 1973 (introduced by Attorney-General Murphy); Australian Human Rights Bill 1985 (introduced by Attorney-General Bowen). There was a third bill the Australian Bill of Rights Bill 1984 (Attorney-General Evans) that was never introduced to Parliament but was made public by Bjelke-Petersen prior to the election.

285 See M R Wilcox *An Australian Charter of Rights?* Law Book Co Sydney 1993, 209-214; P H Bailey *Human rights: Australia in an international context* Butterworths Sydney 1990, 56-58.

286 ALRC DP 54, question 4.1.

287 Endeavour Forum, South-West Region *Submission 147*. Another submission considered that a Bill of Rights was not appropriate at the federal level but may be more applicable at the State level: Queensland Law Society Inc *Submission 324.*

288 A J Kenos *Submission 76*; Confidential *Submission 190*; M Thornton *Submission 268*; Tasmanian Gay & Lesbian Rights Group *Submission 280*; Wesley Central Mission *Submission 299*; WEL Victoria *Submission 307*; Anti-Discrimination Commissioner QLD *Submission 337*; Ministry for the Status and Advancement of Women NSW *Submission 350*; J Blokland *Submission 347*; Commissioner for Equal Opportunity VIC *Submission 510*; Office of the Status Women Cth *Submission 543*. The most commonly cited reason for supporting entrenchment was the fact that once included in the Constitution the equality guarantee could not be amended or removed easily.

289 The referendum procedure has been described as 'onerous': Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia?: An exposure report for the consideration of senators* AGPS Canberra 1985, para 3.3.

290 Constitution (Australia) s 128.

291 Only eight out of 42 referendums have been successful: B Gaze & M Jones *Law, liberty and Australian democracy* Law Book Co Sydney 1990, 57.

292 ibid.

293 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Mabo & Ors v The State of Queensland* (1992) 175 CLR 1.

294 See comments in *Leeth v The Commonwealth of Australia* (1992) 174 CLR 455, 486 that equality is an implied principle but that the discriminatory treatment of women in law is no longer a problem but rather a past anomaly, per Deane and Toohey JJ.

295 M Flynn *Submission 145*; Children by Choice Association QLD *Submission 208*. See also Office of the Status of Women Cth *Submission 543* which supports a statutory guarantee as an initial and important step towards entrenchment. Other submissions supported either method of protecting equality: Sisters-in-Law *Submission 195*; Sex Discrimination Commissioner *Submission 338*; Women of Far North Queensland *Submission 117*. As a second preference: J Blokland *Submission 347*. Other submissions spoke more generally about the need to protect

equality for women in the context of particular issues raised: eg Confidential *Submission 219*; Women Incest Survivors Network NSW *Submission 319.*

296 ALRC DP 54, para 4.9. A similar approach was advocated by the Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia? An exposure report for the consideration of senators* AGPS Canberra 1985, para 3.13.

297 *Canadian Bill of Rights 1960* s 1(b). See discussion in AF Bayefsky 'Defining equality rights' in AF Bayefsky & M Eberts (ed) *Equality rights and the Canadian Charter of Rights and Freedoms* Carswell Toronto 1985, 3-38; D Gibson *The law of the Charter: equality rights* Carswell Toronto 1990, 96.

298 Office of the Status of Women Cth *Submission 543.*

299 Constitution (Australia) s 51(xxix).

300 CEDAW art 2; ICCPR art 2, art 26.

301 *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54, 86, Barwick CJ. See also the adoption and expansion of this test in *The Commonwealth & Anor v Tasmania & Ors* (Tasmanian Dam Case) (1983) 158 CLR 1, 130-131, 172, 232, 259; *Richardson v Forestry Commission* (1987) 164 CLR 261, 289, 303.

302 It is not permissible to go beyond the scope of the international treaty that is the source of the external affairs power.

303 *The Commonwealth & Anor v Tasmania & Ors* (the Tasmanian Dam case) (1983) 158 CLR 1, 234 Brennan J. See also comments Murphy J: id, 172 and Deane J: id, 268. See discussion in Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia? An exposure report for the consideration of senators* AGPS Canberra 1985, para 4.72-4.77.

304 *Constitutional Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 15(1). The text of this provision is reproduced in para 4.10.

305 These different approaches have been extensively analysed by commentators. This analysis will be helpful to the Australian courts. See for eg AF Bayefsky 'Defining equality rights' in AF Bayefsky & M Eberts (ed) *Equality rights and the Canadian Charter of Rights and Freedoms* Carswell Toronto 1985, 1-79; D Gibson *The law of the Charter: equality rights* Carswell Toronto 1990, particularly 96-99; AF Bayefsky 'Defining equality rights under the Charter' in SL Martin & KE Mahoney (ed) *Equality and judicial neutrality* Carswell Toronto 1987, 106.

306 Section 15 of the Charter did not come into operation until 17 April 1985: G Brodsky & S Day *Canadian Charter equality rights for women: one step forward or two steps back?* CACSW Ontario 1989, 7 endnote 2.

307 *Law Society of British Columbia v Andrews et al* [1989] 1 SCR 143.

308 See rec 6.1

309 See paras 5.2-5.6;rec 5.1.

310 See paras 5.22-5.32.

311 MR Wilcox *An Australian Charter of Rights?* Law Book Co Sydney 1993, 160 points out that the cases decided before *Law Society of British Columbia v Andrews et al* [1989] 1 SCR 143 were primarily decided in terms of formal equality, ie the 'similarly situated' test.

312 G Brodsky & S Day *Canadian Charter of Rights and Freedoms: one step forward or two steps back?* Canadian Advisory Council on the Status of Women Ontario 1989.

313 The report found that only 44 (7%) of the cases brought under s 15(1) concerned sex equality (the original figure is 52 but is brought down to 44 when appeals and additional proceedings are eliminated).Of the sex equality decisions 35 were identified as 'men's cases' and 9 were 'women's cases': id, 49.

314 id, 59. See also EA Sheehy 'Feminist argumentation before the Supreme Court of Canada in *R v Seaboyer; R v Gayme*: the sound of one hand clapping' (1991) 18 *Melbourne University Law Review* 450, 465-466.

315 *Law Society of British Columbia v Andrews et al* [1989] 1 SCR 143.

316 See discussion of the potential benefits of the contextual approach adopted in *Law Society of British Columbia v Andrews et al* [1989] 1 SCR 143; KE Mahoney 'The legal treatment of spousal abuse: A case of sex discrimination' (1992) 41 *University of New Brunswick Law Journal* 21, 25-26; S Razack *Canadian feminism and the law: The Women's Legal Education and Action Fund and the pursuit of equality* Second Story Press Toronto 1991, 134.

317 ICCPR art 26. See also ICCPR art 2 and ICESCR art 2(2).

318 ALRC 69(1), para 3.60-3.67, discusses multiple disadvantage in the context of anti-discrimination legislation. See also ALRC 67, ch 2 which discusses the difficulties faced by women who experience other disadvantages in access to the legal system.

319 ICCPR art 26.

320 CEDAW art 4.

321 While CEDAW deals with discrimination against women, see CEDAW preamble para 1, para 3, para 5, para 7, para 14, art 1, art 2(a), art 3, art 4, art 7, art 9, art 10, art 11, art 12, art 13, art 14(2), art 15, art 16: which all refer to 'equality', on the 'basis of equality', 'equal rights', on 'equal terms' (or similar terminology) between women and men.

322 That is, nations that sign and ratify or accede to the Convention.

323 CEDAW art 2(a).

324 This identification of a 'sex neutral/gender specific' approach is discussed in NC Sheppard 'Equality, ideology and oppression: women and the Canadian Charter of Rights and Freedoms' (1986) 10 *Dalhousie Law Journal* 195, 219 fn 86.

325 This possible reaction to a gender specific approach is discussed in NC Sheppard 'Equality, ideology and oppression: women and the Canadian Charter of Rights and Freedoms' (1986) 10 *Dalhousie Law Journal* 195, 216.

326 The use of the male comparator has not been useful for women in bringing about equality. See para 3.1.

327 E A Sheehy 'Feminist argumentation before the Supreme Court of Canada in *R v Seaboyer; R v Gayme*: the sound of one hand clapping' (1991) 18 *Melbourne University Law Review* 450, 463; *R v Morgentaler* [1988] 1 SCR 30 which challenged the constitutionality of criminal prohibition of abortion and *Queen and Canada Employment & Immigration Commission v Schachter* [1992] 2 SCR 679 which challenged the constitutionality of parental leave benefits.

328 K Walker *Submission 175*. The factum submitted by LEAF made specific reference to the systemic nature of inequality and disadvantage in relation to women, despite the fact that the case itself concerned inequality on the ground of citizenship. See discussion of the difficulty this may create for presenting arguments for women's equality in an abstract case: J Fudge 'The public/private distinction: the possibilities of and the limits to the use of Charter litigation to further feminist struggles' (1987) 25 *Osgoode Hall Law Journal* 485, 533.

329 See further *Jane Doe v Police Board of Commissioners (Metropolitan Toronto)* (1989) 48 CCLT 105; (1990) 72 DLR (4th) 580; *Brooks v Canada Safeway* [1989] 1 SCR 1219; *Janzen v Platy Enterprises* [1989] 1 SCR 1252.

330 General recommendation, UN Human Rights Committee.

331 CEDAW art 4. See ALRC 69(1) para 3.52-3.57.

332 See ch 5.

333 SDA s 3(d).

334 See ALRC 69(1), ch 8-12; ALRC 67, ch 3.

335 UN General Assembly resolution number 48/104 UNGA 48.

336 CEDAW General Recommendation 19, adopted 1992 session, Violence Against Women.

337 Declaration on the Elimination of Violence Against Women, art 1. The Declaration is reproduced in ALRC 67, Appendix 1.

338 eg Domestic Violence Advocacy Service, Sydney *Submission 148*; Illawarra Legal Centre *Submission 284*; Office of the Status of Women Cth *Submission 543*; Centre Against Sexual Assault CASA House, Melbourne *Submission 197*. See also ALRC 67, ch 3.
339 Office of the Status of Women Cth *Submission 543*.
340 *Acts Interpretation Act 1901* (Cth) s 15AB(1).
341 id, s 15AA.
342 id, s 15AB(1).
343 id, s 15AB(2).
344 id, s 15AB(2)(b). See discussion in D Gifford *Statutory Interpretation* Law Book Co Sydney 1990, 121-122.
345 The explanatory memorandum is considered an extrinsic aid: *Acts Interpretation Act 1901* (Cth) s 15AB(2)(e).
346 CASA House, Centre Against Sexual Assault, Melbourne *Submission 197*. See also Confidential *Submission 190*; Office of the Status of Women Cth *Submission 543*; J Craddick *Submission 155*.
347 *Acts Interpretation Act 1901* (Cth) s 15AB(2)(d).
348 BA Hepple 'Judging Equal Rights' (1983) 36 *Current Legal Problems* 85.
349 Judgment of 12 March 1975, 39 BVerfG 169 cited in R Harvey 'Equal treatment of men and women in the workplace: the implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany '(1990) 38 *American Journal of Comparative Law* 31, 45.
350 ALRC 69(1), ch 3.
351 See para 4.5.
352 For a list of Canadian human rights legislation see Appendix IV in A F Bayefsky & M Eberts (ed) *Equality Rights and the Canadian Charter of Rights and Freedoms* Carswell Toronto 1985, 630. See also S Day 'Impediments to achieving equality' in S L Martin & K E Mahoney (ed) *Equality and judicial neutrality* Carswell Toronto 1987, 402, 409 where she concludes that, despite the Charter, human rights legislation will remain the most practical and accessible mechanism for most people to redress discrimination, given the limited application of the Charter and the cost and time that will be involved in a Charter action.
353 *Racial Discrimination Act 1975* (Cth), s 6A (RDA). It was stated by the Government on the introduction of this amendment to the RDA that it recognises the developments being made in this field by the State and Territory governments: House of Representatives *Hansard* Vol 131 25 May 1983, 923-924.
354 *Viskauskas & Anor v Niland* (1983) 153 CLR 280. Concerned the validity of *Anti-Discrimination Act 1977* (NSW) s 19.
355 See *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 which states that inconsistency of a State law will be found either where the federal law intends to cover the field to the exclusion of the States, or where there is a direct inconsistency or collision.
356 The human rights codes enacted in a number of Canadian provinces are similar to the anti-discrimination legislation that operates in Australia. Both rely on conciliation as the primary mode for the resolution of disputes.
357 *Brooks v Canada Safeway* [1989] 1 SCR 1219. *Brooks* overturned the earlier decision in *Bliss v Attorney-General of Canada* [1979] 1 SCR 183 which had stated that pregnancy discrimination was not discrimination on the ground of sex.
358 *Janzen v Platy Enterprises* [1989] 1 SCR 1252. *Janzen* held that sexual harassment constituted sex discrimination. Furthermore in that case the court adopted an approach which recognised the relationship between gender, power and sexual harassment.
359 KE Mahoney 'The constitutional law of equality in Canada' (1992) 44 *Maine Law Review* 229, 253.
360 See ALRC 69(1), para 3.34.
361 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOCA), s11(1)(o).
362 HREOCA s 3(1). A 'relevant international instrument' is defined as one which the Minister has made a declaration that it is an international instrument relating to human rights and freedoms for the purposes of the Act': under HREOCA s 47.
363 It is not necessary to include the ICCPR in the Equality Act as HREOC already has this power under its existing legislation.
364 eg in Queensland the Electoral and Administrative Review Commission recommended a Bill of Rights for Queensland: EARC *Report on the review of the preservation and enhancement of individuals' rights and freedoms* EARC Brisbane 1993; there was also a Constitution (Declaration of Rights) Bill 1959 (Qld). In South Australia there was Bill of Rights Bill 1972 (SA), introduced by a private members, and similar bills in 1973-74 and 1974-75. In September 1993 the Premier of SA announced an intention to overhaul the constitution, including consideration of a charter of rights and freedoms. The ACT Attorney-General's Department released an issues paper *A Bill of Rights for the ACT?* in 1993. The Victorian Legal and Constitutional Committee produced *Report on the desirability or otherwise of legislation defining and protecting human rights* Government Printer Melbourne 1987 and the New South Wales Law Reform Commission produced Discussion Paper 30 *Review of the Anti-Discrimination Act 1977* (NSW) Sydney NSWLRC 1993, 26-29 which asked whether there should be a constitutionally entrenched Bill of Rights in NSW. See also J Blokland *Submission 347* who commented on the fact that a number of States and Territories, in different capacities, have considered the inclusion of an equality guarantee in their Constitutions.
365 *State of Victoria v Commonwealth of Australia* (the Payroll Tax Case) (1971) 122 CLR 353, 392 Menzies J, 424 Gibbs J; *Commonwealth of Australia & Anor v State of Tasmania & Ors* (The Tasmanian Dams Case) (1983) 158 CLR 1, 139-140 Mason J.
366 The only instance in recent times in which a law has been found to contravene this prohibition is *State Chamber of Commerce and Industry & Ors v Commonwealth of Australia* (The Second Fringe Benefits Tax Case) (1987) 163 CLR 329 where it was held that the Commonwealth could not impose a tax on payments to parliamentarians and judges, because these are payments made 'to secure the continued existence and functioning of the government of the State': id, 363 Brennan J.
367 *Commonwealth of Australia & Anor v State of Tasmania & Ors* (The Tasmanian Dams Case) (1983) 158 CLR 1, 139 Mason J.
368 Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.193. The draft Australian Bill of Rights Bill 1984 was intended to apply to Commonwealth, State and Territory: cl 9.
369 Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.193.
370 G Winterton 'The separation of judicial power as an implied Bill of Rights' *Future directions in Australian Constitutional Law* Manning Clarke Centre, Australian National University, Canberra 3-4 December 1993.
371 *New Zealand Bill of Rights Act 1990* s 6; draft Australian Bill of Rights Bill 1984 cl 10; Australian Bill of Rights Bill 1985 cl 10. The interpretation of legislation clause in the Australian Bill of Rights Bill 1985 cl 10 did not apply to State legislation, whereas the draft Australian Bill of Rights Bill 1984 cl 10 applies to all levels of government, federal, State and Territory.
372 Modelled on draft Australian Bill of Rights Bill 1984 cl 10(1).
373 See draft Australian Bill of Rights Bill 1984 cl 10(2).
374 For more detailed discussion see para 15.28 and following.
375 *Goodwin v Phillips* (1908) 7 CLR 1, 7 Griffith CJ.
376 DC Pearce & RS Geddes *Statutory interpretation in Australia* 3rd ed Butterworths Sydney 1988, para 7.10.
377 *Maybury & Anor v Plowman* (1913) 16 CLR 468 , 473-474.
378 It may also be referred to as an 'opt-out' provision: Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.210-9.234. The majority of the Constitutional Commission considered it inappropriate and contradictory to include a derogation provision in an entrenched charter of rights and freedoms: id, para 9.210-9.211. See also discussion on this type of provision in

Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia? An exposure report for the consideration of senators* AGPS Canberra 1985, para 4.13-4.21.

379 *Constitution Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 33; draft Australian Bill of Rights Bill 1984 cl 12; Australian Bill of Rights Bill 1985 cl 12. Other examples of derogation provisions can be found in *Canadian Bill of Rights 1960* s 2.

380 See G Winterton 'Can the Commonwealth Parliament enact "manner and form" legislation?' (1980) 11 *Federal Law Review* 167. There are, however, constitutional limits on the extent to which a parliament may prescribe manner and form requirements.

381 State governments would not be able to derogate from the Equality Act.

382 *Canadian Bill of Rights 1960* s 2 contained a derogation provision which allowed Provinces to derogate from the rights and freedoms provided. As a result Quebec derogated from all the rights and freedoms in the *Canadian Bill of Rights 1960*: Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia? An exposure report for the consideration of senators* AGPS Canberra 1985, para 4.9.

383 G Winterton 'Can the Commonwealth Parliament enact "manner and form" legislation?' (1980) 11 *Federal Law Review* 167. For example, Parliament could not enact a manner and form provision that required a specific majority of Parliament as it would be in conflict with Constitution (Australia) s 1: id, 201.

384 id, 201. See also NKF O'Neill 'The Australian Bill of Rights Bill 1985 and the supremacy of Parliament' (1986) 60 *Australian Law Journal* 139 which discusses the validity of the Australian Bill of Rights Bill 1985 cl 12. See also B Gaze & M Jones *Law, liberty and Australian democracy* Law Book Co Sydney 1990, 66: which states that it may be possible to enact such a derogation provision, referring to the Australian Bill of Rights 1985 cl 12; however whether such a provision were to be effective depends on 'judicial willingness to apply such a declaration'.

385 NKF O'Neill 'The Australian Bill of Rights and the Supremacy of Parliament' (1986) 60 *Australian Law Journal* 139, 146.

386 Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia? An Exposure Report for the Consideration of Senators* AGPS Canberra 1985, para 4.13-4.21.

387 id, para 4.20-4.21.

388 Human Rights Bill 1973 cl 5(2) (3); draft Australian Bill of Rights Bill 1984 cl 12; Australian Bill of Rights Bill 1985 cl 12. The provision in the Australian Bill of Rights Bill 1985 was modelled on *Canadian Bill of Rights 1960* s 2 and its interpretation by the Supreme Court of Canada in *R v Drybones* (1970) 9 DLR (3rd) 437. The court held that two inconsistent Acts of Parliament can both be valid but, to the extent of the inconsistency, only one can be operative and that Parliament may give direction as to which is to be operative: The Senate *Australian Bill of Rights Bill 1985: Explanatory Memorandum* para 91.

389 The Senate *Australian Bill of Rights Bill 1985: Explanatory Memorandum*, para 90.

390 *Constitution Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 33 (3).

391 *Constitution Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 33 (4), 33(5).

392 See para 5.2-5.6; rec 5.1.

393 Constitution (Australia) s 109.

394 This approach was taken in the Australian Bill of Rights Bill 1985: L Bowen 'Arguing for a Bill of Rights' in L Spender (ed) *Human rights: the Australian debate* Redfern Legal Centre Publishing Redfern 1987, 238.

395 *Family Provision Act 1982* (NSW); *Administration and Probate Act 1958* (Vic), Pt IV; *Succession Act 1981* (Qld), Pt IV; *Inheritance (Family Provision) Act 1972* (SA); *Inheritance (Family and Dependents Provision) Act 1972* (WA); *Testator's Family Maintenance Act 1912* (Tas); *Family Provision Ordinance 1969* (ACT); *Family Provision Act* 1979 (NT); *Family Protection Act 1955* (NZ). There are variations in the language of the different provisions.

396 In some jurisdictions the legislation includes also 'advancement and education'

397 *Bosch v Perpetual Trustee Co Ltd* (1938) AC 463, 478-79. *Re Duncan* [1939] VLR 355; *Lloyd v Nelson* [1985] 2 NSWLR 291, 298.

398 Had the couple divorced under the *Family Law Act 1975* (Cth), the woman's contributions might have been ranked equal with his and she could have claimed at least half of the matrimonial property on this basis: *Family Law Act 1975* (Cth) s 79(4). A submission to the Commission pointed to this fact in raising the injustice of the result in a situation very similar to the facts outlined in this example. National Council of Women of NSW *Submission 596*.

399 See ch 2 para 2.33-2.44.

400 *Singer v Berghouse* unreported High Court of Australia, 14 September 1994.

401 ibid, Toohey & Gaudron JJ.

402 Members of all of these groups made submissions to the Commission. See Australian Law Reform Commission Report 67 *Equality before the law: women's access to the legal system* ALRC Sydney, ch 2.

403 Now called the Model Criminal Code Officers Committee.

404 Criminal Law Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code Chapter 2: General principles of criminal responsibility* Final Report December 1992 AGPS Canberra 1993.

405 Proposed cl 312: id, 66. This defence is an amalgamation of the defence of 'necessity' at common law and the Griffith Code equivalent: id, 67.

406 ibid.

407 J Blokland *Submission 347*.

408 It is possible that other parliamentary committees may scrutinise bills. For example, the House of Representatives has referred a bill for scrutiny and inquiry to a House Standing Committee on one occasion: the Crimes (Child Sex Tours) Amendment Bill 1994 was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs: D Melham MP 'Management of legislation in the House of Representatives' paper presented at the Australian Institute of Administrative Law *Parliament and the Legislative Process* Conference 2 June 1994, Lakeside Hotel Canberra.

409 ALRC DP 54, para 4.31.

410 id, question 4.16. The DP asks what guidelines should such a committee develop: id, question 4.17.

411 Views varied as to whether such scrutiny should be conducted by the Senate Standing Committee on Scrutiny of Bills or by another committee. For example, Sisters-in-Law *Submission 195* recommends a back bench committee with rotating membership; Wesley Central Mission *Submission 299* supports the concept of a parliamentary committee to scrutinise prospective legislation for gender bias, not just for gender-neutral language but also underlying assumptions based on gender stereotypes; the Anti-Discrimination Commissioner QLD *Submission 337* stated that the Senate Standing Committee on Scrutiny of Bills should perform this function; Affirmative Action Agency *Submission 349* stated this should definitely take place, and that it would be necessary to appoint committee members with expertise; Office of the Status of Women Cth *Submission 543* commented that such a mandate should be included in the work of the existing Senate Committee and to create a separate committee reinforces a 'false dichotomy' between human rights and what is seen as women's rights. WEL Australia *Submission 281* responded that bills should be scrutinised for gender bias and did not specify what committee should perform this function. Similarly Sex Discrimination Commissioner *Submission 338* stated that bills should be scrutinised for gender bias and the committee that performs this should have appropriate staff.

412 WEL Victoria *Submission 307*.

413 *New Zealand Bill of Rights Act 1990* s7. The time at which the Attorney-General is to report depends on whether it is a government bill or a private member's bill. The *Canadian Bill of Rights 1960* s 3 contains a similar provision.
414 CCH *Equal Opportunity Reporter*, 73,197- 73,198. In addition to the reporting requirements of the Attorney-General under *New Zealand Bill of Rights Act 1990* s 7, a select committee to scrutinise proposed legislation for its compliance with the Bill was also established.
415 P Fitzgerald 'Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well-intentioned nonsense' (1992) 22 *Victoria University of Wellington Law Review* 135, 136.
416 Queensland Electoral and Administrative Review Commission *Report on review of the preservation and enhancement of individuals' rights and freedoms* EARC Brisbane 1993, para 7.98. See discussion of arguments, id, para 7.89-7.98.
417 Ministry for the Status and Advancement of Women NSW *Submission 350*.
418 See ALRC 69(1) ch 10, 11.
419 *R v Butler* [1992] 1 SCR 452. *Criminal Code* (Canada) RSC 1985 c. C-46, s 163. The case focused on s 163(8). See also the hate propaganda case *R v Keegstra* [1990] 1 SCR 1123.
420 *Constitution Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 2(b).
421 Justice Sopinka.
422 *R v Butler* [1992] 1 SCR 452, 504.
423 id, 507.
424 id, 509.
425 *Constitution Act 1982* (Canada) Part 1 Charter of Rights and Freedoms s 2(b).
426 id, s 1.
427 id, s 15(1).
428 *Regina v Butler* [1992] 1 SCR 452, 479.
429 See para 5.9-5.15 for discussion of the effect of the guarantee on prior and subsequent legislation.
430 J Fudge 'The public/private distinction: the possibilities of and the limits to the use of Charter litigation to further feminist struggles' (1987) 25 *Osgoode Hall Law Journal* 485, 510.
431 For a discussion of the role of the state in defining and entrenching stereotypes of the roles of women and men see id, 510-511.
432 See discussion of the *Social Securiy Act 1991* (Cth) ch 12.
433 Generally only heterosexual relationships are recognised and de facto heterosexual relationships are accorded different protection compared to marriage.
434 AD (JR) Act s 16. See M Aronson & N Franklin *Review of administrative action* Law Book Co Sydney 1987, 262.
435 s 16 (1).
436 *Church of Scientology Inc & Anor v Woodward & Ors* [1983] 57 ALJR 42, 55. The power to make declarations has also been described as a beneficial and wide power: *P & C Cantarella Pty Ltd v Egg Marketing Board of NSW* [1973] 2 NSWLR 366, 382.
437 SD Hotop *Principles of Australian administrative law* 6th ed. Law Book Co Sydney 1985, 314.
438 M Aronson & N Franklin *Review of administrative action* Law Book Co Sydney 1987, 460-468.
439 Note that State and Territory laws may be invalid if inconsistent with the Equality Act, however prior and subsequent federal laws are inoperative.
440 *The Queen and Canada Employment and Immigration Commission v Schachter & Ors* [1992] 2 RCS 679, 698.
441 See discussion in*The Queen and Canada Employment and Immigration Commission v Schachter & Ors* [1992] 2 SCR 679. The Supreme Court of Canada reversed the decision of the Federal Court of Appeal which extended *Unemployment Insurance Act 1971* s 32 to include adoptive parents as well as natural parents. The decision of the Federal Court of Appeal extended the reach of the legislation by providing a benefit for natural fathers who had previously been excluded from this benefit. The Supreme Court of Canada, although recognising reading in as a proper approach in particular circumstances, considered that reading in in this case substantially altered the legislative scheme as a consequence of the budgetary implications that would result from that decision. See also N Duclos & K Roach 'Constitutional Remedies as "constitutional hints": A comment on R v Schachter' (1991) 36 *McGill Law Journal* 1.
442 s 16(1)(a).
443 See discussion in M Allars *Introduction to Australian administrative law* Butterworths Sydney 1990, para 6.114.
444 In its original jurisdiction: Constitution s 75(v).
445 s 39B.
446 s 16(1)(d).
447 *Minister for Immigration and Ethnic Affairs v Conyngham & Others* (the 'Platters' case) (1986) 68 ALR 441, 448.
448 There is no order of mandamus against the Crown or a servant of the Crown where the duty performed is in the capacity as a servant of the Crown. Mandamus lies where the duty is for the public benefit or the servant is acting in the capacity of a designated person: S D Hotop *Principles of administrative law* Law Book Co Sydney 1985, 282-3; M Allars *Introduction to Australian administrative law* Butterworths Sydney 1990, para 6.118.
449 *Minister for Immigration and Ethnic Affairs v Conyngham & Ors* (the 'Platters' case) (1986) 68 ALR 441, 453.
450 Draft Australian Bill of Rights Bill 1984, cl 17.
451 *Judiciary Act 1903* (Cth) s 40(1).
452 For a legislative example of this principle see *Racial Discrimination Act 1975* (Cth) s 10. See also discussion of this approach to ensuring equality in *The Queen & Canada Employment & Immigration Commission v Schacter & Ors* [1992] 2 SCR 679; N Duclos & K Roach 'Constitutional remedies as "constitutional hints": a comment on R v Schacter' (1991) 36 *McGill Law Journal* 1, 3 fn 8.
453 Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.238, discusses examples of the tort of false imprisonment and an action in tresspass and/or conversion for the wrongful taking of property. See also Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia? An exposure report for the consideration of senators* AGPS Canberra 1985, para 5.4-5.10. Note that the Human Rights Bill 1973 did provide that damages are available for the violation of the rights contained in the bill.
454 eg *Jane Doe v Police Board of Commissioners (Metropolitan Toronto)* (1989) 4 CCLT 105; (1990) 72 DLR (4th) 580. This case is discussed in para 6.4.
455 See ch 5.
456 See ch 2, ch 11, ch 13.
457 eg *Bombair v Harlow* [1987] 7 WWR 55 (Sask. Unif. Fam. Ct.); *Power v Moss* (1986) 61 Nfld. & PIER 5 (Nfld. SC); *Williams v Haugen* [1988] 2 WWR 269 (Sask. Unif. Fam. Ct.); *Wilson v Medical Services Commission of British Columbia* (1988) 30 BCLR (2d) 1 (CA); [1987] 3 WWR 48 (SC): as listed in G Brodsky & S Day *Canadian Charter equality rights for women: one step forward or two steps back?* Canadian Advisory Council on the Status of Women Ontario 1989, 68 endnote 9. These are identified by Brodsky & Day as 'women's cases' as they advance the equality of women, rather than as identifying the gender of the person initiating the action: id, 49. See also discussion of cases: id, 49-56. Canadian cases will be discussed further in ch 7. See also *R v Wallace* (1987) 30 CRR 5 discussed in para 6.3; *Jane Doe v*

Board of Commissioners of Police for Municipality of Metropolitan Toronto et al (1989) 48 CCLT 105; (1990) 72 DLR (4th) 580 discussed in para 6.4; *R v Mortgentaler* [1988] 1 SCR 30.

458 *Law Society of British Columbia et al v Andrews et al* [1989] 1 SCR 143. See ch 3.

459 JA Scutt *Women and the law: commentary and materials* Law Book Co Sydney 1990, 106. See also J Innes 'Equal pay and the Sex Discrimination Act 1984' (1986) 11 *Legal Service Bulletin* 254: J Innes ' Discrimination: The ACTU's comparable worth test case' (1986) 11 *Legal Service Bulletin* 86; D Brereton 'Comparable worth concept rejected' (1986) 11 *Legal Service Bulletin* 87.

460 J Innes 'Equal pay and the Sex Discrimination Act 1984' (1986) 11 *Legal Service Bulletin* 254, 254-255; See also D Brereton 'Comparable worth concept rejected' (1986) 11 *Legal Service Bulletin* 87, 88 for comments on the success of comparable worth in the USA.

461 In 1983 the ACTU added to the *Working Women's Charter 1977* the notion of comparable worth. It noted that the recognition of comparable worth would operate to value work on a non-sexist basis rather than simply on the basis that historically women have performed that form of work: referred to in JA Scutt *Women and the law: commentary and materials* Law Book Co Sydney 1990, 107.

462 *Private Hospitals' and Doctors' Nurses (ACT) Award 1972* (1986) 13 IR 108.

463 id, 113.

464 *Industrial Relations Act 1988* (Cth) s 170BA-170BI.

465 Pay equity was previously known as 'comparable worth'.

466 eg Confidential *Submission 159*; Equal Opportunity Commissioner VIC *Submission 510*; Federation of Community Legal Centres VIC *Submission 512*. See also B Hampton *Prisons and women* New South Wales University Press Kensington 1993 which details personal experiences of women in NSW prisons

467 In the National Prison Census 30 June 1992 the five main offence categories for which women were sentenced to imprisonment were break and enter, other theft, deal/traffic in drugs, robbery and homicide. For men the five main offence categories were break and enter, robbery, sex offences, homicide, and assault: J Walker *Australian prisoners 1992: results of the National Prison Census 30 June 1992: Compiled on behalf of the Correctional Administrators* Australian Institute of Criminology Canberra 1993, table 12, 40.

468 Other problems affecting women prisoners include inadequate health services and lack of education and training, particularly compared to that made available to men: Confidential *Submission 159*; Equal Opportunity Commissioner VIC *Submission 510*; Federation of Community Legal Centres VIC *Submission 512*.

469 *Regina v Wallace* (1987) 30 CRR 5.

470 id, 9.

471 See discussion in KE Mahoney 'The legal treatment of spousal abuse: a case of sex discrimination' (1992) 41 *University of New Brunswick Law Journal* 21; SL Martin 'Some constitutional considerations on sexual violence against women' (1994) 32 *Alberta Law Review* 535.

472 For a good example see limitation periods, para 2.55-2.60

473 (1989) 48 CCLT 105, 113. At first instance the application to have the pleadings struck out was dismissed: *Jane Doe v Police Board of Commissioners (Metropolitan Toronto)* (1989) 48 CCLT 105. The police appealed this decision. The appeal was also dismissed: *Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto et al* (1990) 72 DLR (4th) 580.

474 (1989) 48 CCLT 105, 116.

475 Jane Doe is also arguing that her right to security of the person under Charter s 7 was violated. In support of this she is arguing that the police adopted a policy which placed priority on the apprehension of criminals rather than the protection of potential and identifiable victims: (1990) 72 DLR (4th) 580, 589.

476 (1989) 48 CCLT 105, 112.

477 Interestingly this fact was also relied on by the plaintiff in support of the fact that her right to equality had been violated. At first instance Henry J expressed confusion as to how a woman could be similarly situated to a man in this situation, and therefore suffer a breach of her right to equality. During the hearing *Law Society of British Columbia v Andrews et al* [1989] 1 SCR 143 was handed down. LEAF counsel made this decision available to Henry J who then allowed the matter to proceed to trial given that the similarly situated test had been 'discredited...[and he would therefore] consider anew LEAF's arguments about what constituted a purposive approach to equality': S Razack *Canadian feminism and the law: The Women's Legal Education and Action Fund and the pursuit of equality* Second Story Press Toronto 1991, 119.

478 (1990) 72 DLR (4th) 580, 592.

479 See discussion in S Razack *Canadian feminism and the law: The Women's Legal Education and Action Fund and the pursuit of equality* Second Story Press Toronto 1991, 119-120; M Moran 'Case comments: Jane Doe v Board of Commissioners of Police for the Municipality of Metropolitan Toronto' (1993) 6 *Canadian Journal of Women and the Law* 491.

480 *Thurman et al v City of Torrington et al* (1984) 595 F Supp 1521.

481 Constitution (US) Fourteenth Amendment requires that no State shall 'deny to any person within its jurisdiction the equal protection of the laws'.

482 *Thurman et al v City of Torrington et al* (1984) 595 F Supp 1521, 1528.

483 id, 1527.

484 ibid.

485 The court dismissed her child's action as there was no evidence in relation to the child that the police had failed to protect him. There was only one incident of violence against the child presented to the court.

486 See ch 2.

487 See para 6.5.

488 National Conference of Community Legal Centres *Submission 541*.

489 eg *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; *Kemp v Minister for Education* (1991) EOC para 92-340 (WA EOT); *Waters v Public Transport Corporation* (1991) 103 ALR 513.

490 R Hunter *Indirect discrimination in the workplace* Federation Press Sydney 1992, 212-213

491 ALRC 67, para 4.35.

492 The use of these forms of evidence would be required by the contextual provision recommended for inclusion in the Equality Act, see para 4.23; rec 4.5.. The use of this type of evidence is not new: see discussion in R Hunter *Indirect discrimination in the workplace* Federation Press Sydney 1992, 215-216. See *Kemp v Minister for Education* (1991) EOC para 92-340 (WA EOT); *Watches of Switzerland v Savell* [1983] IRLR 141; *Cobb v Secretary of State for Employment and Manpower Services Commission* [1989] ICR 506.

493 See ch 7.

494 *Joanne Tervia Taikato v Regina* NSW Court of Criminal Appeal unreported Wednesday 6 April 1994, 60776/93.

495 *Crimes Act 1900* (NSW) s 545E(1) and (2).

496 See E Cox, C Sitka & E Lintjens *Purple postcards: final report on concerns and solutions offered to the Australian Council for Women* Distaff Associates Sydney 1994, 12-14.

497 Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.167.

498 id, para 9.195. The Constitutional Commission also points out how its recommended provision provides greater protection than the Canadian Charter of Rights and Freedoms s 32(1) which refers specifically only to executive arms of government and has been held not to apply to the common law as between private parties: id, para 9.196.
499 id, para 9.194.
500 *Constitution Act 1982* (Canada) Part I Charter of Rights and Freedoms s 32.
501 J Fudge 'The public/private distinction: the possibilities and limits to the use of Charter litigation to further feminist struggles' (1987) *Osgoode Hall Law Journal* 485, 489-490.
502 *Law Society of British Columbia et al v Andrews et al* [1989] 1 SCR 143. See also *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174.
503 It has been suggested that this has created 'serious demarcation problems'. For example it has been held in Canada that the Charter does not apply to universities or public hospitals 'notwithstanding their important public functions and almost total reliance upon public funds': M R Wilcox *An Australian Charter of Rights?* Law Book Co Sydney 1993, 250.
504 *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174.
505 The same question was considered by the Queensland Electoral and Administrative Review Commission *Report on review of the preservation and enhancement of individuals' rights and freedoms* EARC Brisbane 1993, para 7.41.
506 See minority report ch 16.
507 Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia? an exposure report for the consideration of senators* AGPS Canberra 1985, para 4.60.
508 id, para 4.62.
509 Senate Standing Committee on Constitutional and Legal Affairs *A Bill of Rights for Australia? an exposure report for the consideration of senators* AGPS Canberra 1985, para 4.61. See also Queensland Electoral and Administrative Review Commission *Report on review of the preservation and enhancement of individuals' rights and freedoms* EARC Brisbane 1993, para 7.42 which considered that the question of the application of the bill of rights to private persons or entities should perhaps be reconsidered if the proposed bill of rights was to be entrenched in the Queensland Constitution.
510 This approach was also supported by Queensland Electoral and Administrative Review Commission *Report on review of the preservation and enhancement of individuals' rights and freedoms* EARC Brisbane 1993, para 7.43.
511 Constitutional Commission *Final report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.167.
512 See especially ch 2.
513 Australian Law Reform Commission Report 27 *Standing in public interest litigation* AGPS Canberra 1985 (ALRC 27).
514 In this chapter the term ' friend of the court ' will be used.
515 Justice E Evatt AO foreword to R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990, vii.
516 N Roxon & K Walker *Submission 175*.
517 National Conference of Community Legal Centres *Submission 541*.
518 For further discussion of what may constitute public interest litigation see ALRC 27 para 30-58.
519 Toohey J 'A government of laws, and not of men' *Speech - Conference on constitutional change in the 1990's* Darwin 4-6 October 1990.
520 For discussion of what constitutes a 'special interest' for the purposes of standing law, see *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27; *Australian Conservation Foundation Inc. v The Commonwealth* (1980) 146 CLR 493.
521 *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27, 42 & 44.
522 *Australian Conservation Foundation Inc. v Commonwealth* (1980) 146 CLR 493, 530.
523 *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27, 37 Gibbs CJ.
524 id, 44 Murphy J.
525 See ch 3.
526 See ALRC 27 para 252-258 for further elaboration of the meaning of 'merely meddling' and a description of the proposed test for standing. The Commission uses 'mere meddler' in preference to 'mere busybody' which has been defined at English case law: see *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* [1980] QB 407, 422-423.
527 Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994, para 2.103. The Committee also recommends that the Commonwealth encourage the States to consider the introduction of such reforms in their jurisdictions: Action 2.7.
528 N.S.W. *Land and Environment Court Act* 1979 (NSW) s 123 (1).
529 *Oshlack v Richmond River* (1994) 82 LGERA 236, 245 Stein J.
530 *US Tobacco Co v Minister for Consumer Affairs and others* (1988) 20 FCR 520, 534.
531 *Corporate Affairs Commissioner v Bradley* [1974] 1 NSWLR 391, 397-398.
532 *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391, 396-403.
533 eg *Administrative Decisions (Judicial Review) Act* (Cth) s 12; *Family Law Act 1975* (Cth) s 91, 92; *Human Rights & Equal Opportunity Act 1986* (Cth) s 11(1)(o); *Industrial Relations Act 1988* (Cth) s 43, 59*; Judiciary Act 1903* (Cth) s 78A; *Sex Discrimination Act 1984* (Cth) s 48(1)(gb).
534 The High Court and Federal Court rules do not provide specifically for intervention and applications by third parties to intervene are made pursuant to rules relating to joinder of actions: ALRC 27, para 275. The rules governing joinder are: Federal Court Rules O 6 r8(1); High Court Rules O 19 r1. When using these rules, the difference between joinder and intervention is the *purpose* of the appearance. A person is joined for the purpose of representing a joint interest with one of the parties, but a person intervenes to represent a different interest from that of the parties.
535 *Bropho v Tickner* (1993) 40 FCR 165, 172.
536 id, 172.
537 See D Scriven & P Muldoon 'Intervention as friend of the court: Rule 13 of the Ontario Rules of Civil Procedure' (1985) 6 *Advocates Quarterly* 448 regarding the evolution of the concept of a friend of the court.
538 *Bropho v Tickner* (1993) 40 FCR 165, 172-173.
539 eg. N Roxon & K Walker *Submission 175;* J Blokland *Submission 347*; Ministry for the Status and Advancement of Women NSW *Submission 350*; National Conference of Community Legal Centres *Submission 541;* Women Advocates for Gender Equity, Sydney *Submission 547*.
540 eg in *Bropho v Tickner* (1993) 40 FCR 165. In *United States Tobacco Company v Minister for Consumer Affairs* (1988) 19 FCR 184; (1988) 20 FCR 520 the Australian Federation of Consumer Organisations Inc (AFCO) was granted leave to appear as amicus curiae before the Federal Court at first instance; on appeal to the Full Court of the Federal Court AFCO was joined as a party. In *R v Murphy* (1986) 64 ALR 498 the President of the Senate was granted leave to appear as an amicus curiae before the Supreme Court of New South Wales. In *Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dams case) the Tasmanian Wilderness Society was granted leave to appear as amicus curiae before the High Court. In *HREOC v Mt Isa Mines* (1993) 46 FCR 301 the Public Interest Advocacy Centre was granted leave to appear as amicus curiae before the Full Court of the Federal Court. PIAC was denied leave in *Brandy v HREOC and Castan and Bell* No C3 of 1994, High Court of Australia*: S*ee para 7.18.

541 *Racial Discrimination Act 1975* (Cth) s 25ZAA, 25ZAB, 25ZAC.
542 *Brandy v HREOC & Castan & Bell* No C3 of 1994, High Court of Australia.
543 *Law Society of British Columbia et al v Andrews et al* [1989] 1 SCR 143.
544 Women Advocates for Gender Equity, Sydney *Submission 547*.
545 ALRC 27, Summary para 3.
546 eg *Robinson v Western Australian Museum* (1977) 138 CLR 283, 327 Mason J; *Onus & another v Alcoa of Australia Limited* (1981) 149 CLR 27, 44 Murphy J. The proposition that reform of the law of standing is properly a matter for the legislature was given general support by Stephen J in *Onus and another v Alcoa of Australia Ltd* (1981) 149 CLR 27, 41 where, stating that the case at hand did not require reconsideration of the present law, he commented: 'Moreover it may be that any general development of the law relating to standing to sue should be left to legislative action, prompted by law reform agencies.'
547 Standing (Federal and Territory Jurisdiction) Bill 1985 is reproduced in appendix 1.
548 ALRC DP 54, para 4.14-15. N Roxon & K Walker *Submission 175*; Women Advocates for Gender Equity, Sydney *Submission 547.*
549 See ALRC 27 for more detailed analysis and recommendations on standing law.
550 N Roxon & K Walker *Submission 175.*
551 H McKelvie 'It's time to educate' (1993) 18 *Alternative Law Journal* 137.
552 J Welch 'No room at the top: interest group intervenors and Charter litigation in the Supreme Court of Canada' (1985) 43 *University of Toronto Faculty of Law Review* 204 makes a similar point regarding the need for procedural mechanisms which ensure representation of a wide range of view points in the context of litigation of political issues under the Canadian Charter.
553 The *Industrial Relations Act 1988* (Cth) s 43 and 59 provides a broad discretion in the Industrial Relations Commission and the Federal Court, respectively, to grant leave to intervene. In addition, since 1992, the *Sex Discrimination Act 1984* (Cth) s 50A provides for referral, by the Sex Discrimination Commissioner, of complaints regarding awards to the Industrial Relations Commission. Consequently, the number of interventions by the Sex Discrimination Commissioner before the Industrial Relations Commission has increased.
554 J Scutt 'Women and enterprise bargaining: who benefits, enterprise bargaining v centralised wage fixing' reproduced in National Women's Consultative Council *Submission 342*.
555 Australian Federation of Business and Professional Women and the National Council of Women.
556 *1969 Equal Pay Case* (1969) 127 CAR 1142; 1*972 Equal Pay Case* (1972) 147 CAR 172.
557 *In the Matter of Applications by RANF and HEF* (1986) 300 CAR 185.
558 *Review of Wage Fixing Principles* October 1993 Print No. K9700 in which the Australian Federation of Business and Professional Women, the Sex Discrimination Commissioner and the Women's Electoral Lobby intervened.
559 The role allowed to the Tasmanian Wilderness Society in *Commonwealth v Tasmania* (1983) 158 CLR 1 is a notable exception.
560 *HREOC v Mount Isa Mines Ltd and Others (*1993) 46 FCR 301. See ch 3 for further discussion of this case. The Court dismissed the appeal, but clarified principles underlying the interpretation of the *Sex Discrimination Act* 1984 (Cth).
561 February 1994. Decisions and transcripts of proceedings in the Childrens' Court are not published and the identity of the parties is confidential.
562 As the infibulation had been inflicted outside Austalia the Court did not make orders addressing this abuse.
563 Women Advocates for Gender Equity, Sydney *Submission 547*.
564 D Scriven & P Muldoon 'Intervention as a friend of the court: Rule 13 of the Ontario Rules of Civil Procedure' (1985) 6 *Advocates Quarterly* 448, 453.
565 Mason CJ 'The role of a constitutional court in a federation: A comparison of the Australian & the United States experience' (1986) 16 *Federal Law Review* 1.
566 In this respect the Supreme Court Rules are more liberal than those in the American State courts which require filing of a written motion for leave to file an amicus brief: H Semmel 'Amicus curiae in public interest litigation: a background paper on the USA experience' unpublished, Public Interest Advocacy Centre Sydney 1991, 5.
567 K O'Connor & L Epstin 'Court rules and workload: a case study of rules governing amicus curiae participation' (1983) 8 *The Justice System Journal* 35, 43. The view that US courts regard amicus curiae briefs as helpful is confirmed by the experience of National Organisation of Women (NOW) Legal Defense and Education Fund, New York. The work of this organisation includes submitting amicus curiae briefs to US courts on behalf of women. In its experience, although the courts regularly receive a number of amicus curiae briefs for one case, most judges welcome the assistance of high quality amicus submissions.
568 In addition to the other references cited in this paragraph see S Krislov 'The amicus curiae brief: from friendship to advocacy'(1963) 72 *The Yale Law Journal* 694.
569 This is partly due to the time limits on oral argument imposed on counsel in United States courts. In lower courts each party is usually limited to approximately 15 minutes oral argument. In the Supreme Court each party is usually limited to approximately one hour oral argument. An amicus curiae in the Supreme Court is usually arguing in support of or against an appeal. In practice, for the amicus curiae to obtain appearance time, the party whose case the amicus is supporting must grant some of its appearance time to the amicus: National Organisation of Women (NOW), Legal Defense and Education Fund *Consultation* New York, USA 28 June 1994.
570 A Hynous 'A generic approach to intervention in administrative proceedings - increased participation and efficiency through regulatory reform'(1982) 28 *Wayne Law Review* 1427.
571 Rule 18.
572 An 'intervenor' in the Canadian Supreme Court is analogous to a friend of the court in Australian courts.
573 Rule 18 (1).
574 Rule 18 (3)(c).
575 Rule 18 (5)(c).
576 The party's written brief of argument submitted to the court is referred to as the party's 'factum'.
577 Womens' Legal Education and Action Fund (LEAF) *Consultation* Toronto, Canada 20 June 1994. In Canada, as in the United States, it is common practice to impose time limits on counsel appearing before courts.
578 However, a third party can be joined to the action under the rule for substituting and adding parties: Rule 17. In *Canada v Schacter and LEAF* [1992] 2 SCR 679 LEAF had been granted leave to intervene as a party at the trial in the Canadian Federal Court, but when the appellant sought leave to appeal against both Schacter and LEAF in the Supreme Court, LEAF (as a party intervenor) was not considered to be 'properly before the court'. For LEAF to be able to participate as a co-respondent, LEAF was added as a party under Rule 17: BA Crane & HS Brown *Supreme Court of Canada Practice 1991-2* Thomas Professional Publishing Canada Scarborough 1991, 137-138.
579 eg Ontario Rules of Civil Procedure Rule 13, provides for 'intervention as an added party' and 'intervention as a friend of the court'. Both forms of intervention are by leave of the court. In contrast the Canadian Federal Court Rules do not provide for intervention and joinder is used as the procedural vehicle for intervention.
580 BA Cane & HS Brown *Supreme Court of Canada Practice 1991-92* Thomas Professional Publishing Canada Scarborough 1991, 141; BM Dickens 'A Canadian development: non-party intervention' (1977) 40 *The Modern Law Review* 666-676; P Muldoon & D Scriven

'Intervention as added party: Rule 13 of the Ontario Rules of Civil Procedure' (1985) 6 *Advocates' Quarterly* 129-59; D Scriven & P Muldoon 'Intervention as a Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure'(1985) 6 *Advocates Quarterly* 448-472.

581 A number of submissions cited LEAF as a model for a women's advocacy body that could be adapted to the Australian context: N Roxon & K Walker *Submission* 175; Domestic Violence Legal Help *Submission 306;* National Conference of Community Legal Centres *Submission 541;* Ministry for the Status and Advancement of Women NSW *Submission 350.*

582 The case of *Schacter v The Queen and Canada Employment and Immigration Commission* (1988) 52 DLR 525, see para 7.35, is a very rare example of LEAF intervening as a party. LEAF no longer acts as the primary legal representative in cases, mainly due to having insufficient resources to do so. Women's Legal Education and Action Fund (LEAF) *Consultation* Toronto Canada 21 June 1994.

583 Women's Legal Education and Action Fund (LEAF) *Consultation* Toronto Canada 20 June 1994.

584 See references to LEAF's participation in other cases in previous chapters: paras 2..59-2.61; 5.21 and 6.4.

585 Unreported, Supreme Court of Canada 3 May 1994.

586 LEAF argued that consent must be interpreted consistently with the equality guarantees in the Canadian Charter of Rights and Freedoms, s 15, 28: Factum of the Women's Legal Education and Action Fund (LEAF) *R v Mason* No 23385 Supreme Court of Canada para 43-48.

587 Factum of the Women's Legal Education and Action Fund (LEAF), *R v Mason* No 23385 Supreme Court of Canada para 37-42, 60-66.

588 (1992) 92 DLR (4th) 449.

589 LEAF's argument had emphasised the relevance of inequalities of power: Factum of Women's Legal Education and Action Fund (LEAF) *Norberg v Wynrib* No 21924 Supreme Court of Canada para 22-25.

590 (1992) 99 DLR (4th) 456.

591 *Divorce Act* SCR 1985 c. 3 (2nd Supp.) s 17(7).

592 Factum of Women's Legal Education and Action Fund (LEAF) *Moge v Moge* No 21979 Supreme Court of Canada para 45-84.

593 (1992) 99 DLR (4th) 456, 477, 480, 482-86, 489-91, 494.

594 (1992) 99 DLR (4th) 456, 489-90.

595 *Schachter v The Queen and Canada Employment and Immigration Commission* (1988) 52 DLR (4th) 524.

596 M Eberts 'New facts for old: observations on the judicial process' in R Devlin (ed) *Canadian perspectives on legal theory* Emond Montgomery Toronto 1991, 480-1.

597 id, 483.

598 The trial judge also found that a statutory provision which discriminated between adoptive and natural parents was in violation of Canadian Charter of Rights and Freedoms s 15. On an appeal to the Federal Court of Appeal the trial judge's decision was upheld: [1990] 2 FC 129. Then the appellants appealed to the Supreme Court of Canada on the issues of constitutional validity and the trial court's power to read in the legislative consequences of any invalidity. In the appeal to the Supreme Court of Canada, LEAF was a co-respondent with Schacter: *Schacter v Canada and LEAF* [1992] 2 SCR 679. The Court held that the discriminatory provision was invalid and that courts have a limited power to extend legislation in the event of constitutional invalidity.

599 Standing (Federal and Territory Jurisdiction) Bill 1985 cl 9. Reproduced in appendix 1.

600 id, cl 10.

601 ALRC 27, para 29.

602 Senate Standing Committee on Legal & Constitutional Affairs *Gender bias & the judiciary* Senate Printing Unit Canberra 1994.

603 In the recent High Court Case, *Brandy v HREOC and Castan and Bell* No C3 of 1994, no reasons for rejecting PIAC's application were given. The High Court has therefore provided no guidlines to other courts or to detalied intervention on how the court's discretion should be exercised. See para 7.18.

604 See recommendation 7.2 below where provision for such reimbursement is specified as one of the functions of the recommended women's equality advocacy fund.

605 (1989) 48 CCLT 105; (1990) 72 DLR (4th) 580. See para 6.4 for the facts of the case.

606 (1988) 52 DLR (4th) 524.

607 See para 7.35 for the facts of the case and further discusion of the role LEAF played. See also M Eberts 'New facts for old: observations on the judicial process' in R Devlin (ed) *Canadian perspactives on legal theory* Emond Montgomery Toronto 1991 regarding LEAF's role in *Schacter* and the significance of findings of fact in litigation in general.

608 In Canadian courts friends of the court are occasionally granted standing in criminal cases where there is an important public interest issue at stake.

609 Mason CJ 'The Australian Judiciary in the 1990s' Address to the Sydney Institute 15 March 1994; Mason CJ 'Changing the law in a changing society' (1993) 67 *Australian Law Journal* 568; McHugh J 'The law-making function of the judicial process' (1988) 62 *Australian Law Journal* 15.

610 ALRC 27, Principal reform 3.

611 See the relevant legislative provisions proposed in ALRC 27, Standing (Federal and Territory Jurisdiction) Bill 1985. Reproduced in Appendix 1.

612 ibid.

613 See recommendations at para 7.44 regarding provision for an original party to the proceeding to apply to the NWJP women's equality advocacy fund for reimbursement of costs which were incurred as a result of an equality intervention.

614 Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994.

615 Dr Lawrence *Access to Justice Forum - Speech* Canberra August 1994.

616 Women's Legal Education and Action Fund (LEAF) *Telephone consultation* 3 June 1994.

617 Women's Legal Education and Action Fund (LEAF) *Consultation* Toronto Canada 21 June 1994.

618 This fund is administered through Legal Aid and Family Services.

619 A total amount of $3 000 000 in 1994-95.

620 Women Advocates for Gender Equity, Sydney *Submission 547*.

621 S Razack *Canadian feminism and the law: The Women's Legal Education and Action Fund and the pursuit of equality* Second Story Press Toronto 1991, 64-65.

622 Criminal Code SCR 1985, c. C-46, s 276 & 277.

623 (1991) 7 SCR (4th) 117 (SCC).

624 LEAF's involvement included presenting a brief to the parliamentary committee considering the proposed Bill: *Brief of the Women's Legal Education and Action Fund (LEAF) to the House of Commons Legislative Committee on Bill C-49 Criminal Code (amdt. - Sexual Assault)* 3rd Sess. 34th Parl. 1991-92.

625 *An Act to Amend the Criminal Code (sexual assault)* SC 1992, c 38.

626 See Forum: Sexual Assault Legislation (1993) 42 *University of New Brunswick Law Journal* 319-85 for text of the new provisions and commentary. See also E A Sheehy 'Feminist argumentation before the Supreme Court of Canada in *R v Seaboyer; R v Gayme*: the sound of one hand clapping' (1991) 18 *Melbourne University Law Review* 450-468.

627 See ch 3-6 regarding legal definitions of equality and the legal protection of equality.

628 eg Australian, State and Territory law reform bodies; Immigration Advice and Rights Centre; Public Interest Advocacy Centre; Refugee Advice and Casework Service.

629 J Jago (ed) *Submission 160.*

630 eg Confidential *Submission 303*; P Page *Submission 600;* Confidential *Submission 630.* See also Domestic Violence Advocacy Service, Sydney *Submission 148;* Outer East Domestic Violence Outreach Service Collective Inc VIC *Submission 249*; Women's Legal Resources Centre, Sydney *Submission 256*; Violence Against women Action Group, Federation of Community Legal Centres Inc VIC *Submission 330*.

631 eg a submission from a woman who engaged six lawyers in turn before she found one who would take seriously her request that her violent and dangerous husband be denied access to their children. Having at last found a lawyer who would prepare her case she succeeded easily in the Family Court. In a second submission she stated that with her new lawyer and a sympathetic court the law had changed from being a problem; 'I now only have one problem - domestic violence': Confidential *Submission 632*.

632 L G Espinoza 'Constructing a professional ethic: law school lessons and lesions' (1989-90) 4 *Berkeley Women's Law Journal* 215, 215.

633 J Goldring 'Better legal education: an essential element for all' *28th Australian Legal Convention* Hobart 26-30th September 1993 *Convention papers* Volume 1, Day 2, 36. See also W Twining 'Developments in legal education: beyond the primary school model' (1990) 2 *Legal Education Review* 35.

634 D Pearce, E Campbell & D Harding *Australian law schools: a discipline assessment for the Commonwealth Tertiary Education Commission* Volume One AGPS 1987, para 1.70.

635 Australian Law Reform Commission Discussion Paper 54 *Equality before the law* ALRC Sydney 1993 (ALRC DP 54), para 7.2.

636 Submissions emphasise the importance of education for all members of the profession. eg Freedom From Violence Action Group WEL VIC *Submission 27*; Humanist Society of Victoria Inc *Submission 32*; Waratah Support Centre, Bunbury *Submission 109*; S Robertson *Submission 112*; Women's Health Centre, Rockhampton *Submission 126*; G Mather *Submission 127*; Confidential *Submission 198*; P Wright *Submission 206*; P Cowburn *Submission 244*; M Dando *Submission 282*; G Trifiletti *Submission 288*; Legal Aid Office ACT *Submission 294*; Domestic Violence Resource Centre Wooloowin QLD *Submission 295*; Wesley Central Mission, Melbourne *Submission 299*; Older Women's Network TAS *Submission 304*; Law Institute of Victoria *Submission 335*; NSW Child Protection Council *Submission 336*; J Blokland *Submission 347*; G Sutcliffe Huigol *Submission 474*. A number of these submission particularly focus on the need for education for all lawyers in regard to the nature of domestic violence and sexual assault.

637 Chief Justice Malcolm 'Women and the law: proposed judicial education programme on gender equality and taskforce on gender bias in Western Australia' (1993) 1 *Australian Feminist Law Journal* 139, 144. See also comments made by Justice Priestley, NSW Court of Criminal Appeal, at the 4th Annual Law and Literature Conference, University of Wollongong referred to in R Evans 'Fair and equal: facing up to gender bias' (1993) 67 *Law Institute Journal* 1130, 1131. This approach was also adopted by the Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994, para 1.14.

638 P Wright *Submission 206.*

639 S Bottomley, N Cunningham & S Parker *Law in context* Federation Press Sydney 1991, 118. This is the historical view of legal education in Australia. This book argues that although this view is changing and an increasing amount of contextual material is incorporated in the curriculum, it still dominates 'many' law schools today.

640 Referred to as: ALRC *Law school questionnaire* 1994.

641 Figure for 1993: C McInnis & S Marginson, Centre for the Study of Higher Education, University of Melbourne *Australian law schools after the 1987 Pearce report* DEET Higher Education Division, Evaluations and Investigations Program AGPS Canberra 1994, Table A5.20, 448. cf 1984 41%, 1980 33.3% and 1974 21.1%: D Pearce, E Campbell & D Harding *Australian Law Schools: a discipline assessment for the Commonwealth Tertiary Education Commission* Volume Two AGPS Canberra 1987, para 11.7.

642 C McInnis & S Marginson, Centre for the Study of Higher Education, University of Melbourne *Australian law schools after the 1987 Pearce report* DEET Higher Education Division, Evaluations and Investigations Program AGPS Canberra 1994, Table A5.30, 458.

643 eg J Jago (ed) *Submission 160*; Gay & Lesbian Rights Lobby and Gay & Lesbian Legal Rights Service *Submission 193*; Sisters-in-Law *Submission 195*; P Wright *Submission 206*; K Isaacs *Submission 238*; Northern Community Legal & Welfare Rights Centre TAS *Submission 239*; M Thornton *Submission 268*; C O'Connor *Submission 278*; Legal Aid Office ACT *Submission 294*; C MacDonald (et al) *Submission 333*; J Blokland *Submission 347*; F David *Submission 400*; Confidential *Submission 409*; ML Griffiths & M McDonald, Northern Territory University Women Law Student's Group *Submission 417*; Confidential *Submission 438*; Confidential *Submission 457*; Confidential *Submission 549.*

644 A Dayman *Submission 320* in which 76 women law students at theAustralian National University were interviewed; T Jowett *Submission 544* in which 235 senior women law students at University of New South Wales were interviewed; and Women Lecturers & Students of the Faculty of Law, University of Tasmania Law School *Submission 258* in which 40 third year women students responded to a questionnaire. The Bar Association of Queensland *Submission 165* also conducted a survey of 18 women members of the Queensland Bar which covered a range of questions from ALRC DP 54; questions 7.1, 7.2 and 7.3 addressed issues relating to law school education.

645 Confidential *Submission 549.* See submissions listed in fn 18-21. The importance of eliminating indirect and systemic discrimination has been discussed in ALRC 69(1) ch 3.

646 Sisters-in-Law *Submission 195*; C O'Connor *Submission 278*; J Durling, *Submission 420*; Confidential *Submission 549.*

647 eg Confidential *Submission 438*; Legal Aid Office ACT *Submission 294*; C Macdonald (et al) *Submission 333.*

648 eg Sisters-in-Law *Submission 195*; A Dayman *Submission 320*; C MacDonald (et al) *Submission 333.*

649 eg J Jago (ed) *Submission 160*; K Isaacs *Submission 238;* C Macdonald (et al) *Submission 333*; J Blokland *Submission 347*; ML Griffiths & M McDonald, Northern Territory University Women Law Student's Group *Submission 420.* Confidential *Submission 457* discussed the 'male culture' of law school. In the survey conducted by the Bar Association of Queensland *Submission 165* the women who responded that they had experienced discrimination at law school, half the respondents, identified these features of the law school experience. In the survey conducted at ANU law school 37% of respondents stated that they felt alienated as women at law school; a further 13% stated that law school was alienating for all people: A Dayman *Submission 320.*

650 Gay & Lesbian Rights Lobby and the Lesbian & Gay Legal Rights Service *Submission 193*; Tasmanian Gay and Lesbian Rights Group *Submission 280*. This was also recognised in the Canadian Bar Association *Touchstones for change: equality, diversity and accountability: report on gender equality in the legal profession* Canadian Bar Association Ottawa 1993, 33-36.

651 Women Lecturers & Students of the Faculty of Law, University of Tasmania *Submission 258*; Confidential *Submission 438.* However, note the concern Legal Aid Office ACT *Submission 294* which points out that while many lecturers use gender inclusive language, this alone does not eliminate sexism and may in fact disguise it. See also M Stewart 'Conflict and connection at Sydney University Law School: twelve women speak of our legal education' (1992) 18 *Melbourne University Law Review* 828, 843 where seven of the twelve women interviewed considered there was little overt sexism or direct discrimination at their law school.

652 T Jowett *Submission 544.* See also A Dayman *Submission 320*. See ch 9.

653 See LG Espinoza 'Constructing a professional ethic: law school lessons and lesions' (1989-90) 4 *Berkeley Women's Law Journal* 215; M Torrey (et al) 'Teaching law in a feminist manner: a commentary from experience' (1990) 13 *Harvard Women's Law Journal* 87; L Finley 'Women's experience in legal education: silencing and alienation' (1989) 1 *Legal Education Review* 101; KB Czapanskiy & JB Singer

'Women in the law school: it's time for more change' (1988) 7 *Law and Inequality* 135; M Stewart 'Conflict and connection at Sydney University Law School: twelve women speak of our legal education' (1992) 18 *Melbourne University Law Review* 828.

654 eg Legal Aid Office ACT *Submission 294*; A Dayman *Submission 340*; J Blokland *Submission 347*; T Jowett *Submission 544*.

655 A Dayman *Submission 320.* The submissions indicate that stigmatisation may take different forms. The views of the woman student may be trivialised; she may be considered difficult, inflexible and always disagreeing; she may be considered a 'man-hater'.

656 Confidential *Submission 549.*

657 Northern Community Legal & Welfare Rights Centre TAS *Submission 239.*

658 ML Griffiths & M McDonald, Northern Territory University Women Law Student's Group *Submission 417*. See M Stewart 'Conflict and connection at Sydney University Law School: twelve women speak of our legal education' (1992) 18 *Melbourne University Law Review* 828, 844.

659 Women Lecturers & Students of the Faculty of Law, University of Tasmania *Submission 258.*

660 Confidential *Submission 549.*

661 C McInnis & S Marginson, Centre for the Study of Higher Education, University of Melbourne *Australian law schools after the 1987 Pearce report* DEET Higher Education Division, Evaluations and Investigations Program AGPS Canberra 1994, Table A5.30, 458.

662 In 1993 of a total of 132 tutorial positions, 82 were held by women and 51 by men; of 295 lecturer positions, 146 were held by women and 149 by men; of 218 senior lecturer positions, 64 were held by women and 145 by men; of 84 associate professor positions, 15 were held by women and 69 by men; and of 84 professor positions, 10 were held by women and 74 by men: C McInnis & S Marginson, Centre for the Study of Higher Education, University of Melbourne *Australian law schools after the 1987 Pearce report* DEET Higher Education Division, Evaluations and Investigations Program AGPS Canberra 1994, compiled from Table A5.31-A5.33, 459-461.

663 A Dayman *Submission 320.*

664 TL Banks 'Gender bias in the classroom' (1988) 38 *Journal of Legal Education* 137, 143; SM Wildman 'The question of silence: techniques to ensure full class participation' (1988) 38 *Journal of Legal Education* 147, 151-52.

665 J Jago (ed) *Submission 160*; A Dayman *Submission 320*; C MacDonald (et al) *Submission 333*; T Jowett *Submission 544.* This is particularly an issue for lesbian and gay students: Gay & Lesbian Rights Lobby and Gay & Lesbian Legal Rights Service *Submission 193.*

666 Canadian Bar Association *Touchstones for change: equality, diversity and accountability: the report on gender equality in the legal profession* Canadian Bar Association Ottawa 1993, rec 2.27.

667 For example the University of Newcastle has invited Justice E Evatt and Justice D O'Connor to speak to students: ALRC *Law Schools Questionnaire* 1994.

668 Confidential *Submission 438.*

669 Confidential *Submission 438.*

670 J Blokland *Submission 347.*

671 Confidential *Submission 549.*

672 Legal Aid Office ACT *Submission 294*; A Dayman *Submission 320.*

673 J Jago (ed) *Submission 160.*

674 L Finley 'Breaking women's silence in law: the dilemma of the gendered nature of legal reasoning' (1989) 64 *Notre Dame Law Review* 886, 898. See also R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990. See also ch 2 which discusses the gender bias of law.

675 C McInnis & S Marginson, Centre for the Study of Higher Education, University of Melbourne *Australian law schools after the 1987 Pearce Report* DEET Higher Education Division, Evaluations and Investigations Program, AGPS Canberra 1994, 157.

676 id, 156. The 13 law schools are those established before 1987. The survey was conducted from 1992/1993 documents.

677 The ability to choose an elective subject is constrained by the electives offered by the law school, the timetable and whether an elective is offered every year.

678 Since the introduction of mutual recognition legislation, discussed in para 8.15-8.16, there will be less divergence in what a university will set as the core curriculum.

679 See discussion of diversity in C McInnis & Marginson, Centre for the Study of Higher Education, Univerity of Melbourne *Australian Law Schools after the 1987 Pearce Report* DEET Higher Education Division, Evaluations & Investigations Program AGPS Canberra 1994, 160-161.

680 R E McGarvie 'The function of a degree: core subjects' (1991) 9 *Journal of Professional Legal Education* 11, 12.

681 eg J Goldring 'The place of legal theory in the law school: a comment' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 159; C Sampford & D Wood '"Theoretical dimensions" of legal education: a response to the Pearce Report' (1988) 62 *Australian Law Journal* 32; M Thornton 'Portia lost in the groves of academe wondering what to do about legal education' (1991) 34 *The Australian Universities' Review* 26. See discussion of debate about the content of the curriculum in C McInnis & S Marginson, Centre for the Study of Higher Education, University of Melbourne *Australian law schools after the 1987 Pearce Report* DEET Higher Education Division, Evaluations and Investigations Program, AGPS Canberra 1994, 40-44.

682 This is known as mutual recognition legislation. Mutual recognition legislation has been enacted in all jurisdictions with the exception of Western Australia: *Mutual Recognition Act 1992* (Cth); *Mutual Recognition Act 1992* (ACT); *Mutual Recognition Act 1992* (NSW); *Mutual Recognition Act 1992* (NT); *Mutual Recognition Act 1992* (Qld); *Mutual Recognition Act 1993* (SA); *Mutual Recognition Act 1993* (Tas); *Mutual Recognition Act 1993* (Vic); Further discussed in ch 9.

683 Uniform Admission Rules, rule 3(b). They are also known as the 'Priestley rules'.

684 The Law Council of Australia have proposed a National Standards and Appraisal Committee: Law Council of Australia *Blueprint for the structure of the legal profession: a national market for legal services* Law Council of Australia Canberra 1994, 16-17.

685 ibid.

686 Consultative Committee of State and Territorial Law Admitting Authorities *Uniform admission requirements: discussion paper and recommendations* April 1992, Appendix A. See also Law Council of Australia *Blueprint for the structure of the legal profession: A national market for legal services* Law Council of Australia 1994, 3-4.

687 R Morgan 'Legal education watershed' (1992) 17 *Alternative Law Journal* 140, 141.

688 Suggestion one of the principal suggestions to law schools states 'That all law schools examine the adequacy of their attention to theoretical and critical perspectives, including the study of law in operation and the study of the relations between law and other social forces': D Pearce, E Campbell & D Harding *Australian law schools: a discipline assessment for the Commonwealth Tertiary Education Commission* Volume One AGPS Canberra 1987, para 1.143.

689 R Bailey-Harris 'Gender bias in the law and the legal system' paper *Lexpo Congress '93* 23-31 October 1993. See also J Blokland *Submission 347;* C Macdonald (et al) *Submission 333.*

690 It has been suggested that these areas of legal practice tend to be consistently omitted from the core tertiary curriculum as they are 'associated with the less powerful sectors of society': M Thornton 'Portia lost in the groves of academe wondering what to do about legal education' (1991) 34 *Australian Universities Review* 26, 27. Although discussing the core curriculum generally these comments are pertinent to the Uniform Admission Rules: C McInnis & S Marginson, Centre for the Study of Higher Education, University of Melbourne *Australian law*

schools after the 1987 Pearce Report DEET Higher Education Division, Evaluations and Investigations Program AGPS Canberra 1994, 41. See also C MacDonald (et al) *Submission 333.*

691 This diversity is acknowledged and discussed in E Jackson 'Contradictions and coherence in feminist responses to law' (1993) 20 *Journal of Law and Society* 398; BA Hocking 'Feminist jurisprudence: the new legal education' (1992) 18 *Melbourne University Law Review* 727; CA MacKinnon 'Feminism in legal education' (1989) 1 *Legal Education Review* 85. See for example the different approaches adopted in the following: C Gilligan *In a different voice: psychological theory and women's development* Harvard University Press Cambridge MA 1982; CA MacKinnon *Feminism unmodified: discourses on life and law* Harvard University Press Cambridge MA 1987; R West 'The difference in women's hedonic lives: a phenomenological critique of feminist legal theory' (1987) 3 *Wisconsin Women's Law Journal* 81; A Harris 'Race and essentialism in feminist legal theory' (1990) 42 *Stanford Law Review* 581; N Duclos 'Lessons of difference: feminist theory on cultural diversity' (1990) 38 *Buffalo Law Review* 325.

692 K T Bartlett 'Feminist legal methods' (1990) 103 *Harvard Law Review* 829, 831.

693 This claim of the law to be neutral, objective and impartial has been described as its claim to have no point of view. That is its 'point-of-viewlessness': CA MacKinnon 'Feminism, marxism, method and the state: toward feminist jurisprudence' in S Harding (ed) *Feminism and methodology* Indiana University Press Bloomington 1987, 137. Submissions also made this point, see J Jago (ed) *Submission 160.*

694 See ch 2.

695 T Jowett *Submission 544.*

696 C MacDonald (et al) *Submission 333.*

697 eg at Murdoch School of Law, University of Western Australia and Northern Territory University: ALRC *Law school questionnaire* 1994. Most law schools responding to this questionnaire did not specify which subjects included a feminist perspective.

698 See ch 2. See R Graycar & J Morgan *Hidden gender of law* Federation Press Sydney 1990; C MacKinnon *Feminism unmodified: discourses on life and law* Harvard University Press Cambridge MA 1987; LM Finley 'Breaking women's silence in law: the dilemma of the gendered nature of legal reasoning' (1989) 64 *Notre Dame Law Review* 886; N Naffine *Law and the sexes: explorations in feminist jurisprudence* Allen & Unwin Sydney 1990.

699 eg KE Mahoney 'The legal treatment of spousal abuse: a case of sex discrimination' (1992) 41 *University of New Brunswick Law Journal* 21; F Olsen 'The family and the market: a study of ideology and legal reform' (1983) 96 *Harvard Law Review* 1497; M Neave 'Resolving the dilemma of difference: a critique of 'The Role of Private Ordering in Family Law' (1994) 44 *University of Toronto Law Journal* 97; N Naffine 'Possession: Erotic love in the law of rape' (1994) 57 *Modern Law Review* 10.

700 eg K A Lahey & S W Salter 'Corporate law in legal theory and legal scholarship: from classicism to feminism' (1985) 23 *Osgoode Hall Law Journal* 543; M Maloney 'Women and the Income Tax Act' (1989) 3 *Canadian Journal of Women and the Law* 182; E Inguili 'Transforming the curriculum: what does the pedagogy of inclusion mean for business law?' (1991) 28 *American Business Law Journal* 605; MJ Frug 'Rescuing impossibility doctrine: A postmodern feminist analysis of contract law' (1992) 140 *University of Pennsylvannia Law Review* 1029; S Wright 'A feminist exploration of the legal protection of Art' (1994) 7 *Canadian Journal of Women and the Law* 59. See also work listed in R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990, 8 fn 33. See also id, ch 2 & 7.

701 C MacKinnon ' Feminism in legal education' (1989) 1 *Legal Education Review* 85. For a discussion of the limitations and impact of the traditional method of teaching in the law classroom see J Morgan 'The socratic method: silencing co-operation' (1989) 1 *Legal Education Review* 151; C Menkel-Meadow 'Feminist legal theory, critical legal studies, and legal education or "the fem-crits go to law school"' (1988) 38 *Journal of Legal Education* 61.

702 T Jowett *Submission 544.*

703 ALRC DP 54, question 7.2. See J Jago (ed) *Submission 160;* Sisters-in-Law *Submission 195*; K Isaacs *Submission 238*; Northern Community Legal & Welfare Rights Centre TAS *Submission 239*: M Thornton *Submission 268*; C O'Connor *Submission 278*; Tasmanian Gay & Lesbian Rights Group *Submission 280*; C MacDonald (et al) *Submission 333*; G Rogers, Child Protection Council NSW *Submission 336*; A Dayman *Submission 340*: J Blokland *Submission 347*; Confidential *Submission 409*; Confidential *Submission 438*; T Jowett *Submission 544*; Confidential *Submission 549*. In the survey conducted by the Queensland Bar Association *Submission 165* 10 women out of 18 considered that feminist legal theory should be included in both the core and the elective curricula. Ministry for the Status and Advancement of Women NSW *Submission 350* states that material on gender bias and gender stereotyping should be included in courses on ethics by the law schools.

704 Confidential *Submission 549.*

705 M Thornton *Submission 268.* See also Legal Aid Office ACT *Submission 294.*

706 F David *Submission 400.*

707 J Jago (ed) *Submission 160.*

708 Northern Community Legal & Welfare Rights Centre TAS *Submission 239.*

709 C MacDonald (et al) *Submission 333*. Footnotes omitted. It should be noted that a number of law schools already incorporate material in the manner suggested by this submission: ALRC *Law school questionnaire* 1994. See para 8.20. See also fn 70.

710 Queensland Law Society Inc *Submission 324.*

711 Women Lecturers & Students of the Faculty of Law, University of Tasmania *Submission 258*: the survey was conducted of third year women students and received 40 responses in total.

712 Bar Association of Queensland *Submission 165.*

713 eg Sisters-in-Law *Submission 195*; C MacDonald (et al) *Submission 333*; Confidential *Submission 544,* See also Queensland Law Society Inc *Submission 324* which states that it sees 'scope' for feminist legal theory being offered as an elective.

714 eg J Jago (ed) *Submission 160*; Legal Aid Office ACT *Submission 294*; C MacDonald (et al) *Submission 333*; Jowett *Submission 544*; Confidential *Submission 549.*

715 C Macdonald (et al) *Submission 333*. See also M J Mossman 'Otherness and the law school: a comment on teaching gender equality' (1985) 1 *Canadian Journal of Women and the Law* 213, 213-214.

716 ALRC *Law school questionnaire* 1994: University of Adelaide; Macquarie University; University of Newcastle; Queensland University of Technology; Australian National University; Murdoch University; Griffith University; Flinders University of South Australia; Wollongong University; University of Technology, Sydney; University of Queensland; University of New England; Bond University; University of Melbourne; University of Sydney; University of New South Wales. The extent to which feminist legal theory is taught in the core curriculum varies considerably among the universities. At some universities it is included in an introductory law subject, or in a jurisprudence or legal theory subject. At other universities it is also included in core subjects such as Torts, Criminal Law, Contract Law and Civil Procedure. A few universities stressed that it depended upon the lecturer who was currently teaching the subject area. The University of Western Australia stressed that it includes material on gender issues in the core curriculum, for example in subjects such as torts and criminal law.

717 *ALRC Law school questionnaire* 1994: La Trobe University; Macquarie University; University of Adelaide; University of Melbourne; Queensland University of Technology; Australian National University; Murdoch University; Griffith University; Flinders University of South Australia; University of Queensland; Monash University; Bond University; University of New South Wales; Unviersity of Sydney; Wollongong University; University of Tasmania; University of Technology, Sydney.

718 M Davies & N Naffine 'Feminist issues in legal education' (1994) 16 *Law Society Bulletin* 18, 19.

719 ibid.

720 ALRC *Law school questionnaire* 1994: Australian National University; Murdoch University; Monash University; University of Tasmania; La Trobe University; University of New South Wales; Adelaide University; University of Western Australia University of Sydney and Flinders University of South Australia. At the University of Melbourne feminist legal theory is offered as one of the legal theory electives in which students must take a legal theory option. There are proposals to introduce an elective on feminist legal theory at the Queensland University of Technology to be available in 1996; at Griffith University in 1995 as 'Law, Gender and Discrimination' and it is a proposal at the University of New England, Faculty of Economics, Business and Law. Wollongong University has approved a course, 'Feminism and the Law', to commence in 1995. The Northern Territory University listed it as a subject as part of the accreditation process but there has been no-one available to teach it. It is not offered as a separate elective at Macquarie University; Bond University; University of Queensland and University of Technology, Sydney.

721 M Thornton *Submission 268.*

722 Announced 23 March 1994: 'Commonwealth to stamp out gender bias in law curricula' Media Release from the Minister for Employment, Education and Training. Associated with this project is a conference on 'Gender in legal education' to be held at the Australian National University 23-24 February 1995 organised by the Feminist Legal Academics' Workshop.

723 Department of Employment, Education and Training *Consultancy brief: gender issues and the law school curriculum*, 1.

724 id, 2.

725 ibid.

726 Chief Justice of Western Australia *Report of the Chief Justice's Taskforce on Gender Bias* June 1994, ch 7, rec 5.

727 id, 189.

728 id, ch 7, rec 5.

729 For discussion on the need to include women in all aspects of the curriculum, ie that it is not just an issue for the elective or the core but for both, see R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990, 9; J Scutt *Women and the law: commentary and materials* Law Book Co Sydney 1990, 52.

730 This has been described as 'pseudo-inclusion': M Thornton 'Feminist jurisprudence: illusion or reality' (1986) 3 *Australian Journal of Law and Society* 5, 19.

731 The Canadian Bar Association in its study of the legal profession recommended that the Canadian Council of Law Deans operate as a 'clearinghouse for curriculum development' to enable law faculties to access and exchange information. It considered that particular attention should be given to the integration of gender and minority issues: Canadian Bar Association *Touchstones for change: equality, diversity and accountability: The report on gender equality in the legal profession* Canadian Bar Association Ottawa, 1993, rec 2.21.

732 J Blokland *Submission 347* recommended that the Committee of Australian Law Deans arrange a 'swap' for the distribution and circulation of 'prepared materials on feminist issues in all core subjects'.

733 This was recognised in C MacDonald (et al) *Submission 333* which, for this reason, states that academics should be encouraged to include this material rather than compelled. See also Legal Aid Office ACT *Submission 294.*

734 A Dayman *Submission 320* recommends the need for staff retraining in this regard. See also J Blokland *Submission 347* which recommends that there be a system of exchange or access to information relevant to integrating material on gender issues in the law school curriculum.

735 CEDAW art 10(c).

736 eg Equal Opportunity Unit, University of Technology, Sydney *Language matters: guidelines for the use of non-discriminatory language at the University of Technology, Sydney* UTS Printing Services Branch Sydney.

737 eg J Jago (ed) *Submission 160* presents many examples where stereotypical roles of women and men are included in examination questions and examples used in class as well as the use of gender-specific language in a number of classes. See also J Blokland *Submission 347* who lists concerns that have been highlighted to her by students, the lack of use of gender-inclusive language being one area of concern. See also C MacDonald (et al) *Submission 333*; Confidential *Submission 438*.

738 C MacDonald (et al) *Submission 333.*

739 J Jago (ed) *Submission 160.* See also Confidential *Submission 438.*

740 K Isaacs *Submission 238.*

741 J Jago (ed) *Submission 160.* This submission includes material from L Ahern, C Christensen, P Czislowski, P Dupuy, C Howlett, J Jago, M Jago, S Ludlow, K Natalier, E Nichols, M O'Keefe and A Stark.

742 J Jago (ed) *Submission 160.*

743 eg MJ Frug 'Re-Reading Contracts: A feminist analysis of a contracts casebook' (1985) 34 *American University Law Review* 1065; C Boyle 'Review' (1985) 63 *Canadian Bar Review* 427; C Tobias 'Gender issues and the Prosser, Wade, and Schwartz Torts Casebook' (1988) 18 *Golden Gate University Law Review* 495; L Finley 'A break in the silence: including women's issues in a Torts course' (1989) 1 *Yale Journal of Law and Feminism* 41; R Hunter 'Representing gender in legal analysis: a case/book study in labour law' (1991) 18 *Melbourne University Law Review* 305; N Naffine 'Windows on the legal mind: the evocation of rape in legal writings' (1992) 18 *Melbourne University Law Review* 741. For an explanation of what a casebook is see R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990, 16. See also discussion of law textbooks and case books: id 16-22.

744 R Hunter 'Representing gender in legal analysis: a case/book study in labour law' (1991) 18 *Melbourne University Law Review* 305. The texts reviewed are: B Creighton & A Stewart *Labour law: an introduction* Federation Press 1990; J Macken, G McCarry & C Sappideen *The law of employment* 3rd Edition Law Book Co 1990; R McCallum, M Pittard & G Smith *Australian Labour Law: cases and materials* 2nd Edition Butterworths 1990.

745 Hunter points out that it appears that casual work is only discussed when it is an issue for increasing numbers of men workers. For example one text relies on a casual/agency employee case which involved men, rather than recognising that it is an issue for more women workers and has been for a long period of time: id, 317.

746 Other work arrangements are referred to in the texts as 'marginal' or 'atypical': ibid.

747 Only one of the texts reviewed has an entry for sexual harassment. Yet as Hunter points out sexual harassment 'might be described as the quintessential occupational health and safety issue for women workers': id, 311.

748 ALRC 69(1) para 2.6-2.9.

749 One text suggests that labour law merely recognises these divisions rather than playing an active part in defining and constructing them: R Hunter ' Representing gender in legal analysis: a case/book study in labour law' (1991) 18 *Melbourne University Law Review* 305, 316.

750 id, 307, 314-315, 318-319.

751 It is also argued that the treatment of these topics is superficial and displays little knowledge of issues concerning equal pay and sex discrimination legislation. This treatment is described as tokenistic: id, 320.

752 id, 325. Hunter also recognises that there are difficulties in insisting on the use of gender inclusive language where it is recognised that labour law is historically about men. It would be misleading to use gender inclusive language in such a situation without explicitly commenting on this fact.

753 One text characterises women in its hypotheticals in one of three roles: 1) powerless, passive victims; 2) women who appear by virtue of their sexuality; 3) bad, disobedient or uppity women who are put in their place: id, 325-327.

754 id, 317.

755 eg Sisters-in-Law *Submission 195*; A Dayman *Submission 320*; C MacDonald (et al) *Submission 333*.

756 Sisters-in-Law *Submission 195*; A Dayman *Submission 320*; G Rogers, Child Protection Council NSW *Submission 336.*

757 C MacDonald (et al) *Submission 333.*

758 In Victoria graduates may either complete 30 weeks PLTC or a 12 month articled clerkship; in Tasmania graduates must complete both 27 weeks PLTC and 12 months articled clerkship or a two year articled clerkship; in NSW graduates until 1995 are to complete 23 weeks PLTC, from mid-late 1995 NSW graduates will complete 15 weeks PLTC and 6 months supervised employment. In Queensland graduates are to complete a 32 week PLTC or 2 year articled clerkship; in ACT graduates complete 33 weeks PLTC; in South Australia a graduate is required to complete a 20 week PLTC leading to the Graduate Certificate in Legal Practice which must be followed by a number of further units for the Graduate Certificate in Legal Practice and unconditional admission follows. Articles of clerkship for 12 months exist in South Australia as an alternative to the Graduate Diploma; in Western Australia and the Northern Territory graduates must complete 12 months articled clerkship.

759 Law Society of New South Wales *The professional program: A blueprint for the preparation for practice as a solicitor in New South Wales: As amended by the Council of the Law Society of New South Wales on 17 December 1992* Law Society of New South Wales Sydney 1993, 3.

760 D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 150.

761 The Standing Committee of Attorneys-General (SCAG) noted in July 1994 that the position adopted by the Consultative Committee of State and Territorial Law Admitting Authorities and approved by the Council of Chief Justices now depends on implementation by each admitting authority. It should be noted that the only objection stated by the admitting authorities was made by South Australia, which objected to the requirement to complete two years full time practical experience. SCAG also stated that in the implementation of this PLT principle the admitting authorities must consider the Law Council of Australia's *Blueprint for a national legal profession* which deals with practical legal training and other issues: Law Council of Australia *Blueprint for the structure of the legal profession: A national market for legal services* Law Council of Austalia 1994.

762 An unrestricted practising certificate enables a practitioner to work as a sole practitioner or as a principal solicitor. The situation varies in the jurisdictions as to whether a newly admitted practitioner must hold a restricted practising certificate for one or two years. The implementation of this principle would provide greater uniformity. M Thornton *Submission 268* expressed concern about the impact of an increase in the length of time before being eligible for an unrestricted practising certificate.

763 ie tertiary legal education. See para 8.39.

764 In some jurisdictions, for example PLTC in Vic and SA, it may not be possible to complete all areas of practice prior to initial admission. in the provision of their PLTC. Those admission authorities will be required to undertake that such newly admitted practitioners will complete the requirements prior to receipt of an unrestricted practising certificate. This will be done through the provision of further part time courses.

765 See para 8.39.

766 ibid.

767 Law Society of New South Wales *The professional program: A blueprint for the preparation for practice as a solicitor in New South Wales: As amended by the Council of the Law Society of New South Wales on 17 December 1992* Law Society of New South Wales Sydney 1993, Annexure B, 6.

768 Submissions emphasise the importance of education for all members of the profession. eg Freedom From Violence Action Group WEL VIC *Submission 27*; Humanist Society of Victoria Inc *Submission 32*; Waratah Support Centre, Bunbury *Submission 109*; S Robertson *Submission 112*; F Collins *Submission 126*; G Mather *Submission 127*; Confidential *Submission 198*; P Wright *Submission 206*; P Cowburn *Submission 244*; M Dando *Submission 282*; G Trifiletti *Submission 288*; Legal Aid Office ACT *Submission 294*; Domestic Violence Resource Centre Wooloowin QLD *Submission 295*; Wesley Central Mission, Melbourne *Submission 299*; Older Women's Network TAS *Submission 304*; R Smith, Law Institute of Victoria *Submission 335*; G Rogers, Child Protection Council NSW *Submission 336*; J Blokland *Submission 347*; G Sutcliffe Huigol *Submission 474*. A number of these submissions particularly focus on the need for education for all lawyers in regard to the nature of domestic violence and sexual assault.

769 Women's Legal Service Steering Committee & Enid Russell Society *Submission 360*; M Thornton *Submission 268*; Confidential *Submission 549* referring to barristers admission course.

770 eg S Anchor *Submission 143*; Attorney-General & Minister for Women's Affairs VIC *Submission 341.*

771 J Nelson *New directions for practical legal training in the nineties: An evaluation of the curriculum of the College of Law's PLT course and its relevance to students'work experiences in practice* A research project conducted on behalf of the College of Law, Centre for Publication and Information, College of Law Sydney 1988, 133.

772 S Anchor *Submission 143*; Attorney-General & Minister for Women's Affairs VIC *Submission 341*; ML Griffiths & M McDonald, Northern Territory University Women Law Student's Group *Submission 417*.

773 S Anchor *Submission 143;* Attorney-General & Minister for Women's Affairs VIC *Submission 341.*

774 Outer East Domestic Violence Outreach Service Collective Inc VIC *Submission 249.*

775 Women's Legal Resources Centre, Sydney *Submission 256.* See U Muller *Submission 355* which discuses how she was not given information about her legal position relating to her property settlement.

776 eg C Thompson *Submission 47*; Women of Far North Queensland *Submission 117*.

777 Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission 330.*

778 See H Astor 'Feminist issues in ADR' (1991) 65 *Law Institute Journal* 69; GR Clarke & IT Davies 'Mediation - when is it not an appropriate dispute resolution process?' (1992) 3 *Australian Dispute Resolution Journal* 70; H Astor 'Violence and family mediation: policy' (1994) 8(1) *Australian Journal of Family Law* 3; S Gribben 'Violence and family mediation: practice' (1994) 8(1) *Australian Journal of Family Law* 22. See ALRC 69(1), para 9.57-9.67.

779 C Chinkin 'Educating lawyers about mediation' (1992) 10(1) *Journal of Professional Legal Education* 43, 46. See K Mack *Submission 48*.

780 Outer East Domestic Violence Outreach Service Collective Inc VIC *Submission 249*; Attorney-General & Minister for Women's Affairs VIC *Submission 341.*

781 See discussion on the need to use gender inclusive langauge and not rely on gender stereotypes in relation to law schools at para 8.27-8.28.

782 eg the Tasmanian School of Legal Practice does not have a policy on using gender inclusive language. The Department of Legal Practice, University of South Australia has a policy on the use of gender-inclusive language. This policy is circulated to all guest speakers. The College of Law, University of Technology, Sydney, also attempts to respond to the concerns of students. They have adopted the language policy of UTS and attempt to incorporate women in the hypothetical cases that form part of the simulated exercises.

783 Confidential *Submission 549.*

784 Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994, para 3.123. Women's Legal Service Steering Committee & Enid Russell Society WA *Submission 360.* M Thornton *Submission 268* expresses concern about the requirement that a graduate have two years practical experience before being eligible for an unrestricted practising certificate. NSW is to commence a new PLTC in September 1995 (the course may be piloted earlier in the year); in addition to attending the College of Law for 15 weeks, students will be required to complete 33 weeks of supervised employment. NSW has expanded the areas in which a person may complete this training. It may be performed in a community legal centre, government agency, legal department in an organisation as well as in a law firm.

785 Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994, para 3.123.

786 See also J Goldring 'The future of legal education: Doubtful assumptions and unfulfilled expectations' (1993) 11(2) *Journal of Professional Legal Education* 149, 156. See ch 9.

787 Women's Legal Service Steering Committee & Enid Russell Society WA *Submission 360* discussed the difficulties faced by mature age women seeking articled clerkship positions in Western Australia; Gay & Lesbian Rights Lobby and Gay & Lesbian Legal Rights Service *Submission 193* and Tasmanian Gay & Lesbian Rights Group *Submission 280* discussed the difficulties faced by lesbians working in the legal profession and being able to be open about their sexuality.

788 Women's Legal Service Steering Committee & Enid Russell Society WA *Submission 360.*

789 Women's Legal Service Steering Committee & Enid Russell Society WA *Submission 360.* See also S Roach Anleu *Submission 30* which discusses the disadvantage experienced by mature age women law students in gaining employment. S Roach Anleu points out that there appears to be a hierarchy in employment prospects, first young men are employed in law, then young women, followed by mature age men and last, mature age women.

790 Fees are to be introduced for the Legal Workshop offered at the Australian National University and fees are being considered for the course to be offered at Wollongong University. The need to introduce fees may also result from the recent decision of the College of Law and the University of Technology, Sydney to disaffiliate: D Fairlie, President's Message 'Funding a future for practical legal training' (1994) 32(9) *Law Society Journal* 2, 2.

791 The report found that 50% of course fees were within the $3000-$6000 range; 19% were within the range of $6000-$9000; and that there had been an increase from 1992 of the courses which charged fees under $3000.

792 M Heagney *Even less rhyme or reason: A report on postgraduate courses for which Australian students are charged fees* CAPA Melbourne 1993. See also M Stead *Report on feepaying postgraduate courses at the University of Adelaide* 1993 referred to in the CAPA report: id, 3.

793 id, 4.

794 D Weisbrot 'Recent statistical trends in legal education' (1991) 2 *Legal Education Review* 219, 230-231 see also fn 40.

795 ALRC *Law society questionnaire* 1994.

796 C McInnis & S Marginson, Centre for the Study of Higher Education, University of Melbourne *Australian law schools after the 1987 Pearce Report* DEET Higher Education Division, Evaluations & Investigations Program AGPS Canberra 1994, 221. In New South Wales postgraduate study may contribute to the mandatory CLE requirements.

797 NSW operates a mandatory system of CLE which requires legal practitioners to complete 10 CLE points each year. The year operates from 1 April until 31 March the following year. In Victoria and Western Australia there is mandatory CLE for accreditation. See para 8.51-8.56 for discussion of accreditation. There has been discussion on whether CLE should be mandatory in other jurisdictions: eg SA: President's Message 'National profession moves closer: Law Council position is a sensible compromise' (May 1994) *Law Society Bulletin* (SA) 7,8. Also in response to the ALRC *Law society questionnaire* 1994: Law Society of the Northern Territory, Queensland Law Society Inc, Law Society of South Australia and the Law Society of Tasmania commented that they were considering introducing mandatory CLE and considered there would be difficulties in doing so.

798 D Weisbrot *Australian lawyers* Longmann Cheshire Melbourne 1990, 152.

799 Law Council of Australia *Blueprint for the structure of the legal profession: a national market for legal services* Law Council of Australia 1994, 13.

800 J Blokland *Submission 347.*

801 ALRC *Law society questionnaire* 1994.

802 Queensland Law Society Inc: ALRC *Law society questionnaire* 1994.

803 Law Institute of Victoria: ALRC *Law society questionnaire* 1994.

804 R Bailey-Harris 'Gender bias in the law and the legal system' paper *Lexpo Congress '93* 23-31 October 1993.

805 ibid.

806 Women's Electoral Lobby VIC *Submission 27*; Tasmanian Gay & Lesbian Rights Group *Submission 280*; Domestic Violence Centre Wooloowin QLD *Submission 295*; J Blokland *Submission 347*; Queensland Bar Association *Submission 165* which included survey results in which 11 respondents considered that gender awareness and discrimination should be included in CLE while 7 responded in the negative. Of the positive responses possible topics suggested were the use of gender-inclusive language and the effect of the law on women.

807 eg Freedom From Violence Action Group WEL VIC *Submission 27*; Humanist Society of Victoria Inc *Submission 32*; Waratah Support Centre, Bunbury *Submission 109*; S Robertson *Submission 112*; Women's Health Centre, Rockhampton *Submission 126*; G Mather *Submission 127*; Confidential *Submission 198*; P Wright *Submission 206*; P Cowburn *Submission 244*; M Dando *Submission 282*; G Trifiletti *Submission 288*; Legal Aid Office ACT *Submission 294*; Domestic Violence Resource Centre Wooloowin QLD *Submission 295*; Wesley Central Mission, Melbourne *Submission 299*; Older Women's Network TAS *Submission 304*; Law Institute of Victoria *Submission 335*; NSW Child Protection Council NSW *Submission 336*; J Blokland *Submission 347*; G Sutcliffe Huigol *Submission 474*. A number of these submissions particularly focus on the need for education for all lawyers in regard to the nature of domestic violence and sexual assault.

808 Confidential *Submission 438.*

809 Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* Senate Printing Unit Canberra 1994, para 5.90.

810 Queensland Law Society Inc *Submission 324.*

811 See ch 9.

812 Law Society of British Columbia Gender Bias Committee *Gender equality in the justice system* Vol 1 Law Society of British Columbia Vancouver 1992, 3-9.

813 id, 3-33.

814 Access to Justice Advisory Committee *Access to Justice : An action plan* AGPS Canberra 1994, para 3.36, see also fn 97.

815 See para 8.54 fn 197.

816 Generally the requirement is that a practitioner has been in practice for at least five years.

817 Access to Justice Advisory Committee *Access to Justice: An action Plan* AGPS Canberra 1994, para 3.36.

818 id, para 3.148-3.149.

819 In Victoria only a practitioner who is accredited can use the term 'specialist'. In NSW a practitioner can advertise being accredited in an area of practice. However in NSW any practitioner may advertise that she or he is a specialist provided that this is not a false of misleading statement. In WA an accredited practitioner may advertise as 'accredited' but may not use the term 'specialist'. In SA and ACT where accreditation is not available, practitioners are able to advertise as a 'specialist in an area of practice' provided it is not a false or misleading statement. In Tasmania there is a restricted right to advertise. However, note that there is concern about accreditation operating as a constraint on competition: see para 8.53.

820 C Palmer 'New opportunities for professional development: an outline of the program' Forum: Specialist Accreditation (1992) 30 *Law Society Journal* 32, 32.

821 Access to Justice Advisory Committee *Access to Justice: An action plan* AGPS Canberra 1994, para 3.151. See also J Disney 'A better deal for clients' *28th Australian Legal Convention* Hobart 26-30 September 1993.

822 M Schiel '... And justice for all?' (1993) 67 *Law Institute Journal* 1021, 1022.

823 Access to Justice Advisory Committee *Access to Justice: An action plan* AGPS Canberra 1994, para 3.149.
824 In NSW accreditation is currently available in family law, criminal law, small business law and personal injury law. In Victoria it is possible to be accredited in the areas of family law, environment, planning and local government law, small business law, immigration law and alternative dispute resolution. In Western Australia accreditation is available in all areas but to date examinations have only been held in family law. In Queensland accreditation is limited to mediation.
825 C Palmer 'New opportunities for professional development: an outline of the program' Forum: Specialist Accreditation (1992) 30 *Law Society Journal* 32, 32.
826 Project for Legal Action Against Sexual Assault VIC *Submission 287* recommends that lawyers working in sexual assault matters be accredited. It specifies that examinations should test the lawyer's understanding of the social context of sexual assault, their knowledge of appropriate services and their ability to work compassionately with 'victim/survivors'. The submission suggests that a group such as their own, or like body, should be involved in such an accreditation evaluation.
827 Domestic Violence Resource Centre Wooloowin QLD *Submission 295.*
828 See ALRC DP 54, para 7.22-7.25; ALRC 67, para 4.28-4.30. See also K Mahoney 'International strategies to implement equality rights for women; overcoming gender bias in the courts' (1993) 1 *Australian Feminist Law Journal* 115, 137.
829 See ch 2.
830 See para 9.39-9.43.
831 See ch 7.
832 Sir A Mason 'The state of the judicature' (1994) 68 *Australian Law Journal* 125, 132.
833 Chief Justice Miles, Supreme Court of ACT *Submission 550.*
834 Justice for Women Action Collective *Submission 2*; Community Legal & Advocacy Centre, Fremantle *Submission 6*; P Ambikapathy *Submission 18*; I Goldsmith *Submission 21*; Women's Electoral Lobby VIC *Submission 27*; Humanist Society of Victoria Inc *Submission 32*, K Mack *Submission 48;* P Easteal *Submission 55*; JF Laidlaw *Submission 96*; Sisters-in-Law *Submission 195*; Centre Against Sexual Assault, CASA House, Melbourne *Submission 197*; Confidential *Submission 198*; Women's Legal Resources Centre, Sydney *Submission 256*; C O'Connor *Submission 278*; G Trifiletti *Submission 288*; Legal Aid Office ACT *Submission 294*; Domestic Violence Resource Centre Wooloowin QLD *Submission 295*; Older Women's Network TAS *Submission 304*; Domestic Violence Legal Help, Darwin *Submission 306*; L Jackson, S Eastwood, S Warren *Submission 518*. Some submissions are cynical about the extent to which this would be effective eg M Redfern *Submission 92*; P Cowburn *Submission 244*; G Sutcliffe Huigol *Submission 474*. These submissions emphasise the need for education at an earlier stage in a lawyer's career.
835 Confidential *Submission 465;* S Roach Anleu *Submission 30*.
836 P Ambikapathy *Submission 18*; Confidential *Submission 198*; Domestic Violence Legal Help, Darwin *Submission 306.*
837 Justice for Women Action Collective *Submission 2.*
838 Domestic Violence Resource Centre Wooloowin QLD *Submission 295.*
839 eg Confidential *Submission 190*; Confidential *Submission 198*; Sex Discrimination Commissioner Cth *Submission 338*; H Andrews, Equal Opportunity Commission WA *Submission 363*; Equal Opportunity Commissioner VIC *Submission 510*. The need for education in the area of discrimination law and practice was directed to all legal practitioners.
840 Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* Senate Printing Unit Canberra 1994.
841 id, para 5.3.
842 id, para 5.85-5.109.
843 id, rec 5, 117.
844 Chief Justice of Western Australia *Report of the Chief Justice's Taskforce on Gender Bias* June 1994.
845 id, 87.
846 Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994, para 2.95-2.97, 15.80-15.103.
847 id, para 15.89.
848 id, para 15.97-15.103. See Action 15.54.
849 id, para 15.95.
850 id, para 15.103. See also Action 2.4.
851 L Armytage 'Judicial education on equality: with particular reference to gender and ethnicity' *Continuing Legal Education Association Annual Conference* Brisbane 1-3 September 1994.
852 eg this occurs in Wisconsin where a course 'Recognising and managing stereotypes and bias in the courts' is offered to new judges and to other judges: Foundation for Women Judges *Judicial education: a guide to state and national programs* Foundation for Women Judges Washington 1986, 17.
853 Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994, para 15.86.
854 See L Armitage *Submission 199*; L Armitage 'Continuing judicial education: the education programme of the Juicial Commission of New South Wales' (1993) 3 *Journal of Judicial Administration* 28.
855 Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* Senate Printing Unit Canberra 1994, para 5.112. ALRC members have addressed these sessions.
856 Evidence Legal Aid Commission of NSW to the Senate Standing Committee on Legal and Constitutional Affiars *Gender bias and the judiciary* Senate Printing Unit Canberra 1994, para 5.112.
857 Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994, para 2.68.
858 In Adelaide 17 to 21 October 1994.
859 Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* Senate Printing Unit Canberra 1994, para 5.115. The Senate Standing Committee on Legal and Constitutional Affairs refered to submissions from Mr I Pike CM, NSW Local Court; Miles CJ, ACT Supreme Court and Nicholson CJ, Family Court of Australia, para 5.115 fn 171.
860 id, para 5.113. Chief Justice of Western Australia Report of the Chief Justice's *Taskforce on gender bias* June 1994.
861 Evidence Chief Justice Waldron to Senate Standing Committee on Legal and Constitutional Affairs *Gender bias and the judiciary* Senate Printing Unit Canberra 1994, para 5.114.
862 Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994, para 2.26.
863 Director of the Women's Policy Unit & Women's Advisor to the Premier QLD *Submission 286.*
864 Although not specifically a gender project, the lack of awareness of the nature of and conduct of discrimination cases by lawyers and tribunal members was commented upon in submissions: Confidential *Submission 190*; Sex Discrimination Commissioner *Submission 338*; H Andrews, Equal Opportunity Commission WA *Submission 363*; Equal Opportunity Commissioner VIC *Submission 510*. See also the original outline of the project in 'Projects: Legal education to increase awareness' (1994) 1 *AGENDER: Sex Discrimination Newsletter 5.* The project is no longer confined to the Sex Discrimination Unit but applies to all HREOC matters.
865 For further information on the Western Judicial Education Centre in Canada see K Mahoney 'International strategies to implement equality rights for women; overcoming gender bias in the courts' (1993) 1 *Australian Feminist Law Journal* 115. See also LH Schafran & NJ Wikler

Operating a taskforce on gender bias in the courts; a manual for acton The Foundation for Women Judges Washington 1986; The Foundation for Women Judges *Judicial education; a guide to state and national programs* Washington 1986.

866 K Mahoney 'International strategies to implement equality rights for women; overcoming gender bias in the courts' (1993) 1 *Australian Feminist Law Journal* 115, 134.

867 A number of these education initiatives are outlined in para 8.63-8.65.

868 48% in 1990 in WA - 'Women graduates - where are they heading?' (1991) 18 *Brief* 6.
50% in Victoria in 1990 - Law Institute of Victoria *Career patterns of law graduates* 1990.
50% in NSW in 1993 - Law Society of NSW *Survey - getting through the door is not enough: an examination of the equal employment opportunity response of the legal profession in the 1990s* 1993.
50% from the University of Adelaide in 1991 - L Kirk 'Women in the legal profession' (1994) 16(7) *Law Society Bulletin* 10.

869 25.1% in 1991 according to ABS *Labour force survey* 1991
20% in Victoria in 1989 - Law Institute of Victoria Career patterns of law graduates 1990, 3.
26% in NSW in 1993 - Law Society of NSW Getting through the door is not enough: an examination of the equal employment opportunity response of the legal profession in the 1990s 1993, table 4.
26% in WA in 1993 - The Hon Mr Justice DK Malcolm AC *Report of Chief Justice's Taskforce on gender bias* 1994, 75.

870 Law Society of New South Wales *Survey: getting through the door is not enough: an examination of the equal employment opportunity response of the legal profession in the 1990s* 1993 6; Law Institute of Victoria *Career patterns of law graduates* 1990 para 2.3.4. 12% of females and 6% of males failed to renew their practising certificates in 1988 - id, 3.

871 Law Society of New South Wales *Survey: getting through the door is not enough: an examination of the equal employment opportunity response of the legal profession in the 1990s* November 1993, 6; Law Institute of Victoria *Career patterns of law graduates* 1990 para 2.3.17 (indicating that of a group of male and female graduates matched for date of graduation, 74% of women and 42% of men earned less than $50 000).

872 SM Jones *Submission 75*; MJ Redfern *Submission 92*; G Barns *Submission 99*; Confidential *Submission 159*; Confidential *Submission 176*; Sisters-in-Law *Submission 195*; P Wright *Submission 206*; Northern Community Legal and Welfare Rights Centre TAS *Submission 239*; Confidential *Submission 243*; Women's Lawyers Association NSW *Submission 255*; Women Lecturers and Students of the Faculty of Law, University of Tasmania *Submission 258*; M Thornton *Submission 268*; B Hatch *Submission 272*; C O'Connor *Submission 278*; R Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis *Submission 292*; Legal Aid Office ACT *Submission 294*; Queensland Law Society Inc *Submission 324*; C MacDonald, S Jackson, E Webb, F Martinn, J Boland *Submission 333*; A Lucadou-Wells *Submission 344*; J Blokland *Submission 347*; Confidential *Submission 438*; Confidential *Submission 549*.

873 M J Redfern *Submission 92*.

874 Centre Against Sexual Assault, CASA House, Melbourne *Submission 197*; A Chopra *Submission 210*.

875 Trade Practices Commission *Study of the professions - Legal* Australian Government Publishing Service Canberra 1994, 135-6.

876 Access to Justice Advisory Committee *Access to justice - an action plan* 1994, xxxiii.

877 Access to Justice Advisory Committee *Access to justice - an action plan* 1994, 16.

878 *Sex Discrimination Act 1984 (*Cth); *Anti-Dicrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (Vic); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act* 1991 (Qld); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT). While Tasmania does not have anti-discrimination laws, women lawyers in that State are covered by the *Sex Discrimination Act 1984* (Cth).

879 Legal Aid Office ACT *Submission 294*; R. Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis *Submission 292*; Women's Lawyers Association NSW *Submission 255*; Women Lecturers and Students of the Faculty of Law, University of Tasmania *Submmission 258*; M Redfern *Submission 92;* Confidential *Submission 438*; L Lucas *Submission 153*.

880 Confidential *Submission 549*.

881 L Lucas *Submission 153.*

882 Legal Aid Office ACT *Submission 294*; Confidential *Submission 438*; J Blokland *Submission 347*; C MacDonald, S Jackson, E Webb, F Martin, J Boland *Submission 333*.

883 Legal Aid Office ACT *Submission 294*; Women's Lawyers Association NSW *Submission 255*; SM Jones *Submission 75*.

884 Women Lawyers Association *Submission 255*; Women Lecturers and Students of the Faculty of Law, University of Tasmania *Submission 258*; L Lucas *Submission 153*; C MacDonald, S Jackson, E Webb, F Martin, J Boland *Submission 333*.

885 J Blokland *Submission 347*.

886 Confidential *Submission 611.*

887 A Dayman *Submission 320.*

888 Confidential *Submission 438.*

889 T Jowett *Submission 544.*

890 Women's Legal Service Steering Committee and Enid Russell Society *Submission 360*.

891 Women Lawyer's Association (NSW) *Submission 255*; Confidential *Submission 176*; Legal Aid Office ACT *Submission 294.*

892 See further Australian Law Reform Commission Discussion Paper 54 *Equality before the law* Sydney 1993 (DP 54) para 9.19-9.21, and Australian Law Reform Commission Report 69(1) *Equality before the law: justice for women* Sydney 1994 (ALRC 69(1) para 2.17.

893 A Dayman *Submission 320*.

894 See Hon Mr Justice DK Malcolm AC *Report of the Chief Justice's Taskforce on Gender Bias* June 1994, 81.

895 Rebecca Borden *Women in the legal profession seminar - Speech* 26 November 1993.

896 Legal Aid Commission of Victoria *Equal employment opportunity staff survey* 1993, 6.

897 See Law Society of NSW *Policy Equal Employment and Promotion* August 1993, 2.

898 Confidential *Submission 176.*

899 Law Society of New South Wales *Getting through the door is not enough: an examination of the equal employment opportunity response of the legal profession in the 1990s* 1993. 'Women graduates - where are they heading?' (1991) 18 *Brief* 6. Victorian Law Institute '*Career patterns of law graduates*' 1990.

900 The Canadian Bar Association *Touchstones for Change: equality, diversity and accountability* August 1993, 72.

901 N Varnai *Submission 19*, S Carter *Submission 324*.

902 The Hon Mr Justice DK Malcolm AC *Report of the Chief Justice's Task Force on gender bias* 1994, 75.

903 Law Society of New South Wales *Survey - getting through the door is not enough* 1993.

904 Law Institute of Victoria *Career patterns of law graduates* 1990, 56.

905 'Experienced, mature, or just too old' (1994) 16(2) *Law Society Bulletin (SA)* 5.

906 ibid.

907 See ALRC 69(1) para 3.22.

908 Wesley Central Mission, Melbourne *Submission 299*; Legal Aid Office ACT *Submission 294*; R Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis *Submission 292*; Confidential *Submission 243*; Sisters-in-Law *Submission 195*; B Hatch *Submission 272*; Country Women's Association of NSW *Submission 202*; Confidential *Submission 549*.
909 See ch 1.
910 *Home Office v Holmes* [1984] 1RLR 299.
911 *Kowalska v Freie Und Hansestadt Hamburg* [1990] 1RCR 447.
912 *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910.
913 *Wright v Rugby Council* (1984) EAT unreported 23528/84.
914 Wesley Central Mission, Melbourne *Submission 299*; Legal Aid Office ACT *Submission 294*; R Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis *Submission 292*; Confidential *Submission 243*; Sisters-in-Law *Submission 195*; B Hatch *Submission 272*; Country Women's Association of NSW *Submission 202*; Confidential *Submission 549*.
915 Sisters-in-Law *Submission 195*.
916 M Court *Submission 443.*
917 B Hatch *Submission 272;* C MacDonald *Submission 333*.
918 J M Nelson (President, Law Society of New South Wales) *Submission 166*.
919 Law Society of New South Wales *Survey: getting through the door is not enough: an examination of the equal opportunity response of the legal profession* 1993, 6; Law Institute of Victoria *Career patterns of law graduates* 1990 para 2.3.4. 12% of females and 6% of males failed to renew their practising certificates in 1988 - id, 3.
920 C MacDonald *Submission 333*.
921 National Council of Women of Australia Inc *Submission 378*; Legal Aid Office ACT *Submission 294*; Confidential *Submission 243*; Sisters-in-Law *Submission 195*.
922 Confidential *Submission 611.*
923 *Employee Relations Act 1992* (Vic).
924 In NSW, Young Lawyers and Women Lawyers have asked the Professional Officers Association to apply to the Industrial Commission for a Solicitors' Award. The application is listed for hearing in December 1994.
925 *Minimum Conditions of Employment Act 1993* (WA).
926 National Women's Consultative Council, *Paid maternity leave - a discussion paper on paid maternity leave in Australia* AGPS Canberra 1993.
927 S Christensen and K Jenkins 'Solicitors and parenthood' 1994 68(8) *Law Institute Journal* 689, 690.
928 B Hatch *Submission 272*, C MacDonald *Submission 333;* Legal Aid Office ACT *Submission 294*.
929 Confidential *Submission 549*. This submission reported that, while partners and senior associates could take maternity leave without damaging their career, more junior solicitors could not.
930 Gay and Lesbian Rights Lobby and the Lesbian and Gay Legal Rights Service *Submission 193.*
931 The Law Institute of Victoria reported that as far as it is aware, no law firms have sponsored child care facilities. R Smith (Acting President, Law Institute of Victoria) *Submission 335*.
932 Law Institute of Victoria *Submission 335*.
933 MJ Redfern *Submission 92.*
934 G Barns *Submission 220,* R Smith (Acting President, Law Institute of Victoria) *Submission 335.* See Access to Justice Advisory Committee *Access to Justice: an action plan* AGPS Canberra 1994, 31 n 22.
935 G Barnes *Submission 220.*
936 J M Nelson (President, Law Society of New South Wales) *Submission 166*.
937 'Childcare options for solicitors' 1994 68(9) *Law Institute Journal* 803, 805 citing K Will, Law Office Management Section, Law Institute of Victoria.
938 Law Society of New South Wales *Survey: Getting through the door is not enough: an examination of the equal opportunity response of the legal profession* 1993, 19.
939 J Napoli *Work and family responsibilities* CCH Australia Limited Sydney 1994, 19.
940 ibid.
941 ALRC *Survey: Working Conditions for Lawyers with Families* 1994.
942 Office of the Director of Public Prosecutions *Enterprise Agreement* para 21-22.
943 'The objective of the Career Break Scheme is to retain skilled staff and for the officer to remain in touch with the Office and their area of expertise.' id, para 21.2.
944 Legal Aid Office ACT *Submission 294*; Sisters-in-Law *Submission 195*; B Hatch *Submission 272*.
945 See further ALRC 69(1) para 3.32.
946 Law Society of New South Wales *Getting through the door is not enough: the equal opportunity response of the legal profession*1993.
947 id, 3.
948 S M Jones *Submission 75*; Sisters-in-Law *Submission 195*; Confidential *Submission 549*; Confidential *Submission 176*; P Wright *Submission 206*; Older Women's Network, Canberra *Submission 93*; Older Women's Network Australia Inc, Sydney *Submission 303*; Legal Aid Office ACT *Submission 294*; C O`Connor *Submission 278*; Confidential *Submission 464*; C Thompson *Submission 47*; Confidential *Submission 549*.
949 Women Lecturers and Students of the Faculty of Law, University of Tasmania *Submission 258*.
950 A Anderson *Submission 239*.
951 Sisters-in-Law *Submission 195.*
952 SM Jones *Submission 75.* See also C MacDonald et al *Submission 333*.
953 Mathews J 'The changing profile of women in the law' (1986) 56 *Australian Law Journal* 634, 641.
954 Confidential *Submission 176.*
955 Gay and Lesbian Rights Lobby and the Lesbian and Gay Legal Rights Service *Submission 193*; L Savell (Tasmanian Gay & Lesbian Rights Group) *Submission 280.*
956 Confidential *Submission 176*. See also SM Jones *Submission 75*, where a female solicitor reports being excluded from a lunch with a major client.
957 *Sensitive Submission.*
958 L Lucas *Submission 153*; S M Jones *Submission 75*; Confidential *Submission* 176; Confidential *Submission 549.*
959 Older Women's Network *Submission 93*; Older Women's Network Australia Inc, Sydney *Submission 303*; Legal Aid Office ACT *Submission 294*.
960 Australian Law Reform Commission *Equality before the law: women's access to the legal system* ALRC Sydney 1994 (ALRC 67) para 2.23. In particular, see Centre Against Sexual Assault, Melbourne *Submission 197*; A Chopra *Submission 210*.
961 ALRC 67 para 2.24.

962 Confidential *Submission 465.*
963 The Law Society of NSW *Getting through the door is not enough: an examination of the equal employment opportunity response of the legal profession in the 1990s* 1993,3; 'Experienced, mature, or just too old '(1994) 16(2) *Law Society Bulletin (SA)* 5; Law Institute of Victoria Career *Patterns of Graduates* 1990 28, 55.
964 Legal Aid Office ACT *Submission 294*; Confidential *Submission 159*.
965 Law Institute of Victoria *Career patterns of law graduates* 1990, 54-55.
966 Law Institute of Victoria *Child care survey preliminary report* 1994, 6.
967 'Experienced, mature, or just too old' (1994) 16 *Law Society Bulletin* (SA) 5. In this case, segregation can amount to direct discrimination.
968 The Hon Mr Justice D K Malcolm AC *Report of the Chief Justice's Task Force on Gender Bias* 1994, 79.
969 ALRC 69(1) para 2.20.
970 The Law Society of NSW *Getting through the door is not enough: an examination of the equal employment opportunity response of the legal profession in the 1990s* 1993, 3; 'Experienced, mature, or just too old' (1994) 16(2) *Law Society Bulletin (SA)* 5; Law Institute of Victoria *Career Patterns of Graduates* 1990 28, 55.
971 The Hon Mr Justice DK Malcolm AC *Report of the Chief Justice's Taskforce on Gender Bias* June 1994, 79. In some circumstances promotion based on fee-earning ability could amount to indirect discrimination, as women are more likely to work in low fee-earning areas.
972 M Court *Submission 442*.
973 ALRC 69(1) para 3.10, 3.32.
974 Sex Discrimination Commissioner *Sex Discrimination Act 1984: Future directions and strategies* AGPS Canberra 1993, 6.
975 Women's Electoral Lobby SA *Submission 537*.
976 Legal Aid Office ACT *Submission 294*.
977 Confidential *Submission 611.*
978 See SDA s.51(a) and s.52(1)(b). See further ALRC 69(1) para 3.34.
979 ALRC 69(1) Recommendation 3.3.
980 Legal Practitioners Act 1970 (ACT); Legal Practitioners Act (NT); Legal Profession Act 1987 (NSW); Queensland Law Society Act 1952 (QLD); Legal Practitioners Act 1981 (SA); Legal Practitioners Act 1959 (Tas); Legal Profession Practice Act 1958 (Vic); Legal Practitioners Act 1893 (WA).
981 See further Access to Justice Advisory Committee *Access to justice: an action plan* AGPS Canberra 1994, 3.20-3.24.
982 See further id, para 3.11.
983 See further id, ch 7.
984 See para 9.4.
985 L Savell (Tasmanian Gay and Lesbian Rights Group) *Submission 280*; C MacDonald (et al) *Submission 333*; National Council of Women of Australia *Submission 378.*
986 C MacDonald (et al) *Submission 333.*
987 Linda Kirk 'Women in the legal profession' (1994) 16(7) *Law Society Bulletin* 10, 12.
988 The Law Society of the Northern Territory referred the Commission to the Women Lawyers' Association. The Tasmanian Law Society relies upon the Law Council of Australia, which recently established a Working Group on Career Paths for Women in the Law.
989 Justice Sally Brown, *Speech* Women Barristers' Association, December 1993.
990 DP 54 para 7.6; ALRC 69(1) para 2.24.
991 Law Society of New South Wales *Getting through the door is not enough: an examination of the equal opportunity response of the legal profession* 1993; Law Institute of Victoria *Career patterns of law graduates* 1990.
992 One submission reports that law societies did not regard research into the position of women in the profession as their responsibility - S Roach Anleu *Submission 30.*
993 Law Society of New South Wales *Getting through the door is not enough: an examination of the equal opportunity response of the legal profession* 1993.
994 Law Institute of Victoria *Career patterns of law graduates* 1990.
995 This research is being conducted by the Work and Child Care Advisory Service which is managed by the Australian Centre for Best Practice Limited and funded by the federal government. A preliminary report was made in October 1994. See also 'Childcare options for solicitors' (1994) 68(9) *Law Institute Journal* 803.
996 'Women graduates - where are they heading?' (1991) 18 *Brief* 6.
997 Confidential *Submission 553.*
998 ibid.
999 The Law Society of South Australia has 2 women on a 29 member governing body; the Law Institute of Victoria has 5 out of 34; Queensland Law Society Inc has 1 out of 17, the Northern Territory Law Society has 2 out of 12; the Law Society of New South Wales has 6 out of 34; the Law Society of Tasmania has 1 out of 16; the Law Society of Western Australia has 5 out of 20; and the Law Society of the Australian Capital Territory has 5 out of 16. The Law Society of the Australian Capital Territory has noted that 27% of practising solicitors in the ACT are women, while 31% of the members of the Council are women.
1000 S Carter *Submission 324.*
1001 M Court *Submission 443*, C Macdonald *Submission 333*.
1002 The Hon Mr Justice DK Malcolm AC *Report of the Chief Justice's Taskforce on Gender bias* 1994, 74.
1003 See para 9.23.
1004 Suggested by Sisters-in-Law *Submission 195* , M Court *Submission 443*, Bain & Hartride (National Council of Women of Australia Inc) Oral *Submission Brisbane* and C MacDonald et al *Submision 333*.
1005 NSW Law Society Equal Employment and Promotion Policy. See also Law Society of British Columbia Gender Bias Committee *Gender equality in the justice system* (1992) vol 1, 3-13. Research also shows that increased workplace benefits correlate to reduced absenteeism and employee stress.
1006 Known as the 'Equity Policy on the Recruitment Process'.
1007 Law Society of British Columbia Gender Bias Committee *Gender equality in the justice system* Volume One Law Society of British Columbia Vancouver 1992, 3-38. However, the findings of this report reveal that the guidelines are not always followed and women still encounter inappropriate questions about their marriage or child-rearing plans and interviews with 'sexual overtones'.
1008 Canadian Bar Association *Touchstones for change: equality, diversity and accountability: report on gender equality in the legal profession* Canadian Bar Association Ontario 1993, 40, rec 2.40.
1009 Jenni Mattila 'Gender discrimination in the legal profession - some dos and don'ts' (1992) *Law Society Journal* 52. See also A Dayman *Submission 320.*
1010 DP 54, para 7.20.
1011 J Blokland *Submission 347*; M Court *Submission 443*; Confidential *Submission 553.*

1012 This provision was introduced in December 1984. An officer at the Law Society has informed us that he is not aware of any complaint being made under the provision during the past three and a half years. He has no knowledge of complaints that may have been made prior to that time. Records do not seem to have been kept. This may have something to do with the Society's investigatory methods. This officer informed us that if a `minor breach' was reported they would get someone who knew the offender to call him and sort it out. A serious complaint would be regarded as unprofessional conduct and referred to the Legal Practice Board.
1013 L Kirk *Women in the legal profession* (1994) 16(7) Law Society Bulletin (SA) 10.
1014 Canadian Bar Association *Touchstones for change: equality, diversity and accountability* Canadian Bar Association Ottowa 1993 , 221.
1015 ibid.
1016 See para 9.27.
1017 See ALRC 69(1) para 3.4-3.6.
1018 Only 52 law firms in Australia have more than 100 employees - ABS statistics.
1019 There is generally no formal acknowledgment of discrimination in firms. Most refer to AA and EEO in gender neutral terms and with the 'familiar rhetoric of equity'.V Marles *Law Firms and Affirmative Action* 1992,28. See also Legal Aid Office ACT *Submission 294.*
1020 Arthur Robinson and Hedderwicks - Affirmative Action Agency *Annual Report* 1993-4.
1021 V Marles *Law Firms and Affirmative Action* 1992, 22.
1022 Statistics supplied by Australian Institute of Judicial Administration, current to 9 August 1994.
1023 Attorney-General's Department *Judicial appointments - procedure and criteria* AGPS Canberra 1993.
1024 id para 1.4.
1025 id 5.59-5.62.
1026 id 5.63-5.69.
1027 M Thornton *Submission 268.*
1028 See Justice *The Judiciary in England and Wales* E & E Plumridge Ltd London 1992, recommending a judicial commission. Canada has introduced a new system of apppointment of judges using an independent committee for the assessment of candidates - Department of Justice *A new judicial appointments process* Canada 1988 6; New Zealand Royal Commission on the Courts *Report of the New Zealand Royal Commission on the Courts* New Zealand 1978 196-203 (recommending a judicial commission). The Attorney-General's Discussion Paper also referred to the *Tokyo Principles* adopted by LAWASIA and the *Universal Declaration on the Independence of Justice* adopted by the First World Conference on the Independence of Justice. In both the Tokyo Principles and the Universal Declaration, the importance of clearly established consultation procedures is emphasized.
1029 ALRC submission to the Attorney-General, 9-10. See also G Anderson *Submission 239*.
1030 See *Administrative Appeals Tribunal Act 1975* (Cth) s6(4), *Social Security Act 1991* (Cth) s 1324(4), *Industrial Relations Act 1988* (Cth) s 12.
1031 M Thornton *Submission 268;* G Anderson *Submission 239*.
1032 Lord Chancellor's Department *Developments in Judicial Appointments Procedures* May 1994.
1033 The terms of reference required the Commission to report by June 1994.
1034 E Cox 'Matrimonial property scuttled' (1985) 10 *Legal Service Bulletin* 192 quoted in R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990.
1035 There is some legal amendment to this proposition in the *Family Law Act 1975* (Cth) s 79 where the contribution of the homemaker must be taken into account.
1036 Australian Bureau of Statistics *1994 Year Book* ABS Canberra 1993, 157.
1037 J Scutt *Women and the law: commentary and materials* Law Book Company Sydney, 1990, 247.
1038 This dichotomy is not uniformly defined. Some feminists have tended to define the family as private and commercial activity as public, while liberal philosophy defines the market as private and the 'public' sphere as political or government activity. See generally J Fudge 'The public/private distinction: the possibilities of and the limits to the use of Charter litigation to further feminist struggles' (1987) 25 *Osgoode Hall Law Journal* 485. H Charlesworth 'The public/private distinction and the right to development in international law' (1992) 12 *Australian Yearbook of International Law* 190; R Gavison 'Feminism and the public/private distinction' (1992) 45 *Stanford Law Review* 1; M Thornton 'The public/private dichotomy: gendered and discriminatory' (1991) 18 *Journal of Law and Society* 448.
1039 C Pateman *The disorder of women* 1989, 118. See also J Fudge 'The public/private distinction: the possibilities of and the limits to the use of Charter litigation to further feminist struggles' (1987) 25 *Osgoode Hall Law Journal* 485.
1040 M Neave 'From Difference to Sameness - Law and women's work' (1992) 18 *Melbourne University Law Review* 768, 807.
1041 eg increasing the availability and affordability of childcare; implementing the aims of ILO 156. See ch 15.
1042 H Katzen *Submission 215.*
1043 Sisters-in-Law *Submission 195;* M Clarke *Submission 221;* Women's Electoral Lobby Australia Inc *Submission 281;* Older Women's Network TAS *Submission 304;* Co-ordinator, Women's Action Alliance Australia Inc *Submission 308*; National Women's Consultative Council NSW *Submission 342.* Australian Institute for Women's Research and Policy *Submission 80*; Co-ordinator, Women's Action Alliance Australia Inc *Submission 308*; L Savage *Submission 599*.
1044 For instance Presbyterian Women's Association of Australia *Submission 173;* Australian Family Association *Submission 200.*
1045 Gosnells District Information Centre Inc WA *Submission 186*.
1046 L Savage *Submission 599*.
1047 R Gibson *Submission 326.*
1048 Country Women's Association of NSW *Submission 202*.
1049 D McCulloch, K Conley, M Martinelli, M Mati, R Walsh *Submission 537*.
1050 Women contributed two thirds of the dollar value of total unpaid work ABS *1992 Unpaid work and the Australian economy* Cat No 5240.0, AGPS Canberra 1994, 2.
1051 For a comprehensive examination of the work of women and the uses of national accounts figures, see M Waring *Counting for nothing: what men value and what women are worth* Allen & Unwin Sydney 1988.
1052 See also the discussion of equitable remedies in para 2.31-2.42.
1053 Art 14.
1054 The number of disability policies issued to farm women is very small and in times of economic downturn and drought would be among the first items of expenditure to be cut back: Insurance Council of Australia consultations 23 August 1994.
1055 Many of these avenues to compensation have been limited or modified by statute. It is beyond the scope of this report to discuss details of each State and Territory's statutory compensation schemes.
1056 *Social Security Act 1991* (Cth) s 1164.
1057 Included in the Women in Agriculture submission to the Attorney-General dated 14 June 1994.
1058 For a discussion of the 'lost earnings' - 'lost economic capacity' debate, see H Luntz *Assessment of damages for personal injury and death* 3rd ed Butterworths 1990, para [5.1.3]-[5.1.11].
1059 See the discussion in id, para [5.5.8]-[5.5.13].

1060 id, para [5.5.12] on authority of *Cole v Commonwealth* [1962] SR (NSW) 700.
1061 R Balkin & J Davis *Law of Torts* Butterworths 1991, 374-5.
1062 eg *Burnicle v Cutelli* [1982] 2 NSWLR 26.
1063 Professor R Graycar points up this anomalous categorisation with the title of her article 'Hoovering as a hobby: the common law's approach to work in the home' (1985) 28 *Refractory Girl* 22.
1064 [1982] 2 NSWLR 26.
1065 id 29.
1066 Notably Justice Murphy in *Sharman v Evans* (1977) 138 CLR 563, 598, and Justice Kirby in *Hodges v Frost* (1984) 53 ALR 373.
1067 (1977) 139 CLR 161.
1068 eg *Veselinovic v Thorley* [1988] 1 Qd R 191*; Kovac v Kovac* [1982] 1 NSWLR 656, *Maiward v Doyle* [1983] WAR 210.
1069 eg *Common Law (Miscellaneous Actions) Act* 1986 (Tas) s 5; *Transport Accident Act* 1986 (Vic) s 93(10)(c); *Wrongs Act* 1936 (SA) s 35 (a)(1)(g) and (h)(2); *Motor Accidents Act* 1988 (NSW) s 72. See comment on these statutes in H Luntz *Assessment of damages for personal injury and death* 3rd ed Butterworths 1990, para [4.6.9].
1070 (1992) 175 CLR 327, 333, Mason CJ, Toohey and McHugh JJ.
1071 id, 338.
1072 For a list of frequent judicial assumptions which reduce the assessment of women's economic capacity see R Graycar 'Compensation for loss of capacity to work in the home' (1985) 10 *Sydney Law Review* 528.
1073 For instance: Australia, Canada, Hong Kong, Ireland, New Zealand and UK; for details see appendix to PB Kutner 'Damages for injuries to family members: does reform mean abolition?' (1993) 1(3) *Torts Law Journal* 231.
1074 The English Law Commission stated
The actions *per quod servitium et consortium amisit* are outstanding examples of the way in which modern law is still tied to its historical past. They are based upon the principle that a master is entitled to sue anyone who causes him to suffer loss by wrongfully depriving him of the services of his servant.
Great Britain. Law Commission Report 56 *Report on personal injury litigation - assessment of damages* HMSO London 1973, para 117.
1075 Gaudron J in *Van Gervan v Fenton* (1992) 175 CLR 327, 350.
1076 eg NSW, WA.
1077 eg *Statutes Amendment (Law of Property and Wrongs) Act 1972* (SA) s 13.
1078 A Riseley 'Sex, Housework and the Law' (1981) 7 *Adelaide Law Review* 421.
1079 M Clarke *Submission 221.*
1080 Australian Family Association *Submission 200.*
1081 Gosnells District Information Centre *Submission 186*.
1082 Sisters in Law *Submission 195.*
1083 High Court of Australia unreported 14 September 1994.
1084 See discussion of *Doherty v Footner*, Supreme Court of South Australia, Full Court, unreported 29 April 1993 in chapter 2 para 2.19.
1085 Supreme Court of NSW, Court of Appeal, unreported 15 October 1990.
1086 K Dempsey 'The oppression of rural women in Australia' and G Poiner 'Landscape with figures: femininity and rural views' both in M-A Franklin, L.M.Short, E.K.Teather *Country women at the crossroads* University of New England Press 1994, 46 and 55.
1087 M Alston 'Women and the rural crisis' in M-A Franklin, LM Short, EK Teather *Country women at the crossroads,* 11 and see also House of Representatives Standing Committee on Legal and Constitutional Affairs *Half way to equal* AGPS Canberra 1992, para 9.2.
1088 M Alston 'Women and the rural crisis' in M-A Franklin, LM Short, EK Teather *Country women at the crossroads,* 17.
1089 'My wife is my partner in the property, not because of tax, but because she helps with the dairying and other jobs. I think she deserves a half share.' from the NSW Women's Advisory Council *Women On the Land* 1985 cited by G Poiner Landscape with Figures: Femininity and Rural Views'
M-A Franklin, L Short & E Teather *Country women at the crossroads*, 55.
1090 The double burden taken on by an increasing number of working women has been recognised. The Work and Family Unit of the Department of Industrial Relations is coordinating strategies 'to encourage changes in attitudes to extend the capacity of men and women to effectively manage their work and family responsibilities'. In the past this has included the issue by the Office of the Status of Women of issues kits specifically aimed at 'sharing the load'. Department of Industrial Relations Work and Family Unit *Strategy for implementing ILO Convention 156* DIR Canberra 1992, 10.
1091 eg *Supreme Court Act 1970* (NSW).
1092 eg workers' compensation and transport accident acts.
1093 Australian Law Reform Commission Report No 32 *Community law reform for the Australian Capital Territory: second report Loss of consortium Compensation for loss of capacity to do housework AGPS* Canberra 1986 (ALRC 32).
1094 ALRC 32 Draft legislation s 4.
1095 The Community Law Reform Committee of the ACT Report No 4 1991. s 30-33 of the *Law Reform (Miscellaneous Provisions) Act 1955* (ACT).
1096 Domestic Violence Action Group, Port Lincoln, *Submission 453.*
1097 For the extensive literature on this topic see Finlay HP, Bradbrook AJ and Bailey-Harris RJ *Family Law: Cases, materials and commentary* 2nd ed Butterworths 1993.
1098 FLA s 79 (4) (d).
1099 *In the Marriage of Scott* (1977) FLC 90-951. See also *In the Marriage of Smyth* (1977) FLC 90-282.
1100 (1985) FLC 91-626. Problems with inherited land are also critical in farm cases. These issues are not considered in this context.
1101 id, 80, 075.
1102 id, 89, 077.
1103 ibid.
1104 Recommendation 88 of the Joint Select Committee:
88. The *Family Law Act 1975* be amended to distinguish farming properties from othe matrimonial property so that the Family Court, in addition to other matters, is able to consider the following:
88.1. whether the farming property was brought into the marriage by one or other party or whether it was acquired by both parties and developed after the marriage;
88.1.1 the necessity for the retention of a farming property as an income producing unit for the future needs of the separating family (paragraph 11.51)
Reproduced in Attorney-General's Department *Family Law Act 1975 Directions for Amendment* AGPS Canberra 1993, 44.
1105 D Boniface *Submission 621.*
1106 Judicial education is further discussed in ch 8, para 8.56 and following.
1107 *In the marriage of Lee Steere* (1985)FLC 91-626, 80,076.

1108 See ch 7.
1109 CEDAW art 14.
1110 House of Representatives Standing Committee on Legal and Constitutional Affairs *Half way to equal* AGPS Canberra 1992, recommendation 52.
1111 This problem is discussed in ALRC Report No 67 (Interim) *Equality before the law: Women's access to the legal sysem* ALRC Sydney 1994.
1112 Australian Law Reform Commission Discussion Paper No 54 *Equality before the law* (DP54) ch 10.
1113 Australian Institute for Women's Research and Policy *Submission 80*; S Nord *Submission 246;* Women's Adviser's Unit South Australian Department of Labour *Submission 285*; Older Women's Network Tas *Submission 304;* Co-ordinator, Women's Action Alliance Australia Inc *Submission 308;* National Council of Women, Launceston, *Submission 447.*
1114 J Baxter *Work at Home* UQP 1993.
1115 Australian Bureau of Statistics *1992 Unpaid Work and the Australian Economy* Cat 5240.0 AGPS Canberra 1994.
1116 Australian Bureau of Statistics *Measuring Unpaid Household Work: Issues and Experimental Estimates* ABS Cat 5236.0.Canberra 1990.
1117 Australian Bureau of Statistics *1992 Unpaid work and the Australian economy* Cat 5240.0 AGPS Canberra 1994.
1118 Womens's Electoral Lobby Australia Inc *Submission 281.*
1119 National Council of Women, Launceston *Submission 447.*
1120 Country Women's Association of NSW *Submission 202.*
1121 Presbyterian Women's Assocation of Australia *Submission 173.*
1122 A J Kenos *Submission 76.*
1123 Under the French system, the main tax unit is the family. Tax is calculated on a per capita basis using income splitting, with one splitting coefficient for each adult and the third and subsequent children and half a coefficient for each of the first two children. All the coefficients or parts are taxed at the standard progressive rate but tax free thresholds and lower rates apply to each individual's part of the divided income. Confidential *Submission 187*; Women's Action Alliance *Submission 308;* R Gibson *Submission 326.*
1124 An example prepared for the Women's Action Alliance *Submission 308.*
1125 Some of the problems are outlined in House of Representatives Standing Committee on Legal and Constitutional Affairs *Half way to equal* AGPS Canberra 1992, 95.
1126 See texts and references in ALRC DP 54 paras 10.10-10.16.
1127 1.8 million men receive a pension or benefit.
1128 Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322;* K Lesley *Submission 25;* P Easteal Australian Institute of Criminology *Submission 79;* AC Thacker *Submission 40;* S Armstrong *Submission 274;* Welfare Rights and Legal Centre ACT *Submission 240;* Townsville Community Legal Service Inc *Submission 493;* H Katzen *Submission 215;* Legal Aid ACT *Submission 294;* P Prezzi *Submission 29;* J A Gardener *Submission 24*; Confidential *Submission 64*; J Bleyerveld *Submission 111*; Confidential *Submission 128*; Confidential *Submission 136*; The Vietnam Veterans Family Support Link Line NSW *Submission 194*; Norwood Community Legal Centre SA *Submission 170*; T Brandrup *Submission 214*; L McKenzie *Submission 235*; Women's Legal Resources Centre, Sydney *Submission 256*; Confidential *Submission 263*; Sutherland Shire Family Support Service NSW *Submission 351*; M Morsan-Utton *Submission 513.*
1129 See para 12.11-12.14.
1130 Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322;* Welfare Rights and Legal Centre ACT *Submission 240;* Townsville Community Legal Centre Inc *Submission 493.*
1131 Welfare Rights and Legal Centre ACT *Submission 240.*
1132 Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322.*
1133 s 40(2)(h).
1134 SDA s 40A. This section was inserted in 1991.
1135 H Katzen *Submission 215;* Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322;* S Armstrong *Submission 274.*
1136 ALRC 69(1) ch 3. See summary discussion of these proposals in para 1.28.
1137 SDA s 33.
1138 There are objections to this change in a number of submissions: Older Women's Network Inc, Sydney *Submission 303;* Older Women's Network TAS *Submission 304;* Older Women's Network, Canberra *Submission 93*; Confidential *Submission 136*. See also 'Women's pension age' *Impact* August 1994. The ALP conference in September 1994 passed a resolution calling for sensitivity to individual circumstances in the move to increase the age at which women become eligible for the age pension by taking account of the (lack of) work history of potential age pension recipients.
1139 H Katzen *Submission 215.*
1140 Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322.*
1141 H Katzen *Submission 215;* Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322;* S Armstrong *Submission 274.*
1142 Carers, widows and special beneficiaries are eligible for JET.
1143 H Katzen *Submission 215.*
1144 Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322;* K Lesley *Submission 25;* P Easteal Australian Institute of Criminology *Submission 79;* AC Thacker *Submission 40;* S Armstrong *Submission 274;* Welfare Rights and Legal Centre ACT *Submission 240;* Townsville Community Legal Service Inc *Submission 493;* H Katzen *Submission 215;* Legal Aid ACT *Submission 294.*
1145 Facts common to two submissions: Working Women's Centre NSW *Submission 242;* I Shaw *Submission 327.*
1146 Parliament of Australia *Working nation: policies and programs* AGPS Canberra 1994, 143.
1147 id, ch 6.
1148 Under the new system each member of a couple will be able to earn $231 per week before their partner's rate of allowance is affected.
1149 Sex Discrimination Commissioner Cth *Submission 338.*
1150 SDA s 6(1) and (2) which deals with discrimination on the grounds of marital status.
1151 Sex Discrimination Commissioner Cth *Submission 338.*
1152 Parliament of Australia *Working nation: policies and programs* AGPS 1994, 147.
1153 House of Representatives Standing Committee on Legal and Constitutional Affairs *Half way to equal: Report of the inquiry into equal opportunity and equal status for women in Australia* AGPS Canberra 1992, recommendation 23.
1154 Sex Discrimination Commissioner Cth *Submission 338.*
1155 eg J Duff *Submission 85;* T Brandrup *Submission 214*; H Katzen *Submission 215;* L McKenzie *Submission 235*; Welfare Rights and Legal Centre ACT *Submission 240;* S Armstrong *Submission 274;* Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322;* Townsville Community Legal Service Inc *Submission 493.*
1156 Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322.*

1157 SSA s 249.
1158 Welfare Rights and Legal Centre ACT *Submission 240.*
1159 The criteria are set out in SSA s 4(3).
1160 s 4(4)(d).
1161 T Brandrup *Submission 214.*
1162 For instance in NSW, NT and ACT, a two year period is required to establish a de facto relationship for the purposes of obtaining a maintenance order - *De Facto Relations Act 1984* (NSW) s 17; *De Facto Relationships Act 1991* (NT) s 16(1); *Domestic Relationships Act 1994 (ACT)* s 12. In other legislation the period can vary from 5 years to 1 year. See De Facto Relationships Reporter.
1163 Social Security Working Group, Federation of Community Legal Centres Inc Vic *Submission 322*.
1164 ibid.
1165 Welfare Rights and Legal Centre ACT *Submission 240;* Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*; Townsville Community Legal Service Inc *Submission 493.*
1166 P Easteal Australian Institute of Criminology *Submission 79;* Welfare Rights and Legal Centre ACT *Submission 240;* Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*. See also R Graycar & J Morgan *The hidden gender of law* Federation Press Sydney 1990, 150-151.
1167 Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322.*
1168 (1981) 3 ALN N83 (Note 49).
1169 *Family Law Act 1975*(Cth) s 72; where de facto legislation operates (NSW, NT and Tas) a custodial parent may also have a right to be supported by her partner.
1170 (1981) 57 FLR 262.
1171 J Raymond *Social security review: Bringing up children alone: policies for sole parents* Issues Paper No 3 AGPS Canberra 1987.
1172 See para 12.12.
1173 Ms S Thompson *Submission 62;* JR McLennan *Submission 70*; Townsville Community Legal Service *Submission 493;* WEL Adelaide *Submission 537;* Paula Baron *Submission 619.*
1174 Consultations with Tasmanian Consultative Council Hobart, Launceston, Burnie 3-5 August 1994. See also J Nielsen *Gender bias in the civil litigation system and its impact on women as civil litigants in NSW - Discussion paper* NSW Ministry for the Status and Advancement of Women, 1994, 2. According to the Australian Banking Industry Ombudsman, about 5% of all closed complaints handled by the Ombudsman relate to guarantees.
1175 Many of these are referred to later in this chapter: see para 13.11. Overseas cases include *Shoppers Trust v Dynamic Homes Ltd* et al (1968) 96 DLR (4th); *Bank of Montreal v Featherstone* (1989) 58 DLR 4th.
1176 G McDonald 'Women and credit in the Australian banking industry' Women and Credit *Conference* Melbourne 6 March 1991.
1177 P Baron *Submission 619.*
1178 Ms S Thompson *Submission 62.*
1179 NSW Court of Appeal unreported 31 May 1994.
1180 See eg *Farmers Cooperative Executors & Trustees Ltd v Perks* (1989) 52 SASR 399.
1181 see B Fehlberg 'The Husband, the Bank, the Wife and her Signature' (1994) 57 *Modern Law Review* 467.
1182 B Fehlberg 'Money and Marriage "Sexually Transmitted Debt".' Unpublished paper Queen's University, Canada, October 1994.
1183 *Beneficial Finance v Comer* (1991) ASC 56-042; *Borg-Warner Acceptance Corporation (Australia) Ltd v Diprose* (1987) 4 BPR 97-297; *Nolan v Westpac Bank* (1989) 51 SASR 496; *Warburton v Whiteley* (1989) 5 BPR 55-453; *European Asian v Kurland* (1985) 8 NSWLR 192; *Peters v Commonwealth Bank of Australia* (1992) Aust ConvRep 90-012; *Efstathia Tzefrios v Irene Polites* Full Court of the Supreme Court Vic unreported 12 March 1993; *Giorgi v European Asian Bank AG* Supreme Court NSW unreported 21 Feb 1989; *Renshaw v Melbourne Money Pty Ltd* (1990) ASC 58-751; *Mussett v Morlend Finance Corp* (Vic) Pty Ltd [1988] ASC 55-686; *Alderton and Anor v the Prudential Assurance Company Ltd* (1993) ASC 56-219; *Nikolski v National Australia Bank* (1993) ASC 56-204; *Morlend Finance Corporation (Vic) Pty Ltd v Westendorp & Ors* (1993) ASC 56-200; *Robinson and Anor v ANZ Banking Group Ltd* (1990) ASC 55-979; *Tessman v Costello* [1987] 1 Qd R 283; *Moray v Scandinavian Pacific Ltd* Sup Court NSW unreported 3 Dec 1991; *Bridge Wholesale Acceptance (Aus) Ltd v GVS Associates Pty Ltd and Ors* Supreme Court NSW unreported 30 September 1991; *White v Ormsby* (1988) ASC 58 026.
1184 Explanations could include the fact that women who are granted loans are more reliable borrowers than men or that many men could not successfully plead the remedies available.
1185 P Baron *Submission 619.*
1186 B Fehlberg 'Money and Marriage "Sexually Transmitted Debt"' Unpublished paper Queen's University, Canada, October 1994.
1187 *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 185.
1188 *Gough v Commonwealth Bank of Australia* NSW Court of Appeal unreported 31 May 1994.
1189 B Fehlberg 'Money and Marriage "Sexually Transmitted Debt"' Paper, Queen's University, Canada October 1994.
1190 (1940) 63 CLR 649.
1191 (1983) 151 CLR 447.
1192 id, 474 (Deane J).
1193 (1956) 99 CLR 362, 405.
1194 *European Asian of Australia Ltd v Kurland* (1985) 8 NSWLR 192,202 (Rogers J).
1195 Discussed in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447,467.
1196 See the discussion in M Sneddon 'Unfair conduct in taking guarantees' (1990) 13 *University of New South Wales Law Journal* 302, 309.
1197 For instance, in *Borg-Warner v Diprose* (1987) 4 BPR 97-279, a wife who guaranteed the business loans of her husband was said on medical evidence to be under such stress that her judgment was impaired and her decisions therefore of no value. The lender had left all the arrangements to the husband and was therefore fixed with his unconscionable conduct.
1198 In *Nolan v Westpac Bank* (1989) 51 SASR 496, the ex-wife of the proprietor of a carpet cleaning business signed a guarantee to secure loans to his business. The conduct of the bank manager was seen to be self-serving and manipulative and, in protecting his own position, he behaved in an unconscionable fashion.
1199 Successful cases more often arise where the professional and social relationship of the lender and borrower renders the guarantor's role in the complete transaction that of an ill-informed and sometimes unwilling participant.
1200 The distinctions are drawn by Justices Mason and Deane in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447,461 and 474.
1201 see eg *European Asian of Australia v Kurland* (1985) 8 NSWLR 192. The position is no longer clear since the House of Lords overruled the manifest disadvantage requirement in *CIBC Mortgages v Pitt* [1994] 1 AC 200.
1202 It is rare for the lender's own conduct to be in question - *Lloyds Bank v Bundy* [1975] QB 326 being one of very few exceptions.
1203 (1939) 63 CLR 649.
1204 id, 684. Mrs Jones eventually failed in her claim to have the mortgage set aside.

1205 id, 675. Although there is no presumption of undue influence between a husband and wife, Justice Dixon said that the marriage relationship was one which had never been divested of 'equitable presumptions of an invalidating tendency'.
1206 id 678.
1207 see *European Asian of Australia v Kurland* (1985) 8 NSWLR 192 and *European Asian of Australia v Lazich* (1987) ASC 55-564.
1208 *National Australia Bank v Akins* NSW Court of Appeal unreported 5 August 1994.
1209 *Barclays Bank plc v O'Brien* [1994] 1 AC 180.
1210 *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 195. The other case was *CIBC Mortgages v Pitt* [1994] 1 AC 200.
1211 *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 194.
1212 id, 198.
1213 ibid.
1214 NSW Court of Appeal unreported 5 August 1994.
1215 The force of the *O'Brien* decision must have been indeed compelling because, although not binding in NSW, it has caused a High Court decision to be rejected by a lower court. Justice Clarke, who gave the leading judgment in *Akins* had himself earlier decided that 'while it may be true to say that the need to recognise the disadvantaged position of a wife would appear less frequently today there are still to be found women in the community who are overborne by their husbands. The need for protection of those women is as great as ever ... [I]t may be that the principles applied in *Amadio* ... provide sufficient protection and there is now no case for retaining the separate doctrine under discussion. However, that doctrine has been applied by the High Court and *until that court indicates that it no longer is good law* I consider I should continue to apply it' (emphasis added). *Warburton v Whiteley* (1989) 5 BPR 11,628, 11644.
1216 *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 196.
1217 NSW Supreme Court unreported 18 August 1994.
1218 *Contracts Review Act 1980* (NSW) s 9.
1219 eg *Gough v Commonwealth of Australia* NSW Court of Appeal unreported 31 May 1994; *West v AGC (Advances)* (1986) 5 NSWLR 610.
1220 See paras 13.46 and following.
1221 House of Representatives Standing Committee on Finance and Public Administration *A pocket full of change* AGPS Canberra 1991.
1222 id para 20.164.
1223 Australian Law Reform Commission *Multiculturalism and the law* ALRC Sydney 1992 (ALRC 57).
1224 *Consumer Credit Code* s 6(1)(b). The Code is contained in the appendix to the *Consumer Credit (Queensland) Act 1994.*
1225 id, s 70.
1226 eg the UK Code of Good Banking Practice and the NZ Code of Banking Practice.
1227 G Burton 'Australian code of banking practice' *Banking Law and Practice Conference* May 1994.
1228 ABA Code of Banking Practice preamble.
1229 The Code will probably be adopted in two stages: those parts that do not mirror provisions in the new consumer credit code in January 1995 and those parts that are equivalent to the consumer credit code in September 1995.
1230 Subject to some exceptions.
1231 eg a family company.
1232 eg of family trusts or to a partner of or co-owner with the guarantor, for example in a family business.
1233 Australian Banking Industry Ombudsman Ltd *Annual Report 1992-93* ABIO Melbourne 1993, 5.
1234 For example, there are at present 102 financial counsellors in NSW accredited by the Financial Counsellors Association. They have all had training in general and financial counselling, supervised experience and carry professional liability insurance.
1235 U Jagose *Submission 633*.
1236 Townsville Community Legal Service *Submission 493.*
1237 Attorney-General Wade reported in R Evans 'Spouse directors run grave risks, report says' (1994) 68 *Law Institute Journal* 234.
1238 Australian Law Reform Commission *Equality before the law: women's access to the legal system* ALRC Sydney 1994 (ALRC 67) reported that there are over 2 million women living in rural and remote areas in the States, the Northern Territory and the Australian Capital Territory.
1239 See ALRC 67 para 2.31-2.33.
1240 These figures are drawn from the last census of Norfolk Island conducted on 6 August 1991.
1241 Includes women with a child not at school and women performing home duties.
1242 *Law Reform Commission Act 1973* (Cth) s 6.
1243 s 122.
1244 The powers of the Norfolk Island Legislative Assembly and the Island's legal regime are described in detail in Appendix 3.
1245 Representatives of the Commission were accompanied by Renee Leon (Senior Government Counsel, Access to Justice Unit, Attorney-General's Department) and Carolyn Bowra (Executive Assistant to the Human Rights Commissioner, Human Rights and Equal Opportunity Commission). All officers met jointly with members of the Norfolk Island Government, the Administrator and Official Secretary and officers employed by the Norfolk Island public service. There was some overlap between issues discussed by the Commission and the Department, for example, the establishment of a legal aid scheme. However, by and large, Ms Leon and Ms Bowra visited the Island for purposes of their own organisations. The purpose of Ms Leon's visit was to consult members of the Norfolk Island Government and other officials in the course of preparing the proposed Government response to the AJAC report. The purpose of Ms Bowra's visit was to prepare for a future visit to Norfolk Island by the federal Human Rights Commissioner, Brian Burdekin.
1246 The work of the Domestic Violence Strategies Group is discussed in detail at para 14.16.
1247 Domestic Violence Strategies Group *Consultation* 21 September 1994.
1248 Confidential *Submission 628*.
1249 Confidential *Submission 624*.
1250 This study was conducted by Sharon Tews of the Queensland Domestic Violence Regional Service. It was fully sponsored by the Department of the Environment, Sport and Territories in cooperation with the Norfolk Island Government.
1251 Confidential *Submission 627*. This submission suggest that complaints to police may represent only 5% of all domestic violence incidents.
1252 Domestic Violence Strategies Group *Consultation* 21 September 1994.
1253 Professor J Braithwaite *Submission 146*, 2. See also ALRC 67, para 2.32 and Dr A Caselyn *Submission 460*.
1254 Confidential *Submission 627*.
1255 S Tews, Queensland Domestic Violence Regional Service *Norfolk Island Project-Discussion Paper* (1994), 5.
1256 Confidential *Submission 626*.
1257 These orders are variously described as apprehended violence orders, intervention orders, restraining orders, restraint orders and injunctions: see *Domestic Violence Act 1986* (ACT); *Crimes Act 1900* (NSW) Pt 15A; *Justices Act 1928* (NT) Part IV Div 8 as amended by the *Justices Amendment Act 1989* (NT); *Domestic Violence (Family Protection) Act 1989* (Qld); *Summary Procedure Act 1921* (SA) s 99, 100; *Justices Act 1959* (Tas) s 106A-106M; *Crimes (Family Violence) Act 1987* (Vic); *Justices Act 1902* (WA) s 172-4. Under these laws, courts may issue orders prohibiting a named person from approaching the protected person, prohibiting or restricting the possession of firearms or prohibiting or restricting certain behaviour: see eg *Crimes Act 1900* (NSW) s 562D. The applicant must demonstrate a fear of violence,

harassment, molestation, intimidation or stalking. The order can be extended to protect the applicant's family or the person with whom the victim has a domestic relationship: see eg *Crimes Act 1900* (NSW) s 562BD. Interim orders can be given over the phone: see eg *Crimes Act 1900* (NSW) s 562H.

1258 The *Judicature Ordinance 1960* (NI) s 13 enables the Court of Petty Sessions to grant equitable relief 'in the exercise of the jurisdiction vested in it'. This jurisdiction does not include the power to grant urgent equitable injunctive relief to restrain a defendant from assaulting a plaintiff. The power to issue injunctive relief to restrain a defendant from assaulting an applicant is an inherent power of the Supreme Court of Norfolk Island: see *Supreme Court Rules* (ACT) Order 55 (in force under the *Supreme Court Act 1933* (ACT). It cannot be exercised by the Court of Petty Sessions without specific legislative direction. As there is no statutory delegation to this effect, the Court of Petty Sessions would appear to be unable to issue urgent equitable injunctive relief.

1259 eg the *Crimes Act 1900 (NSW)* applies as a law of Norfolk Island, subject to the provisions of the *Criminal Law Ordinance 1960 (NI)*.

1260 This was followed by a detailed cross-examination of the complainant on various issues, including her previous sexual history. Since this matter (*R v Friend* Norfolk Island Court of Petty Sessions, 24 May 1993) was heard, the law of Norfolk Island has been amended to bring it up to date with the law in other Australian jurisdictions. The *Criminal Law Amendment Act 1993* (NI) abolished the common law offences of rape and attempted rape, substituting them for statutory sexual assault provisions based on those contained in the *Crimes Act 1900* (ACT) Part IIIA. The *Evidence Amendment Act 1993* (NI) amends the *Evidence Ordinance 1960* (NI) to make evidence relating to the sexual reputation of the complainant inadmissible during proceedings in both the Court of Petty Sessions and the Supreme Court of Norfolk Island: s 43ZP and 43ZJ.

1261 eg Confidential *Submission 627*.

1262 The Commission is informed by the Norfolk Island Government that a new police station and lock-up facilities are currently under construction.

1263 Confidential *Submission 627*.

1264 The Commission was told that there is the equivalent of approximately one registered gun to each person on the Island (including fully and semi automatic weapons). Many more firearms are apparently held unregistered. It was not possible to verify these figures. The Norfolk Island Government advised that importation of fully and semi-automatic weapons is prohibited absolutely under the *Customs Ordinance 1913I (NI)* s 5B and Second Schedule: letter dated 4 November 1994.

1265 Confidential *Consultation* 21 September 1994.

1266 Confidential *Submission 626*.

1267 Confidential *Submission 624*.

1268 Confidential *Submission 627*. *Consultation* 21 September 1994.

1269 Administrator *Consultations* 21 September 1994.

1270 Confidential *Submission 627.*

1271 Domestic Violence Strategies Group *Consultation* 21 September 1994.

1272 Confidential *Submission 626*.

1273 Confidential *Submission 629*.

1274 Confidential *Submission 624*. The Norfolk Island Government advises that the Court of Petty Sessions Bench consists of either three local magistrates or two local magistrates and a professional magistrate from the ACT.

1275 The DVSG has been assisted by Sharon Tews, a consultant from the Queensland Domestic Violence Regional Service engaged by the federal Department of the Environment, Sport and Territories.

1276 S Tews, Queensland Domestic Violence Regional Service *Norfolk Island Project-Discussion Paper* (1994), 3. Ms Tews is assisting the DVSG in the development of the system.

1277 *Domestic Violence Act 1986* (ACT) and *Domestic Violence (Family Protection) Act 1989* (Qld).

1278 *Crimes Act 1900* (NSW) s 562C(3) provides an example of this type of provision. Neither the *Domestic Violence Act 1986* (ACT) nor the *Domestic Violence (Family Protection) Act 1989* (Qld) make it mandatory for a police officer to apply for an order where it is suspected or believed that an offence has been committed or is likely to be committed.

1279 See generally,National Committee on Violence Against Women *The Effectiveness of Protection Orders in Australian Jurisdictions* AGPS Canberra 1993.

1280 Norfolk Island Government *Consultations* 22 September 1994.

1281 Australian Law Reform Commission *Equality before the law: justice for women* ALRC Sydney 1994 (ALRC 69(1)) recommendations 9.1-9.13.

1282 Recommendation 9.1 will be implemented through the *Family Law Reform Bill 1994* (Cth) s 68F(1)(f).

1283 This Ordinance, like many other older provisions in Norfolk Island Acts and Ordinances, are not drafted in gender-neutral language. See for example *Criminal Law Ordinance 1960* (NI) s 8 (habitual criminals). In any event, no women AFP officers have ever served on Norfolk Island (source: AFP). The Commission was told that it is not a suitable posting for women police officers: Confidential *Consultation* 21 September 1994.

1284 The Hon Nadia Lozzi-Cuthbertson OAM MLA, Minister for Health and Education.

1285 The Commission is unaware of any case law on the interpretation of this provision.

1286 s 5. The difference between a licence and a permit is that a licence is given for general use and possession whereas permits are given to authorise more specific conduct such as buying and selling firearms or shortening firearms.

1287 s 24.

1288 s 21 (Table).

1289 s 25(1)(b1).

1290 s 39(1).

1291 s 351A.

1292 s 36(2). The Commission has been told that it is this provision which leads to challenges for applications for apprehended violence orders in NSW. If a gun licence is not held, the order is more likely to be accepted.

1293 Like the NSW Act, the ACT Act attempts to prescribe the purposes for which guns are held, although there is discretion for granting a licence where the ordinary statutory reasons do not apply: s 24. Persons who need to have guns in the course of their employment or for valid recreational purposes are taken to have an approved reason for being granted a licence: s 5. However, a licence application must be refused if the applicant has been convicted of an offence, either summarily or on indictment, in the last 8 years, or is the subject of a restraining order or a protection order issued under either the *Magistrates Court Act 1930* (ACT) or the *Domestic Violence Act 1986* (ACT): s 25.

1294 Letter from Norfolk Island Government dated 4 November 1994.

1295 The Commission is informed by the Norfolk Island Government (*Consultation* 22 September 1994) that the link will not be toll free. However, calls will be able to be made at a much reduced rate.

1296 ALRC 67.

1297 ALRC 69(1).

1298 Norfolk Island is governed by Acts passed by the Norfolk Island Legislative Assembly, ordinances made by the Governor-General, Acts of the federal Parliament, Acts of the NSW Parliament and Imperial law. This legal regime is described in more detail at Appendix 3.
1299 Confidential *Submission 626.*
1300 Confidential *Submission 629*.
1301 eg Confidential *Submission 626*.
1302 eg Confidential *Submission 627*.
1303 See Recommendations 13.4-13.6.
1304 The Commission is aware, for example, that there is some dissatisfaction with legal aid schemes for Christmas Island and Cocos (Keeling) Island.
1305 See discussion at para 14.43.
1306 See discussion about the establishment of a legal aid scheme at para 14.30.
1307 s 7.
1308 Transfer to the Supreme Court of Norfolk Island would be effected under the terms of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).
1309 *Family Law Act 1975* (Cth) s 39(2), 4(1)(a)(ii).
1310 *Family Law Act 1975* (Cth) s 39(2), 4(1)(b).
1311 Under this section, a court may grant injunctions:
- for the personal protection of a party to the marriage
- restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in wich the other party to the marriage resides
- restraining a party to the marriage from entering the place of work of the other party to the marriage
- for the protection of the marital relationship
- in relation to the property of a party to the marriage
- relating to the use or occupancy of the matrimonial home.

Section 114AA empowers police to arrest persons against whom a personal protection injunction is issued if the protected person is harmed or threatened with violence in any way.
1312 Of these, a little over one quarter (27%) proceeded to a completed hearing and judicial decision. This represents approximately 5% of all applications: Family Court of Australia *Annual Report 1992-93*, 36-37.
1313 Letter from Norfolk Island Government dated 4 November 1994.
1314 *Income Tax Assessment Act 1936* (Cth) s 7A, Div 1A.
1315 See para 14.46-14.50.
1316 Confidential *Submission 628*.
1317 The *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 5 provides that a Supreme Court of a State or Territory ('territory' does not include the Northern Territory, however, the Act extends to all external territories therefore 'territory' includes the Territory of Norfolk Island) shall transfer a proceeding to the Family Court where it appears that: (i) the proceeding arises out of, or is related to, another proceeding pending in the Family Court and it is more appropriate that the proceedings be determined in the Family Court; (ii) having regard to specified matters, it is more appropriate that the proceeding be determined by the Family Court; or (iii) it is otherwise in the interests of justice that the Family Court determine the matter. Once a court has established the existence of one of the three specified criteria, it is obliged to transfer the proceedings. There is no appeal from a decision in relation to transfer of a proceeding: s 13; *Re Staples and McCall* (1989) 13 Fam LR 279, 282 per Nygh J; *Re Chapman and Jansen* (1990) 13 Fam LR 853, 868-9 per Fogarty J. The considerations to be taken into account when deciding which is the more appropriate court include: (i) whether the proceedings, or a substantial part of the proceedings, would have been incapable of being instituted in the Supreme Court and capable of being instituted in the Family Court; (ii) the extent to which questions arising in the proceedings relate to Commonwealth law or Territory law; and (iii) the interests of justice.
1318 ALRC 69(1), Recommendation 4.3.
1319 AJAC *Access to Justice-An Action Plan* AGPS Canberra 1994, 249.
1320 Confidential *Submission 626*.
1321 ibid.
1322 Confidential *Consultation* 22 September 1994.
1323 Christopher Staniforth.
1324 Estimate of Legal Aid and Family Services, Attorney-General's Department, based on court statistics supplied by the Norfolk Island Government. These figures may change if and when Norfolk Island law is modified to include provisions for the issue of protection orders.
1325 Approximately $70 000 a year.
1326 'Resident' is defined by the *Immigration Act 1980* (NI) s 28 to mean 'a person (a) who, at any time, whether before or after the commencement of this Act, was born on Norfolk Island; and (b) one of whose parents was, at that time, a resident'. Persons may be deemed born on the Island in certain circumstances: s 28(2). Persons may also be declared residents of Norfolk Island if they satisfy several statutory criteria: s 29. In determining an application for residency, the health and character of the applicant shall be taken into account as well as the extent to which the applicant has assimilated into the Norfolk Island community: s 32. A 'resident' does not include a person holding either a general or a temporary entry permit.
1327 On 6 August 1991, 2.8% of the ordinary residents of Norfolk Island (41 persons) received social security payments under the SSA. A small percentage of the remainder of those ordinarily resident on the Island received social security benefits from elsewhere, including Australia. The vast majority of residents (85.0%) were not in receipt of any social welfare payments at all.
1328 Norfolk Islanders are not eligible for benefits under the *Social Security Act 1991* (Cth). Under the Act, pensions and benefits are available for Australian residents only. Residents of Norfolk Island are not Australian residents for the purposes of the Act: s 7(4)(f). Persons holding general entry permits and temporary entry permits under the *Immigration Act 1980* (NI) are eligible for Commonwealth benefits because they are not residents of Norfolk Island within the meaning of its immigration legislation.
1329 SSA s 26.
1330 Confidential *Submission 625*.
1331 eg Confidential *Submission 629*.
1332 ALP Member of Melbourne, Victoria.
1333 Australia, House of Representatives 113 *Parliamentary Debates* 1523 (4 April 1979).
1334 s 40A(1).
1335 VPs are not considered in this report.
1336 The Hon MW King MLA (Minister for Tourism and Works).
1337 *Immigration Act 1980* (NI) s 23.
1338 eg Domestic Violence Strategies Group *Consultation* 21 September 1994; Confidential *Submission 625*.
1339 Norfolk Island Government *Consultation* 22 September 1994.

1340 Letter dated 4 November 1994.
1341 Confidential *Submission 629*.
1342 *Immigration Act 1980* (NI) s 19.
1343 *Immigration Act 1980* (NI) s 19(5).
1344 *Immigration Act 1980* (NI) s 20(2).
1345 Confidential *Submission 629*.
1346 Letter dated 4 November 1994.
1347 ibid.
1348 Australia, Parliament, House of Representatives Standing Committee on Legal and Constitutional Affairs (1991) *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory* AGPS Canberra, para 7.14.1.
1349 Letter from Norfolk Island Government dated 4 November 1994.
1350 Officers of the Administration of Norfolk Island *Consultation* 21 September 1994.
1351 Department of Industrial Relations, *Submission 41*, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Islands in the Sun: Legal Regimes of Australia's External Territories and the Jervis Bay Territory*, 703.
1352 Excluding students.
1353 eg Confidential *Submission 624*; Confidential *Submission 630*.
1354 Officers of the Administration of Norfolk Island *Consultation* 21 September 1994.
1355 eg Confidential *Submission 629*. Employment-related complaints are dealt with under the *Employment Act 1988* (NI) by a Conciliation Board in the first instance then the Court of Petty Session sitting as the Employment Tribunal. The final avenue of appeal is the Supreme Court of Norfolk Island.
1356 Confidential *Submission 629*.
1357 Confidential *Submission 629*.
1358 This review is being cordinated by the Hon Nadia Lozzi-Cuthbertson OAM MLA, Minister for Health and Education.
1359 Total expenditure on these sub-programs are estimated at $1.177m in 1994-95 (source: Department of the Environment, Sports and Territories).
1360 In 1990-91 and 1991-92 the Department of the Environment, Sport and Territories established that total Commonwealth expenditure on Norfolk Island was $6.149m and $3.353 m respectively.
1361 Australia, Parliament, House of Representatives Standing Committee on Legal and Constitutional Affairs (1991) *Islands in the Sun: Legal Regimes of the External Territories and the Jervis Bay Territory*, para 7.16.5.
1362 For example, the Norfolk Island Aerodrome became wholly owned by the Norfolk Island Government in 1991: *Airport Act 1991* (NI).
1363 Australia, Parliament, House of Representatives Standing Committee on Legal and Constitutional Affairs (1991) *Islands in the Sun: Legal Regimes of the External Territories and the Jervis Bay Territory* AGPS Canberra, para 7.20.4.
1364 ibid.
1365 Government response to report of the House of Representatives Standing Committee on Legal and Constitutional Affairs (1991) *Islands in the Sun: Legal Regimes of the External Territories and the Jervis Bay Territory*, 29-30.
1366 Australian Law Reform Commission Discussion Paper 54 *Equality before the law* ALRC Sydney 1993 (ALRC DP 54).
1367 CEDAW art 7:
States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
(c) To participate in non-governmental organisations and associations concerned with the public and political life of the country.
1368 As at 31 March 1994: Department of the Parliamentary Library Information Services *Current list of women members of Federal and State Parliaments 31 March 1994* Parliament House Canberra, 22.
1369 id, 3-4.
1370 id, 22.
1371 South Australia and Queensland.
1372 Ms Rosemary Follett MLA elected in the ACT.
1373 Western Australia, Victoria and the ACT.
1374 J Thompson *Submission 613*.
1375 Women's Electoral Lobby ACT *Submission 281;* Women Into Politics, A Coalition of Women's Organisations *Submission 546*; Women's Electoral Lobby VIC *Submission 307*; Confidential *Submission 190*; Australian Federation of Business and Professional Women Incorporated *Submission 151*; Women's Policy Unit and Women's Adviser to the Premier QLD *Submission 286;* Women's Council South Australian Liberal Party *Submission 315;* J Thompson *Submission 613.*
1376 J Thompson *Submission 613.*
1377 id.
1378 Women's Electoral Lobby Australia Inc *Submission 281*.
1379 Women Into Politics, A Coalition of Women's Organisations *Submission 546.*
1380 A Ramsay *Sydney Morning Herald* Saturday 15 October 1994, 39.
1381 s 66 (3)(b).
1382 Women into Politics, a Coalition of Women's Groups *Submission 546*.
1383 Hon J Carlton 'Women in parliament' *Women in government seminar* Brisbane, 6 October 1993 among others.
1384 Women's Electoral Lobby VIC *Submission 307* cites the example of Sweden where proportional representation has produced a parliament with more than 40% women.
1385 J Thompson *Submission 613.*
1386 eg Women Into Politics, A Coalition of Women's Organisations *Submission 546.*
1387 Women into Politics, A Coalition of Women's Organisations *Submission 546*; J Thompson *Submission 613.* See also Women's Electoral Lobby Australia *Submission 281* which states that it supports the recommendation of the House of Representatives Standing Committee on Legal and Constitutional Affairs *Half way to equal: Report of the inquiry into equal opportunity and equal status for women in Australia* AGPS Canberra 1992 that the aim should be to have women hold 50% of parliamentary seats by 2000.
1388 Women's Electoral Lobby VIC *Submission 307*; J Thompson *Submission 613.* See also B McGarity 'Why more women into politics?' attachment Women into Politics, A Coalition of Women's Organisations *Submission 546.*
1389 J Thompson *Submission 613* quoting Dr Marian Sawer, an expert in the area of women and politics.
1390 Women's Electoral Lobby Australia *Submission 281*; Women into Politics, A Coalition of Women's Organisations *Submission 546.*

1391 Office of the Status of Women *Women Shaping and Sharing the Future. The New National Agenda for Women 1993-2000,* OSW Canberra 1993, 5.
1392 Women's Electoral Lobby Australia Inc *Submission 281.*
1393 Women's Electoral Lobby Australia Inc *Submission 281.*
1394 Confidential *Submission 190*. Local councils are not subject to State anti discrimination legislation in, for example, the provision of services.
1395 The establishment of the committee was announced by the Minister for Administrative Services, Mr Walker, on 14 October 1994.
1396 Women into Politics, A Coalition of Women's Organisations *Submission 546*.
1397 Women Into Politics, A Coalition of Women's Organisations *Submission 546.*
1398 Women, Power and Politics Conference, Adelaide, October 1994.
1399 These included Australian Institute for Women's Research and Policy *Submission 80*; L Savage, T White *Submission 81*; Australian Federation of Business and Professional Women Inc *Submission 151*; L Lucas *Submission 153*; Taxation Institute of Australia *Submission 162*; Presbyterian Women's Association of Australia *Submission 173*; Sisters-in-Law *Submission 195*; Australian Family Association *Submission 200*; Country Women's Association of NSW *Submission 202*; A O'Connor *Submission 209*; K Geiselhart *Submission 212*; M Clarke *Submission 221*; R Owens *Submission 222;* W Welsh *Submission 234*; S Armstrong *Submission 274*; North Queensland Combined Women's Service *Submission 275;* Women's Electoral Lobby Australia Inc *Submission 281*; C D Wilcock *Submission 283;* Women's Adviser's Unit South Australian Department of Labour *Submission 285*; Older Women's Network TAS *Submission 304*; Co-ordinator, Women's Action Alliance Australia Inc *Submission 308*; ACTU Quennsland Branch *Submission 311*; R Gibson *Submission 326*; J Trutwein *Submission 331*; National Women's Consultative Council NSW Submission 342; National Council of Women, Launceston *Submission 447*; Department of Industrial Relations *Submission 616*.
1400 eg Sisters-in-Law *Submission 195;* Women's Adviser's Unit South Australian Department of Labour *Submission 285.*
1401 eg L Lucas *Submission 153.*
1402 Submissions dealing with discrimination in employment are discussed in the context of the *Sex Discrimination Act 1984* (Cth): ALRC 69(1), ch 3. See discussion of discrimination experienced by women in the legal profession ch 9; discussion of discrimination against home based workers para 2.3.
1403 Discussed in ch 11.
1404 Endeavour Forum South West Region *Submission 147*.
1405 Co-ordinator, Women's Action Alliance Australia Inc *Submission 308.*
1406 Women's Adviser's Unit South Australian Department of Labour *Submission 285.*
1407 Sex Discrimination Commissioner Cth *Submission 338.*
1408 North Queensland Combined Women's Service *Submission 275.*
1409 Australian Federation of Business and Professional Women Inc S*ubmissions 151;* Country Women's Association of NSW *Submission 202;* National Council of Women, Launceston *Submission 447.*
1410 *Income Tax Assessment Act 1936* (Cth) s 51(1).
1411 (1972) 128 CLR 171.
1412 id, 175.
1413 Taxation Institute of Australia *Submission 162*.
1414 Sex Discrimination Commissioner Cth *Submission 338.*
1415 Women's Adviser's Unit South Australian Department of Labour *Submission 285.*
1416 Women's Electoral Lobby Australia Inc *Submission 281.*
1417 Australian Law Reform Commission Report 70 *Child care for kids* ALRC Sydney 1994 (ALRC 70), para 2.7.
1418 id, para 4.51-4.59.
1419 ABS records that in 1947 about 8% of married women between the ages of 25 and 54 were employed in the paid work force whereas in 1991 this figure had climbed to 65%: Australian Bureau of Statistics *1994 Year Book* ABS Canberra 1993.
1420 164% increase in the 20 year period 1973-1993: Australian Bureau of Statistics *Australian social trends 1994* Cat No 4102.0 ABS Canberra 1994, 103.
1421 Part time work includes permanent part time work (sometimes termed 'fractional employment'). The terms and conditions in this work are generally similar to those of full time work although opportunities for promotion and training may in practice be affected. 'Casual work' may be full time.
1422 In August 1993, 76.8% of part time positions were filled by women and 59.7% of casual positions were filled by women; source ABS.
1423 Sisters-in-Law *Submission 195.*
1424 Department of Industrial Relations *Submission 616.*
1425 Sisters-in-Law *Submission 195;* R Owens *Submission 222;* Women's Adviser's Unit South Australian Department of Labour *Submission 285*.
1426 R Owens *Submission 222* now published as 'Women, 'atypical' work relations and the law' (1993) 19 *Melbourne Universty Law Review* 399, 411.
1427 id.
1428 Confidential *Submission 198*.
1429 See *Federated Miscellaneous Workers Union v Adelaide Milk Supply Co-operative* 1978 AILR 418 and 1979 AILR 48 and *Federated Ironworkers Association of Australia v John Perry Ltd* 1979 AILR 157. See also *Wynes v Southrepps Hall Broiler Farm Ltd* [1968] ITR 407 (IT).
1430 R Owens *Submission 222* now published as 'Women, 'atypical' work relations and the law' (1993) 19 *Melbourne Universty Law Review* 399, 412.
1431 W Welsh *Submission 234.*
1432 Women's Adviser's Unit South Australian Department of Labour *Submission 285.*
1433 Tasmanian Women's Consultative Council *Submission 534.*
1434 See eg *Speering v Minister for Education* (1993) EOC 92-513.
1435 Sex Discrimination Commissioner Cth *Submission 338.*
1436 ibid.
1437 Art 3.
1438 SDA s 7A.
1439 *Industrial Relations Act 1988* (Cth) s 170 KA & Schedule 13. See also *ACT Minister for Health v Australian Nursing Federation* AIRC l2261 Sydney, 11 March 1994.
1440 Attorney-General's Department Legislation Working Group of the ILO 156 Interdepartmental Committee *Workers with family responsibilities - Discimination legislation - An issues paper* Attorney-General's Department 1993, 13.
1441 Department of Industrial Relations *Submission 616.*
1442 *Parental Leave Test Case* (1990) 36 1 R 1.

1443 Australian Federation of Business and Professional Women Inc *Submissions 151;* Confidential *Submission 198;* Women's Electoral Lobby Australia Inc *Submission 281;* Women's Adviser's Unit South Australian Department of Labour *Submission 285;* Sex Discrimination Commissioner Cth *Submission 338;* Tasmanian Women's Consultative Council *Submission 534.*

1444 eg Australian Federation of Business and Professional Women Inc *Submission 151*.

1445 National Council for the International Year of the Family *The heart of the matter* AGPS Canberra 1994, 50.

1446 National Women's Consultative Council *Paid maternity leave* AGPS Canberra 1993, 58.

1447 In 1992, of all people over the age of 64, there were 76 males to every 100 females: Australian Bureau of Statistics *Year book Australia 1994* ABS Canberra 1993.

1448 Minister for Social Security *Better incomes: Retirement income policy into the next century* AGPS Canberra 1992.

1449 See para 15.21.

1450 S Armstrong *Submission 274.*

1451 Figures supplied by Office of the Status of Women, Canberra.

1452 See Human Rights and Equal Opportunity Commission *Sex Discrimination Act 1984 superannuation guidelines* HREOC Sydney 1993.

1453 C Brown, Retirement Income Modelling Task Force, Department of Treasury 'The distribution of private sector superannuation assets by gender, age and salary of members' *Second annual colloquium of superannuation reseachers, May 1994*.

1454 Office of the Status of Women *Submission 634.*

1455 S Armstrong *Submission 274.*

1456 R Clare & A Tulpule *Australia's ageing population* EPAC Background paper No 41 AGPS Canberra 1994, 49.

1457 For example, the qualifying age for the Age Pension for women has been raised.

1458 See D Broun & S Fowler (ed) *Australian family law & practice* CCH ,31,201. See also ch 2, para 2.30.

1459 Attorney-General's Department *Family Law Act 1975 Directions for amendment; Government Response to the report by the joint select committee on certain aspects of the operation and interpretation of the Family Law Act 1975* Attorney-General's Department Canberra 1993.

1460 See ALRC 69(1), para 2.20.

1461 Women's Bureau Department of Employment Education and Training (1994) 15(1) *Women and Work* DEET, 3-4.

1462 For example among salespersons, women are under-represented in investment, insurance and real estate, and over-represented among tellers, cashiers and ticket salespersons (as at August 1992): Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993, 125-126.

1463 Women's Electoral Lobby Australia Inc *Submission 281;* Women's Adviser's Unit South Australian Department of Labour *Submission 285;* Tasmanian Women's Consultative Council *Submission 534.* ACTU Queensland Branch *Submission 311.*

1464 D McCulloch, K Conley, M Martinelli, M Mati, R Walsh *Submission 537.*

1465 *Equal Pay Case (Commonwealth Public Service Association (Fourth Division Officers) v Public service Board)* (1972) 147 CAR 172; *Equal Pay Case* (1964) 127 CAR 1142.

1466 Women's Adviser's Unit South Australian Department of Labour *Submission 285.*

1467 Tasmanian Women's Consultative Council *Submission 534.*

1468 Sex Discrimination Commissioner Cth *Submission 338.*

1469 Australian Federation of Business and Professional Women Inc *Submission 151*.

1470 National Women's Consultative Council NSW *Submission 342.*

1471 See McCallum, McCarry, Ronfeldt (eds) *Employment Security* Federation Press Sydney 1994, 91 et seq.

1472 Art 3(3).

1473 ILO Committee of Experts on the Application of Conventions and Recommendations 1986, 21.

1474 See J George 'Developments in industrial relations and their effects on women', *Women Management and Industrial Relations Conference* Macquarie University 6 July 1994.

1475 Confidential *Submission 506.*

1476 Australian Federation of Business and Professional Women Inc *Submission 151.*

1477 Country Women's Association of NSW *Submission 202.*

1478 Confidential *Submission 190.*

1479 *Industrial Relations Act 1988* (Cth) s 170 MG.

1480 SDA s 50A.

1481 D Bagnall 'He's (still) the boss' *Bulletin* 9 August 1994.

1482 Confidential *Submission 168.*

1483 ACTU Queensland Branch *Submission 311.*

1484 Scarlet Alliance *Submission 1*; L Jackson *Submission 156*; Prostitutes Association of South Australia *Submission 60;* Prostitutes Collective of Victoria Inc *Submission 164*; Women's Legal Service Inc Brisbane *Submission 379*; Prostitutes Association of the Northern Territory for Health, Education and Referral Inc *Submission 418*;Women's Electoral Lobby Cairns *Submission 113*.

1485 Most notably the Victorian Government 1985 *Report on Inquiry into Prostitution* partly implemented in the *Prostitution Regulation Act 1986 (Vic).Part 3 and s.77(b)* were not proclaimed.

1486 id.

1487 Criminal Justice Commission R*egulating morality? An inquiry in to prostitution in Queensland* 1991; New South Wales Select Committee *Report of the Select Committee Upon Prostitution* 1986. Studies into the health practices of sex workers and the platform of many prostitute collectives provide evidence of a high level of safe sex practice and awareness of health issues. It is well documented that use of alchohol, tobacco and other drugs are related to the stressful and exploitative working conditions of most prostitutes. R Perkins *Health Aspects of Female Private Prostitutes in NSW* Report to the National Health and Medical Research Council, Canberra 1994.

1488 Scarlet Alliance *Submission 1*.

1489 Prostitutes Collective of Victoria Inc *Submission 164.*

1490 R Perkins, G Prestage, R Sharp, F Lovejoy (ed) *Sex work and sex workers in Australia* University of New South Wales Press Sydney 1994, 67.

1491 *Summary Offences Act 1988* (NSW); *Crimes (Child Prostitution) Amendment Act 1988* (NSW); *Prostitution Regulation Act 1986* (Vic); *Police Act 1892-1982* (WA), *Criminal Code Act 1913* (WA); *Prostitution Laws Amendment Act 1992* (Qld); *Prostitution Regulation Act 1992* (NT); *Police OffencesAct 1935* (Tas).

1492 Tasmania, South Australia, Western Australia and Queensland.

1493 NSW, Victoria, Northern Territory and ACT.

1494 eg in Queensland all types of prostitution are illegal, except for private work as a single operater: *Prostitution Laws Amendment Act 1993* (Qld). In Victoria, while criminal laws still control street work and illegal brothels, the sex industry has been likened to a cottage industry structure with strict licensing and planning laws governing brothels: *Prostitution Regulation Act 1986* (Vic).

1495 Prostitutes Collective of Victoria Inc *Submission 164.*

1496 Criminal Justice Commission *Regulating morality? An inquiry in to prostitution in Queensland* 1991. A similar situation exists in Western Australia and South Australia.

1497 eg Women's Legal Service Inc Brisbane *Submission 379.*
1498 Prostitutes Collective of Victoria Inc *Submission 164*.
1499 *Police Act 1892* (WA) s 59; *Summary Offences Act 1953* (SA) s 25; *Police Offences Act 1935* (TAS) s (8)(1)(c).
1500 *Summary Offences Act 1988 (*NSW) s 4, 19, 20; *Prostitution Regulation Act 1986 (*VIC) s 5; *Prostitution Regulation Act 1992* (STATE) s 10; *Criminal Code* (QLD) s 229I, 229J, 229H; *Vagrancy Gaming and other Offences Act 1931* (QLD) s 18a.
1501 Scarlet Alliance *Submission 1*; Prostitutes Association of South Australia *Submission 60*; L Jackson *Submission 156*; Prostitutes Collective of Victoria Inc *Submission 164*; Prostitutes Association of the Northern Territory for Health, Education and Referral Inc *Submission 418*; Women's Legal Service Inc Brisbane *Submission 379.*
1502 Women's Legal Service Inc Brisbane *Submission 379.*
1503 Criminal Justice Commission *Regulating morality? An inquiry in to prostitution in Queensland* 1991. The Victorian industry has been recognised to some extent to be a workable model. Sex workers report that this does not guarantee improvement in working conditions but pushes control into fewer hands and has not necessarily changed police or community attitudes towards sex workers. See Women's Legal Service Inc Brisbane *Submission 379.*
1504 Women's Legal Service Inc Brisbane *Submission 379.*
1505 See para 15.47.
1506 The Scarlet Alliance *Submission 1.*
1507 Prostitutes Collective of Victoria Inc *Submission 164.*
1508 ibid.
1509 Prostitutes Association of South Australia *Submission 60.*
1510 Prostitutes Collective of Victoria Inc *Submission 164.*
1511 Women's Legal Service Inc Brisbane *Submission 379.*
1512 Prostitutes Collective of Victoria Inc *Submission 164.*
1513 Prostitutes Association of South Australia *Submission 60.*
1514 The Scarlet Alliance *Submission 1.*
1515 eg Prostitutes Association of South Australia *Submission 60*; Women's Legal Service Inc Brisbane *Submission 379.*
1516 Women's Legal Service Inc Brisbane *Submission 379.*
1517 The Scarlet Alliance *Submission 1.*
1518 Women's Legal Service Inc Brisbane *Submission 379.*
1519 Prostitutes Collective of Victoria Inc *Submission 164.*
1520 Scarlett Alliance *Submission 1.*
1521 Prostitutes Association of South Australia *Submission 60.*
1522 For instance M Edwards *Submission 14*; S Reynolds *Submission 61*; B Humphries *Submission 74*; B Campbell *Submission 84*; J Duff *Submission 85*; V Cook *Submission 86*; J Hannell *Submission 91*; Women's Electoral Lobby Cairns *Submission 113*; J Hair *Submission 120*; Norwood Community Legal Centre SA *Submission 170*; Liechhardt Women's Community Health Centre Inc NSW *Submission 172*; Presbyterian Women's Association of Australia; *Submission 173*; C Kennedy *Submission 174*; Gosnells District Information Centre Inc WA *Submission 186*; Australian Family Association *Submission 200*; B Kozyrski *Submission 232*; W Welsh *Submission 234;* Working Women's Centre *Submission 242*; G Comess *Submission 245*; A Cleland *Submission 248*; G and L McCulloch *Submission 252;* D Ali *Submission 261*; J Brooke *Submission 257*; S Blaikie *Submission 211*; Women's Legal Resources Centre, Sydney *Submission 256*; North Queensland Combined Women's Service *Submission 275*; J Clark *Submission 277*; Central Coast Community Women's Health Centre NSW *Submission 279*; L Intemann *Submission 296*; R Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson and S Panagiotidis *Submission 292*; C Woods *Submission 325*; S T Rhode *Submission 300*; National Council of Women of Australia *Submission 378*; A Guy *Submission 405*; L Defrenne *Submission 423*; N Eason *Submission 539*; D Barclay *Submission 419*; D M Newton *Submission 466*; L O'Connor *Submission 490*; J Wilczynski *Submission 559*; P Page *Submission 600*; J A Davies *Submission 595*; Lone Fathers Association WA *Submission 598*. Also 21 Confidential submissions.
1523 Ch 8 dealt with the relevance of domestic violence under the *Family Law Act.* Ch 6 dealt with legal aid.
1524 Australian Law Reform Commission Report 57 *Multiculturalism and the law* ALRC Sydney 1992, para 5.26.
1525 This issue was raised in many submissions eg Legal Aid Office ACT *Submission 294*; H Cox *Submission 170*; Women's Electoral Lobby VIC *Submission 307*; Gosnells District Information Centre Inc WA *Submission 186*; Confidental *Submission 141*; *Confidential Submission 441*; M Court *Submission 443.*
1526 One submission for instance recommended legislation for South Australia similar to that of NSW or NT with the jurisdictional limits of civil divisions in magistrates and district courts whereby property claimed above these limits or complex matters or issues of general importance should be brought in or referred to the Family Court: H Cox *Submission 170*.
1527 J Davies *Submission 595*: Confidential *Submission 528*: Confidential *Submission 501*.
1528 Confidential *Submission 501.*
1529 Legal Aid ACT *Submission 294*.
1530 id.
1531 See also criticism by the Family Law section, Law Council of Australia, August 1994.
1532 R Friend *Submission 68*; Public Sector Union Queensland Branch *Submission 167*; K Walker, M Stewart, F Ammett & K Birthisel *Submission 175*; Gay & Lesbian Rights Lobby and the Lesbian & Gay Legal Rights Service, Sydney *Submission 193*; Northern Community Legal and Welfare Rights Centre TAS *Submission 239*; ACTU Queensland Branch *Submission 311*.
1533 A number of submissions discuss abortion eg Women's Electoral Lobby QLD *Submission 113*; Children by Choice Association QLD *Submission 208*; M Clarke *Submission 221*; Women's Abortion Campaign QLD *Submission 225*; T Jeffcoat *Submission 328*; Abortion Law Repeal Association NSW *Submission 593.*
1534 Children by Choice Association QLD *Submission 208.*
1535 T Jeffcoat *Submission 328.*
1536 Women's Abortion Campaign QLD *Submission 225.*
1537 L Savage, T White *Submission 81.*This submission contains 30 stories and comments on WA law.
1538 The Commission majority (President Alan Rose, Deputy President Sue Tongue, Professor Rebecca Bailey-Harris, Justice Elizabeth Evatt, Michael Ryland and Chris Sidoti) considers that the only area of disagreement is whether the Equality Act should apply to both women and men and to both the public and private spheres. The majority has no fundamental difference with the minority's understanding of gender bias in this chapter.
1539 Professor Hilary Charlesworth, Associate Professor Regina Graycar, Associate Professor Jenny Morgan.
1540 This is commented on further below in our discussion of the Senate Standing Committee on Legal and Constitutional Affairs report on *Gender Bias and the Judiciary* May 1994.
1541 Justice Deirdre O'Connor. Remarks made at Law and Literature Association Annual Conference October 1993.
1542 *Livesey v NSW Bar Association* (1983) 151 CLR 288; *R v Maurice; Ex Parte Attoreny-General (NT)* (1987) 73 ALR 123.

1543 Margaret Allars *Introduction to Australian Administrative Law* Butterworths Sydney 1990 at 271-272, referring to *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256 and *R v Watson, Ex Parte Armstrong* (1976) 136 CLR 248.

1544 Bronwyn Naylor, 'Pregnant Tribunals' (1989) 14 *Legal Service Bulletin* 41. As a letter to The Age newspaper suggested: 'why would Ms S be likely to favour a nursing home? A maternity wing, maybe ...'. The Age, 4 February 1989, cited in Naylor, *op cit*. Although the bias challenge had little chance of success, the applicant might have been more successful with a challenge on another administrative law ground, that the decision was 'so unreasonable that no reasonable decision maker could possibly have' made that decision. See Graycar and Morgan *The Hidden Gender of Law* Federation Press 1990 at 190.

1545 *Sydney Morning Herald* 20 April 1990 at 5. The Attorney-General subsequently successfully sought to have this decision quashed: *R v A Judge of District Courts and Shelley, Ex Parte Attorney-General* [1991] 1 Qd R 170. Compare the recent decision of the US Supreme Court in *JEB v Alabama ex rel TB* 62 USLW 4219 (US 1994).

1546 See, for example, *Blank v Sullivan and Cromwell* 418 F Supp 1 (SDNY 1975). This case is discussed by Peggy C Davis 'Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style' (1991) 66 *New York University Law Review* 1635 at 1638, by Martha Minow 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201 at 1207 and by Judy Scales-Trent 'Women in the Lawyering Process: The Complications of Categories' (1990) 35 *New York Law School Law Review* 337.

1547 *Pennsylvania v Local Union 542, International Union of Operating Engineers* 388 F Supp 155 (ED Pa, 1974), discussed by Minow, n.9 above, at 1207.

1548 See *The Queen v Commonwealth Conciliation and Arbitration Commission and Ors: Ex Parte the Angliss Group* (1969) 122 CLR 546. The challenge was unsuccessful. The High Court decided that neither the statements made in favour of equal pay nor the holding of such a view 'would justify a reasonable apprehension that a member of the Commission might not bring or be able to bring to the work of the Commission involving the question of equal pay a fair and unprejudiced mind able with judicial propriety to decide the matter before it' (at 555).

1549 *Kaycliff Pty Ltd and Ors v ABT* (1989) 90 ALR 310. The full Federal Court rejected the challenge, endorsing the view of the primary judge who said:'it would be wrong to conclude that a casual statement by a husband of his views on a matter under consideration by a tribunal of which his wife is a member gives rise to a reasonable apprehension that the husband's views might have been formed after discussion with his wife, or might be communicated to his wife' (cited at 320).

1550 See *The Great Atlantic and Pacific Company of Canada Ltd v Ontario (Human Rights Commission)* (1993) 109 DLR (4th) 224. As administrative lawyer Professor Margaret Allars has suggested: 'Where individuals are appointed as members of tribunals by virtue of their expertise, their very expertise may expose them to claims of an appearance of bias', Allars *Introduction to Australian Administrative Law* Butterworths Sydney 1990 at 272. Allars was commenting here on the decision in *Koppen v Commissioner for Community Relations* (1986) 67 ALR 215, where an Aboriginal woman conciliator was successfully challenged after referring to the fact that her daughter had been excluded from a club the subject of a race discrimination complaint. Allars went on to say, 'The chairperson's compliance with the requirement of procedural fairness that special knowledge be disclosed, simultaneously involved her in creating the appearance of bias. The bias rule required her to disqualify herself from chairing the conference. But the dividing lines between general and special knowledge of discrimination and between conciliation and participation in the dispute will often be difficult to draw, making the role of experts in the anti-discrimination area an uncertain one' (at 273).

1551 Judy Scales-Trent, 'Women in the Lawyering Process: The Complications of Categories' (1990) 35 *New York Law School Law Review* 337.

1552 *Pennsylvania v Local Union 542, International Union of Operating Engineers* 388 F Supp 155, at 177 (ED Pa, 1974).

1553 Now published in (1990) 28 *Osgoode Hall Law Journal* 507.

1554 id, at 522.

1555 This was the position of REAL (Realistic, Equal, Active for Life) Women as outlined in a letter to the newspaper; see *Toronto Star* 24 February 1990.

1556 See Trindade and Cane The Law of Torts in Australia OUP Melbourne 1985 at 390. Compare, 2nd edition, at 490. Note, however, that the 2nd edition (1993) talks of all plaintiffs as either he, or in a gender-neutral way (for example, the 'plaintiffs who have spent most of their adult lives as domestic carers').

1557 Sean Cooney 'Gender and Judicial Selection: Should There Be More Women on the Courts?' (1993) 19 *Melbourne University Law Review* 20 at 21.

1558 See *Equality Before the Law: Justice for Women,* First Main Report No 69 1994 Chapter 2 and see comments by Justice Sally Brown quoted in *The Australian* November 18 1993.

1559 See generally *The Hidden Gender* of Law chapter 1.

1560 Catharine MacKinnon *Feminism Unmodified* Harvard University Press Cambridge 1987 at 103.

1561 This is not to suggest that there is not also an additional gender dimension to Aboriginal imprisonment: when Aboriginal women's rate of imprisonment is compared to those of non-Aboriginal women there is an even greater disproportion than when Aboriginal men's rate of imprisonment is compared to that of non-Aboriginal men: See *Implementation of Commonwealth Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* First Annual Report 1992-93 Volume 1 Table 11 23.

1562 In *re Edith Haynes* (1904) 6 WAR 209. This case, and other related Australian cases are discussed by Margaret Thornton in 'Embodying the Citizen' in Thornton (ed) *Fragile Frontiers: Feminist Debates about Public and Private* Oxford University Press 1995 (forthcoming). For discussion of the Canadian 'persons' cases, see Mary Jane Mossman '"Invisible" Constraints on Lawyering and Leadership: The Case of Women Lawyers' (1988) 20 *Ottawa Law Review* 567 and 'Women Lawyers in Twentieth Century Canada: Rethinking the Image of Portia' in R Graycar (ed) *Dissenting Opinions: Feminist Explorations in Law and Society* Allen and Unwin 1990.

1563 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

1564 See *Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1993.*

1565 See Graycar and Morgan *The Hidden Gender of Law* at 258-9.

1566 See Submissions 58, 276 and 306. And see para 5.31 Report No 69, Part I.

1567 See *Submissions 185, 230, 250.*

1568 Lesbian Legal Rights Group (Victoria) *Submission* 251, at 18. They also point out (at 17) that the work of most government organisations, including the National Committee on Violence Against Women, makes no specific reference to violence against lesbians.

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1570 Pitcairn Island is situated approximately 6800 kilometres to the east of Norfolk Island.

1571 If Norfolk Island was ever annexed to the Colony of New South Wales, this Order had the effect of severing the connection. The Order also had the effect of vesting the Governor of New South Wales with the authority of Governor of Norfolk Island.

1572 This enabled the Governor to legislate for Norfolk Island not in his capacity as Governor of Norfolk Island but as Governor of the New South Wales Colony. Immediately prior to federation in 1901, these powers were transferred to the Governor of the State of New South Wales.

1573 In 1975 the Whitlam Government appointed Sir John Nimmo as Royal Commissioner. He was asked 'to make inquiry into and to report and make recommendations on the future status of Norfolk Island and its constitutional relationship with Australia'. The Nimmo Report was

tabled in federal Parliament in November 1976. Its principal recommendations included greater autonomy for the Island through the establishment of a Norfolk Island Legislative Assembly, representation in federal Parliament and application of Australian income tax and social security regimes to the Island.

1574 The permanent population comprised residents (1294 persons or 56.6% of the total popul;ation) and persons holding general entry permits under the *Immigration Act 1980* (NI) (184 persons or 8.1% of the total population).

1575 Of these 424 persons, 424 (19.6%) held temporary entry permits; the remaining 10 persons (0.4%) did not require or were awaiting permits.

1576 *Citizenship Act 1948* (Cth).

1577 29.6% of the permanent population were born on the Australian mainland, 23.8% were born in NewZealand, 4.9% were born in the United Kingdom and 4.4% were born in other countries.

1578 Norfolk Island is not part of Australia for the purposes of the *Health Insurance Act 1973* (Cth) and persons resident on the island are not eligible to receive benefits under the Medicare program. Members of the Norfolk Island Healthcare Scheme (all persons aged 18 years and over) are levied $130 every six months. Members (whether families or individuals) must pay the first $3,000 of medical expenses.

1579 See fn 6.

1580 see fn 7.

1581 Ordinary residents includes permanent and itinerant residents; it does not inludes tourists and others on visitor permits.

1582 see fn 13.

1583 73 men and 38 women.

1584 21 women and 17 men.

1585 The Ministers of the Seventh Norfolk Island Legislative Assembly are: the Hon Michael King (Tourism and Works); the Hon Nadia Lozzi-Cuthbertson (Health and Education); the Hon Geoff Bennett (Finance); and the Hon Neville Christian (Environment). The President of the Seventh Norfolk Island Legislative Assembly is David Buffet. Monica Anderson is the Deputy President. The other members of the Assembly, excluding the President and Deputy President, are Brian Bates, Robert Adams and Helen Sampson. Under the *Legislative Assembly Ordinance 1979* (NI), a person is entitled to be enrolled to vote (and stand for election) in Legislative Assembly elections if the person is 18 years of age or over and has been present in Norfolk Island for a total of 900 days during the 4 years immediately preceeding the person's application for enrolment: s 6(1).

1586 The Minister for Tourism and Works, the Hon Michael King.

1587 s 35.

1588 *Norfolk Island Act 1979* (Cth) s 19(2) prohibits the Legislative Assembly from making laws: authorising the acquisition of property otherwise on just terms: authorising the raising or maintaining of any naval, military or air force: or authorising the coining of money.

1589 See *Northern Territory (Self-Government) Act 1978* (Cth) s 6, *Australian Capital Teritory (Self-Government) Act 1988* (Cth) s 22.

1590 See eg *Northern Territory (Self Government) Act 1978* (Cth) s 49.

1591 Goods imported to Australia from Norfolk Island will be subject to duty if they are not produced or manufactured in the Territory, shipped in the Territory for export to Australia or otherwise subject to excise duty: s 64.

1592 s 21(5). Schedule 2 includes matters such as revenue raising, street lighting, water sewerage and drainage, roads, firearms, radio and television, telephone and postal services, registration of companies, births deaths and marriages, public works and civil defence and emergency forces.

1593 s 21(6). Schedule 3 includes matters such as fishing, customs (including the imposition of duties), immigration, education, quarantine and social security.

1594 s 23.

1595 *Federal Court Act 1979* s 24, 25.

1596 Court of Petty Sessions Ordinance 1960 s 33A (inserted by *Court of Petty Sessions Amendment Act 1991* (NI) s 2).

1597 *Berwick Ltd v RR Gray, Deputy Commission for Taxation* (Cth) (1976) 133 CLR 603.

1598 s 7.

1599 Australian Constitution s 122.

1600 Sub-section (2).

1601 Sub-section (1).

1602 s 28.

1603 s 16.

1604 *Norfolk Island Act 1957* (Cth) s 12.

1605 Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory* (1991) AGPS Canberra.