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# Terms of reference

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## 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

# 1. The reference

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## The importance of the reference

### *One woman's experience*

1.1 One woman's experience demonstrates the importance of this reference. The woman appeared at the Commission's hearings and spoke of her fear of her partner's violence. He had recently been awarded custody of their child. Less than a month later the Commission was told that he had shot the child and killed himself. The child is now recovering. The work on this reference assumed even more relevance and importance.

### *Listening to what women had to say*

1.2 All over Australia women came to the Commission to explain how the legal system had failed them. Some spoke as professionals on behalf of their clients, others came bravely to relate their own experience in the hope that other women may be spared. Reporting on the oral hearing in Bunbury one woman wrote:

*This was a special occasion to be able to speak to a woman who reflected no minimisation of our suffering. We were treated with respect and carefully listened to with a glimmer of hope for change to our society and our legal system . . . Some involved found this experience to be a highly emotional and/or empowering event. It is not easy to talk about such deep and disturbing places of our past and present. A feeling of encouragement was present in the room . . . It was refreshing to relate to a woman . . . who could inform the authorities of the inequality and desperation some of us live in . . .<sup>1</sup>*

Women told how the horror of the violence against them from their partners and ex-partners or from an assailant had been compounded by the law's failure to protect them. They complained of the lack of services to meet their needs, of ineffective legal remedies and of their humiliation by a system of justice that they perceived as trivialising their injuries and disbelieving them. The accumulated experiences of the women shocked and moved members of the Commission and imbued them with a sense of the urgency of the need for change.

### *Equality and violence*

1.3 The Commission knew that violence was a serious problem for women but the intensity and uniformity of the women's submissions brought home to the Commission that the link between women's inequality and violence was fundamental. The legal system's tolerance of violence against women underwrites women's inequality before the law. Women cannot be equal until the legal system

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1. Waratah Support Centre *Waratah Magazine* Bunbury Summer 1993, 15.

responds effectively to violence and until women are treated as equals, violence against them will not be reduced. The experience of violence is in itself disempowering for women and impedes their access to legal services.

### *Equality and access to justice*

1.4 Women's experiences of violence indicated the difficulties women face in obtaining justice. The urgent need to improve access to justice as a response to violence against women has persuaded the Commission to concentrate on access to justice in this interim report. There are clear directions for change in this area and initiatives that can be taken immediately and effectively. This interim report outlines some of them.

## **Background to the reference**

### *The Prime Minister's announcement*

1.5 The Prime Minister, the Hon Paul Keating, announced the reference to the Australian Law Reform Commission on 10 February 1993 as part of the Government's *New National Agenda for Women*. It is part of the Government's commitment to ensuring full equality for women before the law.

### *The terms of reference*

1.6 The terms of reference were given to the Commission by the then federal Attorney-General, the Hon Michael Duffy, on 8 February 1993. They require the Commission to consider whether laws should be changed, or new laws made, within the power of the Commonwealth

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.

They also require the Commission to consider and recommend non legislative approaches to ensuring women's equality. The terms of reference are set out at the beginning of this interim report.

### *The discussion paper*

1.7 In July 1993 the Commission issued a discussion paper (DP 54) which covered a broad range of issues.<sup>2</sup> Over 8,000 copies of that paper were distributed throughout the community. There was also significant overseas demand for copies. DP 54 asked many questions about the effect of the law and the legal system on women and about how the law and the legal system can be changed to ensure women's equality. It invited both written submissions and participation in public hearings.

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2. Australian Law Reform Commission Discussion Paper 54 *Equality before the law* ALRC Sydney 1993 (DP 54).



### **Consultation**

1.8 The Commission received over 300 written submissions in response to the reference and the discussion paper. Many individual submissions presented the views of large numbers of women consulted by the community groups making them. During August, September and October 1993 the Commission held public hearings in all State and Territory capital cities and the regional centres of Bunbury (WA), Port Lincoln (SA), Mt Gambier (SA), Launceston (Tas), Rockhampton (Qld), Townsville (Qld), Cairns (Qld) and Alice Springs (NT). Approximately 270 oral submissions were made at these hearings. Those making submissions came from a wide range of backgrounds. Many spoke of individual experiences. The Commission has never had such a broad response to any reference. The response was particularly significant in view of the difficulties faced by women in participating as full citizens in the public arena.<sup>3</sup> To do justice to the hundreds of people who participated, the Commission is now undertaking the huge task of analysing these submissions. The short time frame established for this interim report precluded the completion of this analysis and the usual continuing consultation. However, informal discussions have continued with some of those concerned with the issues in this interim report. The work of analysing submissions and the consultation process will continue. A list of submissions appears in Appendix 3.

### ***This interim report***

1.9 ***Request for an interim report.*** The Attorney-General asked the Commission to provide an interim report on this reference by 31 December 1993. Because of the quantity of submissions and other material sent to the Commission, the Attorney-General agreed to extend the date to 31 January 1994. This interim report presents initial findings in general terms. It is, in effect, a progress report. A full discussion of the issues, including the issues addressed in this report, will appear in reports later in the year.

1.10 ***Scope of this interim report.*** In this interim report the Commission outlines what the Commission heard from women and men around Australia. The problems identified by the submissions, the level of continuing public interest in these issues and the work done by other agencies in Australia and overseas are discussed, and the Commission's approach is outlined. The Commission considers it appropriate, indeed essential, to make recommendations in the interim report for an immediate national response on access to justice. The Attorney-General and the Minister for Justice have already recognised the significance of this issue by establishing a Committee on Access to Justice to report by March 1994.<sup>4</sup>

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3. For a discussion of these concerns see National Committee on Violence Against Women *Submission to the Joint Select Committee on certain aspects of the operation and interpretation of the Family Law Act Office of the Status of Women Canberra 1991*, 71.

4. The Access to Justice Advisory Committee, chaired by Mr R Sackville QC, was set up by the Attorney-General and the Minister for Justice in October 1993. It is to make recommendations for reform of the administration of the Commonwealth justice system in order to render it fairer, more efficient and more effective.

1.11 **National Women's Justice Program.** The Commission recommends a National Women's Justice Program as a focus for advancing women's access to the legal system and to ensure that the legal system responds in an appropriate and adequate manner. The recommendations relate to non-legislative measures, in accordance with the terms of reference. Later reports will address legislative measures.

#### ***Previous reports***

1.12 In undertaking its work, the Commission has had regard to a number of previous reports as required by its terms of reference. They are the National Strategy 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* (Cth), 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 (*Half way to equal*), particularly as it refers to the *Sex Discrimination Act 1984* (Cth), the Commission's previous reports on *Multiculturalism and the law* (ALRC 57) and *Matrimonial property* (ALRC 39) and the Review of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986*.

#### ***Future reports***

1.13 The Commission will present its final report in two parts. It anticipates presenting the first part to the Attorney-General in April 1994. It will address in some detail the meaning of equality, the *Sex Discrimination Act 1984* (Cth) and alternative legislative measures to provide for equality, further access to justice and selected legal responses to violence. The second part, which will be presented later in 1994, will address other issues raised in DP 54 and identified as major concerns in submissions.

## **Human rights and equality**

### ***Human rights***

1.14 The terms of reference refer to Australia's international human rights obligations. The Commission's legislation requires it to ensure that Australian laws and proposals for reform are consistent with the *International Covenant on Civil and Political Rights*.<sup>5</sup> Australia's international obligations underlie the Commission's work in this reference. While Australia does not have legally enforceable guarantees of human rights as part of its law there are rules of international human rights law which Australia has undertaken to observe. Some of these are directly relevant to women's equality. These rules are embodied in international legal agreements or treaties (called covenants and conventions) negotiated through the United Nations and its specialised agencies. They express the agreements reached by governments over many years of negotiation. For that reason they represent human rights standards which are common across different economic, political and cultural systems. Three treaties of particular importance for women's

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5. *Law Reform Commission Act 1973* (Cth) s 7(b).

equality and access to the law are the *International Covenant on Civil and Political Rights*<sup>6</sup> (the ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*<sup>7</sup> (the ICESCR), which with the Universal Declaration of Human Rights are called the International Bill of Rights, and the *Convention on the Elimination of all forms of Discrimination Against Women*<sup>8</sup> (CEDAW).

### *Equality rights*

1.15 The ICCPR recognises the equal right of men and women to the enjoyment of the civil and political rights set out in the covenant. It declares specific sex equality rights: not to be discriminated against in the enjoyment of rights,<sup>9</sup> to be equal before courts and tribunals<sup>10</sup> and to be equal before the law and entitled to the equal protection of the law.<sup>11</sup> The ICESCR also recognises sex equality rights: to the enjoyment of rights<sup>12</sup> and to remuneration for work of equal value, equal conditions of work and equal opportunity for promotion.<sup>13</sup> CEDAW also contains important provisions concerning equality for women.

## **Developments since the beginning of the reference**

### *Overview*

1.16 The Commission's work on equality in 1993 coincided with an increased level of interest in the status of women in the Australian community. This interest was reflected in a series of government initiatives for women, in extensive media interest and community debate, and by continuing advocacy and activism by women.

### *Initiatives in 1993*

1.17 *Federal initiatives.* This reference is part of the Government's *New National Agenda for Women*. Released in February 1993, the agenda sets the direction of activities for improving the status of women in Australia to the year 2000.<sup>14</sup> There have been several specific federal initiatives since the reference was given, including:

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6. Adopted by the UN General Assembly 16 December 1966 and ratified by Australia 13 August 1980.
  7. Adopted by the UN General Assembly 16 December 1966 and ratified by Australia 10 December 1975.
  8. Adopted by the UN General Assembly 18 December 1979 and ratified by Australia 28 July 1983.
  9. ICCPR art 2(1) uses the term 'distinction'.
  10. ICCPR art 14.
  11. ICCPR art 26.
  12. ICESCR art 3.
  13. ICESCR art 7.
  14. Office of the Status of Women *Women - Shaping and sharing the future: The new National Agenda for women 1993-2000* Office of the Status of Women AGPS Canberra 1993.

- The Attorney General has released a discussion paper on Phase 2 of the Government's response to *Half way to equal*.<sup>15</sup> Submissions are currently being considered. The ALRC has made a submission on proposed amendments to the *Sex Discrimination Act 1984* based on its work on this reference.
- The Attorney General has also released a discussion paper *Judicial appointments: procedure and criteria* in September 1993.<sup>16</sup> The paper identifies reforms which may ensure that candidates for judicial office are chosen from a broader cross-section of the community. The Commission has made a submission on judicial appointments based on its work on this reference.
- The Senate Standing Committee on Legal and Constitutional Affairs has undertaken an inquiry into whether the publicity surrounding judicial comments in sex offences cases is a proper reflection of a failure by the judiciary to understand gender issues, and the appropriate response to any such failure.<sup>17</sup> A final report has not yet been released.
- The federal Government has responded to the Report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act 1975* (Cth).<sup>18</sup> Legislation to amend the Family Law Act is expected to be introduced in mid 1994.
- The Australian Institute of Judicial Administration (AIJA) has been funded under the National Strategy on Violence Against Women to develop gender awareness programs for the judiciary.<sup>19</sup> A Gender Awareness Committee arranged for ten Australian judges to attend a course in Canada and for a pilot court training program to be conducted in Victoria. In June 1993 the AIJA presented a seminar on gender awareness which was addressed by Professor Kathleen Mahoney of the University of Calgary, Canada.
- The Family Court has been funded under the National Strategy on Violence Against Women to develop a pilot program on gender awareness.<sup>20</sup> The program aims to enhance the awareness of judges and decision-makers about the nature and effects of violence against women and the need to consider the role played by stereotyped assumptions about women and violence in the resolution of family law matters.

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15. Attorney-General *Proposals to amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993.

16. Attorney-General *Judicial appointments: Procedure and criteria* Discussion Paper Attorney-General's Department Canberra 1993.

17. Referred by the Senate 26 May 1993: *Hansard (Sen)* Vol S158 26 May 1993, 1288.

18. Attorney-General *Family Law Act 1975 - directions for amendment: Government response to the report of the Joint Select Committee on certain aspects of the operation and interpretation of the Family Law Act 1975* Attorney-General's Department Canberra 1993.

19. Commonwealth funded \$80 000: Australia Parliament *Women's Budget Statement 1993-94* Budget Related Paper No 4 AGPS Canberra 1993, 9.

20. Commonwealth funded \$80 000 in 1993-94: id, 56.

- The ILO 156 Interdepartmental Committee circulated a discussion paper on the implementation of ILO convention 156, Workers with Family Responsibilities. The ALRC has made a submission in response to this paper.
- The Attorney-General and Minister for Justice have established an Access to Justice Advisory Committee to consider initiatives to improve access to the legal system. It is due to report at the end of March 1994.

1.18 *State and Territory initiatives.* There have also been a number of significant State and Territory initiatives.

- In Western Australia the Chief Justice of the Supreme Court established a Gender Bias Task Force. A review which was completed in May 1993 examined the existing roles of the Office of Women's Interests (OWI), the Women's Advisory Council and the Women's Information Service. The review recommended that OWI have a stronger policy formulation and co-ordination role in the development of strategic policy across government.
- The Northern Territory *Anti-Discrimination Act 1992* commenced operation on 1 August 1993. An Anti-Discrimination Commissioner was appointed in July 1993 and has established the Anti-Discrimination Office.
- In May 1993 the New South Wales Ministry for the Status and Advancement of Women was established.<sup>21</sup>

#### *Community awareness of gender issues*

1.19 In 1993 there was an unusually high level of media coverage and public debate about the operation of the Australian legal system, particularly as it relates to women. One judge's remarks to the jury in late 1992 in the course of a 'rape in marriage' trial received enormous media attention early in 1993 and led to a strong community reaction in the following months. Public debate was heightened by the findings of the appellate court in that case in April 1993 and by reports of remarks by other judges in several other sexual assault cases in Victoria, New South Wales and South Australia.

1.20 Media attention was not confined to sexual assault matters. There was also intense interest in how the legal system dealt with women who after years of domestic violence killed their abusers. In September the Director of Public Prosecutions in the Northern Territory withdrew charges of murder against a woman who had been battered for many years. In November a court in Queensland set aside an Aboriginal woman's conviction for the murder of her de facto husband after evidence of years of abuse and threats was presented. These cases received particular attention.

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21. In addition the Tasmanian Women's Consultative Council conducted a Phone-In on Sex Discrimination in September 1993. A report of the results is to be submitted to the Tasmanian Minister for the Status and Advancement of Women.

1.21 The portrayal of women in the media was also the subject of comment during 1993. There were reports of a large increase in the number of women complaining about advertisements. Several advertisements were removed by the Advertising Standards Council on the grounds of offensiveness in how they depicted women.<sup>22</sup> A NSW magistrate dismissed, without a conviction being recorded,<sup>23</sup> charges against a number of women for defacing a billboard which depicted a woman being sawn in half. The magistrate's strong statements about violence against women were widely reported.

1.22 Several sexual harassment cases received wide attention, most notably those involving the Australian Defence Forces. Equal employment opportunity issues, particularly the 'glass ceiling' on women in senior management positions, were reported. Awards of compensation to women for personal injuries, particularly in relation to estimated future earnings, came under scrutiny.<sup>24</sup> The Attorney General's Discussion Paper on judicial appointments led to further discussion about the composition of the judiciary and its sensitivity to issues affecting women's lives. Many judges entered the public debate for the first time.<sup>25</sup> The term 'gender bias' became widely known throughout the community.

#### *Awareness of gender bias in the community*

1.23 Some members of the legal profession and the judiciary spoke of this attention to gender and the law as a media 'beat-up'. The discussions were conducted over a long time, however, and covered a very broad range of issues. The coverage pointed to a wider and deeper public unease with aspects of the legal system as it affects women. The Commission heard about these in submissions and in its consultations. Clearly many women and some men in the community regard gender bias in the law as going far beyond issues involving individual judges and magistrates. It arises from cultural and social assumptions about the natures and roles of women and men. While some of it may be unconscious it nonetheless pervades the law and the practice of the law. The legal profession, the legislature and the judiciary have historically been, and remain, male dominated. It follows that the practice and substance of the law reflect partial perspectives.

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22. R Burbury 'Women make waves about sexist ads' *The Sydney Morning Herald* 21 October 1993, 26. Some of the advertisements which drew complaints were a Toyota 'wide body' advertisement which used the body of a pregnant woman; as beer advertisement showing a woman having her jeans ripped off by a dog; and as Katies advertisement where managers could not trust their female staff to be at work because of the sale.

23. *Crimes Act 1900* (NSW) s 556A.

24. eg M Stenberg 'Woman's payout cut over brothers' *The Sydney Morning Herald* 9 August 1993, 4.

25. For example, the Chief Justice of Victoria, Justice Phillips, in an open letter to *The Age*, 13 September 1993, 13.

## 2. The submissions

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### Introduction

2.1 The Commission emphasises that the actual experiences of women, in all their diversity, are of crucial importance to this reference. This chapter provides a brief overview of written and oral submissions the Commission received in response to its discussion paper (DP 54).<sup>1</sup> It then deals in greater detail with responses to the issues raised in that paper on women's access to justice, and quotes from a representative sample. Quotes from submissions have been placed in boxes. Where individual women are speaking about personal experiences their words are italicised.<sup>2</sup> These experiences obtained from a wide range of women form the background to the recommendations that follow in Chapter 4.

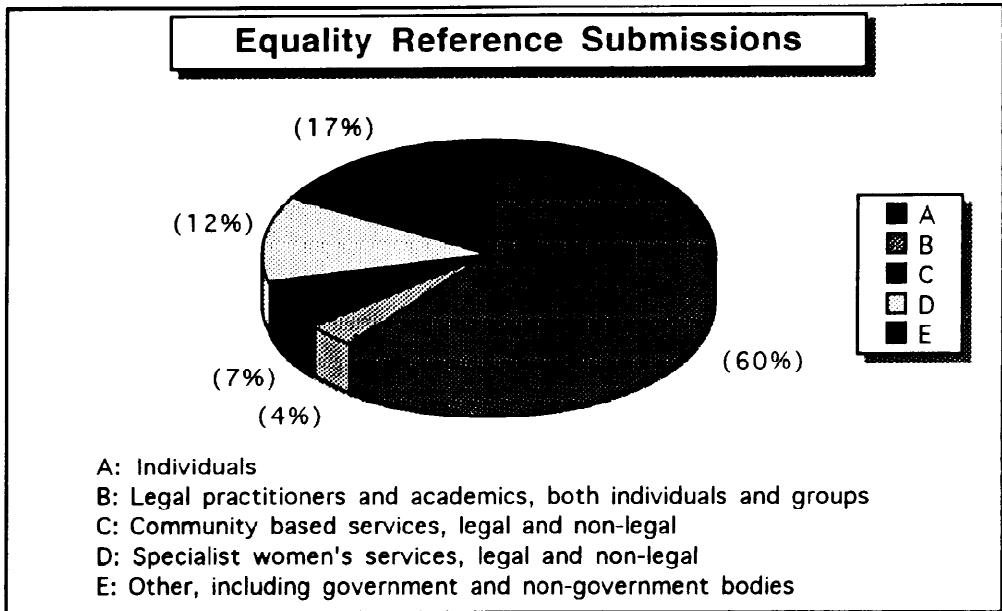
### Overview of the submissions

#### *Numbers and sources of submissions*

2.2 *A record response.* After distributing DP 54 in August 1993 the Commission received approximately 570 submissions of which 273 were oral submissions given at public hearings held throughout Australia.<sup>3</sup> The number of different submissions is larger than for all but one other reference undertaken by the Commission since its inception. This is despite the fact that an exceptionally short time (3 months) was given for responses. Many submissions were made on behalf of or described the experiences of large numbers of women.<sup>4</sup> In terms of the number of women represented it appears to be a record for the Commission. The amount of work done to produce the submissions and the supporting material presented with them is exceptional. As an example an extract from one submission which highlights issues of access to justice is reproduced in Appendix 2.

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1. Australian Law Reform Commission Discussion Paper 54 *Equality before the law* ALRC Sydney 1993 (DP 54).
  2. In many cases submissions were supported by documents or court transcripts.
  3. A list of submissions appears in Appendix 3.
  4. The Commission's reference on Privacy is the only reference with a higher number of submissions. However, those were received over a period of more than three years.

2.3 *Sources of submissions.* Submissions came from a wide range of individuals and organisations.<sup>5</sup> The very high proportion of submissions from individuals highlights the vital importance of this reference to the everyday lives of women across Australia.



5. Sources include:
- individuals
  - legal professionals and academics
  - judges
  - women's health centres
  - women's centres
  - community centres
  - community legal centres
  - women's legal and advocacy services
  - domestic violence services
  - sexual assault services
  - services for people of non English speaking background
  - Aboriginal and Torres Strait Islander groups and services
  - Women's Electoral Lobby, at Commonwealth, State and local levels
  - lobby groups and other specialist women's services
  - legal aid commissions
  - research centres - government and non-government
  - Government bodies, at Commonwealth, State and Territory level, including
    - Office of the Status of Women
    - Human Rights and Equal Opportunity Commission
    - Sex Discrimination Commissioner (Cth)
    - Equal Employment Opportunity Commissioners
    - Ministry for the Status and Advancement of Women, NSW
    - Affirmative Action Agency
    - Ethnic affairs units
    - Women's policy units



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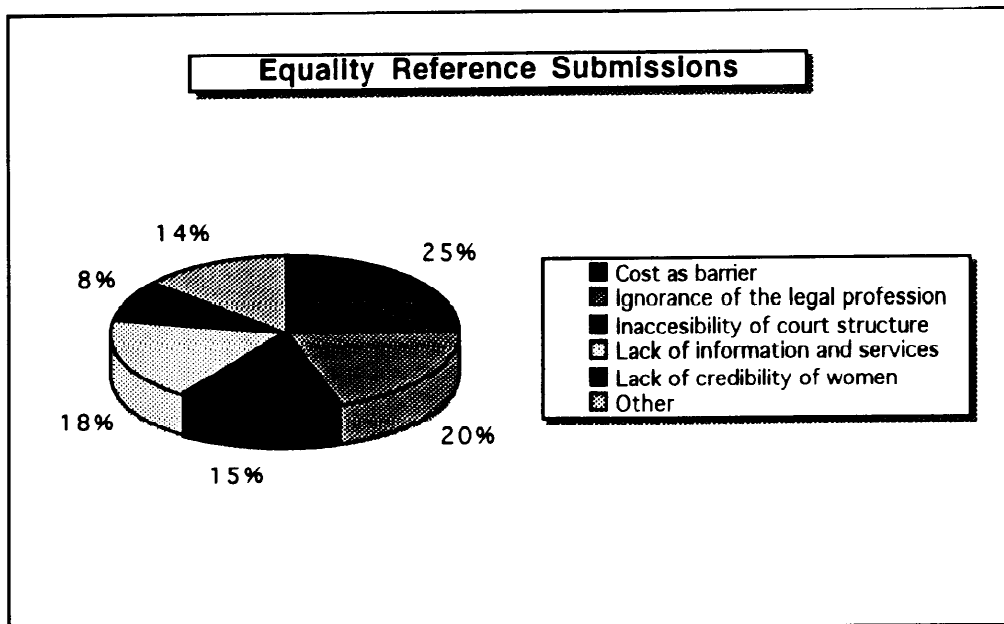
2.4 ***A representative sample.*** At the oral hearings women repeatedly spoke for other women who, they said, were frightened or unable to come before the Commission. Many said that they found it difficult to speak. They hoped that by speaking out they could help other women. Many community and women's services presented case histories which they said represented a fraction of the stories of thousands of women they have helped over a number of years. The problems revealed in this process may be more widespread and therefore more serious than the Commission has been able to discover in the short time available for the reference. The lack of comprehensive statistical data on these issues also makes it impossible to estimate the extent of the problems with any accuracy. Nonetheless the Commission has heard from many hundreds of people detailing women's experiences of the law and is convinced of the seriousness of women's problems in obtaining justice.

***Issues raised in submissions***

2.5 ***Many submissions raised access to justice.*** Submissions dealing with aspects of access to justice range over many different areas of the law and the legal system. They cover such matters as consumer rights, refugee and immigration issues, rights in social security law, aspects of criminal justice, including sentencing policies, and the rights of offenders and of victims. Many of these matters will be considered in the first or second part of the Commission's final report. Some 155 submissions comment specifically and in detail on women's access to justice. In DP 54 the Commission stated that equality before the law required equal access to justice.<sup>6</sup> Access to justice refers to the ability to make effective use of the legal system. It includes access to information about legal rights, to legal advice and ancillary services and to courts and tribunals to enforce legal rights and remedies. Because of the broad concern about access to justice the Commission selected for separate analysis the 155 submissions dealing in detail with these issues raised in DP 54.

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6. para 5.2.



**2.6 Submissions from community organisations.** Community organisations from all States and Territories contacted the Commission. They included community legal services, women's legal services, domestic violence and sexual assault services, women's health centres, women's support groups, women's refuges and shelters. Submissions from these groups constitute 12% of the total number of submissions received but over 60% of those specifically address access to justice. These submissions provide valuable information on access to justice issues because of those organisations specialised skills and knowledge about women and the law, particularly relating to violence. Some include case studies. For example, the Illawarra Legal Centre reported its own research in the form of a phone-in and oral interviews conducted over a six week period in the Illawarra region of New South Wales.<sup>7</sup> Over 140 women participated. Forty-three staff of relevant local community organisations and government departments were interviewed for the submission. The Centre Against Sexual Assault in Melbourne drew examples from the 8000 women survivors of sexual assault who have attended the centre over the past six years.<sup>8</sup> It reported that women have told of the responses from the legal system, including the police, legal personnel, the courts and the judiciary, and of their experiences with the system. Many women who survive a violent crime are harmed again through their contact with the legal process.<sup>9</sup>

7. Illawarra Legal Centre *Submission 284*. See appendix 2.

8. Centre Against Sexual Assault (CASA House), Melbourne *Submission 197*. The centre is one of 15 operating in Victoria and 73 nationwide.

9. *ibid.*

2.7 *General problems of access.* The submissions point out that women become involved in the legal system on a wide range of issues. Like men, women have to seek legal advice or go to court in relation to personal injury compensation, consumer credit, debt recovery, social security, taxation, family law and as victims or offenders in criminal law. Men may face disadvantage, for example, on grounds of class or ethnic origin but, where one of these grounds is coupled with being a woman, the disadvantage and discrimination is compounded. The Australian Consumer's Council pointed out in its submission that it is clearly difficult for women to obtain information about their legal rights to consumer protection even though most purchasers of consumer goods are women. Agencies handling consumer complaints lack cultural and gender awareness and women lack confidence in seeking legal advice from services which they see as intimidating and insensitive.<sup>10</sup>

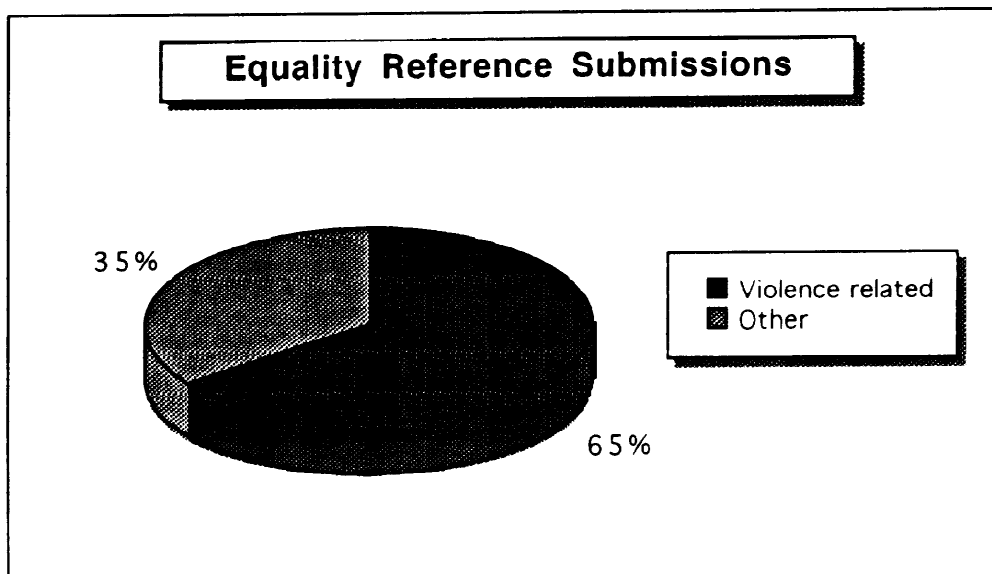
2.8 *The particular problem of violence.* Many submissions made particular reference to the law's treatment of violence. Issues of violence can arise directly, in criminal proceedings, or indirectly, for example, in the context of custody and access of children and property settlements or in the area of immigration law.

Violence, or the threat of it, impinges on a woman's physical, emotional, sexual and economic wellbeing. It compromises her safety, freedom and independence and violates her basic human rights. For some women, it results in permanent physical injury or death. A relationship that is characterised by the power and control of one partner over the other is void of equality.<sup>11</sup>

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10. Australian Consumers Council *Submission 552*.

11. Domestic Violence Resource Centre, Woolloowin *Submission 295*.



From the material contained in submissions it appears to the Commission that many women have a real and urgent need for the law to protect them from violence. Violence is also the issue where they believe that the law is most likely to let them down. Seventy-seven submissions deal with this issue.<sup>12</sup> Over 70% of respondents to the Illawarra Legal Centre phone-in cited violence in relation to physical or sexual assaults as the reason for their contact with the law. **All** the respondents were dissatisfied with the way violence had been dealt with at various levels of the legal system.

## **Women face difficulty in getting access to justice**

### *An accumulation of obstacles*

2.9 Submissions to the Commission reveal that women's attempts to seek the protection of the law are fraught with obstacles. Their problems begin with the attempt to find accurate legal information. After that, when women try to enforce their rights they undergo further frustration as they encounter in turn police, lawyers, prosecutors, magistrates or judges. These problems were especially severe when women sought protection from violence. The frustration experienced by many women in their dealings with police and lawyers, and their resulting lack of protection, is well illustrated by the following account. In this case the defendant's sentence was reduced on the basis of diminished responsibility at the time of the killing and his wife is still fearful for her life.

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12. Illawarra Legal Centre *Submission 284*.

Y [the speaker's estranged husband] was seen as a man of great integrity yet during the length of my marriage he would cut my phone calls short, he would take my keys to my car. . . so that I had no transport for the children. He would smash plates frequently if I didn't keep the standards set by him in the house. He would belittle me in front of the children. If anything went wrong it would be my fault and then finally in the last years of marriage there was physical [abuse]. . . [A]fter the separation my estranged husband killed X [speaker's new partner] and attempted to kill me . . . I'd managed to escape out the back and started running and he proceeded to race after me firing shots at me, one went through my back and came out through my arm, until he ran out of ammunition . . . I was hoping the prosecution would speak to me . . . because he was a well spoken, well educated man who had a cool character, who could paint something as though he had become stressed and it would appear as though it was diminished responsibility when in fact the whole thing was premeditated. The injustice was that domestic violence was ruled out and only briefly mentioned in so far as I was asked 'was there domestic violence?' I said 'Yes.' and he denied it later by saying 'No, there wasn't.' Yet had that been portrayed it would have been seen that it was normal for him to be abnormal for 12-14 years, not that he became abnormal at a point where he couldn't cope . . . I took out Restraining Orders and every time I called the police and said he was threatening to kill me they said that there was nothing they could do because nothing had happened, and I had an Interim Order saying simply 'No domestic violence' and when I called the police saying that on every access change over he was threatening to kill me, they'd say 'Well it will only get laughed out of court if you take it to court because it's your word against his, we've seen this happen before'. So, finally when I thought I really had something on him after about a year when he broke into the home, because it took me a year to get the full Order, I thought well, this is good, this will protect me. Then he was only given a \$200 fine and at that point he was threatening to burn the house down and blow my brains out and kill X . . . [S]o many things were missed in the murder trial . . . I can assure you, he certainly didn't have a 22 rifle during the marriage and I was never asked that question. . . then Y was asked when did he purchase the gun and he simply said that he'd had it since he was 18 which was a direct lie, and so I see that that was a total injustice and I was in an unfair position being outside the court room. . . At 3 pm the day of the murder I had called the . . . police and said 'I'm so worried, a report's just come through where he's just lost total access of the children due to his psychiatric state. I don't know how I'm going to get out 'cause I know he's watching the house, he's going to spot me. Is there anything you can do, put some patrols out to watch, 'cause I'm frightened he's going to come round', and they said 'There's nothing we can do, we haven't got enough police. We can't do that, if we were doing that all the time, where would we be?' And that was the night that X was killed, but when the police were called then by the lady across the road, it was like the whole police force was there . . . The look he gave me at the end of the trial was one of 'I'm going to get you' and only I know that. Yet, who believes me? It's like I'm still right back in square one . . . 13

The following sections deal in detail with the complaints of women about access to justice.

*The first obstacle*

2.10 *Women's lack of awareness of the law and of legal services.* A first step in using the legal system is to be aware that the problem is a legal problem and to know what legal rights and remedies might be available.<sup>14</sup> DP 54 asked whether lack of awareness of the law makes it difficult for women to use the law effectively to protect their rights.<sup>15</sup> Thirty six women gave direct accounts of their difficulties in seeking information or advice on the legal avenues available to them. A joint submission from professionals in women's affairs in South Australia states

Most women have no idea of the law - what it is, how it works, how it could or may apply to them or their situation. Most women have no idea about their rights under Family Law - laws in relation to their marriages, children and primary relationships. The ignorance of the general public is great and the ignorance of women is far greater because until 1978 (in SA) women left school earlier than men and received a different education while they were there. Any woman older than 30 has had much less chance of education than younger women, and all women who came from families or suburbs which defined women as wives and mothers have been and are at a legal disadvantage. Poor women, who are seldom connected with the law except when they break it, are at the worst disadvantage of all. <sup>16</sup>

2.11 *Nature of the problem.* Women's ignorance of their rights is related to a relative lack of financial resources and often to their isolation in the home.<sup>17</sup> Ignorance of the law was seen as a particular problem for older women,<sup>18</sup> women with disabilities<sup>19</sup> and women in rural and remote areas.<sup>20</sup> Cultural barriers pose additional problems for Aboriginal women and women from non-English speaking backgrounds.

14. Eighteen percent of all submissions refer specifically to this.

15. ALRC op cit, question 5.1.

16. Sister Kate Conley, Chaplain to the Women's Prison, Adelaide, Deborah McCulloch, Co-ordinator, Women's Electoral Lobby (SA), Maggie Martinelli, Co-ordinator, Welfare Rights Centre, SA, Magdalene Mati, Education Officer, Hope Haven Women's Shelter, SA, Rille Walsh, Co-ordinator, Single Pregnancy and After Resource Centre *Submission 537*.

17. The Commission received 37 submissions on cost as a barrier for women: See para 3.3.

18. Older Women's Network, Canberra *Submission 93*; Older Women's Network TAS *Submission 304*; Older Women's Network Australia Inc *Submission 303*.

19. Menstrual Management Research Team, Department of Social Work and Social Policy, University of Queensland *Submission 185*; NSW Sub-Committee on Sexual Assault and People with an Intellectual Disability *Submission 250*.

20. Bunbury Community Legal Centre *Submission 97*; Women's Legal Service Inc, Brisbane *Submission 379*; Marnja Jarndu Women's Refuge *Submission 362*.

Women often feel intimidated at the thought of dealing with a lawyer. They may lack confidence or experience of the 'business' world which can disadvantage them in gaining information and advice . . . Women who do not work outside the home often do not know where to start to get information about a legal problem . . . Women's domestic responsibilities often make it difficult or impossible for them to attend appointments with lawyers. They face the additional burden/expense of arranging childcare before they can venture to the appointment or have to try to obtain advice in the presence of their children.<sup>21</sup>

2.12 *Consequences of the problem.* Inadequate information and poor advice leaves women unprotected. They are likely to remain in unacceptable situations or to endure violations of their rights simply through lack of knowledge of alternatives. The Domestic Violence Advocacy Service in Sydney state

It has become apparent that many women are clearly ignorant of the ways in which the law can provide protection for victims of domestic violence . . . Clearly, women require access to quality, accurate and confidential information regarding the legal avenues available to them . . . As a part of an evaluation of the first 5 years of operation of the Service, a number of women were interviewed regarding their experiences in obtaining legal protection. Over half of the women interviewed indicated that they would have done nothing or stayed in the violent situation they were trying to escape from if they were dissatisfied with the service they received. Thus for women, the most striking consequence of receiving inadequate or inaccurate information is to remain in the violent situation.<sup>22</sup>

### *The second obstacle*

2.13 *The police lack awareness of women's needs and experiences.* Even when women are aware of their rights, the Commission was told they are often unable to exercise them because of attitudes of the police.<sup>23</sup> Police are the first point of contact for many women in a crisis situation, when their safety or life, or that of their children has been threatened. In some States and regions police services are considered helpful, especially in places where there are special domestic violence or crisis units.<sup>24</sup> However, many women's services told us police often fail women. Seventy-three submissions state that the police are generally ignorant of the

21. Women's Legal Resources Centre, Sydney *Submission 256*.

22. Domestic Violence Advocacy Service, Sydney *Submission 148*.

23. Domestic Violence Resource Centre, Woolloowin *Submission 295*; Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc Vic *Submission 330*; Confidential *Submission 426*.

24. J MacNee *Submission 317*; Confidential *Submission 83*; Confidential *Submission 383*; Upper Murray Centre Against Sexual Assault, *Submission 182*.

dynamics of domestic violence issues and fail to see domestic violence as a crime. The Domestic Violence Legal Help Service in Darwin said that for many women contact with the police was a 'negative and disempowering experience'.<sup>25</sup> According to the Service, police perceive women as poor witnesses and inherently unbelievable. There is also the perception that domestic violence is not real police work and that it is not a crime.

Police attend a home after a woman has been assaulted by her partner. They speak to the perpetrator first before speaking to the woman. The result is that the police take no action, do not want to listen to the woman as they have been convinced by the partner that everything is alright.

[A]n Aboriginal woman reports an assault by her husband on her to the police and indicates that she would like him charged. They tell her that this would involve a lot of paper work on their part and a lot of effort on her part. She is consequently convinced that it would not be the right thing to do.<sup>26</sup>

[P]olice accord 'domestics' low priority. Although Community Policing Squads are generally very good at responding to and assisting victims, most victims are seen by police in general duties whose common reply is 'this is not a police matter' followed by a plea for calm and reason and referral to a priest, counsellor, legal aid. With violence frequently occurring at night or on the weekends, this advice is quite useless. Many women victims sense that the male police side and sympathise with the male perpetrators and secretly condone the abuse and control exercised . . . [P]olice often require visible injuries or actual witnessing an assault before they will actually act and lay criminal charges and even where such evidence exists, they are reluctant to prosecute.<sup>27</sup>

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25. Domestic Violence Legal Help, Darwin *Submission 306*.

26. *ibid.*

27. Confidential *Submission 292*.



The Illawarra Legal Centre provided this story:

*One night he came home in a foul mood. He said I'd made him look a fool, like a criminal by taking out a restraining order. He said I was a bitch, and I deserved everything I got. Then he took off his belt and started hitting me. My two children were hanging on my legs (a three and four year old). They were screaming . . . He dragged them over to the bathroom and locked the door on them, I ran for the back door but he dragged me by the back of the hair and started punching me . . . I got out the back door and ran to a neighbour's house and she rang for the police . . . They asked me what had happened, and I told them. In the middle of this my husband came out. He said we'd had an argument, that I'd nagged him about his going out, and then I'd thrown things at him. This wasn't true. One of the policemen said that his 'wife got annoyed when (he) went to the pub too. Maybe (we) should just calm down and relax . . .'<sup>28</sup>*

2.14 *The police view.* The Commission was told that the police experience difficulties which hamper their effectiveness in dealing with domestic violence. The Illawarra Legal Centre reported that police at a recent domestic violence seminar in Wollongong, New South Wales talked about the frustration that they experience when they see many cases of domestic violence dismissed by magistrates or acquitted by a jury after the police have gone through the difficult procedure of establishing the validity of the complaint and then laying charges.<sup>29</sup> The Commission heard of problems in enforcing protection orders under State law in cases of serious domestic violence where there was a Family Court Order for access to children. In this case, the federal order overrides the State legislation.

*We often have cases where there has been serious abuse against the woman and there are a whole set of stringent conditions on the AVO.<sup>30</sup> Then at the end of these conditions it will say 'except in the case of access ordered by the Family Court', which just opens it up for the man to approach the woman again. There are not sufficient safeguards in the system.<sup>31</sup>*

A former welfare rights worker from the Illawarra Legal Centre commented.

28. Illawarra Legal Centre NSW *Submission 284*.

29. *ibid.*

30. Apprehended Violence Order, a term used for protection orders under NSW law.

31. *ibid.*

I must have placed at least 50 or 60 women outside the area to get them away from the terrible situations they were in (when their partners kept tracking them down). But I had to bring ten of them back into the area to attend the (Family) Court. If I hadn't, the police would have tracked them down and this would have blown their cover. Then the Family Court orders access. We're talking about women who have every reason to fear for their lives. They're trapped.<sup>32</sup>

Many submissions raised the need for the Family Court to give more weight to violence when dealing with matters concerning children or property.<sup>33</sup>

### *The third obstacle*

2.15 *Legal service providers fail to provide accurate and appropriate assistance.* Women's legal services express concern about the large numbers of women who come to their services complaining of legal workers, such as solicitors, chamber magistrates and local court staff, giving women incorrect information or inappropriate advice, especially about avenues for help in domestic violence and family law matters.<sup>34</sup>

*I left my husband . . . because of their father's sexual abuse and neglect and cruelty . . . to my infant sons and to me . . . I had engaged six solicitors . . . and barristers in an attempt to protect my two infant sons. I was lied to, intimidated and threatened by them, one solicitor telling me that it was 'better to have my infant sons molested every week-end than the whole time if the father was given custody'.<sup>35</sup>*

32. *ibid.*

33. eg G Mather *Submission 127*; Confidential *Submission 83*; Domestic Violence Resource Centre, Lutwyche Qld *Submission 381*; Marrja Jarndu Women's Refuge, Broome WA *Submission 362*.

34. Twenty percent of the 155 submissions received on access to justice referred to this. Domestic Violence Resource Centre, Woolloowin *Submission 295*; J Mulburn *Submission 184*; Women's Legal Resource Centre, Sydney *Submission 256*; Domestic Violence Advocacy Service, Sydney *Submission 148*; North Queensland Combined Women's Service *Submission 275*; Domestic Violence Resource Centre, Lutwyche Qld *Submission 381*; Domestic Violence Legal Help, Darwin *Submission 422*.

35. Confidential *Submission 305*.

A woman contacted the legal service for legal representation in relation to an application to extend an apprehended violence order. As she was eligible for legal aid she was referred to a private practitioner. When the woman was in the witness box she was asked for the first time about the nature of the breach on the basis of which she sought an extension of the order. She gave evidence of a sexual assault. Up to this point, the practitioner was unaware of, and seemingly uninterested in, the nature of the breach.<sup>36</sup>

A woman tried to find a solicitor who would agree to defend a case in the Family Court. Her husband was applying for access to their two small children. Her husband had recently made death threats against her and the children and she had a restraining order against him. She engaged a total of three solicitors and tried seven more before she found a lawyer who would take her case. She succeeded in having access denied in the Family Court.

*On many occasions I was virtually being intimidated into allowing access which made me feel guilty and ashamed to stay with my initial decision or to say that I want to deny access.*

*Solicitors told me I had the right to ask for denial but whenever it became an issue (even before a hearing) I was told it would be impossible, that I should show the judge that I'm doing everything to enable the father access. I was constantly being trapped into agreeing with solicitors. Solicitors informed me that if I did not agree to some form of access the judge would decide and I might not be happy with this decision. . .*

*. . . Solicitors informed me that if he has sexually abused a child or if he is a mass murderer, then he might be denied access. Death threats meant nothing to solicitors. But for the woman in fear of her life and that of the children, she had to keep going until blood was shed.<sup>37</sup>*

#### *The fourth obstacle*

2.16 *Legal costs.* The costs of justice are a recognised problem for most individuals.<sup>38</sup> However, because women are generally poorer than men,<sup>39</sup> cost is a greater barrier to them in getting legal help. The cost of legal assistance deters

36. Domestic Violence Advocacy Service, Sydney *Submission 148*.

37. *Sensitive Submission*.

38. See Senate Standing Committee on Legal and Constitutional Affairs *The costs of justice: foundations for reform* AGPS Canberra 1993.

39. This is elaborated on in Chapter 4.

many women from pursuing legal remedies.<sup>40</sup> DP 54 asked to what extent women found cost a barrier to enforcing their rights.<sup>41</sup> Submissions express concern that in areas such as custody and access proceedings, proceedings for property division and domestic violence matters, legal aid is either limited or unavailable. For example, the Commission was told that it could cost a woman in Hobart between \$600 and \$700 to engage a private solicitor to assist her in obtaining a protection order.<sup>42</sup> Another woman said that she had to spend over \$4000 to obtain restraining orders which failed to keep her ex-husband from harassing her and her children.<sup>43</sup>

2.17 Many women complained of the cost of custody and access proceedings, as well as about their inability to follow up property settlements after separation from partners. This caused them either to forgo their entitlement altogether or to attempt to challenge their partners in court, unrepresented, with mostly unsuccessful results.

One woman, who was married for 13 years and had supported her husband financially through his last two years of study, was hospitalised as a result of his violence in the last year of her marriage.

*I just decided that I had to get my children out, that it was just no good for them being brought up in that situation. Up until then, I hadn't really thought about financial matters . . . For tax purposes, the home was in [husband's name deleted] name . . . About three months later I found out that he had sold the house. Supposedly, he paid off business debts. He never told me that he intended doing this. I have not received any money at all from the sale of the house. Also, he has apparently shown a loss in his practices. So far there is no maintenance . . . he makes me beg and then he might send me a hundred dollars . . . I went to see a solicitor about property settlement and divorce. He told me that in cases like mine, it often costs thousands and thousands of dollars, and even then there was no guarantee that I would get anything out of the settlement after legal fees . . . he also told me that I'd be lucky to get a solicitor to take it on, as I had no money at all to pay legal fees . . . Now I'm just going to let the whole thing go. At least I'm away from his temper, and the children are starting to do really well in school. I may have a part time job soon as a book-keeper in a local business. And I'm starting to feel good for the first time in years.<sup>44</sup>*

40. The Commission received 37 submissions on this point.

41. Question 5.9.

42. D Port *Submission 446*; Tasmanian Government Representatives, *Hobart Consultation 28 September 1993*.

43. Waratah Support Centre, *Bunbury Submission 109*.

44. Illawarra Legal Centre *Submission 284*.

*My daughter has been persecuted and financially ruined by the cost of court and fees for lawyers and barristers. When she sold her house she was cut off from legal aid. Now all her money is gone. Her present lawyer is trying to get legal aid restored, but there seems little hope, so my daughter will have to go back to court without legal representation. What chances does she have of saving her child on her own against a very aggressive lawyer and an uncaring judge and a man whose one aim in life is to break the mother and put the child through it.<sup>45</sup>*

2.18 *The importance of legal representation.* The importance of being legally represented in order to succeed in a court action is mentioned in submissions. For instance, in the Northern Territory the first three months' operation of a specialist domestic violence legal service was evaluated. In that time the proportion of successful applications for a protection order in the Darwin Magistrates' Court rose to 72% from 43% in the corresponding period of the previous year.<sup>46</sup> The study concluded that having a legal representative was the main reason for the improved outcomes. A submission from Tasmania reports that the withdrawal of legal aid for restraining orders effectively prevents domestic violence legislation from working because women's success rate in court is so severely affected.<sup>47</sup>

#### *The fifth obstacle*

2.19 *Inaccessibility of services.* DP 54 asked to what extent barriers of time and place and absence of childcare impede women in access to courts, tribunal and other legal services.<sup>48</sup> Submissions confirm that problems of access were experienced by women. Even when other obstacles are overcome many women find courts physically inaccessible or unsuitable. Most have no child care facilities and waiting areas are limited and inappropriate. Women with disabilities and older women also told us that they were excluded from buildings because of large numbers of steps.

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45. Sensitive Submission.

46. Darwin Community Legal Service *Domestic violence legal help: An evaluation of the first three months operation of the service* Darwin Community Legal Service 1993, 8-9.

47. Women Lecturers and Students of the Faculty of Law, University of Tasmania *Submission 258*.

48. ALRC *op cit*, question 5.14.

2.20 *Lack of child care facilities.* Some submissions highlight the lack of child care at courts as a significant deterrent to women's ability to obtain justice.

Women have particular difficulties because of the lack of facilities in many of the courts. In particular there are concerns because there are no private areas for feeding or changing infants or providing child care or play facilities for children . . . This only adds to the stress level of women concerned; it also affects their capacity to participate in court proceedings. It is not unusual for a woman to be trying to control a fractious child while a magistrate is making decisions affecting the care and control of her child, or passing sentence . . . Many women who appear before the courts . . . in circumstances where they are defendants or witnesses . . . do not have the social networks or the financial resources to arrange care for their children before attending court. Indeed, in many instances the nature of their applications are urgent, and they do not have time to make arrangements.<sup>49</sup>

[C]ourts need to be more sensitive to the child care responsibilities of parents. This particularly arises with mothers. Last week I was present when a Magistrate said at 10am that he would have to stand an application for a restraining order down to 12.30pm. The applicant mother burst into tears because her child care arrangements ran out at noon.<sup>50</sup>

The [local] Family Court creche is shut in the afternoon yet many cases drag on all day.<sup>51</sup>

2.21 *Lack of appropriate waiting areas.* Submissions also comment that women are sometimes forced to face their violent husbands in areas around and outside the court due to the lack of waiting areas at the local courts. Often duty solicitors in consultation with offenders take up the only available space.<sup>52</sup> Where waiting areas are provided they are usually common areas in which the parties mingle. Many women complain of intimidation, harassment and even physical violence while they wait at court.

49. Confidential Submission 292.

50. J Harrison Submission 416.

51. D McCulloch, K Conley, M Marinelli, M Mati, R Walsh Submission 537 (Adelaide).

52. Confidential Submission 292.

Lack of facilities also has an impact in relation to the circumstances in which women provide instructions to their legal representatives. Often sensitive matters need to be discussed in crowded public areas. Women who appear as witnesses often on behalf of the prosecution have no private areas in which to wait. They may be required to sit in crowded corridors for lengthy periods.<sup>53</sup>

Thursday Island courthouse has no waiting area for people to sit except a small verandah, or under the trees. During the wet season, crowded onto the small verandah with the man who has been violent to you and against whom you are taking this action is a very upsetting experience for most women.<sup>54</sup>

The cells for women at many courts are small and primitive and lack privacy. Many women are deeply distressed by constant camera surveillance. In some police cells the facilities for interviewing women prisoners is inferior to that provided for men. In general visitors are not allowed into police cells which is a particular anguish for women with children.<sup>55</sup>

## The failure of justice

### *Disillusionment with the law*

2.22 Many women express their disillusionment with the legal system. As several community organisations report they remember more bitterly their treatment in the legal system than the original mistreatment from their assailant.<sup>56</sup>

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53. *ibid.*

54. Women of Far North Queensland *Submission 117*.

55. Confidential *Submission 292*.

56. Illawarra Legal Centre *Submission 284*. CASA House Melbourne *Submission 197*.

*I consider that I was abused by the legal process. There were times when I was NOT informed of my rights . . . There were times when I was restrained from speaking in my own defence. I was told to answer yes and no, and I did the best I could. This often meant that I could not clarify something that was important. I couldn't "tell my story". And there was no way that the judge could understand what really happened without understanding what our story might have been...and what some families are really capable of .<sup>57</sup>*

*Going through the Family Court was a lot like domestic violence all over again.<sup>58</sup>*

*If I had known I would be treated the same way as the offender treated me I would never have reported the crime to the police.<sup>59</sup>*

*I am disillusioned by the whole system. A woman never leaves home for no reason.<sup>60</sup>*

For most of her long married life X was subjected to violence from her husband. She decided to leave but in the attempt was stabbed by her husband with a pair of scissors. The case went to trial. She appeared in court with a bandaged hand.

*. . . when I had to give evidence Justice (withheld) said 'What's your problem? You're only cut, you're not dead.' Later, (the Judge) said that he thought that I had 'an overactive imagination', and implied that some women will do 'anything to get attention', and that the wounds may have been self inflicted . . . [I] felt absolutely worthless as a person. I was treated with absolute contempt. After the case [was dismissed], I became very depressed. I felt that there had been no point going to court - I'd never go to court again, never. Since then, my husband never leaves me alone. He follows me round, parks his car near me in the street. My telephone wires have been cut, my windows have been broken. But I can't prove he's doing any of it. I'm scared most of the time. I can still see the look of hatred on [his] face as he tried to stab me. Maybe if the court had taken the attack seriously, then my husband would too. Maybe he would leave me alone.<sup>61</sup>*

57. L Intermarrn Submission 296.

58. *ibid.*

59. Centre Against Sexual Assault, CASA House, Melbourne Submission 197.

60. M Dietrich Submission 22.

61. Illawarra Legal Centre Submission 284.



Twenty other women contacted the Illawarra Legal Centre with similar experiences.<sup>62</sup> The SCARLET Alliance, the national forum for sex workers' rights organisations, reports the problems of sex workers with the justice system.<sup>63</sup>

... The fact a woman was a sex worker weighs heavily in any court case be it family or criminal. . . 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 for fear (justified) of being arrested and charged. . . Acts of violence towards sex workers are seen as 'part of the job' and disregarded to all intents and purposes by the judicial system. . .

2.23 *The Court environment.* In response to DP 54 women told the Commission that when they enter the legal system they experience the court environment as profoundly alienating. They report that they feel their individual credibility and the seriousness of their problem are undermined or dismissed.

Women's experiences testify that the court room environment, and the mystique of the legal system generally, are threatening to women due to the inaccessibility of the language and procedures and its male dominated milieu.<sup>64</sup>

The problems are extreme in cases involving sexual violence.<sup>65</sup> One submission gave the harrowing experience of the legal process endured by an elderly victim of rape. As she was too indisposed after her ordeal she requested her counsellor to write, enclosing notes from counselling sessions before and after the court hearing in which she was a witness.

62. A summary of the findings of the Illawarra Legal Centre is reproduced in Appendix 2.

63. SCARLET Alliance *Submission 1*. Also noted by Prostitutes Collective of Victoria Inc *Submission 164*; Prostitutes Association of SA *Submission 60*.

64. Centre Against Sexual Assault, Melbourne *Submission 197*.

65. K thickens *Submission 556*.

... the refusal to allow the validity of Mrs X's concern for truth and justice, sexualised, minimised, trivialised, patronised her. I was shocked at the lack of any sense, on the part of the players in this legal theatre, of the real issues for Mrs X. There was pity and real concern for her plight but no acknowledgment of her rights. Her right to be treated with dignity and as an equal; her right to have her reality respected; to have her say, to be heard.<sup>66</sup>

Some women and women's organisations argued in their submissions for better support for women in court and for measures to ensure that their privacy and dignity are respected.<sup>67</sup> For instance when a woman has to give details of a sexually intimate nature as a witness it can be profoundly embarrassing to face a male audience, and more so if she is from a cultural background in which these matters are never discussed in front of men.<sup>68</sup>

The consequences of sexual assault are chronic and ongoing. They are emotional and psychological. Yet they are political, economic and social as well. They affect women's use of public space, enforcement of human rights and enjoyment of equal opportunity. Because rape is a gendered crime, the consequences of rape also affect women's relationship with men. They affect how women experience a judiciary which is staffed by men, and characterised by notions of 'reasonable' men and man's law. It is this system that women look to for justice, and are rebuffed by it.<sup>69</sup>

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66. Upper Murray Centre Against Sexual Assault *Submission 182*.

67. Illawarra Legal Centre *Submission 284*; Women's Information Service, Alice Springs *Consultation 23 August 1993*; Domestic Violence Resource Centre, Lutwyche *Submission 381*; National Council of Women of Australia *Submission 378*; Supporting Our Sisters *Submission 376*; Upper Murray Centre Against Sexual Assault *Submission 182*; see also ch 3.

68. J Waters *Submission 459*.

69. Project for Legal Action Against Sexual Assault *Submission 287*.

### *Credibility questioned*

2.24 Women spoke to the Commission about lawyers and courts who trivialised their legal needs and gave their experience little or no credibility.<sup>70</sup>

*The question why women and children don't tell is because they are not believed, they are afraid, threatened, ashamed, humiliated, degraded, isolated, cut off from family and friends. No one listens and if you are lucky enough to have someone take notice, there's nothing that can be done.<sup>71</sup>*

### *One submission commented*

*We consider this [gender bias] includes not only conscious or unconscious attitudes and judgments by individuals within the legal system but the maintenance of structures and conventions which fail to address the experiences of women and which even form a barrier to the articulation of women's experiences . . . As more women bring their experiences of child sexual abuse to the notice of police and the courts, we continue to be told that our cases need physical proof or corroboration, that it happened too long ago, that the abuser is too old for a jail term, that the incident was too trivial, our current lifestyles would prejudice our case or even that maybe we were somehow to blame for what happened to us . . . As we highlight the need for the criminal justice system to be made to address our experiences, our concerns and suggestions are branded "unrealistic".<sup>72</sup>*

A lawyer spoke of the problem of legal principles and assumptions not adequately accommodating women's actual experiences.

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70. Confidential Submission 383; S Eastwood, L Jackson, S Warren Submission 518; Confidential Submission 372; Confidential Submission 479; Confidential Submission 123; Confidential Submission 492.

71. L Jackson Submission 156.

72. Women Incest Survivors Network NSW Submission 319.

*As a solicitor, there often seemed to me to be a fundamental schism between the experiences, and hence the 'world view', of the men I dealt with and those of myself or my female clients . . . Many of the principles embodied in the law which are lauded as 'neutral' and 'value-free' are in fact values and viewpoints that benefit a particular class of people in society and do not sufficiently take account of the needs and experiences of many other social groups . . . The law must be relevant to the needs of the whole population and not just a powerful minority . . . The law must listen to what women say of their experience, must step into their shoes and reconsider the concept of 'reasonableness' from the viewpoint of a woman, in those cases where it is a woman's responses which are being tried . . . When judges talked about the 'reasonable man' in the past they did not mean the 'reasonable person'. They meant the 'reasonable man' - someone who thought, acted, lived and responded like a man. I would like to imagine that the law really can start to come to terms with the reasonable person. When I read judgments and legislation I want to see myself - and all women - acknowledged and reflected therein.<sup>73</sup>*

Some submissions saw the problem in terms of lack of awareness on the part of the legal profession and lack of advocacy for women's interests.

A better understanding of the fears of women . . . and issues of power and control might enable courts and police to understand why women withdraw from legal proceedings . . . There is also a perception that violence will cease once a relationship is over and that violence consists only of isolated incidents rather than a cycle of abuse. This has a particular impact on the attitude of courts when they are making decisions in cases where violence against a woman is an element. One way of educating magistrates and judges in the use of expert evidence in cases is to give the court information about the long term effects of physical and mental abuse . . . or to make provision for an intervening party in legal proceedings along the lines of the LEAF [Women's Legal Education and Action Fund] model.<sup>74</sup>

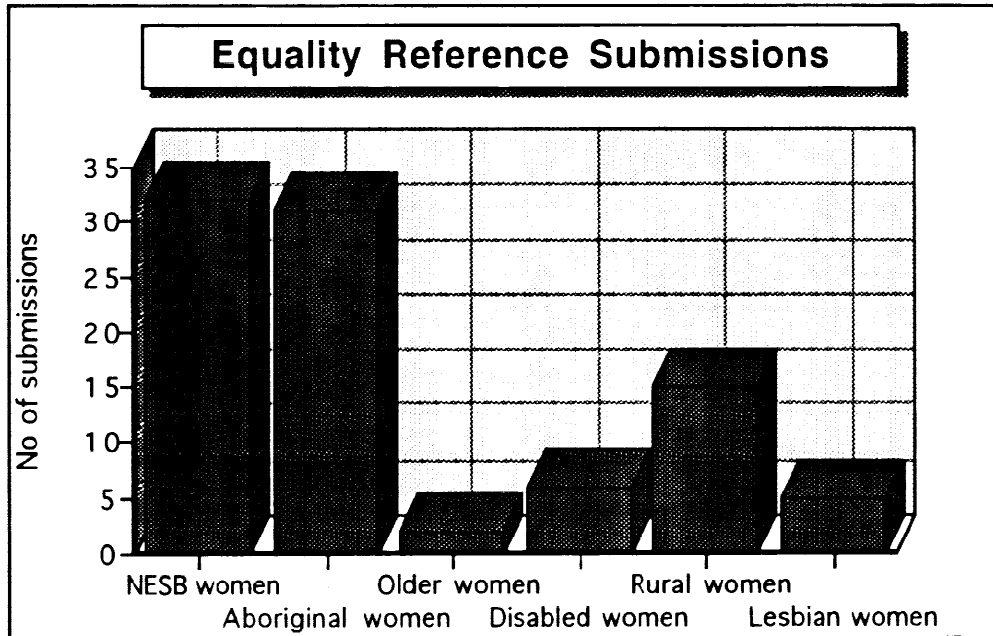
73. P Wright *Submission 206*.

74. Domestic Violence Legal Help, Darwin *Submission 306*. LEAF Women's Legal Education and Action Fund is a Canadian women's advocacy group which is discussed further at paras 4.32 and 4.33.

## Women's needs are not identical

### *Submissions reflect diversity amongst women*

2.25 DP 54 asked whether particular groups of women, such as indigenous women or isolated women, had unmet needs for legal information and services and generally whether there were specific needs for any groups of women.<sup>75</sup> The Commission received submissions from a wide cross-section of women in the community.



### *Indigenous women*

2.26 Particular problems experienced by Aboriginal and Torres Strait Islander women include lack of access to police or police aides,<sup>76</sup> unhelpful attitudes of police,<sup>77</sup> no access to Aboriginal and Islander legal services in domestic violence matters,<sup>78</sup> no or inappropriate services for remote communities, and lack of cultural sensitivity of lawyers and courts.<sup>79</sup> In Alice Springs, the Commission heard striking evidence from organisations and individuals of special factors which impede Aboriginal women's access to justice, particularly in relation to domestic violence, but also in relation to the law generally. There are cultural barriers which prevent Aboriginal women from discussing certain issues ('women's

75. Questions 5.2, 5.3, 5.6.

76. Confidential Submission 413; Confidential Submission 564; Women's Legal Service Steering Committee WA Submission 360.

77. Confidential Submission 13; Central Australian Advocacy Service Submission 433.

78. Confidential Submission 407; Women's Legal Service Steering Committee WA Submission 360.

79. Confidential Submission 116; Confidential Submission 412; Confidential Submission 415.

business') with male lawyers,<sup>80</sup> a particular problem in a town where most lawyers are men. The result is that often courts do not receive relevant evidence from women. The same cultural barriers often impede Aboriginal women's ability to communicate with police.<sup>81</sup> The courtroom environment is particularly alien to women from traditional Aboriginal communities, and the Commission heard that little is done to make that environment more acceptable. For instance, judges, magistrates and lawyers are often brought from Melbourne or Sydney to work in the Northern Territory for particular cases or on short-term circuit, and they frequently lack awareness of Aboriginal culture and traditions.<sup>82</sup> Aboriginal women living in remote traditional communities suffer extreme isolation from legal services. Such communities may be virtually closed and the problem of enforcement of legal remedies - such as restraining orders - within them is often nearly insurmountable.<sup>83</sup> Moreover, for such traditional Aboriginal women as do find help, existing sexual assault services are limited and culturally inappropriate.

2.27 The barriers which Aboriginal women in Australia experience in using the legal system assume particular importance in the context of debates (both inside and outside the courtroom) over the degree of violence which is culturally acceptable in Aboriginal society. There is real evidence that women's voices on this crucial issue are not being heard. The result may well be a distorted picture of culturally acceptable behaviour.

2.28 The Commission was told that the needs of Aboriginal women are not being properly considered in the provision of legal aid services. There are almost no services that cater specifically to the needs of Aboriginal and Torres Strait Islander women which can differ according to region and lifestyle. Aboriginal and Islander legal services commonly have a policy that prohibits the representation of one indigenous person against another. This policy is an attempt to avoid conflicts of interest and perceptions that the service is taking sides in a dispute between family or community members. However it was submitted to the Commission that this serves to disadvantage indigenous women, particularly in matters where they are the victims of violence perpetrated by indigenous men.<sup>84</sup>

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80. Confidential *Submission 427*; Confidential *Submission 428*; Women's Information Service, Alice Springs *Consultation 23 August 1993*; Pitjantjatjara Women's Council, Alice Springs *Consultation 23 August 1993*.

81. *ibid.*

82. Women's Information Service, Alice Springs *Consultation 23 August 1993*.

83. L Young *Submission 432*; Confidential *Submission 428*; Pitjantjatjara Women's Council, Alice Springs *Consultation 23 August 1993*.

84. L Steer *Submissions 301*; Women's Legal Resources Centre, Sydney *Submission 256*.

Women are experiencing violence in the 1990s as it has never been experienced in these communities before . . . Many Aboriginal men are not considering themselves accountable to anyone in their behaviour towards women and children . . . I know too many women and children in the Northern Territory who live in an isolated hell. The traditional protection is gone for these women and non-Aboriginal law is unresponsive . . . This problem is not traditional but is part of a situation that colonisation has brought about.<sup>85</sup>

An Aboriginal woman who has been in hiding for the past year has moved 200kms from her home town, family and friends to escape her violent Aboriginal partner to whom she has two young children. She was advised by the local police and magistrate that she should move interstate with her children and change her name as they are unable to protect her from her partner's violence. She says that she cannot move because there is a Family Court order for supervised access to the children by her former partner.

*If I escape now, I'd be in breach of the Family Court. Then he could track me down legally. There's no way I am ever going to get him out of my life. . . . I was really scared of him. I had an AV out on him, and he has breached the AV eight times. Sometimes he really hurt me, but he was never put in prison once. Always got good behaviour bonds. He always pleaded suicidal tendencies, so they release him. . . . Court just increases his sense of power. Every time he gets off, he thinks he rules the roost. I'm locked up, and he walks around shouting abuse outside court. . . . He always turns up with the best barrister. I don't know where he gets the money from - maybe Aboriginal Legal Aid is helping him . . . He's going for access to (their second child) next. Now I'm scared that if I get a job or study that he can tell the (Family) court that I can't look after the kids properly. Then he'll ask for full custody and he'll probably get it. He always gets what he wants.<sup>86</sup>*

Torres Strait Islander women report that domestic violence is their main problem. They acknowledge that their problems would be similar to those faced in many remote communities.<sup>87</sup>

85. S Gilmour Submission 276.

86. Illawarra Legal Centre Submission 284.

87. Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc Vic Submission 330.

There is no resident lawyer and the magistrate visits only once a month, so that a woman needing a protection order is vulnerable up to a month before action can be taken . . . With only one legal aid solicitor, he/she has to represent both sides which does not allow for fair representation . . . There is no mediation or counselling services available in remote communities like this . . . There is much fear on the part of Island women in dealing with the male dominated police and courts; particularly fear of the police.<sup>88</sup>

### *Women of non-English speaking backgrounds*

2.29 *Barriers to justice.* Submissions emphasise that the legal system also fails to provide services that would give women of non-English speaking backgrounds (NESB) equal access to the legal system.<sup>89</sup>

NESB women in Australia face similar difficulties when accessing legal services as other women in the community face . . . However, difficulties arising from these barriers doubly disadvantage NESB women because of poor or no knowledge of the English language and from cultural expectations. Lacking the ability to communicate effectively in English, NESB women are less likely to understand the law, to learn about their legal rights and how to exercise them. Little or no information about the legal system is available in community languages . . .<sup>90</sup>

Even when aware of their legal rights women from non-English speaking backgrounds may find it very difficult to take action through using services which are alienating and unsuited to their needs. A particular example is in cases of domestic violence where many cultures have strong prohibitions against a woman leaving her husband or taking action against him.<sup>91</sup>

2.30 *The barrier of language.* Fundamental to obtaining justice is the ability to communicate effectively at all levels of the legal system, including with the police, legal practitioners and the court. Submissions indicate that many women cannot enjoy this right. In a recent case involving a woman who could not speak English and had no legal representation, the Full Court of the Family Court recently said

88. Women of Far North Queensland *Submission 117*.

89. Migrant Women's Emergency Service Qld *Submission 388*; C Karp *Submission 387*; S Goiser *Submission 273*; A Lucadou-Wells *Submission 344*.

90. S Goiser *Submission 273*.

91. S Goiser *Submission 273*; Migrant Women's Emergency Service Qld *Submission 388*; C Karp *Submission 387*.



*It is almost laughable to speak of notions such as equality of access to the courts in the context of a case such as this one. It is, we believe, intolerable that a person in the position of the wife in this case should be expected to present reasoned argument to an appellate court without legal representation.<sup>92</sup>*

Submissions indicate that the lack of interpreting services and the inappropriate use of interpreters are widespread. Key providers of legal information have been described as culturally ignorant of women's needs and stereotype women according to their country of origin.<sup>93</sup>

Lawyers and community workers report that there is a general impatience throughout the system when people from non-English speaking backgrounds are involved. Women who don't speak English are often treated as non-entities, and/or patronised. This impatient tone has an intimidatory effect on women who are unlikely to be familiar with the Australian legal process and unconfident and therefore unable to effectively assert their needs.<sup>94</sup>

A woman who was hospitalised after she sustained a serious assault at the hands of her violent husband was 'persuaded' by police to sign a statement requiring them to take no further action. They said there was not enough evidence. When they took her initial statement they did not use an accredited interpreter, and they told her that if she really wanted to get away from the violent husband she should leave the country.<sup>95</sup>

A Muslim woman had her case dismissed for an Intervention Order because her complaint that she had been spat in the face was not, from the Magistrate's dominant cultural perspective, considered serious. In her culture to be spat on is considered a gross violation and extremely frightening in its suggestion of future violence.<sup>96</sup>

92. *In the Marriage of Sajdak and Sadjak* (1993) FLC 92-348, 79,687.

93. *Women of Far North Queensland Submission 117*; *Confidential Submission 368*; *Illawarra Legal Centre Submission 284* particularly referred to Asian women.

94. *Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc Vic Submission 330*.

95. *ibid.*

96. *ibid.*

**Women in isolated communities**

2.31 There are over 2 million Australian women living in rural and remote areas.<sup>97</sup> Remoteness presents a special disadvantage for women in Australia. A joint submission from Far North Queensland, incorporating the views of women from a variety of government, community and women's services, places particular emphasis on the needs of women in remote areas.<sup>98</sup>

The availability of legal information and assistance to women in rural and remote areas is severely restricted by virtue of their geography . . . To varying degrees, remoteness affects the way in which women are able to get information, legal advice, support services, the legal processes and also to engage in public and political life. For those in the remotest parts of Far North Queensland, the day to day lives of the women are profoundly affected by isolation.<sup>99</sup>

2.32 The Commission was told that there were no reported rapes in Cooktown last year. It was suggested that this is because there is no rape counsellor, female police officer or female doctor in Cooktown.<sup>100</sup> Evidence was also received from Tasmania, the Northern Territory and Western Australia.

2.33 Country towns often have only one or two solicitors, if any at all. In the absence of special services for women, a woman may have as her only source of legal advice a solicitor who has an existing legal relationship with the woman's husband. Any advice regarding the family business or farm will usually have been obtained by the husband. In addition, if the solicitor is a man, which is usually the case, he is likely to be a personal acquaintance of the husband.<sup>101</sup>

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97. Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993, table 1.5, 12. The figure represents women living in 'other areas' which ABS states is an approximate figure for women living in remote and rural areas: id, 282.

98. Women of Far North Queensland *Submission*. 117. Participants in this submission included the Anti-Discrimination Commission, Cairns Campus Student Association, Cairns Community Legal Centre, Domestic Violence Unit, Family Resource Service, Leichhardt Electorate Office, Mookai-Rosie Women's Hostel, Self-health for Workers in the Sex Industry, Ruth's Women's Shelter and the Women's Electoral Lobby.

99. *ibid.*

100. *ibid.*

101. *ibid.*

[F]arms 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.<sup>102</sup>

Submissions to the Commission also talk of similar problems with police who also may have personal relationships with the husband.<sup>103</sup> Women in mining towns were seen to be especially vulnerable, isolated and disenfranchised.<sup>104</sup>

### Older women

2.34 Women aged 65 and over constitute 6.5% of the population and women between the ages of 55-64 years constitute 4.2% of the population.<sup>105</sup>

The accumulated effects of lifelong gender bias discrimination indicate that many of the discussed issues and possible reforms/new laws will not overcome many of the effects of the past inequalities or the present disadvantages older women must live with; not the least is that the majority live below the poverty level because of the effects of the discrimination. To name only two: impoverished education and low-paid employment.<sup>106</sup>

Submissions indicated that DP 54 was deficient in not realising the needs of older women.

Lack of awareness of the law does make it difficult to use the law effectively to protect rights. Because of traditional isolation in the home and fragmentation as a population group, older women, in particular, are easy prey for those, either family or strangers, to take advantage of the lack of legal knowledge of rights on property, tenancy, income security and personal protection. This can be compounded for older women from non-English speaking backgrounds.<sup>107</sup>

102. Domestic Violence Action Group, Port Lincoln *Submission 453* cited from Commission notes of oral submission.

103. Women's Legal Resource Centre, Sydney *Submission 256*.

104. Women's Health Centre, Rockhampton *Submission 126*.

105. Australian Bureau of Statistics *Census Characteristics of Australia; 1991 Census of Population and Housing* ABS Canberra 1991, Table 2, 13.

106. Older Women's Network Australia Inc, Sydney *Submission 303*

107. Older Women's Network, Canberra *Submission 93*.

*We are invisible in positions which emanate an air of authority . . . older women are often referred to as 'grannies' in news items. This effectively robs us of our individual identities and the recognition of individual achievements.<sup>108</sup>*

We know of instances where older women have been defrauded of their homes (elders abuse) by unscrupulous handymen preying on their fear of being alone and their lack of knowledge of the law.

Numbers of older women's experiences of law are not positive, eg sexual assault cases, property settlements, domestic violence charges.<sup>109</sup>

#### *Women with disabilities*

The Commission was told that

**Women who have an intellectual disability (and particularly those who have high support needs) have greatly reduced opportunity to be aware of their rights. This may be partly due to the legal profession's inexperience with people who have an intellectual disability.<sup>110</sup>**

A problem of particular significance for women with intellectual disabilities who have high support needs, was the disturbing incidence of sterilisation as a form of 'menstrual management'. The High Court of Australia recently recognised that sterilisation interferes with a 'fundamental right to personal inviolability'.<sup>111</sup> Nevertheless

**Institutional discrimination resides in the lack of uniformity of legislative protection for Australian women who have an intellectual disability, in respect of menstrual elimination procedures.**

108. *ibid.*

109. Older Women's Network Australia Inc, Sydney *Submission* 303,

110. Menstrual Management Research Team, Department of Social Work and Social Policy, University of Queensland. *Submission* 185.

111. *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218.

It was submitted that:

Currently decisions being made about the sterilisation (including menstrual and/or fertility elimination) of female children, are contravening the individual's rights.

Submissions write of the incidence of sexual abuse of women with disabilities, both in and out of institutions, from those responsible for their care. A particular concern raised is the inappropriate use of sterilisation in response to concerns about the potential for sexual abuse:

The risk of sexual abuse is raised in some of the [reported court] cases. If the woman is perceived to be at risk of sexual abuse, the limited research available . . . suggests that the abuser is likely to be a family or staff member; that is, someone who knows her. It follows, therefore, that the risk of abuse may be increased if the potential abuser knows that detection through pregnancy will not occur . . . Perhaps approaches to managing the young woman's environment to minimise opportunities for sexual abuse should be considered.<sup>112</sup>

The Mental Health Legal Centre Inc in a submission from Victoria point out that sterilisation is an issue that particularly involved women; in its six year history, no application has been brought to sterilise a young man.<sup>113</sup>

We contend that women with psychiatric or intellectual disability are being brought into the legal system against their wishes, to fight for the control of their own fertility. Women with disabilities are being discriminated against because they are being treated differently from men since it appears that the fertility of men is not interfered with in comparable ways. We would submit that this is an example of gender bias which produces inequality.<sup>114</sup>

The Legal Centre also pointed out that they had acted for many women who have been the victims of sexual assault committed against them by male co-patients and male staff.

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112. *ibid.*

113. Mental Health Legal Centre Inc VIC *Submission 230*

114. *ibid.*

Another issue that arises from these sexual assaults is women's access to the justice system when such sexual assault takes place. For a number of women with psychiatric disability, it may take many years before they are prepared to come to terms with the issue of the sexual assault. Present time limits discourage women from making a complaint under discrimination law or crimes compensation if more than 12 months has elapsed since the incidents. This also applies in negligence cases where claims should be lodged within six years from the date of injury.<sup>115</sup>

The gendered impact of statutes of limitations (time limits for bringing actions before the courts) will be considered in the Commission's final report.

### *Young women*

2.35 It is apparent that DP 54 failed to address the particular needs of young women as victims and juvenile offenders.

Although the letter of the law does not discriminate against young women the effect of it does because young women are more often the victims of abuse.

Young women are most likely to be victims of sexual abuse. They often are denied the compensation to which they would be entitled because they are not advised of their right to claim under criminal injuries compensation legislation. The abuser is commonly a family member and there is often a reluctance on the part of the abuser survivor's family to press a compensation claim.<sup>116</sup>

One of the most comprehensive submissions the Commission received was from the Women Incest Survivors Network.

In many cases, survivors of incest and child sexual abuse are still the most invisible victims of crime... Some of us have had direct experience of making a judgement as children that there was no point in telling anyone about what was happening to us. As survivors of incest and sexual abuse, all of us know what it is like to feel powerless, terrorised, desperate and alone — isolated from any form of assistance.<sup>117</sup>

115. *ibid.*

116. National Children's and Youth Law Centre *Submission 312*

117. Women Incest Survivors Network *Submission 319*.

A lack of credibility was the overwhelming problem facing young women in using the legal system. The Network submitted that apart from the issue of statutory limitation periods and the restraints of evidentiary procedure, the community and the legal profession are generally ignorant of incest and child abuse.

*Lesbians*

2.36 Submissions received from lesbian and gay lobby groups indicate that sexual orientation is not recognised or protected under the law across a wide range of areas. They referred particularly to the situation of same sex partners in relation to intestacy, next of kin, the care of children and property division on relationship breakdown. They also described the distinctive nature of violence against lesbians.<sup>118</sup>

Access to justice is a problem for lesbians that is not recognised by the judicial system. An inability on the law's part to recognise that the issues of lesbians are distinct and separate from heterosexual women . . . Because of the general unacceptance and understanding of homosexuality, lesbians may doubt that their evidence is being given equal consideration. The legal system can be dismissive of a lesbians sexuality . . . Lesbians, even more than heterosexual women, are likely to have their testimony given less credibility than men.<sup>119</sup>

The assumption of heterosexuality in the justice system seeks to silence many lesbians . . . The negative stereotyping of lesbians presents a serious barrier to access to justice. Fear about the nature of justice which will be administered by a court prevents many lesbians from seeking remedies except in absolute crisis situations.<sup>120</sup>

2.37 Submissions said that many of the legal issues affecting lesbians extend beyond a reference on women's equality before the law. They requested that the Commission be given a separate reference on equality before the law for lesbians and gay men.

118. Lesbian Legal Rights Group Vic *Submission 251* p 18.

119. Tasmanian Gay and Lesbian Rights Group *Submission 280*.

120. Gay and Lesbian Rights Lobby and the Lesbian and Gay Legal Rights Service, Sydney *Submission 193*.

## 3. The link between access to justice and violence

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### Introduction

3.1 This chapter considers the link between violence against women, equality issues and women's access to justice. It describes responses overseas to violence against women, both in international human rights law and in national proposals and programs. It also describes initiatives taken in Australia by the Commonwealth and the States and Territories.

### The submissions

#### *Violence is a recurrent issue*

3.2 Access to justice and violence against women are recurrent issues which frequently arise together in submissions. Submissions portray violence as a regular part of life for large numbers of women in Australia and one of the main complaints is how the legal system responds.<sup>1</sup> Most submissions on access to justice deal with problems that survivors of violence experience in dealing with the legal system. When women seek access to justice they are often seeking protection from violence. Freedom from violence cannot be separated from women's equality and their access to justice.

Violence against women cannot be separated from the structural injustices women face economically and politically, or from women's experiences of gender bias in the systems with which they interact. Violence against women and structural inequalities faced by women are human rights issues that must be dealt with if Australia is to become a just society and fulfil its human rights obligations.<sup>2</sup>

The links between inequality and violence are so strong that women's equality cannot be ensured unless violence is addressed. This requires more effective measures to provide women with appropriate access to justice. In the next chapter the Commission makes recommendations for a new program to promote women's access to justice. The submissions' evidence of the pervasive nature of violence against women convinced the Commission of the urgent necessity of those recommendations.

#### *A national problem*

3.3 Submissions indicate that violence against women is a problem of national dimensions affecting many thousands of women throughout Australia. One complaint by women concerns the lack of uniform standards in the responses to

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1. See ch 2.

2. Illawarra Legal Centre *Submission 284*.



violence. Both the legal provisions and the provision of services for women survivors are uneven, not only among jurisdictions but also within them. For example, the women of Cairns asked why they could not have the level of protection that appeared available in New South Wales and Victoria.<sup>3</sup> In Western Australia there were many complaints about the lack of police support in domestic violence matters and the lack of legal services for women.<sup>4</sup> In South Australia there was some evidence of good support from the police but inadequacies in magistrates' courts. There are no legal services in Tasmania specifically for women subjected to domestic violence, although some legal aid is available for obtaining restraining orders.<sup>5</sup> In the Northern Territory there was a marked contrast between the quality and adequacy of services in Darwin and those in other parts of the Territory. The Commission was repeatedly told that in towns like Alice Springs and Tennant Creek women subjected to violence often have nowhere to go for legal and medical assistance.<sup>6</sup> By contrast, the level of services appeared high in the ACT.

## International developments

### *Terms of reference*

3.4 The Commission is required under its Act and its terms of reference to have regard to international human rights law and to the relevant law of any other country. It has examined the most significant international human rights instruments and the law and practice of Canada, the United States of America and the United Kingdom. Recent policy and program initiatives, particularly in Canada, are being examined.

### *International human rights law*

3.5 **Introduction.** The major international human rights treaties, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* referred to in Chapter 1, declare fundamental human rights and freedoms. They require that rights be enjoyed equally and that

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3. Women's Centre, Cairns *Consultation* 13 September 1993.

4. Bunbury Domestic Violence Action Group *Submission* 98; Waratah Support Centre *Submission* 109; Confidential *Submission* 369.

5. Tasmanian Government Representatives, Hobart *Consultation* 28 September 1993.

6. eg J Devlin *Consultation* 24 August 1993; Women's Information Service, Alice Springs *Consultation* 23 August 1993; Confidential *Submission* 426; K McNab *Submission* 434. An account of the effect of lack of resources was given during public hearings by a lawyer practising as a barrister and solicitor in Alice Springs. She was asked to represent two women in a discrimination claim against their former employer. The two women had allegedly been dismissed from their place of employment because they were pregnant. The lawyer discovered that there is not a single copy of the *Equal Opportunity Reporter* in Alice Springs. As she observed, 'Without access to resources of this sort I cannot possibly give adequate legal advice'. She eventually discovered that the closest copy of the *Equal Opportunity Reporter* was located in Darwin, approximately 1500 kilometres away: P Ditton *Submission* 431.

discrimination be prohibited. Although their provisions address many concerns of women they do not expressly address violence against women. Recognition of violence against women as a human rights issue has only come more recently.

3.6 ***CEDAW and violence against women.*** The *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) does not refer specifically to violence against women. However following increasing recognition by the international community that violence against women is a human rights issue which denies women's basic entitlement to equality, the committee established to monitor CEDAW adopted a General Recommendation in 1992 which identified gender-based violence as a form of discrimination against women that seriously inhibits their ability to enjoy rights and freedoms on a basis of equality with men.<sup>7</sup>

3.7 ***The World Conference on Human Rights.*** The World Conference on Human Rights held in Vienna in June 1993 declared that 'gender based violence and all forms of sexual harassment and sexual exploitation ... are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation'.<sup>8</sup>

3.8 ***The Declaration on Violence Against Women.*** In December 1993 the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women.<sup>9</sup> It calls on all nations to provide 'access to the mechanisms of justice' and 'develop appropriate sanctions' to redress the wrongs caused to women subjected to violence. The Declaration defines 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 private life.*<sup>10</sup>

It describes the persistence of violence against women as

*a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of their full advancement [and] ... is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.*<sup>11</sup>

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7. Report of the Committee on the Elimination of Discrimination Against Women 11th Session January 1992 *Official Records of the General Assembly 47th Session Supplement No 38 (A/47/38,4) General Recommendation 19(1)*.
  8. Vienna Declaration and Program of Action 1993 para 18.
  9. General Assembly resolution number 48/104 UNGA 48. The Declaration on the Elimination of Violence Against Women is reproduced in Appendix 1.
  10. Declaration on the Elimination of Violence Against Women art 1.
  11. *ibid*, preamble para 6.

### **Other countries**

3.9 **Canadian Panel on Violence Against Women.** The Canadian Panel on Violence Against Women recently recommended a National Action Plan to ensure equality for women and the elimination of violence against women.<sup>12</sup> The proposed plan suggests a policy of 'zero tolerance of violence', that is, that no level of violence is acceptable and that women's safety and equality are priorities.

3.10 **US Violence Against Women Bill 1993.** In 1993 a Bill on violence against women was introduced into the United States Congress.<sup>13</sup> It is wide-ranging in its scope. It sets up a scheme of grants to State public and private bodies. The grants would be for the training of law enforcement officers and prosecutors to identify and respond to domestic violence, the establishment of data collection systems on domestic violence, education programs about rape, telephone hotlines for victims and other measures. The Bill also provides for the establishment of a National Institute of Justice and a National Board on Violent Crime with wide ranging responsibilities to develop policy and review the progress made by the federal Government and agencies in implementing the legislation.

## **Australian responses**

### **Current responses**

3.11 In recent years the Commonwealth and the States and Territories have recognised violence against women as a national issue.<sup>14</sup> They now accept that it is a pervasive problem throughout Australia and each jurisdiction has made some efforts to improve the situation of women. Some of this activity has been in response to the work of the National Committee on Violence Against Women from 1990 until June 1993. The Committee initiated research and provided a forum for national consideration of legal, policy and program issues. In 1992 the Committee produced the *National Strategy on Violence Against Women* which provided a framework for all levels of government to address the issues.<sup>15</sup> The Committee also continued the National Domestic Violence Education Program which ran from June 1990 to June 1993.

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12. Canadian Panel on Violence Against Women *Changing the Landscape: Ending Violence - Achieving Equality* Minister of Supply and Services Ottawa 1993.
  13. The Bill passed through the House of Representatives in November 1993 and is currently before the Senate.
  14. eg National Committee on Violence *Violence: directions for Australia* Australian Institute of Criminology Canberra 1990, 100, 102.
  15. National Committee on Violence Against Women *National Strategy on Violence Against Women* Office of the Status of Women, Department of the Prime Minister and Cabinet Canberra 1992.

3.12 A number of reports on domestic violence legislation and the effectiveness of support services have been produced for State and Territory governments over the past five years.<sup>16</sup> The operation of criminal laws as they affect women, particularly in relation to sexual assault, has also been examined in several States.<sup>17</sup> There has been much less research on the experiences of particular groups of women, for example, Aboriginal and Torres Strait Islander women, women from non-English speaking backgrounds, women with disabilities and lesbians.<sup>18</sup> Government responses to these inquiries and reports have varied. Some States and Territories have introduced new laws and new programs. Some have made significant amendments to legislation, for example, in relation to stricter control of gun ownership, inter-state enforceability of protection orders, the availability of urgent interim orders outside normal court hours and the extension of legislation to provide for protection from stalking and other intimidating behaviour.<sup>19</sup>

3.13 The federal Government has funded a new community education program *Stop Violence Against Women* which is running until mid 1995. The program provides community grants and includes a general publicity campaign, research papers, a resource kit and a campaign on consent in sexual relations and sexual violence.

### *Towards a more effective national response*

3.14 The National Committee on Violence Against Women sought to develop an effective response on a national basis, particularly through the National Strategy, but had limited success in achieving parallel standards of access to justice. Responses have been incomplete, uncoordinated and often under-resourced. The need for an effective national response remains. The next chapter in this interim report recommends some initial steps towards a more effective national response. The Commission's final report on Equality before the law will deal with these issues in greater detail.

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16. eg NSW Domestic Violence Committee *Report of the NSW Domestic Violence Committee* NSW Women's Co-ordination Unit Sydney 1991; Queensland Domestic Violence Task Force *Beyond these walls* Queensland Domestic Violence Task Force Brisbane 1988; the Community Law Reform Committee of the Australian Capital Territory Discussion Paper No. 2 *Domestic violence* ACT Attorney General's Department Canberra 1992; J Mugford, P Eastale & A Edwards prepared for the Community Law Reform Committee of the Australian Capital Territory Research Paper No. 1 *Domestic Violence* ACT Attorney General's Department Canberra 1993.
  17. eg Z Rathus *Rougher than usual handling: women and the criminal justice system* Womens' Legal Service Brisbane 1993; Law Reform Commission of Victoria Report No. 43 *Rape: reform of law and procedure* Melbourne 1991 (VLRC 43) and Report No. 46 *Rape: reform of law and procedure: supplementary issues* Melbourne 1992 (VLRC 46); NSW Sexual Assault Committee *Sexual assault phone-in report* NSW Ministry for the Status and Advancement of Women Sydney 1993.
  18. eg NSW Domestic Violence Committee *Report on consultations with Aboriginal communities* NSW Women's Co-ordination Unit Sydney 1991; M Carmody *Sexual assault of people with an intellectual disability: final report* (prepared for NSW Women's Coordination Unit) Parramatta 1990.
  19. Amendments providing protection from stalking: *Crimes (Domestic Violence) Amendment Act 1993* (NSW) s 3; *Criminal Law Amendment Act 1993* (Qld) s 3. A Bill was also introduced in SA in 1993 but has not yet been passed.

3.15 Although a number of government and non-government programs have attempted to address the issue of violence against women, the problem remains widespread and in need of urgent and more effective responses. It is inadequate simply to blame individual men for violence against women. The size and nature of the problem indicates that individual acts alone do not account for it. It is systemic. As such it will require action on many fronts. Changing the community's tolerance of violence is part of this. The Commission agrees with the Canadian Panel on Violence Against Women that

One of the most tragic conclusions from our journey is that much of the violence women have endured was preventable. Solutions must be based on the fact that there is a high level of tolerance of violence, and therefore, that a policy of zero tolerance must be adopted at all levels of government - as well as within each and every organisation in society.<sup>20</sup>

The legal system should play an integral part in responding to violence and providing redress for wrongs suffered by women. In order that women receive the level of protection from the law to which they are entitled they must have improved access to justice. Access to justice issues are inseparable from the broader question of women's equality. The law must be closely examined and steps taken to improve it if violence against women and other equality issues are to be adequately addressed. Clearly concerted action involving co-operation among all levels of government is needed. For these reasons the Commission has decided to focus the recommendations in this interim report on a new framework for a national response to the barriers that women face in obtaining access to justice.

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20. Canadian Panel on Violence Against Women *Changing the landscape: ending violence - achieving equality* Minister of Supply and Services Ottawa 1993, xiii.

## 4. A national women's justice program

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### Introduction

4.1 This chapter proposes the establishment of a National Women's Justice Program. The Commission sees this as fundamental to creating equal access to justice for women.

### Women's unequal access to justice

4.2 The Commission does not underestimate the difficulties for any person in using the justice system. However, there are special factors which affect women as a group. Violence,<sup>1</sup> sexual assault,<sup>2</sup> sexual harassment<sup>3</sup> and discrimination in employment<sup>4</sup> affect women of all social classes and cultural backgrounds. Women as a group still have the major responsibility for child rearing and work in the home.<sup>5</sup> To pursue their rights they have to enter an arena where men have

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1. US studies suggest that domestic violence occurs between 11-30% of married couples and 21-36% of divorcing couples: H Astor *Position paper on mediation* (prepared for National Committee on Violence Against Women) The Committee Canberra 1991, 14.
  2. According to the 1992 national Australian crime victim's survey, about one out of every hundred women had experienced a rape or attempted rape in 1991: J Walker *Crime in Australia* Australian Institute of Criminology Canberra 1993, 19. In 1986 Australia had the third highest rate of reported rape out of 32 countries, behind the US and New Zealand: D Weatherburn & C Devery 'How violent is Australia?' in D Chappell et al (ed) *Australian violence: contemporary perspectives* Australian Institute of Criminology Canberra 1991, 26.
  3. A random telephone survey of 411 young women aged between 16 and 25 found that 24% had suffered sexual harassment in the form of verbal or physical abuse, a threat to continuing employment or advancement or a combination of these: Elliot & Shanahan Research for Human Rights & Equal Opportunity Commission *Executive report of a survey of young women in the workplace* 1990, Table 13 (unpublished). Of the 783 complaints lodged under the SDA in the period 1 July 1992 to 30 June 1993, 292 were about sexual harassment alone and a further 74 concerned a complaint of sexual harassment and sex discrimination: Human Rights & Equal Opportunity Commission *Annual report 1992-93* AGPS Canberra 1993, Table 12, 255.
  4. Women are segregated into occupations which are less prestigious and attract lower pay. Women's occupations are concentrated in sales, clerical and 'caring' professions such as nursing. In August 1992 more than half of all female employees were employed as clerks, salespersons and personal service workers. Only 6.7% worked as managers or administrators, compared to 14.7% of male employees: Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993c, Table 5.3, 125. Women are more likely to be in part time and casual employment than men; these jobs tend to have lower security, pay and status, and fewer fringe benefits. In August 1992, 43.3% of Australian women in paid employment were employed on a part-time basis (cf to 10.5% of men) and 31% of female employees were employed on a casual basis (cf to 16% of men): *id* Table 5.23, 157, 124. A survey of private organisations found that in 1992 only 1.3% of female employees occupied senior management positions, whilst 10.1% of men did; the proportion of women had decreased from 2.5% in 1984: L Still, CD Guerin and W Chia *Women in management revisited: progress, regression or status quo* 1993, 6 (unpublished).
  5. The 1992 Time Use Survey found that women in Australia spent 159 minutes per day on 'housework' while men spent only 58 minutes per day. The type of work and the time spent on that work varied considerably by sex. It was found that women were 'heavily represented' in the tasks of food preparation and cleaning up afterwards (86.5% women compared to 56.3% men), washing and ironing (56.5% women compared to 11.9% men) and 'other housework' (71.1% women compared to 26.4% men). The care and minding of own children is performed by 26.6% women compared to 14.8% men: Australian Bureau of Statistics *How Australians use their time* AGPS Canberra 1993b, Table 6, 21.

historically had control, and where men have constructed the rules. Most women have less access to financial resources than most men.<sup>6</sup> These factors make a difference. They create a need for effective justice mechanisms and simultaneously operate to prevent access to those mechanisms.

### *Access to justice is a national issue*

**4.3 National needs.** The federal government bears responsibility for Australia's compliance with its international human rights obligations. It has recognised the disadvantages and barriers Australian women face in many areas as a national issue,<sup>7</sup> particularly the nature and extent of violence against women<sup>8</sup> and their health status.<sup>9</sup> The government has recognised that equality for women is also a national issue.<sup>10</sup> One of the determining factors of equality for women in Australia is equality before the law and equal access to justice.

**4.4 Need for a coordinated response.** The submissions demonstrate that women throughout Australia have different experiences of the legal system in different States and Territories.<sup>11</sup> They have different legal rights, are accorded different treatment and have access to different services. In particular, the laws and services dealing with violence against women differ greatly.<sup>12</sup> There is a manifest need to construct a more coordinated response to address women's lack of access to justice and to establish some method by which information and developments in each of the States or Territories can be monitored and evaluated.<sup>13</sup> Special initiatives are necessary.

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6. Women in paid work earned on average 67% of the total earnings of men: Australian Bureau of Statistics *Average weekly earnings, States and Australia: February 1993* AGPS Canberra 1993a, 1. Only 57% of women earn income compared with 79% of men. In 1989-90 50% of all female income recipients received less than \$10 000 compared with 22% of men, whilst only 9% of women received more than \$30 000 compared with 33% of men: Australian Bureau of Statistics op cit 1993c, 170-71.
  7. See Office of the Status of Women *Women - Shaping and sharing the future: The new National Agenda for women 1993-2000* AGPS Canberra 1993.
  8. See National Committee on Violence Against Women *National strategy on violence against women* Office of the Status of Women Canberra 1992.
  9. See Department of Community Services and Health *National women's health policy: advancing women's health in Australia* AGPS Canberra 1989.
  10. eg 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. See also Prime Minister *Government response to Half way to equal: the report of the inquiry into equal opportunity and equal status for women in Australia by the House of Representatives Standing Committee on Legal and Constitutional Affairs* AGPS Canberra 1992.
  11. eg Legal Aid Office ACT *Submission 294*; J Harrison *Submission 416*; L Goodchild *Submission 497*.
  12. See ch 3.3.
  13. Illawarra Legal Centre *Submission 284*; Women's Legal Resources Centre, Sydney *Submission 256*; Ministry for the Status and Advancement of Women NSW *Submission 350*; Sex Discrimination Commissioner *Submission 383*.

### *Need for new programs for women*

4.5 In an environment of inequality women need both specialist services which have specific expertise and a focus on women and mainstream services which are responsive to their needs and situations. Specialist services have an important role to play in addressing immediate and particular needs and in developing models that may influence mainstream services. Women's need for specialist services have already been recognised by community groups, women lawyers and others who have worked to provide services with limited resources.<sup>14</sup> The overwhelming demands upon these services is evidence of their need.

## **A national women's justice program**

### *Introduction*

4.6 The Commission considers that there is an established need for a national women's justice program to operate as a central focus for advancing women's access to the legal system and ensuring that the legal system responds to Australian women in an appropriate and adequate manner. This program would recognise women's lack of access to justice as an issue of national concern and would encourage Commonwealth, State and Territory cooperation to advance the interests of women in this area. A useful model for this type of program is the existing National Women's Health Policy and Program.

### *Responding to women's health needs: the National Women's Health Policy*

4.7 **Women's health policy.** Women's past and present disadvantage in access to appropriate health services has been identified in many studies. Governments recognised the need to respond with a policy and program that addressed this disadvantage and improved women's health status. In 1989, following extensive consultation and discussion, the Federal Government announced the National Women's Health Policy for an initial five year period.<sup>15</sup> The policy adopted the

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14. Existing services include the Women's Legal Resources Centre in Sydney, the Women's Legal Resource Group in Melbourne, the Women's Legal Service in Brisbane, unfunded women's legal services, eg in Townsville, and many domestic violence services, eg the Domestic Violence Advocacy Service in Sydney and Domestic Violence Legal Help in Darwin.
  15. Department of Community Services and Health op cit 1989.



World Health Organisation's approach of a 'social health perspective'.<sup>16</sup> This is an understanding of health 'within a social context'.<sup>17</sup> It recognises the associations and connections of health, culture and socio economic factors. The policy identifies seven major health concerns for women in Australia, including violence against women.<sup>18</sup> It adopted five broad structural areas<sup>19</sup> as the focus for improving the health status of Australian women in areas of concern:

- improvements in existing health services and provision of new health services for women
- provision of adequate and appropriate health information to women
- research and data collection
- increasing the participation of women in decision making in the provision of health services and the creation of health policy
- training health care providers.

The policy is for all Australian women but its main focus is on women who experience particular disadvantage in access to appropriate, affordable and responsive health care services as a result of 'economic disadvantage, cultural inappropriateness or geographic or linguistic isolation'.<sup>20</sup>

**4.8 Women's health program.** The policy recommended the National Women's Health Program.<sup>21</sup> Program funds total \$33.72 million over the four year period to 1992-93 on a dollar-for-dollar cost share basis between the Commonwealth and the States and Territories. The program has funded projects in three categories

- provision of a diverse range of new and existing services in major population centres and rural centres, focussing on prevention, counselling, support services, screening services and treatment
- provision of education and information for women with the focus on the seven priority issues
- provision of training and education for effective health care which expands continuing education systems and developing curricula.<sup>22</sup>

The program is implemented through a small unit in a federal department, with a funding and coordination role, working with services in the States and Territories.

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16. *ibid*, 6.

17. Department of Office of the Status of Women. *Women in Australia: Australia's second progress report on implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* OSW Canberra 1992, 147.

18. The other concerns were reproductive health and sexuality, the health of aging women, emotional and mental health, occupational health and safety, the health needs of women as carers and the health effects of sex role stereotyping on women.

19. Referred to as the 'key action areas': Department of Community Services and Health *op cit*, 82.

20. Office of the Status of Women *op cit*, 1992, 148.

21. Department of Community Services and Health *op cit*, 84.

22. Australia Parliament *Women's Budget Statement 1992-93* Budget Related Paper No 5 AGPS Canberra 1992, 142. The program funded 273 projects. The program has been extended for a further four-year phase from 1993/94 to 1996/97 with an allocation of nearly \$30 million: Australia Parliament *Women's Budget Statement 1993-94* Budget Related Paper No 4 AGPS Canberra, 128.

**4.9 Usefulness of this model for women's access to justice.** The National Women's Health Policy and Program coordinates and builds on existing services in States and Territories, expands their capacity to provide services to meet women's needs and supports new or pilot programs to fill the gaps in areas of particular concern to women. It seeks to avoid duplication and to provide the most effective services with available funds. It provides a model which is appropriate for a program to address women's needs for access to justice.

***The proposed National Women's Justice Program***

**4.10 Women's justice needs.** Women's justice needs are as significant as their health needs. They need legal services that are appropriate, affordable and responsive. They need access to the legal system in every area of law. Submissions to the Commission highlight justice issues of particular concern to Australian women

- violence against women
- the costs of justice
- information about rights and remedies
- women's credibility in court
- family law, especially concerning custody of and access to children and property division
- sex discrimination and sexual harassment
- legal interpreter services which are gender aware and culturally sensitive for women of non-English speaking background
- legal services that meet the needs of Aboriginal and Torres Strait Islander women.

These areas of need reflect women's inequality before the law. A nationally coordinated approach is required to address these needs.

The Commission **recommends** the immediate establishment of a National Women's Justice Program to address women's needs for access to justice.

**4.11 Program goals and components.** The National Women's Justice Program (NWJP) should promote equal access to justice for all women in Australia. Its focus should be on those with least access to justice. It should include appropriate measures to address the particular needs of women who may face barriers relating to isolation, race, culture, disability or age. It should consist of at least six program areas

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

4.12 *Specific initiatives for women and discrimination.* In the Commission's view special initiatives which enhance women's access to justice do not involve discrimination against men. Women do not currently enjoy access to justice on the basis of equality with men. This interim report describes women's accounts of their experiences of the justice system. These experiences will be analysed in detail in the Commission's final report. An access to justice program specifically designed to address women's experiences does not disadvantage men but rather responds to women's inequalities. Even if the program is considered in a formal sense to give favourable treatment to women it is not unlawful under the *Sex Discrimination Act 1984* (Cth) because it is a 'special measure' for women designed to achieve 'equal opportunity' with men.<sup>23</sup> These issues will be discussed in detail in the first part of the Commission's report.

## Legal representation

### *Unequal aid*

4.13 In Australia most assistance for legal representation in court is provided through legal aid. Fewer people have been able to obtain legal aid in recent years, due in part to the escalation of the cost of providing services. The recession has also increased the level of demand for free or subsidised legal services. As fewer cases can be funded, the priorities for approving legal aid have become narrower. Priority is given to the needs of criminal defendants. There is less legal aid available therefore in family law matters and in other areas of law which are particularly important to women. Women currently receive a much smaller share of the legal aid dollar than men do. In 1992-93 men received 63% of net legal aid expenditure in Australia of \$133.9 million and women received 37%, \$34.8 million less than men.<sup>24</sup> The first part of the Commission's final report will contain a more detailed analysis of women's inequality in access to legal aid.

### *Legal aid priorities disadvantage women*

4.14 *Priorities for legal aid.* Most criminal defendants are men<sup>25</sup> and most applicants for and recipients of legal aid for criminal matters are men.<sup>26</sup> As a result, because legal aid funds are limited, in many cases victims of violence who cannot afford a private solicitor are without legal assistance, for example, to obtain criminal compensation or a protection order. The lack of legal assistance has a

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23. SDA s 33; See *Proudfoot & Ors v ACT Board of Health & Ors* (1992) EOC 92-417.

24. Legal Aid and Family Services *Gender bias in litigation legal aid: an issues paper* Attorney-General's Department Canberra 1994. The high level of legal aid for criminal cases may have been affected by the High Court decision in *Dietrich v R* (1992) 109 ALR 385 but statistics on this are not yet available.

25. Over 80 per cent of homicide offenders and well over 90 per cent of those charged with serious assault, robbery, and sexual assault are men: National Committee on Violence *Violence: directions for Australia* Australian Institute of Criminology Canberra 1990, 33.

26. Legal Aid and Family Services op cit.

marked effect on success in court.<sup>27</sup> The vast majority of applicants for protection orders are women. Apart from violence, women predominantly need legal assistance in family law matters, particularly in custody and access matters and in property disputes, and to a lesser extent in civil matters. Legal aid in these areas has been substantially reduced, leading the Family Court, for example, to call for a re-examination of legal aid funding in family law.<sup>28</sup>

4.15 *Serious consequences for women.* In legal aid priority is given to criminal cases largely because of the serious consequences of criminal conviction, for example possible imprisonment. However other legal proceedings also have serious consequences, particularly for women. The loss of custody of children, the loss of home and possessions and the resultant poverty have been described as 'an unacceptable sentence for someone who has not been charged or convicted of any crime, but is a victim of separation and divorce'.<sup>29</sup> Failure to obtain protection from violence can leave women at risk of injury or even death.

#### *Improving representation of women*

4.16 *Introduction.* There is clearly a case for measures to increase women's access to legal representation in court proceedings. These measures could include

- changing legal aid priorities
- increasing legal aid for private lawyers
- increasing 'in house' services in legal aid commissions
- funding community based services to represent women.

4.17 *Re-allocation of legal aid priorities.* The first option is the re-allocation of legal aid priorities, and funds, from criminal defence to family law and civil proceedings. These are areas in which women seek and require representation. Guidelines on availability of legal aid vary among States and Territories. In the ACT, for example, the Office of Legal Aid has been concerned to protect the availability of aid in family law matters. It also conducts a free duty lawyer service for people seeking urgent protection from domestic violence<sup>30</sup>. Legal aid guidelines could be amended to balance priorities better between criminal matters and matters where an applicant is at risk of violence or has special disadvantages, such as a non-English speaking background.

27. For example Redfern Legal Centre *Women's domestic violence court assistance scheme: evaluation* Redfern Legal Centre Sydney 1991, table 3.3 & 3.6, 23-24, which noted that apprehended violence orders (AVO) were granted to 74.3% of those represented by the Women's Domestic Violence Court Assistance Scheme, 50% of those represented by other practitioners and 40% of those represented by police. Only 3% of those unrepresented were granted an AVO.

28. *In the marriage of Sajdak and Sajdak* (1993) FLC 92-348, at 79,687. See also Family Court of Australia *Submission by the Family Court of Australia to the Joint Select Committee on certain aspects of the operation and interpretation of the Family Law Act* vol (f) 1992, 43 which states that legal aid funding for family law matters should not be affected by the requirements for legal aid in criminal matters.

29. E van Moorst & K Deverell for Women's Legal Resources Group Inc 'Justice for all: Women's access to legal aid and justice in Victoria' (1993) 1 *The Australian Feminist Law Journal* 147, 150.

30. Legal Aid Office ACT *Submission* 294.

4.18 *Additional funds targeted at women's needs.* The second option is to increase allocation for legal aid and to target the increases to family law and civil law, areas where women are more likely to seek aid.

4.19 *Employ specialist advocates in legal aid commissions to assist women.* Legal aid commissions often employ in-house legal advocates to represent legally aided parties in court. This is seen as one cost effective way to provide representation. In-house advocates can also become specialists in the less profitable areas of law which are of most concern to particular disadvantaged groups of clients. The employment in legal aid commissions of more advocates or duty lawyers (as in the ACT) who specialise in areas of law affecting women would provide increased resources for women's legal representation at affordable cost. It could also ensure that women clients receive appropriate specialist assistance.

4.20 *Fund community based services to employ women's advocates.* Women often seek assistance from community based legal centres which they find sensitive to their situations and needs. Few of these organisations are presently able to provide court representation at a significant level. Most are poorly funded and struggle even to meet demands for legal advice. They attempt to refer women elsewhere for court representation. Earmarked funds could be provided to community based organisations to enable them to undertake this representational work themselves. Many women would find this approach particularly appealing as they already deal with these organisations and have confidence in them.

4.21 *Achieving equality.* The Commission does not recommend a preferred option at this stage. This will be addressed in the fuller discussion of legal aid in the first part of its final report. The option should be selected on the basis that it will provide the best service to women at the most affordable cost.

The Commission recommends, as part of the National Women's Justice Program, the adoption of measures to increase women's access to legal representation in court proceedings.

## **Legal advice and referral**

### *Women's legal services*

4.22 Specialist women's legal services and centres are currently performing a vital function. They are highly regarded by women's organisations and those who use them.<sup>31</sup> They provide advice, information and referral on legal matters that affect women. They are considered sensitive to women's needs and experiences. They can play an important role in overcoming the attitudinal barriers that women confront in the legal system.<sup>32</sup> These services can also help a court

31. Domestic Violence Advocacy Service, Sydney *Submission 148*; Domestic Violence Legal Help Darwin *Submission 306*; S Eastwood, L Jackson & S Warren *Submission 518*.

32. See ch 2.

dominated by male lawyers to understand female perspectives and to assist in the development of legal principle. There are only three funded women's legal services in Australia: the Women's Legal Resources Centre in Sydney, the Women's Legal Resource Group in Melbourne and the Women's Legal Service in Brisbane.<sup>33</sup> There is also a small number of specialist domestic violence legal services. Many submissions sought the extension of adequately funded services.<sup>34</sup> They referred to attempts to establish a women's legal service in Western Australia<sup>35</sup> and to the survival struggles of unfunded voluntary services in the Northern Territory<sup>36</sup> and far north Queensland.<sup>37</sup> The Commonwealth should provide funding for additional women's legal services. This funding should be on the basis of tender in response to advertisements in appropriate newspapers. Existing and proposed organisations could submit tenders to provide the services. The services should be funded for an initial three year period.

The Commission **recommends** that as part of the National Women's Justice Program an additional women's legal service be funded in each State and Territory.

#### *Legal services for Aboriginal and Torres Strait Islander women*

4.23 Many oral and written submissions described Aboriginal and Torres Strait Islander women's experience of inequality before the law, particularly their lack of access to justice.<sup>38</sup> Indigenous women experience a disproportionate amount of domestic and community violence. While Aboriginal people represent 1.5% of the population Aboriginal women comprise 16% of all female homicide victims.<sup>39</sup> Despite the incidence of violence, Aboriginal women have difficulty in obtaining appropriate legal assistance. Aboriginal and Torres Strait Islander legal services, as a matter of policy, do not act for one indigenous person against another. They also give priority to criminal defence matters. Indigenous women are more often victims of crime than offenders and their abusers are often indigenous men. Consequently the women are frequently left without assistance from the funded legal services which cater specifically for indigenous people. The legal needs of indigenous women will be discussed more fully in the first part of the Commission's final report on equality before the law. At this stage the

33. These three services are in the most populous States and cannot meet the demands on them.

34. Domestic Violence Advocacy Service, Sydney *Submission 148*; Women's Legal Resources Centre, Sydney *Submission 256*; Domestic Violence Legal Help, Darwin *Submission 306*; Women's Legal Service, Brisbane *Submission 397*.

35. Women's Legal Steering Committee WA *Submission 360*.

36. Domestic Violence Legal Help, Darwin *Submission 306*.

37. North Queensland Combined Womens' Service *Submission 275 & Submission 498*.

38. eg M Wanjurri Nungala *Submission 358*; Marnja Jarndu Women's Refuge, Broome WA *Submission 362*; Confidential *Submission 427*; Confidential *Submission 428*; Central Australian Advocacy Service *Submission 433*; L Goodchild *Submission 497*; Office of Indigenous Women, Aboriginal and Torres Strait Islander Commission *Submission 548*.

39. H Strang 'Characteristics of homicide in Australia 1990-91' in H Strang & SA Gerull (ed) *Homicide: patterns prevention and control* Conference Proceedings No 17, 12-14 May 1992, Australian Institute of Criminology Canberra 1993, 15.

Commission considers it appropriate to respond to submissions from Aboriginal and Torres Strait Islander women and from women's legal services. These submissions sought the establishment of specialist legal resource and advocacy centres for indigenous women.<sup>40</sup> These centres should be established and controlled by indigenous women to meet their local needs. Aboriginal women's meetings have made similar recommendations.<sup>41</sup>

The Commission **recommends** the funding, as part of the National Women's Justice Program, of legal resource and advocacy centres for Aboriginal and Torres Strait Islander women as pilot programs for an initial three year period.

*Legal information for women of non-English speaking backgrounds*

4.24 *Particular needs.* Women of non-English speaking backgrounds have particular legal needs.<sup>42</sup> Many come from countries with legal systems very different from Australia's or from cultures with different attitudes towards women and their role in the family and in society. They may not know that domestic violence can be dealt with as a crime under Australian law, that legal protection is available or that services such as refuges exist.<sup>43</sup> They may have misconceptions about their rights relating to children and property upon the breakdown of a relationship. Where they have language difficulties and lack a network of friends and relatives for support and advice, for example, in rural areas, migrant women can be extremely isolated and particularly vulnerable to violence.

4.25 *Improving responses from specialist women's services and other legal services.* While the Commission does not support the establishment of specialist legal services for women of non-English speaking backgrounds, it encourages better responses to their needs from existing and proposed legal services. Specific strategies need to be designed and implemented by these legal services to cater to the needs of women in different communities. Services should consult with local ethnic community organisations and other relevant specialist services in developing strategies. For instance information about legal rights and remedies must be made available in a variety of ways which are accessible to women with limited or no English. This may mean an increased availability of pamphlets in community languages. However, it should also include other means of

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40. Aboriginal and Torres Strait Islander Corporation for Women *Submission 551*; Aboriginal Women's Legal Issues Group *Submission 558*; Confidential *Submission 427*; Confidential *Submission 428*; Women's Legal Resources Centre, Sydney *Submission 256*; Domestic Violence Advocacy Service, Sydney *Submission 148*.

41. The Aboriginal Women's Legal Issues Conference, Parramatta, 19 June 1993 recommended that ATSIC fund the establishment of an Aboriginal Women's Legal Resource and Advocacy Centre in New South Wales (Recommendation 1.1).

42. Bureau of Ethnic Affairs *Submission 391*; Migrant Women's Emergency Service Qld *Submission 388*; Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc Vic *Submission 330*. See also ch 2.

43. C Bertram *NESB domestic violence awareness campaign* (prepared for Blacktown Migrant Resource Centre) Blacktown 1992, 9.

communication such as community radio, ethnic press and public information sessions (where interpreters may be used). Services should also ensure that interpreters are available for women who need them. The strategies should include training staff in the use of interpreters and cross-cultural awareness issues. The legal needs of women from non-English speaking backgrounds will be discussed more fully in the first part of the Commission's final report on equality before the law.

The Commission **recommends** that legal aid commissions, women's legal services and other funded community legal services be required to implement strategies to ensure that they respond to the needs of women of non English speaking backgrounds. The Commission also **recommends** that limited additional funding be available to existing services in identified high-need areas to increase non-English speaking women's access to justice.

#### *Telephone advice and information services*

4.26 Submissions describe the situation of women isolated by distance in rural and remote areas and by transport difficulties, language, disability and the demands of children in suburban areas.<sup>44</sup> Although many women may find it difficult or impossible to go to a legal centre for advice, almost all have access to a telephone.<sup>45</sup> In most States and Territories some form of telephone service for women is now available but often the service is so short of funds as to be of only limited use to a few women.<sup>46</sup> Women can wait up to two weeks to get through<sup>47</sup> or have to rely on volunteers to provide a basic service for a couple of hours one or two nights a week.<sup>48</sup> Women in some states and regions have no access at all to these services. All women in Australia with access to a telephone should have access to a telephone advice and information service. This will require that existing and newly established services be funded at a level that makes them sustainable. It

44. See ch 2.

45. 95.5% of Australian households have phones: Telecom Australia *Annual Report 1992* Telstra Corporation Melbourne, 22.

46. eg the Women's Legal Resources Centre, Sydney operates a toll free number for country callers four and a half days a week; the Women's Information Service in WA operates a toll free number for country callers between 9am to 5pm Monday to Friday; Women's Legal Resource Group, Melbourne operates a toll free line 12 hours per day; the Refuge Referral Service, Melbourne operates a toll free line only for domestic violence 24 hours per day; the Crisis Line, Qld operates a toll free line for domestic violence 24 hours per day; Crisis Care Service SA operates a toll free line during business hours; the NT has a toll free crisis line which is not domestic violence specific but over half the calls are domestic violence related; there is no toll free service operating in Tasmania.

47. Women's Legal Resources Centre, Sydney *Submission 256*.

48. North Queensland Combined Women's Service *Submission 275*.



could require extending existing ones or establishing new services.. The service should be provided on a State and Territory or, preferably, regional basis to take account of differences in the law and in local needs. All services should have access to interpreter services. The provision of telephone advice services in new areas should be funded on a tender basis.

The Commission **recommends** that as part of the National Women's Justice Program a toll free telephone legal advice and referral service be available to all women in Australia.

## Community legal education

4.27 Submissions argue that women need to know more about the law, the legal system and their rights.<sup>49</sup> This is an issue not only of information but of community legal education. It requires an active program of community outreach rather than the more reactive approach of responding to requests for advice as they arise. One function of legal aid commissions is to undertake educational programs. Existing community legal centres, including women's legal services, conduct seminars, prepare and publish easy to understand material on the law and undertake other educational activities. They report a great unmet demand for community legal education.<sup>50</sup> The educational efforts of legal aid commissions and community legal centres should be coordinated to ensure effectiveness. Community legal education should be made appropriate and accessible to women of different cultures through consultation with community groups. Funds should be allocated under the Program to support projects both on a submission basis for projects initiated by community organisations and by tender for projects promoted by the Program itself.

The Commission **recommends** that the National Women's Justice Program include a community legal education component.

## Development of the law

### *The importance of the courts*

4.28 **Statute law and common law.** Australian law has two components: statute law, enacted by parliaments, including regulations and rules made under statutes, and common law, the set of legal principles and precedents developed over the

49. Older Women's Network, Canberra *Submission 93*; Confidential *Submission 8*; Women's Electoral Lobby Vic *Submission 307*; Legal Aid Office ACT *Submission 294*; J Harrison *Submission 416*; D McCulloch, K Corley, M Martinelli, M Mati, & R Walsh *Submission 537*. See ch 2.

50. Women's Legal Resources Centre, Sydney *Submission 256*; Ministry for the Status and Advancement of Women NSW *Submission 350*; Anti-Discrimination Commissioner Qld *Submission 337*; Women's Legal Service, Brisbane *Submission 379*.

centuries and adapted and applied by the courts. It is important that both these arms of the legal system develop in a way that takes equitable account of the demands of both women and men. The Commission will examine women's participation as members of parliament and as judges and lawyers in the second part of its final report on equality before the law.

**4.29 Courts make law.** As interpreters of statute law and developers of common law the courts play a major part in the process of law making. The potential for the development of the law through case law is evident in the *Mabo* judgment.<sup>51</sup> There the High Court overturned two centuries of legal practice by applying a new analysis of fundamental principles to the facts of British settlement of Australia. The Court refused to accept the fiction on which Australian law was based, that Australia was unoccupied and unowned at the time of settlement. It was prepared to take account of new understandings of Aboriginal and Torres Strait Islander society and colonial history and of developments in human rights law. Women too can look to the courts to develop the law to take account of their perspectives and experiences in ways that to date the law has been unwilling or to unable to do.

### *The courts and women*

**4.30 Barriers to legal development.** In the Australian legal system the people who have participated in the courts as litigants, lawyers, magistrates and judges have overwhelmingly been men. There is increasing awareness that, as a result of the historical predominance of men, apparently gender neutral law tends to reflect the experiences, perceptions and demands of men. To encourage the development of law to become equally responsive to women, judges need to be aware of the realities of women's lives.

**4.31** There are two ways of increasing judicial awareness. One is through judicial education outside the court. The Australian Institute of Judicial Administration is already examining gender awareness among the judiciary and providing programs to address this issue.<sup>52</sup> It will be further discussed in the second part of the Commission's report. The second way is to bring accurate and relevant information about women's lives into the court room. The courts' task is to assess the merit of arguments presented and to interpret and apply the relevant law in making its decision. The courts' opportunity to develop the law in a way which is responsive to women is restricted to the cases that come before them. In particular, test cases give courts the opportunity to respond to challenges to the current boundaries of the law. However, it is unreasonable to rely solely on individuals to undertake test cases on their own.

**4.32 Developments in Canada and the United States.** In Canada and the United States women's and other advocacy organisations have been able to undertake important test cases. The courts have also been prepared to allow them to intervene in significant cases as 'friends of the court'<sup>53</sup> so that a broader range of material could be placed before the courts. Some women's groups have been

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51. *Mabo v Queensland* (No 2) (1992) 175 CLR 1.

52. See para 1.17.

53. *amicus curiae*, also referred to in those jurisdictions as an intervenor.

permitted to present argument to the courts on behalf of women. In Canada, women's and other groups established the Women's Legal Education and Action Fund (LEAF) for these purposes. LEAF is funded by a mixture of public and private sources and has received support from both national and provincial governments in Canada.

4.33 *Canadian Court Challenges Program.* Until recently, the Canadian Government facilitated the development of the law through advocacy under a program known as the Court Challenges Program. This program funded various organisations, including LEAF, to be involved in litigation under the Canadian Charter of Rights and Freedoms. Cases supported by LEAF have been important in developing Canadian law in ways that are more responsive to women's experiences and needs. Some of LEAF's work will be described in the first part of the Commission's final report. This Canadian experience points to the possibilities for Australian women to promote development of Australian law in a similar way.

4.34 *Support for court challenges.* The National Conference of Community Legal Centres, which represents over 100 community legal centres throughout Australia, has recognised the need for test cases to promote women's equality and improve their access to justice. Participants expressed concern that legal services are limited in their ability to represent women in test cases. In its submission to the Commission, the National Conference of Community Legal Centres proposes the establishment of advocacy services to promote the interests of women generally in courts and tribunals.<sup>54</sup> To be effective any such organisation will need to be adequately resourced, not only to prepare and conduct litigation, but also to liaise with community groups across the country and provide training and education to further its objectives. In NSW and Victoria there is already a network of women's services and advocacy groups willing to participate in the establishment of such services. Similar networks could be available elsewhere. Federal funding is needed to enable cases to be brought on issues of concern to women. This could be done by supporting litigants or intervenors. The cases should be ones which can assist in improving women's equality before the law. Funding should be provided on the basis of submissions to an expert committee established for the purpose.

The Commission recommends that the National Women's Justice Program include a component for funding test cases.

54. National Conference of Community Legal Centres *Submission 541*. See also N Roxon & K Walker *Submission 175* and Women Advocates for Gender Equality *Submission 547* who argued in detail in support of funded court advocacy for women's interests. In addition many submissions referred to the need for women's perspectives to be incorporated into substantive law. Some of these specifically recommended the LEAF model eg P Easteal *Submission 55*; P Wright *Submission 206*; Women's Electoral Lobby Australia *Submission 281*; Domestic Violence Resource Centre Qld *Submission 295*; Domestic Violence Legal Help, Darwin *Submission 306*; J Blokland *Submission 347*; Ministry for the Status and Advancement of Women NSW *Submission 350*; Feminist Lawyers *Submission 511*.

## Research and data collection

4.35 In undertaking this reference the Commission became aware of the need for research and better data on women and the legal system. Research and data are important for effective law making, policy development and program administration. The Commission has found that, much of the material in the legal research and data collection projects relevant to women undertaken in recent years is not comparable due to different methodology between projects and between jurisdictions. This is particularly the case with statistics on domestic violence.<sup>55</sup> Submissions often referred to individual experiences of the legal system but the Commission was unable to determine the extent of particular problems. In one consultation the Commission was referred to cases coming before the Family Court in which subsequently the woman or a child was murdered or seriously injured. It was argued convincingly that there needs to be proper study and analysis of these cases.<sup>56</sup> Another stressed the importance of nationally focussed research, particularly in areas such as sentencing.<sup>57</sup> There is also a need for the coordination of research efforts and data through a central clearinghouse. This would ensure that research findings are widely available and that duplication of research efforts is kept to a minimum. This work could be contracted out to an appropriate tertiary institution.

The Commission **recommends** that promoting and coordinating research and data collection should be an important part of the National Women's Justice Program.

## Court processes and facilities

### *Women's experiences in court*

4.36 Submissions describe the isolation and intimidation that many women experience in court. The court room is alienating to them and court procedures are often unintelligible. This is especially so for many women of non-English speaking backgrounds and indigenous women because of language and cultural barriers. Survivors of sexual assault and domestic violence find proceedings particularly traumatic, especially as they may be required to give evidence twice during a criminal prosecution because of committal procedures. The adversarial nature of the system, the questioning of their credibility and confrontation of their abuser are made even more harrowing by the fact that proceedings are often held in public. Suggestions for reform, some of which are based on existing models in some jurisdictions, include allowing a support person to accompany the woman to increase her confidence and help her express herself freely, providing screens to

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55. A National Clearinghouse on Violence has now been established at the Australian Institute of Criminology and may in part address this deficiency. The AIC also has access to Proceeds of Crime funds which may enable broader research into crime and the law affecting women.

56. S Eastwood *Consultation* 12 October 1993.

57. P Eastal *Submission* 79.

ensure that a woman witness is not within view of the defendant when giving evidence of violence against her and allowing her to give evidence by closed circuit television. Enabling a woman to give her evidence freely is in the interests of the court and of justice as much as in her interest. These matters will be discussed in more detail in the first part of the Commission's final report.

***The right to an interpreter***

4.37 The Commission recommended in its report on *Multiculturalism and the law* that all witnesses in federal proceedings should have a right to an interpreter while giving evidence, and that defendants in criminal proceedings should be entitled to an interpreter at Commonwealth expense throughout the trial.<sup>58</sup> In recognition of the financial barriers to justice, it recommended that as far as possible the costs of interpreting in all proceedings should be met by the courts in accordance with the government's commitment to access and equity.<sup>59</sup> Special measures, such as consideration of the establishment of a hardship fund for those parties to civil proceedings who are not legally aided, the provision of interpreters at court expense in certain Family Court proceedings and the recruitment of bilingual staff, were recommended.<sup>60</sup> Many courts now provide interpreters for witnesses. The federal Government has made additional allocations to federal courts for this purpose.<sup>61</sup> The right of a party to be present in court must extend to a right to understand what is being said. Care must be taken to ensure that the services provided are appropriate. The Commission heard evidence that a male interpreter may affect a woman's ability to express herself, particularly in cases of domestic violence and sexual assault. Interpreters must be accredited and should also be familiar with the legal process. These issues will be discussed in more detail in the first part of the Commission's final report.

The Commission **again** recommends the implementation of its recommendations in the report on *Multiculturalism and the law*.

58. See Recommendations 6-8, *Multiculturalism and Law*, Australian Law Reform Commission (ALRC 57) ALRC, Sydney.

59. *ibid* para 3.22.

60. *ibid* rec 9.10.

61. eg the federal Government has supplemented the interpreter services for courts to the effect on outlays of \$0.1 million in 1992-93 and an expected effect on outlays of \$0.2 million in 1993-94: Australia Parliament *Budget Statements 1992-93* Budget Paper No 1 AGPS Canberra 1992, Measures Table, 3.208.

***Improving court facilities***

4.38 ***Child care.*** Women are the predominant carers of children. Their ability to use the courts often depends on their ability to obtain child care. Some courts, particularly the Family Court, have recognised this and have taken, or are taking, steps to provide on site child care services. Even so child care is still rarely available to women at courts other than the Family Court.<sup>62</sup>

4.39 ***Protecting women at court.*** Women often go to court as survivors of domestic violence or sexual assault. They are often forced to confront their abusers in the court area because there are few courts with separate waiting rooms for women. The Family Court's current design requirements include separate waiting rooms. In other courts, however, for many women the experience of going to court for justice becomes another experience of intimidation and sometimes even violence.<sup>63</sup>

4.40 ***Physical accessibility.*** Women with disabilities and those with small children often have difficulty obtaining physical access to many courts. An assessment should be made of the appropriateness of facilities for women in federal courts and tribunals and of other courts exercising federal jurisdiction. Where possible existing court facilities should be adapted to accommodate women's needs, for example, by having rooms allocated for child care or for the separate accommodation of survivors and defendants, or by the court arranging for the use of a local child care centre when required. Funds should be provided for capital works to address existing deficiencies on the basis of need. Women's needs should be taken into account in planning new court and tribunal premises and in refurbishing existing ones.

The Commission recommends that as part of the National Women's Justice Program the needs of women attending courts and tribunals should be addressed.

***A court charter***

4.41 ***England and Wales.*** One criticism of court processes is that they lack a client focus.<sup>64</sup> In the United Kingdom *The Courts Charter* has been developed for the courts of England and Wales.<sup>65</sup> This Charter sets out the services which consumers are entitled to expect from the courts and best practice standards for court staff. It aims to increase the courts' responsiveness to the public and public confidence in the courts. One Charter strategy is to give comprehensive practical

62. Confidential Submission 292; Confidential Submission 78; Sisters-in-Law Submission 195; Mt Pritchard Family Resource Centre Submission 329.

63. Confidential Submission 292; Women's Electoral Lobby Vic Submission 307; J Waters Submission 459; J Rowland Submission 114; Women of Far North Queensland Submission 117.

64. eg T W Church 'A Consumer's Perspective on the Courts' *Second Annual AIJA Oration in Judicial Administration* Australian Institute of Judicial Administration South Carlton 1990.

65. E Gilvarry 'English Courts Charter makes New Dawn' (1993) 145 *ACT Law Society Gazette* 57.

information about transport and court facilities, in advance, to anyone called to the court, whether as witness, litigant, defendant or juror. The Charter provides for other publications on victim's rights and the role of witnesses in the court.

4.42 *Australian courts.* In Australia in recent years courts have sought to decrease delays through case management practices and to develop performance standards to improve services. Many Australian courts are already increasing their client focus but there is continuing need for significant improvement through a more systematic and comprehensive approach.<sup>66</sup> A court charter could assist in this by increasing staff sensitivity to the needs of clients, particularly women. It could also promote greater public confidence in the courts and a more accessible justice system. It should provide, for all those coming to court, adequate and appropriate information about court processes and facilities, including the availability of child care, likely waiting times and waiting rooms, court personnel available to provide information and services such as transport, telephones and food and drink.

The Commission **recommends** that federal courts and tribunals and other courts exercising federal jurisdiction develop a court charter to promote a better client focus in the delivery of court services, with special attention to the needs of women and child carers.

## Implementing the program

### *A national effort*

4.43 Most legal aid funds are provided jointly by the Commonwealth and the States and Territories. Legal aid commissions, which are jointly funded, are the major providers of legal aid. Community legal services are most commonly funded through these commissions, although they may receive grants directly from the federal government, from the State or Territory government or from some other joint program. Ideally the National Women's Justice Program would be a joint program, as the National Women's Health Program is. These issues of access to justice are problems throughout Australia and require a national response. Many of the concerns identified in submissions to the Commission relate to State and Territory practices and laws. The States and Territories are responsible for magistrates courts where most cases of violence are handled. They are also responsible for police forces other than the Australian Federal Police. The federal government's responsibilities include the *Family Law Act (1975)* (Cth), the Family Court, the social security system and immigration. The problems in obtaining justice require a combined Commonwealth, State and Territory response. The National Women's Justice Program should be a joint Commonwealth, State and Territory program in close cooperation with legal aid commissions.

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66. P A Sallmann 'Towards a more consumer-oriented court system' (1993) 3 *Journal of Judicial Administration* 47.

***Policy***

4.44 Responsibility for the Program should lie at the highest level among the chief law officers of the governments involved. Its policy should be set by the Standing Committee of Attorneys General or, if the program is a federal initiative alone, by the federal Attorney-General.

***Management***

4.45 The management of a joint Commonwealth, State and Territory program should be the responsibility of a committee established by the Standing Committee of Attorneys General and reporting to the Standing Committee. If the Program is only a federal program it should be managed by a committee established by the federal Attorney-General and reporting directly to him or her. It would consist of senior members of relevant federal agencies, such as the Attorney-General's Department, the Office of the Status of Women, the Aboriginal and Torres Strait Islander Commission and the Office of Multicultural Affairs. It should also include representatives of community based organisations, such as the National Conference of Community Legal Centres Network. In either event the committee and the Program should be serviced by a small secretariat within the federal Attorney-General's Department.

***Duration***

4.46 The National Women's Justice Program should be established initially for four years. The Program must be guaranteed funding for a period long enough to enable it to address the priority concerns raised in this interim report and in the two parts of the Commission's main report. It should be time-limited, however, to allow proper evaluation and re-consideration after a reasonable period.

***Policy development and monitoring***

4.47 The Program must be monitored during its life so that it can be adjusted to meet new needs and to take account of experience in its implementation. This monitoring process should be associated with a continuing examination of the effect of the legal system on women and its responsiveness to their needs and experiences. The management committee is not appropriate to undertake continuing policy development and monitoring roles. These functions should be the responsibility of a separate body with expert membership, including from outside the public sector. A new committee could be established for this or the federal Attorney-General could give a new reference to the Australian Law Reform Commission to undertake the task during the life of the Program.



### **An extract from**

### **'A Human Right to Justice: Experiences of women and the law in the Illawarra region' from Illawarra Legal Centre**

**Prepared by Judy Stubbs  
October, 1993**

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## **2. METHODOLOGY**

### **2.1. Approach**

The focus of the submission is on the experiences that women themselves have had in seeking and obtaining justice, in the broadest sense of the word. Data was collected through a case study approach. Major trends or themes emerging from the case studies have been drawn out, with full case histories, comments or examples used to illustrate the issue where relevant.

This approach was used for a number of reasons. First, the public hearings held by the ALRC throughout Australia provided the opportunity for women and others in the community to speak directly about their experiences and observations. Given that the ALRC was unable to hold hearings in the Illawarra, the ILC felt that it was important to take on this role in this region.

Secondly, given the nature of the issues and the frequent absence of women from decision-making forums and positions of power, it seemed essential to provide women with the opportunity to talk about their experiences in their own way.

Thirdly, the phenomenon of "systemic bias" ( in this case, attitudes held consciously or unconsciously by those in the legal system that may affect the application of the law or its outcomes) is often difficult to quantify. Certain studies have pointed to problems such as differential sentencing patterns for women and men as indicators of systemic bias. Court transcripts can also be analysed for comments in which biased or stereotyping attitudes on the part of the judiciary are evident.

However, this type of bias is often far more subtle, and the degree of the impact on the woman herself may not be readily perceived. An obvious example is where a woman's first contact with the legal system to seek help for domestic violence is so humiliating or judgmental that she delays or never seeks help again, with all the consequences that this entails.

### Article 5

The organs and specialized agencies of the United Nations system should, within their respective fields of competence, contribute to the recognition and realization of the rights and the principles set forth in the present Declaration, and to this end should, *inter alia*:

(a) Foster international and regional cooperation with a view to defining regional strategies for combating violence, exchanging experiences and financing programmes relating to the elimination of violence against women;

(b) Promote meetings and seminars with the aim of creating and raising the awareness among all persons of the issue of the elimination of violence against women;

(c) Foster coordination and exchange within the United Nations system between human rights treaty bodies to address the matter effectively;

(d) Include in analyses prepared by organizations and bodies of the United Nations system of social trends and problems, such as the periodic reports on the world social situation, examination of trends in violence against women;

(e) Encourage coordination between organizations and bodies of the United Nations system to incorporate the issue of violence against women into ongoing programmes, especially with reference to groups of women particularly vulnerable to violence;

(f) Promote the formulation of guidelines or manuals relating to violence against women, taking into account the measures mentioned herein;

(g) Consider the issue of the elimination of violence against women, as appropriate, in fulfilling their mandates with respect to the implementation of human rights instruments;

(h) Cooperate with non-governmental organizations in addressing violence against women.

### Article 6

Nothing in the present Declaration shall affect any provision that is more conducive to the elimination of violence against women that may be contained in the legislation of a State or in any international convention, treaty or other instrument in force in a State.

Similarly, more subtle forms of bias in other structures such as education, employment or the political arena may best be described by women who directly experience this bias.

We recognise that one of the limitations to this approach is that sometimes we are only hearing one side of a very complex story. However, given women's lack of participation in structures where decisions are made, the need to hear from women directly about their situations from their own perspectives may perhaps be allowed to override these considerations.

## **2.2. Research Strategies**

The ILC aimed to consult as widely as possible on the ALRC Reference (Discussion Paper 54: Equality Before the Law). This consultation included the following steps.

1. Over 60 community organisations and government departments were invited to attend a preliminary consultation and follow up meeting to identify the main issues of concern that were relevant to the ALRC Reference.
2. Individual agencies and workers were followed up to explore these issues further, and where relevant, to provide case studies or contact with clients willing to discuss their experiences. File studies were conducted where relevant.
3. A media campaign was launched through regional newspapers, television and radio to publicise the issues widely and ask for public input.
4. A phone-in was held for two days in Wollongong and one day in Nowra to enable women to ring in with their comments and experiences. Follow-up contact was made with a number of women, many of who were interviewed in person. A number provided access to documentation, including court decisions, transcripts and legal bills.
5. Two special forums were held: one for women in local government and another for women who are or have been prominent in the trade union movement. Interviews were also conducted with other special interest groups, including women who are involved in politics.

## **2.3. Research Outcomes**

1. Over 140 women were interviewed over a six week period, including seventy-one who participated in the phone-in.
2. Forty-three staff of relevant community organisations and government departments were interviewed in depth. Many others were consulted.

Organisations consulted included ethnic-specific organisations, women's services and refuges, youth refuges, sexual assault counsellors, youth and children's services, housing organisations, legal services and State and Federal Government

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Departments including the Office of Juvenile Justice, Community Services, TAFE, Immigration, Dept. of Public Prosecution, the Illawarra Area Health Service and the Anti Discrimination Board.

**Note:** Real names have not been used as a number of cases are current, or use of victims names would identify the accused in cases that were dismissed or acquitted. Some workers also feared the ramifications of their comments. Although some workers and women wanted to be named, it was thought better to omit all names than risk a breach of confidentiality.

### 3. SUMMARY OF MAJOR FINDINGS

3.1. Violence against women (as defined in ALRC Discussion Paper 54) is a serious and entrenched problem that requires an integrated response from the legal system and the community.

3.2. In general, existing measures have failed to prevent this violence, or to treat women's concerns about violence seriously. There is evidence to suggest that the perpetrator's experience with the legal system may lead him to believe that violence is tolerated or even condoned by the community. This especially true in cases of ongoing domestic violence.

3.3. Violence against women cannot be separated from the structural injustices women face economically and politically, or from women's experiences of gender bias in the systems with which they interact. Violence against women and structural inequalities faced by women are human rights issues that must be dealt with if Australia is to become a just society and fulfil its human rights obligations.

3.4. Over 70% of respondents to the Illawarra phone-in cited violent treatment in relation to physical or sexual assault. Violence against women was also the major concern raised by services interviewed. All respondents expressed dissatisfaction with the way this violence had been dealt with at various levels of the legal system. The failure of the State Domestic Violence legislation (in particular, Apprehended Violence Orders) to adequately protect women is a matter of grave concern.

3.5. Women also experience violent treatment by the institutions through which they seek justice. This institutional or structural violence may not be recognised in the same way that an act of criminal violence is. However women report that its effects can be as lasting and profound.

3.6. Women report that stereotyping attitudes are evident at all levels of the legal system. These attitudes may be subtle or unconsciously held, or they may be openly stated and acted upon. It would appear that covert or more subtle bias and stereotyping is more damaging in its effect as it is more difficult to detect and prove, more difficult to link to specific outcomes, and therefore harder to attack. On the other hand, overtly stereotyping behaviour (such as comments by the judiciary publicised by the press) more readily attracts community outrage.

3.7. The overwhelming domination of the legal system by men is also a concern to women. These concerns centre upon both the predominance of men at the upper levels of the system, and the male dominance of the history and philosophy of legislation, common law and legal procedures.

3.8. The current system for dealing with victims of sexual assault is archaic, and historically serves male interests. Women view their experiences in court as an extension of the criminal abuse they have suffered. There are also clear legislative anomalies between the crime of sexual assault and all other crimes, and the effects are discriminatory on women. Changes to the legislation and procedures which currently apply to the crime of sexual assault are well overdue.

3.9. The application of certain State and Federal legislation can also have violent consequences for women. There is a need to eliminate these unintended consequences of the law.

3.10. Under the Federal Immigration Act the main concerns surround regulations or (omissions) that reinforce a stereotyped view of women as a "commodity". These concerns relate especially to women from Southeast Asia.

The main concerns are in the areas of:

- serial sponsorship - the fact that an Australian man can serially sponsor any number of women to Australia, who may subsequently be deported if they don't "work out". Despite stringent checks on the woman by the Immigration Department, the man currently does not face a check on his history of marriage, sponsorship, domestic violence or criminality.
- the two year temporary residency provision for women who marry "on-shore",
- the requirement that women marry within six months of arrival under the fiancée sponsorship scheme,
- the subsequent deportation of women if they fail to marry within six months, or their marriage breaks down within their two years of temporary residency, and the way that this serves to keep them in abusive relationships, or forms the basis of blackmail from an abusing partner, and
- the inadequacy of existing domestic violence safeguards under the Immigration Act.

3.11. Under the Family Law Act the main concerns relate to access granted by the Family Court to men where there has been a history of domestic violence or sexual assault. They are:

- the Court is not stringent enough in considering domestic violence in its decisions on applications for access by the non-custodial male parents. A number of women who have been victims of domestic violence have voiced the opinion that the Court appears to put the rights of the man above the right of women and children to safety and emotional well being.

Even in cases of severe and ongoing domestic violence, AVO's often contain a number of stringent conditions but will then qualify this with "except in the case of access". Police have made the point that Federal legislation over-rides state criminal provisions in this respect, and makes the enforcement of AVO's more difficult. There is a need for clarification and possibly greater co-ordination at the State and Federal level in this matter.

- there is a need for a better system of supervised access than currently operates. Access supervised by a friend or relative of an abusing partner is not satisfactory to women. Their anonymity is not sufficiently protected under the current practices.
- there is also a need for immediate intervention where cases of sexual assault are under investigation. A system similar to an AVO that comes into effect immediately for a given period of time, contains certain conditions and is recognised by the Family Court when making determinations about access, has been proposed.

### 3.12. Access to justice is a problem for many women.

3.12.1. Lack of knowledge about their rights and how the system works is a significant barrier to seeking justice. More community resources are required to resource and support women.

3.12.2. The mediation system as it operates in the Family Court assumes equal power on the part of men and women to express their concerns and needs, and to negotiate equitable outcomes. For many victims of domestic violence, or women who have lived their lives in situations of unequal power, the ability to negotiate equitable outcomes is not a reality.

3.12.3. The absence of legal aid for property matters is also a major barrier to women in pursuing their right to justice. Men are more likely to be able to afford legal representation, and in the current adversarial system, this is a distinct advantage.

3.12.4. In cases of severe domestic violence, where it is a woman who is more likely to have left the family home, the need to escape this violence will often override a woman's desire to pursue her right to a share of the matrimonial property. Failure to pursue property settlement was reported by a number of women who had escaped from violent situations. It is likely to contribute to the greater levels of after-divorce poverty experienced by women.

The Family Law Act has provisions for the making of orders for exclusive occupancy. However, the Court requires an extraordinary amount of evidence before such orders are made, even for the interim period from separation until the completion of property settlement. The result is that the woman is usually required to flee the home with the children. She is then forced to live in disruption and poverty until the completion of property settlement (if she pursues it at all). Practitioners report that this is often at least 10-14 months later.

3.12.5. Special problems are faced by women from a non-English speaking background. They include isolation, lack of access to the dominant culture and language, and lack of knowledge about their rights and services that could assist them.

3.12.6. In relation to the Family Court, free interpreting services are not available to assist them with custody, access and property settlement. These women are far less likely to speak English than their male partners. They are also more likely to be in poverty, and interpreting services are extremely expensive. Many women are denied equal access to justice through the lack of this essential service at the Family Court.

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A full bibliography will be published in the second part of the final report. This is a selected bibliography of materials used for this interim report.

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