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**Appendix A:** Draft legislation

**Appendix B:** List of submissions



# Terms of reference

## MULTICULTURALISM

I, LIONEL FROST BOWEN, Attorney-General of Australia, HAVING REGARD TO:

- (a) the fact that Australia is a multicultural society, made up of people from differing cultural backgrounds and from ethnically diverse communities;
- (b) the provisions of the International Covenant on Civil and Political Rights, in particular, article 14 (which provides that all persons shall be equal before the courts and tribunals), article 26 (which prohibits discrimination on the ground of, among other things, race and national origin) and article 27 (which protects the rights of religious, linguistic and ethnic minorities); and
- (c) the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination;

HEREBY REFER to the Law Reform Commission, in accordance with section 6 of the *Law Reform Commission Act 1973*, the following matters for review and report:

- (1) whether the following laws to which the *Law Reform Commission Act 1973* applies, namely:
  - (a) laws that relate to marriage divorce and matrimonial causes, parental rights and obligations and the custody and guardianship of children, including the *Marriage Act 1961* and the *Family Law Act 1975*;
  - (b) laws relating to the formation and performance of contracts, especially consumer contracts, and in particular the *Trade Practices Act 1974* and the *Insurance Contracts Act 1984*;
  - (c) laws creating offences;

are appropriate to a society made up of people from differing cultural backgrounds and from ethnically diverse communities; and

- (2) any related matter.

THE COMMISSION'S REPORT on each of these matters will consider whether the principles underlying the relevant law, and the mechanisms available for resolving disputes arising under or concerning the law, take adequate account of the cultural diversity present in the Australian community.

THE COMMISSION IS TO consult the Australian community generally and ethnic communities in particular, the Human Rights and Equal Opportunity Commission, the Family Law Council, the Administrative Review Council, the Committee of Review of Commonwealth Criminal Laws, the States, the Northern Territory and the Administration of the Australian Capital Territory and such persons and bodies as it thinks fit.

THE COMMISSION is to draft the legislation necessary to give effect to its recommendations, and the appropriate explanatory memorandum, having regard to any constitutional limitations on Commonwealth power.

THE COMMISSION is to report by 30 September 1991.

DATED 2 August 1989

Lionel Bowen  
Attorney-General

# Participants

## The Commission

The Division of the Commission constituted under the *Law Reform Commission Act 1973* for the purpose of this report comprised the following members of the Commission:

### President

Justice Elizabeth Evatt, AO, LLB (Syd), LLM (Harv)

### Deputy President

John Greenwell

### Commissioners

Greta Bird, LLB (Melb) LLM (Mon), M Phil (Cantab) (to 30 September 1991)<sup>1</sup>

Professor Michael Chesterman, BA, LLB (Syd), LLM (Lond)

Professor John Goldring, BA, LLB (Syd), LLM (Columbia)

Stephen Mason, BA, LLB, MTCP (Syd) (from 27 February 1992)

Justice Peter Nygh, LLB (Syd), SJD (Michigan)

Dott Paolo Totaro, AM (to 30 September 1991)<sup>1</sup>

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Susan Gabor (from 14 January to 1 March 1991)

Andrew Naylor (from 3 April to 29 November 1991)

Meena Sripathy (from 3 April 1991)

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<sup>1</sup> Ms Bird and Dott Totaro continued to take part in the Commission's work as consultants after their commissions ended.

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\* The recommendations in the report and statements of opinion and conclusion are those of the members of the Commission. They are not necessarily shared by the consultants or nominees nor by the Departments or organisations with which they are associated.

# Summary of recommendations

## Information and education

1. As part of the Government's social justice and access and equity policies federal departments should be required to develop and report on education and information programs necessary to make proposed legislation effective, taking into account access and equity principles (para 2.27).
2. An agency should be established to co-ordinate and support community legal education initiatives. It should conduct a nation wide audit of community legal education programs and should hold information about community legal education on a computerised data base (para 2.27).
3. The Australian Institute of Judicial Administration should include in its education and information programs for the judiciary and court personnel, programs designed to increase cross cultural awareness and to provide training in the use of interpreters (para 2.27).
4. Legal institutions should adopt recruitment policies at all levels which will in the long term ensure that their composition reflects that of the general population (para 2.27).
5. All federally funded educational institutions should include cross cultural studies in their legal vocational courses. University law courses should provide special bridging courses for people seeking recognition of legal qualifications obtained overseas (para 2.27).

## Interpreters and the legal system

6. The *Evidence Bill 1991* (Cth) cl 34 which entitles a witness to give evidence through an interpreter unless the witness can speak and understand English adequately should be enacted (para 3.31, 3.44).
7. The *Evidence Bill 1991* (Cth) cl 34 should apply in all prosecutions for an offence against the law of the Commonwealth, wherever tried, until such time as uniform evidence provisions are introduced in all State and Territory jurisdictions. Only professional interpreters should be used to interpret the evidence of a witness in a criminal trial. The cost of providing interpreters to interpret witnesses' evidence should be borne by the Commonwealth. Federal prosecuting agencies should not apply for the costs of an interpreter when applying for an award of costs against a convicted defendant (para 3.31).
8. A person accused of a federal offence who does not understand English well enough to understand what is said in the court should be entitled to an interpreter to interpret the whole of his or her trial for the offence, whether or not he or she chooses to give evidence. The cost of the interpreter should be borne by the Commonwealth, which should not seek to recover the cost from a person who is convicted (para 3.36).
9. The federal Government should consider establishing a fund to pay the cost of interpreters in civil proceedings in cases of hardship where the party is not legally aided. The court should have

power to recommend that a payment should be made from the fund in defined circumstances of hardship including where the person who required the interpreter cannot recover the costs of the interpreter from the other party. There should be a cap on the amount that can be paid out in relation to particular proceedings (para 3.44).

10. The Family Court should actively recruit bilingual staff at all levels. In particular, it should take all steps necessary to ensure that bilingual counsellors and mediators are employed and that attention is given to the specific language needs of particular communities. The federal Government should specifically fund the Family Court to enable it to provide interpreters for use in proceedings about children and for counselling and mediation. The *Family Law Act 1975* (Cth) should be amended to provide that, when the Court orders a person to attend counselling or to attend an Order 24 conference, the Court should be required to ascertain if an interpreter or bilingual counsellor is required.<sup>1</sup> If an interpreter is required, the Family Court administration should be responsible for arranging and paying for the interpreter (para 3.45).

11. Sections 23H of the *Crimes Act 1914* (Cth), (which deals with questioning of Aboriginals and Torres Strait Islanders), 23K (which deals with questioning of persons under 18) and 23N (which requires the presence of an interpreter) should be amended to require that the interpreter or interview friend be present when a police officer has reasonable grounds to believe that one is needed. There should be no question whether the officer actually forms the belief (para 3.54).

12. The provisions of the *Evidence Bill 1991* (Cth) relating to the exclusion of evidence improperly obtained should be implemented (para 3.56).

13. The Commonwealth should encourage the enactment of uniform legislation regarding use of interpreters in the criminal investigation process (para 3.57).

## **Family law**

### **The family**

14. Access and equity aims and objectives should be amended to include the need to take into account the diversity of family forms and functions. Government departments and agencies would then be required to demonstrate in annual reports and in program performance statements how they have ensured that this diversity is reflected in their programs (para 4.28).

15. Access and equity principles and strategy should be extended to apply them expressly to Government program and policy development (para 4.29).

16. So far as it is able, the Senate Standing Committee for Scrutiny of Bills should include in its scrutiny the extent to which a bill adheres to access and equity aims and objectives. The Senate could consider amending the terms of reference of the committee to include scrutiny of provisions which fail to take into account the ethnic diversity of Australian society, including the diversity of family arrangements. Senate Legislative and General Purpose Standing Committees and Estimates Committees should consider developing further their role of monitoring departmental program performance by giving attention to access and equity issues, and family diversity in particular, when reviewing annual reports and program performance statements (para 4.30).

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<sup>1</sup> By majority.

17. All federally funded family support services, including the Family Court, should have a funding component included in their grants or budgets to be applied to developing comprehensive and detailed access and equity plans. Federal departments' access and equity strategies should include a component for ensuring that the family support services they fund have appropriate access and equity strategies (para 4.55).

## **Marriage and similar relationships**

18. The Commonwealth should undertake an information campaign among communities whose country of origin has suffered severe social and political upheaval as a result of war, some members of which may face special difficulty proving that their marriage is valid. The campaign should focus on information about what sort of material should be included in an affidavit filed in lieu of a marriage certificate and what supporting evidence should be attached to it (para 5.21).

19. The *Family Law Act 1975* (Cth) should be amended to provide appropriate protection for a person whose spouse refuses to do what is necessary to effect a religious divorce in the following circumstances

- under the relevant religious law, the parties themselves are able to effect a religious divorce
- the applicant has done, or undertaken to do, everything in his or her power to effect the religious divorce
- the applicant has asked the other party to do what is within the other party's power to do to effect the religious divorce and
- the other party has not complied with the request.

If the court finds these circumstances exist, a *decree nisi* should become absolute unless it is satisfied that the party who has not complied with the request has genuine grounds of a religious or conscientious nature for not doing so or there are circumstances because of which the *decree nisi* should become absolute. If the circumstances exist in other proceedings, except in a proceeding relating to a child, the court should have the power to adjourn the proceedings<sup>2</sup> (para 5.42).

20. Pre-marriage contracts governing the distribution of property in the event of a dissolution of the marriage should be enforceable unless a court decides that enforcement would cause substantial injustice. The recommendations in ALRC 39 *Matrimonial Property* should be implemented (para 5.46).

## **Children**

21. The welfare of the child should remain the paramount consideration (para 6.23).

22. The *Family Law Act 1975* (Cth) s 64(1)(bb)(i) should be amended to make it clear that, in deciding matters relating to children, the court should take into account the nature of the child's relationship with each of his or her parents and with other persons with whom the child has a relationship that is important to his or her upbringing or development<sup>3</sup> (para 6.28).

23. The *Family Law Act 1975* (Cth) should be amended to require the court to explain, or cause to be explained, to the parties in any proceedings relating to a child, in language likely to be readily understood by them, the purpose and effect of, and the reasons for, the proposed order (para 6.32).

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<sup>2</sup> By majority.

<sup>3</sup> By majority.

24. The *Family Law Act 1975* (Cth) s 64(1)(bb) should be amended to ensure that the desirability of the child's maintaining his or her links with the culture of each of his or her parents and with other persons with whom the child has a relationship that is important to his or her upbringing and development is taken into account in the decision making process<sup>4</sup> (para 6.41).

## **Criminal law**

### **Maintaining harmony and peaceful coexistence**

25. The Commonwealth should amend the *Crimes Act 1914* (Cth) to make racist violence an offence under federal law (para 7.33).

26. Incitement to racist hatred and hostility should be unlawful but not a criminal offence<sup>5</sup> (para 7.47).

27. The legislation regulating broadcasting should include a provision prohibiting the broadcast of material that is likely to incite hatred or hostility against, or gratuitously vilify, any person or group on the basis of colour, race, religion or national or ethnic origin<sup>6</sup> (para 7.50).

28. All references to blasphemy in federal legislation should be removed. Offences that protect personal and religious sensibilities should be recast in terms of 'offensive material' (para 7.59).

### **Accommodating cultural diversity**

29. The offender's cultural background should be specified as a factor to be taken into account when the court is passing sentence (para 8.14).

30. The *Crimes Act 1914* (Cth) s 19B should be amended to ensure that the offender's cultural background is taken into account when the court considers whether it is appropriate not to proceed to a conviction (para 8.15).

31. The prosecution policy of the Commonwealth should be amended to include expressly the alleged offender's cultural background and the fact that the alleged offender did not know and could not reasonably have been expected to know that what he or she did was an offence as matters to be considered in deciding whether to prosecute (para 8.16, 8.28).

32. When considering proposed legislation creating offences, Parliament should consider the implications for people from particular cultures and of particular religious faiths. The Senate should consider amending the terms of reference of the Senate Standing Committee for the Scrutiny of Bills to require it to report whether the offence provisions in bills it scrutinises will unduly restrict the cultural and religious freedom of individuals (para 8.20-8.21).

33. The *Crimes Act 1914* (Cth) s 16A should be amended to include specifically the fact that the accused did not know that what he or she did was an offence, and could not reasonably be expected to have known, as a matter to be taken into account in deciding what sentence to impose (para 8.26).

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4 By majority.

5 By majority.

6 By majority.



34. The provisions of the *Evidence Bill 1991* (Cth), which overcome existing obstacles to the admission of evidence about an accused's cultural values and practices, should be implemented (para 8.36).

### **Infringement notice scheme**

35. An infringement notice scheme, with appropriate safeguards, should be introduced for minor offences. The main elements of such a scheme should be:

- an infringement notice
- a small penalty
- multicultural sensitivity
- an opportunity to dispute or raise matters outside the court
- the option at all stages to have the matter dealt with by the court (para 9.16).

### **Criminal justice system**

36. The *Crimes Act 1914* (Cth) should be amended to require that a person detained by the police be informed in a language in which he or she is reasonably fluent of the right to communicate with a friend or relative and the right to consult with, and have present, a legal practitioner. Whenever an investigating official is required to inform a suspect of his or her rights in relation to an investigation procedure this information should be given in, or translated into, a language in which the suspect is reasonably fluent (para 10.21).

37. In the Attorney-General's review of the *Crimes Act 1914* Part IC, particular attention should be paid to the experience of people of non-English speaking backgrounds and the effectiveness of the legislation in safeguarding their rights. The question whether the safeguards that currently only apply to young persons and Aborigines and Torres Strait Islanders should be extended to persons of non-English speaking backgrounds should be reconsidered (para 10.22).

38. The Ombudsman's resources should be supplemented to enable it to investigate complaints against the police more effectively, to carry out targeted information campaigns, and to provide interpreting and translating services in order to improve access for non-English speaking complainants (para 10.24).

39. The bail provisions in the *Criminal Investigation Bill 1977* (Cth) and in the *Criminal Investigation Bill 1981* (Cth) should be enacted (para 10.36).

40. Those provisions in the Evidence Bill which specify characteristics of the witness to which a court is to have regard in exercising its control over the questioning of a witness, or the admissibility of evidence, should be amended to include cultural background and language of the witness or defendant (para 10.59).

41. The *Evidence Bill 1991* (Cth) provisions concerning the swearing of witnesses should be enacted. The court should be under a duty to advise the witness that he or she may choose whether to swear or affirm and that these are equally valid ways of undertaking to tell the truth to the court (para 10.61).

42. When migrants become citizens, they should be given an opportunity to register immediately on the electoral roll. The Department of Immigration, Local Government and Ethnic

Affairs should include information about the jury system and jury duty in the information package supplied to applicants for citizenship (para 10.63).

## **Consumer contracts**

### **Credit**

43. The draft Credit Bill should require that contracts, guarantees and related notices should be easy to read and be written in clear and simple language. Regulations under that Bill should specify a minimum print size and state that print should be easy to read and in a colour that stands out clearly against the colour of the paper. Commissioners for Consumer Affairs should have the power, to monitor credit contracts used by credit providers, to suspend the use of a particular contract and apply within a specified period to the court or tribunal for a direction that the contract not be used (para 11.23).

44. The draft Credit Bill should require credit providers to include on the front page of their offer documents, a statement, in clear and simple language, of the amount borrowed, the credit charge, the total establishment and other fees, the annual percentage rate, if the interest rate is variable—the terms on which it can be varied, the total of payments, details of repayments and, if there is a cooling off period—that the borrower should get a separate notice about rights under the cooling off period (para 11.31).

45. The draft Credit Bill should require that a statement of rights and obligations, which is easy to read and in clear and simple language, be handed to the borrower, along with a copy of the whole contract, before he or she signs the offer form. On request, or if the credit provider knew or ought to have known that the borrower is not fluent in English, the statement should be given in a specified community language that the borrower understands (para 11.31).

46. The draft Credit Bill should require there to be a warning in a box next to where the borrower signs the offer. The warning should state that the borrower should read the offer, the entire contract, the statement of rights and obligations and any other documents they are given before signing the offer. On request, or if the credit provider knew or ought to have known that the borrower is not fluent in English, the statement should be given in a specified community language that the borrower understands. In such a case, the statement should advise the borrower to get someone to explain the contract in a language he or she can understand before they sign the offer (para 11.31).

47. The draft Credit Bill should provide for a cooling off period of two whole business days for all point of sale credit transactions of more than \$500, except those involving credit cards or store charge cards. Before signing the contract, the borrower should have to be handed a cooling off notice (para 11.41).

48. The draft Credit Bill should provide that credit providers must inform guarantors why a guarantee is required (para 11.54).

49. The draft Credit Bill should provide that credit providers must disclose to prospective guarantors all material facts known to it relating to the borrower and the proposed transaction; failure to do so should render the guarantee voidable unless the credit provider can show that the failure was inadvertent and the guarantor knew of the relevant fact, and it is just to enforce the guarantee (11.54).

50. The *Privacy Act 1988* (Cth) should be amended to make it clear that credit providers, with the consent of borrowers, are permitted to disclose information about the borrower or prospective borrower to a prospective guarantor (para 11.54).

51. The summary on the front page of an offer document for a contract of guarantee should include a statement that the borrower has the right to be informed about the borrower's circumstances and a warning in large print that the guarantor could lose assets and property, including the family home, if the borrower does not repay the debt (para 11.54).

52. The draft Credit Bill should apply to all credit contracts, including contracts for business purposes, for sums up to \$100,000. All housing loans would also be covered by the legislation regardless of the amounts involved (para 11.61).

## **Insurance**

53. Consideration should be given to changing the duty of disclosure to reduce the unfairness that might occur. Greater efforts should be made to explain clearly the nature and effect of the duty of disclosure and the consequences of breaching the duty. The form of words prescribed under the *Insurance Contracts Act 1984* (Cth) that can be used to tell insureds of the general nature and effect of the duty of disclosure should be changed to make it clear that a person who tells the insurer of every matter he or she knows or believes might affect the insurer's decision might still be at risk and that a court might subsequently decide that there were other matters that he or she should have disclosed (para 12.13).

54. The Insurance and Superannuation Commission should establish a task force comprising industry and consumer groups and the Law Reform Commission to establish standards and to develop guidelines for standards of legibility and comprehensibility of documents. Regulations should specify a minimum print size (para 12.18).

55. The *Insurance Contracts Act 1975* (Cth) should be amended to require an insurer to give an insured, on request, a statement of the reasons for refusing a claim. The basis of this right should be the same as the right to obtain reasons for cancellation (para 12.25).

56. The *Insurance Contracts Act 1984* (Cth) s 15 should be amended so that the consumer protection provisions of the Trade Practices Act apply to insurance contracts. The *Insurance Contract Act 1984* (Cth) s 33 and 55, which provide exclusively for remedies for the insurer for misrepresentation and failure to comply with the terms of an insurance contract, should not be disturbed (para 12.30).

# PART I—INTRODUCTION

## 1. The reference

### Background to the reference

#### National Agenda for a Multicultural Australia

1.1. The National Agenda for a Multicultural Australia is a statement of the federal government's policy response to the changing ethnic composition of Australian society. The Agenda is based on a specific definition of 'multiculturalism'.<sup>1</sup> It defines the government's multicultural policies and the goals underlying them, and it includes a number of policy initiatives, including this reference to the Commission. The government's objectives include the promotion of:

- equality before the law by systemically examining the implicitly cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians, and
- an environment that is tolerant and accepting of cultural and social diversity and respects and protects the associated rights of individuals.<sup>2</sup>

#### The reference

1.2. As part of the National Agenda for a Multicultural Australia, the federal government asked the Australian Law Reform Commission to consider whether Australian family law, criminal law and contract law are appropriate for a society made up of people from different cultural backgrounds and from ethnically diverse communities. The Commission's task was to consider whether the principles underlying the relevant laws, and the mechanisms available for resolving disputes arising under or concerning the law, take adequate account of the cultural diversity of Australian society.<sup>3</sup>

#### The Commission's work

##### Publications

1.3. In the course of the inquiry, the Commission published the following documents.

- ***Multiculturalism and the Law***.<sup>4</sup> In this issues paper, the Commission outlined the conceptual framework within which it intended to deal with the issues raised by the inquiry. The paper briefly examines what multiculturalism means, outlines the approach the Commission proposed to adopt and discusses each step it proposed to take.

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1 For this definition see para 1.15.

2 Department of the Prime Minister and Cabinet, Office of Multicultural Affairs *National Agenda for a Multicultural Australia: Sharing our future* AGPS, Canberra, 1989, 17.

3 The terms of reference are at the beginning of this Report. The original reporting date of 30 September 1991 was extended by the Attorney-General to 15 March 1992.

4 ALRC IP 9, January 1990.

- ***Multiculturalism: Family law.***<sup>5</sup> This paper deals generally with the law relating to the family. It discusses the law of marriage and comparable relationships, family support policies and the legal control of parental rights and duties towards children. In each case the paper identifies the values underlying the law. It also identifies other values which may not be sufficiently protected by the law. Possible options for reform are outlined and discussed.
- ***Multiculturalism: Criminal law.***<sup>6</sup> This paper raises a number of issues arising out of the application of the criminal law in a society that is made up of diverse ethnic groups, with a range of cultural and religious affiliations. It asks to what extent the criminal law can accommodate the cultural values, beliefs and customs of minority communities in Australia. It also asks if criminal law should be used to prohibit and punish conduct that threatens religious and cultural freedom and the rights of people who belong to minority cultures and religious groups. In addition, it examines the laws of criminal procedure covering investigation, arrest, detention of suspects and evidence and considers if they impact fairly on all members of the Australian community.
- ***Multiculturalism: consumer contracts.***<sup>7</sup> This paper looks at a number of options for reform in two particular areas of consumer law: credit and insurance. It also looks more broadly at access to remedies. The principles underlying the proposals are that people who make legally enforceable agreements should have as much information as possible about the nature of the obligations that they have assumed and the consequences of failing to comply with them so that, as far as possible, disputes will be avoided. The paper also proposes that people should have access to mechanisms by which they can exercise their legal rights if a dispute arises.
- ***Family law: issues in the Vietnamese community.***<sup>8</sup> This research paper examines the pattern of use of family law services by Vietnamese people in Australia and asks why the level of use of such services is low. It makes recommendations for changing the law and related services to make them more accessible to, and appropriate for, Vietnamese people.

## **This report**

1.4. The proposals for reform which were made in the discussion papers are considered in this report in the light of the Commission's consultation since they were published. Each discussion paper is dealt with in a separate part of the report. The material from each discussion paper dealing with interpreters and with community legal education has been brought together in separate chapters of the report on those matters. A draft *Law Reform (Multiculturalism) Bill*, in Appendix A, sets out clauses to implement some of the specific recommendations in the report.

## **Consultation**

1.5. ***Consultation with other government agencies.*** As required by its terms of reference, the Commission consulted a number of federal bodies whose interests and work were relevant to the Commission's inquiry.<sup>9</sup> They included:

- the Human Rights and Equal Opportunity Commission
- the Family Law Council
- the Administrative Review Council, and
- the Committee of Review of Commonwealth Criminal Laws (Gibbs Committee).

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5 ALRC DP 46, January 1991.

6 ALRC DP 48, May 1991.

7 ALRC DP 49, August 1991.

8 Multiculturalism and the law RP 1. This paper was written by Danielle Celermajer, a student in Social Work at the University of Sydney who was on a placement at the Commission.

9 The Commission's terms of reference require the Commission to consult the bodies mentioned, the States and Territories and such persons and bodies as the Commission thinks fit.

The Commission also consulted State and Territory agencies, particularly State and Territory bodies responsible for multicultural and ethnic affairs.

1.6. ***Appointment of honorary consultants.*** Following its usual practice, the Commission appointed a number of honorary consultants from government and community groups to help it with its inquiry. The names of consultants are listed at the beginning of this report and the Commission acknowledges with appreciation the contribution they have made. They attended several lengthy meetings to discuss the Commission's proposals and draft documents and provided other detailed comment and assistance. Their expertise and insights were of great value.

1.7. ***Community groups.*** It was important for the Commission to encourage members of non-English speaking and other ethnic communities to contribute submissions to the inquiry because it is, to a large extent, about protecting their cultural rights. The Commission therefore made special efforts to reach the communities affected to seek information from them about the way the law affects them because of their culture, language and religion and about any perceived disadvantages which they experience in that regard. The Commission consulted with community organisations throughout Australia. In every State and Territory the Commission organised seminars for community workers, including Grant-in-Aid workers, welfare workers and community legal centre workers. It consulted lawyers, police officers, interpreters and other professionals working in the legal system. Finally, using the group facilitator program of the Office of Multicultural Affairs (OMA) the Commission elicited response from members of migrant and other communities who were able to participate in their own language. The result of these efforts has been that many people who had never done so before have taken part in a law reform exercise.

1.8. ***Submissions.*** The Commission's issues paper and discussion papers were widely distributed. The specific proposals for reform in these papers were the basis of significant and detailed comment. Over 400 written submissions were received from individuals and groups, including State and Territory governments, ethnic and other community groups. Summaries of the issues paper and discussion papers were translated into 22 community languages and distributed to community organisations throughout Australia. The names of people who made written submissions are listed in Appendix B.

1.9. ***Public hearings.*** The Commission held hearings which the public were invited to attend in the capital city of every State and Territory and in Townsville. One hundred and seventeen people made oral submissions at the public hearings. The names of the people who made oral submissions are listed in Appendix B.

## **Acknowledgments**

1.10. The Commission thanks all those who contributed to the reference by accepting appointment as honorary consultants, by making written submissions, by attending meetings and hearings, and by taking part in all the formal and informal consultations. The Office of Multicultural Affairs gave the Commission considerable support in planning the reference and the consultation program, and by arranging for the use of the group facilitator program. Particular thanks are due to Elizabeth Morley, of the Consumer Credit Legal Centre (NSW) and Danielle Celermajer, for their contributions to the Commission's work.

## Other relevant inquiries

### ALRC inquiries and reports

1.11. **Aboriginal customary law.** A previous report of the Commission of considerable significance for this inquiry was *The Recognition of Aboriginal Customary Law*.<sup>10</sup> The Commission there recommended that certain principles of Aboriginal customary law be given recognition, where that could be achieved in a manner which was consistent with human rights principles and acceptable to the communities affected.<sup>11</sup> While the Commission has concluded that specific factors affecting the Aboriginal community do not apply to migrants,<sup>12</sup> the principles established in the earlier inquiry for dealing with minority interests and rights have been of considerable value in the present exercise.

1.12. **Other ALRC Reports.** Several other inquiries previously conducted by the Commission were of special relevance in this reference. Commission reports which were drawn on in this report include: *Matrimonial Property* (ALRC 39); *Evidence* (ALRC 38); *Insurance contracts* (ALRC 20); *Criminal Investigation* (ALRC 2); *Child Welfare* (ALRC 18); and *Sentencing* (ALRC 44).

### Reports of other agencies

1.13. **Administrative Review Council.** While this reference was in progress, the Administrative Review Council undertook a project as part of the National Agenda to determine whether people from Australia's ethnic communities, specially those of non-English speaking backgrounds, have fair and effective access to the Commonwealth administrative review system. In its Report, *Access to Administrative Review by Members of Australia's Ethnic Communities*, the ARC concluded that:

Members of ethnic communities do not have effective access to administrative review. This is mainly because review agencies have failed adequately to publicise themselves and their services.<sup>13</sup>

It made recommendations to make administrative review more accessible to those communities. Like the Administrative Review Council, the Commission found that there were many deficiencies concerning access to the law and to information and education about the law.

1.14. **Reports of other agencies.** During the period of this inquiry a number of other inquiries reported on matters relevant to Commonwealth family law, criminal law and consumer contract law, or were in progress. These include

- the *Report of the Royal Commission on Aboriginal Deaths in Custody*, 1991
- *Racist Violence*, Report of the National Inquiry into Racist Violence in Australia, Human Rights and Equal Opportunity Commission, 1991

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<sup>10</sup> ALRC 31 (2 vols) 1986.

<sup>11</sup> Principles of non-discrimination do 'not preclude reasonable measures distinguishing particular groups and responding in a proportionate way to their special characteristics, provided that basic rights and freedoms are assured to members of such groups. Nor does it preclude 'special measures', for example for the economic or educational advancement of groups or individuals, so long as these measures are designed for the sole purpose of achieving that advancement, and are not continued after their objectives have been achieved': ALRC 31, para 158.

<sup>12</sup> ALRC 31 distinguishes between Aborigines and migrants who have come by choice to a settled country with an established legal system: para 164.

<sup>13</sup> Report No 34, 1991, para 1.3.

- reports of the Committee of Review of Commonwealth Criminal Laws (Gibbs Committee)
- *A Pocket Full of Change: Banking and Deregulation*, Report of the House of Representatives Standing Committee on Finance and Public Administration, 1991 (the Martin Committee).

## Scope of reference

### Multiculturalism and law

1.15. ***The multiculturalism policy.*** Multiculturalism is defined by the National Agenda for a Multicultural Australia as a policy for ‘managing the consequences of cultural diversity in the interests of the individual and society as a whole’. It includes<sup>14</sup>

- ***cultural identify:*** the right of all Australians, within carefully defined limits, to express and share their individual cultural heritage, including their language and religion<sup>15</sup>
- ***social justice:*** the right of all Australians to equality of treatment and opportunity, and the removal of barriers of race, ethnicity, culture, religion, language, gender or place of birth, and
- ***economic efficiency:*** the need to maintain, develop and utilise effectively the skills and talents of all Australians, regardless of background.

1.16. ***Cultural basis of the law.*** The Australian legal system is a product of the society in which it has evolved over the past two centuries and, to a lesser extent, the society (England) from which it was transplanted 200 years ago. Since European settlement, the non-Aboriginal society has been predominantly Anglo-Celtic and has largely excluded the original inhabitants and ignored their cultures, at least until recently. As a result of the post-war immigration of large numbers of people from continental Europe and later from the Middle East, Asia and South America, the ethnic composition of Australian society has dramatically and irrevocably changed. While cultural diversity is now an accepted part of Australian society, the consequences of this for the legal system have not yet been fully considered.

1.17. ***Impact of law on cultural expression.*** Multiculturalism as a social policy requires a systematic examination of Australian law to consider first, whether it creates barriers to the expression of cultural identity and secondly, whether it could play a more positive role in achieving the goals of multiculturalism by promoting effective equality before the law (not just formal equality). A further question is whether the law could be administered so that it does not have an unintended, discriminatory impact on the members of particular ethnic minority groups.

1.18. ***Limits on multiculturalism.*** While multiculturalism supports the expression of cultural identity, this is not an unlimited right. To maintain social cohesion, certain principles should be accepted by all Australians. Multicultural policies

- are based on the premise that all Australians should have an overriding and unifying commitment to Australia

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14 Department of Prime Minister and Cabinet, Office of Multicultural Affairs, *National Agenda for a Multicultural Australia: Sharing our Future*, AGPS, July 1989, p vii.

15 Culture is the shared language, religion, traditions and customs of a particular community, including those that concern family and social relationships.



- require all Australians to accept the basic structures and principles of Australian society—the Constitution and the rule of law, tolerance and equality, parliamentary democracy, freedom of speech and religion, English as the national language and equality of the sexes and
- impose obligations as well as rights, in particular, the obligation to accept the right of others to express their views and values<sup>16</sup>

In line with these principles the Commission's inquiry is not only about extending the boundaries of the legal system to give greater recognition to cultural diversity, and to ensure equality of treatment and opportunity. It is also about establishing appropriate limits on the right to cultural freedom.

## The Commission's approach

### Approach outlined in the issues paper

1.19. ***Examining values.*** In IP 9 the Commission suggested that a series of questions should be asked:

- what are the values underlying each of the areas of law covered by the inquiry
- what are the values that may not be given enough respect or protection by the existing law
- can and should the law be changed in any way so that those values are better protected?

1.20. ***Commission's approach generally supported.*** Submissions show that there was general support for the Commission's approach to the question of accommodating values. Some express concern that the fundamental values of Australian law would be abandoned or overthrown by alien values. Most, however, welcomed the reference because it creates an opportunity for migrant communities to contribute to the values of our legal system and to review laws which reflect dominant values, which do not accord in all respects with the values of significant sections of the community or which make no allowance for important cultural differences. There was support for the view that the structures and principles of Australian law should give expression to and be shaped by the cultural values of the whole community, and that multiculturalism can contribute to the growth and modification of legal principles to the benefit of all Australians.

1.21. ***Accommodating values.*** Following this approach, the Commission looked at substantive law, that is, the law as written, including legislation and judge-made law, legal structures and institutions and procedures. The Commission sought to identify areas where the law creates special problems for people with particular beliefs and traditions, where the law is a barrier to the free expression of the cultural values of individual Australians and groups of Australians or where it impedes equal participation in Australian society. Once these areas were identified, the first question was whether, and if so how, those values should be better accommodated by the law.

1.22. ***Language and cultural barriers.*** As the inquiry proceeded, it became clear that language and cultural barriers to equality in the legal system were of as much importance as questions concerning the substantive values of the law. In consultation and submissions, frequent reference was made to inequalities in access to law as a major problem. The significance of issues such as lack of knowledge of the law and access to interpreters were such that separate chapters of the report have been devoted to Interpreters and Education.

## Assessing competing values

1.23. ***Cohesion and diversity.*** An important matter for the Commission to keep in view was to ensure that proposals to accommodate minority values in the legal system do not prejudice the basis of social cohesion. Under Australia's multiculturalism policy, social cohesion depends on common acceptance of principles which have been outlined above, and on the free choice of people to be joined under one government and one law under principles of parliamentary democracy. At the same time, the goals of cohesion should not be used to justify the imposition of the values of a dominant group on a minority. Cohesion is better advanced when people have the greatest possible freedom to express individual cultural values in a way which is compatible with respect for the same freedom of others and for common social goals. The problem is to differentiate between those values which are necessary for cohesion and those which may be adjusted to allow for diversity.

1.24. ***Separate laws unacceptable.*** Some submissions suggest that cultural values be accommodated by introducing special laws applying to particular ethnic groups. The case for legal pluralism of this kind was considered in the Commission's report on Aboriginal Customary Law. The disadvantage of applying laws to specified groups in society was acknowledged there. In most situations, the preferred solution was to respond to particular problems so far as possible by making changes of general application.<sup>17</sup> The Commission remains of the view that the better approach in nearly all cases is likely to be a general amendment of Australian law to make it less narrowly monocultural and more flexible to accommodate individual differences. Imposing special laws on people because they belong to a particular ethnic group could introduce unjustified discriminations into the law, lead to unnecessary and divisive labelling of people, and possibly be oppressive of individual members of that group. Where exemptions from the law are necessary on the ground of belief, it is preferable for the law to apply in general terms, even though in fact only members of one group may claim its benefit.

## Universal principles

1.25. ***Human rights instruments.*** One source of principles to guide the Commission in dealing with competing values are the international human rights instruments to which Australia is a party. The Commission's terms of reference refer specifically to the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Other such instruments include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child (CROC). Some of the rights protected by these instruments are included in specific implementing legislation.<sup>18</sup> Other rights exist without specific legal protection because there has not in fact been legislation to override them. Human rights that are of special relevance to this inquiry are:

- ***Equality before the law and equal protection of the law.*** The ICCPR, art 26 provides for equality before the law.
- ***Equality before the courts and tribunals.*** The ICCPR, art 14 provides for equality before courts and tribunals.

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<sup>17</sup> 'But it may be that the best remedy to a particular problem is not the recognition of customary laws as such, but some more general amendment to Australian law which would accommodate not only that problem but other similar problems encountered within the community generally': para 167.

<sup>18</sup> eg *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth).

- **Protection of the family as the natural and fundamental group unit of society.** The ICCPR art 23(1) and CROC provide for the protection of the family. This principle is included in the *Family Law Act 1975* (Cth) s 43(b).
- **Protection of children by family, society and state.** The ICCPR art 24(1) and CROC provide for protection of children. This principle is included in the *Family Law Act 1975* (Cth) s 43(c).
- **Freedom of thought conscience and religion.** The ICCPR art 18(1) provides for freedom of thought conscience and religion. The Australian Constitution, s 116 protects the right to the free exercise of religion from encroachment by the Commonwealth, and prohibits the Commonwealth from establishing a religion.
- **Freedom of expression.** The ICCPR art 19(2) provides for freedom of expression. The right to dissent, to hold and express values which differ from those of the majority or which are unpopular with other people, is of special importance in a society of diverse cultures and religions.<sup>19</sup>
- **Cultural rights.** The ICCPR art 27 provides that, in states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

1.26. **Importance of universal values.** The international covenants and other instruments declare fundamental rights and values which transcend cultural, political and economic differences. They provide a comprehensive statement of rights in a context which enables each right to be given its proper weight and, where necessary, a balance to be struck.

1.27. **Balancing rights.** In some situations, the rights outlined above appear to point in different directions. Cultural rights or religious freedom may, for example, appear inconsistent with the equality rights of women.<sup>20</sup> State intervention to protect children may be seen by some as incompatible with the need to support the family unit, or with other cultural or religious values. At several points in the inquiry, the Commission has had to consider conflicts of this kind. For example, should limits be set on free speech where it is used to undermine the cohesion of the society by stirring up hatred of a particular group or member of a group? The legal solution to these apparently inconsistent objectives must ensure that each right is given its proper scope of operation, and that no right is excluded or jeopardised because too much emphasis is given to another. They have to be kept in balance. While that balance may reflect the needs of the particular society, it should also be compatible with the universal quality of the rights in question.

1.28. **Relevance of difference.** Difficult questions arose concerning what differences should be relevant and what should be disregarded in the application of the law. These issues were of particular importance in relation to criminal law and family law. The Commission has made recommendations in both these areas to ensure that cultural background can be included as one among other relevant factors in deciding certain issues. For example, while the welfare of the child should continue to be the principle underlying decisions about children, in applying that principle consideration should be given to the desirability of the child's maintaining his or her links with the culture, language and religion of people with whom he or she has a significant relationship.

## Basic principles

1.29. The basic principles which guided the inquiry are:

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<sup>19</sup> The Constitutional Commission recommended that there be entrenched in our Constitution provisions to ensure that everyone has the right to freedom of conscience and religion, freedom of thought belief and opinion, and freedom of expression; Australian Government, Constitutional Commission, *Final Report*, (vol 1) AGPS, Canberra, 1988, para 9.261.

<sup>20</sup> There are specific exemptions from the *Sex Discrimination Act 1984*, for religious organisations.

- law should apply equally to all without discrimination; there should not be different rules for different people on the ground that they belong to a particular ethnic group
- within the limits necessary in a free and democratic society, each individual should be free to choose, to maintain and to express his or her cultural or religious values
- the law should take account of a person's individual cultural experience, values and attitudes when it is relevant to do so, is not discriminatory and does not jeopardise the rights of others
- equality before the law and equal access to the law require the removal of communication barriers, whether arising from language or from lack of understanding.

## **Areas for reform**

1.30. ***Making adjustments to the law.*** In applying these principles, the Commission found that there were areas where the law could be regarded as discriminatory, or where it forced the acceptance of values against the conscience of the individual. If the law was found to be capable of adjustment to accommodate other values, specific recommendations have been made for reform, which are consistent with the basic principles which have been outlined and which maintain the integrity of the underlying legal principles.

1.31. ***Barriers of language and lack of knowledge.*** The Commission also found that there were a number of specific barriers to equality, arising from language and lack of knowledge. Equality before the law requires that efforts be made to ensure that information about the legal system, including such matters as bail and the jury system, is accessible, that explanations are available in community languages and that interpreting is available when necessary. It has recommended that governments should take responsibility for removing barriers to equality and access to the legal system. This should be done by increasing awareness of legal rights, duties and responsibilities and the role of the state among the community in general and persons from non-English speaking backgrounds in particular. Multicultural education should also be included in the education and training of people who work in the legal system.

## **Tolerance**

1.32. The success of a multicultural society, however, depends not just on legal measures, but also on acceptance by the general community and by legal institutions and the legal profession of the right of people to be different, to have different opinions, religions and traditions. Without this acceptance, multiculturalism cannot work. The law can help to encourage tolerant attitudes; but to be effective it should be supplemented by knowledge, understanding and communication of ideas. This report is intended to be a contribution to the process.

## PART II—ACCESS TO JUSTICE

### 2. Information and education

#### Introduction

2.1. This chapter deals with the theme of information and education, issues which have been raised in all the areas of law which the Commission has been asked to examine. The solution to many of the problems that migrants, Aboriginal people and people of non-English speaking backgrounds have with the law requires a better exchange of information between the legal institutions and related departments and services on the one hand and these groups of people on the other. The chapter identifies the areas where such communication can and should be improved and suggests ways in which better communication and awareness on both sides can be achieved. Recommendations are made to ensure the most effective use of the limited resources available for improved communication, to increase institutional sensitivity and to promote greater government responsibility and accountability for community information programs.

#### The need for information about the law and related services

##### Issues addressed in discussion papers

2.2. *Lack of information can have serious consequences.* In each of its discussion papers, the Commission drew attention to the community's need for information about the law. Fundamental principles of access and equity require that all Australians know their legal rights, duties and responsibilities, the role of the state, the basis on which it will intervene and how the courts and the legal system operate. They also demand that services and support provided by government are accessible to all who are entitled to use them, without discrimination or hidden barriers. In DP 46, the Commission noted that there appears to be a general lack of knowledge about the legal system among Australians and that this lack of knowledge denies many people the opportunity to participate in the process or to understand the reason why the legal system affects them in particular ways. There can be serious consequences in the context of family law, for example, where people do not know the principles governing court decisions about such sensitive matters as who should have custody of children and if and when the non-custodial parent should have access to his or her children. A person who does not understand the basis on which the decision is made may find it very difficult to accept and may fail to co-operate in the implementation of the decision. In DP 48, the Commission considered the issue in the context of its proposals for taking into account ignorance of the law when a person is charged with a criminal offence. Access to information about the rights and obligations assumed by a person who enters into a contract is a consistent theme of DP 49. The discussion papers also referred to the fact that many people do not know about existing services designed to help people avoid the legal system or help them negotiate their way through it.

2.3. *Special problems for people of non-English speaking backgrounds.* The Commission acknowledges that the problems arising from lack of knowledge about the law are not unique to a particular ethnic community or to ethnic communities generally; they are problems for the community as a whole. However, barriers to accessing information are greater for people whose language is not English, who are used to different methods of acquiring knowledge or who are used to a different legal system. The Commission asked for submissions about the particular information

and education needs of migrant groups. In DP 48, for example, it asked what sort of information about the criminal law is most important for communities with different cultural backgrounds. It also asked for submissions about the strategies that should be adopted to make information campaigns effective.

2.4. ***Government responsibility for community legal education.*** In DP 48 the Commission proposed that governments should take responsibility for, co-ordinating the development and delivery of community legal education and information about the criminal law. Other proposals were: that extensive consultation with community groups and appropriate research be conducted to ensure that information needs are met in accordance with access and equity principles; that Government and community efforts be co-ordinated at a national level; and that the Commonwealth, States and Territories develop jointly model programs and campaigns. In DP 49 the Commission proposed that governments, industry and community organisations develop and implement a co-ordinated and effective strategy for the education of disadvantaged consumers.

## **The legal system should be more sensitive to the cultural and linguistic differences in Australian society**

2.5. In its discussion papers the Commission drew attention to the need for all those who work in the legal system including judges, lawyers, court personnel and police, to be sensitive to the cultural differences in Australian society. They should be aware that the law embodies values which may not be shared or even understood by everyone within the Australian community, and that cultural and religious values that are very important to some Australians may not be protected by the law.<sup>1</sup> The Commission's consultation reveals a general perception that there is widespread cultural insensitivity in the operation and administration of the law. Perceived problems include stereotyping and the failure of courts and lawyers and other staff to acknowledge the role of culture in a person's behaviour and to deal with it adequately in decision making. Consultation also indicates that there is major concern about the lack of skills and training provided for those administering the legal system in assessing language competence and making appropriate and effective use of interpreters.

## **What consultation has shown**

### **Strategies for community education**

2.6. ***Co-ordination needed.*** The Commission's attention has been drawn to a plethora of activities directed towards informing the public about various aspects of the law, the legal system and related services. These have been carried out by government departments and agencies, community legal centres and other organisations. Many of them have been directed specifically to particular ethnic communities. The following examples of public and community projects show the range of activities.

- *The Federal Bureau of Consumer Affairs* is running a three year (1989-1992), consumer education program for ethnic communities and workers in community welfare organisations. Important features of the program are
  - (a) the use of research to plan and implement the project

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1 This is most evident in family law.

- (b) the targeting of particular ethnic groups with information prepared by speakers of the relevant language and tailored to meet the particular needs of that group
  - (c) the use of media that research shows to be the most effective for reaching those particular communities
  - (d) evaluation of each stage of the project.
- *The Administrative Review Council Report*<sup>2</sup> explains how trial programs to increase awareness of administrative review were conducted and assessed and how effective they were.
  - *Family Resources Centres*. The federal Department of Community Services and Health is funding a number of Family Resources Centres, to be set up in selected disadvantaged areas. The criteria used to select an area include the level of Aboriginal, ethnic, sole parent and isolated families in the area. The centres will provide one stop information about, and referral to, local services, will develop a comprehensive data base of family needs in the area and will examine the social or physical barriers to use of existing services. It will assist local services to develop and target information to meet special needs such as those of a local ethnic community.<sup>3</sup>
  - *The Legal Aid Commission (Vic)* has been conducting a telephone information service on family law in four languages (Polish, Greek, Italian and Vietnamese). It is to become part of their general telephone information service on a weekly basis and will cover general legal information. Training is being conducted for additional workers.
  - *The Legal Information Services Network (LISN)* is a project of the Ethnic Communities Council of New South Wales, funded by the Law Foundation of New South Wales. It is producing a series of programs about the law, the legal process and legal services for broadcasting on community radio. The programs are aimed at ethnic communities and will be supplemented by training kits for ethnic community workers. The focus of the programs, and the languages in which they will be broadcast, is being determined by consultations with ethnic community groups and service providers.
  - *Legal Information Access Centre*. A Legal Information Access Centre is based at the State Library of New South Wales which sends out material on law to local libraries. It is funded by the Law Foundation of New South Wales.
  - *Community Legal Centres*. Many community legal centres and legal resources centres have produced information and provided special services for local people of non-English speaking backgrounds. Springvale Community Aid and Advice Bureau in Victoria, for example, has run programs to acquaint newly arrived migrants with local services. The Liverpool Neighbourhood Law Centre in New South Wales has a staff member whose specific task is to conduct community legal education programs concentrating on access for people of non-English speaking backgrounds. South Brisbane Immigration and Community Legal Service has produced a legal information kit in seven community languages, covering such topics as the Australian Legal System, Family Law, Criminal Law, Civil Law, Personal Injuries, Police Powers, Consumer Rights and Employment. It has received a grant from the Office of Multicultural Affairs to undertake cross-cultural training for the legal profession and to produce a kit for nationwide use.

Many of the programs are national in scope—others are locally focussed and there may be unnecessary duplication. The effectiveness of the programs should be evaluated so that limited funding can be used to the best advantage. Many projects are funded on a short term basis so that the emphasis is on a product (such as a pamphlet) rather than on a continuing program. Some campaigns would be useful models for others to follow. However, there is little co-ordination between federal and State or Territory agencies and between government and other bodies.<sup>4</sup> There is at present no single body at a national or State or Territory level that takes ultimate responsibility for ensuring that accessible information about the law is produced and its provision co-ordinated.<sup>5</sup>

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2 *Administrative Review Council Report to the Attorney-General: Access to Administrative Review by Members of Australia's Ethnic Communities Report 34*, AGPS, Canberra 1991.

3 Department of Community Services & Health (Cth) *Submission* May 1991.

4 LB Myles *Submission* July 1991; J O'Mara *Transcript* Fairfield 23 September 1991.

5 Federation of Ethnic Communities' Councils of Australia Inc *Submission* August 1991.

A co-ordinated information strategy involving the Commonwealth and State agencies would ensure a far better use of resources<sup>6</sup>

2.7. **Programs should be developed in consultation with communities.** Many submissions say that the most successful strategies are those developed in consultation with the communities themselves so that the information is relevant and appropriate to their needs.<sup>7</sup> Campaigns should be language specific and issue specific to meet the special needs of particular communities.

2.8. **Programs should use existing community networks.** The Commission's consultation shows that many people of non-English speaking backgrounds depend on community networks and verbal communication for their information about the law. This is confirmed by research.<sup>8</sup> One way to improve the situation is to ensure that community agencies have access to accurate information, and especially information about referrals to services. Submissions suggest that legal education should target existing local community networks, for example, welfare and community workers such as Grant-in-Aid workers, women's groups, trade unions and professional associations, religious institutions and community leaders. Members of these networks could in turn provide basic information to other members of the community about aspects of the law and make appropriate referrals. Audio-visual and multi-lingual written material should be produced and regularly updated to keep these networks informed. A national body should co-ordinate this exercise.<sup>9</sup> On the other hand, fear has been expressed that governments sometimes place too much responsibility on community organisations to provide services necessary to implement access and equity policies without ensuring that they have adequate funding. Devolution of responsibility for the implementation of multicultural legal education policies to community based settlement agencies should be conditional on the provision of resources.<sup>10</sup>

2.9. **Use of ethnic media.** Many submissions suggest that greater use can and should be made of ethnic media as a means of disseminating information.<sup>11</sup> Some comment on the effectiveness of strategies in which agencies used a question and answer format in a regular column in the ethnic press to provide information on particular issues.<sup>12</sup> Another suggestion was to make a series of programs dealing with, for example, issues in family law, which would be broadcast and then made available to community organisations on cassette. This would be backed up by providing the telephone number of a relevant agency able to provide further information or referral. The introduction of material through the 'soap opera' format of such programs as *A Country Practice* was suggested by participants in the Commission's community languages consultation.

2.10. **School education.** A number of submissions argued that community education should start at school. The Commission's community languages consultation suggests that school is an important source of legal information for young people and, through them, adults of non-English speaking backgrounds. The inclusion of legal education and cultural and racial awareness programs

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6 Trade Practices Commission *Submission* February 1992.

7 North Richmond Community Health Centre Inc *Submission* July 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

8 eg J Jupp, *Settlement needs of small newly arrived ethnic groups*, Bureau of Immigration Research, AGPS, Canberra 1991, 58; Ethnic Community study by Yann Campbell Hoare Wheeler, June 1988, commissioned for the Ethnic Community Road Safety campaign in Victoria. This was recognised by the Department of Immigration, Local Government and Ethnic Affairs (Cth) *Submission* September 1991.

9 Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

10 See eg LB Myles *Submission* April 1991.

11 LB Myles *Submission* April 1991; Department of Transport and Communications (Cth) *Submission* April 1991; Humanist Society of Victoria Inc *Submission* May 1991; Ethnic Affairs Commission of New South Wales *Submission* June 1991; Department of Transport and Communications (Cth) *Submission* July 1991; Dr K Smith *Transcript* Brisbane 14 May 1991; J O'Mara *Transcript* Fairfield 23 September 1991.

12 They referred in particular to the 'Bao Cong' column in a Vietnamese language weekly magazine, which began as part of an information campaign conducted by the Administrative Review Council. See para 2.22.



as part of human development courses is one approach suggested.<sup>13</sup> The South Australian government states that schooling is the most cost-effective means of community education. It has recently introduced a 'Common Knowledge' curriculum which provides legal education for children in years 8 to 10. The South Australian Children's Court has produced a kit for the course which includes case studies and information about the court's operations. The South Australian Government is also developing a new core subject 'Common Ground' for primary schools which will include such topics as belief systems in Australia and overseas, 'law makers and breakers' and marriage across cultures.<sup>14</sup>

**2.11. Needs of rural and remote groups.** The need for special attention to be directed to providing information and education to people of non-English speaking backgrounds in rural and remote areas was highlighted in submissions and consultation.<sup>15</sup>

## **Matters that should be addressed by community legal education**

**2.12.** Consultations and submissions show that there is a general lack of knowledge about the legal system and the law. This was raised particularly in relation to prospective and newly arrived migrants. The areas of law in which there is a special need for education include family, criminal and contract law. In all three areas, people need a much better understanding of legal practice and procedure. Consultation also suggests that people need to know more about the existence of and operation of alternative dispute resolution procedures such as counselling, mediation and informal tribunals such as small claims tribunals in consumer contract and family law areas.<sup>16</sup> In family law, the most commonly mentioned areas of need are education about the formalities of marriage, the grounds for divorce (irretrievable breakdown, conclusive evidence of which is 12 months separation), maintenance and property division and the basis on which custody and access decisions are made.<sup>17</sup> Education about the law relating to parental responsibility and the extent of children's autonomy and about the reasons for the law's approach is also considered important.<sup>18</sup> In criminal law, knowledge of rights within the criminal justice system, including the right to use complaint mechanisms such as the ombudsman, is considered to be crucial.<sup>19</sup> As ignorance of the law is no excuse, an understanding of the substance of legal restrictions in the criminal law is fundamental.<sup>20</sup> Women are considered to be in great need of information about their rights, particularly in relation to assault in the home, and about points of access to the law.<sup>21</sup> Young people are also considered to be an important target audience. Community education about consumer rights and responsibilities and in particular about guarantees is also considered necessary. One submission says that, while information about the substance of the law is important, it is expensive to produce, and that a more cost effective starting point is providing information about where or how to get information about the law.<sup>22</sup>

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13 eg Country Women's Association of New South Wales *Submission* May 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; Ethnic Communities' Council of New South Wales *Submission* July 1991; Dr AT Kenos *Submission* April 1991; Humanist Society of Victoria Inc *Submission* May 1991; Department for Family and Community Services (SA) *Submission* June 1991.

14 South Australian Government *Submission* September 1991.

15 See eg Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; S Hussain, D Johnson *Transcript* Townsville May 1991.

16 See eg Ethnic Affairs Commission of New South Wales *Submission* June 1991.

17 See eg E Byrne *Submission* March 1991; Ethnic Affairs Commission of New South Wales *Submission* June 1991.

18 See ch 6.

19 See ch 10.

20 See ch 8.

21 eg Federation of Ethnic Communities' Councils of Australia Inc *Submission* August 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991.

22 Department of Immigration, Local Government & Ethnic Affairs *Submission* September 1991.

## Cross cultural awareness for legal professionals

2.13. *The need for awareness.* A common theme in consultation and in some submissions is the fundamental importance of cross cultural training for legal professionals and all those involved in administering the legal system.<sup>23</sup>

2.14. *Courts and the judiciary.* The Ethnic Affairs Commission of New South Wales emphasises the importance of the judiciary in the legal process.

It is desirable for society to have in place a judicial system that is objectively attuned to cultural and demographic reality ... The cross cultural awareness of the judiciary is an essential element in meeting such an objective.<sup>24</sup>

The question of cross cultural awareness of courts has also been referred to in a number of recent major reports. The Human Rights and Equal Opportunity Commission's report, *Racist Violence*, pointed to a strong perception of institutionalised injustice among Aboriginal people.<sup>25</sup> It stresses that courts should take a broad view of the relevance of questions relating to cultural diversity when assessing the impact and severity of words or actions and the severity of sanctions.<sup>26</sup> The *Report of the Royal Commission into Aboriginal Deaths in Custody* discussed the perceptions of Aboriginal people that there was a lack of cultural awareness among the judiciary. It reported that although there were many instances where judges and magistrates have made special efforts to overcome lack of knowledge about Aboriginal culture, the efforts are not uniform. It recommended that judicial officers and people who work in the court service who come into contact with Aboriginal people be encouraged to participate in appropriate training and development programs about Aboriginal society, customs and social factors which contribute to the disadvantaged position of many Aboriginal people.<sup>27</sup> Submissions and consultation indicate that attention should be given to

- the use of interpreters during criminal investigation and in all court proceeding<sup>28</sup>
- the importance of multilingual information within the legal system
- understanding of possible differences in demeanour between cultural groups
- how to implement consistent but flexible court procedures for the use of interpreters and swearing of witnesses
- sensitivity to aspects of court procedure, such as the use of legal jargon, which may disadvantage individuals of non-English speaking background and how to overcome them
- the impact of cross cultural issues in the exercise of judicial discretion
- the role of cultural values in assessing such concepts as reasonableness or state of mind or assessing behaviour generally or lifestyle or in sentencing.<sup>29</sup>

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23 Humanist Society of Victoria Inc *Submission* May 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee (J Hussain) *Submission* August 1991; LB Myles *Submission* April 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; E Byrne *Transcript* Perth November 1990; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; Casa House *Submission* July 1991; Ethnic Health Unit, Health Department Victoria *Submission* April 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; C See Kee *Transcript* Darwin May 1991; B Simpson *Transcript* Townsville May 1991.

24 Ethnic Affairs Commission *Submission* August 1991.

25 Human Rights & Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, Canberra, 1991, 111.

26 *ibid* 310.

27 Royal Commission into Aboriginal Deaths in Custody, *National Report* Vol 3, AGPS, Canberra, 1991, Rec 96, 73, 78.

28 eg Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; see ch 3.

29 eg Ethnic Affairs Commission of New South Wales *Submission* August 1991; see also ch 8.

2.15. ***Lawyers and others working in the legal system.*** Many submissions say that lawyers, court staff, public servants, counsellors, social workers and police should be educated about the diversity of cultural values in Australian society and principles of access and equity.<sup>30</sup> Some say that training these groups of people in the use of interpreters is of even greater immediate importance.<sup>31</sup> Public service employees dealing with the public should also be trained in these areas.

2.16. ***How training should occur.*** Submissions suggest many ways of implementing training. Some consider that professional organisations, such as law societies, could play a role by organising seminars or conferences and by publishing articles in their journals on these issues.<sup>32</sup> Continuing legal education programs could be used for training. Some say training should be compulsory.<sup>33</sup> Including these issues in in-service education programs for the judiciary and others administering the law is one option.<sup>34</sup> The development of a 'bench book' for the purpose of providing judicial officers with information on issues of language use and cultural issues is suggested by another.<sup>35</sup> The Ethnic Affairs Commission drew attention to important initiatives in judicial training now taking place in the United Kingdom. The board responsible for training the judiciary has proposed the establishment of an Ethnic Minorities Advisory Committee to be chaired by a High Court Judge. Its role would be to advise and act as consultant to the board, conduct training where required and liaise with human rights organisations.<sup>36</sup> Submissions suggest a number of measures for the public service. Some suggest that the federal Attorney General's Department should play a role in education. Others say that cross cultural or multicultural awareness units in the relevant government departments and agencies should be established to run training programs<sup>37</sup> especially for front counter staff.<sup>38</sup> Another suggests that successful completion of cross cultural awareness courses should be a pre-requisite for career advancement in the public service.<sup>39</sup>

2.17. ***Training in law schools.*** Many submissions consider that cultural awareness training, training in the use of interpreters and studies in multiculturalism and ethnic issues should be compulsory for those undertaking legal studies in tertiary institutions.<sup>40</sup> One submission favours the integration of these issues into the main curriculum, rather than setting up a separate subject.<sup>41</sup> Clinical legal education is suggested as being a suitable place to begin training in the use of interpreters.

2.18. ***Equal opportunity recruitment and strategies.*** The use of equal opportunity recruitment policies is seen by many as an important part of any strategy to achieve greater institutional sensitivity and awareness. Current initiatives in the United Kingdom include asking applicants for judicial appointment to include information about their ethnic origin. The Lord Chancellor's

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30 Humanist Society of Victoria Inc *Submission* May 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee (J Hussain) *Submission* August 1991; LB Myles *Submission* April 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; E Byrne Transcript Perth November 1990; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; Casa House *Submission* July 1991; Ethnic Health Unit, Health Department Victoria *Submission* April 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; C See Kee Transcript Darwin May 1991; B Simpson Transcript Townsville May 1991.

31 eg Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991.

32 See eg Humanist Society of Victoria Inc *Submission* May 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; Australian Federation of Islamic Councils Inc., Law Reform Sub-Committee (J Hussain) *Submission* August 1991.

33 Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991.

34 Casa House *Submission* July 1991; LB Myles *Submission* April 1991.

35 Ethnic Affairs Commission of New South Wales *Submission* June 1991.

36 Ethnic Affairs Commission of New South Wales *Submission* August 1991.

37 Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee (J Hussain) *Submission* August 1991; LB Myles *Submission* April 1991; Office of Ethnic Affairs (NT) *Submission* August 1991.

38 E Byrne Transcript Perth November 1990.

39 Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991.

40 See Casa House *Submission* June 1991; Ethnic Communities' Council of NSW *Submission* June 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service *Submission* July 1991.

41 B Simpson Transcript Townsville May 1991.

Department proposes to publish data from time to time and if it finds that ethnic minorities have been disproportionately unsuccessful, it will conduct an investigation. The Law Society has welcomed the move.<sup>42</sup> One submission suggests that ‘bilingualists’ should be actively encouraged to seek work in the Family Court and other legal and support services. It suggests that the Linguistic Availability Performance Allowance should be upgraded, and substantial remuneration provided for bilingual staff accredited at NAATI level 2 and above. Staff should be given time off work to prepare for accreditation exams on approved study leave which is a recognised condition of many awards. The cost of these exams should be subsidised by the employer.<sup>43</sup>

## **Strategies for reform**

### **A national audit of existing community legal information programs**

2.19. ***Co-ordination needed.*** The Commission has been told that within Australia there is a wealth of knowledge and information about effective information strategies for ethnic communities. However there has been no nationally co-ordinated approach to providing legal information to ethnic communities or to the Australian community generally. The expertise developed in community organisations who are running programs could be used more effectively by other organisations or departments wanting to set up information programs. State, Territory and federal government departments often do not co-ordinate their efforts, resulting in duplication and waste of scarce resources. Funding is generally allocated on the basis of small project applications from community, or government agencies. The lack of co-ordination means there is no way of knowing whether particular communities or areas of law are left out. Newly arrived migrant groups which have no established community organisations are less able to identify their own needs and to seek appropriate funding. As a result they are without doubt disadvantaged.

2.20. ***Need for audit.*** There should be a national audit of all community education initiatives (past and present) and of all organisations involved in community education. This would provide a comprehensive picture of what publications and information kits there are, what organisations are involved and what further initiatives are needed. This would release funds saved from the avoidance of duplication and ensure their more effective use. The ‘expensive translated pamphlets sitting on the shelf’ syndrome would be avoided.

### **Commitment on the part of governments to raise level of community awareness about the law and the legal system**

2.21. ***Responsibility of government and government departments.*** The effective implementation of social justice and access and equity policies requires action to raise the level of community awareness about the law. Without this awareness people may be unable to use effectively their rights or secure entitlements which are part of Australia’s social strategies. Governments have a responsibility to make a concerted and co-ordinated effort to educate the community about the law. The aim should be to provide people with enough information to enable them to identify their problem as a legal problem and to be aware of what services are available and when to seek help. Legal education of this kind should be a fundamental part of primary and secondary education. The need to educate the community should be part of the implementation strategy of government departments when new laws are developed. Community legal education should also be a part of the social justice and access and equity strategies of government departments and agencies, especially

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42 E Gilvary ‘Ethnic monitoring of judges’ posts ordered.’ *The Law Society Gazette*, September 1991, 6.

43 Commonwealth-State Council on Non-English Speaking Background Women’s Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

when there is a high legal component involved. The Commonwealth should take responsibility for informing people about important legal principles which affect many people but are not readily understood by migrants and non-English speaking background communities. Governments should be committed to social and cultural awareness programs at all levels of the community and in particular in the training of those administering the law and related services. They should promote the development of legal education programs in schools. An understanding of the law and the legal system should play an important role in the development of children as citizens of Australia.

2.22. ***Administrative Review Council model.*** The strategies for community education adopted in a pilot scheme run by the federal Administrative Review Council<sup>44</sup> provide government departments agencies with a useful model to follow. The aim of the project was to find out whether people from non-English speaking backgrounds have effective access to Commonwealth administrative review, to identify barriers to access and to explore ways of overcoming them. The project targeted two discrete communities. It carried out a survey to measure knowledge of administrative review, then carried out a series of community education and other intervention activities. Finally, it measured the effect of these activities with a second survey. Results of the first and second surveys show the importance of effective information strategies to increase knowledge of, and willingness to use, a service. The report made a number of recommendations about how government departments should promote access to their services and communicate information to the community.

- Commonwealth service-providers should publicise their services more effectively, especially to those sections of the community—including ethnic communities—in which special needs exist.
- Government officials who deal with members of ethnic communities should monitor their operations to ensure they are communicating effectively with them.
- Agencies should design their publicity activities imaginatively. Strategies should be tried out on a limited scale first to assess effectiveness. Members of staff should be involved in planning of, and be committed to the goals of, the strategy.
- The message should be simple and translations should be accurate and culturally appropriate.
- Agencies should consult with knowledgeable individuals and organisations within target communities to establish which methods of publicity are likely to be the most effective.
- Agencies should make financial provision to ensure that appropriately qualified and trained interpreters and translators are routinely available.

## **Identification of areas of information need**

2.23. In the course of this inquiry, the Commission has identified a number of specific areas of the law about which people need more information. It has also identified a number of groups of people from non-English speaking backgrounds for whom special educational measures may be needed, for example, women and young people. The first stage of an effective co-ordinated information and education strategy would be to identify in more detail, areas of particular need. The Bureau of Immigration Research might be a suitable body to undertake this work. In addition, community specific and language specific consultation is essential to the success of any campaign.

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44 This was a project conducted as part of the National Agenda for a Multicultural Australia. See Administrative Review Council, *Report to the Attorney General: Access to Administrative Review by Members of Australia's Ethnic Communities* (No 34) AGPS Canberra, 1991.

## **Include cross cultural training in vocational courses**

2.24. ***Current initiatives.*** Current initiatives for the training of legal professionals and others working in the legal system include the following

- The National Centre for Cross-Cultural Studies in Law has developed material dealing with cultural issues for law teachers to include in their courses.
- Institutions providing practical training for law graduates intending to practice as lawyers are beginning to include training in cross cultural communication and the use of interpreters in their courses.<sup>45</sup>
- The Victorian Bar Council has a component on cross cultural communication and use of interpreters as part of its Bar Readers course.
- Police forces are beginning to include cross cultural awareness components in their training programs.<sup>46</sup>

These initiatives should be continued and supported. Programs should be designed to broaden horizons and should avoid stereotyping. They should help people to become aware of their own values and of other, equally legitimate, values that others may hold. The use of interpreters should also be a compulsory component of this training. Law students should gain a good understanding of how the community actually experiences the legal system. Aboriginal people and people of non-English speaking background and interpreters should be actively involved in the development and presentation of material.

2.25. ***New programs to be developed.*** Tertiary educators and vocational trainers should include in their vocational curricula material aimed at increasing the cultural awareness of professionals and others administering the legal system and ensuring that they learn how to use interpreters. This material should be included in training for police, clerks of court, social workers, psychologists, counsellors, welfare workers and lawyers.

## **Strategies to ensure that composition of legal institutions reflects that of the general population**

2.26. Institutions can take positive steps to increase cultural awareness by adopting recruitment policies which ensure that staff profiles better reflect the class, racial and cultural composition of the general population. This is a long term goal. However, the process would be speeded up considerably if Australia had a more efficient and equitable system for the recognition of legal and other professional qualifications obtained overseas. The federal Department of Employment Education and Training is involved in a number of initiatives to address this issue; responsibility for the recognition of legal qualifications remains, however, with state law societies. There needs to be a nationally co-ordinated approach to this issue and universities should be encouraged to introduce special bridging courses to ensure that people who need to upgrade their qualifications are able to do so as quickly and efficiently as possible.

## **Recommendations**

2.27. The Commission makes the following recommendations.

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45 eg the Leo Cussen Institute in Melbourne, the Legal Workshop at the Australian National University, the Graduate Diploma in Legal Practice at the South Australian Institute of Technology.

46 eg Northern Territory Police and South Australian Department of Police.

- As part of the Government's social justice and access and equity policies federal departments should have effective community education strategies in relation to legal issues and related services within their portfolios. They should be required to develop and report on education and information programs necessary to make proposed legislation effective, taking into account access and equity principles. They should also undertake a similar program in relation to existing laws to take account of any special needs of people of non-English speaking backgrounds.
- An agency should be established to co-ordinate and support community legal education initiatives. It should conduct a nation wide audit of community legal education programs and should hold information about community legal education on a computerised data base. The agency could be a library or a centre at a university.
- The Australian Institute of Judicial Administration should include in its education and information programs for the judiciary and court personnel, sections designed to increase cross cultural awareness and to provide training in the use of interpreters. These programs should emphasise the need to use plain language in court procedures and judgments. They should also give a picture of how ordinary people experience the legal system, especially when there are cultural or linguistic barriers.
- Legal institutions should adopt recruitment policies at all levels which will in the long term ensure that their composition reflects that of the general population.
- All federally funded educational institutions should include cross cultural studies in their legal vocational courses. University law courses should provide special bridging courses for people seeking recognition of legal qualifications obtained overseas.

### 3. Language barriers to equality: interpreters and the legal system

#### Introduction

3.1. Access to justice for those who do not speak English well or at all can depend on their access to competent interpreters. In this chapter the Commission makes a number of recommendations to improve access to and use of interpreters in the legal system, particularly in relation to criminal justice and family court proceedings. In considering these issues the Commission has sought to develop, rather than duplicate, the work done by the Commonwealth Attorney General's Department and published in their report, *Access to Interpreters in the Australian Legal System (Access to Interpreters)*.<sup>1</sup>

#### Current law and policy

3.2. **Existing law.** The language of the courts and legal system is English, although there is no law that stipulates this. The extent to which a person involved in court proceedings who is not fluent in English may be entitled to use an interpreter depends on whether the person is a party or a witness, whether the proceedings are criminal or civil and in what jurisdiction the proceedings are taking place.<sup>2</sup> Generally speaking, at common law, the court has a broad judicial discretion to determine whether or not a person may give evidence in his or her own language through an interpreter. There is no statutory right to an interpreter in court in Commonwealth law, nor even a presumption in favour of allowing use of an interpreter.<sup>3</sup> As far as the process of criminal investigation is concerned, there have been recent changes in Commonwealth law conferring a right to an interpreter in certain circumstances.<sup>4</sup>

3.3. **Languages of Australians.** Most Australians speak only English. However, about two million Australians over the age of five speak a language other than English at home; about 60 000 Australians are reported as not speaking English at all and more than 320 000 others say that they cannot speak English well.<sup>5</sup> The Government's multiculturalism policy is based on the fact that English is, and will remain, the predominant language. For that reason it provides that all Australians should have the opportunity to acquire and develop proficiency in English but also in languages other than English.<sup>6</sup> Further, one of the four goals of the government's language and literacy policy is the expansion and improvement of language services provided through interpreting and translating.<sup>7</sup>

3.4. **Importance of language.** In the context of this inquiry, language is of significance as a key element in culture. It is particularly important to appreciate the nexus between language and culture in the legal system, where people's rights and obligations are at stake.

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1 AGPS, Canberra, April 1991.

2 The law and arrangements for provision of interpreters (federal and State and Territory) are extensively described and discussed in *Access to Interpreters*, para 2.1-12.

3 Some States have modified the common law position by statute and, at the time of writing, there is Commonwealth legislation before Parliament: see para 3.23.

4 para 3.47.

5 The figures are based on the 1986 census: Australian Bureau of Statistics, *Census 86—Multicultural Australia*, ABS, Canberra, 1991, 27-31.

6 Department of Prime Minister and Cabinet, Office of Multicultural Affairs, *National Agenda for a Multicultural Australia*, AGPS, Canberra, July 1989, 37.

7 Department of Employment, Education and Training, *Australia's Language: the Australian Language and Literary Policy*, AGPS, Canberra, August 1991, 20.



## Australia's international obligations

### The International Covenant on Civil and Political Rights

3.5. **General provisions.** Parties to the International Covenant on Civil and Political Rights (ICCPR) undertake to respect and ensure the rights it contains for everyone subject to its jurisdiction 'without distinction of any kind', including language.<sup>8</sup> It provides that

all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.<sup>9</sup>

More specifically, it provides that

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing.<sup>10</sup>

Consequently, to the extent that a fair hearing of any matter, criminal or civil, requires that a person have the services of an interpreter, he or she should be entitled to (and if necessary provided with) an interpreter.

3.6. **A right to an interpreter in a criminal trial is specified.** The ICCPR contains minimum requirements for a fair trial of a person for a criminal offence. These include the right to be informed promptly and in detail 'in a language which he understands' of the charge against him or her and the right

to have the free assistance of an interpreter if he cannot understand or speak the language used in court.<sup>11</sup>

### The International Convention on the Elimination of All Forms of Racial Discrimination

3.7. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) also requires parties to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, particularly

the right to equal treatment before the tribunals and all other organs administering justice.<sup>12</sup>

Like the general provisions of the ICCPR, this must require that a person should be entitled to an interpreter if this is necessary to ensure equal access to justice.

### The Convention on the Rights of the Child

3.8. The rights contained in the ICCPR and the CERD are reflected in the Convention on the Rights of the Child (CROC). It provides that the rights of all children are to be respected without

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8 art 2 (1).

9 art 26.

10 art 14(1).

11 art 14(3)(a), (f).

12 art 5(a).

discrimination of any kind.<sup>13</sup> A child who is capable of forming his or her views should have the right to express those views freely in all matters affecting him or her and should be given the opportunity to be heard in any judicial and administrative proceedings affecting him or her, either directly or through a representative or an appropriate body.<sup>14</sup> Where a child is separated from his or her parents against their will, all parties should be given an opportunity to participate in the proceedings and make their views known.<sup>15</sup> If a child is charged with a criminal offence, he or she has the right to be informed promptly and directly of the charges against him or her and, if appropriate, to have legal or other appropriate assistance in the preparation and presentation of his or her defence. There should be legal or other appropriate assistance for a child against whom criminal proceedings are taken. Appropriate assistance for a child who has been accused of a criminal offence includes the right to have the free assistance of an interpreter if the child cannot understand or speak the language used.<sup>16</sup>

## Findings and recommendations by other bodies

### Introduction

3.9. Several bodies and inquiries have recently examined entitlement and access to interpreters in the legal system. Their findings and recommendations are referred to briefly here, and in more detail where appropriate.

### ALRC 38 on Evidence

3.10. In its report *Evidence*<sup>17</sup> the Commission recommended that a witness should be able to give evidence through an interpreter unless the court orders otherwise.

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand fully, and to make adequate reply to, questions that may be put about the fact.<sup>18</sup>

This recommendation is contained in the *Evidence Bill 1991* (Cth) which is currently before the federal parliament.<sup>19</sup> When implemented, the provision would apply to all proceedings in federal courts. The Commission acknowledged that there is a need to have interpreters of the highest quality. Nevertheless, while urging that every effort should be made to increase the number and quality of interpreters, for practical reasons it did not recommend that only accredited professional interpreters should be used.<sup>20</sup>

### Review of Commonwealth Criminal Law (Gibbs Committee)

3.11. In its interim Report *Detention before Charge* (1989), the Review of Commonwealth Criminal Law (Gibbs Committee) made recommendations on a suspect's right to an interpreter during criminal investigation. These are substantially implemented by the *Crimes (Criminal Investigation) Amendment Act 1991* (Cth).<sup>21</sup>

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13 art 2(1).

14 art 12.

15 art 9(2).

16 art 40(2).

17 Australian Law Reform Commission, *Evidence*, Report No 38, AGPS, Canberra, 1987 (ALRC 38).

18 ALRC 38 App A cl 34.

19 See para 3.21.

20 ALRC 38, para 112(a).

21 para 3.47.

## **National Conference on Police Services in a Multicultural Australia**

3.12. The National Conference on Police Services in a Multicultural Australia held in August 1990 brought together key personnel from federal, State and Territory police services to embark on preparing a national strategy for police services appropriate for a multicultural society. One of the central themes of the conference was 'Bridging the Language Barrier'. Eight recommendations were made on the use of interpreters in the public's access to police services and in criminal investigation by the police.<sup>22</sup> These are referred to in the relevant section of this chapter.

## **Report of the Commonwealth Attorney-General's Department**

3.13. As part of the National Agenda for a Multicultural Australia, the Commonwealth Attorney-General's Department undertook to review legislative and administrative arrangements on access to, and provision of, interpreters in the Australian legal system and to identify unmet needs and possible responses. The goal was to eliminate language and communication barriers that may impair the principles of equality before the law. The final report, *Access to Interpreters in the Australian Legal System*, was published in April 1991. It made 11 recommendations, dealing with use of interpreters in courts and in the police investigation process, development and accreditation of interpreter skills, payment of interpreters and the need for statistical data on the use of interpreters. These are separately considered in the course of this chapter. The federal Government has made no response to this report or its recommendations.

## **The National Inquiry into Racist Violence**

3.14. In its report, the National Inquiry into Racist Violence (NIRV) endorsed the recommendations made in ALRC 38. However, its recommendations went beyond those of the Commission. The Commission did not address the needs of parties to proceedings as distinct from witnesses. Whether or not a party chooses to give evidence, he or she may need an interpreter to communicate with his or her legal representative and to understand the proceedings. NIRV recommended that, subject to the court's discretion, a party who is unable to understand the court proceedings should be entitled to an interpreter. NIRV stressed that confidence in the competence and reliability of interpreters is critical. It endorsed the recommendation in *Access to Interpreters* that a national registration system for interpreters be established. It supported specialist registration of legal interpreters who would be required to meet strict standards in language skills and have adequate knowledge of the judicial system, legal terminology and the role and ethical responsibilities of interpreters.<sup>23</sup>

## **The Royal Commission into Aboriginal Deaths in Custody**

3.15. In its final report the Royal Commission into Aboriginal Deaths in Custody recommended that legislation in all jurisdictions should provide that, where there is any doubt that an Aboriginal defendant is able fully to understand proceedings in English and to express himself or herself in English, the court must satisfy itself that the defendant is so able. If the person cannot, the proceedings should not continue until a competent interpreter is provided to the person without cost to that person. In addition, governments should take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of

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22 Victoria Police and the Australian Bicentennial Multicultural Foundation, *Police Services in a Multicultural Australia, Conference Report*, Melbourne, 1991 para 4.6.

23 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, Canberra, 1991, 305-12.

Aboriginal people appear before the courts.<sup>24</sup> The combined Commonwealth and State Governments' response to this Report is to be tabled in Parliament on 31 March 1992.

## **Federation of Ethnic Communities Councils of Australia**

3.16. The Federation of Ethnic Communities Councils of Australia (FECCA) examined the first-round Access and Equity (A&E) Plans of eight Commonwealth government agencies. Its report documents the policy and practice of the agencies regarding use of interpreters. It commends the Human Rights and Equal Opportunity Commission (HREOC) for its policy of accepting written complaints from members of the public in any language, translated at HREOC's expense.<sup>25</sup> In its draft second-round A&E plan HREOC accepts that a person who wants an interpreter should be entitled to one; the entitlement should not be at the discretion of the Commission. FECCA recommends that this principle should be adopted by the Attorney-General's Department, State and Territory legal systems and the police to ensure more equitable access to justice.

The fundamental right to a competent and qualified interpreter by all persons involved in legal proceedings who feel that they need one should be guaranteed by legislation.<sup>26</sup>

It also recommended that an independent, professional interpreting service, fully funded by the federal Government, should be established in each State and Territory. All legal interpreters should be provided free and have at least NAATI Level 3 accreditation.<sup>27</sup>

## **The Commission's approach**

### **Consultation reveals dissatisfaction with access to interpreters**

3.17. Access to interpreters was raised in each of the three discussion papers published by the Commission as part of this inquiry. However, the Commission did not make any specific proposals about interpreters in its discussion papers because it was aware of the work being done by the Attorney-General's Department as part of the National Agenda for a Multicultural Australia. Nevertheless, the Commission's consultation reveals a profound and widespread frustration with the legal system's current failure to provide or accommodate interpreters. Since the publication of *Access to Interpreters*, consultation has revealed disappointment the report did not go further in its recommendations for reform. Access to interpreters has therefore emerged as a key concern of participants in the Commission's inquiry. To avoid duplicating the work of the Attorney-General's Department and other bodies which have addressed the issue in recent years, the Commission makes its recommendations in light of *Access to Interpreters* and responses to it, the reports of other bodies and the submissions made to the Commission's own inquiry into multiculturalism and the law.

### **A statement of principles**

3.18. ***Equality before the law.*** A fundamental principle of any democratic society is that all citizens should be equal before the law. This means, among other things, that every citizen should

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24 Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 3, AGPS, Canberra, 1991,79-80.

25 HREOC also arranges interpreters for interviews with non-English speaking complainants.

26 F Milne and S Zelinka, *They Mean Well, But ... An Examination of First Round Access and Equity Plans of Eight Commonwealth Government Departments*, Federation of Ethnic Communities' Councils of Australia, Sydney, 1991, 22.

27 This is the official policy of FECCA, endorsed by all the Ethnic Communities' Councils around Australia.

have, at the very least, access to the systems and structures established by government to protect citizens' rights. These include police services and courts and tribunals.

3.19. ***Access to justice by people of non-English speaking background.*** A person who cannot communicate with those providing a service does not have access to that service equal to that of a person who can. Ensuring equality of access in a multicultural society requires that clients who are unable to communicate in English are provided with the means to communicate in a language that they can speak and understand. There are a number of ways this can be achieved. The service provider can employ bilingual staff who can then communicate with the client in his or her own language. Alternatively, the service provider can use an interpreter, either by telephone or on-site. This principle applies at all levels of the legal system, including the provision of police services, legal assistance and advice, and courts and tribunals.

### **Interpreters in court—general principles**

3.20. ***Entitlement to an interpreter in court.*** Where a party or witness requests the assistance of an interpreter there should be a presumption in favour of granting the request. Where no such request is made but there is doubt about the likelihood of the court being able to understand a party or a witness, or about the ability of the party or witness to comprehend and communicate in the proceedings, the court should make inquiries and ensure that an interpreter is provided if necessary. The court has a duty to remove any barriers to communication (that are within its power to remove) which may interfere with the person's right to the fair trial of a matter. It has a particular duty to assist an unrepresented accused, in this case by making sure the accused is aware of the right to an interpreter and how to obtain an interpreter. There should be opportunities for magistrates and judges to learn how to assess a person's competence in English.

3.21. ***Should only professional interpreters be used?*** Once the decision to use an interpreter has been made the question is who is qualified to interpret in a court. Any person who is reasonably fluent in two languages is able to interpret to a greater or lesser degree of competence. However, a high degree of competence in both languages is required to interpret legal proceedings. As the outcome of a case may depend on a particular piece of oral evidence, the interpretation of a witness' evidence must be very precise. The Commission has been told that interpreters who are not competent in translating precisely can affect the course of a trial when the evidence is being translated.<sup>28</sup> Furthermore, the interpreter may need to have a knowledge of technical legal language and, depending on the nature of the case, the technical language of another discipline, for example, engineering or commerce. The need for competent, accredited, professional interpreters in the legal system has been emphasised to the Commission again and again.<sup>29</sup> Professional interpreters can be expected to have the requisite degree of skill and ethics that would ensure that they have the confidence of the court and the other participants in the case.<sup>30</sup> On the other hand, limiting the use of interpreters to professional interpreters limits access to interpreters. Unlike friends or relatives, professional interpreters have to be paid. There may not be a professional accredited interpreter available for the witness' language, especially for new or very small migrant groups. If so, any reasonably able interpreter would be better than no interpreter at all. A professional interpreter may not be necessary in all cases. Some people may feel more comfortable using a friend or relative rather than a professional interpreter who is not known to them. For these reasons and to retain flexibility in choosing an interpreter, the Commission, in ALRC 38, recommended that witnesses should not be limited to professional interpreters. As a general

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28 QD Ton-that *Transcript* Melbourne 2 October 1991.

29 S Abraham *Submission* July 1990; South Australian Government *Submission* May 1990; Federation of Ethnic Communities' Councils of Australia Inc *Submission* August 1991; L Vidal *Transcript* Canberra 4 September 1991; B Cidade *Transcript* Sydney 26 September 1991.

30 The Social Security Appeals Tribunal and the Immigration Review Tribunal guidelines expressly prohibit the use of relatives as interpreters.

principle, the Commission believes that interpreters working in the legal system should be accredited as specialised legal interpreters. It supports in principle the recommendation in *Access to Interpreters* that, following the establishment of the national registration system of interpreters and translators, legislation should be enacted to compel the use of registered interpreters in courts, tribunals and the police investigation process, other than in exceptional circumstances.<sup>31</sup> It realises, however, that this goal cannot be achieved immediately and that, in the meantime, priorities have to be set. What these should be are discussed in this chapter.

**3.22. *Who should pay for interpreters in court proceedings?*** The next question is who should pay for interpreters in courts. Should the cost of an interpreter be met from the public purse or by the person who needs the interpreter? There are a number of competing considerations. Equality of access to justice demands, in principle, that a person should not be barred from participating in court proceedings, the outcome of which may affect his or her rights, for no other reason than that he or she does not speak English. It also demands that such a person should not be liable for an additional cost that applies only because he or she does not speak English. Generally speaking, the person does not choose the interpreter. Unlike a legal representative, an interpreter does not represent, take instructions from or advocate on behalf of the person for whom he or she is interpreting. The interpreter's function is simply to interpret, thereby making a non-English speaker's evidence accessible to the court and the proceedings (or that part of them being interpreted) accessible to the non-English speaker. The interpreter is the voice and ears of the non-English speaker and, when the non-English speaker is giving evidence, the voice and ears of the court. In some cases, an individual may simply be unable to afford the cost of a professional interpreter and may be unable or unwilling to organise a suitable interpreter from among friends or relatives.<sup>32</sup> If a person does engage and pay for his or her interpreter, the interpreter may be seen as partisan. The Commonwealth has already accepted responsibility for providing interpreters in some contexts.<sup>33</sup> The Commission believes that, as far as possible, the costs of interpreting in courts should be funded as part of the infrastructure of the courts in accordance with the government's commitment to access and equity in the legal system. However, it acknowledges that priorities must be set for the gradual extension of interpreter services and has indicated what these should be in its recommendations in this chapter.

## **Interpreters in court: criminal trials**

### **Witnesses in criminal trials**

**3.23. *Existing law and practice.*** In most jurisdictions the entitlement of a witness (including a defendant who gives evidence in his or her own trial) to an interpreter is determined by applying common law principles.<sup>34</sup> The court has a wide discretion to allow or not allow an interpreter to be used to interpret the evidence of an accused person who chooses to give evidence and other witnesses (for example, victims of crime, who are prosecution witnesses). The material consideration is whether, without an interpreter, the witness is likely to be unfairly handicapped in giving evidence. In criminal matters the court's duty to ensure a fair trial for the accused is the 'guiding star'; both the accused and the jury (or magistrate) must be able to hear and understand a witness' evidence.<sup>35</sup>

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31 See para 6.16.1.

32 This would not be an option if only professional interpreters could be used: see para 3.21.

33 See para 3.24.

34 In South Australia and Victoria legislation governs the right of a witness to give evidence through an interpreter: see *Evidence Act Amendment Act 1986* (SA) s 14(1); *Magistrates Court Act 1989* (Vic) s 40.

35 *R v Johnson* (1986) 25 A Crim R 433.

3.24. **Who provides the interpreter?** In all criminal courts in Australia, the Crown—either the prosecuting body or the criminal listing body—usually accepts responsibility for providing and paying for interpreters for the defendant, the defendant’s witnesses and prosecution witnesses.<sup>36</sup> In federal criminal matters the government department which administers the Act under which the person is charged bears the responsibility for the costs of prosecuting the person for that offence. If, for example, a non-English speaking person is charged with an offence under the *Social Security Act 1991* (Cth) or the *Migration Act 1958* (Cth), the cost of using an interpreter in the prosecution of these offences falls on the Department of Social Security or the Department of Immigration, Local Government and Ethnic Affairs respectively. In a customs prosecution the Australian Customs Service arranges for interpreters. When the Director of Public Prosecutions prosecutes an offence under an Act which falls within its responsibility,<sup>37</sup> it bears the costs involved, including the cost of interpreters.<sup>38</sup> However, costs may be recovered from unsuccessful defendants. If a person, having been convicted, is ordered to pay the costs of the prosecution, he or she could also be ordered to pay the costs of the interpreter that the agency arranged for him or her. Policy and practice vary between different federal agencies. It is the general policy of the Director of Public Prosecutions not to seek an order for costs for interpreters used in court in any matter. While an order may be sought for investigation costs, which could include interpreter costs, this is only done occasionally, for example, where it is believed that the use of the interpreter during investigation was unreasonable and a deliberate abuse of process. On the other hand, the Australian Customs Service routinely seeks costs, including interpreter costs, in summary prosecutions for minor breaches of customs and quarantine laws, where the majority of defendants are of non-English speaking background.<sup>39</sup> This order is in addition to any penalty imposed.<sup>40</sup>

3.25. **Evidence Bill 1991 (Cth).** The *Evidence Bill 1991* (Cth), which is currently before Parliament, contains the following provision

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.<sup>41</sup>

This corresponds to the Commission’s recommendation in *Evidence*<sup>42</sup> and a recommendation in *Access to Interpreters*.<sup>43</sup> When implemented, it would have the effect of reversing the presumption that a witness is not entitled to an interpreter. Witnesses would be entitled to an interpreter—for all or part of their evidence—unless it can be shown that they can speak and understand English sufficiently to understand and respond adequately to questioning. However, the Evidence Bill would only apply to proceedings in federal courts and in the Australian Capital Territory.<sup>44</sup> It would not apply to most federal prosecutions as these are conducted in State and Territory courts which apply local rules of evidence.<sup>45</sup>

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36 See *Access to Interpreters*, para 8.2.1-2.

37 eg the *Crimes Act 1914* (Cth).

38 In prosecutions for state offences in NSW the interpreter is provided by the Department of Courts Administration (through the Ethnic Affairs Commission).

39 See para 9.20; in the 3 month period September to November 1991 the ACS recovered \$1212 from offenders for interpreter costs in respect of customs prosecutions in local courts in NSW. This was their total expenditure on court interpreters and was recovered in full.

40 *Crimes Act 1914* (Cth) s 21; orders for costs can also be made under *Customs Act 1901* (Cth) s 263.

41 cl 34; see also cl 20(3) and cl 20(7) which deal with a witness’s incapacity to communicate and the court’s power to determine whether and how the incapacity may be overcome.

42 ALRC 38 App A cl 34.

43 See para 3.10.4-7.

44 cl 11.

45 There is no provision for giving evidence through an interpreter in the (now lapsed) *Evidence Bill 1991* (NSW). The Commission understands that the New South Wales Government decided that to include a statutory right in the Bill would create an expectation for services that are not currently available because of inadequate accreditation of interpreters.

3.26. ***The effect of reversing the presumption.*** The effect of this provision in the Evidence Bill is to create a presumption in favour of allowing an interpreter. Although retaining a discretion not to allow an interpreter, the court will have to satisfy itself that the witness can understand and speak English well enough to understand and answer the questions put to him or her before deciding not to allow an interpreter. The witness will not have to satisfy the court that he or she needs an interpreter. The court's finding that a witness understands English well enough would be subject to appeal. Thus, although the court would still retain the authority to refuse use of an interpreter, the framework for making the decision would be significantly different. The judge or magistrate must be satisfied that a witness who has requested an interpreter in fact has a sufficient grasp of English to proceed without one. Any judicial difficulties in assessing whether or not a witness needs an interpreter will have to be resolved in favour of the witness.

3.27. ***Does this go far enough.*** The *Evidence Bill 1991* (Cth) does not confer an unfettered right on a witness to give evidence through an interpreter. Many submissions, both to the Attorney-General's Department and to the Commission, argue that the decision whether or not an interpreter is needed should be made by the witness, not by the court. Underlying these submissions is dissatisfaction with the way the courts currently exercise their discretion. Lawyers still show some resistance to allowing interpreters and, whether a witness who asks to give evidence through an interpreter is provided with one, depends largely on the attitudes of the lawyer for the other side and of the magistrate or judge. There is a prevailing attitude in courts that, if a witness with some knowledge of English is allowed to use an interpreter, he or she will obtain an unfair advantage in cross-examination by pretending ignorance and gaining time. In fact, a person giving evidence through an interpreter is more likely to be at a considerable disadvantage—because of the loss of impact of evidence mediated in this way, the lack of skilled and experienced court interpreters, the nature of the adversarial system and the fact that neither courts nor those practising in them are properly equipped to work with interpreters. There are no objective standards for assessing a person's ability to give evidence and respond to (often complex) questions in English. Rather, assessments appear to be *ad hoc* and highly subjective.<sup>46</sup> For these reasons, a number of submissions call for the creation of a statutory right to an interpreter for any person whose first language is not English.<sup>47</sup> However, if the *Evidence Bill 1991* (Cth) were to apply, many of these problems would be overcome. The remaining problems would be practical rather than legal, namely, how to ensure that a witness is aware of the 'right' to an interpreter and how to ensure that the courts are able and equipped to arrange for the interpreter's attendance.<sup>48</sup>

3.28. ***The Evidence Bill should apply to federal prosecutions.*** Offences against federal laws are usually prosecuted in State and Territory courts, where local rules of evidence apply. Even when the Evidence Bill is implemented, it would apply only in federal courts. It would not apply to federal prosecutions. If it were to apply, the court would have to apply different rules of evidence, depending on whether it was a federal or a State or Territory offence, sometimes in the same case. On the other hand, the *Evidence Bill 1991* (Cth) and the *Evidence Bill 1991* (NSW) reflect a trend towards uniform evidence law throughout Australia. In any case, it is appropriate that the Commonwealth should take responsibility for ensuring that a person charged with an offence against its laws has a fair trial and this includes making provision for evidence to be given through an interpreter where necessary.

3.29. ***The interpreter should be a professional interpreter.*** The arguments in favour of using only a professional interpreter are very clear in the context of a criminal trial. Given the potential

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46 L Roberts-Smith QC, R Frey & S Bessell-Browne (eds.), *Working with Interpreters: in Law, Health & Social Work*, National Accreditation Authority for Translators and Interpreters, WA, 1990.

47 Ethnic Affairs Commission of New South Wales *Submission* August 1991; Federation of Ethnic Communities' Councils of Australia Inc *Submission* August 1991; L Vidal *Transcript* Canberra 4 September 1991; C See Kee *Transcript* Darwin 29 May 1991; B Cidade *Transcript* Sydney 26 September 1991.

48 See para 3.46.



consequences of conviction of a criminal offence, it is particularly important that there should be no misunderstanding. The evidence of witnesses in a criminal trial should be interpreted by a professional interpreter if interpretation is necessary.

3.30. **Who should pay?** The protection provided by the *Evidence Bill 1991* (Cth) cl 34 to a non-English speaking criminal defendant would be illusory if access to a professional interpreter were to depend on the ability of the defendant to pay the costs of the interpreter. It would jeopardise the right to a fair trial. It is the Commonwealth's responsibility to ensure that a person charged with an offence against its laws has a fair trial and, if this requires interpreters for witnesses, then the Commonwealth should bear the cost. The practice of some federal agencies of applying for the costs of interpreters against convicted persons discriminates against non-English speaking defendants and is inconsistent both with the requirements of the ICCPR and with established policy. The principle that defendants in criminal matters should not have to pay the costs of their interpreters is well established and accepted. The importance of this was recognised in consultation and in the Attorney General's Department's report.

3.31. **Recommendation.** The Commission recommends that the *Evidence Bill 1991* (Cth) cl 34 be enacted. It should apply in all prosecutions for an offence against the law of the Commonwealth, wherever tried, until such time as uniform evidence provisions are introduced in all State and Territory jurisdictions. Only professional interpreters should be used to interpret the evidence of a witness in a criminal trial. The cost of providing interpreters to interpret witnesses' evidence should be borne by the Commonwealth. Federal prosecuting agencies should not apply for the costs of an interpreter when applying for an award of costs against a convicted defendant.

## **Defendants—understanding the proceedings**

3.32. **Existing law and practice.** In most Australian jurisdictions the question whether a defendant will be allowed to have all the evidence of witnesses interpreted to him or her is determined by common law principles.<sup>49</sup> At common law a party does not have a right to have all the evidence and proceedings interpreted even if he or she cannot understand what is being said without interpretation. It is a matter for the trial judge's discretion. However, it is generally recognised that in a criminal trial evidence should be interpreted for a non-English speaking accused person unless the judge is satisfied that the accused substantially understands the evidence and the case against him or her.<sup>50</sup> When a person is tried for a federal offence, the prosecuting agency generally arranges for a defendant's interpreter, whether or not he or she will be giving evidence. Where the attendance of an interpreter for a defendant is arranged, the interpreter will generally be available for the whole proceedings. This is the case whether or not a defendant is legally represented. Charges for interpreter services are generally by the day and half-day rather than by the hour so the cost of providing an interpreter for the whole proceedings is not greatly inflated in a short matter. While the costs are initially borne by the prosecutor, these may be recovered from a convicted defendant.<sup>51</sup>

3.33. **Should a defendant be entitled to have someone interpret the proceedings?** Allowing an accused person to have an interpreter beside him or her to interpret the whole of the proceedings may irritate and distract the other participants. In a long trial, the cost of providing an interpreter throughout the proceedings would be high. However, the financial and other costs must be weighed against the right of the accused person to a fair trial, which requires that he or she is

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49 The exception is Victoria where the *Magistrates Court Act 1989* (Vic) s 40 provides that where the Court is satisfied that a defendant (charged with an offence punishable by imprisonment) does not have sufficient knowledge of English the Court must not hear or determine the proceedings without a competent interpreter interpreting it.

50 *R v Lee Kim* (1916) 1 KB 337.

51 See para 3.24.

present, is able to understand the case made against him or her and has an opportunity to answer it. Allowing an interpreter to interpret the proceedings is necessary to put a non-English speaking defendant in the same position as an English speaking one, so far as it is possible to do so. It would implement Australia's obligations under the ICCPR.<sup>52</sup> The involvement of a competent, professional interpreter is not generally disruptive and courts have power to deal with disruption where it does occur.<sup>53</sup> The cost of an interpreter is a very small part of the overall cost of a prosecution and is certainly less than the cost of a retrial in the event of a successful appeal against conviction on the ground that the accused did not have a fair trial.

3.34. ***Should it be a professional interpreter?*** The consequences of inadequate interpretation of evidence given against a defendant in a criminal trial are potentially very serious. A defendant who has not understood, or has misunderstood, evidence given against him or her is not in a position to answer that evidence. The use of a professional interpreter would avoid any suggestion of bias or collusion between the defendant and the interpreter that might prejudice a jury against the defendant<sup>54</sup>

3.35. ***Should the interpreter be provided by the Commonwealth?*** The Commonwealth already takes responsibility for providing interpreters for defendants in prosecutions for federal offences; this includes providing an interpreter to enable a defendant to understand the proceedings. However, it is current practice in respect of some matters to seek to recover interpreter costs from unsuccessful defendants.<sup>55</sup> This means that non-English speaking persons convicted of an offence pay higher costs than their English speaking counterparts for no other reason than the fact that they do not speak English well enough to understand the proceedings.

3.36. ***Recommendation.*** The Commission recommends that a person accused of a federal offence who does not understand English well enough to understand what is said in the court should be entitled to an interpreter to interpret the whole of his or her trial for the offence, whether or not he or she chooses to give evidence. The prosecuting agency should continue to be responsible for arranging the attendance of the interpreter. Where possible, the interpreter should be a professional interpreter. However, the Commission acknowledges that a professional interpreter may not always be available and, if this is the case, an interpreter who is not professionally qualified should be able to be used if the court is satisfied of his or her competence to interpret. If no interpreter is available, the court should adjourn the proceedings until one is available. The cost of the interpreter should be borne by the Commonwealth, which should not seek to recover the cost from a person who is convicted.

## Interpreters in court: civil trials

### Existing law and practice

3.37. The decision to allow a party to civil proceedings to have the proceedings interpreted for him or her or to allow a witness to give evidence through an interpreter is a matter for the trial judge's discretion. The guiding principle is natural justice. However, the New South Wales Court of Appeal recently held that any party who is unable, either because of some physical incapacity or due to lack of knowledge of the language of the court, to understand what is happening must, by the use of an interpreter, be placed in the position which he or she would be in if those defects did not exist. Refusal to allow translation while the litigant remains in open court is to discriminate

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52 See para 3.6.

53 See generally, Australian Law Reform Commission, *Contempt*, Report No 35, AGPS, Canberra, 1987 (ALRC 35).

54 The arguments for and against using only a professional interpreter are canvassed in para 3.21.

55 See para 3.24.

against the litigant on the basis of lack of proficiency in speaking or understanding the English language.<sup>56</sup> In relation to witnesses, the material consideration is whether, without an interpreter, the witness is likely to be unfairly handicapped in giving evidence. Generally speaking, parties are responsible for providing their own interpreters and their witnesses' interpreters although in most courts the successful party may recover his or her costs, including the cost of an interpreter, from the unsuccessful party. However, there are numerous exceptions to the general rule. In some courts and tribunals, particularly accident compensation courts or consumer tribunals, the Social Security Appeals Tribunal and the Immigration Review Tribunal, interpreters are arranged and paid for by the court or tribunal. In South Australia, the costs of interpreters for interpreting witnesses' evidence is met by a levy included in court filing fees.<sup>57</sup> In some small claims courts the cost of an interpreter or legal representation is not recoverable from the unsuccessful party. Similarly, costs incurred by litigants in the Family Court are generally not recoverable from the unsuccessful party, as each party is usually responsible for payment of his or her own costs.<sup>58</sup> Legal aid, if available, will cover the costs of interpreters.

### **Should a party be entitled to have someone interpret the proceedings?**

3.38. The traditional reluctance of courts to allow a party to have someone to interpret the proceedings for him or her probably derives from a perception that it may be disruptive. It may be regarded as giving a litigant an unfair advantage. However, interpretation does no more than diminish the disadvantage suffered by a party who cannot understand the proceedings because of language difficulties. Without interpretation, a person who cannot understand what is being said is effectively being denied the right to be present during the trial of a matter to which he or she is party. This would be a breach of the rules of natural justice. That a party should be entitled to have someone interpret the proceedings has already been acknowledged in some jurisdictions.<sup>59</sup>

### **Evidence Bill 1991 (Cth)**

3.39. When implemented, the Evidence Bill 1991 (Cth) cl 34 would give a witness the right to give evidence through an interpreter unless he or she speaks English well enough to do so without one.<sup>60</sup> It would apply to proceedings in all federal courts and in the courts of the Australian Capital Territory.

### **Should it be a professional interpreter?**

3.40. Parties to civil proceedings are expected to assume responsibility for conducting the case as they see fit. They are more likely than a defendant in criminal proceedings to have to bear all or some of the costs, even if successful. The arguments in favour of requiring professional interpreters<sup>61</sup> are less persuasive in relation to civil proceedings than criminal proceedings. A distinction should be drawn, however, between interpreting witnesses' evidence, which involves a duty to the court, and interpreting proceedings for a party, which does not. However, unless the cost of the interpreter is to be borne by the Commonwealth, requiring that only a professional interpreter be used would effectively debar the use of interpreters in many cases.

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56 *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414, 418 (Kirby P).

57 For further details see *Access to Interpreters*, para 8.3.1-7.

58 *Family Law Act 1975* (Cth) s 117,118.

59 eg NSW (see para 3.37); the Immigration Review Tribunal and the Social Security Appeals Tribunal.

60 See para 3.25.

61 See para 3.21.

## Should the interpreter be provided by the Commonwealth?

3.41. The Commonwealth has accepted responsibility for providing interpreters for parties to civil proceedings in some contexts—chiefly those where a federal entitlement is in issue.<sup>62</sup> Recent reports to the government have recommended that the Commonwealth should provide interpreters in some circumstances: the Administrative Review Council has recommended that the Administrative Appeals Tribunal should take responsibility for providing qualified interpreters for parties appearing before it<sup>63</sup> and the Attorney-General's Department has recommended that, in cases of hardship, the cost of providing interpreters for parties and witnesses in civil cases should be met from a levy included in filing fees.<sup>64</sup> On one view, the general rule that parties to civil proceedings are responsible for conducting their own cases and bearing their own costs supports the conclusion that they should provide their own interpreters. If a professional interpreter is not required there may not be any costs involved. On the other hand, if a person who needs an interpreter cannot afford the cost of this, he or she is effectively debarred from participating in proceedings. Access to justice is to this extent blocked. Even without this added expense, the high cost of litigation precludes many people from access to justice, unless they qualify for legal aid. To the extent that the added cost of an interpreter bars access it adds a further level of discrimination against non-English speakers. There are grounds for concluding that access and equity principles require the Commonwealth to provide such resources as are necessary to ensure that inability to pay for an interpreter is not a barrier to justice.

## Special considerations applying to Family Court proceedings and procedures

3.42. ***Proceedings.*** In family law proceedings there are additional grounds to support the view that the Commonwealth should provide interpreters in circumstances when lack of an interpreter is a barrier to justice. It is not usual for costs orders to be made in family law proceedings; each party pays his or her own costs, whether as applicant or respondent. In proceedings about children, for example, the custody of, and access to a child, the court must regard the welfare of the child as the paramount consideration.<sup>65</sup> Generally speaking, the child will not be a party to the proceedings and may not be separately represented. If one party cannot take proceedings or defend them because he or she cannot afford an interpreter or is unable to give proper instructions and is unable to be understood and to understand the evidence of the other, the interests of children may not be adequately protected.

3.43. ***Counselling and other procedures may be ordered by the court.*** Under the *Family Law Act 1975* (Cth) the court may direct a party to proceedings to attend counselling.<sup>66</sup> The court may order parties to financial proceedings to attend a conference to attempt to reach an agreement (an Order 24 conference). With the consent of the parties, the court may refer matters in dispute between the parties to a mediator. All of these procedures are intended to facilitate settlement of the proceedings. A person who does not speak English well enough to participate effectively in them would be severely disadvantaged and little progress towards settlement is likely to be made in the absence of an interpreter. The Court has no formal arrangements for identifying parties who may need an interpreter to enable them to understand and participate in these procedures. It appears that it does not have funding to provide interpreters. As a result, participants in counselling, Order 24 conferences and mediation must provide their own interpreters or go without.

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62 See para 3.37.

63 Administrative Review Council, *Access to Administrative Review by Members of Australia's Ethnic Communities*, AGPS, Canberra, 1991, 68.

64 *Access to Interpreters*, para 8.6.1.

65 *Family Law Act 1975* (Cth) s 64(1)(a).

66 s 62; in cases concerning the custody, guardianship, welfare of or access to a child, the court may order the parties to attend a conference with a counsellor.

## Recommendations

3.44. ***Civil proceedings in general.*** The Commission recommends the interpreter provisions of the *Evidence Bill 1991* (Cth) be enacted. This will ensure that a witness in civil proceedings in federal courts can give evidence through an interpreter unless he or she speaks English well enough to do so without one. Where a party needs an interpreter to understand the proceedings, the court should assist and promote the use of an interpreter for this purpose as far as it is able to do so. It should do nothing to prevent or to interfere in the interpretation of proceedings by a person for a party, unless this disrupts the proceedings. Consideration should be given to establishing a fund to pay the cost of interpreters in cases of hardship where the party is not legally aided. The court should have power to recommend that a payment should be made from the fund in defined circumstances of hardship including where the person who required the interpreter cannot recover the costs of the interpreter from the other party.<sup>67</sup> There should be a cap on the amount that can be paid out in relation to particular proceedings.<sup>68</sup>

3.45. ***Family law proceedings and procedures.*** The Commission recommends that the Family Court should actively recruit bilingual staff at all levels. In particular, it should take all steps necessary to ensure that bilingual counsellors and mediators are employed and that attention is given to the specific language needs of particular communities. The Commission recommends that the federal Government should specifically fund the Family Court to enable it to provide interpreters for use in proceedings about children and for counselling and mediation. The Commission, by majority, recommends that the *Family Law Act 1975* (Cth) be amended to provide that, when the Court orders a person to attend counselling or to attend an Order 24 conference, the Court should be required to ascertain if an interpreter or bilingual counsellor is required. If an interpreter is required, the Family Court administration should be responsible for arranging and paying for the interpreter. This would involve amendments to s 19B, s 62, s 64(1B), s 79(9) of the *Family Law Act*.<sup>69</sup> Where the region served by a particular registry includes a language group which is in sufficient numbers and has particular need, consideration should be given to employing a permanent interpreter in that language, at least on a trial basis.

## Procedures for using interpreters in court

3.46. When the *Evidence Bill 1991* (Cth) is implemented, a witness will have the right to give evidence through an interpreter unless the court finds that he or she understands English well enough to do without one. There will still be practical problems. These include ensuring that people who need an interpreter have one, that the interpreter is available when needed and that judges, magistrates, lawyers and court officers understand the role of interpreters and how to work effectively with them. Courts should develop standard procedures to identify people who may need an interpreter at the hearing or in a conference, and to arrange for the attendance of an interpreter at the appropriate time. This would minimise the risk that the court would try to make do without an interpreter, and reduce unnecessary delays and costs caused by adjourning proceedings to enable a party or witness to obtain an interpreter.

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67 The *Federal Proceedings (Costs) Act 1981* (Cth) allows a court in certain circumstances to grant a 'costs certificate' to a party in specified appeal proceedings. The Attorney General may then authorise payment of the party's costs out of government funds.

68 Federal Proceedings (Costs) Regulations prescribe maximum amounts that can be authorised as payments.

69 Justice Peter Nygh dissents.

## Interpreters in the investigation of crime

### Suspects—law and practice

3.47. ***Crimes Act 1914 (Cth)***. Federal legislation now requires the use of interpreters in the criminal investigation process. The *Crimes Act 1914* (Cth) Part IC provides that

where an investigating official believes on reasonable grounds that a person under arrest for a federal offence is unable because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in that language, the official must, before starting to question the person, arrange for the presence of an interpreter.<sup>70</sup>

The caution<sup>71</sup> must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency.<sup>72</sup> The caution and any responses must be tape-recorded.<sup>73</sup> The Act defines arrest broadly—so the requirement to provide an interpreter would apply where, for example, the investigating official ‘has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so’.<sup>74</sup> The main sanction for breach of these requirements to provide an interpreter lies in the power of the court to exclude evidence obtained without an interpreter when one should have been used.

3.48. ***The Evidence Bill 1991 (Cth)***. The *Evidence Bill 1991* (Cth) cl 130 provides for the exclusion of evidence on various grounds, several of which may apply where an interpreter was not present during interrogation. The Bill creates a presumption that improperly obtained evidence—including evidence obtained in contravention of a law—is not to be admitted. It reverses the onus placed on the defence at common law. This provision makes it clear that evidence obtained in the absence of an interpreter when one should have been used is evidence improperly obtained and therefore *prima facie* to be excluded. Further, when weighing the desirability of admitting the evidence against the undesirability of admitting evidence improperly obtained, the court is directed to take into account whether the impropriety infringed any right recognised in the ICCPR.<sup>75</sup> The Bill further provides that an admission made by a defendant in a criminal proceeding is inadmissible unless the circumstances in which it was made make it unlikely that the truth of the admission was adversely affected.<sup>76</sup> There is a broad judicial discretion to exclude evidence of an admission where, having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.<sup>77</sup> If applicable, these provisions would go a long way towards ensuring compliance with the requirement to use an interpreter during the criminal investigation process. Even when implemented, however, these provisions will not apply to State and Territory courts where most federal offences are prosecuted.

3.49. ***Federal Police instructions direct that interpreters be used***. Australian Federal Police (AFP) instructions provide that if a police officer proposes to interview, interrogate or take a statement from, any person and he or she has reasonable grounds for believing that the person

- does not fully understand or speak English

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70 s 23N. Similar provision is made in the *Customs Act 1901* (Cth) s 219ZD.

71 Before starting to question a person who is under arrest for a Commonwealth offence, the investigating official must caution the person that he or she does not have to say or do anything, but that anything that the person does say or do may be used in evidence.

72 s 23F(2).

73 s 23U.

74 s 23B(2).

75 See para 3.5-3.6 for the relevant provisions of the ICCPR.

76 cl 91.

77 cl 96.

- has a physical disability which renders him or her unable to communicate orally with reasonable fluency in English or
- for any other reason cannot communicate orally with reasonable fluency in English

the officer must obtain the services of an interpreter competent in that person's language before starting to question the person.<sup>78</sup> Failure to comply with this instruction renders the officer liable to disciplinary action. A multilingual card, which says in 19 languages: 'Would you please indicate which language you speak and we will endeavour to obtain an interpreter to help us', is used to help officers identify which language a person speaks, so that the appropriate interpreter can be arranged.<sup>79</sup>

3.50. ***Position in the States and Territories.*** South Australia and Victoria are the only States which have enacted legislation requiring the use of interpreters during police interrogation of non-English speaking suspects. Officers must defer questioning and investigation until the interpreter is present.<sup>80</sup> In most other States and Territories, police standing orders lay down the procedures to be followed. In the Northern Territory these incorporate the 'Anunga Guidelines' which include the requirement that an interpreter be present if the suspect being questioned is not fluent in English.<sup>81</sup> Western Australia Police have no written guidelines on the use of interpreters.<sup>82</sup>

## Problems identified by the Commission

3.51. ***Interpreters are not always used.*** The Commission's consultation reveals that there is widespread concern about police reluctance to use interpreters when questioning suspects (or interviewing victims) with inadequate English skills.<sup>83</sup> There is a perception that an interpreter is unlikely to be used for a relatively minor offence.<sup>84</sup> This appears to be so even in jurisdictions where there is legislation requiring police to obtain interpreters before questioning a suspect.<sup>85</sup> If this is so, statutory provisions requiring the use of an interpreter may not be enough by themselves. There are a number of reasons for police reluctance to use an interpreter. They may not recognise that a suspect who speaks some English may not be competent enough in English to handle a police interrogation. An interpreter may not be available when needed, for example, after hours or at the weekend. If the police want to use anything the suspect says through an interpreter as evidence, they will have to call the interpreter to give evidence.<sup>86</sup> If an interpreter is not used when necessary there is likely to be mutual misunderstanding, suspicion and frustration.<sup>87</sup> It is likely that the suspect, even if informed of his or her rights, will not have understood them, particularly the right to remain silent, and that disputes about what was said or not said will arise at a later stage.

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78 General Instruction 34.

79 The same card is used by police in Victoria and Queensland.

80 See *Summary Offences Act 1953* (SA) s 79(a)(1)(b)(ii), s 83(a)(1) and s 83(a)(2); *Crimes Act 1958* (Vic) s 464D.

81 These guidelines were enunciated in *R v Anunga* (1976) 11 ALR 412, 414; see also ALRC 31, para 554.

82 The National Conference on Police Services in a Multicultural Australia recommended that all police services develop guidelines which ensure that, where there may be language difficulties, in all instances an interpreter is made available.

83 North Melbourne Legal Service Inc *Submission* September 1990; Marrickville Legal Centre and Children's Legal Service *Submission* October 1991; C See Kee *Transcript* Darwin 29 May 1991; see also *Access to Interpreters*, para 4.4.5.

84 See Ethnic Affairs Commission of New South Wales *Submission* August 1990.

85 A number of community legal centres in Victoria are conducting a research project to establish the incidence of, and reasons for, police failure to use interpreters when interviewing suspects with English language difficulties: Federation of Community Legal Centres (Vic) Inc, *Access to Interpreters Working Group Submission* July 1991.

86 The Commission has been told that some interpreters are reluctant to do police work for this reason.

87 A Danaoui *Submission* October 1991; C See Kee *Transcript* Darwin, 29 May 1991; B Cidade *Transcript* Sydney 26 September 1991.

3.52. ***Police interpreters are sometimes used.*** The Commission has been told that bi-lingual police officers are sometimes used to act as interpreters during police questioning of a suspect.<sup>88</sup> If a police officer is used there is a danger that the suspect may be uncertain as to the officer's independence of the police interrogators.<sup>89</sup>

3.53. ***Reasonable grounds to believe.*** The amendments to the Crimes Act only require a police officer to obtain the services of an interpreter or have an interview friend present if the officer believes on reasonable grounds that one is needed. This is a very high standard to attain. It is equivalent to the standard required before a police officer can arrest someone for an offence. Not only must there be reasonable grounds for the belief, the officer must in fact have the belief. Such a standard is specifically designed to be a restraint on police action. It is appropriate when the issue concerns depriving the subject of his or her liberty. It is hardly appropriate when the issue concerns whether an interpreter or an interview friend should be present.

## Recommendations

3.54. ***The Crimes Act.*** The provisions of the *Crimes Act 1914* (Cth), with one exception, give non-English speaking suspects and persons accused of federal offences adequate protection in legal terms. Additional safeguards are provided by the requirement that all confessions and admissions should, as far as possible, be recorded or they will be inadmissible as evidence.<sup>90</sup> In the event of a dispute about what was said or not said, the court will be able to hear for itself and, if necessary, have it interpreted by an independent interpreter. The exception concerns the standard to be required of a police officer before he or she must arrange for an interpreter or an interview friend to be present during questioning. The present standard is too high. Sections 23H of the Act (which deals with questioning of Aboriginals and Torres Strait Islanders), 23K (which deals with questioning of persons under 18) and 23N, which requires the presence of an interpreter) should be amended to require that the interpreter or interview friend be present when a police officer has reasonable grounds to believe that one is needed. There should be no question whether the officer actually forms the belief.

3.55. ***Implementation.*** The focus should now be on the implementation of the Crimes Act provisions, monitoring their effectiveness and education and training of all those involved in criminal investigation. The Commission supports the recommendation of the National Conference on Police Services in a Multicultural Australia that police services should evaluate interpreter provisions and the use of language resources in their operations by undertaking qualitative and quantitative research into interpreter use by operational staff. It recommends that an independent body, such as the Australian Institute of Criminology, be involved in the evaluation and that the monitoring be conducted in consultation with the professional bodies, NAATI and AUSIT, and with appropriate ethnic community organisations. The problems of police competence to identify or assess language difficulty, and their reluctance to call in an interpreter, should be addressed through training.

3.56. ***Evidence obtained without an interpreter.*** The Commission recommends that the provisions of the *Evidence Bill 1991* (Cth) relating to the exclusion of evidence improperly obtained be implemented.<sup>91</sup> However, even when implemented, they would not apply to

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88 The National Conference on Police Services in a Multicultural Australia recommended that a police officer with an appropriate level of interpreting and linguistic skills should be used when an independent interpreter is not available: Victoria Police and the Australian Bicentennial Multicultural Foundation, *Police Services in a Multicultural Australia, Conference Report*, Melbourne, 1991, rec 4.6.6.

89 S Abraham Submission July 1990; J Maloney Submission July 1990.

90 *Crimes Act 1914* (Cth) s 23V.

91 para 3.48.



prosecutions for federal offences in State and Territory courts. The Commission urges State and Territory governments to adopt similar provisions.<sup>92</sup>

3.57. ***Need for uniform legislation.*** Most of the problems revealed in the Commission's consultation relate to the investigation of State and Territory offences by State or Territory police. Reforms enacted by the Commonwealth will have no direct effect on these problems. The legislative arrangements for the provision of interpreters in the criminal investigation process vary enormously among the Commonwealth, States and Territories. The Commission recommends that the Commonwealth encourage the enactment of uniform legislation in this area.<sup>93</sup> In all States and Territories, audio or video recording of police interviews is being carried out at least on a trial basis, although it tends to be reserved for serious criminal offences. In the Commission's view, priority should be given to interviews involving interpreters.

### **Victims of crime—law and practice**

3.58. ***No specific entitlement for victims of crime.*** The statutory provisions that require police to use an interpreter when interviewing a suspect do not apply to interviews with victims. However, Australian Federal Police instructions do require police to use an interpreter when interviewing or taking a statement from any person who does not fully understand or speak English.<sup>94</sup>

3.59. ***Effective law enforcement demands that interpreters be used where necessary.*** Effective law enforcement demands that an interpreter be used by police who are interviewing or taking a statement from a victim of crime who is not proficient in English, to avoid misunderstanding and to ensure that information obtained is as precise and clear as possible. The consequences of misunderstandings or ambiguities in a burglary or theft victim's statement to the police may have serious consequences for any insurance claim the victim may wish to make. Failure to use an interpreter where necessary discourages victims from reporting crime and hampers the investigation of the crime.<sup>95</sup> Consultation reveals that there is a perception that, faced with conflicting accounts of an event, for example, a traffic accident, police are more likely to accept the one given by a person fluent in English than that given by a non-English speaking person (or person whose English is poor). Concern has also been expressed about the use of children or other relatives (particularly husbands, where he is the alleged assailant) as interpreters when a non-English speaking woman alleges domestic violence. Submissions suggest that victims of crime should have the same access to an interpreter as suspects do<sup>96</sup> and that women interpreters should be used for the victims of domestic violence and sexual assault cases, where the victim is generally a woman.<sup>97</sup>

3.60. ***No specific recommendations for reform.*** Generally speaking, victims of crime will be interviewed by State or Territory police at the scene of the crime or at the police station. It is in the interests of the investigators of crime and the victims of crime that they are able to communicate with each other effectively. The Commission does not make any specific recommendations for reform in this area. However, it considers that, as far as possible, victims of crime should have

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92 The *Evidence Bill 1991* (NSW) contains a provision with substantially the same wording as in the Commonwealth Bill: cl 124.

93 The Attorney-General's department also recommended this: *Access to Interpreters*, para 4.6.2.

94 See para 3.49; see also the AFP Access and Equity Plan that says that the Telephone Interpreter Service will be used to communicate with victims and proposes increased reliance on officers who have a second language except where an independent interpreter is required: Department of Prime Minister and Cabinet, Office of Multicultural Affairs, *Access and Equity Plan—Attorney General's Portfolio—Australian Federal Police Plan*, Report No. 17, AGPS, Canberra, 1989, 7.

95 Lack of competence in English is one of the main reasons that women in some communities do not call the police to intervene when they are being assaulted in the home: K Dang & C Alcorso, *Better on your own? A survey of domestic violence victims in the Vietnamese, Khmer and Lao communities in New South Wales*, Vietnamese Women's Association, Lidcombe, 1990, 17; Women's Information & Referral Exchange, Office of Women's Interests, *Submission* December 1990; Women's Legal Resources Centre *Submission* July 1991.

96 eg Ethnic Affairs Commission of New South Wales *Submission* August 1991; Northern Territory Police *Submission* June 1991; South Australia Police Department *Submission* September 1991; Victoria Police, Law Review Unit *Submission* August 1991.

97 Women's Legal Resource Centre *Submission* July 1991.

access to interpreters. Police stations should be equipped with a three-way telephone so that the Telephone Interpreter Service can be used when a person who does not speak English (or does not speak it well) makes a complaint. There should be a multilingual notice prominently displayed in every police station, telling people what to do if they need an interpreter.

## **Interpreters for prisoners and other convicted persons**

3.61. There are standard guidelines for corrections in Australia which provide, among other things, that information must be given to a prisoner of non-English speaking background in a language he or she can understand and that, when matters relating to his or her management are being discussed with a prisoner who does not speak English, an interpreter must always be used.<sup>98</sup> Federal offenders serve their sentences in State and Territory prisons, over which the Commonwealth has no direct control. The Commission makes no recommendations about interpreters for prisoners. However, its consultation suggests that the national guidelines referred to above are not generally complied with and that communication barriers result not only in increased isolation for non-English speaking prisoners but also lack of access to information about rights and obligations in prison and on parole or probation.<sup>99</sup> The Commission suggests that, at the very least, every prison should have a three-way telephone so that the Telephone Interpreter Service can be used when appropriate.

## **Monitoring, research and statistics on the use of interpreters in the legal system**

3.62. The Commission endorses the recommendations of the Attorney-General's department's report on the keeping of statistics on the use of interpreters by federal courts and tribunals and the monitoring of performance by service providers. This would assist in the planning, costing and delivery of interpreter services. They are in line with FECCA's recommendations on collection of ethnicity data to improve compliance with Access and Equity requirements. The Commission recommends that the Family Court in particular should make it a priority to collect data on demand for and provision of interpreter services.

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<sup>98</sup> *Standard Guidelines for Corrections in Australia*, Conference of Correctional Administrators, May 1989, para 3.19 & 3.20.

<sup>99</sup> See also Patricia Easteal, *The Forgotten Few—Overseas-Born Women in Prison*, Bureau of Immigration Research, forthcoming.

## PART III—FAMILY LAW

### 4. The family

#### Law and the family

##### Australia's international obligations

4.1. The International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, states that

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.<sup>1</sup>

There are other Conventions which deal with equality rights in the family<sup>2</sup> and with the rights of children.<sup>3</sup>

##### Australian law

4.2. *Focuses on the individual members.* Australian family law recognises

the need to give the widest possible protection and assistance to the family as the natural and fundamental unit of society, particularly while it is responsible for the care and education of dependent children.<sup>4</sup>

However, the 'family' as an entity has no legal status or legally enforceable rights or duties. Within the family there is no longer a legally recognised hierarchy of power (other than parental power over children, which is subject to limits). The law concerns itself with the rights, duties and responsibilities of the individuals who belong to families of particular (but not all) kinds. In other words, it is about the rights and duties a person has towards others who stand in a particular relationship to that person.

4.3. *Does not define family.* The law does not define 'family'. It implicitly recognises the existence of certain kinds of 'family'. The relationships with which it is most concerned are those that constitute the nuclear family, whether still intact or not. Family law deals with the obligations which married people and people in marriage-like relationships have towards each other and with the circumstances in which those relationships begin and end. It is also concerned with the rights, duties and obligations of parents towards their children, particularly when they cannot agree, and with defining when a child is regarded as autonomous for particular purposes. In its form and application, the law assumes that many people are living or have lived in nuclear-type families comprising either a married (or unmarried) couple and dependent children or a sole parent and dependent children.

4.4. *Does not concern itself with the ongoing family.* Unlike the law of some European countries, Australian law does not provide a comprehensive code for family relationships. It does

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<sup>1</sup> art 23 (1).

<sup>2</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

<sup>3</sup> Convention on the Rights of the Child (CROC); ICCPR art 24.

<sup>4</sup> *Family Law Act 1975* (Cth) s 43(b).

not tell the family how to organise itself but provides for the circumstances in which the law will intervene. At one time, if the law intervened, it was for the purpose of supporting the hierarchy of power in the family rather than interfering with it. The non-interventionist basis of the law has survived even though the head of the family no longer has the legal power and authority he once had. The content and enforcement of parental rights and responsibilities have been modified by the welfare principle,<sup>5</sup> and by the recognition of the equal rights of women. But the law does not define clearly the content of rights and responsibilities. It does not provide a framework for parental decision making which gives substance to the equality of partners. Instead, the law intervenes mainly to resolve disputes, often after the family has broken up. At this stage its focus is on the interests of the individuals, rather than on the family unit.

4.5. ***Support policies have regard to family relationships.*** The state recognises that people's need for financial support is affected by their relationships; for example, whether they have dependents or are dependent on others. These factors are recognised in social security payments, such as family allowances, and in the denial of unemployment benefits to a person whose spouse is working. Non-custodial parents may be forced to contribute to the support of their children under court orders or through the Child Support Scheme. Government policies exert considerable influence over the form of the family unit by giving or withholding benefits to individuals on the basis of those relationships and by the scale of, and emphasis given to, family support programs. The state therefore often only recognises the family indirectly through the support, or lack of support, it gives individuals in defined circumstances.

## **The family in a multicultural society**

### **The importance of family**

4.6. ***Families play important cultural and support roles.*** Families play a central role in the development of a person's cultural identity and the transmission of culture, language and social values. In some communities the family may be responsible for a range of welfare functions that, in western industrialised nations, governments have assumed. Research suggests that the family rather than the state remains the major source of support for some groups.<sup>6</sup> It also shows that family networks are crucial in the immigration and adjustment process for helping people cope with the social, economic and cultural dislocation caused by moving from one society to another.<sup>7</sup>

4.7. ***Law and policy should take into account the kinds of diversity in families.*** Because of the important roles families have, the impact of law and policy on the family is of special significance in a multicultural society. Laws and policies based on one view or one set of assumptions about family relationships which do not take into account the diversity of family arrangements in Australian society may impact harshly on communities or individuals whose family relationships are differently defined. Families may perform different functions; for example, family networks of settling migrants may have a far wider role in providing financial and social support than is the case with established communities. Families may also be more broadly defined and composed of different elements. The significance placed on the various relationships may differ as may the role each member of the family takes.

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5 ie, that the welfare of the child is the paramount consideration in making decisions about a child: see eg *Family Law Act 1975* (Cth) s 64(1)(a).

6 M Morrissey et al, *The Family in the Settlement Process*, 1991, Bureau of Immigration Research AGPS, Canberra, 74.

7 M Humphrey 'Islamic Law in Australia' in Middle East Research and Information Association *Islam in Australia*, 1985,41; see also M Morrissey et al, *op cit*, 75.

## Law and policy should support families

4.8. ***Insufficient support for families.*** In the discussion paper *Multiculturalism: Family Law*<sup>8</sup> the Commission noted concerns raised in submissions and during consultations that laws and policies do not pay sufficient regard to the nature or the needs of diverse kinds of families. The major concerns were that law and policy

- tend to focus too narrowly on the nuclear family and ignore the diversity of family structures in the community and
- focus too much on the individual members of the family and ignore the role and collective values of family structures as a whole.

Lack of adequate general support for settling migrants to enable them to establish stable family arrangements was also considered to be a problem. Finally, there was considerable concern that support services available to families experiencing crisis were inadequate.

4.9. ***Kinds of recognition and support needed.*** DP 46 asked for submissions on the best ways to ensure that government policy and practice take account of a diversity of family structures. It also asked for submissions on the needs of newly arrived migrants and on the adequacy of, and best means of improving, family support services. Subsequent submissions suggested that, to provide proper support for families, the law should

- recognise the wide range of family relationships that exist<sup>9</sup>
- embody collective as well as individual values<sup>10</sup>
- support parents, children and families generally in the adjustments they face in the settlement process and in the relationship crises they experience.<sup>11</sup>

4.10. ***Taking a broad view of family relationships.*** Whether the focus of laws and policies is on the individual and his or her relationships or on the family unit, defined in one or more ways, submissions recognise that there should not be a narrow approach to the family. They argue that a broad view should be taken of family relationships and responsibilities to allow for the diversity of family structures within Australian society. They recognise that many programs still concentrate on the individual and on a limited range of relationships of that individual. In this report, 'the family' is used in its broadest sense.

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8 ALRC DP 46.

9 See eg Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991; Dr K Smith *Transcript* Brisbane May 1991; Country Women's Association of New South Wales *Submission* May 1991; Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee (J Hussain) *Submission* August 1991.

10 See eg Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991; Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee (J Hussain) *Submission* August 1991.

11 See eg M Humphrey, *op cit*, 43; Dr AT Kenos *Submission* April 1991; Migrant Women's Interests Committee (WA) *Submission* May 1991; M Wood *Submission* April 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991; Country Women's Association of New South Wales *Submission* May 1991; Department for Family & Community Services (SA) *Submission* June 1991; Manning District Domestic Violence Monitoring Committee *Submission* August 1991; Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee (J Hussain) *Submission* August 1991; South Australian Government *Submission* September 1991; N Narayanan *Transcript* Perth November 1990; L Perez *Transcript* Brisbane May 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991.

## Goals for reform

### An overview

4.11. Some of the concerns expressed in submissions directly relate to family law and its administration. These are considered in later chapters. This chapter focuses on government policies and programs which may affect the ability of families of different kinds to function and survive. Submissions and consultations confirm the need for governments to implement policies which deliver more active support for parents, children and families generally, and which have regard to particular kinds of family networks and the social and economic difficulties faced by families during the settlement process.<sup>12</sup> Services or other measures based on policies of this kind will have more real effect in the longer term than changing the law.<sup>13</sup>

## Strategies to ensure that law and policy take into account diverse family arrangements

### Discussion paper proposal

4.12. In DP 46 the Commission proposed that governments should establish mechanisms to ensure that the impact of policies on families of different kinds is systematically examined, and that policies are flexible enough to ensure the support of a wide range of family relationships. Whether their focus is on the individual (and the relationships of that individual) or on the family unit, policies should enable families of different kinds to meet their common goals. The Commission sought submissions on the best means of achieving this.

### Responses to the proposal

4.13. *Support for the proposal.* Submissions show strong support for the proposal<sup>14</sup> and a range of mechanisms were suggested.

4.14. *A family impact statement.* One approach would be to require all government departments to have a 'family impact statement' prepared before any new policy or legislation is implemented. The statement could be prepared either by the departments themselves or by an independent body.<sup>15</sup> This would involve setting up a new procedure which, to be effective, would require considerable expense, expertise and research. Some doubts were expressed to the Commission about the effectiveness and the need for this single mechanism approach.<sup>16</sup>

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12 See eg Dr AT Kenos *Submission* April 1991; Migrant Women's Interests Committee (WA) *Submission* May 1991; M Wood *Submission* April 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991; Social Issues Committee of the Anglican Diocese of Sydney *Submission* May 1991; Country Women's Association of New South Wales *Submission* May 1991; Department for Family & Community Services (SA) *Submission* June 1991; Manning District Domestic Violence Monitoring Committee *Submission* August 1991; Australian Federation of Islamic Councils Inc, Law Reform Subcommittee (J Hussain) *Submission* August 1991; South Australian Government *Submission* September 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991.

13 See eg General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991, which points out that there is a greater need for reform emphasis on administrative policies rather than on legislation.

14 Dr AT Kenos *Submission* May 1991; Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Catholic Multicultural Council *Submission* April 1991; Migrant Women's Interests Committee (WA) *Submission* May 1991; M Wood *Submission* April 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991; Department for Family & Community Services (SA) *Submission* June 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women *Submission* July 1991; South Brisbane Community Legal Service Inc, *Submission*, July 1991; Manning District Domestic Violence Monitoring Committee *Submission* August 1991.

15 See eg Catholic Multicultural Council *Submission* April 1991; Australian Family Association (NSW) *Submission* April 1991.

16 See South Australian Government *Submission* September 1991; Office of Ethnic Affairs (NT) *Submission* August 1991.

4.15. ***The need for more research and data collection.*** An obstacle to reform in the area of service provision to non-English speaking background communities is the lack of relevant data substantiating their needs.<sup>17</sup> The development of policies, programs and legislation which take account of and support a wide range of family arrangements is impossible unless there is adequate information on the way different families and communities operate and on how they are affected by particular programs. Methods of data collection in the government and non-government sectors should be revised so that they consistently and regularly provide information on the needs of non-English speaking background clients and their families.<sup>18</sup> An agency such as the Australian Institute of Family Studies, together with the Bureau of Immigration Research, should ensure that cultural identity and the needs of families stemming from cultural differences are addressed.<sup>19</sup> A recent evaluation study carried out by the Federation of Ethnic Communities' Councils of Australia identified the collection of comprehensive ethnicity data as essential for the proper implementation of access and equity strategies by the Family Services areas of the federal Attorney General's portfolio and the Family Court.<sup>20</sup>

4.16. ***Family policy advisory units.*** Another way to ensure that the impact of policies on families of different kinds is systematically examined would be for family policy advisory units to be established by the federal government and by each State and Territory government. Such units could include representatives of ethnic and religious communities and welfare and family assistance agencies. They would meet annually or every two years.<sup>21</sup>

## Access and equity strategy

4.17. ***Access and equity strategy outlined.*** The federal government's Access and Equity Strategy is a mechanism to assess the impact of government policy on diverse families. This strategy requires government agencies

to review regularly, monitor and evaluate all services, programs and policies to ensure that they take account of the diverse linguistic, cultural and racial characteristics of Australian society.<sup>22</sup>

The Office of Multicultural Affairs (OMA) has asked government departments, agencies and statutory bodies to prepare first and second round Access and Equity plans. OMA has used these plans to raise departmental awareness of the need to take into account and develop strategies to implement access and equity principles. It is responsible for evaluating access and equity plans.

4.18. ***Reporting on implementation.*** As part of implementing these plans, departments and agencies must include in their annual reports an access and equity section and outline program implementation of the strategy in both internal and external audits of programs.<sup>23</sup> OMA guidelines on annual reports require departments to outline

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17 Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; see also M Morrissey et al, *op cit*, 79.

18 Office of Ethnic Affairs (NT) *Submission* August 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

19 Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991

20 F Milne and S Zelinka, 'They Mean Well, But ....': *An Examination of First-Round Access & Equity Plans of Eight Commonwealth Government Departments*, Federation of Ethnic Communities' Councils of Australia Inc, Sydney, 1991,31.

21 General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991.

22 It also requires that there should be special emphasis on the needs of NESB women and the ethnic disabled. *Access and Equity Revised Requirements and Guidelines*, 1990, 1.

23 eg Program Performance Statements.

- research, consultation and reviews of program and service delivery and policy formulation undertaken to identify barriers to access and equity for different cultural and linguistic groups, including the barriers faced by women in these groups
- changes to services or procedures or in approaches to policy development introduced under access and equity implementation
- measurable improvements in access to and use of services by different cultural groups (both of English and of non-English speaking backgrounds), using cultural, country of birth and language data on actual and potential clients as performance indicators to measure achievements against access and equity targets and
- any continuing barriers to Access and Equity and proposed solutions.<sup>24</sup>

If properly implemented, these strategies would have a real impact on family law services and many other areas covered by this reference. The strategy has so far been aimed at departmental service delivery and related policy. There would be even greater impact if the access and equity strategy were applied to policy development generally and to legislation.

### **Scrutiny of policy, programs and legislation by parliamentary committees**

4.19. ***Parliamentary committees and accountability.*** The question is who could watch over the implementation of access and equity in these areas. The principal institutions responsible for monitoring legislation and departmental performance are parliamentary committees.

4.20. ***Scrutiny of legislation.*** There are several mechanisms by which legislation is scrutinised by Parliament. Two Senate standing committees look at the more technical aspects of legislation. These are the Senate Standing Committee for Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances. These committees look at all Bills and subordinate legislation for provisions that trespass unduly on personal rights and liberties, make rights or obligations unduly dependent upon insufficiently defined administrative powers or make rights, liberties or obligations unduly dependent upon non-reviewable decisions. They also look at more specific aspects of delegated legislation, for example, in relation to the appropriateness of delegations. The Committee for Scrutiny of Bills examines proposed legislation on strictly technical grounds and within the very tight timetable imposed by the legislative process. It avoids issues of policy. However, within these parameters, it has taken a broad approach to the personal rights and liberties aspects of its terms of reference. It is sensitive to the notion that individuals should receive equal treatment under the law and that their access to it should be equal and as easy as possible. It would be within its terms of reference to draw the attention of Senators to, for example

- a housing Bill which had the effect of excluding people who live in extended families from having access to a particular housing scheme
- a social security Bill which unjustifiably limited advantages or benefits to people living in one kind of family arrangement to the exclusion of others
- a childcare Bill which gave fee relief or subsidy to parents who had the care of a child but not to grandparents or aunts who happened to have the care of a child.

4.21. ***Expansion of terms of reference in some jurisdictions.*** A recent Queensland report has recommended that parliamentary committee scrutiny of legislation for undue trespass on personal rights could include the failure of a bill 'to have sufficient regard to Aboriginal traditions and Torres

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24 See Office of Multicultural Affairs, *Access and Equity Revised Requirements and Guidelines*, 1990, 25.



Strait Islander traditions'.<sup>25</sup> The goals of this reference would be furthered if the Senate gave consideration to broadening the terms of reference of its Scrutiny of Bills Committee to include scrutiny for provisions which fail to take into account the ethnic diversity of Australian society, including the diversity of family arrangements. The Commission acknowledges that including this term might take the Committee outside its current field of expertise, that scrutiny could not include policy aspects of this issue and that it would be subject to considerable time restrictions. Nevertheless the Commission sees some merit in such an expansion of the Committee's responsibilities.

4.22. ***Scrutiny of legislation policy.*** The Senate has recently set up a new process to ensure that there is a more systematic approach to parliamentary scrutiny of legislation at the policy level.<sup>26</sup> All Bills introduced into the Senate or received from the House of Representatives go to a Senate Standing Committee on the Selection of Bills which decides whether a Bill should be referred to a Senate Legislative or General Purpose Standing Committee and, if so, which committee it should go to. The selection of Bills for general review tends to depend on political rather than policy considerations. It might be useful to alert Senators to the need to scrutinise Bills from an access and equity point of view and, where there appears to be some problem, to push for a review.

4.23. ***Monitoring policy development.*** Failure to take family diversity into account is also an issue that arises when government departments develop and implement programs. These are matters that can be pursued in other parliamentary committees.

4.24. ***Estimates Committees and departmental performance.*** Ministers and departments are increasingly accountable to Parliament for the extent to which policies and programs meet government objectives. This is done through Senate Estimates Committees. The main role of these committees, established in 1970, was to review Appropriation Bills. When the federal Government introduced program management and budgeting in the mid-1980s to improve the management efficiency and effectiveness of the federal public service, Estimates Committees took on the additional role of monitoring program performance of government departments. Each department presents program information to the Estimates Committees in the form of a Program Performance Statement in which it sets out the objectives for portfolio programs, its portfolio program structure and the measures it uses to evaluate the effectiveness of its programs. Department of Finance guidelines set three key benchmarks by which managers are required to evaluate their program performance: efficiency, effectiveness and appropriateness. The guidelines define appropriateness as the extent to which program objectives match both Government priorities and community needs.<sup>27</sup> There is considerable potential within this process for departments and agencies to report on the extent to which their current and planned programs meet access and equity objectives. Estimates Committees could, for example, ask the Australian Bureau of Statistics about the way it ensures that its census and other statistical collection programs reflect the true diversity of family structures in Australia.

4.25. ***Annual report scrutiny by Senate Legislative and General Purpose Standing Committees.*** Annual reports which federal departments and statutory authorities must produce are becoming an important means by which parliamentary committees can review the administration and operation of department programs in pursuing access and equity objectives.<sup>28</sup> Guidelines for the presentation of reports require departments to outline objectives and achievements in the social justice area. The Senate now refers all annual reports to the relevant Legislative and General Purpose Standing

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25 See Queensland Electoral and Administrative Review Commission, *Report on Review of the Office of Parliamentary Counsel*, The Committee, Brisbane, 1991, 88-89.

26 See Australian Parliament, Senate Select Committee on Legislation Procedures *Report*, AGPS, Canberra, 1988.

27 'Senate Estimates scrutiny of government finance and expenditure', *Papers on Parliament No 6*, March, 1990, 101.

28 *Public Service Act 1922* (Cth) s 25 requires Commonwealth departments and statutory authorities to produce annual reports.

Committee for review. The process of evaluation is still evolving. In the past, committees have tended to concentrate on whether the report was submitted on time and whether it met the guidelines regarding content. Some committees are now selecting one or two reports for detailed attention and making general comments about the rest.<sup>29</sup> Committees have the power to hold public hearings to focus on particular areas of concern arising out of annual reports. Departments responsible for developing housing programs could, for example, be asked about the extent to which housing for newly arrived migrants accommodates the needs of unattached teenagers.

4.26. ***Scrutiny of departmental performance on family arrangements.*** Both of these processes are potentially means by which departmental performance on access and equity in general, and accommodating family diversity in particular, could be assessed. These processes may also play a role in ensuring that legislation and programs take into account relevant access and equity principles.

## **Recommendation**

4.27. ***Develop existing strategies.*** An important aspect of supporting families is to ensure that government policy, legislation and programs take into account the fact that families may be formed in a number of different ways, and that they may perform a range of cultural, social and economic functions. As outlined in earlier paragraphs, there are mechanisms already in existence that could be more effectively used to achieve this objective.

4.28. ***Include family in access and equity strategy.*** The Commission recommends that access and equity aims and objectives should be amended to include the need to take into account the diversity of family forms and functions. Government departments and agencies would then be required to demonstrate in annual reports and in program performance statements how they have ensured that this diversity is reflected in their programs. As these agencies also play a key role in the development of government policy, annual report and program performance statement scrutiny can also influence the development of options for government policy.

4.29. ***Expand the levels at which access and equity policies are required to be implemented.*** The Commission recommends that the access and equity principles and strategy be extended to apply them expressly to government program and policy development.

4.30. ***Make more effective use of parliamentary committees to monitor the implementation of access and equity principles at all levels.*** The Commission recommends that, so far as it is able, the Senate Standing Committee for Scrutiny of Bills include in its scrutiny the extent to which a bill adheres to access and equity aims and objectives. The Senate could consider amending the terms of reference of the committee to include scrutiny of provisions which fail to take into account the ethnic diversity of Australian society, including the diversity of family arrangements. Senate Legislative and General Purpose Standing Committees and Estimates Committees should consider developing further their role of monitoring departmental program performance by giving attention to access and equity issues, and family diversity in particular, when reviewing annual reports and program performance statements. The Committees should insist on the development of more specific and detailed performance indicators. These should include the adequacy or otherwise of the resources committed to the provision of interpreters and to the collection of ethnicity data and data on family diversity. Where the Senate thinks a bill may fail to take into account ethnic and cultural or family diversity, it should consider referring it to a Legislative and General Purpose Standing Committee for review.

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29 The relevant committees report to the Senate once in each period of sittings drawing the attention of the Senate to any significant matters relating to the operations and performance of the bodies furnishing the reports.

## Settlement support for migrants

### The law and difficulties faced by migrants

4.31. Some migrants see family law as a major cause of their many social and economic difficulties. Often, however, these problems arise out of the migration and refugee experience. Migrant parents might blame laws protecting the rights of children for their loss of authority over their children. But it is often the social and economic pressures associated with the settlement process that cause the change in power balance. Men might blame liberal divorce law for family breakdown on arrival, when the real cause may be difficulties that men face in adjusting to the greater economic independence of women or the psychological trauma associated with migration. Good settlement support is necessary to enable migrants to establish stable family arrangements of their choice. Even more support is needed for refugees. These people may come without any family, may have been tortured and may have lived in war conditions and in refugee camps for a long time.

### Assistance for newly arrived migrants

4.32. The Department of Immigration, Local Government and Ethnic Affairs (DILGEA) provides a range of services for assisting the settlement of newly arrived migrants. In the financial year 1990-91 DILGEA spent almost \$140 million on settlement assistance programs for the benefit of newly arrived migrants and refugees. English language programs and programs facilitating access to employment are given priority.<sup>30</sup> Other programs include interpreting services, pre- and post-arrival information and orientation programs and on-arrival accommodation assistance to women and young people. Special efforts are made to ensure that refugees are given adequate access to information and more general services.<sup>31</sup>

### Discussion paper sought submissions

4.33. In DP 46 the Commission sought submissions on the particular needs of newly arrived migrants and refugees and the best ways of meeting them. The Commission asked if more services are required or more support for existing services. In particular, it asked

- whether current employment and training programs are appropriate
- whether non-bureaucratic solutions are better and
- whether there is a need for pre- or post-arrival counselling and language programs.

### Responses to the discussion paper

4.34. ***Clear need for more assistance.*** There is an overwhelming consensus in submissions on the need for improved provision of assistance for newly arrived migrants.<sup>32</sup> It is generally agreed that

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30 About \$98 million was spent on the Adult Migrant English Program.

31 Department of Immigration, Local Government and Ethnic Affairs (Cth) *Submission* June 1991.

32 Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991; Dr K Smith *Transcript* Brisbane May 1991; S Hussain, D Johnson *Transcript* Townsville May 1991; Ethnic Affairs Commission of New South Wales *Submission* June 1991; Department for Family & Community Services (SA) *Submission* June 1991; North Richmond Community Health Centre Inc *Submission* July 1991; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; Women's Legal Resources Centre *Submission* July 1991;

the immediate post-arrival period is particularly stressful for immigrants, especially for groups such as refugees. However a number of submissions suggest that many of the kinds of support needed for recent arrivals are also needed by migrants who have been in Australia for longer periods.<sup>33</sup> That governments need more information about the relationship between length of stay and support requirements is confirmed by a recent study on the family in the settlement process.<sup>34</sup>

4.35. **Assistance with language.** A number of submissions identify English language courses as the most critical need, an essential component of assistance programs designed to help new arrivals.<sup>35</sup> Some say there is not enough recognition of the needs of migrant women who often see their needs as less important than those of their husbands and families.<sup>36</sup> They argue that English language classes should be more readily available and geographically accessible to women. Women should be encouraged to attend no matter how long they have lived in Australia.<sup>37</sup> There is concern that services in this area appear to be being reduced rather than increased.<sup>38</sup>

4.36. **Access to interpreters.**<sup>39</sup> Another critical need identified in submissions and consultation is greater access to interpreters in all aspects of service provision to settling migrants. There is a perception that the current level of provision for interpreters is inadequate and that interpreting and translation services are becoming less accessible to non-English speakers.<sup>40</sup> The recent introduction of the 'user-pays' principle for the Telephone Interpreter Service (TIS) may result in some newly arrived migrants and refugees being denied access to government and community based services.<sup>41</sup>

4.37. **How to get assistance and information.** Ensuring that migrants know how to get the information and assistance they need is another important issue raised in submissions and consultation.<sup>42</sup> The need to know is not confined to new arrivals.<sup>43</sup> Strategies for ensuring that people of non-English speaking background know where to get the information and services they need are discussed in chapter 2.

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Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; Federation of Ethnic Communities Councils of Australia *Submission* August 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; T Jung *Transcript* Adelaide November 1991; South Australian Government *Submission* September 1991; I Pap, B Weedon *Transcript* Brisbane August 1991; J De Luea *Transcript* Darwin May 1991; J O'Mara *Transcript* Fairfield September 1991; B C *Transcript* Fairfield September 1991; A Hall and A Grimes *Transcript* Springvale October 1991; P Robert Hill, J Flach *Transcript* Hobart October 1991; P Johnson *Transcript* Fairfield September 1991; QD Ton-that *Transcript* Melbourne October 1991.

33 See eg Ethnic Affairs Commission of New South Wales *Submission* June 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; Dr K Smith *Transcript* Townsville May 1991.

34 M Morrissey et al, *op cit*, 1991, 79. This study pointed to the need for studies of selected groups of people over at least a three year period following arrival. The focus of these studies would include use of the migrant-specific and general welfare provisions, English language provisions, employment experiences and patterns of household formation. The examinations of the particular needs of individual ethnic groups, of women and of refugees would be an essential part of these studies.

35 eg Springvale Community Aid & Advice Bureau Inc *Submission* April 1991, Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991, South Brisbane Community Legal Service Inc *Submission* July 1991.

36 Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991.

37 Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; S Hussain, D Johnson *Transcript* Townsville May 1991.

38 See Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Office of Ethnic Affairs (NT) *Submission* August 1991.

39 see ch 3.

40 eg Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; L Vidal and S Kushwaha *Transcript* Canberra September 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; Ethnic Affairs Commission of New South Wales *Submission* June 1991; Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; South Australian Government *Submission* September 1991; Annette Hall, A Grimes *Transcript* Springvale October 1991; R Hill, J Flach *Transcript* Hobart October 1991; B Cicade *Transcript* Fairfield September 1991; P Johnson *Transcript* Fairfield September 1991.

41 Office of Ethnic Affairs (NT) *Submission* August 1991; see also General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* May 1991; Ethnic Health Unit, Health Department Victoria *Submission* April 1991.

42 See eg Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; Department for Family & Community Services (SA) *Submission* June 1991; North Richmond Community Health Centre Inc *Submission* July 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991.

43 Dr K Smith *Transcript* Brisbane May 1991.

4.38. ***A range of preferred avenues for support.*** The Commission's community languages consultations show that, although there is a range of support services available, some of which migrants know about, there is a strong preference among many groups towards using friends, family (including children) and community networks for help.<sup>44</sup> This is particularly so for help with marriage difficulties. These less formal sources are preferred by many even for legal information and help because they can get help in their own language. Some participants preferred interpreters from these informal sources also. This trend is confirmed by studies on settling migrants.<sup>45</sup> The Commission's consultation suggests that there are a range of reasons

- many migrants prefer to handle difficulties within the family or community
- they do not know about the services
- many services are inaccessible to non-English speakers because the service providers are not bilingual
- many people are unfamiliar with, or afraid of using, the kinds of services provided.<sup>46</sup>

It may be that programs of support for some groups will have to take into account the actual ways that settling migrants go about getting support in order to be effective. This may involve plugging into less formal family or community networks and working with them.<sup>47</sup> However, services will also have to take into account the fact that some settling migrants, especially those arriving without family networks and with no existing formal or informal community networks, will have to rely on more formal publicly funded or provided services for support.<sup>48</sup>

4.39. ***Is current settlement support adequate?*** Submissions clearly show that good settlement support is of critical importance to the ability of migrants to establish stable family arrangements of their choice. This includes the support necessary for people to leave unsatisfactory or unsafe family arrangements. DILGEA is running programs for its target population of immigrants resident in Australia for less than five years to address all the areas of need which submissions have raised. This includes, for example, attention to the provision of child care to meet the needs women have for access to English classes. Submissions suggest that, although DILGEA is on the right track, migrants in particular, and Australians generally, would greatly benefit if more resources could be devoted to its programs. DILGEA's ability to use more resources is limited by the budgetary restraints imposed on all government departments. Government funding decisions should take into account the extent to which greater expenditure on support will result in savings in services devoted to 'mopping up' in the wake of family breakdown and social dislocation. Australia will also benefit from the skills and creativity which satisfactorily settled migrants contribute to their new country.

4.40. ***Length of stay and service needs.*** A number of DILGEA's programs address migrant access to general services, including information and language services. This is consistent with the Commonwealth's social justice and access and equity policies and focuses on improved efficiency by phasing out duplication of services. English language programs are targeted at migrants in their first five years of settlement. However, as yet not enough is known about the settlement process to be sure that length of time in Australia is an adequate guide to the settlement support needs of migrants. Consultation and submissions suggest that more research may be needed to assess

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44 For details of the consultation see para 1.7.

45 See eg M Morrissey et al, *op cit*, 1991, 74, 80.

46 See eg D Celermajer, ALRC *Research Paper* No 1, 1991. This paper showed a low level of use and understanding of services such as counselling and shelters among the Vietnamese community; see also North Richmond Community Health Centre Inc *Submission* July 1991, Office of Ethnic Affairs (NT) *Submission* August 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

47 See eg Office of Ethnic Affairs (NT) *Submission* August 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

48 See eg J Jupp, A McRobbie and B York, *Settlement Needs of Small Newly Arrived Ethnic Groups*, Bureau of Immigration Research, AGPS, Canberra, 1991, 60.

whether regardless of length of stay some migrants will for cultural or other reasons continue to need and prefer to use family, community networks or ethno-specific services for support. If support programs are designed without taking into account this reality, a significant section of Australians will continue to be disadvantaged. Governments and government departments will be unable to implement fully principles of access and equity unless the needs of this group are met.

## **Recommendation**

4.41. The Commission recommends that the Commonwealth continue to develop and, where possible, expand settlement support programs. The Bureau of Immigration Research should be requested to conduct ethnographic longitudinal research to provide the government with more accurate information on the nature of the settlement process, patterns of family formation and service use and needs. The results of this research should form the basis on which settlement support programs are developed.

## **Assisting families in crisis**

### **Families in crisis and the law**

4.42. The current approach of the law to family relationships is essentially remedial. Individuals resort to the law to deal with family problems in narrowly defined situations, which often involve crisis and lead to intrusive intervention. It would often be preferable to provide readily accessible support to help members of families to meet their responsibilities towards each other, handle difficulties and resolve their own disputes. Keeping in mind the need to protect the rights of individual members of families who may be specially vulnerable, these support measures ought not to reduce the options available to family members when difficulties arise but create further choices. There are counselling, conciliation and mediation services available, but it is uncertain whether they are equally accessible to all communities. It is also uncertain whether the legal system or other services are able to take into account the fact that it may be especially difficult for women and children to protect themselves by leaving their current family arrangements in cultural contexts where family unity and collective responsibility are of fundamental importance.

### **Discussion paper sought submissions**

4.43. In DP 46 the Commission asked for submissions on a number of specific issues relating to support for families in crisis.

- What is the best way to ensure that communities participate in designing and developing family support programs?
- What is the best approach to developing appropriate dispute resolution and counselling services for all users?
- Is there a need for dispute resolution and counselling services to help adults and children resolve differences where clashes of values arise and, if so, what is the most appropriate way to deliver them?
- How can culturally appropriate programs best be designed to ensure that victims of domestic violence have real access to protection?

## Responses to the discussion paper

4.44. **An overview.** Submissions suggest a range of ways in which families in crisis and, in appropriate circumstances, individuals who want to leave their families could be more actively supported. Most of the suggestions are designed to make existing services more accessible to migrants and to people of non-English speaking backgrounds. Improvements in counselling and dispute resolution services and services for victims of domestic violence are considered to be the most important to increase support for families. A common theme in nearly all the submissions is that people of non-English speaking or migrant backgrounds should be involved in the planning, implementation and evaluation of counselling, dispute resolution and other family support services.<sup>49</sup> The need to employ bicultural and bilingual staff in key services is also emphasised.<sup>50</sup>

4.45. **Marriage guidance counselling.** The Commonwealth funds a number of non-government agencies to provide marriage education and marriage counselling.<sup>51</sup> A number of submissions draw attention to the need to make marriage counselling services more accessible to people of non-English speaking backgrounds.<sup>52</sup> A recent evaluation of the access and equity plans of federal government departments expressed concern that there was not enough monitoring of the accessibility of marriage counselling services to people of non-English speaking background.<sup>53</sup> The Office of Legal Aid and Family Services<sup>54</sup> (OLAF) intends to conduct a National Mapping and Needs-Based Planning exercise as a way of addressing this concern.<sup>55</sup> A further step would be to require marriage counselling agencies to submit access and equity plans as part of their funding arrangements. These agencies would need to provide information about the strategies they use to meet the needs of ethnic communities and guidelines about the employment of counsellors and associated staff.<sup>56</sup> As many of these organisations are operating on low budgets using considerable numbers of voluntary staff, the Office may need to give them specially earmarked funds to help them meet this requirement.

4.46. **Family Court counselling and mediation.** A number of submissions stress the value of Family Court counselling and mediation in reducing the trauma of separation and divorce.<sup>57</sup> Efficiency demands that these services be accessible to all clients of the Family Court. Qualified interpreters should be available for counselling sessions where they are needed.<sup>58</sup> Counselling and mediation services, and the community in general, should give greater consideration to the linguistic and cultural needs of families and individuals in the context of the total migration

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49 eg Ethnic Affairs Commission of New South Wales *Submission* June 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; Women's Legal Resources Centre *Submission* July 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; A Ayan *Transcript* Melbourne October 1991.

50 See eg North Richmond Community Health Centre Inc *Submission* July 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

51 These include both church-based agencies, such as UNIFAM and the Catholic Family Welfare Agency, and secular agencies such as the National Marriage Guidance Councils which operate in each State and Territory, the Cairnmillar Institute and the Citizens' Welfare Bureau in Victoria.

52 Ethnic Affairs Commission of New South Wales *Submission* June 1991; North Richmond Community Health Centre Inc *Submission* July 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; South Australian Government *Submission* September 1991.

53 F Milne and S Zelinka, *op cit*, 23.

54 within the Attorney-General's Department.

55 *Access and Equity Plan 1991-1994: Attorney-General's Portfolio*, Office of Multicultural Affairs, Department of the Prime Minister and Cabinet, 1991, AGPS, Canberra.

56 South Australian Government *Submission* September 1991. This submission also makes a number of suggestions about how access to these services could be improved. Providing ethno-specific marriage counselling services was one of these.

57 See eg E Byrne *Submission* May 1991; Law Council of Australia, Family Law Section *Submission* May 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; Federation of Ethnic Communities' Councils of Australia Inc *Submission* August 1991; South Australian Government *Submission* September 1991; see also F Milne and S Zelinka, *op cit*, 1991, 23.

58 Ethnic Health Unit, Health Department Victoria *Submission* April 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; Ethnic Affairs Commission of New South Wales *Submission* June 1991, South Australian Government *Submission* May 1990.

experience. Some people may have experienced extreme poverty, ethnic, religious and political oppression, violence, extended periods of separation from family and the stress associated with adapting to a new environment.<sup>59</sup> One submission suggests that the counselling processes of the Family Court are too closely tied to the administrative aspects of the Court's functions for these broader aspects to be taken into account and dealt with appropriately.<sup>60</sup> Submissions suggest that the Family Court should adopt and put into practice the following policies

- recruitment of bilingual counsellors who have the relevant sensitivity and experience from working with the major ethnic communities which reside in the area where each court is located<sup>61</sup>
- training all counsellors in the use of interpreters and cross-cultural counselling and
- training professional interpreters.<sup>62</sup>

Similar policies should be adopted in relation to the Family Court Mediation Service.<sup>63</sup> Research conducted by the Family Court itself lends weight to the importance of these approaches in meeting the needs of migrants.<sup>64</sup> Submissions also refer to the need to educate the community about the value and availability of these services.<sup>65</sup>

4.47. **Family Court and access and equity strategy.** There is concern that these kinds of strategies have not been adequately addressed or systematically implemented in the Family Court's first or second round access and equity plans and strategy.<sup>66</sup> Availability of resources is clearly an issue for the Court. However, it should now take the important step of setting concrete and measurable access and equity objectives and targets. It should work out, as part of its corporate plan, what specific programs and strategies are needed to meet these objectives. With a comprehensive framework of objectives and strategies the Family Court would be in a better position to attract the resources necessary to implement the wider programs. The framework should address not only the information and counselling aspects of Family Court administration but all aspects of its operations. Cultural as well as linguistic issues should be addressed. Systematic qualitative research on the experience of people of non-English speaking migrant backgrounds with the Family Court would be an important feature of the development of any strategy.

4.48. **Other dispute resolution services.** Submissions provide information about existing community-based dispute resolution and mediation services and the steps some have taken to extend their services to people of non-English speaking backgrounds. The Family Mediation Centre at Noble Park in Victoria is one example. It has adopted a strategy designed to overcome the low level of use of the centre by members of the Vietnamese community. The strategy includes training Vietnamese mediators and developing contacts within community networks in order to spread word of the service. As a result, for the first time, Vietnamese clients are approaching the service voluntarily. The value of and need for the strategy was endorsed by a submission from the coordinator of the Springvale Indo-Chinese Mutual Assistance Association.<sup>67</sup> Family dispute

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59 Ethnic Affairs Commission of New South Wales *Submission* June 1991.

60 E Byrne *Submission* August 1990.

61 See eg Law Council of Australia, Family Law Section, *Submission to Parliamentary Inquiry into the Family Law Act*, 3.4.1.3.

62 Ethnic Affairs Commission of New South Wales *Submission* June 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; Federation of Ethnic Communities' Councils of Australia Inc *Submission* August 1991; South Australian Government *Submission* September 1991.

63 See eg Federation of Ethnic Communities' Councils of Australia Inc *Submission* August 1991; North Richmond Community Health Centre Inc *Submission* July 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

64 See eg E Renouf, *The Family Court and Migrants: Analysis of a Caseload of One Hundred Migrant Cases*, Family Court of Australia, Canberra, 1983, 39.

65 See eg South Australian Government *Submission* September 1991; North Richmond Community Health Centre Inc *Submission* July 1991.

66 See Attorney General's Portfolio *Access and Equity Plan 1991-1994* 49-51; F Milne and S Zelinka, *op cit*, 1991.

67 See V Nguyen *Transcript* Springvale October 1991; also Springvale Community Aid & Advice Bureau Inc *Submission* April 1991.



resolution forms part of the work of a number of other community-based dispute resolution centres including the Community Justice Centre (NSW) and the Conflict Resolution Service in Canberra which is modelled on the centre at Noble Park.<sup>68</sup> Community-based dispute resolution services may well be more accessible to migrants and people of non-English speaking background than institutional services. They may be more effective in delivering the support and services needed. Consideration should be given to developing ethno-specific dispute resolution services which have an understanding of cultural practices. This understanding could help in settling family disputes.<sup>69</sup> These could either be separate from or within existing services. As with dispute resolution mechanisms generally, care would have to be taken to ensure that gender-based power imbalances are addressed in the development of these dispute resolution mechanisms.<sup>70</sup>

4.49. ***Intergenerational counselling and dispute resolution.*** There appears to be a particular need to help adults and children resolve differences relating to clashes of values before they become extreme. OLAFS funds 11 family mediation and family therapy services. The Australian Institute of Family Studies is currently evaluating them. This kind of help should be available when child welfare authorities become involved—it may avoid parental estrangement with older children or may help family members to come to terms with a decision that has been made by a welfare worker or court.<sup>71</sup> If the evaluation should find that families of migrants and people of non-English speaking backgrounds are under-represented among clients of these services, some research should be done on the extent to which this kind of service is appropriate for, and capable of, meeting the needs of this group of people.

4.50. ***Support for victims of domestic violence.*** Domestic violence is a problem affecting Australians of all social and ethnic backgrounds. Many submissions identify language difficulties, adherence to values associated with family loyalty and the stigma attached to seeking outside help as being factors which may make it especially difficult for victims (particularly women and children) to get the protection they need when they experience violence. Elderly women from some ethnic communities, for example, may find it particularly difficult to leave a violent situation.<sup>72</sup> Women who are not yet permanent residents and whose applications for residency were based on their marriage to, or de facto relationship with, an Australian citizen or resident may fear deportation if they leave the relationship.<sup>73</sup> Recent amendments to the Migration Regulations have addressed this problem to some extent.<sup>74</sup> Submissions to the Commission and consultations show widespread concern that much more needs to be done to meet the needs of migrant women experiencing domestic violence.<sup>75</sup> Specific issues raised for women of non-English speaking backgrounds in submissions include the following.

- ***Access to immediate protection—police and protection orders.*** Victims of domestic violence often do not call the police or apply for protection orders from a court.<sup>76</sup> One reason they do not is their inability to

68 See eg D Syme and F Hooshmand *Transcript* Canberra September 1991.

69 See A Ayan *Transcript* Melbourne October 1991.

70 See Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

71 Ethnic Affairs Commission of New South Wales *Submission* June 1991.

72 Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

73 Ethnic Affairs Commission of New South Wales *Submission* June 1991.

74 *Migration Regulations* reg 126.

75 Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; S Knox *Submission* May 1991; Department for Family & Community Services (SA) *Submission* June 1991; Casa House *Submission* July 1991; Ethnic Communities' Council of New South Wales *Submission* July 1991; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Manning District Domestic Violence Monitoring Committee *Submission* August 1991.

76 See eg Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; N Narayanan *Transcript* Perth. See also K Dang

communicate. There is a need for better arrangements to ensure that women can contact police in an emergency through interpreter services or possibly women's refuges. There is also clearly a need to use interpreters for victims of violence who contact police seeking protection<sup>77</sup> and for the recruitment of bilingual policewomen to respond to calls for help from women needing protection.<sup>78</sup> Another reason why some women do not use existing legal solutions to domestic violence is that they do not know about protection orders. The scheme piloted at Redfern Local Court (in inner city Sydney), which provides women with access to solicitors and support workers when they seek legal protection from violence, may provide a useful model.<sup>79</sup> Information about options for victims of domestic violence should be available in community languages.<sup>80</sup> In addition, there should be more co-ordination and communication between local courts which handle protection orders and the Family Court to ensure that orders made under State or Territory law are taken into account in related family matters.<sup>81</sup>

- ***Lack of adequate support on leaving.*** Many victims do not have information about how or where to get help and support. Relatives may not be available or willing to provide the support a woman might have expected in her country of origin. Some submissions suggest that many women's refuges are not yet able to meet the language, cultural and other needs of non-English speaking background and migrant women who as a result may be reluctant to use them.<sup>82</sup>
- ***Community-based follow-up support and counselling.*** An important gap in current support for victims of domestic violence is in the area of follow-up support and counselling for migrant women who have decided to separate from a violent man. This is necessary to assist women suffering from the particular isolation and depression that often occurs when migrant women leave violent situations.<sup>83</sup>

4.51. ***Access to services and support generally.*** Studies undertaken on the question of access and relevance of services to women of non-English speaking background indicate that services should

- collect information on the populations in the area serviced to guide policy and program development
- employ appropriately trained and bilingual workers
- make use of appropriate<sup>84</sup> interpreters trained in working with victims of domestic violence
- identify and maintain links with other relevant culture-specific agencies.<sup>85</sup>

4.52. ***Further community education.*** Considerable efforts have already been made by a number of women's agencies to educate the community, including people of non-English speaking backgrounds, about domestic violence. Submissions and consultation indicate that further efforts are needed to promote community discussion and to raise community awareness and understanding of the issues. Greater support should be provided to women's groups responsible for running education programs.<sup>86</sup> Education programs should be culturally appropriate or ethno-specific. Account should be taken of the fact that formal and informal community networks including

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and C Alcorso, *Better on Your Own?: A Survey of Domestic Violence Victims in the Vietnamese, Khmer and Lao Communities* Vietnamese Women's Association, 1990, 28.

77 See para 3.47-60 for discussion of the use of interpreters in the investigation of crime.

78 Casa House *Submission* July 1991.

79 See Marrickville Legal Centre & Children's Legal Service *Submission* May 1991.

80 Community legal education is discussed in chapter 2.

81 See Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Manning District Domestic Violence Monitoring Committee *Submission* August 1991.

82 eg Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Casa House *Submission* July 1991; see also K Dang and C Alcorso, *op cit*, 1990, 22.

83 eg Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; see also K Dang and C Alcorso, *op cit*, 1990, 29.

84 Submissions suggested that the gender of the interpreter is an important issue.

85 See Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; Women's Legal Resources Centre *Submission* July 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

86 See Department for Family & Community Services (SA) *Submission* June 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

community and religious leaders, and professional members may help to ensure that members of their community who are victims of domestic violence have adequate access to support.<sup>87</sup>

### **Improving access to family support services**

4.53. **Strategies.** Submissions and consultation show a remarkable consensus about the kinds of strategies services should adopt to ensure that migrants and people of non-English speaking backgrounds have adequate access to family support services. The essential features are

- good information about the nature of the population being serviced
- the recruitment of appropriately trained and bilingual workers who have had experience working with the ethnic or other groups being serviced
- the consistent use of suitable and appropriately skilled interpreters
- systematic and close links with the relevant culture-specific agencies and community-based networks to ensure good feedback between services, to gain the trust and confidence of the client population and to develop referral networks.

4.54. **Resources and access and equity.** To be effective these strategies should be built into the day-to-day operations of a service. The Commission's consultation suggests that most services are only able to give a very passing consideration to these issues. This is because resources are stretched to the limit to meet the demands placed on them. However, unless all services have clear objectives and targets, with a developed framework of specific strategies to meet those targets, they will not be in a position to attract the necessary funding to meet the more resource demanding aspects of their strategies. Governments and funding bodies will not know what resources services need to meet access and equity objectives.

### **Recommendation**

4.55. **Access and equity plans.** The Commission recommends that all federally funded family support services, including the Family Court, have a funding component included in their grants or budgets to be applied to developing comprehensive and detailed access and equity plans. Plans should outline what the service does or proposes to do to identify barriers to use of the service and what solutions it proposes to use to ensure that it meets the access and equity requirements outlined in paragraph 4.17. Plans should include the research or review process the service proposes to carry out and what changes in procedures and approaches to policy development it intends to adopt to meet its objectives. Plans should also outline how the service proposes to measure improvements in access and equity. Federal departments' access and equity strategies should include a component for ensuring that the family support services they fund have appropriate access and equity strategies.

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87 Ethnic Communities' Council of New South Wales *Submission* July 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

## 5. Marriage and similar relationships

### Introduction

5.1. Marriage is a relationship between two people which forms the basis of a family unit. Traditionally the only socially acceptable way to form a new family, it is still the most common. Marriage has significant personal, social and, for some, religious consequences. It also has legal consequences. The statutes relating to marriage, the *Marriage Act 1961* (Cth) and the *Family Law Act 1975* (Cth), provide a broad legal framework within which people may choose, by contracting a marriage, to organise their relationships, particularly their family relationships. The law governing marriage relationships is concerned with four matters

- it specifies the circumstances under which a particular relationship will be recognised as a valid marriage (whether it took place here or overseas)
- it imposes on the parties to a marriage an obligation of mutual support
- it provides for the formal ending of a marriage and the conditions to be fulfilled for this to happen (whether the marriage was ended here or overseas)
- it regulates some of the consequences of the ending of a marriage, in particular, the arrangements for children and the division of property between the parties.

This chapter proceeds on the basis that the law should, so far as possible, respect and protect the relationships that people choose for themselves. It focuses on the law relating to marriage. It examines a number of aspects of the law to ensure that it takes enough account of the diversity of relationships people choose for themselves.

### Recognition of marriages that take place in Australia

#### Existing law

5.2. A marriage that takes place in Australia is recognised as a valid marriage if both parties have capacity to marry, both parties consent to the marriage and the legal formalities are not observed. A person has the capacity to marry if he or she is of marriageable age, is not lawfully married to another person at the time of the marriage and is not related to the other party in any one of a number of prescribed ways.<sup>1</sup>

#### Age of marriage

5.3. **Marriageable age.** A marriage is not valid if either of the parties lacks capacity because he or she was not of marriageable age at the time of the marriage.<sup>2</sup> The marriageable age is 18 for men and women.<sup>3</sup> In 'exceptional and unusual' circumstances, a court may authorise a marriage if one of

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1 The prescribed relationships are:

- a person and an ancestor or descendant of the person (eg a parent or a child)
- a brother and sister, including a half-brother and half-sister.

They include relationships constituted by adoption, but not relationships by marriage: *Marriage Act 1961* (Cth) s 23B(2)-(3).

2 *Marriage Act 1961* (Cth) s 23(1)(e); s 23B(1)(e).

3 *Marriage Act 1961* (Cth) s 11.

the parties is no more than two years below marriageable age.<sup>4</sup> Generally speaking, anyone under 18 also requires the consent of his or her parents although failure to obtain consent does not render the marriage void.

5.4. ***Whether a person should be able to marry between the ages of 16 and 18.*** In DP 46, the Commission invited submissions on whether there is any justification for allowing a person between the ages of 16 and 18 to marry and, if so, in what circumstances. Most submissions agree that a court (the Family Court or a local court) should be able to authorise a person to marry before he or she has reached the age of 18 in some circumstances. Circumstances suggested include

- whether the young person is mature enough and understands the implications of marriage<sup>5</sup>
- whether the marriage is likely to be successful<sup>6</sup>
- whether the court is satisfied that both parties consent to the marriage and that neither party has been coerced into marriage<sup>7</sup>
- whether the couple has adequate financial support<sup>8</sup>
- the duration of any previous periods of cohabitation<sup>9</sup>
- the traditional cultural lifestyles of the parties.<sup>10</sup>

A number of submissions suggest that the court should be able to dispense with the age requirement if the girl is pregnant or a child has been born. Some say that the discretion should not be exercised unless the couple has had counselling to ensure that they themselves genuinely want to marry.<sup>11</sup> One submission says that the court should be mindful of a young woman's ability to resist family pressures associated with arranged marriages. If the marriage is 'arranged', the woman should be required to attend confidential Family Court counselling. She should be informed of her right under Australian law to choose her spouse and to choose when to marry. If she is hesitant about the marriage, the marriage ought not to be authorised. Counselling should also be available to the family.<sup>12</sup>

5.5. ***Recommendation.*** The Commission acknowledges that it is traditional in some communities for girls to marry before they are 18. Girls generally mature earlier than boys. However, marriage is an important relationship and has long term consequences. Postponing marriage until she is 18 would give a girl the opportunity to complete her school education and to gain some extra maturity before taking on the responsibilities of marriage. The existing law gives a couple who wish to marry before one of them has turned 18 the opportunity to have their circumstances considered objectively. It gives the court enough flexibility to make its decision taking into account the particular circumstances of the case. Among the circumstances that could be taken into account, if

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4 *Marriage Act 1961* (Cth) s 12(2).

5 eg North Richmond Community Health Centre Inc *Submission* July 1991; Catholic Multicultural Council *Submission* April 1991; Ethnic Affairs Commission of New South Wales *Submission* June 1991.

6 eg North Richmond Community Health Centre Inc *Submission* July 1991; Catholic Multicultural Council *Submission* April 1991.

7 eg Springvale Community Aid and Advice Bureau Inc *Submission* April 1991; Catholic Multicultural Council *Submission* April 1991; Marrickville Legal Centre and Children's Legal Service *Submission* May 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991; Department of Attorney-General (Qld) *Submission* July 1991.

8 eg Springvale Community Aid and Advice Bureau Inc *Submission* April 1991.

9 eg Ethnic Affairs Commission of New South Wales *Submission* June 1991.

10 eg Department of Attorney-General (Qld) *Submission* July 1991.

11 eg Catholic Multicultural Council *Submission* April 1991; M Wood *Submission* April 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; C McDiven *Submission* May 1991; Humanist Society of Victoria Inc *Submission* May 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991.

12 Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991.

applicable, are the cultural traditions of the couple. The Commission is of the view that there are no grounds for extending the circumstances in which it is appropriate for a court to give consent to a person to marry before he or she is 18. It does not recommend that the existing law should be changed.

## Polygamy

5.6. **Existing law.** A marriage that takes place in Australia is not a legal marriage if either of the parties is, at the time the marriage takes place, already lawfully married to someone else.<sup>13</sup> In general terms, it is an offence (bigamy) for a person who is already married to purport to marry another person.<sup>14</sup>

5.7. **Discussion paper proposal.** In DP 46 the Commission considered whether, consistently with its general approach to family law in a multicultural society,<sup>15</sup> the law should recognise as valid a 'marriage' entered into in Australia that would be polygamous and, if so, whether such a marriage should be recognised as valid for all purposes or for limited purposes only. The Commission proposed that such a marriage should not be recognised as a valid marriage at all.

5.8. **Proposal is anomalous.** At least one submission draws attention to the fact that the proposal is inconsistent with the principle that the law should not inhibit the formation of family relationships and should recognise and protect the relationships people choose for themselves.<sup>16</sup> There is also some inconsistency between not recognising as valid a person's second formally contracted marriage and government policy that attaches some of the consequences of a marriage to a de facto relationship that may be concurrent with a marriage of one of the parties or, indeed, with another de facto relationship. In some communities, for example, the Muslim community, a polygamous marriage may be acceptable to all the parties and recognised as a valid marriage in the community; a de facto relationship, on the other hand, may be totally unacceptable in that community.

5.9. **Polygamous marriages contracted overseas.** A marriage that is, or has at any time been, polygamous and was validly contracted overseas is deemed to be a marriage for the purposes of proceedings under the *Family Law Act 1975* (Cth).<sup>17</sup> This means that the husband or wife may take proceedings under the Act for dissolution of the marriage, custody of children of the marriage, maintenance and property settlement. Whether or not an actually polygamous marriage contracted overseas, that is, a second marriage contracted during the currency of a first marriage, is recognised as a valid marriage depends on the domicile of the parties. If a man who is domiciled in Australia marries a second wife while he is still married to the first, the marriage will be regarded as bigamous in Australia and denied recognition. However, if a polygamous marriage that is contracted overseas is valid according to the law of the place where it was contracted, it is valid in Australia if the parties were domiciled in the overseas country or, possibly, in any country where a person can contract a valid polygamous marriage (even if they were resident in Australia). Such a valid polygamous marriage may also be recognised for other purposes of Australian law, for example, inheritance law and fatal accidents legislation.

5.10. **Recommendation.** The Commission acknowledges that, within the Muslim community, a polygamous marriage may be acceptable and that marrying polygamously is more acceptable to

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13 *Marriage Act 1961* (Cth) s 23(1)(a); s 23B (1)(a).

14 *Marriage Act 1961* (Cth) s 94.

15 ie that the law should not inhibit the formation of family relationships and should recognise as valid the relationships that people choose for themselves: see para 5.1.

16 eg R Chisholm *Submission* April 1991.

17 *Family Law Act 1975* (Cth) s 6.

members of that community than entering a de facto relationship while still legally married. It also acknowledges as anomalous the Australian law that makes a second marriage a criminal offence but, in some circumstances, treats a de facto relationship in the same way as a marriage even if one or both parties is legally married or in another de facto relationship. Recognising the legal status of polygamy would, however, offend the principles of gender equality that underlie Australian laws. There is very little support for the recognition of polygamy in the Australian community.<sup>18</sup> The Commission does not recommend that the law should be changed to allow a polygamous marriage contracted in Australia to be recognised as a valid marriage.

## Bigamy

5.11. Bigamy is a criminal offence, punishable by up to five years imprisonment.<sup>19</sup> It is bigamy for a person who is married to go through a form or ceremony of marriage with a person (other than the person's own spouse) unless the person believed on reasonable grounds that his or her spouse was dead. It is also bigamy for a person to go through a form or ceremony of marriage with a person who is married, knowing or having reasonable grounds to believe that the latter person is married. A bigamous marriage is not a valid marriage. In many cases, bigamy would involve an intent to deceive the other party. Deception is not, however, an element of the offence; the critical act is going through a form or ceremony of marriage which purported to be a ceremony of marriage under Australian law.<sup>20</sup> To attempt to do so knowingly, however, constitutes one or more other offences on the part of either or both of the parties or the celebrant.<sup>21</sup> It seems doubtful whether the harm done to the other party, especially in cases where that party has not been deceived, is such as to require an additional criminal sanction. It can be argued that the offence of bigamy itself is therefore no longer necessary to deter the conduct against which it is directed. It creates anomalies; although the marriage is not valid, the parties may be in a de facto relationship and certain consequences may follow from this.<sup>22</sup> The Commission recommends that further consideration should be given to the question whether the policy that a person may not marry legally while already married should be enforced by a criminal offence.

## The marriage ceremony

5.12. ***Civil and religious marriages are recognised as legal marriages.*** Australian law recognises as a legal marriage a marriage that takes place in a religious or a civil ceremony, provided certain formalities are complied with.<sup>23</sup> Both civil and religious celebrants are authorised to solemnise marriages under the *Marriage Act 1961* (Cth).

5.13. ***Discussion paper proposal.*** In DP 46 the Commission considered whether the law should provide that a legal marriage could be contracted only in a civil marriage ceremony, distinct and separate from any religious ceremony that the parties might wish to have. Although a majority of the Commission did not favour a uniform civil ceremony, it invited submissions on the issue. The main argument in favour of the proposal is that there would be a clear distinction in the minds of the parties between the two ceremonies and between the legal (and legally enforceable) rights and obligations arising out of marriage and the promises made by the parties to a religious marriage.

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18 Most submissions to the Commission did not favour recognising polygamous marriages contracted in Australia as valid marriages.

19 *Marriage Act 1961* (Cth) s 94; see also *Crimes Act 1914* (NSW) s 94.

20 See *R v Bham* [1966] 1 QB 159.

21 Each of the parties must make a declaration that, among other things, he or she believes that there is no legal impediment to the marriage: *Marriage Act 1961* s 42 (1)(c)(ii). It is an offence, punishable by a fine of \$1000 or 4 years imprisonment, wilfully to make a false statement in such a declaration: *Marriage Act 1961* s 96 (1). It is an offence, punishable by a fine of \$500 or 6 months imprisonment, for an authorised celebrant to solemnise a marriage contrary to s 42.

22 See para 5.22-5.23.

23 The main requirements are that a month's notice must be given and that the marriage must take place in the presence of an authorised marriage celebrant and two witnesses. Generally speaking, failure to observe the formalities will not make the marriage invalid: *Marriage Act 1961* (Cth) s 42. A couple may choose to marry in a religious ceremony or not.

5.14. **Recommendation.** Consultation reveals that there is some confusion about the legal status of the promises made in a religious marriage ceremony and the distinction between those promises and the legal rights and obligations arising out of a marriage. However, the arguments in favour of retaining the existing system whereby a couple may choose to marry in a civil ceremony or in a religious ceremony conducted by an authorised religious celebrant are compelling. Submissions were generally in favour of retaining the present system.<sup>24</sup> Providing for the widest possible choice of ceremony is consistent with the general principle underlying the Commission's recommendations about family law<sup>25</sup> and is appropriate for a multicultural society. The Commission does not recommend any change to the existing law.

## Recognition of overseas marriages

### Existing law

5.15. **Overseas marriages are recognised.** Overseas marriages are recognised in Australia. The general rule is that a marriage is recognised as valid in Australia if it was valid in the country where it took place at the time it was solemnised or later became valid in that country.<sup>26</sup> Even if not, it may be recognised as valid under the common law rules of private international law.<sup>27</sup> In addition, a marriage may be recognised as valid as to form if, as a result of a breakdown of the civil administration of the place where the marriage took place, or for other specific reasons, it was impossible for the parties to comply with the local formalities.

### Problems identified by the Commission

5.16. **Problems that may arise.** In the course of this inquiry, the Commission identified a number of problems relating to the recognition of overseas marriages. Some of these were discussed in DP 46. Others came to light in subsequent consultation. They arise in the following situations

- the parties contracted a legal marriage, which was registered and in respect of which a certificate was issued, but they have lost the certificate and, as a result of civil upheaval where the marriage took place, it is not possible to get a duplicate certificate
- the parties married according to customary law at a time and in a place where registration of the marriage was a pre-requisite of validity and did not register the marriage
- the parties married according to local law at a time and in a place where there was no registration requirement and no documentation of the marriage.

5.17. **Where documentation is lost.** A marriage certificate, entry or record of a marriage (or a certified copy) issued by a competent authority in the relevant country is *prima facie* evidence of the facts stated in the document and of the validity of the marriage to which it relates.<sup>28</sup> The Commission has been told of cases where a couple has lost their documents and cannot get copies

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24 eg General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991.

25 See para 5.1.

26 The exceptions mirror the grounds on which a marriage contracted in Australia may be declared invalid, namely, one of the parties is already married or is not of marriageable age (and one of them is domiciled in Australia), the parties are within a prohibited relationship or the consent of either party was not a real consent: *Marriage Act 1961* (Cth) s 88D(2).

27 At common law, a marriage is recognised as valid if

- the formal requirements of the law of the place where the marriage was contracted are satisfied and
- each of the parties has the capacity to marry the other under the law of the place in which he or she is domiciled immediately before the marriage.

28 *Marriage Act 1961* (Cth) s 88G(1).



of them. In Cambodia before the Pol Pot regime, for example, marriage certificates were issued and records were kept. However, in the subsequent upheaval, many people lost all their possessions and official documentation was destroyed.<sup>29</sup> Family Court procedures provide for the situation where a couple has lost their marriage certificate and it is not possible to get documentary evidence of the marriage from the country where it took place. It appears, however, that in some of the cases drawn to the attention of the Commission people have been given inaccurate advice. They have not been told that it is possible to prove a marriage in circumstances where the marriage certificate has been lost and cannot be replaced. An applicant for divorce may file an Affidavit in Lieu of a Marriage Certificate together with supporting evidence.<sup>30</sup> The affidavit includes

- where and when the ceremony took place
- who was present at the ceremony
- who performed the ceremony
- the words, as well as can be remembered and translated into English if necessary, by which the parties took each other as husband and wife
- what formal record was made of the proceedings and of the marriage having taken place and what documentation of the marriage, if any, was given to the parties at the time of the ceremony
- a statement that the parties recognised each other as husband and wife and were recognised by others as husband and wife
- a statement of any secondary evidence of the marriage that may be available, for example, a copy of a passport showing that the person is married.

In a case where there was no dispute between the parties as to whether they were married, the court may accept oral evidence of this fact. It is a matter for the court whether or not it accepts the evidence.

5.18. ***Where marriage not registered as required.*** When a couple marry according to customary law but do not register their marriage with the civil authorities in circumstances where registration is a pre-requisite of validity, the issue is whether the marriage can be recognised. The general rule is that recognition depends on whether or not the marriage is recognised as valid in the place where it took place. In Vietnam, for example, a customary marriage is recognised as a legal marriage only after registration. Therefore, the marriage will not be recognised as a valid marriage in Australia unless it has been registered. Again, it appears from the Commission's consultation that some people in this situation have been given misleading advice and have been discouraged from applying for spousal maintenance and for orders relating to property. A couple whose marriage is not recognised as valid in Australia cannot be divorced in Australia. However, if a couple has gone through a ceremony that is recognisable as a ceremony of marriage but which, for some defect such as failure to register the marriage with the appropriate authorities, is not a valid marriage, it is possible to apply to the Family Court for a decree of nullity on the grounds that the marriage is void.<sup>31</sup> The court's powers to make orders for maintenance or relating to property apply equally to parties to a void marriage as to parties to a valid marriage.<sup>32</sup>

5.19. ***Where registration not required where marriage took place.*** In some countries a customary marriage is recognised as a valid marriage without its having been registered. In Papua New

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29 J Devos *Transcript* Fairfield 23 September 1991; see also V Nguyen *Transcript* Springvale 1 October 1991 concerning similar problems relating to Vietnamese people.

30 Family Court Rules O 7 r 5(2)(a).

31 *Lengyel v Rasad* (No 2) 100 FLR 1.

32 *Family Law Act 1975* (Cth) s 71.

Guinea, for example, an automatic citizen<sup>33</sup> who is not a party to an existing statutory marriage may enter into a customary marriage 'in accordance with the custom prevailing in the tribe or group to which the parties to the marriage or either of them belong or belongs'.<sup>34</sup> The legislation provides that 'a customary marriage is valid and effectual for all purposes'. It does not define customary marriage and does not lay down procedures to be observed. There is no procedure by which a certificate of marriage is issued to a couple married according to customary law. A number of submissions have drawn to the Commission's attention the situation that existed in Cambodia during the Pol Pot regime.<sup>35</sup> Mass 'onka' or marriage ceremonies, often involving up to 100 couples, were organised by local leaders in rural areas. They did not involve a person with civil 'marrying' powers and they were not documented. Nevertheless, they were sanctioned by the regime and recognised by the community.<sup>36</sup> No documentation was given to the couples and no records were kept. But the couples considered themselves to be married, their local communities considered them married and their children were regarded as legitimate.<sup>37</sup> There is no doubt that a customary marriage that comes within the Papua New Guinea legislation would be recognised as valid in Australia. There seems to be no reason why a marriage celebrated as described above in Cambodia should not be. In either case, unless the fact of the marriage is disputed by one of the parties, affidavit or even oral evidence of the parties, or one of them, would be enough to prove the marriage. However, if the existence of the marriage is in dispute, it may be difficult to prove it. Customary marriages in Papua New Guinea are established in different ways in different places and it may not be appropriate to talk of 'essential requirements' for a customary marriage.<sup>38</sup> It may be necessary to produce expert evidence as to the law as well as an affidavit and supporting evidence of the marriage. This will add considerably to the cost of proceedings.

5.20. ***Non-recognition of a marriage may cause hardship.*** The Commission has been told of many instances where the fact that a marriage is not recognised as valid under Australian law, has resulted in hardship for individuals. If the circumstances are such that the court can grant a declaration of nullity, some of this hardship is overcome. However, if a person is a party to a customary marriage that cannot be recognised and cannot be declared void, that person cannot apply for a divorce or other relief under the Family Law Act. This may have serious consequences, both personal and legal. Divorce from a perpetrator of domestic violence may give a victim of domestic violence a sense of security that she or he might not otherwise have. Whether or not a person will be entitled to the payment of maintenance for himself or herself or the alteration of interests in property will depend on whether the relationship can be characterised as a 'void' marriage or, failing that, on whether the State or Territory in which he or she lives has legislation governing de facto relationships.<sup>39</sup> A person who has come to Australia as a married person and, following the breakdown of that marriage, wants to sponsor another person for the purpose of marriage must satisfy immigration authorities that his or her marriage has been terminated.<sup>40</sup> If expert evidence is needed to establish the validity of a marriage, severe financial hardship may result because of the added cost.

## Recommendation

5.21. In DP 46 the Commission proposed that customary marriages should be recognised for some purposes, in particular, the distribution of property and spousal maintenance. That proposal was intended to overcome the difficulties experienced by people who find that their marriage is not

33 ie a person who gained automatic citizenship on Independence Day or who is a citizen by descent.

34 *Marriage Act (Ch 280)* (PNG) s 3.

35 eg Springvale Community Aid and Advice Bureau Inc *Submission* April 1991; J Devos *Transcript* Fairfield 23 September 1991.

36 V Nguyen *Transcript* Springvale 1 October 1991.

37 J Devos *Transcript* Fairfield 23 September 1991.

38 Jessop O and Luluaki J, *Principles of Family Law in Papua New Guinea*, University of Papua and New Guinea Press, 1985, 17-8.

39 See para 5.22-5.23

40 In some circumstances a court may issue a declaration of nullity: the effect of this declaration is that the couple were never married.

recognised for the purpose of family law. However, many of the problems identified by the Commission in its consultation relate to proof of marriage rather than to their validity. Practical solutions to the problems of proving a marriage have been outlined. If adopted, they would reduce the need to change the underlying rule that the recognition of overseas marriages depends on whether or not the marriage is valid where it took place. Recognising as valid in Australia a marriage that is not recognised as valid where it took place would put such a marriage on a different footing from a de facto relationship in Australia and would give the parties benefits not enjoyed by parties to a de facto relationship. Recognising as valid in Australia some marriages, but not others, that are not recognised as valid in the country where they took place may lead to uncertainties in the law and would conflict with the principles of private international law. In some cases, some of the hardship suffered by individuals whose marriages are not recognised in Australia may be overcome by a declaration that there was a void marriage;<sup>41</sup> in others, the hardship would be overcome if there were uniform legislation governing relations between de facto spouses.<sup>42</sup> For these reasons, the Commission does not recommend a change in the existing law. Instead it recommends that the Commonwealth should undertake an information campaign among communities some members of which may face special difficulty proving that their marriage is valid, namely communities whose country of origin has suffered severe social and political upheaval as a result of war. The campaign should focus on information about what sort of material should be included in an affidavit filed in lieu of a marriage certificate and what supporting evidence should be attached to it.<sup>43</sup> In addition, the Family Court should have clear practice directions on this issue.

## De facto relationships

### Existing law

5.22. *Marriage and de facto relationships.* Australian law already treats de facto relationships in the same way as it treats marriage for many purposes.<sup>44</sup> The main difference between marriage and de facto relationships, in terms of the legal consequences attaching to the relationships, concerns the financial rights and obligations of the parties towards each other, maintenance and property rights. The law that applies to the financial relations of people in a de facto relationship is State or Territory law. Some States and Territories have such laws; others do not. This means that the rights and obligations of people in a de facto relationship depend on where in Australia they live.

5.23. *State laws.* Two States—New South Wales and Victoria—and the Northern Territory have legislation governing the financial relations of people in a de facto relationship. The Queensland Law Reform Commission is reviewing its law. In New South Wales, the *De Facto Relationships Act 1984* (NSW)

- gives a broad judicial discretion to divide property between de facto spouses
- gives judicial power to award maintenance between de facto spouses
- clarifies the validity and binding effect of cohabitation and separation agreements.<sup>45</sup>

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41 This would enable the court to make orders about property and maintenance.

42 See para 5.26.

43 See ch 2 for a discussion and recommendations about community education.

44 Disputes concerning guardianship and custody, maintenance of, and access to, children of a de facto relationship are determined by the Family Court. In addition, in many areas of government policy, a man and a woman living in a de facto relationship are, in principle, treated in the same way as a married couple.

45 The legislation applies to 'significant' or 'substantial' de facto relationships, past or present. This condition is satisfied if, among other things, the relationship has lasted for at least 2 years or the parties to the relationship have had a child.

The Victorian legislation is more limited. The *Property Law Act 1958* (Vic) provides only for the discretionary division of real property (for example, a house) between de facto spouses. Other matters, for example, the division of personal property and maintenance, are left to the operation of the common law. The provisions of the Northern Territory legislation<sup>46</sup> are similar to those in New South Wales.

## Discussion paper proposal

5.24. ***The proposal.*** In DP 46, the Commission considered whether there is a case for extending provisions relating to the adjustment of rights in property and maintenance rights to couples in a de facto relationship. It proposed that these provisions should be extended and that parties to such a relationship should have the right to make a valid agreement about their financial relations.

5.25. ***Response to the proposal.*** Response to the proposal is mixed. Some submissions would support going further than the Commission's proposal and extending all the provisions of the *Family Law Act 1975* (Cth) to persons in de facto relationships.<sup>47</sup> On the other hand, some argue that it is inconsistent to make a proposal that would have the effect of further assimilating marriage and de facto relationships, yet not to recognise as valid polygamous marriages.<sup>48</sup> Others consider that the Commission's proposal further erodes the institution of marriage by blurring the distinction between marriage and de facto relationships.<sup>49</sup>

## Recommendation

5.26. The Commission is of the view that the law relating to de facto relationships should be uniform throughout Australia. Within the context of this inquiry, the main factors that support this conclusion are that it is consistent with the general principle that the law should support people in the relationships they have chosen for themselves and that it would alleviate the problems of people who regard themselves as married but whose 'marriage' is nevertheless not recognised as a marriage. A person whose overseas customary law marriage is not recognised in Australia and who is unable to produce enough evidence to prove a valid marriage or obtain a decree of nullity will have different rights to property depending on which State or Territory the couple has settled in. The law relating to marriage is the same throughout Australia. The law relating to custody and maintenance of children and the Child Support Scheme is the same throughout Australia. This law applies whether or not the parents of a child are married and the Family Court can deal with them on a uniform basis throughout Australia. But the law applying to the property and maintenance rights of persons in de facto relationships is not uniform. A person who is in a de facto relationship in New South Wales may have rights under the legislation if he or she remains in New South Wales; if the person moves to South Australia, for example, those rights will be lost.<sup>50</sup> The case for uniformity is overwhelming, but the Commonwealth does not have direct power to legislate in respect of de facto relationships. The Commission recommends that the Commonwealth take up this issue with the States and Territories and put it on the agenda of the Standing Committee of Attorneys-General with a view to urging the development of uniform national law.

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46 *De Facto Relationships Act 1991* (NT).

47 eg South Brisbane Community Legal Service Inc *Submission* July 1991.

48 eg S Ahmed *Submission* April 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991.

49 See eg Endeavour Forum *Submission* February 1991; G Blight *Submission* April 1991; S Ahmed *Submission* April 1991; Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee *Submission* August 1991; Filipino Women's Group of the Filipino Australian Club of Perth Inc *Submission* April 1991; Presbyterian Women's Association of Australia in NSW *Submission* April 1991; Australian Family Association (NSW) *Submission* April 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Canon Law Society of Australia & New Zealand *Submission* June 1991; Rev LJ Percy *Transcript* Brisbane 14 May 1991; Dr K Smith *Transcript* Brisbane 15 May 1991.

50 *De Facto Relationships Act 1984* (NW) s 15.

## Dissolution of marriage

### Giving legal recognition to customary and religious divorce

5.27. **Existing law.** Unless one party has died, two people who have married remain married until the marriage is dissolved or annulled<sup>51</sup> by a court.<sup>52</sup> Either spouse may institute proceedings for divorce, with or without the consent of the other, on the sole ground that the marriage has broken down irretrievably. This is held to have been established if, and only if, the court is satisfied that the parties have separated and lived apart for at least 12 months.<sup>53</sup> A religious divorce or annulment is not required; nor is it legally recognised.<sup>54</sup> Nor is a legal divorce effected under procedures for customary divorce that exist in some communities.<sup>55</sup>

5.28. **Discussion paper proposal.** In DP 46 the Commission considered whether a dissolution of a marriage effected in Australia under religious or customary law should be recognised as valid under Australian law and concluded that it should not be. Very few submissions support the legal recognition of religious or customary divorce.<sup>56</sup> One submission suggests that the system could be ‘privatised’ by the appointment of authorised ‘divorce celebrants’.<sup>57</sup> On the other hand, many submissions comment that it is too easy to get a divorce in Australia and suggest that the separation period should be longer than 12 months or that divorce should be based on fault.<sup>58</sup>

5.29. **Recommendation.** There should be a single mechanism, that provided by the *Family Law Act 1975* (Cth), for getting a divorce in Australia. This does not prejudice any capacity a person who has retained overseas citizenship or domicile might have to get a divorce overseas. Recognising religious and customary divorce as legally valid would be consistent with the principles underlying the Commission’s recommendations. However, there would be significant practical difficulties. Criteria would have to be established to determine the circumstances in which a religious or customary divorce would be recognised as valid. Administrative machinery would have to be set up. Mechanisms for ensuring that the interests of any children were safeguarded would have to be worked out. The cost of this is not warranted given that very few people want the change. For these reasons, the Commission does not recommend any change to the existing mechanism for divorce.

### Recognising Australian divorces overseas

5.30. The Commission’s attention has been drawn to the fact that an Australian divorce granted to an Australian citizen or resident will not necessarily be recognised overseas. For example, an Italian-born Australian citizen’s divorce may not be recognised in Italy. Recognition of an Australian divorce in another country depends on the law of the other country. People with overseas citizenship should be aware of the rules affecting recognition of foreign divorces in the overseas

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51 In which case the purported marriage did not ever exist in law.

52 The only exception to this is that, in certain circumstances, a decree of dissolution or annulment of marriage obtained overseas is recognised in Australia.

53 *Family Law Act 1975* (Cth) s 48(2).

54 A number of religious denominations have procedures by which an annulment or dissolution of a marriage may be granted or recognised. The Catholic and Greek Orthodox churches have tribunals which are empowered to grant religious annulments (in the case of the Catholic church) and religious divorces (in the case of the Greek Orthodox church). Members of the Jewish faith accomplish their own divorce by the mutual delivery and acceptance of the ‘gett’. Under Islamic law, the husband may unilaterally divorce his wife; a judicial divorce may be available to the wife in limited circumstances; otherwise, the husband must consent.

55 eg in some Chinese communities.

56 Those that do, want the law to recognise divorces effected under Islam which provides for a separation period of only three months. The combined effect of a 12 months separation period before divorce, a prohibition on polygamy and community antipathy towards de facto relationships makes life difficult for Muslims who want to marry someone else shortly after a marriage ends.

57 Women’s Legal Resources Centre *Submission* July 1991.

58 eg Endeavour Forum *Submission* February 1991.

country when they apply for a divorce in Australia. An Australian divorce may be granted on the basis of the applicant's or the respondent's Australian domicile, citizenship or residence of at least 12 months. If a country to which an overseas-born Australian citizen may wish to return will recognise an Australian divorce granted on the basis of that person's Australian citizenship, he or she should apply for the divorce on the basis of Australian citizenship.<sup>59</sup> The Commission makes no recommendation for change.

## Removing barriers to remarriage

### The gett

5.31. Under Jewish law, a divorce can be accomplished only by the parties. It is effected by the formal delivery by the husband and the acceptance by the wife of a Bill of Divorcement (a 'gett') under the supervision of a Rabbinical Court, the Beth Din. The parties are divorced and free to marry again after the gett has been delivered and accepted. Until such a divorce is effected, a man may marry again only if he obtains a dispensation from the Rabbinical Court. A woman may not remarry unless her husband dies. If she does (in a civil ceremony) any children of any subsequent marriage will be regarded as 'illegitimate' in the Jewish community. Because both the giving and the receiving of the gett is voluntary, either party may put considerable pressure on the other in negotiations about the custody of the children and the division of property.<sup>60</sup> The problem has been raised in the Family Court on several occasions. The Court has accepted an undertaking from a husband to do everything necessary to give his wife a gett<sup>61</sup> and has ordered a wife to appear before the Beth Din and accept a gett.<sup>62</sup> On the grounds that the wife's opportunity of remarriage was reduced by the husband's refusal to deliver a gett, the Court ordered that the lump sum maintenance payable by a husband was to be reduced if he did so.<sup>63</sup>

### Discussion paper proposal

5.32. ***The proposal.*** In DP 46 the Commission considered whether the civil law should be used to compel a party within whose power it is to grant a religious divorce to do so when the marriage has been dissolved under civil law. The Commission was divided on the issue. A majority of the Commission proposed that the Court should have a discretion to adjourn an application for a divorce on the ground that the applicant had not done everything within his or her power to remove any religious barriers to the spouse's remarriage. Some members of the Commission took the view that the court should be given further powers to compel a spouse to grant a religious divorce. One member opposed any mixing of religious and civil law.

5.33. ***Response to the proposal.*** This proposal elicited considerable comment most of which supported the proposal in principle. The submissions reflect the division of opinion within the Commission. They fall into three groups: opposition to the proposal, support for the proposal as made and submissions to the effect that the proposal does not go far enough.

5.34. ***Grounds of opposition to the proposal.*** A number of submissions reject the proposal on the ground that civil and religious law should remain separate.<sup>64</sup> One submission notes that introducing

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59 The person would have to produce his or her naturalisation certificate to prove citizenship.

60 A similar problem arises for Muslim women whose divorce may not be recognised within the community until the husband grants her a religious divorce.

61 *Schulsinger and Schulsinger* (1977) FLC 90-207.

62 *In the marriage of Gwiazda*, unreported, 23 February 1983 (Emery SJ).

63 *Steinmetz and Steinmetz (No 2)* (1981) FLC 91-079.

64 eg Catholic Multicultural Council *Submission* April 1991; Presbyterian Women's Association of Australia in NSW *Submission* April 1991; Baptist Union of Queensland *Submission* May 1991; Dr H A Finlay *Submission* May 1991; Sydney Anglican Diocese, Ethnic Workers

principles of equality, desirable though they may be, may amount to superimposing western culture on a traditional religious culture and be in conflict with the aims of multiculturalism.<sup>65</sup> Two Jewish organisations oppose the proposal: one on the ground that there is no need to obtain a gett to effect the dissolution of a Jewish marriage<sup>66</sup> and the other on the ground that, as most members of the Jewish community in Australia are not orthodox Jews, the proposed change would have little effect.<sup>67</sup>

5.35. **Alternative strategies.** Some submissions suggest alternative strategies. Pre-marital and post-marital agreements about granting a gett should be enforceable.<sup>68</sup> Consideration should also be given to adjourning ancillary applications, for example, property applications and applications for custody of children, where one party recalcitrantly fails to do everything within his or her power to remove religious barriers to divorce.<sup>69</sup> An ethnic and religious affairs ombudsman should be appointed to the Family Court. His or her duties would include providing multicultural advisory and support service to the court, legal professionals and the parties in dispute and developing and delivering a volunteer counselling service for disputing parties.<sup>70</sup>

5.36. **Last resort.** Some submissions suggest that, if the proposal were adopted, the discretion should be exercised only in limited circumstances. One submission suggests it should be exercised only if the parties are able to demonstrate that grounds exist for the grant of a religious divorce and it is in the power of one party to effect the divorce but he or she refuses to do so.<sup>71</sup> Another suggests it should be reserved for cases where failure to do so would seriously disadvantage or penalise one of the parties.<sup>72</sup>

5.37. **The proposal does not go far enough.** A number of submissions support the proposal as far as it goes but suggest that it is inadequate. The proposal does not address the difficulties faced by an applicant for divorce whose spouse refuses to deliver or to accept the gett.<sup>73</sup> Many of these suggestions urge the Commission to adopt the Canadian model.<sup>74</sup> Submissions also referred to the difficulty in changing the Jewish law and the need for the civil law to adopt a positive approach to the problem.<sup>75</sup>

## Overseas responses

5.38. **Canada.** Legislation providing for no fault divorce came into effect in Canada in June 1986. Following consultation with all major religious groups, the *Divorce Act 1985* (Can) was amended to give the court the power to dismiss any application, and strike out any pleadings and affidavits, filed

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Forum *Submission* May 1991; cf Ethnic Affairs Commission of New South Wales *Submission* June 1991 which accepts the principle of separation of civil and religious law but states that adjournment of an application for divorce is a legitimate function of the civil law when the fundamental freedom of an individual is deliberately inhibited by the spouse seeking a civil divorce.

65 Department of the Attorney-General (Qld) *Submission* July 1991.

66 Jewish Secular Humanistic Society *Submission* August 1991.

67 National Council of Jewish Women of Australia *Submission* June 1991.

68 eg A Strum *Submission* April 1991; T Schwarcz *Submission* May 1991.

69 Law Council of Australia, Family Law Section *Submission* May 1991.

70 National Council of Jewish Women of Australia *Submission* June 1991.

71 Justice JV Kay *Submission* March 1991.

72 Dr HA Finlay *Submission* May 1991.

73 eg Executive Council of Australian Jewry, Jewish Women's Issues Committee *Submission* April 1991; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; Perth Jewish Ecclesiastical Court *Submission* April 1991; T Schwarcz *Submission* May 1991; G Hammer *Submission* April 1991; Dr V Ranki *Submission* April 1991; A Berger *Submission* April 1991; Rabbi JB Kamins *Submission* April 1991; Women's International Zionist Organisation NSW *Submission* April 1991; Australian Federation of Women's International Zionist Organisations *Submission* April 1991; Australian Jewish Welfare Society *Submission* April 1991; A Gordon *Submission* April 1991; I Nemes *Submission* April 1991; Professor S Encel *Submission* April 1991; National Status of Women Council *Submission* May 1991; A Naylor *Submission* May 1991; South Australian Government *Submission* September 1991; L Rosenblum *Transcript* Brisbane 14 May 1991.

74 See para 5.38.

75 L Rosenblum *Transcript* Brisbane 14 May 1991.

by a spouse who has failed to remove all religious barriers to the remarriage of the other spouse. The legislation was expected

- to place spouses on a more equal footing in civil divorce actions
- to encourage women in particular to exercise fully their rights under the law and
- to maintain the integrity of the *Divorce Act 1985* (Can) by helping to ensure that refusing to accept or to give a religious divorce is not used as a bargaining tool to gain concessions on child custody and access, or monetary support.

Under the legislation a spouse may serve on the other spouse and file with the court an affidavit stating

- the nature of any barriers to his or her religious remarriage, the removal of which is within the other spouse's control
- he or she has removed, or has indicated a willingness to remove, any religious barriers to the remarriage of the other spouse, the removal of which is within his or her control, and the date and circumstances of the removal or indication of willingness to remove
- he or she has, in writing, requested the other spouse to remove all religious barriers, the removal of which is within the other spouse's control, to his or her remarriage
- the date of the request and
- the other spouse, despite the request, has failed to remove the barriers.<sup>76</sup>

If a spouse who has been served with such an affidavit does not within 15 days (or longer with leave of the court) serve on the other spouse and file with the court an affidavit stating that the barriers have been removed and satisfy the court that they have been removed, the court may make certain orders. It may, subject to any terms it considers appropriate, dismiss any application and strike out any other pleadings or affidavits filed by the spouse under the Act.<sup>77</sup> If the court is satisfied that a person has

genuine grounds of a religious or conscientious nature for refusing to remove the barriers

the court may decline to make any orders.<sup>78</sup>

5.39. **New York.** In New York, the court cannot enter a judgment of annulment or divorce unless any barriers to religious remarriage by a spouse, the removal of which are within the control of the other spouse, have been removed. The *Domestic Relations Law* s 253 provides that, in a contested divorce, any applicant whose marriage was solemnised by a religious celebrant must file a statement that

- he or she has taken, or will take, all steps within his or her power to remove all barriers to the other spouse's remarriage or
- the other spouse has waived in writing the applicant's obligation to file the statement.

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<sup>76</sup> *Divorce Act 1985* (Can) s 21.1(2).

<sup>77</sup> *Divorce Act 1985* (Can) s 21.1(3).

<sup>78</sup> *Divorce Act 1985* (Can) s 21.1(4).



In an uncontested divorce, both parties must file such a statement or waive the obligation of the other party to do so. A final judgment of divorce or annulment cannot be entered unless the court receives the statements. Even if the statements have been filed, final judgment cannot be entered if the person who solemnised the marriage swears that, to his or her knowledge, the applicant has failed to take all steps within his or her power to remove all barriers to the other party's religious remarriage.<sup>79</sup>

## Recommendation

5.40. ***Should the law be changed?*** The first question is whether legislation should give the court specific power to take measures, whatever they be, to try to compel a person to perform a religious act or to undertake a religious proceeding. It may be argued that the Family Court has adequate powers to deal with the situation. The *Family Law Act 1975* (Cth) s 114 gives the court power to grant injunctions. In some proceedings, this includes the power to grant an injunction in aid of the enforcement of a decree.<sup>80</sup> Failure to comply with an injunction is contempt of court. A person who is in contempt because he or she has failed to comply with a court order may be imprisoned until he or she complies with the order. In the Commission's view, a person who refuses to deliver or accept a gett should not be at risk of imprisonment. Imprisonment is not an appropriate sanction in the circumstances and may well ensure that the person becomes a religious martyr. For this reason, the court should have alternative powers to deal with the situation. On the other hand, it may be argued that to give the court specific powers to deal with the situation is inconsistent with the traditional separation between church and state that has been maintained in western democratic legal systems in modern times at least. However, to the extent that the Family Court has, on a few occasions, used its powers to do what it can to ensure that a man delivers, or a woman accepts, a gett<sup>81</sup> that principle has given way to the interests of the party who may be prejudiced by the wilful refusal of the other to do what he or she has power to do. A woman whose husband refuses to deliver a gett is able to remarry according to civil law; her subsequent marriage is a valid marriage. Her position is no different from that of a woman whose divorce is not recognised by the Catholic church and who is unable to remarry in a Catholic church. On the other hand, delivery and acceptance of the gett, unlike the granting of a Catholic annulment, is within the power of the parties alone. Only the husband can deliver, and the wife accept, a gett. The Rabbinical Court can cajole and persuade but, in a secular society, it has no powers of enforcement. In the context of civil divorce proceedings, refusal to deliver or accept the gett can be used as a tool to apply emotional and financial pressure on the other party in negotiations between them about the custody of, and access to, children, spousal maintenance and property. This is inappropriate and its inappropriateness is widely recognised in the Jewish community. Failure to obtain a gett means that a woman who is divorced under the law cannot fully enjoy the benefits of her divorce not because this is not allowed under religious law but because her former husband will not do what is necessary to make it possible. For these reasons a majority of the Commission<sup>82</sup> favours changing the law in a way that would ensure that she can.

5.41. ***Options for reform.*** There are a number of options for reform. The majority view expressed in the discussion paper was that the court should have a discretion to adjourn an application for divorce unless the applicant had done everything in his or her power to remove any religious barriers to the spouse's remarriage. The discretion would be exercisable only when the person refusing to deliver, or accept, the gett was the applicant for the civil divorce. It would not be

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79 For a discussion of the New York legislation, see M Feldman, 'Jewish Women and Secular Courts: Helping a Jewish Woman to Obtain a Get' (1989-90) 5 *Berkeley Women's Law Journal*, 139.

80 *Family Law Act 1975* (Cth) s 114(3); see also *In the marriage of Gwiazda*, unreported, 23 February 1983 (Emery SJ).

81 See para 5.31.

82 Justice Nygh dissents

exercisable if the respondent to the divorce proceedings failed to deliver, or accept, the gett. Either party, applicant or respondent to the divorce proceedings, should have this protection. The discretion would be exercisable only in the context of divorce proceedings and not in any subsequent proceedings. One party may be vulnerable to pressure from the other to agree to a disadvantageous property settlement in return for a promise to deliver or accept a gett. A majority of the Commission is now of the view that the discussion paper proposal does not go far enough.<sup>83</sup> However, the Commission does not favour the New York approach. That law imposes an obligation on all persons married in a Jewish religious ceremony, whether or not the couple has come to an amicable arrangement between themselves. In the Commission's view, the statute should apply only when the parties are in dispute. To this extent, a majority of the Commission favours the approach adopted by the Canadian legislature. However, the discretion given the court in the Canadian legislation is too broad. It would allow the court to dismiss an application or strike out pleadings in cases involving children. Such cases should be decided on the basis of the best interests of the child and the court's capacity to take account of matters relevant to this should not be prejudiced. The Canadian approach would, for example, allow a court to strike out a party's defence in property proceedings and make orders for the distribution of property as if the defence had not been filed. This is not appropriate in the circumstances and contrary to the principles of natural justice. The Court's discretion should be limited to adjourning proceedings and, in divorce proceedings, ordering that a *decree nisi* does not become absolute until the court is satisfied of certain matters.

5.42. **Recommendation.** A majority of the Commissions<sup>84</sup> recommends that the *Family Law Act 1975* (Cth) should be amended to provide that, on application, in specified circumstances, a *decree nisi* does not become absolute until the court is satisfied of one of three grounds. In any other proceedings, except a proceeding relating to a child, in the specified circumstances, the court should have the power to adjourn the proceedings. The circumstances are

- the applicant has removed, or has undertaken to remove, any impediments to the other party's remarriage that it is solely within the applicant's power to remove and
- the applicant has asked the other party to remove a specified impediment to the applicant's remarriage that it is solely within the other party's power to remove and
- the other party has not complied with the request.

Before the court may order that the *decree nisi* should become absolute, or continue to hear the proceedings before the end of the adjournment, the court must be satisfied of one of the following

- the impediment has been removed or
- the other party has genuine grounds of a religious or conscientious nature for not removing the impediment or
- there are circumstances because of which the *decree nisi* should become absolute, or the court should continue the hearing of the adjourned proceedings, even if the court is not satisfied of one of the matters above.

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83 Most submissions support the Commission's view.

84 Justice Nygh dissents from this recommendation.

## Marriage contracts

### Pre-marriage contracts not enforceable

5.43. The law encourages a couple whose marriage has ended to come to an agreement about how their property should be distributed and, where appropriate, what arrangements should be made about maintenance. However, such agreements made before the marriage has taken place are not enforceable.

### Discussion paper proposal

5.44. In DP 46 the Commission proposed that pre-marriage contracts governing the distribution of property in the event of the dissolution of the marriage should be enforceable. This would be subject to a provision which would empower the court to set aside the contract if it would cause substantial injustice having regard to particular matters. The Commission has already made this recommendation in its 1987 report *Matrimonial Property*.<sup>85</sup> Consideration of the question of substantial injustice would be limited to the financial aspects of the agreement. It would be determined taking into account

- the fairness and reasonableness of the agreement, both at the time it was made and in the light of changes in circumstances since that time
- whether or not the parties had independent legal advice at the time it was made and
- whether enforcing the agreement would leave one of the parties reliant on social security for maintenance.

### Response to the proposal

5.45. Most submissions support the proposal in principle.<sup>86</sup> One submission would restrict the property that could be subject of a pre-marriage contract to property which is to be held separately by the parties.<sup>87</sup> Persons considering entering into a pre-nuptial agreement should each receive independent legal advice as to the implications of the contract.<sup>88</sup> A number of submissions suggested alternative criteria that should be taken into account in deciding whether the contract should be enforceable.<sup>89</sup> The main ground of opposition to the proposal is that pre-marriage contracts, by providing for the contingency of the dissolution of the marriage, are inconsistent with the notion that marriage is a life-long commitment<sup>90</sup> and would inevitably have a destabilising effect on the relationship.<sup>91</sup>

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85 ALRC 39.

86 eg Family Law Council *Submission* September 1991; R Chisholm *Submission* April 1991; Dr AT Kenos *Submission* April 1991; Filipino Women's Group of the Filipino Australian Club of Perth Inc *Submission* April 1991; Migrant Women's Interests Committee WA *Submission* May 1991; Law Council of Australia *Submission* May 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Queensland Law Society Inc, Family Law Committee *Submission* June 1991; Ethnic Affairs Commission of New South Wales *Submission* June 1991; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; South Australian Government *Submission* September 1991.

87 Canon Law Society of Australia and New Zealand *Submission* June 1991.

88 Ethnic Affairs Commission of New South Wales *Submission* June 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991.

89 eg Law Council of Australia, Family Law Section *Submission* May 1991; Dr HA Finlay *Submission* May 1991; Marrickville Legal Centre and Children's Legal Service *Submission* May 1991.

90 eg The Brethren *Submission* April 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991.

91 eg Baptist Union of Queensland *Submission* May 1991; Dr K Smith *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* May 1991.

## **Recommendation**

5.46. Making pre-marriage contracts enforceable is consistent with the encouragement given by the law to divorcing couples to make their own arrangements about property and maintenance during the course of the marriage and on dissolution within the framework of the law. It is also consistent with the general principles underlying the recommendations in this report. In some communities, pre-marriage agreements about property are made as a matter of course and taken very seriously by the parties themselves and their families. There would be no compulsion on people who did not want to make such an agreement to do so. For many, an enforceable agreement provides a degree of security. However, there must be adequate safeguards to ensure that an agreement is not enforced if to do so would cause substantial injustice. The Commission recommends that pre-marriage contracts governing the distribution of property in the event of a dissolution of the marriage should be enforceable unless a court decides that enforcement would cause substantial injustice. For these reasons and for the reasons advanced in its earlier report, *Matrimonial Property*, the Commission reaffirms that the recommendation made in that report should be implemented.

## 6. Children

### Introduction—responsibility for children

#### Introduction

6.1. **Overview.** Parents have primary responsibility for the care and welfare of children. The law gives them the powers necessary to meet those responsibilities. The law does not set a particular standard which parents must meet in caring for their children. Instead, it sets the general standard of welfare or the ‘best interests of the child’. It assumes that parents will act in the best interests of their children and gives them considerable autonomy to do so. However, the powers of parents are not unlimited. There has been a gradual reduction of the once nearly absolute rights and authority of fathers over children, with the recognition of the equality rights of women, the growing autonomy of children, the gradual assumption by the law of a more protective role over children and the increasing priority given to the welfare principle.

6.2. **Legislation.** The *Family Law Act 1975* (Cth) is part of the law relating to children. It also includes State child welfare and adoption law. Both family and child welfare law emphasise the parent-child relationship. A new element in considering the law is the UN Convention on the Rights of the Child (CROC).

#### Role of parents

6.3. **Parents have responsibility for their children.** In line with principles of sex equality, the powers and responsibilities of parents in relation to their children are jointly held. This position applies whether or not the parents are married.<sup>1</sup> Parents have a bundle of responsibilities for, and powers in respect of, their children. These include responsibility for meeting the day-to-day needs of their children, including the need for food, clothing and housing and health and medical needs, emotional needs and the power to discipline, educate and make major long term decisions about the child’s health, education and religious upbringing. Parents also have a duty to maintain their children financially. The term ‘custody’, for the day-to-day care of, and ‘guardianship’, for the long term powers and responsibilities for, children are used in the Family Law Act as ways of dividing the totality of powers and responsibilities. When combined, these are the responsibilities and duties that parents jointly hold and exercise autonomously in the absence of any court order.

6.4. **Limits on parental responsibility.** The main limit to parental powers and responsibilities is that they must be exercised for the child’s benefit. Further, the law treats parental authority as diminishing over time. As children gain in age and maturity, the law expects parents to recognise their increasing autonomy. These limitations are not expressed in the law, but are what underlie the law’s list of circumstances when it will intervene. In fact, however, parents have considerable autonomy to decide what is in a child’s interests.

6.5. **The state’s responsibility.** The state accepts ultimate responsibility for children. The law may intervene in, and may take over, the parental role, or direct how it is to be exercised, when parents

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1 Except in Western Australia where different rules apply when the parents are not married.

- fail to carry out their responsibilities, or abandon their child, and their child's welfare is at risk
- cannot agree about their children or
- wish to transfer, or take on, responsibility for a child (adoption).

The state also supports the parental role in various ways.

## **The present law—when does the law intervene?**

### **Risk to a child's welfare**

6.6. *Categories of risk.* The law provides for state intervention to protect children when

- parents have not protected or are unlikely to protect their child from physical, emotional, psychological or intellectual harm
- a child has been abandoned, or the parents are dead or incapacitated and the child is left without suitable care
- a child fails to attend school
- there is a serious breakdown in the relationship between parents and their child
- parents make decisions about particular matters which may give rise to long term and fundamental risks for the welfare of a child, for example, by refusing medical treatment such as blood transfusion.<sup>2</sup>

6.7. *How intervention works.* Legal intervention to protect children may happen in a number of ways. Social and welfare workers generally play the most active role in welfare matters. When the relevant authorities (police or a welfare department officer) are notified that a child may be in need of protection they investigate. If they think it is necessary, they can take a child into safe custody until application for a protection order is made to a court. Welfare workers or others may start court proceedings in the welfare jurisdiction. The court then makes a decision which may limit the exercise of parental power.

6.8. *What is taken into account in decisions about intervention.* The welfare of the child is the central concern of the court in considering protection applications. The court generally must take into account a number of factors which may be relevant to welfare

- the importance of maintaining the relationship of a child with his or her parents and family
- the need to keep a child in the home wherever possible
- the need to maintain continuity of education or employment
- in some cases, the wishes of the child
- the importance of cultural continuity, especially for Aborigines and, in some cases, for other cultural groups.

The law also requires that similar factors govern the decisions of welfare workers.

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2 Sterilisation of intellectually disabled children is a situation where the law is able to interfere, but the question whether the court's consent is required to carry it out is now before the High Court. It is not clear on what basis cases get to court or how parents would know that a court's consent might be needed.

6.9. ***Results of the law's intervention.*** If a court finds that a child is in need of protection, it can make a range of orders. These include the partial or total removal of parental power and control from the child's parents, and giving it to the state or some other designated person. Orders may be permanent or temporary. Where there is a question of the appropriateness of a parental decision about medical treatment or an operation, the court may give a legally effective consent to the treatment or operation despite parental objection or may order the parents not to allow it to be carried out.

## **Parents divorce or separate**

6.10. ***Intervention on divorce.*** When parents seek a divorce, the court has a duty to satisfy itself that proper arrangements have been made for the welfare of children of the marriage before a decree of divorce becomes final. Unless there are special circumstances, a decree does not become final unless the Family Court declares itself so satisfied.<sup>3</sup> The failure of the non-custodial parent to make adequate financial arrangements for the child may be a reason to refuse or delay the granting of a decree.

6.11. ***Intervention when parents cannot agree about children.*** When parents cannot agree about what arrangements to make for their children, they can apply under the Family Law Act (usually to the Family Court) to decide the matter for them.<sup>4</sup> Disputes about children, whether their parents are married or not, can be taken to the Family Court. A child or any person who has an interest in the welfare of the child may also apply to the court for a decision.<sup>5</sup> The court can make decisions about custody, guardianship or maintenance of a child and about access by the non-custodial parent. Although the law will intervene in these situations, it recognises that it is better if parents can reach their own decision. It therefore provides for counselling and mediation, processes in which parents are helped to reach agreement.

6.12. ***What the court takes into account.***<sup>6</sup> In proceedings about children under the Family Law Act, the court must regard the welfare of the child as the paramount consideration. It must consider any wishes expressed by the child: these may be reported by a court counsellor. The Act also provides that the child's views can be put to the court by a separate representative. Other factors the court must consider are

- the relationship of the child with each of the parents and other persons
- the effect of separation of the child from the people the child has been living with
- the effect of any changes in existing arrangements for the care of the child
- the attitude of the parents to their duties and responsibilities as parents
- the capacity of the parents or others to meet the needs of the child
- the need to protect the child from abuse or psychological harm, and
- any other relevant fact or circumstance.

No express provision is made about cultural continuity or religious upbringing. They are subsumed under the general welfare principle. While preference is not given to one culture or one religion over another, factors related to religious observance or to cultural background are sometimes considered to have a bearing on the welfare of the child.

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3 *Family Law Act 1975* (Cth) s 55A.

4 Magistrates and Local Courts also have jurisdiction although it is not often exercised in contested matters.

5 In Western Australia a State law applies to children of parents who are not married.

6 s 64, 62A, 65.

6.13. ***Orders the court can make.*** The court can make any order about these matters it thinks proper. It can also make orders placing the child in the custody of, or giving guardianship to, any person or any of two or more persons jointly. A non-custodial parent or other person may be granted the right of access visits to a child.

6.14. ***Special provisions for child support.*** In the last three years a number of changes have been made to family law to ensure that parents meet their duty to maintain their children after separation. Under amendments to the Family Law Act, the obligation of a parent to maintain his or her biological child is to be given a high priority and is not lessened by the fact that the child, or the other parent, is receiving a social security pension or benefit. Parents who separated before 1 October 1989 may make child maintenance applications to the Family Court or to a Local or Magistrates court. Orders and agreements can be registered with the Child Support Agency for collection. Parents who separated after 1 October 1989 and cannot agree on the level of maintenance to be paid may apply for an assessment to the Child Support Agency.<sup>7</sup> The amount of maintenance a non-custodial parent has to pay is determined by a formula. The Child Support Agency collects these payments and takes action against those who try to avoid their obligations.

6.15. ***Special provisions for international abduction.*** Where one parent has abducted a child from another country to Australia or vice versa, there may be a dispute between the parents about which country should exercise jurisdiction to decide guardianship and custody. The 1980 Hague Convention on the Civil Aspects of International Child Abduction now governs this question as part of Australian law. If an application is filed in the Family Court in circumstances to which the Convention applies, the court must, unless certain exceptions apply, order the child returned to the country from which he or she was wrongfully removed. The grounds on which a court may refuse to order the return of the child are specifically defined and allow little scope for the exercise of discretion. This law only applies where children are abducted to Australia from countries that are signatories to the Convention.<sup>8</sup> Special provisions apply to the recognition of custody orders made in certain other overseas countries.<sup>9</sup> Where children are abducted to Australia from countries other than these, the court applies the principle that the welfare of the child is the paramount consideration in deciding its order.

## **Adoption and the transfer of parental powers**

6.16. ***When the law intervenes.*** The law makes special provision for the transfer of full legal responsibility for children from one person to another. All jurisdictions have adoption legislation to regulate the situation where a parent wishes permanently to transfer legal responsibility, or a person wishes to acquire permanent responsibility, for a child. In the past there was a large number of Australian children available for adoption. The main source of adoptees today is from overseas. Adoption law is now also used to remake families after breakdown. In a trend to more open adoption, information about natural parents and children and access to them is more freely available to both parents and children than it once was.

6.17. ***Inter-country adoption.*** Now that inter-country adoption is the main form of adoption in Australia, there is growing concern about the problems a child who is removed from its country of origin and cultural environment may experience. This concern has led to tighter legislation about inter-country adoption. The Hague Conference on Private International Law is working on a

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7 A sole parent in receipt of a means tested pension or benefit generally must apply unless the agreed amount is similar to the assessed amount.

8 As at December 1991 there were 20.

9 eg Papua New Guinea and most US states; see *Family Law Act 1975* (Cth) s 68.



convention on adoption of children from abroad.<sup>10</sup> Meanwhile, the matter is regulated by a combination of State laws and Commonwealth immigration law.

6.18. **Family reformation.** The legal effect of an adoption is the complete substitution of the adoptive parents for the natural parents. Adoption by step-parents in a re-formed family has become one of the main forms of transfer of parental responsibility. However, there is increasing conviction among policy makers that adoption is not the best approach to formalising the relationship between a child and a step-parent. The grant of guardianship rights to the step-parent with continuing access to the child by the biological parent is regarded as a better approach. The *Family Law Act 1975* (Cth) has been amended to ensure that adoption in these cases does not affect the child's status as a child of the former marriage unless leave of the court is obtained.<sup>11</sup> It also includes provisions to ensure that agreements which transfer the parental powers of custody or guardianship to non-parents by consent orders or registered child agreements will receive court scrutiny.

## Principles underlying the law

### The welfare principle

6.19. **International conventions.** The International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, requires party states to ensure that every child has, among other things

the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.<sup>12</sup>

States must also ensure that provision is made for the protection of any children of a marriage which is dissolved.<sup>13</sup> The United Nations Convention on the Rights of the Child, which Australia signed and ratified in 1990, provides that the essential concern of parents will be the interests of the child.<sup>14</sup> Further, it provides that

[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child should be a primary consideration.<sup>15</sup>

6.20. **Australian law.** Under Australian law, the best interests of the child is the basis on which any decision or order about a child is to be made. It is the fundamental principle which governs decisions made by the Family Court and in adoption and all child welfare proceedings.<sup>16</sup>

6.21. **Meaning of the welfare principle.** The concept of the welfare of children is sociological rather than legal. None of the legislation relating to children specifically defines what is in the interests of a child. Most set out some factors which must be considered but do not indicate what weight a court should give to them. The term 'welfare' has been given a very wide meaning by the

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10 It is also dealt with in the Convention on the Rights of the Child art 21 and the UN General Assembly Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special Reference to Foster Placement and Adoption Nationally and Internationally.

11 See *Family Law Act 1975* (Cth) s 60AA.

12 art 24(1).

13 art 23(4).

14 art 18(1).

15 art 3.

16 An exception arises in international child abduction cases to which the international child abduction convention and regulations apply; generally speaking, the child must be returned to the country from which he or she has been abducted. The policy behind the legislation is that it is, generally speaking, in the interests of all children to discourage parents from abducting a child. It does this by ensuring that no advantages flow from abduction.

courts—it covers all aspects of well-being, including physical, financial, intellectual, emotional, moral and spiritual well-being. The Family Court has held that the welfare of the child is to be determined having regard to contemporary social standards. Apart from this, courts have consistently declined to lay down rigid rules or principles about how the welfare of a child should be determined. They insist that it depends on the facts of the particular case and on the weighing up of a number of diverse factors which may or may not arise in particular cases. The application of the principle therefore involves a judge in the exercise of a very broad discretion.

6.22. ***Values underlying the application of the welfare principle.*** The welfare principle is child centred. The outcomes sought, even though they have a major impact on a range of other people, focus on the child. As a child matures, the law gives greater weight to his or her wishes and is less likely to enforce parents' rights to exercise parental authority over the child. This reflects the long term goal of encouraging the development of autonomous young adults. In weighing up factors, courts tend to regard stability of lifestyle and continuity of relationships as central to the ability of children to grow up into well adjusted, educated and healthy adults. They tend to give favourable consideration to arrangements in which a child remains in the one household, has a suitable place of residence, does not have to travel and can continue to go to the same school or job. In considering continuity of relationship, that between parent and child and the people with whom the child lives are usually given the greatest emphasis.

## **Welfare of the child should continue to be the paramount consideration**

6.23. The focus of all laws relating to children is, and should continue to be, the interests of children. The Commission's consultation and all submissions relating to children received in this reference show overwhelmingly that there is continuing and widespread support for this principle. The Commission recommends that the welfare of the child should remain the paramount consideration.

## **Broadening the consideration of a child's relationships**

### **A child may have a number of important relationships**

6.24. Under the Constitution, Commonwealth legislative power over children has depended on the parents being married to each other. In line with this, the Family Law Act originally gave emphasis to the 'child of the marriage' and to the parent-child relationship. Now, since most States have given to the federal Parliament the power to make laws to deal with disputes over all children, anyone with an interest in the welfare of a child can apply to the court for an order in relation to guardianship, custody or access.<sup>17</sup> This is in line with the reality that a child may have a significant relationship with a person or persons other than his or her parents. For example, a child who spends a large part of each day with grandparents may have a relationship with them that is as important to his or her sense of security as that with his or her parents. The Family Law Act now provides that, in proceedings relating to a child, the court must take into account, among other things, the nature of the child's relationship with each parent 'and with other persons' and the effect on the child of any separation from either parent or 'any child, or other person, with whom the child has been living'. The emphasis is on the child's relationship with parents and those with whom he or she is living. Anyone outside those categories is relegated to the category of 'other persons', without distinction. In DP 46 the Commission proposed that the *Family Law Act 1975* (Cth) s 64 be amended to ensure that, within the principle of the paramountcy of the child's welfare, greater

consideration is given to the child's actual significant relationships. This would avoid any inference that there are no other relationships likely to be significant to a child.

### **Information about relationships should be put before decision makers**

6.25. Decision makers including courts can, and in practice do, consider all significant relationships when the relevant information is before them.<sup>18</sup> However, the Commission's consultation and submissions show strong support for changing the law to encourage greater consideration of a child's actual significant relationships.<sup>19</sup> They suggest that, in the day-to-day practice and process of the law, information about this wider range of relationships tends to be ignored or filtered out of the court process so that it is not available to be considered by decision makers.<sup>20</sup> The Commission has also been told that lawyers tend to make assumptions about how a court will approach an issue and suggest conventional formulations of the orders to be sought. They may suggest, for example, asking for access 'every second weekend and half the school holidays' for the non-custodial parent and discourage grandparents or others with whom the child might have a significant relationship from applying for custody or access. The reality is that parties accept agreements on this basis because they are advised, rightly or wrongly, that they are unlikely to get a different result from a court.

### **The law should not make assumptions about a child's relationships**

6.26. To be consistent with the Commission's approach that the law should support a diverse range of family relationships and not unnecessarily inhibit the ability of people to choose and maintain their kin relations, the law should not make assumptions about who, apart from parents, might have a significant relationship with a child or who might be important to a child's upbringing or development.<sup>21</sup> This approach could be of special significance for Aboriginal people and for members of Australia's ethnically and culturally diverse society. The law should make clear that, when a court, lawyer or counsellor is concerned with matters relating to those outlined in *Family Law Act 1975* (Cth) s 64(bb)(i) and (ii),<sup>22</sup> they should consider all those with whom the child has relationships which are important to his or her upbringing. The concept of 'significant relationship' is now being used in the Migration Regulations as a means of recognising 'non-formal' child-parent relationships as a relationship of adoption.<sup>23</sup> This is in line with a general trend in social security and other laws which affect families to focus more on the reality of the family relationships rather than rely on legal status as a basis for action.

### **Ensuring that relevant information is put before decision makers**

6.27. Educating administrators and lawyers is one way to ensure that relevant information about important relationships is put before decision makers. Another way is to amend the law to make express reference to these factors. This would ensure that those responsible for putting all the

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18 See Queensland Law Society Inc, Family Law Committee *Submission* June 1991; South Australian Government *Submission* September 1991; Family Law Council *Submission* September 1991.

19 Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Filipino Women's Group of the Filipino Australian Club of Perth Inc *Submission* April 1991; Migrant Women's Interests Committee (WA) *Submission* May 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; Anglican Church of Australia, Diocese of Riverina *Submission* May 1991; Country Women's Association of New South Wales *Submission* May 1991; Ethnic Affairs Commission of New South Wales *Submission* June 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

20 Ethnic Affairs Commission of New South Wales *Submission* June 1991.

21 The UN Convention on the Rights of the Child states that parents or legal guardians have the primary responsibility for the upbringing and development of the child: art 18. It also provides that States Parties shall respect the responsibilities, rights and duties of parents, or ... the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, ... appropriate direction and guidance in the exercise by the child of the rights recognised in the convention: art 5.

22 ie the nature of the relationship of the child with relevant people and the effect of separation from them.

23 *Migration Regulations* reg 2A.

relevant material before the decision maker are made aware of what is relevant. If the *Family Law Act 1975* (Cth) s 64(1)(bb) is amended so that the court is required to take into account the nature of the child's relationship not only with each parent but with persons with whom the child has a particular kind of relationship, lawyers, counsellors and administrators will be alerted to the need, where appropriate, to involve those persons in counselling, mediation and other relevant processes and to put information before the court.

## Recommendation

6.28. A majority of the Commission<sup>24</sup> recommends that the *Family Law Act 1975* (Cth) s 64(1)(bb)(i) be amended to make it clear that, in deciding matters relating to children, the court should take into account

the nature of the child's relationship with each of his or her parents and with other persons with whom the child has a relationship that is important to his or her upbringing or development.

The Commission acknowledges that this change may not result in different orders being made in most cases. However, it will draw the attention of people making decisions at every stage of the process, including the parties themselves, their advisers and courts, to the need to consider all those people with whom the child may have a significant relationship.

## Considering the effect of the decision on others

### The decision of a court may be hard to accept

6.29. The Commission's consultation reveals that it is difficult for some people to accept the intervention of the court in their family life and its decisions about children. Submissions suggest that the Court seldom acknowledges, either in the process itself, or its decisions, the fact that depriving a parent of custody of a child may result in a major loss of status, honour and identity of that parent and deprive the parent of the opportunity to exercise a deeply felt sense of responsibility for a child. In DP 46 the Commission proposed that *Family Law Act 1975* (Cth) s 64 be amended so that, within the framework of the paramountcy of the welfare principle, some acknowledgment is given to the impact a decision may have on those with whom a child has a significant relationship. Submissions confirm the importance of the issue, particularly where people do not share or understand the values underlying the court's actions.<sup>25</sup> A number of submissions were in favour of measures to ensure that people understand and come to terms with the decision a court has made.<sup>26</sup> Others were concerned that an amendment to s 64 to require weight to be given to the effect of a decision on others would dilute the welfare principle.<sup>27</sup>

### The welfare of the child and the effect of a decision on others

6.30. Ignoring the fact that a decision may result in strong feelings, such as of loss of status and identity, in parties to a custody or access dispute is not in the long term interests of the children

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<sup>24</sup> Justice Nygh dissents.

<sup>25</sup> eg Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991; Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991; Filipino Women's Group of the Filipino Australian Club of Perth Inc *Submission* April 1991; Migrant Women's Interests Committee (WA) *Submission* May 1991.

<sup>26</sup> See eg Commonwealth-State Council on Non-English Speaking Background Women's Issues, Office of the Status of Women (Cth) *Submission* July 1991.

<sup>27</sup> See Queensland Law society Inc, Family Law Committee *Submission* June 1991; R Chisholm *Submission* April 1991.

involved. The chances of the situation settling down and agreement being reached may be reduced. If the reasons for a decision are not understood or accepted, that decision may be rejected or ignored as soon as the parties leave the court. The custodial parent and child may be ostracised or isolated from part of the family and wider social networks. A totally distraught non-custodial parent may be unwilling or unable to make a contribution to the upbringing of his or her child. It may lead to further destructive litigation which will inevitably have an adverse impact on the child. Although the well-being of parents is a factor considered in the welfare of a child in some situations,<sup>28</sup> the relevance of questions such as loss of status or identity do not appear to have received much attention from courts or counsellors. However, after considering the submissions on this issue the Commission has concluded that its proposal to amend s 64 relating to the effect of a decision might be counter-productive. It could lead to arguments being put to the court that, because of a likely hostile reaction, the court should come to a different decision. An expected hostile reaction cannot deter a court from acting in accordance with the child's interests. The Commission has therefore departed from the approach taken in the discussion paper.

### **The effect of a decision on others should be acknowledged**

6.31. The Commission remains of the view, however, that judges, lawyers and counsellors should understand and acknowledge such things as the loss of status and identity that a change in parental status and role may cause. The law should encourage a positive approach to dealing with these issues in a way that does not place the interests of parents or others above those of the child. This would involve courts and counsellors adopting a more sophisticated approach to decisions. Changes in attitudes and approach are at least as important as change in legal principles.<sup>29</sup> Steps should be taken to ensure that parties are given a clear explanation of the reason why a court has come to a particular decision. This is of special importance where value differences and cultural factors are involved. In these cases, the explanation should acknowledge the issues which each party considered important and the feelings the decision may generate. Parties are much more likely to accept a decision they understand and which shows an understanding of their own feelings and outlook.

### **Recommendation**

6.32. **Recommendation.** The Commission recommends that the *Family Law Act 1975* (Cth) be amended to require the court to explain, or cause to be explained, to the parties in any proceedings relating to a child, in language likely to be readily understood by them, the purpose and effect of, and the reasons for, the proposed order.

6.33. **A further step.** One Commissioner<sup>30</sup> takes a somewhat different view. In addition to an amendment of the Family Law Act as just recommended, he would recommend that the Family Law Act be amended in the way suggested in DP 46. *The Family Law Act 1975* (Cth) s 64 requires the welfare of the child to be the touchstone for all the court's decisions about children. Amendments to the list of factors to be taken into account cannot detract from the primacy of the principle of the welfare of the child. The proposal in DP 46 was designed to encourage the court to seek solutions, in these difficult cases, which would both advance the welfare of the child and do the least damage practicable to the interest of the persons with whom the child has a significant

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28 eg *Children and Young Persons Act 1989* (Vic) s 87(e), 119, which provides that determinations on protection or irreconcilable differences applications must, as far as practicable, take into consideration the effect of a finding or order on the stability of family relationships and the welfare and interests of the child. Access is sometimes suspended when the access parent is violent towards the custodial parent. The court has taken into account the ability of parents to cope with the care of an intellectually disabled child in deciding whether to authorise the sterilisation of a child.

29 Education and the best way of achieving this is discussed in ch 2.

30 Stephen Mason.

relationship. That is the more sophisticated decision-making process which the law ought to challenge the Family Court to undertake. Accordingly, he recommends that a new subparagraph should be inserted after subparagraph 64(1)(bb)(v):

‘(vaa) the effect of any proposed order on a person mentioned in subparagraph (bb)(i); and’.

## **The desirability of maintaining cultural links**

### **Cultural links are important**

6.34. There is sometimes a tension between the way the state defines what is in the best interests of the child and the way one or both parents define it. This is partly because the legal system takes an ethno-centric view about such things as what are appropriate child rearing practices. Another factor is that people feel that the state does not give enough weight to the value they place on cultural continuity or enough support for their social networks arising from shared cultural values, institutions and origins. The Commission’s approach is to recognise that, while it is not always necessary or desirable to prefer one set of values to another, it is nevertheless in the long term interests of the child to enhance his or her capacity to make his or her own choices and not to restrict the available options. This means that the law should not cut a child off from cultural values, institutions and associated social networks to which he or she can relate. The UN Convention on the Rights of the Child refers in its preamble to ‘the importance of the traditions and cultural values of each people for the protection and harmonious development of the child’. It may therefore also be in the interests of children that the cultural options and social networks of their parents, their families and significant others are maintained. DP 46 proposed that, within the framework of protecting the interests of children, the Family Law Act should provide that the effect of a decision on cultural identity and on continuity of contact should be taken into account by the court.

### **Support for explicit recognition in law of importance of cultural factors**

6.35. The Family Court can take into account cultural issues when relevant material is put before it.<sup>31</sup> Nonetheless there is strong support for the view that s 64 should be amended to include explicitly as a matter to be taken into account the effect of a decision on the child’s cultural identity and on continuity of contact.<sup>32</sup> Those who were not in favour of such an amendment were concerned that cultural issues would be given undue weight.<sup>33</sup> Others were concerned that decisions taking cultural issues into account may have a gender bias.<sup>34</sup>

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31 The court must take into account ‘any other fact or circumstance (including the education and upbringing of the child) that, in the opinion of the court, the welfare of the child requires to be taken into account’: s 64(1)(bb)(vi).

32 See Dr AT Kenos *Submission* April 1991; Filipino Women’s Group of the Filipino Australian Club of Perth Inc *Submission* April 1991; Migrant Women’s Interests Committee (WA) *Submission* May 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991; Country Women’s Association of New South Wales *Submission* May 1991; Ethnic Affairs Commission of New South Wales *Submission* June 1991; Department for Family and Community Services (SA) *Submission* June 1991; E Byrne *Submission* March 1991; Manning District Domestic Violence Monitoring Committee *Submission* August 1991; Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee (S Ahmed) *Submission* August 1991; South Australian Government *Submission* September 1991.

33 See eg R Chisholm *Submission* April 1991; Commonwealth-State Council on Non-English Speaking Background Women’s Issues, Office of the Status of Women (Cth) *Submission* July 1991; South Brisbane Community Legal Service Inc *Submission* July 1991.

34 Department for Family and Community Services (SA) *Submission* June 1991; Women’s Legal Resources Centre *Submission* July 1991; Commonwealth-State Council on Non-English Speaking Background Women’s Issues, Office of the Status of Women (Cth) *Submission* July 1991.

## Failure of the law adequately to handle cultural issues

6.36. Submissions and consultation confirm that there are two contexts in which cultural issues are receiving inadequate consideration. First is that cultural issues can be filtered out in the legal process, either because of lack of awareness or because they are not seen as relevant by those involved in the system. Lawyers seem to be failing to seek out relevant cultural information or, if they have the information, to see the relevance of it. As a result, information which may be important to a decision is not going before the court. For example, the Aboriginal Legal Service in Sydney (which can only act when only one of the parties is Aboriginal) has told the Commission that it has experienced difficulties and resistance from other solicitors and the Bar when it tries to submit that Aboriginal culture is a relevant consideration in custody cases. The other concern was that the now recognised importance to children of cultural identity is not sufficiently reflected in family law. A number of submissions pointed out that there is no Aboriginal placement principle in family law.<sup>35</sup>

## Discussion

6.37. ***The issue of cultural identity.*** The identity problems that Aboriginal children have experienced as a result of their removal from their families and cultural environment are now well documented.<sup>36</sup> As a result, most child welfare agencies accept the Aboriginal child placement principle.<sup>37</sup> Policy relating to children is placing increasing emphasis on the importance to a child's identity of maintaining ties with his or her cultural background. Adoption laws now tend to place children, wherever possible, with parents of similar cultural background. There is a concern about inter-country adoption on this ground. But apart from the Aboriginal Placement Principle, there are few attempts to deal directly with cultural influences in the child welfare area.<sup>38</sup> Culture or cultural ties are not expressly included as a matter to be taken into account in the Family Law Act, although there are a number of reported cases where there has been a sensitive consideration of cultural issues.<sup>39</sup>

6.38. ***Identity in cross-cultural disputes.*** Placing children in a culturally familiar environment is relatively straight forward where cross-cultural issues are not present. In the Family Court context, difficult questions of cultural identity arise mostly in situations where the parties have different cultural backgrounds and the court is faced with two competing proposals for the welfare of the child. The issue is usually not one of 'preserving' the cultural environment of a child because, whichever choice the court makes, the child is likely to lose contact to some extent with aspects of the cultural environment with which he or she has been familiar. But this does not make the issue any less important to the welfare of the child.<sup>40</sup>

6.39. ***Considering cultural identity as a relevant factor.*** Given that the question of the cultural identity of a child is important to the welfare of a child, how should a court take it into account in disputes over children? It is not necessarily desirable to give the matter greater weight than any other factor. The importance to a child of his or her connection with a culture will vary according to

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35 eg B Cain *Submission* March 1990. See Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, 1986 (ALRC 31) vol 1 para 367 in which the Commission concluded that no specific provision regarding Aboriginal placement should apply to disputes about children between Aboriginal and non-Aboriginal parties.

36 See eg ALRC 31 para 344-5.

37 The principle has been accepted a policy in all States and Territories and has been enacted in NT, NSW and Victoria. The Royal Commission on Aboriginal Deaths in Custody recommended specific national legislation: rec 54 Vol 2 83.

38 See eg *Children (Care and Protection) Act 1987* (NSW) s 72(2)(d), which provides that the court in care proceedings should have regard to the need to preserve the cultural environment of the child.

39 See eg *In the marriage of Sanders and Sanders* (1976) FLC 90-078, 10 ALR 604; *DKI v OBI* (1979) FLC 90-661 (Lusink J); *In the marriage of Goudge and Goudge* (1984) FLC 91-534 (Evatt CJ); *In the marriage of R and R* (1985) FLC 91-615; *In the marriage of McL and McL, Minister for Health and Community Services (NT) (Intervener)* (1991) FLC 92-238.

40 See eg Frederick H Zemans, 'Cultural Diversity in Custody Disputes' in Judicial Conference on Family Law, *Family Law Dimensions of Justice: Selected Papers Presented at the Judicial Conference on Family Law*, 1981, 152.

the individual circumstances. To make assumptions about this would not be in the interests of individual children. Whether or not this matter is of greater importance when a child is a member of an indigenous population cannot be explored here. It is desirable to achieve, overall, a more sophisticated decision making process in which courts, lawyers and counsellors give proper and sensitive consideration to this issue. That consideration should include the question of gender equality and gender bias in the cultural values being considered. The reported decisions do not suggest, however, that women are necessarily disadvantaged when cultural identity is an issue.<sup>41</sup>

6.40. **Legislation would ensure that this matter is considered.** The fact that there are cases in which cultural factors have been given attention and dealt with sensitively by the Family Court does not mean that there are not many other cases in which cultural factors relevant to the welfare of a child were not considered by the court, or in which cultural issues played a part in a decision but do not appear in the judgment. An amendment to s 64 would acknowledge the importance of the issue and would ensure that court judgements make clear how this issue has been dealt with and what weight has been given to it.

6.41. **Recommendation.** The Commission<sup>42</sup> recommends that the *Family Law Act 1975* (Cth) s 64(1)(bb) be amended to ensure that the desirability of the child's maintaining his or her links with the culture of each of his or her parents and with other persons with whom the child has a relationship that is important to his or her upbringing and development is taken into account in the decision making process.

### The question of the cultural 'expert'

6.42. **Ways of getting cultural evidence before the court.** A number of submissions suggested that there is a need for special provision to ensure that cultural evidence comes before the court. The suggestions include the establishment of a panel of registered experts on matters such as Islamic law or Buddhism, who would be available to advise judges, magistrates, arbitrators and conciliators.<sup>43</sup> Another suggestion was to provide for a representative of a particular community to have a right as a friend of the court (*amicus curiae*) to make a statement to the court about cultural factors relevant to the matter in dispute and the effect that any decision might have on relationships within that community or between that community and other groups.<sup>44</sup> The Commission did not make a proposal on this question in DP 46. It saw problems in appointing or giving independent rights to representatives or leaders of a community to present evidence. Nonetheless, the Commission asked for submissions on the kinds of situations in which an independent expert might be needed and the ways in which the problem might be addressed.

6.43. **The problems with cultural experts.** Submissions and consultation support the Commission's view about the difficulties involved in the appointment of cultural experts. It is difficult to establish the identity of a particular community or the representatives or leaders of that community. As was pointed out during one consultation

it is easy to find leaders in other communities, but they disappear when you look at your own.

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41 See eg *In the marriage of Sanders and Sanders* (1976) FLC 90-078, 10 ALR 604; *DKI v OBI* (1979) FLC 90-661; *In the marriage of R and R* (1985) FLC 91-615; *In the marriage of Figaro, Almagira (Intervener)* (1986) FLC 17-3001; *In the marriage of McL and McL, Minister for Health and Community Services (NT) (Intervener)* (1991) FLC 92-238.

42 Justice Nygh dissents from this recommendation.

43 Dr HA Finlay *Submission* May 1991.

44 See A Ray, 'Parents, Children and Family Law in a Multicultural Society, *Law in a Multicultural Society*, One Day Seminar, Federation of Ethnic Communities' Councils of Australia No 87, 1990, 35.



Several submissions emphasised that there is always a plurality of values within any cultural group and that values represented as being those of a particular cultural group may not necessarily be relevant to a particular member of that group.<sup>45</sup> Differences generated by factors such as gender, class, rural or urban origins and religion add to the complexity and make generalisation on the basis of membership of a social network or national or ethnic origin impossible. An expert purporting to speak with special knowledge of a group culture could assume an importance detrimental to the individual parties.<sup>46</sup>

6.44. **Recommendation.** The best approach is to allow the parties to a case to choose what evidence regarding cultural factors they wish to put to the court. Provisions in the *Evidence Bill 1991* (Cth) have removed the requirement that expert witnesses called by parties have formal qualifications. It is now sufficient if an expert witness has specialised knowledge based on training, study or experience.<sup>47</sup> The Commission, on the assumption that the *Evidence Bill 1991* will be enacted, recommends no change to the law.

## Rethinking the law's approach to parental responsibility

### There are different views about parental responsibility

6.45. A major issue raised during consultation and in submissions is anxiety among some migrant adults about their role as parents and about the power of the state to intervene in relation to their children. For example, the notion of the state assuming responsibility for the welfare of children is alien to some people.<sup>48</sup> According to some submissions, the law's capacity to intervene and allocate<sup>49</sup> or take over the roles of parents<sup>50</sup> causes an unacceptable loss of status and prevents parents from carrying out their fundamental responsibilities towards their children. Some people also find it difficult to come to terms with the increasing degree of responsibility and autonomy that the law expects young people to exercise. The Commission was told that in some cultures assumption of independence and responsibility depends on the social roles a person takes on<sup>51</sup> rather than on age. On the other hand, consultations also suggest that migrant youth are also concerned about this issue, although from the opposite perspective. For example, children who try to exercise their independence may find themselves in deep conflict with their parents.

### A clearer definition of parental responsibilities?

6.46. **Discussion paper proposal.** The law regards parental powers over children as being held for the benefit of children.<sup>52</sup> But it does not clearly define parental responsibilities and powers except in relation to child maintenance.<sup>53</sup> Definitions of guardianship and custody in the Family Law Act give some guidance. Some detail is given about what custody is.<sup>54</sup> But the specific powers, rights and duties of guardians are not set out in detail in the legislation; they derive mainly from common law. The question raised in DP 46 was whether, as a way of addressing concerns about parental roles and responsibilities, there should be a more clearly defined statement of the rights and duties of parents

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45 See eg Law Council of Australia, Family Law Section *Submission* May 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991.

46 Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* May 1991.

47 cl 85

48 See eg Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Samoa Association in Brisbane Inc *Submission* July 1991. See also some groups consulted during the OMA Group Facilitator Consultation.

49 ie in custody or access disputes.

50 ie in some welfare matters.

51 eg entering into a marriage, or being required to become the head of the family.

52 See para 6.1.

53 See *Family Law Act 1975* (Cth) s 66B.

54 eg custody is the right to have the daily care and control of the child, and the right and responsibility to make decisions about this: s 63E(2).

and others responsible for children. DP 46 suggested that the approach of some European countries, of a systematic and comprehensive code of family law, could be adopted.<sup>55</sup> The Commission sought submissions about whether this should be done and in what way it could be achieved.

6.47. ***Support for clearer definition.*** There is considerable support among submissions for a clearer definition of parental responsibilities in the law.<sup>56</sup> A number of submissions suggested that clarifying the law in this way would help to clear up misunderstandings and fears about the issue in the community generally.<sup>57</sup> For example, one said that clear articulation of parental powers and duties might help newly arrived migrant parents who find themselves in conflict with their children over values and acceptable standards of behaviour.<sup>58</sup>

6.48. ***Problems raised about clearer definition.*** A considerable number of submissions, however, thought it would be undesirable to define parental responsibilities. Some said that adopting the European approach would result in a law that is too narrow and inflexible for an ethnically diverse society where people live in a range of family arrangements.<sup>59</sup> Some submissions thought that the responsibilities of parents should be balanced with the needs and rights of the child.<sup>60</sup> Others said that a detailed code may cause even more confusion as some responsibilities may attract legal intervention if not fulfilled and others will not. If understanding the law is a problem, community education about existing law and increasing access to counselling services was seen by them to be a more appropriate approach.<sup>61</sup>

## Discussion

6.49. ***More detailed definition is not the answer.*** Some of the concerns about parental responsibility expressed in submissions arise from the fact that the law is no longer based on patriarchal values and authority. The reform of family law to recognise the equality of mother and father was achieved, in part, by shifting to a greater recognition of children's interests and of parental responsibilities rather than power. Returning to patriarchal authoritarian values would undermine the principle of gender equality which underpins Australian family law. However, the loss of parental status that can occur when the state intervenes to protect the welfare of children or to help parents settle disputes over children remains an issue of major concern. This report has already argued that failure of the law to address this issue may not be in the long term interests of a child.<sup>62</sup> Tinkering with existing definitions is not likely to address concerns that parents have about their role. Changing the terminology may be a more effective way of addressing these concerns. A

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55 Some of these codes include provisions about the relationship of parents with their children. The German code, for example, includes mutual duties of parents and children to assist and respect each other. These provisions mostly take the form of general models of behaviour rather than specific rules of conduct with direct sanctions for their violation. See MA Glendon, *The Transformation of Family Law*, University of Chicago Press, Chicago, 1989, 87, 99.

56 See Dr AT Kenos *Submission* April 1991; The Brethren *Submission* April 1991; Springvale Community Aid & Advice Bureau Inc *Submission* April 1991; Filipino Women's Group of the Filipino Australian Club of Perth Inc *Submission* April 1991; Migrant Women's Interests Committee (WA) *Submission* May 1991; Anglican Church of Australia, Diocese of Riverina *Submission* May 1991; Humanist Society of Victoria Inc *Submission* May 1991; Country Women's Association of New South Wales *Submission* May 1991; Department for Family and Community Services (SA) *Submission* June 1991; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; Office of Ethnic Affairs (NT) *Submission* August 1991; Manning District Domestic Violence Monitoring Committee *Submission* August 1991; L Curtis, N Chynoweth, K Batterham and L Vidal *Transcript* Public Hearings Canberra September 1991.

57 See eg Department for Family and Community Services (SA) *Submission* June 1991; Springvale Community Aid & Advice Bureau Inc *Submission* April 1991.

58 Springvale Community Aid & Advice Bureau Inc *Submission* April 1991.

59 See eg Ethnic Affairs Commission of New South Wales *Submission* June 1991; Marrickville Legal Centre & Children's Legal Service *Submission* May 1991; D Back *Transcript* Public Hearings Brisbane May 1991.

60 eg Filipino Women's Group of the Filipino Australian Club of Perth Inc *Submission* April 1991; Humanist Society of Victoria Inc *Submission* May 1991.

61 General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* May 1991; Women's Legal Resources Centre *Submission* July 1991; E Byrne *Submission* March 1991; Baptist Union of Queensland *Submission* May 1991.

62 See para 6.30.

discussion paper released in April 1991 by the Family Law Council *Patterns of Parenting after Separation* discusses this issue.

6.50. ***Problems with current terminology.*** The terms ‘guardian’ and ‘custodian’, currently used to describe parental status, come from English common law tradition. They are words of authority and have strong overtones of rights of ownership inconsistent with a welfare-based approach which emphasises the interests of children.<sup>63</sup> The discussion paper cites divorce mediators Folberg and Graham who assert that ‘many post-separation disputes over children represent a search for parental status’. It discusses research that shows that non-custodial parents have very strong negative and loss of status associations with terms such as ‘custody’ and ‘visitation’.<sup>64</sup> This perception has been reinforced by the fact that in our law the question of a child’s residence has usually been linked to the question of parental status. When a court orders that a child live with one parent the other parent is said to ‘lose’ custody.<sup>65</sup> A further problem with the currently used terms is that they are not easily understood or translated, especially by people from other legal and cultural traditions.

6.51. ***Moves in other jurisdictions.*** In a number of countries moves are being made to change the terminology. The *Children Act 1989* (UK) uses the term ‘parental responsibility’ as meaning ‘all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child’.<sup>66</sup> It also now has a new set of orders relating to children in family proceedings. Instead of the old custody and access orders, there are ‘residence orders’, ‘specific issues orders’, ‘contact orders’ and ‘prohibited steps’ orders.<sup>67</sup> In other jurisdictions concepts such as ‘parenting plan’, ‘parenting functions’ and ‘residential schedules’ have replaced the terms custody and visitation.<sup>68</sup> These have the advantage of being more understandable.

6.52. ***No loss of parental status.*** With this kind of approach parental status remains even though the way parental responsibilities are exercised may change. Because as much as possible of the role and status of a parent is preserved, there is a better prospect of each parent maintaining a good relationship with the child. It also removes one of the major fears felt by parents in disputes over children. By shifting the emphasis away from rights and ownership aspects towards continuing parental responsibility for, and relationship with, children the law would more clearly reflect and promote current policy in relation to children.

6.53. ***A functional approach to shared responsibility.*** The approach to sharing parental responsibilities adopted in the State of Washington under its *Parenting Act 1987* may also be an option for reform. Under that law those approaching the court for a divorce must submit a ‘parenting plan’ which must cover four areas of parenting. These are

- the child’s residential arrangements
- child support
- allocation of decision making
- a dispute resolution process.<sup>69</sup>

A fundamental assumption in that approach is to encourage parents to accept joint responsibility for decisions about children after separation. Because each functional area can be allocated separately a

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63 See Family Law Council, *Patterns of Parenting after Separation: Discussion Paper*, 1991, 30.

64 *ibid*, 31.

65 *ibid*, 40.

66 s 3.

67 s 8.

68 Washington *The 1987 Parenting Act*.

69 See *Family Law Act 1975* (Cth) s 55A which could form a basis for this approach.

wide range of solutions can be arrived, which suit each individual case, which involve no loss of status and which are not based on assumptions related to the terms of custody and access. Instead of the 'usual formula' for custody and access a special individual plan can be drawn up.

6.54. ***Commission support for a new approach.*** The Commission believes that a new approach to terminology and a functional approach to the sharing of parental responsibilities may be an important way of addressing the concerns that have been raised in submissions and consultations. To adopt this approach would involve a major review of the parts of the Family Law Act relating to children. The options discussed above need further consideration and investigation. The term 'parenting plan', for example, may need adaptation to encompass other people who are important to the upbringing of a child. It would also be important to ensure that this approach did not enable one party to exert undue pressure over the other where there is domestic violence or where one of the parties (likely to be the woman) is in a relatively powerless position. A legal framework which required agreement should be structured in such a way as to avoid this disadvantage.

6.55. ***Recommendation.*** The Commission recommends that, following upon the report of the Family Law Council on *Patterns of Parenting After Separation* and the Parliamentary Joint Select Committee Inquiry into the Family Law Act, consideration be given to changing the current legal terminology relating to parental rights and responsibilities and to the introduction of the functional approach to the sharing of parental responsibilities.

## PART IV—CRIMINAL LAW

### 7. Maintaining harmony and peaceful coexistence

#### Introduction

7.1. This chapter deals with conduct which is intended to, and has the effect of, causing harm to particular communities within the Australian community. In broad terms, it is concerned with racist conduct, that is, conduct that harms particular communities identified by colour, race, religion or national or ethnic origin. Such conduct undermines the goals of multiculturalism. It may or may not be criminal on other grounds. The primary question addressed in the chapter is whether the racist element in it justifies the imposition of new criminal sanctions and the strengthening of existing ones. The chapter outlines existing legislation that deals with racist conduct, the reports of relevant federal inquiries that indicate the extent of the problem and some overseas legislation. It then considers whether acts of violence that are intended to, and have the effect of, causing members of such a community to fear for their safety should be treated differently from similar acts that do not have that intention or effect. It also considers whether conduct that promotes hatred or hostility against such communities should be punishable in the absence of actual violence. Finally, it considers the role of the common law offence of blasphemy in federal law.

#### Australia's international obligations

##### Main provisions

7.2. *Individual freedoms.* The International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, contains a number of provisions that are relevant to the issues raised in this chapter.

- freedom of thought, conscience and religion
- freedom of expression
- the enjoyment of one's culture, the profession and practice of one's religion and the use of one's own language in community with other members of one's ethnic and religious community.<sup>1</sup>

In addition, parties to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), including Australia, undertake to guarantee the right of everyone to equality before the law and equality in the enjoyment of the rights to

- freedom of thought, conscience and religion
- freedom of opinion and expression
- freedom of peaceful assembly and association.<sup>2</sup>

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<sup>1</sup> art 18(1), 19(2), 27.

<sup>2</sup> art 5(d) (vii)-(ix).

7.3. ***Potentially conflicting rights must be balanced.*** The rights in the ICCPR are not unlimited. For example, the ICCPR provides that the freedom to manifest one's religion or beliefs may be limited by law. The permissible limits are those that

are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.<sup>3</sup>

The right to freedom of expression carries with it certain duties and responsibilities and may be subject to restrictions necessary 'for respect of the rights or reputations of others' and for the protection of national security, public order or public health or morals. Where rights are apparently inconsistent, a balance must be struck having regard to the permissible limits and to the overall objectives of the covenants. However, limitations necessary to ensure respect for other rights must not jeopardise the right itself.

7.4. ***Protecting individual freedoms by law.*** Both the ICCPR and CERD require parties to prohibit certain conduct. The ICCPR states that

any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.<sup>4</sup>

CERD requires States parties to

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities.<sup>5</sup>

7.5. ***Australia's reservations.*** When Australia signed the ICCPR it stated that Australia interprets the rights provided for by arts 19, 21 and 22<sup>6</sup> as consistent with art 20.

[A]ccordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the Article in matters of practical concern in the interests of public order, the right is reserved not to introduce any further legislative provision on these matters.

When Australia ratified CERD<sup>7</sup> it said that Australia was not in a position specifically to treat as offences all the matters covered by article 4(a) and that acts of the kind mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It went on to say

It is the intention of the Australian Government, at the first suitable moment to seek from Parliament legislation specifically implementing the terms of Article 4(a).

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3 art 18(3).

4 art 20(2).

5 art 4(a).

6 Those relating to freedom of expression, the right of peaceful assembly and freedom of association.

7 30 September 1975.

## Australian law

### Australian constitution

7.6. The Constitution contains few human rights provisions. It provides some protection for religious freedom. Section 116 provides that the Commonwealth

shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion.

All legislative powers of the Commonwealth are subject to this provision.<sup>8</sup> The prohibition does not apply to the States. Religion is defined broadly. There are no general anti-discrimination provisions; nor is there general power to legislate in respect of equality or discrimination. The main constitutional basis of Commonwealth anti-discrimination legislation, such as the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth), is the external affairs power<sup>9</sup> which gives the Commonwealth power to implement international human rights treaties and covenants to which Australia is a party.

### Commonwealth law

7.7. **Laws prohibiting discrimination.** Federal legislation makes unlawful acts of discrimination on the grounds of

- race, colour or national or ethnic origin<sup>10</sup>
- sex, marital status or pregnancy.<sup>11</sup>

Discrimination on these grounds is unlawful but it is not a criminal offence. Rather, the law provides civil remedies for an individual who can establish that he or she has been discriminated against in (among other things) employment, accommodation and the provision of goods and services.<sup>12</sup> The purpose of anti-discrimination legislation is to ensure the equal recognition, enjoyment or exercise of rights and freedoms. It emphasises conciliation and education, and the possibility of redress for the complainant, rather than punishment of offenders. Incitement to commit an unlawful act of racial discrimination is also unlawful, but neither discrimination nor incitement to commit an act of discrimination is criminal.<sup>13</sup> Federal legislation does not expressly prohibit discrimination on the ground of political or religious conviction. However, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(f) gives the Commission power to inquire into and conciliate where there is any act or practice of the Commonwealth that may breach any right in the ICCPR. Section 31(b) gives it similar powers in relation to discrimination in employment on the basis of 19 specified grounds, pursuant to the ILO Discrimination (Employment and Occupation) Convention.

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8 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116.

9 Constitution s 51(xxix).

10 *Racial Discrimination Act 1975* (Cth) which gives effect to CERD.

11 *Sex Discrimination Act 1984* (Cth) which implemented in part the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

12 The *Sex Discrimination Act 1984* (Cth) expressly covers sexual harassment in employment and education. There is no equivalent provision in the *Racial Discrimination Act 1975* (Cth).

13 *Racial Discrimination Act 1975* (Cth) s 26.

7.8. **Regulation of broadcasting.** The *Broadcasting Act 1942* (Cth) s 118 prohibits the broadcasting of ‘blasphemous, indecent or obscene’ matter. An offence against this section cannot be prosecuted without the Minister’s written consent. The Australian Broadcasting Tribunal (ABT) lays down broadcasting standards to be observed by licensees of commercial radio and television stations. The Australian Broadcasting Corporation must take account of these standards. It is a breach of broadcasting standards to transmit a program that is likely to incite or perpetuate hatred against, or that gratuitously vilifies, a person on the basis of ethnicity, nationality, race, religion, gender, sexual preference or disability. The ABT has the power to cancel or refuse to renew a broadcasting licence if these standards are breached. No cancellation has ever occurred on this ground. No equivalent safeguards exist for the print media and the Australian Press Council relies on voluntary compliance with its guidelines. On 7 November 1991 an ‘exposure draft’ Broadcasting Services Bill was released by the Commonwealth for public comment and consultation. It would establish a new regulatory authority, the Australian Broadcasting Authority (ABA). Part 9 of the Bill deals with Program Standards. It provides that radio and television industry groups, in consultation with the ABA, should develop codes of practice. These should take into account, among other things

prevailing community attitudes to ... the portrayal in programs of matter that is likely to incite or perpetuate hatred against or vilifies any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, age, religion or physical or mental disability.<sup>14</sup>

7.9. **Criminal Law.** The *Crimes Act 1914* (Cth) contains a number of offences that could be used to prosecute racist activities. Sedition is an offence punishable by imprisonment for three years. Sedition includes engaging in, conspiring with another person to carry out and encouraging another person to carry out a ‘seditious enterprise’ with the intention of causing violence or creating public disorder or a public disturbance.<sup>15</sup> A ‘seditious enterprise’ is one done with an intention, among others

to promote feelings of ill-will and hostility between different classes of Her Majesty’s subjects so as to endanger the peace, order or good government of the Commonwealth.<sup>16</sup>

Writing, printing, uttering or publishing ‘seditious words’<sup>17</sup> with the intention of causing violence or creating public disorder is an offence punishable by imprisonment for three years.<sup>18</sup> It is also an offence knowingly or recklessly to use a postal or telecommunications service to menace or harass another person or in a way that would be regarded by reasonable persons as being, in all the circumstances, offensive.<sup>19</sup> Inciting to, urging, aiding or encouraging the commission of any of these offences or printing or publishing any writing which does so is an offence.<sup>20</sup> A person who aids, abets, counsels, procures or, by act or omission, is directly or indirectly knowingly concerned in, or party to, the commission of a federal offence is deemed to have committed that offence and may be punished as if for the offence.<sup>21</sup> An attempt to commit an offence is an offence punishable as if the attempted offence had been committed.<sup>22</sup>

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14 cl 114(3)(e).

15 s 24C.

16 s 24A(g).

17 ie words expressing a seditious intention.

18 s 24D.

19 s 85S; 85ZE.

20 s 7A.

21 s 5(1).

22 s 7.



## Laws of the States and Territories

7.10. **Offences against the person and property.** All States and Territories have laws that protect persons from harm and their property from damage. Acts of violence motivated by racism would be an offence against these laws. Offences include common assault, assault occasioning actual bodily harm, intentionally or recklessly causing injury to another person and maliciously destroying or damaging property belonging to another.

7.11. **New South Wales.** In 1989 New South Wales enacted legislation specifically to deal with racist abuse and threats. It established a new ground of complaint (racial vilification) under the *Anti-Discrimination Act 1977* (NSW) and created a new criminal offence (serious racial vilification). Racial vilification is defined as inciting hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of the race of the person or members of the group.<sup>23</sup> The law only applies to 'public acts' which include

- any form of communication to the public
- any conduct observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia and
- the distribution or dissemination of any matter to the public knowing that it vilifies a person or group of persons on the ground of race.<sup>24</sup>

The criminal offence of 'serious racial vilification' arises where racial vilification (as defined in s 20C) includes 'threatening physical harm towards, or towards any property of, the person or group of persons; or inciting others to (so) threaten'.<sup>25</sup> The President of the Anti Discrimination Board must, within 28 days after receiving a racial vilification complaint, decide whether an offence may have been committed under s 20D and, if so, refer the complaint to the Attorney General<sup>26</sup> whose consent is a necessary precondition to prosecution.<sup>27</sup> The penalty for the offence is 10 penalty units or 6 months imprisonment for an individual and 100 penalty units for a corporation.<sup>28</sup> There have been no prosecutions for this offence.

7.12. **Western Australia.** Following a racist propaganda campaign involving posters and graffiti in Perth in the 1980s, the *Criminal Code 1913* (WA) was amended in October 1990 to create four new offences.<sup>29</sup>

- possession of written or pictorial material that is threatening or abusive, intending it for publication, distribution or display with the intention that hatred of any racial group should thereby be created, promoted or increased
- publication, distribution or display of written or pictorial material that is threatening or abusive, with the intention that hatred of any racial group should thereby be created, promoted or increased
- possession of written or pictorial material that is threatening or abusive, intending the material to be displayed and with the intention to thereby harass any racial group
- display of written or pictorial material that is threatening or abusive intending thereby to harass a racial group.

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23 *Anti-Discrimination Act 1977* (NSW) s 20C.

24 s 20B.

25 s 20D.

26 s 89B.

27 s 20D(2).

28 Presently \$1 000 for an individual and \$10 000 for a corporation,

29 s 76-80.

Penalties include terms of imprisonment ranging from three months to two years and fines of up to \$2 000. There have been no prosecutions for these offences.

7.13. **Queensland.** In Queensland, the *Anti-Discrimination Act 1991* (Qld) (most of which has not yet been proclaimed) makes discrimination on certain grounds, including race and religion, unlawful. In addition, it is an offence if a person, by advocating racial or religious hatred or hostility, incites unlawful discrimination or another contravention of the legislation.<sup>30</sup>

7.14. **Australian Capital Territory.** In the Australian Capital Territory, it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of race. Serious racial vilification, including threatening, or inciting others to threaten, physical harm towards a person or group of persons or towards their property, is an offence.<sup>31</sup>

7.15. **Tasmania.** The former Tasmanian Government introduced a Bill to make discrimination on certain grounds, including race, unlawful. The Bill prohibits racial vilification by making it unlawful to carry out a public act that promotes or expresses, on the ground of the race of a person or a group of persons, hatred, serious contempt for or severe ridicule of that person or group.<sup>32</sup> The prohibited conduct is not a criminal offence. However, remedies (including compensation) would be available to a complainant on determination of a Tribunal. The Bill was passed by the House of Assembly but lapsed when Parliament was dissolved in January 1992.

7.16. **Victoria.** In Victoria a committee to advise the Attorney-General on racial vilification was established in March 1990. It was asked to assess the nature and extent of racial vilification in Victoria and to propose measures to counter it. Its report is expected in the first half of 1992.

## **Inquiries by federal bodies**

### **The National Inquiry into Racist Violence (NIRV)**

7.17. **The inquiry.** In December 1988 the Human Rights and Equal Opportunity Commission (HREOC) resolved to conduct an inquiry into

- acts of violence or intimidation based on racism directed at persons, organisations or property
- acts of violence or intimidation directed at persons or organisations on the basis of their advocacy of, support for, or implementation of non-racist policies, including violence or intimidation intended to deter such advocacy, support or implementation and
- current or prospective measures by government instrumentalities to deal with the above matters.

The inquiry opened in Sydney on 24 August 1989 and, during the next 12 months, held public hearings around Australia. It received more than 230 written submissions. The final report of the Inquiry was published in April 1991.

7.18. **Findings of the National Inquiry.** The report concludes that racist violence, including intimidation and harassment, is an endemic problem for Aborigines and Torres Strait Islander

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30 s 126.

31 *Discrimination Act 1991* (ACT) s 66-7.

32 *Anti-Discrimination Bill 1991* (Tas) cl 19.

people in all Australian States and Territories. It found that racist attitudes and practices pervade Australian institutions, both public and private. Relations between Aborigines and police have reached a critical stage due to the widespread involvement of police in acts of racist violence, intimidation and harassment. Racist violence also occurs on the basis of ethnic identity. The report concludes that the existence of a threatening environment is the most prevalent form of racist violence confronting people of non-English speaking backgrounds. They are subjected to racist intimidation and harassment because they are visibly different. In public places, racist violence usually takes the form of unprovoked, 'one-off' incidents by strangers; on the other hand, neighbourhood incidents are more likely to be sustained campaigns by perpetrators known to the victim. Racist violence reported to HREOC included abusive and threatening letters and telephone calls, vandalism, burglary and arson, the desecration of sacred buildings and disruption of religious worship and attacks on religious schools. The level of racist violence on the basis of ethnic identity in Australia is nowhere near that in many other countries. Nevertheless, it exists at a level that causes concern and could increase in intensity and extent unless firmly addressed.

**7.19. *Recommendations of the National Inquiry.*** The report makes 67 recommendations directed to governments, police, public housing authorities, employer and employee organisations, education authorities, schools and higher education institutions and the media. Among the recommendations most relevant to this chapter are

- civil remedies under the *Racial Discrimination Act 1975* (Cth) should be extended to cover, for example, racial harassment
- the *Crimes Act 1914* (Cth) should be amended to create two new federal offences
  - (a) an offence of racist violence and intimidation and
  - (b) an offence of incitement to racist violence and racial hatred which is likely to lead to violence
- the *Crimes Act 1914* (Cth) and the Crimes Acts and Criminal Codes of the States and Territories should be amended to enable courts to impose higher penalties where there is a racist motivation or element in the commission of an offence.

It recommends that there should be a broad definition of race, including colour, descent or national or ethnic origin, making the scope coextensive with that of the *Racial Discrimination Act 1975* (Cth). The Inquiry concluded that

acts of racist violence should be treated as distinctive, serious criminal offences in exactly the same way as other specific types of assault (such as aggravated assault or sexual assault). This will assist in directing police and public attention to the prevention of such offences and the apprehension of offenders.<sup>33</sup>

**7.20. *The government's response to the National Inquiry.*** On 19 December 1991 the federal Attorney-General tabled the Government's response to the report. The Government supported most of the recommendations in principle. In particular, it intends to pursue the resolution of any remaining legislative difficulties impeding the removal of Australia's reservation to the CERD. It will make its final response to matters where there is significant overlap between the recommendations of the report and the recommendations of the final report of the Royal Commission into Aboriginal Deaths in Custody, in March 1992. These matters include the creation of an offence of racist violence and intimidation and an offence of incitement to racist violence and racial hatred which is likely to lead to violence.

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33 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, Canberra, 1991, 297.

## The Royal Commission into Aboriginal Deaths in Custody

7.21. In its final report<sup>34</sup> the Royal Commission considered whether there should be legislation making racial vilification unlawful. It considered the provisions of the ICCPR and the CERD and the need to balance competing rights: the right to freedom of speech and the right of the state to limit speech that can lead to overt conflict among its citizens. It also drew attention to another issue

that is, the question of the rights of the individual that is the basis of much of liberal western thought as distinct from the rights of the collective, the group that exists by virtue of its treatment in the society as a whole.<sup>35</sup>

The Royal Commission found that language has considerable impact on relations between Aboriginal people and police in the context of discrimination by police against Aborigines. It noted that a quarter of all complaints of racist statements lodged with the Human Rights Commission up to 1984—by various groups—concerned statements made by officials such as police officers. The Royal Commission concluded that it is important to make racial vilification unlawful to fulfil Australia's international obligations and because it would have a powerful educative effect. It preferred the New South Wales model<sup>36</sup> to that of Western Australia<sup>37</sup> because it puts less emphasis on the criminal law. In this area conciliation and education are likely to be more effective than making martyrs; particularly when it is words, not acts, that are in issue.<sup>38</sup> If conciliation fails, a tribunal should be able to award damages and costs and should have injunctive powers to order a person to desist from the conduct or to take some positive steps to reduce the harm caused by the conduct.<sup>39</sup> Conduct that constitutes racial vilification and is also an offence against the criminal law should be prosecuted as an offence.

## Review of Commonwealth Criminal Law (Gibbs Committee)

7.22. **Sedition.** The law relating to sedition<sup>40</sup> has been examined by the Gibbs Committee in its fifth interim report.<sup>41</sup> The Committee concluded that the offence should be retained but rewritten, eliminating archaic features and including some new ones, 'to accord with a modern democratic society'.<sup>42</sup> It proposes that the existing offence be replaced by

A person must not, by any means, incite the use of force or violence by one group within the Australian community, whether distinguished by nationality, race or religion, against another group within the Australian community.

The maximum penalty for the offence would be seven years imprisonment. The provision is intended to implement in part Australia's obligations under ICCPR art 20. The external affairs power of the Commonwealth is the constitutional basis for the proposal

7.23. **Incitement to commit an offence.** The Gibbs Committee recommended some changes to the offence of incitement to commit an offence against federal law. It also recommended that the penalty for incitement should be linked to the penalty for the principal offence.<sup>43</sup> The recommended

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34 Royal Commission into Aboriginal Deaths in Custody, *National Report*, Volume 4, AGPS, Canberra, para 28.3.31-50.

35 para 28.3.35.

36 See para 7.11.

37 See para 7.12.

38 para 28.3.44.

39 para 28.3.49.

40 See para 7.9.

41 Attorney-General's Department, Review of Commonwealth Criminal Law (Chairman Sir Harry Gibbs), *5th Interim Report*, AGPS, Canberra, June 1991, 301-9.

42 The existing provision refers to 'an intention to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth': *Crimes Act 1914* (Cth) s 24A(g).

43 Review of Commonwealth Criminal Law, Interim Report, *Principles of Criminal Responsibility and Other Matters*, AGPS, Canberra, 1990, ch 18.

offence would cover incitement to commit an offence and printing (intending it will be published) and publishing material knowing that it contains matter expressed so as to incite another person to commit an offence. The penalty recommended is imprisonment for three years or the penalty that is the maximum penalty for the principal offence, whichever is the lesser.

## Overseas legislation

### New Zealand

7.24. In New Zealand incitement to racial disharmony is a criminal offence. The *Race Relations Act 1971* (NZ) s 25 makes it an offence

- to publish or distribute written matter, or to broadcast by means of radio or television words, which are threatening, abusive or insulting
- to use words which are threatening, abusive or insulting either in any public place, or within the hearing of persons in a public place or at any meeting to which the public are invited or have access.

The conduct must be done with the intention to excite hostility or ill will against, or to bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of the group. The written matter or words must be likely to excite hostility or ill-will. It is a summary offence and the penalty for the offence is three months imprisonment or a fine of \$1000. The consent of the Attorney General is required for a prosecution.<sup>44</sup> It is also a criminal offence to refuse to allow a person access to places, vehicles or facilities

by reason of the colour, race, or ethnic or national origins of that person or of any relative of that person ... or of any associate of that person.<sup>45</sup>

### Canada

7.25. Incitement to racial hatred is an offence in Canada. A person who, by communicating statements in a public place, incites hatred against any identifiable group that is likely to lead to a breach of the peace is guilty of an offence punishable by two years imprisonment. Further, a person who, by communicating statements other than in private conversation, wilfully promotes hatred against any identifiable group is also guilty of an offence.<sup>46</sup> There must be an intention to promote hatred.<sup>47</sup> 'Identifiable group' means any section of the public distinguished by colour, race, religion or ethnic origin.<sup>48</sup> It is a defence if

- the statements were true
- the accused, in good faith, expressed or attempted to establish by argument an opinion on a religious subject
- the statements were relevant to any subject of public interest, discussion of which was for the public benefit and if on reasonable grounds the accused believed them to be true or

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44 s 26.

45 *Race Relations Act 1971* (NZ) s 24.

46 *Criminal Code* (Can) s 319(2).

47 *R v Buzzanga and Dурrocher* (1980) 49 CCC (2d) 369.

48 s 318(4).

- the accused, in good faith, intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.<sup>49</sup>

The Attorney-General must consent to a prosecution for ‘wilful promotion of hatred’.<sup>50</sup>

## Great Britain

7.26. The *Public Order Act 1986* (UK) Part III prohibits the stirring up of racial hatred. Racial hatred is defined as

hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.<sup>51</sup>

It is an offence to use threatening, abusive or insulting words or behaviour, or to display any written material which is threatening, abusive or insulting, in a public or private place (except ‘inside a dwelling’ and not seen or heard by anyone except persons in that or another dwelling).<sup>52</sup> It is also an offence to publish or distribute written material which is threatening, abusive or insulting.<sup>53</sup> The act must have been done with the intention of stirring up racial hatred or in circumstances where racial hatred is likely to be stirred up.<sup>54</sup> If a person did not intend to stir up racial hatred and did not intend and was not aware that his or her words or behaviour, or the written material, might be threatening, abusive or insulting, he or she is not guilty of an offence under s 18. If the accused did not intend to stir up racial hatred, it is a defence to a prosecution under s 19 that he or she was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting. Performances of plays, distributing, showing and playing sound or video recordings, and broadcasting where the material is ‘threatening, abusive or insulting’ and intended to or likely to stir up racial hatred are all prohibited.<sup>55</sup> Possession of racially inflammatory material with intention to stir up racial hatred is also an offence.<sup>56</sup> In each case defences are provided for an accused who did not intend to stir up racial hatred. The Act provides for specific police powers of entry and search. A new and controversial provision of the Act prohibits the use of threatening, abusive and insulting words or behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.<sup>57</sup>

## Common elements of the offences

7.27. In each jurisdiction it is an offence to incite racial hatred or, in New Zealand, racial disharmony, by using words or by displaying or distributing written material. In two jurisdictions (New Zealand and Great Britain) the words or written material must be ‘threatening, abusive or insulting’; in Canada it must be likely to lead to a breach of the peace. In each case, the prohibited conduct must be done with an intention to excite hostility or to promote or stir up hatred or, in Great Britain, subject to defences of ignorance of the nature of the material, in circumstances where hatred is likely to be stirred up. In each case, a defined group must be the subject of the hostility or hatred. Colour, race and ethnic origin are included in the definition of the group in all three

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49 s 319(3).

50 s 319(6).

51 s 17.

52 s 18.

53 s 19.

54 s 18-9.

55 s 20-2.

56 s 23.

57 s 5.

jurisdictions; other characteristics are national origin (New Zealand and Great Britain), nationality, including citizenship (Great Britain) and religion (Canada).

## Racist violence

7.28. Generally speaking, doing, or threatening to do, an act of violence is an offence under State or Territory law. It is an offence, for example, to hit another person. Under State or Territory law, the harm done to the victim of an act of violence is punished. The punishment is proportionate to this harm: for example, murder is punished more severely than a common assault. While a particular act of racist violence may have a single victim as its immediate target, it is a characteristic of racist violence that it is directed towards, and affects, members of a whole community.<sup>58</sup> Its effect is to instill fear in members of that community that they will be subjected to violence, not on a random basis, as is everyone else in the community, but because they are members of a particular community.<sup>59</sup> The harm done by violence of this kind goes beyond the harm done to the individual victim. It extends to all the members of the community to which it is directed and impairs their equal enjoyment of human rights and fundamental freedoms. It is this harm that an offence of racist violence is intended to deter and this harm for which an offender is punished.

## Should there be a federal offence of racist violence?

### Competing considerations

7.29. *Australia's obligations.* The ICCPR art 20 (2) on which Australia has reserved<sup>60</sup> requires parties to prohibit by law

any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

It is concerned with incitement to hostility or violence, not hostility or violence itself, and would certainly authorise, though it does not necessarily require, the creation of a criminal offence; effective civil sanctions would satisfy the provision. Parties to the CERD 'undertake to adopt immediate and positive measures designed to eradicate all incitement to, and acts of,' racial discrimination. These include declaring

an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.<sup>61</sup>

This provision covers acts of violence and incitement to acts of violence. It requires the creation of a criminal offence; civil sanctions would not be enough.

7.30. *Is racist violence an appropriate matter for federal legislation?* Multiculturalism is an articulated policy of the national government. The protection of all Australians from acts and

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58 'The victims of the ANM (Australian Nationalist Movement) firebomb attacks on a number of Asian restaurants were never intended to be the proprietors of the restaurants but the Asian community as a whole. Similarly a swastika painted on the wall of a synagogue is not merely vandalism in the class of, for example, painting an obscenity on a telephone booth or private property. It is the sending of an unambiguous, threatening message to all Jews': J Jones *Submission* August 1991.

59 The Commission acknowledges that this is equally true of groups identified by a characteristic other than race; homosexual men, for example, are subjected to violence because they are homosexual: see eg P Berman *Submission* July 1991.

60 See para 7.5.

61 art 4 (a): Australia has indicated its intention of implementing this provision.

expressions of racist violence and intimidation is an integral part of this policy. Racist violence has a very damaging impact on community relations in a multicultural society. The Commonwealth's commitment to multiculturalism and its stated acceptance of its international obligations strongly support the view that it should take responsibility for ensuring that all Australians are protected from racist violence and not rely on the States and Territories. Many submissions support in principle the proposal to create an offence of racist violence. It was said that legislation which specifically identifies racist violence would help in assisting in the development of procedures to monitor the incidence of such violence and strategies to overcome it.<sup>62</sup> It would spell out clearly that the community rejects violence that is motivated by racism.<sup>63</sup>

**7.31. *Would federal racist violence legislation be enforceable?*** Conduct that constitutes racist violence is also an offence of violence under State or Territory law. Generally speaking, such an offence would be reported to State or Territory police who would investigate it to determine if there were sufficient evidence to charge a person with a State or Territory offence. Additional evidence would be required to support a further charge of racist violence in order to show the additional element that distinguishes racist violence from violence alone. Although both offences could be charged, police may not be willing to allocate time and resources to gather the additional evidence for the federal offence when the State and Territory offences would be easier to prosecute. Prosecuting authorities would be more confident of securing a conviction for the State or Territory offence than they would be of securing a conviction of an offence that required proof of an additional element, namely, the intention on the part of the accused that would make an act of violence an act of racist violence. These practical reasons may make it unlikely that a federal offence of racist violence would be enforced and were the main grounds of opposition to the creation of a federal offence of racist violence in submissions.<sup>64</sup> It was suggested, for example, the police should be encouraged to enforce existing laws more efficiently and more impartially<sup>65</sup> and that better education and training of police might lead to more effective enforcement than creating a new offence.<sup>66</sup> However, in circumstances where police, including the Australian Federal Police, are put on notice that racist violence may occur, for example, where a well publicised rally is to be held at a mosque or a synagogue, they would be in a position to prevent the violence or, if not, arrest the perpetrators of it.

**7.32. *Does the Commonwealth have power?*** The legislative power of the Commonwealth to create an offence of racist violence depends on whether the legislation gives effect to the provisions of an international convention to which Australia is a party. If so, it will be valid under the external affairs power of the Commonwealth.<sup>67</sup> The legislation must conform to the provisions of the international convention 'in substance'. There is no requirement of exact equivalence; it is enough if the legislation is 'within reason', 'sufficiently stamped with the purpose' or 'reasonably appropriate'.<sup>68</sup> International agreements are the result of compromise between states with very different legal and social systems and are not expressed with the precision of legislation. It is sufficient to give effect to a convention if the Act gives effect to the principles stated in the convention.<sup>69</sup> It may also be necessary that there is 'reasonable proportionality' between the means chosen and the purpose or object of the convention.<sup>70</sup> Although it is a requirement that the subject of the laws made by the Commonwealth should be a matter of international concern as well as

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62 See eg Ethnic Affairs Commission of New South Wales *Submission* August 1991.

63 See eg General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* August 1991.

64 See eg Victoria Police, Law Review Unit *Submission* August 1991; Northern Territory Police *Submission* June 1991.

65 I Leader-Elliott *Submission* October 1991.

66 Northern Territory Police *Submission* June 1991.

67 Constitution s 51(xxix); there is no antithesis between external and internal affairs and the 'external affairs power' can be used to deal with domestic matters, such as civil rights for Aborigines: *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.

68 See eg *Commonwealth v Tasmania* [1983] 158 CLR 1, 172, 178 (Murphy J); *Koowarta v Bjelke-Peterson* [1982] 153 CLR 168, 233 (Mason J); *Gerhardy v Brown* [1984-5] 159 CLR 70, 124 (Brennan J).

69 *Aldridge v Booth* (1988) 80 ALR 1, 12 (Spender J).

70 *Commonwealth v Tasmania* [1983] 158 CLR 1, 260 (Deane J).



being the subject of an international agreement, racial discrimination satisfies this test.<sup>71</sup> Racist violence against individuals is a particularly offensive form of discrimination on the basis of race or ethnic origins.

## **Recommendation—a federal offence of racist violence**

### **Recommendation outlined**

7.33. The Commission recommends that the Commonwealth should amend the *Crimes Act 1914* (Cth) to make racist violence an offence under federal law. Racist violence is intended to harm, and does harm, people other than the individual victim of the violence. It harms members of the community against whom the violence is directed. It causes them to fear that they themselves will be subjected to violence, not randomly, but because they belong to that community. Racist violence undermines community relations and is potentially destructive of the social fabric. It is a national problem and should be addressed at national level. To make racist violence a federal offence would be a valid exercise of the external affairs power of the Commonwealth provided that the legislation falls within the principles mentioned above. It would also implement Australia's obligations under the ICCPR and the CERD. The practical problems of enforcement should be able to be overcome in time. The creation of an offence would promote research and education that might help reduce the incidence of racial intolerance.

### **The recommended offence**

7.34. *The form of the legislation.* In DP 48 the Commission proposed a single offence of racist violence. The acts constituting the offence were defined as 'assault' or 'damage to property' carried out with a specific intent. A problem with this approach is that the offending acts can include a wide range of conduct. The offence would not distinguish between serious acts of violence and less serious ones.<sup>72</sup> It is not possible to determine a single penalty for an offence that is so broadly defined. What is required is a range of offences, each with a penalty appropriate to the degree of violence involved. Since the acts of violence that form part of the offence of racist violence already constitute an offence under State or Territory law, and the offence could be committed in any State or Territory, the Commission considered linking it to the criminal law of the State or Territory where it occurred. This would mean, however, that the exact offence and the penalty for the offence would be different in different places. A majority of the Commission concluded that it is preferable to select the law of a single jurisdiction as the underlying law for the offence and to apply that body of law as a Commonwealth law throughout Australia. The Commission has framed its recommended offence in terms of an act of violence that, if it were committed in the Jervis Bay Territory, would be an offence in that Territory.<sup>73</sup> This avoids the need to enact a comprehensive code of offences of racist violence ranging from common assault to murder.

7.35. *Laws of the Jervis Bay Territory.* Jervis Bay is a Commonwealth Territory located in the south east of New South Wales. The criminal law that applies there is the criminal law of the Australian Capital Territory<sup>74</sup> as amended by the Commonwealth. Since the Australian Capital Territory became self-governing, Jervis Bay is the only mainland jurisdiction for which the Commonwealth makes criminal law. Basing the recommended offence on Jervis Bay criminal law

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71 *Koowarta v Bjelke-Peterson* [1982] 153 CLR 168, 235 (Mason J).

72 A fatal blow and a raised fist may both constitute an assault; property damage may be slight or extensive.

73 One member of the Commission, Justice Peter Nygh, whilst supporting the recommendation that racist violence be made an offence under federal law, has serious reservations about implementing this by reference to the laws of the Jervis Bay Territory, an area whose existence will be unknown to many Australians and whose law is obscure even to most Australian lawyers.

74 ie the criminal law of NSW as amended by ACT laws.

enables the Commonwealth to retain control over all the elements of the offence and the penalty and ensures that there is a single law of racist violence throughout Australia.

7.36. **Offences against Jervis Bay law that comprise an element of the recommended offence.** If the recommended offence were created, the offences under Jervis Bay law that comprise an element of the recommended offence should be specifically identified and included in a schedule to the *Crimes Act 1914* (Cth). The criteria for selecting the relevant Jervis Bay offences would be that they each involve an ‘act of violence’ but, because this phrase is not precise enough in itself to identify clearly the relevant offences, it is essential that they be individually identified.<sup>75</sup> This would ensure that members of the public, who have to comply with the law, and the police, whose duty it is to enforce it, can find out exactly what conduct is prohibited by the recommended offence.

7.37. **Elements of the offence.** In order to prove the offence of racist violence, the prosecution would have to show that the accused has committed or threatened to do an act that, if it had been committed in Jervis Bay, would be an offence against a specified law of that Territory.<sup>76</sup> The prosecution would also have to prove that

- the accused intended the act or the threat to cause, or ought reasonably to have foreseen that the act or threat would cause, members of an identifiable group to fear for their physical safety because they are members of an identifiable group, defined as a section of the public distinguished by colour, race, religion or national or ethnic origin and
- the act or threat is likely to cause members of the group to fear for their physical safety because they are members of the group.

The prosecution would not have to prove that the victim of the violence was himself or herself a member of the group.

7.38. **Offences may be prosecuted by State or federal authorities.** The power to initiate a prosecution for a Commonwealth offence is not restricted to Commonwealth officers.<sup>77</sup> State police officers and officers of State or Territory government departments frequently charge people with federal offences. They are usually prosecuted by the federal Director of Public Prosecutions (DPP). The DPP can act as prosecutor for offences against State or Territory law if the informant is a federal officer.<sup>78</sup> Arrangements exist for determining whether federal or State or Territory prosecuting authorities should conduct the matter, where a Commonwealth officer is informant for a State or Territory offence or vice-versa, or where charges have been laid under both State and Commonwealth laws. The offence may be prosecuted at the same time as a State or Territory offence.<sup>79</sup> The federal offence is framed in a way that requires the prosecution to prove that the Territory offence has been committed or threatened and that there are also the additional elements that convert the violence into racist violence. If the prosecution proves the Territory offence but fails to prove the additional elements of the recommended offence,<sup>80</sup> the accused may still be convicted of the relevant State or Territory offence in the State or Territory where it took place. If so, he or she would be punished for the State or Territory offence. If the prosecution proves both the State or Territory offence *and* the recommended federal offence, the accused may be punished for

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75 One member of the Commission, Stephen Mason, considers that this is unnecessary: the phrase ‘act of violence’, linked to offences against Jervis Bay law, is already used in federal legislation such as the *Crimes (Aviation) Act 1991* (Cth) without the need for extensive definition or listing offences in a schedule.

76 ie the law specified in the schedule.

77 *Crimes Act 1914* (Cth) s 13.

78 *Director of Public Prosecutions Regulations 1984* (Cth), reg 3.

79 A person may be charged with a federal and a State or Territory offence at the same time providing it is not the same offence: *Crimes Act 1914* (Cth) s 4C.

80 See para 7.37.

the federal offence (the maximum sentence for which is greater than that for the relevant State or Territory offence) as long as he or she has not been punished for the State or Territory offence.<sup>81</sup>

7.39. **Penalty.** The racist element converts the offence into a more serious offence than it would otherwise have been. The maximum penalty for the new offence should be higher than for the act of violence alone. It should be one and a half times the penalty prescribed as the maximum penalty for the act under the law of the Jervis Bay Territory. Thus, if the maximum penalty for the assault under that law were two years imprisonment, the maximum penalty for the federal offence should be three years imprisonment.

## **Incitement to racist violence**

7.40. It is an offence to incite the commission of a federal offence by

- inciting, urging, aiding or encouraging or
- printing or publishing any writing which incites to, urges, aids or encourages.

The maximum penalty is 12 months imprisonment.<sup>82</sup> The Gibbs Committee has recommended that this should be increased.<sup>83</sup> It follows that, if the recommended offence of racist violence were created, incitement to commit that offence would also be an offence unless it were expressly excluded. The Commission recommends that it should not be excluded and that an offence of incitement to racist violence should accordingly be introduced into the law of the Commonwealth.

## **Incitement to racist hatred or hostility**

### **Discussion paper proposal**

7.41. In DP 48 the Commission considered whether the *Crimes Act 1914* (Cth) should be amended to create an offence of incitement to racial hatred. Such an offence would prohibit conduct likely to expose a person or persons to hatred, hostility or contempt on the ground of his or her membership of an identifiable group. The group would be any section of the public distinguished in terms of colour, race, religion or ethnic origin. The prohibited conduct would include

- publishing or distributing written material that is threatening, abusive or insulting and
- publicly speaking words that are threatening, abusive or insulting.

Violence or incitement to violence would not be an element of the offence. The Commission did not make a specific proposal. It invited submissions on whether there should be an offence of incitement to racial hatred.

### **Should incitement to racist hatred or hostility be unlawful?**

7.42. **Existing law.** Incitement to racist hatred or hostility, or racial vilification, encompasses words, whether speech or writing, and actions and gestures that promote hatred, hostility, contempt or serious ridicule of a person or group of persons on the ground of colour, race, ethnic or national

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81 *Crimes Act 1914* (Cth) s 4C(2).

82 *Crimes Act 1914* (Cth) s 7A.

83 See para 7.23.

background. Conduct amounting to racial vilification may be an offence under State or Territory law or federal law. It may be unlawful under the anti-discrimination legislation of a State or Territory or of the Commonwealth or under legislation regulating broadcasting.<sup>84</sup>

7.43. ***Freedom of expression should not be curtailed unnecessarily.*** Freedom of expression is one of the hallmarks of a free and democratic society. It is an indication of tolerance of the expression of unpopular views. It is one of the rights protected by the ICCPR and CERD. In Australia, freedom of speech derives from an absence of legal intervention: whatever is not prohibited is allowed. There are no express guarantees in the Constitution. Rather, an individual is free to express his or her ideas as long as there is no positive law prohibiting it.<sup>85</sup> Freedom of expression is limited by law in the interests of social stability, national security, confidentiality and personal integrity.<sup>86</sup> Laws prohibiting contempt of court, sedition, defamation, obscenity and offensive behaviour are some of the laws, civil and criminal, that limit freedom of expression. They are justified on the basis that there is a legitimate reason for limiting freedom of expression and that they are necessary for the effective functioning of a democratic society. In the view of a majority of the Commission, the prohibition of racist threats and abuse is consistent with existing limits on freedom of expression.

7.44. ***Freedom of expression must be balanced against other community values.*** In the view of a majority of the Commission, freedom of expression is just one of the values the law protects in a democratic society.<sup>87</sup> In a tolerant society people are entitled to be protected against serious attempts to undermine tolerance by stirring up hatred between groups. Laws prohibiting incitement of racist hatred and hostility protect the inherent dignity of the human person. In a multicultural society, values such as equality of status, tolerance of a wide variety of beliefs, respect for cultural and group identity and equal opportunity for everyone to participate in social processes must be respected and protected by the law. Laws prohibiting incitement to racist hatred and hostility indicate a commitment to tolerance, help prevent the harm caused by the spread of racism and foster harmonious social relations. Australia is a multicultural society. Its survival as a multicultural society demands that the communities that make up the Australian community can live in peace and harmony. Inciting hatred and hostility against sections of the community is an offence against the whole community and the whole community has an interest in ensuring that it does not happen.

7.45. ***The Commission's view.*** A majority of the Commission<sup>88</sup> is of the view that incitement to racist hatred and hostility should be unlawful.

### **Should incitement to racist hatred and hostility be a criminal offence?**

7.46. Incitement to racist hatred and hostility can be dealt with by conciliation. Civil remedies, including orders restraining the offensive behaviour, public apologies and damages payable to the complainant, may be more appropriate than a criminal penalty. On the other hand, the onus of initiating a civil complaint lies on the individual whereas the state is responsible for prosecuting a criminal offence. Submissions are divided as to whether there should be a criminal offence. A number of submissions suggest that the offence should be limited to the incitement of racist

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84 eg *Summary Offences Act 1966* (Vic) s 9 (wilful destruction, damage, etc of property); s 10 (posting bills etc and defacing property); s 17 (obscene, indecent, threatening language and behaviour etc in public); *Summary Offences Act 1988* (NSW) s 4 (offensive conduct or language); s 8 (damaging shrines, monuments or statues) s 9 (defacing walls); see also para 7.1-7.16.

85 cf Canada where the Charter of Rights and Freedoms, and the United States where the Bill of Rights, give constitutional protection (in somewhat different terms) to an individual's freedom of expression.

86 This is consistent with the ICCPR and CERD: see para 7.3.

87 Justice Nygh takes the view that in a democratic and pluralist society freedom of expression is of special importance which may necessitate tolerance of obnoxious and hateful views which do not incite violence.

88 Justice Nygh dissents.

hostility likely to lead to violence.<sup>89</sup> A number of submissions oppose the creation of a criminal offence on the ground that it would be an unacceptable curtailment of freedom of expression.<sup>90</sup> As already indicated, a division of opinion already exists between the National Inquiry into Racist Violence (recommending an offence of incitement to racist hatred where it is likely to lead to violence) and the Report of the Royal Commission into Aboriginal Deaths in Custody (favouring civil rather than criminal remedies for racial vilification).

## Recommendation

7.47. **Recommendation.** The Commission, by majority, supports making incitement to racist hatred and hostility unlawful.<sup>91</sup> The majority considers that making it a crime, however, restricts freedom of speech unduly. It is of the view that conciliation, backed up by civil remedies when conciliation fails, is the more appropriate way to deal with it and opposes the creation of a criminal offence.

7.48. **A dissent.** Two members of the Commission<sup>92</sup> do not agree. In their view, it is important that the criminal law be available as a remedy for spreading racist propaganda designed to stir up hatred and hostility on racist lines. In many cases there may be only a fine line between stirring up hatred and hostility on the one hand and incitement to violence on the other. Where proof of intention to cause violence falls short, the existence of intent to cause hatred may be quite clear. To offer no more than conciliation in such cases would add to the trauma of the victim. The measures already proposed will attack the expression of racism through racist violence. This is consistent with and is justified by Australia's obligations under CERD article 4(a). But CERD does not stop there. It also requires states parties to

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred.

The wording of this provision is to be contrasted with the wording of other provisions in CERD which merely call on states parties to prevent or to make unlawful particular activities. The distinction drawn by CERD is appropriate. Apartheid, racial segregation and racism depend in the final analysis on ideas of racial superiority or hatred. Such ideas are the root cause of racism. To leave the propagation of hatred to be dealt with under 'offensive behaviour' or similar provisions is to ignore the quite different insidious effects of this kind of speech. In these members' view, an appropriate balance will be struck between the obligations Australia has assumed of declaring the dissemination of racist propaganda a criminal offence and the rights elsewhere guaranteed under international law if Australian law creates an offence of publishing anything based on ideas or theories of racial superiority, or promoting hatred between races, with the intention of inciting hatred or hostility towards racial groups. The suggested provision to be added to the Crimes Act is

Incitement to racist hatred or hostility

85ZKE. (1) A person must not publish, by any means, anything that is based on ideas or theories of superiority of any race or group of persons of one colour or ethnic origin over another, or promotes hatred or hostility between such races or groups, if the person intends that the publication will incite hatred or hostility towards an identifiable group and is likely to have that effect.

Penalty: ?.

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89 eg Ethnic Affairs Commission of New South Wales *Submission* August 1991; cf Ethnic Communities' Council of NSW, Anti-Racism Taskforce *Submission* August 1991.

90 See eg Sydney Anglican Diocese, Ethnic Workers Forum *Submission* August 1991; Victoria Police, Law Review Unit *Submission* August 1991; DK Malcolm, Chief Justice Supreme Court of Western Australia *Submission* August 1991.

91 para 7.45.

92 The President, Justice Evatt, and Stephen Mason. Dott Paolo Totaro and Greta Bird, who continued to take part in the Commission's work as consultants after their commissions ended on 30 September 1991, support their view.

(2) “Publish” means publish to the public or to a section of the public.

Such a provision will, in these members’ view, adequately address Australia’s obligations under article 4(b) as well. That article requires states parties to ban organisations promoting and inciting racial discrimination under criminal penalty. The main function of such an organisation is the public promotion of racism. If that is made criminal, it is unnecessary also to add racist organisations to the list of organisations that can be declared illegal under the *Crimes Act 1914* s 30A.

## **Broadcasting material likely to incite racist hatred and hostility**

### **Racism and the media**

7.49. The Commission’s consultation revealed that there is a great deal of concern about recurring racism in the media and the lack of effective sanctions against offenders, even when complaints are upheld by the Australian Press Council or regulatory bodies.<sup>93</sup> This is consistent with submissions made to the National Inquiry into Racist Violence (NIRV).<sup>94</sup> NIRV found ‘ample evidence of discriminatory reporting and racial stereotyping’ of Aboriginal people, and documents a number of specific examples in its report. Existing complaints mechanisms were found to be largely ineffectual. It also found that there is a connection between media coverage of immigration issues, foreign affairs and events involving ethnic minorities, and the level of harassment experienced by people of non-English speaking background. Inflammatory media coverage of current events, for example the Gulf War, the portrayal of Islam as a malevolent force, the stereotyping of Aborigines as criminals and drunkards, does not inform; it misinforms and contributes to racial tensions. In the Commission’s own consultations a great deal of concern has been expressed about the role of the media in exacerbating racial prejudice, and the lack of redress for the damage this does to individuals, communities and social relations generally.

### **Recommendation**

7.50. The Government acknowledges that ‘broadcasting is an integral part of national identity and culture’ and recognises the power of the broadcasting media to ‘influence the daily lives and attitudes of their audiences’.<sup>95</sup> It is not appropriate that the broadcasting of material that is likely to incite hatred and hostility against communities within the Australian community and to lead to social disharmony should be left to self-regulation.<sup>96</sup> Standards should be set by Parliament and appropriate sanctions should be provided in the event that the standards are breached. The Commission, by majority, recommends<sup>97</sup> that the legislation regulating broadcasting should include a provision prohibiting the broadcast of material that is likely to incite hatred or hostility against, or gratuitously vilify, any person or group on the basis of, at least, colour, race, religion or national or ethnic origin.<sup>98</sup>

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93 See para 7.8 for a discussion of regulation of broadcasting.

94 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, Canberra, 1991, 356-66

95 Hon KC Beazley, Minister for Transport and Communications, *Draft Broadcasting Services Bill: Explanatory Papers*, 7 November 1991.

96 The emphasis of the Bill is on self-regulation

97 Justice Peter Nygh dissents.

98 This is similar to the current Radio Program Standard 3.

## Should references to blasphemy in federal law be removed?

### International conventions

7.51. Member states agree that everyone shall have the right to freedom of thought, conscience and religion. The right includes

freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.<sup>99</sup>

Freedom to manifest one's religion or beliefs may be subject only to such limitations as

are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.<sup>100</sup>

### Australian law

7.52. **Common law offence of blasphemy.** The law of blasphemy is an ancient common law offence constituted by the publication of material which provokes outrage in Christians by insulting, ridiculing or vilifying God, Christ or the Christian religion as practised in the Church of England. Blasphemy is a statutory offence under the Crimes Act or Criminal Code of the States and Territories.<sup>101</sup>

7.53. **Blasphemy in Commonwealth law.** Blasphemy is not a Commonwealth offence. However, it is picked up in Commonwealth legislation which refers to 'blasphemous' material.<sup>102</sup> This legislation is currently under review.<sup>103</sup> Blasphemy is not specifically defined in any of this legislation so it must be assumed that the English common law definition of blasphemy applies.

7.54. **Other laws protecting religious belief and practice.** In some States the criminal law creates a number of offences designed to protect religious practice and places of worship. Examples include obstructing or assaulting a clergyman and sacrilege (that is, breaking and entering a place of divine worship and committing a felony),<sup>104</sup> and disturbing religious worship.<sup>105</sup> It is also an offence to desecrate an Aboriginal sacred site or destroy or damage Aboriginal relics.<sup>106</sup>

### Blasphemy provides only limited protection

7.55. Religious affiliations in Australia are many and diverse. Although most Australians describe themselves as Christian, the largest single group of whom are Catholics, a growing minority (more than 300 000 in 1986) are members of non-Christian religious faiths, particularly Islam, Buddhism and Judaism. Nearly 2 000 000 Australians do not subscribe to any religion.<sup>107</sup> The offence of blasphemy, however, protects only the Christian religion, with specific reference to the rituals and

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99 art 18(1).

100 art 18(2).

101 In NSW the Law Reform Commission is presently reviewing the law of blasphemy: see New South Wales Law Reform Commission, *Blasphemy*, Sydney 1992 (NSWLRC DP 24).

102 Customs regulations prohibit the importation of blasphemous material: Customs (Cinematograph Films) Regulations reg 13; Customs (Prohibited Imports) Regulations reg 4A(1)(a). The *Broadcasting Act 1942* (Cth) prohibits the broadcasting of blasphemous, indecent or obscene matter: s 118.

103 See para 7.8; see also Australian Law Reform Commission, Report 55 *Censorship Procedure*, AGPS Canberra 1991 (ALRC 55).

104 *Crimes Act 1900* (NSW) s 56; 106; 107.

105 *Imperial Acts Application Act 1969* (NSW) s 39.

106 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 22.

107 Australian Bureau of Statistics, *Census 86—Multicultural Australia*, ABS, Canberra, 1991, p 37.

doctrines of the Anglican Church. Offences that involve the common law of blasphemy apply only to material that vilifies Christianity. Of the other offences that protect religious practice and places of worship, some protect only Christian ceremonies and institutions, while others are broader in their application. The protection given to minority religions is not the same throughout Australia. This is not consistent with Australia's human rights obligations.<sup>108</sup>

## Discussion paper proposal

7.56. ***Remove all references to blasphemy in federal law.*** In DP 48 the Commission proposed that references to 'blasphemous' material in federal law should be removed. It is not within the power of the Commonwealth to abolish the offence of blasphemy except in some Territories. It is within power to remove references to 'blasphemous material' in federal law. There have been strong views expressed both for and against the Commission's proposal.

7.57. ***Submissions against the proposal.*** Submissions opposing the proposal to remove all references to blasphemy from federal law are divided into two groups

- there should be no change to the existing law<sup>109</sup>
- references to the offence should remain and it should be extended to include other religions.<sup>110</sup>

Submissions argue that, to the extent that the proposal would remove a protection that exists for a large section of the community, it is inconsistent with the Commission's stated concern to protect individuals because of their race or religion. The protection against blasphemy in existing public order offences<sup>111</sup> is limited only to incidents which occur in public places.<sup>112</sup> The proposed new offence of racial and religious violence would not provide adequate protection because the intent provisions of that offence would be difficult to prove and one should not have to be subjected to violence to be protected against blasphemy.<sup>113</sup> Many Australians would be offended by the removal of references to blasphemy from the law.<sup>114</sup> The Commission also received many submissions opposing the removal of references to blasphemy from the law during its Censorship inquiry.<sup>115</sup>

7.58. ***Submissions in favour of the proposal.*** The starting point for submissions in favour of the proposal is that such an offence should not be retained unless it covers all religions. It is argued that extending it to cover all religions would raise serious difficulties in defining 'religions' and 'gods',<sup>116</sup> would have grave consequences for freedom of speech and might contribute to religious conflict.<sup>117</sup> On the other hand, removing all references to blasphemy in federal law would have the effect of removing an apparently preferential position of one religion and moving towards a situation of parity between religions in federal law. For this reason it should be done.<sup>118</sup> In so far as blasphemy causes hurt to a person's sensibilities, the existing provisions on offensive behaviour and other public order offences are sufficient.<sup>119</sup> Alternatively, the federal offence of incitement to racist

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108 See para 7.2.

109 eg Save Australia (Tas) *Submission* July 1991; Rev K Sharples *Submission* July 1991; The Brethren *Submission* July 1991.

110 eg JV Coombs *Submission* June 1991; K Weissenfeld *Submission* July 1991; M Majarich *Submission* July 1991; KA McKenzie, *Submission* August 1991; M Smith *Transcript* Sydney, 26 September 1991.

111 eg the *Summary Offences Act 1988* (NSW) s 4 which makes it an offence to conduct oneself in an offensive manner, or use offensive language, in or near, or within view or hearing from a public place or a school.

112 Anglican Diocese of Sydney, Social Issues Committee *Submission* August 1991.

113 Presbyterian Women's Association of Australia in NSW *Submission* August 1991.

114 South Australia Police Department *Submission* September 1991.

115 ALRC 55, para 6.7.

116 B Bryceson *Submission* October 1991.

117 Humanist Society of Victoria *Submission* July 1991.

118 Ethnic Affairs Commission of New South Wales *Submission* August 1991.

119 D Weisbrot & RM Hope QC *Submission* May 1991.



violence proposed by the Commission should include incitement to violence on the basis of religious belief.<sup>120</sup>

## Recommendation

7.59. The Commission has recommended the creation of an offence of racist violence that makes it an offence to commit or threaten to do an act of violence that

- the perpetrator intended, or ought reasonably to have foreseen, would cause members of a group identifiable by their religion (among other things) to fear for their physical safety because they are members of the group and
- is likely to cause members of the group to fear for their physical safety because they are members of the group.<sup>121</sup>

Incitement to commit the offence would also be an offence. Unlike blasphemy, this offence would apply equally to all sections of the public identified by religion. It would include violence intended to cause Christians to fear for their physical safety because they are Christians. A majority of the Commission favour making incitement to racist hatred and hostility unlawful.<sup>122</sup> Some federal legislation has already been amended to remove reference to blasphemy. An offence of sending blasphemous material through the post was repealed in 1989 and replaced with an offence of using Australia Post postal or telecommunications services in a way that would be regarded as ‘offensive’.<sup>123</sup> The Commission does not favour extending the law of blasphemy to cover faiths other than Christianity. It would be very difficult to devise a satisfactory definition of religion and would be an unreasonable interference with freedom of expression. For these reasons, the Commission recommends that all references to blasphemy in federal legislation should be removed. Offences that protect personal and religious sensibilities should be recast in terms of ‘offensive material’. The Commission does not suggest any change to other laws protecting religious belief and practice.<sup>124</sup>

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120 General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* August 1991; L Curtis and others *Transcript* Canberra 4 September 1991; RH Arnot *Submission* August 1991.

121 para 7.33-7.39.

122 See para 7.47.

123 *Crimes Act 1914* (Cth): s 85S—improper use of postal services; s 85ZE—improper use of telecommunications services.

124 See para 7.54.

## 8. Accommodating cultural diversity in the criminal law

### Introduction

8.1. Multiculturalism is defined by the National Agenda for a Multicultural Australia as a policy for ‘managing the consequences of cultural diversity in the interests of the individual and society as a whole’. The aim of the policy is

to protect the rights of all members of society to enjoy their culture and language and practise their religion ... Fundamentally, multiculturalism is about the rights of the individual ... to be accepted as an Australian without having to assimilate to some stereotyped model of behaviour.<sup>1</sup>

This chapter considers the extent to which the criminal law should reflect these policy objectives. Both the International Covenant on Civil and Political Rights (ICCPR) and the National Agenda emphasise the principle of individual autonomy and place the onus on the state to justify its interference with the right of individuals to live according to their own cultural values. The ICCPR also provides that all persons are equal before the law and entitled to the equal protection of the law.<sup>2</sup> Clearly, the law must sometimes restrict the liberty of individuals in order to protect others from harm or oppression. The state must, for example, impose prohibitions on physical violence against others. In other cases, however, it is not so obvious where the line should be drawn between individual autonomy and state regulation. This chapter considers whether the criminal law takes adequate account of cultural diversity. The conclusion is that, on the whole, the principles underlying the criminal law reflect shared, universal values and have general acceptance. The Commission recommends a number of changes to the way the criminal law is applied to ensure that different cultural values can be accommodated within the overall framework of the protection of the whole community. It also recommends a set of procedures to ensure that these issues are addressed when laws creating offences are being drafted and considered by Parliament.

### The criminal law may not take adequate account of cultural background

#### The problems identified

8.2. **Introduction.** The Commission has identified a number of areas where compliance with the law is more difficult for some people and where a proper account may not be taken of an accused person’s cultural values and background in determining criminal liability.

8.3. ***Obeying the law may involve violating cultural norms.*** Some immigrant groups, particularly those who do not speak English, come from countries with different cultures and customs from those of the majority in Australia. Members of these groups may find that practising their customs and beliefs in Australia could constitute a breach of the criminal law. Individuals may find themselves having to choose between violating their cultural norms, perhaps jeopardising their status in the community with which they identify, and breaking the law. A wide range of cultural or religious values and practices could be involved, including dress codes, ways of slaughtering animals for food and concepts of individual or family honour. The criminal laws that might be

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1 Department of the Prime Minister and Cabinet, Office of Multicultural Affairs, *National Agenda for a Multicultural Australia*, AGPS, Canberra, 1989, 15.

2 art 26.

infringed range from road safety rules, for example when wearing a turban while riding a motor bike<sup>3</sup> to offences against the person, for example female genital mutilation.<sup>4</sup>

8.4. ***Justifiable lack of knowledge may not be taken into account.*** Generally speaking, ignorance of the law does not excuse a person from criminal liability. This rule may impact harshly on people who have lived much of their lives under a legal system which did not prohibit (and may indeed have encouraged or required) the acts with which they are now charged. The Commission's consultations have shown that this rule is seen as unfair in its application to people who are unaware of the relevant prohibition and who are prevented by language barriers from finding out.

8.5. ***The subjective standard may not take adequate account of different cultural values.*** One major aspect of the test for criminal liability is the 'subjective' or 'mental' element. This focuses on the offender's state of mind. In theory, it can take account of a whole range of influences on a person's state of mind at the relevant time, including the person's cultural values. In practice, however, insufficient account may be taken of such factors. As a result, inappropriate inferences may be drawn and cultural stereotypes may go unchallenged.

8.6. ***The objective standard for determining liability may be inappropriate.*** Other aspects of the test for criminal liability are more objective, imposing a general standard (such as reasonableness) against which the behaviour of individuals is judged. Whether the offender thought he or she was conforming to the standard is not relevant. By refusing to consider the subjective intention or state of mind of the individual on the question of, say, reasonableness, the law is supposed to ensure the application of a single, consistent standard of behaviour which reflects broad community standards. In practice, however, the so-called 'objective' standards often reflect the values of the dominant group in society and may disadvantage individuals from different cultural backgrounds who may have different values.

## Possible solutions

8.7. The Commission has considered the following possible solutions to the problems identified:

- recognising a 'cultural defence'
- allowing exemptions to particular laws
- recognising a defence of justifiable ignorance of the law
- taking more account of cultural factors in existing tests of liability.

## Should the law recognise a cultural defence?

### Existing law

8.8. At common law it is not a defence to a criminal charge that a person was acting according to his or her religious belief or cultural tradition. So, for example, a Jehovah's Witness who refuses to consent to a blood transfusion for his or her child may be guilty of manslaughter if the child dies.<sup>5</sup> It is not a defence to a charge of assaulting a child to claim that severe physical discipline by a parent

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3 Which may breach the requirement to wear safety helmets.

4 Which, although not common in Australia, is an assault or a more serious offence.

5 But see *Transplantation and Anatomy Act 1978* (ACT) s 23 which provides for the administration of blood transfusions to children without parental consent.

is sanctioned by culture or religious authority, nor to a charge of bigamy to claim that polygamy is accepted in the accused's culture.

### **Should the law excuse those who act in accordance with their own cultural values?**

8.9. ***The concept of a cultural defence.*** Tests of criminal liability are there to determine whether or not a person should be punished for his or her behaviour. Does it promote the objectives of criminal law to punish a person who has acted in conformity with cultural norms? The law could provide that a person should be excused from criminal liability if, in committing the offence, he or she was following the customary requirements of his or her own culture. Such a defence would negate or mitigate criminal responsibility where acts are committed under a 'cultural imperative': that is, if the accused believed in good faith that what he or she did was required by culture or custom. Such a defence could apply either generally, to absolve an accused person entirely, or it could operate as a 'partial defence', reducing the level of liability in specific cases.

8.10. ***The Commission has rejected a broad customary law defence in an earlier inquiry.*** In its report *The Recognition of Aboriginal Customary Laws* (ALRC 31), the Commission concluded that a general customary law defence was not desirable. The reasons for that conclusion were that translating customary law into a formal defence would be awkward, the defence would apply in practice in only a few cases and it might have the effect of depriving some individuals, such as victims of assault, of legal protection. It might also subject the relevant customary laws to the kind of formal testing and public scrutiny that would risk violating or distorting those laws.<sup>6</sup>

8.11. ***Recommendation: no general cultural defence.*** In DP 48 the Commission rejected a 'cultural defence' that would completely absolve a defendant from criminal liability. The main ground for this view was that such a defence would violate the principles of equality before the law and equal protection of the law. The Commission's conclusions in regard to Aboriginal customary law apply with the same or even greater force in regard to migrant communities. The parameters of a cultural defence, applying to all communities in Australia, would be so hard to establish that the law would not be certain. The Commission's view was widely endorsed in submissions.<sup>7</sup> Accordingly, the Commission does not recommend such a defence.

8.12. ***Recommendation: no partial cultural defence.*** In ALRC 31 the Commission recommended a very limited 'partial cultural defence'. The defence would only be available to a member of an Aboriginal community who would, but for the defence, be convicted of murder or wilful murder. If such an accused could show that he or she did the act that caused the death

in the well founded belief that the customary laws of an Aboriginal community of which the accused was, at the relevant time, a member required that the act be done by the accused (whether alone or with other persons) the accused would be convicted of manslaughter instead of murder.

The recommendation in ALRC 31 was a response to a particular set of circumstances, including the social and geographic isolation of many Aboriginal communities, and the extent to which they depend on the customary law framework to continue to function as communities. Equivalent

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6 ALRC 31, para 449-50.

7 The Brethren *Submission* July 1991; K A McKenzie *Submission* August 1991; P Berman *Submission* July 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* July 1991; Victoria Police, Law Review Unit *Submission* August 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* August 1991; Department of Immigration, Local Government and Ethnic Affairs (Cth) *Submission* September 1991; Bar Association of Queensland *Submission* October 1991; G Scott QC *Submission* September 1991; Judges of the County Court of Victoria, Law Reform Committee *Submission* June 1991; Northern Territory Police *Submission* June 1991; Department of Attorney-General (NT) *Submission* August 1991; Ethnic Affairs Commission of New South Wales *Submission* August 1991; South Australia Police Department *Submission* September 1991; Bar Association of Queensland *Submission* October 1991; Presbyterian Women's Association of Australia in NSW *Submission* August 1991.

considerations do not apply in other contexts. So far as the Commission is aware, there are no 'requirements' of the same kind in other cultures here. The Commission does not recommend such a defence in cases involving members of other ethnic or cultural groups. While the Commission is of the view that the law should not ignore an individual's cultural values, there is adequate scope within the existing framework of criminal law to take account of cultural factors without creating a new defence, either complete or partial. These are discussed in the following paragraphs.

### **Other ways in which cultural values can be recognised in the criminal law<sup>8</sup>**

8.13. ***In deciding what sentence to impose.*** The court has a wide discretion in deciding what penalty to impose on an offender in a particular case, subject to the maximum penalty specified for the offence.<sup>9</sup> For federal offenders, the law sets out a list of factors each of which the court must take into account, if relevant and known to the court, in determining the sentence. These include

- the nature and circumstances of the offence
- the consequences of the offence, including the personal circumstances of any victim of the offence
- the character, antecedents, age, means, and physical or mental condition of the person
- the probable effect that any sentence or order would have on any of the person's family or dependants.<sup>10</sup>

The decision what sentence to impose on an offender involves a delicate balancing of these and other factors. It seems that, both at general law and under this provision, cultural considerations can be and sometimes are taken into account on sentencing.<sup>11</sup> In DP 48 the Commission provisionally proposed that the law should be amended to include expressly the offender's cultural values and beliefs in this list. In some consultations fears were expressed that such a reform could be used to justify less harsh sentences in cases involving violence against women: the Commission was told that the offender's cultural values are often raised as a mitigating factor in domestic violence cases.<sup>12</sup> Many submissions, however, supported the proposal.<sup>13</sup>

8.14. ***The Commission's recommendation.*** The Commission recommends that the offender's cultural background should be specified as a factor to be taken into account when the court is passing sentence.<sup>14</sup> This should be done by adding 'cultural background' to *Crimes Act 1914* (Cth) s 16A(2)(m), which already refers to the offender's character, antecedents, age, means, and physical or mental condition. Such a change would be useful, as it would ensure that the offender's cultural background is not overlooked where it is relevant. The Commission recognises that amending the law in this way may lead to more arguments being raised in the sentencing hearing to reduce the severity of sentences in some cases. The Commission is confident, however, that courts can attribute to this factor the weight that is, in all the circumstances, proper. The Commission also considered whether to specify the cultural background of the victim of the offence as a factor. The Crimes Act already requires the court to take into account 'the personal circumstances of any victim

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8 For the question whether the law should have more regard to cultural values and traditions in determining state of mind or culpability see para 8.29-8.38.

9 Some offences in some jurisdictions also carry a minimum penalty.

10 *Crimes Act 1914* (Cth) s 16A(2); see also ALRC 44, para 167-71.

11 *Neal v The Queen* (1982) 149 CLR 305, 326; *Rogers v The Queen* (1989) 44 A Crim R 301; *Juli v The Queen* (1990) 50 A Crim R 31; Judges of the County Court of Victoria, Law Reform Committee *Submission* June 1991; G R Milliner, Minister for Justice and Corrective Services (Qld) *Submission* July 1991; Department of Attorney-General (NT) *Submission* August 1991.

12 S Knox *Submission* May 1991; H Matepi *Submission* November 1991.

13 Northern Territory Police *Submission* June 1991; P Berman *Submission* July 1991; Humanist Society of Victoria Inc *Submission* July 1991; South Australia Police Department *Submission* September 1991; South Australian Government *Submission* November 1991; Judge HH Jackson, President Children's Court of Western Australia *Submission* June 1991; Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee *Submission* September 1991; Department of Attorney-General (NT) *Submission* August 1991 suggested that the court should have a discretion, not an obligation, to take cultural factors into account.

14 This was recommended in the Commission's report, *Sentencing*, ALRC 44, para 170.

of the offence', without specifying what this might encompass.<sup>15</sup> It already includes the victim's cultural background. To add a specific reference to cultural background without specifying other aspects of 'personal circumstances' could distort the meaning.

8.15. ***The discretion not to record a conviction.*** When a court finds a charge for an offence against a federal law proved, it need not necessarily convict or impose a penalty on the offender. It may dismiss the charge or discharge the offender without recording a conviction.<sup>16</sup> The question for the court is whether

having regard to:

- (i) the character, antecedents, age, health or mental condition of the person;
- (ii) the extent (if any) to which the offence is of a trivial nature; or
- (iii) the extent (if any) to which the offence was committed under extenuating circumstances;

... it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation.

The offender's cultural background could be specified as another factor. For similar reasons to those set out in paragraph 8.14, the Commission recommends that the *Crimes Act 1914* (Cth) s 19B be amended to ensure that this matter is taken into account when the court considers whether it is appropriate not to proceed to a conviction.

8.16. ***The discretion to prosecute.*** Law enforcement officers have a discretion whether or not to prosecute an offence against federal law.<sup>17</sup> Under guidelines issued by the Director of Public Prosecutions (Cth)<sup>18</sup> the principal considerations are

- whether there is a reasonable prospect of a conviction being secured
- whether a prosecution would be in the public interest.

Factors relevant to deciding whether a prosecution would be in the public interest include

- the seriousness or triviality of the alleged offence
- any mitigating or aggravating circumstances
- the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or a victim
- the alleged offender's antecedents and background
- the degree of culpability of the alleged offender
- the availability and efficacy of any alternatives to prosecution
- the attitude of the victim.

The extent to which an alleged offender was acting in accordance with his or her cultural traditions and values can be taken into account under these guidelines. However, the prosecution guidelines issued by the Director of Public Prosecutions (NSW) have recently been amended to specify that

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<sup>15</sup> *Crimes Act 1914* (Cth) s 16A(2)(d).

<sup>16</sup> *Crimes Act 1914* (Cth) s 19B. Broadly similar provisions apply in other jurisdictions.

<sup>17</sup> The position is similar for State and Territory offences.

<sup>18</sup> Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, AGPS, Canberra, 1990, 3.

consideration of an alleged offender's antecedents and background is to include a consideration of that person's 'culture and ability to understand the language'.<sup>19</sup> For reasons broadly similar to those set out in paragraph 8.14, the Commission recommends that the prosecution policy of the Commonwealth be amended to include expressly the alleged offender's cultural background as a matter to be considered when the decision is made whether the public interest requires a prosecution. Making explicit reference to this factor means it is less likely that it will be overlooked and will ensure that the influence of an accused's cultural values will be considered where relevant.

## Allowing special exemptions from the criminal law on cultural grounds

### Existing law

8.17. **Exemptions from the criminal law.** The law can expressly exempt a person from criminal liability for particular acts. Exemptions can be given on the basis of moral or religious objections or for other reasons of policy. The mechanism of exemption can vary. For example, getting a licence may be all that is needed. Alternatively, the law could provide a defence of lawful or reasonable excuse. In this case it will be for the accused to prove that she or he had such an excuse. Exemptions of this kind do not apply to the full range of criminal offences; they generally apply in specific cases under the law. Perhaps the best known example of an exemption is the provision made for conscientious objectors to compulsory military service.<sup>20</sup> Another example is the provision made for religious slaughter of animals for human consumption which would otherwise violate the laws regulating the meat industry<sup>21</sup> and possibly constitute an offence of cruelty.<sup>22</sup> In Western Australia, a person can apply for exemption from the requirement to wear a motor-cycle crash helmet for reasons relating to a medical condition or 'for any other reason which the Board considers sufficient' which, presumably, could include religious belief.<sup>23</sup> In New South Wales, an exemption to the law prohibiting gaming and betting allows the playing of two-up on Anzac Day.<sup>24</sup>

8.18. **Exemptions sought by some groups.** The Commission received a number of submissions asking it to consider recommending particular exemptions to laws that were seen to interfere with their religious or cultural freedom. Most if not all of these were matters of State or Territory law. They include:

- exemptions from laws prohibiting possession of weapons in public to allow carrying ceremonial knives<sup>25</sup>
- exemptions from the requirement to wear a crash helmet where this would interfere with wearing religious headdress<sup>26</sup>
- continuing the exemptions allowing the religious slaughter of animal<sup>27</sup>
- exemption from drug laws to allow Shivite Hindus to smoke cannabis within religious prescriptions, for example, on public holidays and Shiva's birthday.<sup>28</sup>

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19 Director of Public Prosecutions, New South Wales, *Prosecution Policy and Guidelines*, Sydney, 1991, 5.

20 *National Service Act 1951* (Cth) s 29A.

21 eg *Meat Inspection (NSW) Orders 1984 O 16* made pursuant to the *Meat Inspection Act 1983* (Cth).

22 eg *Prevention of Cruelty to Animals Act 1979* (NSW) s 24(c)(i).

23 *Road Traffic Code 1975* (WA) reg 1607(4); in NSW the exemption in the *Motor Traffic Regulations* has been removed for all grounds, medical as well as religious.

24 *Gaming and Betting Act 1912* (NSW) s 20B.

25 Sikh Council of Australia *Submission* September 1991.

26 Sikh Council of Australia *Submission* September 1991; also see B S Jagdev and G S Sidhu *Transcript* Sydney 26 September 1991; R Rana *Submission* April 1990.

27 Association of Rabbis & Ministers of Australia & New Zealand supported by Executive Council of Australian Jewry *Submission* July 1991; cf Presbyterian Women's Association of Australia in NSW *Submission* August 1991; Humanist Society of Victoria Inc. *Submission* July 1991.

28 R Rana *Submission* April 1990.

In all cases the arguments were put in terms of the significance of the practice to the religious or cultural group and its relative harmlessness to the general community. There was, however, some opposition. For example, some submissions opposed, on public health and expenditure grounds, granting exemptions from laws that have a health and safety purpose, such as those requiring the wearing of protective helmets.<sup>29</sup> Other submissions cautioned against granting special rights to separate groups in the community.<sup>30</sup>

8.19. ***Support for Commission's approach.*** DP 48 set out the Commission's suggested approach to granting exemptions. It involved establishing principles against which legislative proposals could be judged and establishing procedures, including 'cultural impact statements', to ensure that the question of exemptions on these grounds was appropriately taken into account in framing laws creating offences. The proposals in DP 48 received considerable support in submissions.<sup>31</sup> For example, the South Australian government suggested that community consultation before drafting final legislation will reveal obvious and easily expressed impacts on particular communities, and is therefore critical. It points out that 'access and equity policies being adopted by all Commonwealth departments should ensure that ethnic communities will be involved in community consultations'.<sup>32</sup>

## Recommendation

8.20. ***The principles to be applied.*** When considering proposed legislation creating offences, Parliament should consider the implications for people from particular cultures and of particular religious faiths. In each case, it will be necessary to examine the policy of the particular law and to ask

- what rights and interests does the law protect?
- what harm does it seek to prevent?
- what belief or practice is at stake?
- to what extent would an exemption, if granted, undermine the law's effectiveness?

Whether or not an exemption from a legal duty or prohibition is justified in the interests of religious and cultural freedom will have to be decided according to principle. There will be difficult issues to determine, competing considerations to weigh up. The law should support individual religious and cultural freedom only where the significance to the individual of upholding the right outweighs the harm the law seeks to prevent and where the recognition of that freedom by the law poses no direct threat to the person or property of others. It would be desirable if, as far as possible, exemptions in a particular case were expressly provided for in the legislation creating the offence, rather than by conferring on the courts a discretion to decide (for example, by providing for 'reasonable excuse'). Clearly there will be circumstances when no exemption can be considered.

8.21. ***The procedure to be used.*** The existing parliamentary mechanisms for scrutinising proposed legislation are discussed in paragraphs 4.19-4.30 (the Family Chapter). The Senate or the House of

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29 The Humanist Society of Victoria Inc *Submission* July 1991.

30 eg Presbyterian Women's Association of Australia in NSW *Submission* August 1991; K A McKenzie *Submission* August 1991; Victoria Police, Law Review Unit *Submission* August 1991; Western Australia Police Department *Submission* September 1991.

31 Judges of the County Court of Victoria, Law Reform Committee *Submission* June 1991; Northern Territory Police *Submission* June 1991; Department of Attorney-General (NT) *Submission* August 1991; Ethnic Affairs Commission of New South Wales *Submission* August 1991; South Australia Police Department *Submission* September 1991; Bar Association of Queensland *Submission* October 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* July 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* August 1991. Some practical concerns are expressed: Victoria Police, Law Review Unit *Submission* August 1991.

32 South Australian Government *Submission* November 1991.



Representatives should adopt the practice of referring proposed legislation creating offences to the relevant Standing Committee where there may be an adverse impact on a particular community. The Senate should consider amending the terms of reference of the Senate Standing Committee for the Scrutiny of Bills to require it to report whether the offence provisions in bills it scrutinises will unduly restrict the cultural and religious freedom of individuals. It is a natural extension of an important task of the Committee, which is to alert the Senate to the possibility of infringements of individuals' rights and liberties. It would still be for Parliament to decide what action to take, and whether to provide for an exemption in the legislation. The Office of Multicultural Affairs (OMA) in the Department of Prime Minister and Cabinet has the opportunity to comment on all proposed government legislation. It can play an important role in identifying the cultural impact of proposed offences on particular communities, and advising the Government on the need for exemptions.

## Should the law recognise a defence of justifiable ignorance of the law?

### Existing law

8.22. It is a general principle of the common law that ignorance of the law does not excuse a person from criminal liability. Except in very limited circumstances, the fact that a person did not know that what he or she did is an offence is not a defence to a criminal prosecution, although it may reduce the penalty. Where a person is charged with an offence created by a regulation, it may be a defence to show that the regulation has not been notified in the *Gazette*.<sup>33</sup> There is no statutory requirement to publish or notify Acts of Parliament in the *Gazette*—passage through Parliament is considered enough publicity.

### A defence of justifiable ignorance of the law

8.23. **Proposal.** In DP 48 the Commission considered whether there should be a defence that the accused did not know that the conduct was an offence and that his or her ignorance of the law was the result of inadequate provision of information in an accessible form. This had been suggested by the Ethnic Affairs Commission of New South Wales.<sup>34</sup> The suggestion was prompted by a perception that the existing rule may impact harshly on people who are unaware of the relevant prohibition and are unable to find out about it because of language barriers and a lack of information about the criminal law in languages other than English. If the prohibited conduct is acceptable in a person's country of origin, or in terms of his or her cultural traditions and beliefs, it may not occur to that person that an offence is involved. The conduct may be criminal but, in the circumstances, not blameworthy, in the sense of deserving punishment. The Commission, however, proposed that there not be such a defence.

8.24. **Recommendation.** The Commission still adheres to this view. It accepts that many ordinary Australians experience great difficulty in finding out what the law is in order to comply with it. There is an ever-increasing number of laws governing many aspects of our lives. The law is constantly changing and, in some respects, becoming more complex. For some Australians, the difficulty is compounded by language barriers and cultural differences. But the view expressed in DP 48 was supported in a number of submissions.<sup>35</sup> The basic principle of imposing responsibility

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33 *Acts Interpretation Act 1901* (Cth) s 48(1)(a) provides that regulations shall be notified in the *Gazette*. The Review of Commonwealth Criminal Law (Gibbs Committee) has recommended that the defence of ignorance should apply where the instrument has not been published or otherwise reasonably made available, or its effect made known, to the public or those persons likely to be affected by it: cl 3K, *Interim Report, Principles of Criminal Responsibility and Other Matters*, AGPS, Canberra, July 1990; see also *Ex p Sawyer* (1990) 51 A Crim R

34 Ethnic Affairs Commission of New South Wales *Submission* June 1990. See also Barnfield & Somerville, *Barristers and Solicitors Submission* April 1990; M Allan *Submission* July 1990.

35 *Save Australia (Tas) Submission* July 1991; Anglican Diocese of Sydney, *Social Issues Committee Submission* July 1991; General Synod of the Anglican Church of Australia, *Social Responsibilities Commission & Multicultural Advisory Committee Submission* August 1991; Victoria Police, *Law Review Unit Submission* August 1991.

on all members of the community to know what is and is not allowed should not be disturbed merely because it is difficult for some people to know what the law is. Instead, governments and responsible agencies should improve their efforts to communicate the substance of legal restrictions to those likely to be affected by them.<sup>36</sup> As with the question of the ‘cultural defence’, there are other ways in which ignorance of the law, particularly ignorance that results from different cultural experiences and expectations, can be taken into account.

### Other ways in which ignorance of the law can be taken into account

8.25. ***Court’s sentencing discretion***, The Commission proposed in DP 48 that the *Crimes Act 1914* (Cth) should be amended to include specifically the fact that the accused did not know that what he or she did was an offence as a matter to be taken into account in deciding what sentence to impose. A number of submissions supported this proposal.<sup>37</sup> Particular support was expressed by those concerned with proceedings in children’s courts.<sup>38</sup> Others suggested that the proposal would be unnecessary if community education strategies are adopted.<sup>39</sup> Although existing legislation does not preclude the court taking a person’s ignorance of the law into account, its omission from the list of factors specified in the legislation means it may be overlooked. There is no recent authority for the common law proposition that ignorance of the law may be a ground for mitigation of sentence.<sup>40</sup>

8.26. ***The Commission’s recommendation***. The Commission recommends that the *Crimes Act 1914* (Cth) s 16A should be amended to include specifically the fact that the accused did not know that what he or she did was an offence, and could not reasonably be expected to have known, as a matter to be taken into account in deciding what sentence to impose.

8.27. ***Courts’ discretion not to record a conviction***. DP 48 also provisionally proposed that the *Crimes Act 1914* (Cth) s 19B be amended to require specifically that, in exercising the discretion to discharge an offender without recording a conviction, courts should take into account the extent to which the relevant law has been published and its effect made known to the public. Where the offender is a person of non-English speaking background, whether or not the law has been publicised in languages other than English should also be taken into account. The proposal is supported in a number of submissions.<sup>41</sup> However, the Commission now considers that it is unnecessary to amend the law in this way. What is relevant to the question whether a conviction should be recorded is whether the offender knew that what he or she did was an offence, not whether the law had been widely publicised.<sup>42</sup> Under s 19B the court presently must consider whether there were extenuating circumstances. These may include the fact that the offender did not know that what he or she did was an offence.<sup>43</sup> This, combined with the recommendation in paragraph 8.15 that the offender’s cultural background be added to the list of factors that a court must consider in deciding whether to record a conviction, will appropriately cover the situation of

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36 For recommendations on this matter see chapter 2.

37 Northern Territory Police *Submission* June 1991; P Berman *Submission* July 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* July 1991; Humanist Society of Victoria Inc *Submission* July 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* August 1991; Ethnic Affairs Commission of New South Wales *Submission* August 1991; Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee *Submission* September 1991; South Australia Police Department *Submission* September 1991; but cf Department of Attorney-General (NT) *Submission* August 1991.

38 Marrickville Legal Centre & Children’s Legal Service *Submission* October 1991; Judge HH Jackson, President Children’s Court of Western Australia *Submission* May 1991 (particularly concerned with Aboriginal children).

39 Presbyterian Women’s Association of Australia in NSW *Submission* August 1991; Sydney Anglican Diocese Ethnic Workers Forum *Submission* August 1991.

40 The only authorities traced for this proposition are both English cases: *R v Crawshaw* (1860) Bell CC 303, CCR; *R v Derriviere* (1969) 53 Crim App Rep 637.

41 Northern Territory Police *Submission* June 1991; Ethnic Communities’ Council of Queensland Ltd *Submission* July 1991; Victoria Police, Law Review Unit *Submission* August 1991; Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee *Submission* September 1991,

42 Judges of the County Court of Victoria *Submission* June 1991; Department of Attorney-General (NT) *Submission* August 1991.

43 *Walden v Hensler* (1987) 163 CLR 561.

an offender with limited or no English who is unaware because of his or her cultural background that the behaviour in question is prohibited and without access to information about the relevant law in his or her own language.

8.28. ***The decision to prosecute.*** The Commission provisionally proposed in DP 48 that the Commonwealth prosecution guidelines include a provision that, in exercising their discretion to prosecute, prosecutors should take into account the fact that a person did not know, and could not reasonably be expected to have known, that what he or she did was an offence. The proposal was supported in a number of submissions.<sup>44</sup> Those who opposed the proposal did so largely on the basis that ignorance is already taken into account in appropriate circumstances<sup>45</sup> and that the proposal would unfairly discriminate if it were limited to people of non-English speaking backgrounds.<sup>46</sup> For reasons similar to those advanced in paragraph 8.25, the Commission recommends that the Commonwealth prosecution guidelines be amended to require prosecutors to take ignorance of the law, based on cultural factors, into account in deciding whether to prosecute. However, the form of the guidelines should be more explicit than that suggested in DP 48. It should specify ignorance only if that ignorance is reasonable. To ensure that they are not overlooked, cultural and language barriers should be specified as examples of causes of ignorance that might justify, in appropriate cases, declining to prosecute.

## **Taking cultural factors into account in determining whether a person was at fault**

### **Existing law: the notion of culpability**

8.29. A criminal offence generally consists of two elements. The first is whether the accused did the act which is prohibited, for example, whether the accused struck the blow that caused death. The second element is the subject of the following paragraphs. It is essentially whether, in doing the act, the accused was 'at fault'. Fault can be shown in either or both of two ways. First, it can be, and most commonly is, a requirement that the accused, in doing the act, had a particular state of mind—for example, that the accused intended to do the act, or did the act 'knowingly', or intentionally or recklessly.<sup>47</sup> Secondly, the court might be required to apply a standard to what the accused did—to judge the accused's actions, for example, as reasonable or unreasonable, or to judge whether it is reasonable or unreasonable for the accused to have had the relevant state of mind. It depends on the construction of each offence which of these factors must be proved. In some cases, none of these factors need be proved.<sup>48</sup> In others, while it must be shown that the accused had a particular state of mind, the accused can escape conviction if he or she shows that it was reasonable to have had that state of mind. The criminal law acknowledges human frailty and allows that even a reasonable person will sometimes cause harm or injury—for example, by mistake, under duress or if severely provoked. A person's powers of self-control, or capacity to resist threats or pressure, are generally assessed by reference to the yardstick of the ordinary or reasonable person, a person of 'ordinary firmness' or who has 'reasonable beliefs'. It can be seen that the question what the defendant's state of mind was is a question of fact. Whether what the accused did or thought was reasonable or reckless or negligent, on the other hand, is a matter of judgment.

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44 Northern Territory Police *Submission* June 1991; Ethnic Communities' Council of Queensland Ltd *Submission* July 1991; P Berman *Submission* July 1991; Humanist Society of Victoria Inc. *Submission* July 1991; Australian Civil Liberties Union *Submission* October 1991; Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee *Submission* September 1991; New South Wales Police Department, Legal Services Branch *Submission* July 1991; Judge HH Jackson, President Children's Court of Western Australia *Submission* June 1991. The need for consistency across jurisdictions was noted in South Australian Government *Submission* November 1991.

45 Department of Attorney-General (NT) *Submission* August 1991; South Australia Police Department *Submission* September 1991; Western Australia Police Department *Submission* September 1991.

46 Queensland Police Service *Submission* July 1991; K A McKenzie *Submission* August 1991.

47 Whether the accused intended to bring about the result that actually occurred is not always relevant.

48 eg industrial health and safety legislation.

## **The significance of different cultural values**

8.30. *The wrong inferences may be drawn from behaviour.* In a criminal trial the court must generally make a finding of fact as to the defendant's knowledge or intention. In doing so, the common law in Australia concentrates on the defendant's actual intention or state of mind rather than imputing an intention based on objective standards, or assuming that a person intends the natural and probable consequences of his or her actions. Inevitably, however, a person's state of mind is likely to be inferred from his or her behaviour. There is a danger that inappropriate monocultural or ethnocentric assumptions may be made, to the possible detriment of persons of ethnic minority background. The magistrate or jury may not take into account differences in behaviour and belief that derive from adherence to different cultural and religious values. In working out what was an accused's state of mind, a judge or jury are likely to apply their own cultural logic and may make the wrong inferences from behaviour unless they have evidence of the customs, practices and beliefs prevalent in the accused's community. This is particularly so if it is a minority community.

8.31. *Assessment of reasonableness of accused person's behaviour may be ethnocentric.* An assessment by a court that a person's behaviour breached an 'objective' standard, and that he or she behaved unreasonably or without due care, may not reflect the values of the accused or of his or her community. According to those values, what the accused did may have been, in the circumstances, quite reasonable. A person's perceptions of the world are influenced—in some cases, strongly influenced—by ethnic or cultural background and values. These perceptions inform behaviour, beliefs and attitudes. It may not always be fair to assess the reasonableness of an accused's actions and intentions without considering them in the context and from the perspective of his or her own background, a perspective that may not be readily apparent or familiar to the jury or judge. There is a perception that rules imposing liability or ascribing guilt have evolved and developed in relation to the Anglo-Saxon prototype (the 'ordinary or reasonable man', once called 'the man on the Clapham omnibus') and that these are both ineffective and unjust in a multicultural society.<sup>49</sup>

## **Consideration of cultural factors in determining intention or state of mind**

8.32. *Extent to which ethnicity and culture can be considered.* What an accused's intention or state of mind was when the offence was committed is a question of fact. Like other questions of fact, the court must take into account all evidence relevant to the question that is given to it and is admitted. Clearly, so far as they help to show what the accused's state of mind was, the accused's culture and ethnic background will be relevant, just as, so far as they help to show his or her state of mind, the fact that the accused is intellectually or physically disabled, and his or her education and personality, are relevant.

8.33. *Discussion paper proposal.* In DP 48 the Commission provisionally proposed that legislation should provide that, where a court has to determine the intention or state of mind of an accused, the court should have regard to the cultural values, beliefs and practices of the accused. It also proposed that evidence of the accused's cultural values and, if relevant, of the practices and traditions of his or her community should be admissible for this purpose.<sup>50</sup> The reaction to this proposal in submissions was mixed. There was general support in some submissions for the proposal so far as it would ensure that a cultural background which differs from stereotyped Australian perspectives is taken into account and in that way make the fact-finding process more

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49 Ethnic Affairs Commission of New South Wales *Submission* June 1990.

50 ALRC DP 48, para 2.32

accurate.<sup>51</sup> On the other hand, some submissions feared that the proposal might encourage racial or cultural stereotyping and could disadvantage women from certain ethnic backgrounds which were seen as particularly oppressive towards women.<sup>52</sup>

8.34. ***The Commission's recommendation.*** The Commission now considers it unnecessary to amend the substantive law in the way proposed in DP 48. The law already provides that the impact of culture and ethnic background must be considered on the question of the defendant's state of mind if evidence of it is before the court. There are, however, three qualifications to this conclusion. First, although such evidence is relevant, there are some procedural difficulties in having it admitted in a trial. Second, there remains a risk that lawyers and others who are not attuned to the significance of cultural differences may not see the relevance of these matters in a particular case. Finally, unless attention is explicitly directed to the question of cultural mores and practices in some cases, cultural stereotypes can operate implicitly and may go unchallenged.<sup>53</sup> The first of these problems is addressed in the following paragraphs. Chapter 2 addresses the last two problems.

## Procedural difficulties

8.35. ***The problem with existing law of evidence.*** The rules of evidence can present serious obstacles to the admission of evidence about an accused's cultural values and practices and those of his or her community. In a criminal trial the burden is on the prosecution to prove its case, including, where relevant, the accused's intention or state of mind. The prosecution might rely on the accused's conduct as evidence of his or her intention or state of mind. It would then be for the accused to adduce enough evidence of his or her actual intention, grounded in particular cultural values and traditions, to displace the inferences that the prosecution seeks to draw. The accused may wish not only to give evidence himself or herself but to call other witnesses, including 'experts', to tell the court about the cultural values and norms that prevail in his or her community, in support of the accused's own account. An accused may face difficulties in doing this because some rules of evidence restrict the admissibility of some evidence of this kind. Under the common law, evidence cannot be given about matters of 'common knowledge'. Unless particular cultural values are determined by the judge to be so peculiar as to be outside the 'normal' range of experience, evidence of them may not be allowed.<sup>54</sup> Another rule excludes evidence and statements of witnesses that are expressed in terms of an 'ultimate issue' the court has to decide.<sup>55</sup> Finally, there are laws restricting who can give evidence as an expert. In establishing expertise the emphasis is often on formal qualifications.<sup>56</sup>

8.36. ***Recommendation.*** On 15 October 1991 the Attorney-General introduced the *Evidence Bill 1991* (Cth) into federal Parliament.<sup>57</sup> That Bill was based on this Commission's 1987 report *Evidence* (ALRC 38). It addresses each of the problems just identified.

- ***Common knowledge rule abolished.*** The Bill abolishes the common law rule that evidence cannot be given about matters of common knowledge.

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51 S Hussain *Transcript* Townsville 17 May 1991; Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee *Submission* September 1991.

52 H Matepi *Submission* November 1991; I Leader-Elliott *Submission* October 1991.

53 I M Johnstone *Submission* March 1990.

54 eg *R v Watson* (1987) 1 Qd R 440, at 446 (Dowsett J).

55 The clearest example is that of a witness in a negligence case who says 'the defendant did not take proper care in what she was doing'.

56 see ALRC 38; cf *R v Yildiz* (1983) 11 A Crim R 115 where expert opinion evidence of the attitudes of the Turkish community to homosexuality was allowed to be given by a witness whose qualifications were that he was of Turkish origin, closely associated with the Turkish community and acted as an interpreter for that community.

57 The *Evidence Bill 1991* (NSW), which in relevant respects is similar, was introduced in NSW on 20 March 1991, but lapsed with the dissolution of Parliament in May 1991.

- **Ultimate issue rule abolished.** The Bill abolishes the rule that evidence and statements of witnesses expressed in terms of an ultimate issue before the court are not admissible. This will make it easier for people to give evidence in a natural way without being tripped up by technicalities.
- **Expertise.** The Bill significantly liberalises the rules about what evidence can be given by experts and what qualifications are required for a person to be treated as an expert. All that is required under the Bill is specialised knowledge based on training, study or experience. The rule that some formal qualification must exist will not apply. This will make it easier for expert evidence about cultural norms and values of particular communities to be introduced where it is relevant.

The *Evidence Bill 1991* (Cth), as at present drafted, only applies in cases in the Federal Court, the Family Court and courts in the Australian Capital Territory. It does not apply to the trial of offences against federal laws in State or Territory courts. In fact, most trials for federal offences are conducted in State and Territory courts. The application of different rules of evidence in different jurisdictions results in inequality before the law, as a person charged with the same federal offence may be convicted in one State and acquitted in another because certain evidence was or was not admissible. This may create a situation where Australia is in breach of its obligations under the ICCPR.<sup>58</sup> The Standing Committee of Attorneys-General has on its agenda the matter of uniform evidence law. New South Wales has already moved to introduce legislation based on ALRC 38. The Commonwealth should continue to encourage that process.

### Consideration of cultural factors in determining reasonableness

8.37. **Provisional proposal.** In DP 48 the Commission proposed that legislation should provide that, where a court has to determine the reasonableness of an act, omission or state of mind, it should have regard to the cultural values, beliefs and practices of the accused. It also proposed that evidence of the accused's cultural values and, if relevant, of the practices and traditions of his or her community would be admissible for this purpose.<sup>59</sup> A number of submissions supported this proposal—it was seen as broadening the concept of 'reasonableness' to make it more representative of the diverse nature of Australian society.<sup>60</sup>

Here the problem has to do with enlarging jury understanding of what counts as reasonable and unreasonable behaviour in a multicultural society ... the role of the expert witness must be to inform the jury about usual and accepted forms of behaviour in cultures whose practices are relatively unknown to the wider community ... If D's behaviour was unexceptionable in his own community, the conclusion that his behaviour was grossly negligent is less likely.<sup>61</sup>

Other submissions expressed reservations or doubts.<sup>62</sup> Some argued that taking a broader view of the concept of 'reasonableness' should not allow individuals to refuse to comply with standards of behaviour which are required of the general community.<sup>63</sup> The importance of applying, where it is relevant, a uniform standard to individuals' behaviour was emphasised: it is important, it was said, not to allow different standards to be applied to different accused persons.<sup>64</sup>

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58 arts 14 and 26.

59 ALRC DP 48, para 2.32.

60 eg South Australian Government *Submission* November 1991; Northern Territory Police *Submission* June 1991; Victoria Police Law Review Unit *Submission* August 1991; New South Wales Police Department, Legal Services Branch *Submission* September 1991; D K Malcolm Chief Justice Supreme Court of Western Australia *Submission* August 1991; Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee *Submission* September 1991; J Aleck *Transcript* Canberra 4 September 1991; Ethnic Affairs Commission of New South Wales *Submission* August 1991.

61 I Leader-Elliott *Submission* October 1991.

62 South Australia Police Department *Submission* September 1991; L B Myles *Submission* July 1991.

63 P Berman *Submission* July 1991.

64 Anglican Diocese of Sydney, Social Issues Committee *Submission* July 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee *Submission* August 1991.

8.38. **Recommendation.** It is clear that there is concern in the community about standards of behaviour and assessments of reasonableness being devised and imposed from the perspective of the dominant culture. This may be unfair to individuals as well as being unrepresentative of society at large. On the other hand, there is concern about the possible proliferation of different standards and the need for a uniform standard to be observed by all where necessary for the protection of individuals and society. It has already been pointed out that, generally speaking, subjective factors are an important element in determining criminal liability. The Commission's recommendation on that point<sup>65</sup> will help to ensure that the impact of the accused's cultural background is considered in that context. Where reasonableness, negligence or recklessness is an element, however, the determination is ultimately a value judgement, not a question of fact. Such a judgement can only be made against one set of values. The Commission agrees that a proliferation of different standards against which to judge the reasonableness or otherwise of a person's behaviour in the criminal law context is undesirable. To apply different standards to different groups would lessen the protection afforded to all by the criminal law. There should not be legislation such as that suggested in DP 48. However, this cannot mean that the standards of reasonableness against which behaviour is judged are static. The standards themselves have changed over time, and will continue to change, in response to changing social conditions including the impact on Australian society of different cultures and ethnic groups. A better result will be achieved if the standard is encouraged to evolve to reflect the cultural diversity in the Australian community. The Commission considers that the recommendations made in this report as a whole will help to accelerate this process. A greater understanding of cultural diversity among all those involved in the administration of justice is particularly important. Efforts should also be made to ensure that membership of the judiciary, magistracy and the legal profession is not drawn only from a narrow elite as this fosters perceptions of bias when value judgements have to be made.

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65 See para 8.34.

## **9. An infringement notice scheme**

### **Introduction**

9.1. This chapter considers whether it is appropriate in all cases to prosecute breaches of the criminal law in the criminal courts. It identifies problems associated with the prosecution of minor criminal offences. It recommends an infringement notice scheme for minor offences against Commonwealth law.

### **The problem**

#### **Overview**

9.2. Generally speaking, a person who commits a criminal offence against the criminal law is prosecuted in the criminal courts. This is so whether the offence is serious or trivial and whether or not the person knew that what he or she did was an offence. A criminal prosecution for even a minor offence is costly and cumbersome and, for the accused person, may have consequences out of all proportion to the offence.

#### **A less harsh and discriminatory way of punishing non-compliance**

9.3. Early in its work on this project the Commission received submissions which questioned whether all offences should be prosecuted in the court system.<sup>1</sup> To be prosecuted for a criminal offence is very traumatic for most people. The Commission has been told that people experience considerable distress when prosecuted for even minor offences. If the accused is unfamiliar with the court system and cannot understand English, still less the language of the legal system, it is even more traumatic. If proceedings have to be conducted through an interpreter, they are longer, costs are increased and there are more likely to be adjournments and delays in disposing of a matter. The stigma of a criminal prosecution and conviction may make it more difficult for newly arrived migrants to find employment. Some people, from particular communities, may feel shame and dishonour out of proportion to the nature of the offence. In some cultures a court appearance and conviction can lead to ostracism from family and community. For people who come from autocratic regimes where state authority is used in an arbitrary and brutal way, the experience may be especially frightening. When the offence is a minor one, these difficulties seem quite out of proportion to the result.

#### **A person may not know that what he or she did was an offence**

9.4. A person may be prosecuted for doing something that he or she did not know is an offence. This is not just a problem for non-English speakers or newly arrived migrants. However, given the gaps in dissemination of information about the law, this problem may be more critical for these groups. In some circumstances, what constitutes the offence may not be an offence, or may not be regulated at all, in the person's country of origin. Examples of this include fishing and lighting fires in the open. The person may not even think to make inquiries about possible regulation.

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<sup>1</sup> eg South Australian Government *Submission* May 1990; Minister for Youth, Sport, Recreation and Ethnic Affairs (NT) *Submission* November 1989; Attorney-General's Department (Cth) *Submission* December 1989.



Submissions have suggested that non-English speakers are more likely to be prosecuted for strict liability offences<sup>2</sup> and that people of non-English speaking background are often charged with minor offences unnecessarily.<sup>3</sup> The perception that this is so, whether or not supported by research, is a factor to be considered when considering an alternative.

### **Prosecution is costly and cumbersome**

9.5. The smooth running of a complex society demands that laws creating even minor offences be enforced. Current means of enforcement through the courts, even the lower courts, are expensive. The cost of prosecution is borne by the prosecuting agency (which may, however, recover its costs if the prosecution is successful) and ultimately by society as a whole and the cost of the infrastructure (the courts and their personnel) is also borne by society as a whole. The prosecution of minor offences in courts that are already congested adds considerably to their workload.

### **What is a minor offence?**

#### **Many offences are minor offences**

9.6. A broad spectrum of conduct is subject to criminal sanctions. It ranges from the most serious criminal offences, for example, murder and rape, to relatively trivial breaches of the law. Many acts punishable as offences are not generally regarded as criminal or blameworthy in the way that, say, offences against the person are. An offence may properly be regarded as a minor offence for a number of reasons. The relevant law may be designed to prevent conduct that amounts to a public nuisance but does not necessarily cause real harm to other people, for example, laws relating to street trading, noise and the disposal of rubbish. The law may require a person to be licensed to engage in an activity that is not intrinsically offensive, for example, fishing, or prohibit an otherwise inoffensive activity in certain circumstances, for example, the lighting of fires in the open on very hot days. Depending on the circumstances of the case, however, an offence against these laws may not be minor. Burning off acres of stubble on a day when a fireban is in force could have far more serious consequences than having a backyard barbecue. Whether serious or minor, all such offences are prosecuted in the criminal courts (often by the relevant agency rather than the police) and, although the penalties do not usually include imprisonment, the offender still suffers the ordeal and stigma of criminal prosecution.

#### **Criminal intent need not always be proved**

9.7. Many offences of this kind are offences of strict or absolute liability. This means that the act or omission may be punishable even though there is no criminal intent or negligence involved. Strict or absolute liability is more likely to apply where the acts in question are not blameworthy in any real sense but are nonetheless prohibited in the public interest. Imposing the responsibility on the individual to conduct his or her affairs in a way that does not prejudice the general welfare promotes good citizenship.

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<sup>2</sup> Barnfield and Somerville, Barristers and Solicitors *Submission* April 1990

<sup>3</sup> North Melbourne Legal Service Inc *Submission* September 1990.

## An infringement notice as a diversionary measure

### A new procedure for some offences

9.8. In DP 48 the Commission proposed that a diversionary tool, an infringement notice scheme, should be adopted to divert offenders in minor cases away from the criminal courts.<sup>4</sup> In general terms, under an infringement notice scheme a person who has committed an offence may be issued with an infringement notice giving him or her the option of paying an amount of money (an ‘on the spot fine’) as an alternative to prosecution in a court for the offence. An infringement penalty notice is usually issued by an authorised person, for example, a police officer or a customs officer, who believes that a person has committed an offence. The notice usually directs the person to whom it is addressed to pay a specified amount within a specified time, failing which the person will be prosecuted for the offence. The person may choose to have the matter dealt with by a court. The amount of the penalty is usually considerably less than the maximum penalty provided for the offence.

### Support for the proposal

9.9. The idea of diverting the enforcement of certain minor offences by means of an infringement notice scheme drew support in consultations. A number of submissions support the proposal on various grounds,<sup>5</sup> including the fact that a special procedure to deal with minor regulatory offences would avoid the very time consuming, costly and inefficient procedures of courts.<sup>6</sup>

### Reservations expressed in submissions

9.10. **Concerns about net-widening.** Some submissions drew attention to difficulties with such a scheme. First, it was said that an infringement notice scheme may encourage authorities to issue a notice in circumstances in which ‘they would otherwise issue a warning and take no further action. It would be undesirable, these submissions said, for an infringement notice scheme to be seen as a substitute for the exercise of a discretion not to prosecute in an appropriate case and used instead of diversion procedures which involve no penalty but serve as a warning not to repeat the offending behaviour. Many people, especially people of non-English speaking background, plead guilty to a wide variety of regulatory offences of various types, even if they could successfully defend the charge, because of the cost of defending it and the limited availability of legal aid. Many such people may prefer to pay the fine whether or not they are guilty of the offence rather than face the difficulties and costs of a court hearing, especially if the costs include the cost of private legal representation and an interpreter.<sup>7</sup>

9.11. **There may not be appropriate safeguards against discriminatory enforcement.** Some submissions argued against the introduction of infringement notice schemes because, generally speaking, the issue of infringement notices and the collection of penalty payments is not subject to court supervision and the safeguards built in to criminal court procedures. Other submissions drew attention to the point that an infringement notice scheme may exacerbate problems of discriminatory law enforcement. Individuals who are least able to challenge authority and who are

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4 ALRC DP 48, para 6.15.

5 eg Social Issues Committee, Anglican Diocese of Sydney *Submission* July 1991; Humanist Society of Victoria Inc *Submission* July 1991; General Synod, Anglican Church of Australia *Submission* August 1991; Ethnic Affairs Commission of New South Wales *Submission* August 1991; Northcote Ethnic Communities’ Council *Submission* September, 1991.

6 eg Legal Aid Commission of Victoria *Submission* September 1991.

7 South Australian Government *Submission* May 1991; Department of Immigration Local Government and Ethnic Affairs *Submission* September 1991.

most vulnerable to its abuse, for example, newly arrived migrants and people who do not speak English, may be targeted, consciously or unconsciously, by law enforcement officers. While generally supporting the scheme, police services comment that, although they have been criticised for not giving sufficient weight to rights of suspects, at least the police are trained to appreciate that these rights exist and police are under a legislative obligation to observe them.<sup>8</sup>

## Existing schemes

### Administrative penalty schemes operating in some States

9.12. **New South Wales.** A scheme analogous to that suggested in DP 48 exists in New South Wales—Self Enforcing Infringement Notice Scheme (SEINS). It provides for the prosecution of minor offences by issue of a penalty notice and, if required, an enforcement order. Penalty notices can be issued in respect of a range of statutory offences. SEINS is used by the Police Department for unpaid traffic and parking infringement notices, by the State Rail Authority for matters under the *Transport Administration Act 1988* (NSW), by the Department of Agriculture for infringement of the *Fisheries and Oyster Farms Act 1935* (NSW), by some local councils for failure to vote and by the State Pollution Control Commission. Under SEINS, matters are only listed before the court at the request of the defendant, and this request is made only in a small proportion of cases.<sup>9</sup>

9.13. **Victoria.** There is a similar scheme in Victoria, the Penalty Enforcement by Registration of Infringement Notice system (PERIN). It may be used instead of commencing court proceedings against a person for some offences.<sup>10</sup> Infringement notices are issued by police under various Acts and Regulations—including traffic, littering, marine and environment protection laws. The penalty must be paid within 28 days. The person served can contest the matter by electing to have it dealt with by a court. The enforcement of these notices is simplified. If the penalty is not paid, and the matter is not to be dealt with by a court, an enforcement order may be issued. Failure to pay as required by this order will result in imprisonment. There is provision for the person to ask for an extended time to pay or to pay by instalments. The system is used by many government departments and municipalities.<sup>11</sup>

9.14. **Other States and Territories.** In South Australia legislation provides for the issuing of on-the-spot notices to adults alleged to have committed a ‘simple cannabis offence’, that is, possession or cultivation for private use of small amounts of cannabis. The offence cannot be prosecuted in court unless payment of the prescribed amount or fine is not made within 60 days.<sup>12</sup> The Commission has been told that a system of infringement notices for minor offences is being considered in the Northern Territory.<sup>13</sup>

### Administrative penalty schemes operating in the Commonwealth

9.15. There are at least 12 federal Acts which provide for administrative penalties as an alternative to prosecution for some offences.<sup>14</sup> In each case, regulations generally contain detailed provisions

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8 It has been suggested that such a scheme will not be of any benefit to persons of non-English speaking background unless appropriate training is provided for enforcement officers: Victoria Police, Law Review Unit *Submission* August 1991.

9 A review of the New South Wales court system attributed a drop in the number of summons cases disposed of in the Sydney metropolitan region, from 352 000 in 1984 to 92 000 in 1988, largely to the introduction of SEINS: Coopers & Lybrand WD Scott, *Report on a Review of the New South Wales Court System*, May 1989.

10 *Magistrates Court Act 1989* (Vic) s 99; the procedure is set out in Schedule 7 to the Act.

11 Victoria Police, Law Review Unit *Submission* August 1991.

12 *Controlled Substances Act 1984* (SA) s 45a.

13 Northern Territory Police *Submission* June 1991.

14 They include the *Civil Aviation Act 1988* (Cth), the *Migration Act 1958* (Cth), the *Taxation Administration Act 1953* (Cth), the *Income Tax Assessment Act 1936* (Cth), the *Defence Act 1903* (Cth) and the *Great Barrier Reef Marine Park Act 1975* (Cth).

setting out what information the infringement notice must contain, on whom it should be served, how service may be effected, what the prescribed penalty is and what time is allowed for payment. They also generally provide that where the penalty is paid no further proceedings may be taken in respect of the offence and a person shall not be regarded as having been convicted. Under the *Great Barrier Reef Marine Park Act 1975* (Cth), for example, an administrative penalty can be imposed as an alternative to prosecution. This scheme only applies to specified offences including offences against regulations relating to

- littering
- the use of vessels
- moving or landing vessels and
- landing, using or flying aircraft.

The maximum penalty for littering is a fine of \$200; the penalty specified in an infringement notice is \$25. The *Migration Act 1958* (Cth) s 76 makes it an offence for a master, owner, agent, charterer or operator of a vessel to carry persons without travel documents to Australia. The maximum penalty for the offence is a fine of \$10 000; the penalty payable under an infringement notice is \$1 000.<sup>15</sup>

## Recommendation

9.16. The Commission recommends that an infringement notice scheme, with appropriate safeguards, should be introduced for minor offences. The main elements of such a scheme should be

- an infringement notice
- a small penalty
- multicultural sensitivity
- an opportunity to dispute or raise matters outside the court
- the option at all stages to have the matter dealt with by the court.

## Implementation

### Scheme should apply to minor breaches

9.17. An infringement notice scheme should be available as an alternative to prosecution for specified offences. It should be used for conduct that amounts to a minor breach of the relevant law. The scheme devised by the Commission encourages officers to use it where a minor offence has been committed yet gives them the freedom either to issue a warning for trivial breaches or to prosecute more serious breaches of the same law in the ordinary way. This is achieved by allowing the officer to decide in each case whether to give a warning, to issue an infringement notice or whether to prosecute. Once an infringement notice is issued and paid, however, the Commonwealth cannot prosecute a person for the offence. On the other hand, the accused person retains his or her

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15 reg 179A.

rights to have the matter dealt with by a court and need not take any specific action to exercise that right.<sup>16</sup>

## Offences to which the scheme might apply

9.18. ***Suggested offences.*** This report does not identify particular offences to which the scheme might apply. However, the Commission's consultation reveals particular support for the introduction of an infringement notice scheme for minor breaches of quarantine and for home distilling offences. In the Commission's forthcoming report *Customs and Excise* an administrative penalty scheme, devised along the lines recommended here, is recommended. An extract from the draft legislation attached to that report is included in Appendix A as an illustration of the practical application, in that context, of these recommendations. Agencies or ministers promoting or administering legislation that creates offences should consider whether such a scheme should be introduced in their legislation.

9.19. ***Minor breaches of quarantine.*** The overwhelming majority of quarantine prosecutions are for minor offences alleged to have been committed by passengers entering or returning to Australia with prohibited imports.<sup>17</sup> The offence covers a wide range of conduct, including conduct that might have very serious consequences for the health and welfare of the population and for the continued existence of Australian agriculture. However, it also covers very trivial and inconsequential acts such as bringing into the country a small amount of processed food. Most prosecutions for the offence are for minor breaches and are dealt with in lower courts. Persons charged are generally first offenders and the vast majority of them plead guilty. The average penalty imposed is between \$200 and \$300, plus costs, usually amounting to about \$600. Costs may include the cost of an interpreter for the offender who needs one. The goods themselves are forfeited.<sup>18</sup> Many people prosecuted for this offence are of non-English speaking background. Often they are migrants who are returning to Australia from a rare visit to their country of origin, where relatives or friends have pressed fruit, vegetables, herbs, seeds or meat on them. Many people, particularly those who seldom travel overseas, do not realise that these are prohibited goods and do not understand that they could pose a threat to Australian agriculture and ecology. People who are not literate in English are unlikely to be made aware of the fact that they should declare foodstuffs in the customs declaration form given to all incoming passengers.

9.20. ***Home distilling of spirits.*** The *Distillation Act 1901* (Cth) imposes strict controls, including licensing requirements, on the production of spirits and creates a number of offences in connection with this. The offences most commonly charged are unlawful possession of a still<sup>19</sup> and possession of illicit spirits.<sup>20</sup> The maximum penalty for both offences is \$5 000. More than 90% of prosecutions for the manufacture of illicit spirits are brought against persons of non-English speaking backgrounds.<sup>21</sup> The Commission has been told in its community consultations that home-distilling is an important cultural tradition in some communities and that large amounts must often be produced for special occasions such as weddings and christenings to maintain one's standing in

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16 cf PERIN.

17 The offence commonly charged is against the *Quarantine Act 1908* (Cth) s 67(1), which makes it an offence knowingly to import, or bring into any port or place in Australia ... any noxious insect, or any pest, or any disease germ or microbe, or any disease agent, or any culture virus or substance containing any disease germ or microbe or disease agent, or any goods, or any animal or plant, or any part of any animal or plant.

The maximum penalty for the offence is, for a natural person, imprisonment for 10 years or a fine of \$50 000 or both and, for a corporation, a fine of \$200 000.

18 s 68.

19 s 73A(1).

20 s 74(4).

21 Department of Prime Minister and Cabinet, Office of Multicultural Affairs, *Australian Customs Service, Access and Equity Report No 13A*, AGPS, Canberra, 1990,8.

the community. Despite appearances to the contrary, a large still and large amounts of spirit do not necessarily indicate that spirit is being produced commercially.

## **The recommended procedure**

### **The scheme outlined**

9.21. ***Circumstances in which an infringement notice might be served on a person.*** Under the recommended scheme, an officer of the department administering the relevant legislation<sup>22</sup> may, if he or she believes on reasonable grounds that a person has committed an offence under the legislation, serve, or cause to be served, an infringement notice on the person. The notice may be handed to the person, posted to the person or served in any other way provided by law. The notice must be served on the person within 12 months of the date of the alleged offence.

9.22. ***The contents of the infringement notice.*** The infringement notice should include

- the name and address of the person on whom it is served
- the offence alleged to have been committed and the particulars of the offence, including the day on which, and the place at which, it was alleged to have been committed
- the penalty to be paid under the infringement notice and the maximum penalty that may be imposed for the offence if it were dealt with by a court
- how the penalty is to be paid
- the options available to the person on receipt of an infringement notice.<sup>23</sup>

The notice should also include a statement in a number of community languages that the notice contains important information and that, on request, a translation of the notice will be given to the person and what a person must do to get a translation.

9.23. ***What a person may do on receipt of an infringement notice.*** On receiving an infringement notice, a person may, within the time specified

- notify a specified person of any matters that ought to be taken into account in deciding whether the notice should be enforced
- pay the penalty specified in the infringement notice or
- apply to a specified person to pay the penalty by instalments

If the person does none of these things, he or she may be prosecuted for the alleged offence.

9.24. ***Consequences of notifying the specified person of matters that ought to be taken into account.*** A person who receives an infringement notice should have an opportunity to draw to the attention of the specified person matters which, if known at the time the notice was issued, might have led him or her not to have issued the notice. If a person takes this opportunity and notifies the specified person of such a matter, for example, that the person did not commit the offence, the specified person may either withdraw the notice or decide that it should stand. In either case, he or she must notify the person who, if the notice is not withdrawn, can choose to pay the penalty or be

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<sup>22</sup> ie the legislation in which the offence is created.

<sup>23</sup> See para 9.23.

prosecuted for the offence. An admission made by the person in correspondence with the specified person cannot be used in evidence against him or her in any subsequent court proceedings.

9.25. ***Consequences of paying the penalty.*** If, on receiving the notice, the person pays the penalty in the time specified no further action can be taken against him or her in respect of the alleged offence. As the person has not been convicted of an offence, there would be no conviction recorded.

9.26. ***Consequences of applying to pay the penalty by instalments.*** If the person applies to the specified person to pay the penalty by instalments, the specified person may make an arrangement with him or her for this to be done. Until the person is notified whether or not payment may be made by instalments, no further action can be taken against him or her.

9.27. ***Prosecution of the offence.*** If the person notifies the specified person that he or she wishes the matter to be dealt with by a court or does not respond to the notice at all, the person may be prosecuted for the offence. In determining the sentence for the offence if the person is convicted, the court may not take into account the fact that the person chose to have the matter dealt with by a court rather than pay the infringement notice penalty.

9.28. ***Penalty.*** The infringement notice penalty should be no more than one fifth of the maximum penalty for the offence. Ideally the amount would be that which would offer no scope for pressure on an innocent defendant but is not so high as to induce the guilty to allow the matter to proceed to court.

## 10. Criminal justice system

### Introduction

#### Principles underlying the criminal justice system

10.1. *International covenants*. The International Covenant on Civil and Political Rights (ICCPR) includes provisions dealing with the criminal justice system. It requires states parties to ensure that

all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.<sup>1</sup>

More specifically, it provides that ‘all persons shall be equal before the courts and tribunals’ and that in the determination of any criminal charge ‘everyone shall be entitled to a fair and public hearing’.<sup>2</sup> It requires states parties to incorporate safeguards against arbitrary arrest and imprisonment into their law.<sup>3</sup>

10.2. *Need to ensure equality*. A commitment to equality requires that the law does not formally discriminate against a section of society. It also requires that positive measures be taken to overcome any structural barriers which may impede equality of protection and treatment. The Commonwealth’s access and equity strategy is designed to overcome barriers of language, culture and prejudice in access to services and resources. It applies to those components of the criminal justice system that come within Commonwealth control.

#### Limited Commonwealth role in criminal justice administration

10.3. *Criminal justice is largely a State responsibility*. The major responsibility for and control over the criminal justice system rests with the State and Territory administrations. Most criminal offences are offences against State or Territory law and are investigated and prosecuted by State or Territory authorities. In addition, most prosecutions for Commonwealth criminal offences are conducted in State and Territory courts, using the criminal procedures of that State or Territory.<sup>4</sup> Many of the problems brought to the Commission’s attention in the course of consultations and in submissions concern the application of State and Territory law.

10.4. *Different laws in different jurisdictions*. The immediate consequences for a person who is suspected of having committed a criminal offence depends on whether he or she is suspected of having committed a federal or a State or Territory offence and in which State or Territory the offence is alleged to have been committed. Federal law now governs some of the criminal investigation procedures for federal offences—particularly arrest, detention and custody of federal offenders.<sup>5</sup> For both federal and State or Territory offenders, determinations of bail are made

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1 art 26; see also International Convention on the Elimination of All Forms of Racial Discrimination (CERD) art 5.

2 art 14.

3 eg informing an arrested person of the reasons for arrest and the charge against him or her, trial within a reasonable time and the provision of mechanisms for bail.

4 *Judiciary Act 1903* (Cth) s 68: there are significant exceptions, for example customs, excise and taxation prosecutions.

5 *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* (Cth).



according to the law of the State or Territory in which the person is arrested. Criminal trials are conducted according to State or Territory law and procedures (including rules of evidence).

10.5. **Moves towards uniformity.** It is especially important in view of Australia's commitment to guaranteeing equality before the law that the criminal justice system should operate consistently across the country.<sup>6</sup> There are moves towards uniformity in the criminal law. The Commonwealth is preparing a Model Criminal Code and is consulting with the States and Territories on its content. At present the draft only deals with matters of substantive law but it may progress to procedural matters. In any event, if the criminal justice system is to adapt to the needs of a multicultural society, action will have to be taken by State and Territory governments as well as by the federal government.

10.6. **Recommendations of other inquiries.** Both the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody have recommended ways to improve the operation of the criminal justice system in the context of a multicultural society, particularly in relation to police-community relations.<sup>7</sup> The Commission does not wish to duplicate this work but notes its relevance to the concerns raised in the context of this inquiry.

### **The scope of this chapter**

10.7. This chapter examines some of the key elements of the criminal justice system and makes recommendations to improve the administration of justice in a multicultural society. Some important aspects of the criminal justice process—such as factors influencing the decision to prosecute, and access to interpreters, are dealt with in other chapters.<sup>8</sup>

## **Investigation of crime: problems in a multicultural society**

### **Ignorance, fear and communication barriers**

10.8. **Lack of understanding of police role.** The police play a central role in the enforcement of the criminal law.<sup>9</sup> They are responsible for preventing, detecting and investigating crime and for maintaining public order. Police respond to citizens' requests for help or reports of victimisation. However, some people may be reluctant to report crime because they fear the police. Migrants or refugees from more repressive regimes, for example, may associate the police with state terror tactics or corruption rather than seeing them as a source of help and protection.<sup>10</sup> A suspect's fear of the police can create serious problems during the investigation process. It may cause minor misunderstandings to escalate into major confrontations. People from countries where the police and military have significant control over the judicial process may be confused by the different roles of the police and the courts here and may feel the need to provide a full explanation of their actions to the police.<sup>11</sup>

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6 para 10.2.

7 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, Canberra, 1991; Commission into Aboriginal Deaths in Custody, *National Report*, Volume 5, AGPS, Canberra, 1991.

8 Chapter 8 'Accommodating diversity' and chapter 3 'Interpreters' respectively.

9 Each State and Territory has its own police force. The Australian Federal Police are responsible for investigating offences against federal law and for community policing in the ACT.

10 D Webb *Submission* July 1990.

11 North Melbourne Legal Service Inc *Submission* September 1990.

10.9. ***Lack of knowledge of rights.*** Many people do not know their rights; nor do they know the limits of police powers of investigation. They may be unfamiliar with police procedures. It seems bizarre, for example, for police on the one hand to say that you do not have to answer any questions and on the other to continue to ask questions. Some suspects may be afraid to assert their rights even if they understand them because of a ‘cultural fear of authoritarian figures’.<sup>12</sup> Young people of non-English speaking backgrounds tend to be less informed about their rights and therefore at a disadvantage in dealings with the police.<sup>13</sup>

10.10. ***Communication barriers.*** Concern has also been expressed about the potential consequences for an individual of cross-cultural misinterpretation in police interviews. The communication barriers resulting from language difficulties should diminish with the involvement of competent interpreters.<sup>14</sup> But there are other problems. The traditional police interviewing style may disadvantage people not used to the direct question and answer mode of communication. For example, possibly the most serious disadvantage experienced by Aboriginal English speakers is caused by the common Aboriginal conversational pattern of agreeing with whatever is being asked, even if the speaker does not understand the question. This tends to happen more often if there is physical or verbal intimidation, however slight.<sup>15</sup>

## **Police community relations**

10.11. ***Negative stereotyping impairs police community relations.*** The Commission’s consultations reveal concern about negative ethnic stereotyping resulting in whole communities being put on trial and stigmatised for the real and imagined activities of some members of those groups. The experience of the Greek community in the ‘Greek social security conspiracy’ case, and the continuing problems for the Italian and Asian communities of being popularly associated with organised crime, are cited as examples.<sup>16</sup> There is concern about a perceived tendency to cast young people of particular ethnic backgrounds as delinquent.<sup>17</sup> This may result in a young person being at a disadvantage in dealings with the police and at court. Young people who gather together because they are related, are family friends, go to school together or live near each other, may be assumed by the police to be involved in illegal gang activities simply due to their appearance.<sup>18</sup> On the other hand, submissions from police deny that this kind of stereotyping influences police behaviour.<sup>19</sup>

10.12. ***Reference to ethnic background in description of suspects.*** In DP 48 the Commission asked whether guidelines for describing suspects without reference to the alleged ethnic background of the person should be developed for use by police and the media. Opinion is divided on this subject. Some submissions take the view that reference to ethnic background can be an effective way of describing a person. Information may be provided in this form to the police.<sup>20</sup> Others are

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12 North Melbourne Legal Service *Submission* September 1990.

13 Federation of Ethnic Communities’ Councils of Australia *Submission* August 1991; Judge HH Jackson, President Children’s Court of Western Australia *Submission* June 1991.

14 See ch 3.

15 Other minority groups in Australia may be affected by similar (or different) communicative disadvantages: Dr D Eades *Submission* July 1991.

16 Ethnic Affairs Commission of New South Wales *Submission* August 1991; also see A Kondos, ‘The Politics of Ethnic Identity: ‘Conspirators’ Against The State, or, Institutional Racism’, (1992) 28 (1) *Australian and New Zealand Journal of Sociology*, in press.

17 Research prompted by sensational media coverage of Vietnamese youth found crime rates lower than among their non-Vietnamese peers: P W Easta, *Vietnamese Refugees, Crime rates of Minors and Youths in New South Wales*, Australian Institute of Criminology, Canberra, 1989.

18 Marrickville Legal Centre & Children’s Legal Service *Submission* October 1991; Federation of Ethnic Communities’ Councils of Australia *Submission* August 1991.

19 Victoria Police *Submission* August 1991; Western Australia Police Department *Submission* September 1991.

20 Northern Territory Police *Submission* June 1991; South Australia Police Department *Submission* September 1991; Western Australia Police Department *Submission* September 1991.

concerned that describing a person by reference to national or ethnic categories can reinforce stereotypes, is not necessarily helpful to investigation, and can be offensive to ethnic communities. It implies that people of a particular ethnic background 'all look the same'. It was pointed out in consultation that most people are not able accurately to identify ethnic backgrounds from appearance. In Victoria, a Working Party has been set up to prepare guidelines which require that descriptions are accurate and framed in non-offensive and non-discriminatory language.<sup>21</sup> New South Wales Police guidelines now stress that descriptions should be given in terms of physical characteristics wherever possible. However, they still allow reference in specific terms to racial or ethnic appearance.<sup>22</sup>

## **Lack of effective, accessible complaints mechanisms**

10.13. In consultation and submissions concern was expressed about selective and excessive use of police powers and their abuse. People disadvantaged by youth, language and cultural barriers can be particularly vulnerable to abuse of authority.<sup>23</sup> Complaints about the police can be made to the Commonwealth, or the appropriate State or Territory, Ombudsman.<sup>24</sup> Complainants tend to be better educated and more likely to be from an English-speaking background than the Australian community as a whole.<sup>25</sup> A survey conducted by the Administrative Review Council of particular ethnic communities 'demonstrated profound ignorance of the Ombudsman'. Some community workers knew of the existence of the Office but had no idea of what it did or how to approach it. Complainants must provide their own interpreters or use the Telephone Interpreter Service. This is seen by community workers as a significant barrier to access.<sup>26</sup> At the moment the Ombudsman is not able to deal with complaints quickly and effectively. This is of concern to the Australian Federal Police as well as to the public.<sup>27</sup> The National Inquiry into Racist Violence also commented on the inadequacy of existing police complaints mechanisms in all jurisdictions.<sup>28</sup>

## **Responses to problems**

### **Improved statutory safeguards for suspects and accused persons**

10.14. *Crimes Act 1914 (Cth)*. Amendments to the Crimes Act 1914 (Cth) which came into operation in November 1991 contain important safeguards to protect the rights and liberties of people suspected of having committed federal offences:

- set time limits on the length of time for which a person can be detained

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21 Victoria Police, Law Review Unit *Submission* August 1991.

22 Terms allowed are: 'Of Caucasian (white), Aboriginal, Pacific Islander, East Asian, Indian, Middle Eastern, Mediterranean, Black African, Latin American or other (specify) appearance': NSW Police Media Unit Press Release, May 1990.

23 eg Federation of Ethnic Communities' Councils of Australia *Submission* August 1991; North Melbourne Legal Service Inc *Submission* September 1990; Marrickville Legal Centre & Children's Legal Service *Submission* October 1991; B Jenkins *Transcript* Perth 22 November 1991.

24 *Ombudsman Act 1976* (Cth); *Complaints (Australian Federal Police) Act 1981* (Cth) s 22. All State and Territory jurisdictions have an Ombudsman and have statutory provisions allowing members of the public to make complaints about police conduct.

25 Australia Parliament, Senate Standing Committee on Finance and Public Administration, *Review of the Office of Commonwealth Ombudsman, Report*, AGPS, Canberra, 1991, para 5.75.

26 Administrative Review Council, *Access to Administrative Review by Members of Australia's Ethnic Communities, Report No 34*, AGPS, Canberra, 1991, 73-5.

27 Australia Parliament, Senate Standing Committee on Finance and Public Administration, *Review of the Office of Commonwealth Ombudsman, Report*, AGPS, Canberra, 1991; see also para 5.75.

28 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, Canberra, 1991, 109.

- a requirement that when a person under arrest is cautioned,<sup>29</sup> the caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency. The giving of the caution, and any other information, and the person's responses must be tape-recorded if practicable
- a right to communicate with a friend or relative and a right to consult with, and have present, a legal practitioner
- in the case of Aborigines and Torres Strait Islanders, a right to have an interview friend present during questioning, and a requirement that the investigating officer notify an Aboriginal legal aid organisation that the person is in custody
- in the case of young people under 18, a right to have an interview friend present during questioning
- a requirement that the investigating officer must arrange for the presence of an interpreter if the person under arrest is unable to communicate with reasonable fluency in English
- a requirement that a person who is under arrest must be treated with humanity and with respect for human dignity
- a requirement that any confessions or admissions made by a suspect should be tape-recorded if reasonably practicable and if not a record in writing must be made in the language used by the person.<sup>30</sup>

The investigating officer must inform an arrested person of the right to communicate with a friend, relative and legal adviser, and enable him or her to do so. These safeguards do not apply in the investigation of offences against State or Territory laws, although in some states similar provisions apply.<sup>31</sup>

### **Do these safeguards take adequate account of the needs of people of non-English speaking background?**

10.15. ***Right to have an 'interview friend' present during questioning.*** The purpose of this safeguard is to ensure that a suspect who may be vulnerable to being overborne by the process of police interrogation has access to personal support. The 'interview friend' may not only provide advice and support during a stressful experience but also functions as an observer to ensure fair play during the interview. At the moment the right applies only to young people, Aborigines and Torres Strait Islanders. However, the Commission is aware that some people of non-English speaking background may, by virtue of cultural differences and communication difficulties, be equally bewildered by the experience of a police interview and vulnerable to being overborne.

10.16. ***Access to legal advice and assistance.*** All suspects have the right to consult a lawyer, and to have a lawyer present during questioning—as long as this does not unduly interfere with the police investigation. However, unless appropriate resources are made available, people will not be able to exercise this right. At the moment it is the individual suspect's responsibility to find and pay for a lawyer. There is no arrangement in place to ensure that a duty lawyer is available to assist a suspect during police questioning, especially after-hours. The right of access to legal advice is a vital safeguard for suspects. It is especially important to those who, because of their cultural background or language difficulties, may be particularly mystified by the criminal investigation process, ignorant of their rights and at risk of incriminating themselves unintentionally.

10.17. ***Notification of rights.*** At the moment, the requirement that a person should be informed in a language he or she understands applies only to the caution administered by police before questioning a suspect. In DP 48 the Commission asked whether a person should be notified in a

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29 ie told that he or she does not have to say or do anything but anything he or she does say or do may be used in evidence.

30 *Crimes Act 1914* Part 1C.

31 eg *Crimes Act 1958* (Vic) s 464–464ZG; *Summary Offences Act 1953* (SA) s 79a, s 83a; South Australian Government *Submission* November 1991.

language in which he or she is fluent of his or her rights in relation to other investigation procedures, for example, participation in an identification parade and bail. This is broadly supported in submissions.<sup>32</sup>

### **Initiatives under way to improve police—community relations**

10.18. ***Access and Equity***. The Australian Federal Police (AFP) has published its second Access and Equity Plan, covering the period 1991 to 1994. It relates mainly to the AFP's community policing role in the ACT Region. The Plan identifies and seeks to address access and equity barriers, in particular communication difficulties, distrust of police and lack of understanding of the role and powers of police.<sup>33</sup> The strategies being adopted include

- the establishment of an organisational language policy (to develop and utilise officers' second language skills)
- consultation and liaison with local ethnic communities
- developing a regional pilot program in multicultural awareness training
- recruitment strategies aimed at attracting people from a variety of cultural backgrounds and with second language skills.

Like many other Police Services in Australia, the AFP (ACT) has an Ethnic Liaison Officer whose job it is to establish links and consult with local community groups and relevant government agencies, and to promote awareness of access and equity issues within operational policing. It is this officer's responsibility to initiate translation of printed matter into community languages as the need is identified.

10.19. ***National Police Cross-Cultural Advisory Bureau***. Commonwealth, State and Territory Police Services are involved in an initiative, with the Australian Bicentennial Multicultural Foundation, to establish a national bureau to 'develop co-ordinated approaches to the delivery of equitable and professional police services to a culturally diverse Australia'.<sup>34</sup> The proposed National Police Cross-Cultural Advisory Bureau will assist in the development and adoption of effective multicultural policies and programs by police services. It will help to implement the recommendations arising from the successful 1990 National Conference on Police Services in a Multicultural Australia.

10.20. ***Proposals to improve police complaints system***. The parliamentary Review of the Office of Ombudsman recommended that, unless adequate resources are made available for active investigation by the Ombudsman of complaints against the police, this role should be removed from the Ombudsman's jurisdiction. The Royal Commission into Aboriginal Deaths in Custody recommended that in all jurisdictions the processes for dealing with complaints against police should be urgently reviewed. It sets out principles on which legislation should be based, which stress the importance of an independent investigation body. The Administrative Review Council recommends that the Ombudsman's office should:

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32 Victoria Police, Law Review Unit *Submission* August 1991; Save Australia (Tas) *Submission* July 1991; L B Myles *Submission* July 1991; P Berman *Submission* July 1991; Ethnic Affairs Commission of New South Wales *Submission* August 1991; South Brisbane Immigration and Community Legal Service Inc *Submission* September 1991; L Vidal & S K Kushwaha *Transcript* Canberra 4 September 1991. It was suggested that this should not require the intervention of an interpreter, it would be sufficient if the notice was given in writing in the relevant language: D K Malcolm Chief Justice Supreme Court of Western Australia *Submission* August 1991.

33 Department of Prime Minister and Cabinet, Office of Multicultural Affairs, *Access and Equity Plan 1991-1994, Australian Federal Police Portfolio*, AGPS, Canberra 1991, 4.

34 From Draft Mission Statement, to be submitted for approval to the Police Commissioners' Conference of Australasia and West Pacific Region scheduled for May 1992.

- identify parts of the community where the need for its services is greatest and carry out a properly planned, targeted and measured (and imaginative) publicity campaign aimed at these people
- provide interpreting and translating services in order to improve access for members of ethnic communities
- receive extra resources to enable it to implement these recommendations.<sup>35</sup>

## Recommendations

### Notification of rights

10.21. As a general principle, whenever an investigating official is required to inform a suspect of his or her rights in relation to an investigation procedure this information should be given in, or translated into, a language in which the suspect is reasonably fluent. Accordingly, the Commission recommends that the *Crimes Act 1914* (Cth) should be amended to require that a person be informed in a language in which he or she is reasonably fluent of the right to communicate with a friend or relative and the right to consult with, and have present, a legal practitioner.<sup>36</sup> The information may be given orally or in writing. The Commission suggests that the preparation of appropriate multilingual audiotapes of the information required to be given would assist the police in executing these duties.

### Reviewing the effectiveness of safeguards

10.22. The Attorney General has undertaken to monitor the effectiveness of the *Crimes Act 1914* Part IC and to review it once it has been in operation for long enough to permit proper assessment.<sup>37</sup> The Commission recommends that in this review particular attention be paid to the experience of people of non-English speaking backgrounds and the effectiveness of the legislation in safeguarding their rights. The question whether the safeguards that currently only apply to young persons and Aborigines and Torres Strait Islanders should be extended to persons of non-English speaking backgrounds should be reconsidered. The need for a duty-solicitor scheme (provided through the Legal Aid Commissions) to ensure that people are able to exercise their right to communicate with a legal adviser should be examined.<sup>38</sup>

### Description of suspects, missing persons and victims

10.23. The Commission considers that reference to a person's (supposed or actual) ethnic or national origin will rarely be justified as part of a police description. It does not assist in the construction of a clear and accurate picture of a person, but may tend to reinforce racial and ethnic stereotypes. This is not conducive to good police-community relations. The recent revision of the New South Wales guidelines indicates awareness of the problem but has not solved it. The Commonwealth should encourage all police services to adopt uniform guidelines on the description of suspects, victims and missing persons which state that no-one should be described by reference to ethnic or racial appearance.

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35 Administrative Review Council, *Access to Administrative Review by Members of Australia's Ethnic Communities Report No 34*, AGPS, Canberra, 1991, 77.

36 s 23G.

37 House of Representatives, *Hansard*, No. 2 1991, 12/2/91, p 527. The undertaking to review was made to the Police Commissioners in response to their concerns.

38 The need to make this right more effective was recognised in the Review of Commonwealth Criminal Law, *Interim Report: Detention Before Charge*, AGPS, Canberra, March 1989, para 6.8.

## Enhancing the role of the Ombudsman in the investigation of police complaints

10.24. The existence of an independent, effective and accessible mechanism for investigating complaints against the police is vital to public confidence in criminal justice administration. The Ombudsman is the appropriate body to carry out these functions. The Commission recommends that the Ombudsman's resources be supplemented to enable it to investigate complaints against the police more effectively, to carry out targeted information campaigns, and to provide interpreting and translating services in order to improve access for non-English speaking complainants. This recommendation is consistent with the conclusions of the Administrative Review Council and the Senate Standing Committee.<sup>39</sup>

## Launching a prosecution

### Problems identified

10.25. ***Arrest is used too frequently.*** There are two ways to bring a person before a court for a criminal offence: by arrest (with or without warrant) and by summons. Initiating a criminal prosecution by way of summons overcomes the problems associated with arrest. It also gives the person summonsed an opportunity to take advice. For most people, arrest is equivalent to an additional penalty. The *Crimes Act 1914* (Cth) provides that a police officer may arrest without warrant any person whom the officer reasonably believes has committed an offence against a federal law, but only if the officer believes that proceeding against the person by summons would not be 'effective'.<sup>40</sup> The Australian Capital Territory and Victoria have legislation providing that arrest should only be used where a summons is unlikely to be effective.<sup>41</sup> Elsewhere, internal police instructions indicate, with different degrees of emphasis, that police should not arrest for minor offences where a summons would bring a person to court. Police instructions do not have the force of law. Submissions to the Commission indicate that police often arrest for minor offences where a summons would have been effective and much less traumatic.<sup>42</sup>

10.26. ***The summons procedure.*** Many of the summons and charge forms used to initiate a prosecution are not comprehensible. The language used is often archaic and full of technical jargon. They are almost incomprehensible to an English-speaking lawyer, let alone a non-English speaking layperson. If there is no warning in community languages on the document that it is important, an accused person who does not understand English may ignore it. This could have serious consequences. English versions of the forms should be in plain English. Translating an incomprehensible document into numerous other languages is a waste of time and money as it will not perform its intended function of providing information but will only mystify the recipient.

10.27. ***The procedure for release on bail.*** The concept of bail conditional on the payment of money is confined to common law countries. Some words associated with bail—such as 'recognisance', 'surety', and indeed 'bail'—may have no equivalent in other languages. Unless it is explained in a language the arrested person can understand, bail can easily be confused with a fine. A person who makes this mistake and fails to appear in court on the due date, believing that the matter has been dealt with, can find himself or herself in serious trouble. Failure to appear may result in the issue of a warrant for the person's arrest. In future proceedings the presumption in favour of bail may not apply. In some jurisdictions the criteria used to assess the risk that a person

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39 See para 10.13.

40 s 8A.

41 *Crimes Act 1900* (ACT) s 352(2) and *Crimes Act 1958* (Vic) s 458.

42 North Melbourne Legal Service Inc *Submission* September 1990; South Australian Government *Submission* November 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* August 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* August 1991.

may fail to appear in court are not always clearly specified in legislation. Even if they are, a recently arrived migrant may have difficulty satisfying an officer as to his or her community ties. Bail conditions may discriminate against the poor. There is also the problem of people breaking their bail conditions because they did not understand what the conditions were in the first place.<sup>43</sup>

## Responses to the problems

### Minimising resort to arrest

10.28. Submissions agree that proceedings should be commenced by way of summons rather than arrest where possible.<sup>44</sup> The Royal Commission into Aboriginal Deaths in Custody recommended that all police services should use arrest only where necessary.

### Improving the summons procedure

10.29. *The Commission's proposal.* If the summons procedure is to be effective in a culturally and linguistically diverse society, it needs to be comprehensible to all. In DP 48 the Commission proposed that the summons and associated documents, including a copy of the police caution, bail forms and charge sheets, should be in plain English and translations of them should be available. The summons should include a brief statement in community languages advising the recipient that a translation is available. Audiotapes and videotapes explaining these procedures should be available to assist people with literacy problems.

10.30. *Submissions support the proposal.* There is considerable support for the Commission's proposal, especially from police.<sup>45</sup> In some jurisdictions at least, progress towards this objective is already being made. In the context of its community policing role within the ACT, the Australian Federal Police is taking steps to 'make the documentary legal process more accessible to non-English speakers'. A multilingual statement warning people in 13 languages not to ignore the notice is sent out with traffic and radar infringement notices. There are plans to send such a statement out with summonses. In Victoria, the summons form has been revised into plain English and regulations require information to be printed on the back of the summons and charge form in 12 community languages (specified in the regulation) warning the recipient of the importance of getting it interpreted and explained if he or she does not understand the English version.<sup>46</sup> Some concern was expressed about the cost of providing translations, and where responsibility for meeting this cost should lie.<sup>47</sup> It was also suggested that the preparation of explanatory audio or video tapes for people with literacy problems may be outside the role of the police.<sup>48</sup>

### Improving the bail procedure

10.31. *The Commission's proposal.* Whether or not a person charged with an offence is released on bail is vitally important. In DP 48 the Commission proposed that a person in custody should be fully informed, in a language he or she understands, of the right to apply for bail and how to do so, including the need to get legal advice. He or she should be told what bail means and the consequences of failing to comply with the conditions of bail. This procedure should be in the

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43 J Fonseca *Transcript* Sydney 23 September 1991.

44 Anglican Diocese of Sydney, Social Issues Committee *Submission* August 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* August 1991.

45 Northern Territory Police *Submission* June 1991; Department of Attorney-General (NT) *Submission* August 1991; Victoria Police, Law Review Unit *Submission* August 1991; South Australian Government *Submission* November 1991.

46 *Magistrates Court General Regulations SR 170/1990* (Vic).

47 Victoria Police, Law Review Unit *Submission* August 1991; South Australia Police Department *Submission* September 1991.

48 Victoria Police, Law Review Unit *Submission* August 1991.



relevant legislation. Legislation should list all factors relevant to the question whether or not the accused will appear in court to answer the charge and should direct that all the relevant factors, and only the relevant factors, are considered.

10.32. ***Submissions support the proposal.*** A number of submissions support this proposal, in particular the proposal to impose a statutory duty to explain bail, and the associated rights and procedures, to a person in a language he or she understands was endorsed.<sup>49</sup> In Western Australia, the prescribed forms containing information about how the bail decision is made, the factors that will be taken into account, the fact that conditions may be attached and the right to receive a copy of the bail decision have been translated so far into six languages.<sup>50</sup> Concern was expressed that children, especially young refugees who are not attached to parents, are often at a disadvantage in relation to bail. Young people may also be reluctant to involve parents, grandparents or guardians and this may have an effect on the likelihood of bail being granted.<sup>51</sup>

10.33. ***Disagreement with some aspects of the proposal.*** Some submissions oppose the suggestion that the grant or refusal of bail should be determined by reference to a statutory list of factors. Rather bail is, and ought to continue to be, a matter of discretion predicated upon a presumption in favour of liberty. In this view, it would be most unwise to fetter the discretion by an exhaustive statutory list of factors. It would not be possible to list all relevant factors, and to list some only would be productive of injustice. Those who held this view did, however, agree that laws relating to bail should always be clear and that those whose liberty is restrained ought to be informed of their rights and given reasonable assistance to exercise those rights.<sup>52</sup>

## Recommendations

### Arrest

10.34. In its 1975 report *Criminal Investigation* the Commission recommended that arrest could only be justified on specified grounds, relating to the offender's appearance in court, to preventing the offence and to safeguarding persons or evidence.<sup>53</sup> These principles are now widely accepted.<sup>54</sup> Observance of the principles and enactment of legislation as recommended by the Commission and by the Review of Commonwealth Criminal Law would resolve many of the problems identified in submissions and in the Commission's consultation.

### Plain English and multilingual summons forms

10.35. If a person is arrested he or she must be informed promptly and in detail, in a language he or she understands, of the nature and cause of the charge.<sup>55</sup> All charge and summons forms should be written in plain English and include, or have attached, a statement in all the major community languages that the notice contains very important information which, if the person does not

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49 Save Australia *Submission* July 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* July 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* August 1991; P Berman *Submission* July 1991; Victoria Police, Law Reform Unit *Submission* August 1991; Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee *Submission* September 1991; South Australia Police Department *Submission* September 1991; South Australian Government *Submission* November 1991; D K Malcolm, Chief Justice of the Supreme Court of Western Australia *Submission* August 1991; Department of the Attorney-General (NT) *Submission* August 1991.

50 G Scott QC *Submission* September 1991.

51 Marrickville Legal Centre & Children's Legal Service *Submission* October 1991.

52 Judges of the County Court of Victoria, Law Reform Committee *Submission* June 1991.

53 ALRC 2 para 38-44.

54 See eg Review of Commonwealth Criminal Law, *Fifth Interim Report*, AGPS, Canberra, 1991.

55 This is required by ICCPR article 14(3)(a). The Crimes Amendment Bill 1991 (Cth) cl 8F would require that a person must be told the offence for which he or she is being arrested, but does not specify that this must be done in a language the person understands or is fluent in: Review of Commonwealth Criminal Law, *Fifth Interim Report*, June 1991.

understand it, he or she should have interpreted and explained. Information about where to get help with this—for example a legal aid office, a solicitor, a local court house or the Telephone Interpreter Service—should be provided. The cost of providing translations of the forms, which is a one-off cost, should be seen as a routine expense of enforcing the law and borne by the agency that usually bears the cost of preparing the form. The Commission recommends that the Commonwealth encourage and support moves in this direction by all the State and Territories.

## The bail procedure

10.36. The Commission made recommendations to clarify and reform bail procedure in its 1975 report, *Criminal Investigation*.<sup>56</sup> These were picked up in the *Criminal Investigation Bill 1977* (Cth) and in the *Criminal Investigation Bill 1981* (Cth). Both bills provide that a person who has been arrested and charged with an offence should be informed in a language in which the person is reasonably fluent, in writing and also, if practicable, orally of

- the right to apply for bail
- the right to communicate with a lawyer, and any other person of his or her choice, about the provision of bail
- the matters that are relevant to the granting of bail and any conditions that may be attached
- the decision and reasons for it.<sup>57</sup>

These provisions would resolve many of the problems identified in the Commission's consultation and in submissions. Police training and supervision should address the problems raised concerning possible discriminatory effects of conditions attached to police bail, and the importance of avoiding monocultural assumptions in considering the criteria for bail, for example, what constitutes community ties or family support.

## The trial

### The main features of the adversary system

10.37. ***A contest between the parties.*** The process by which a person is found guilty or not guilty of a criminal offence is a public, adversary one. The proceedings are for the most part oral. Evidence is elicited by direct questioning (examination) of witnesses who may then be cross examined by the opposing party. The style of these proceedings is confrontational—prosecution and defence prepare and present their cases, as they are able and see fit, before a neutral tribunal. Magistrates and judges have powers, duties and discretions to ensure that justice is administered fairly. However, the contestants define the parameters of the contest. The judge or magistrate does not control or direct the investigation, collection or presentation of evidence. The judicial right to call and examine witnesses is limited and not often exercised. The main purpose of the system is not so much to find out the truth but to ensure that a person is convicted and sentenced only where it is possible to say without reasonable doubt that the defendant did what he or she has been charged with.

10.38. ***Witnesses swear to tell the truth.*** At common law no particular form of religious oath is required but a witness must swear an oath binding on his or her conscience. In all jurisdictions there

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<sup>56</sup> ALRC 2, paras 173–175.

<sup>57</sup> *Criminal Investigation Bill 1977* (Cth) cl 49; *Criminal Investigation Bill 1981* (Cth) cl 46.

is provision for a religious oath. Many courts have handbooks which set out alternative forms of oaths and affirmations for people of different religious beliefs including Christians, Jews, Buddhists, Hindus and Muslims. A witness may make a solemn affirmation instead of taking a religious oath.<sup>58</sup>

10.39. ***Trial by jury.*** Trial by jury is a cornerstone of the common law. The Constitution states that ‘the trial on indictment of any offence against any law of the Commonwealth shall be by jury’.<sup>59</sup> Such trials are held in the State or Territory in which the offence was committed.<sup>60</sup> State and Territory laws therefore regulate the selection and operation of juries.<sup>61</sup> Jurors are selected at random from the electoral roll.<sup>62</sup> In all jurisdictions, some categories of persons are ineligible for jury service. Not having an adequate command of English is a ground of ineligibility. Both the prosecution and the defence have a right to challenge jurors who have been selected.<sup>63</sup>

### **Problems identified by the Commission**

10.40. ***Lack of equality.*** If the parties do not have an equal opportunity to present and challenge evidence, the adversary mode of trial tends to break down. In criminal proceedings the parties are rarely on an equal footing. The prosecution is conducted by the state, which has substantial resources and expertise at its disposal. A person whose English language skills are inadequate and who is unfamiliar with the criminal justice process may be disadvantaged even if he or she is legally represented. Many defendants, particularly in the lower courts, are unrepresented. The evidence of non-English speaking witnesses (or of witnesses who are not fluent in English) may be distorted by misunderstanding the questions. There may not be a cultural or linguistic equivalent of the terms used. The Commission has been told that many people expect that the court will act to protect the interests of the accused and will intervene to ensure that the truth emerges. For those more familiar with a European inquisitorial system, which involves a wide-ranging judicial inquiry, the adversary system can cause substantial misunderstanding. Many people expect to be able to give their own account of events, rather than respond to particular questions.

10.41. ***Lack of court support.*** The Commission’s community languages consultation identified a need for court support services to enable defendants and witnesses of non-English speaking backgrounds to understand what happens at court and how to access legal advice and assistance. Concern was expressed about the reduction in the availability of legal aid that is taking place in all jurisdictions.

10.42. ***Problems with the swearing of witnesses.*** The Commission’s consultation reveals several problems arising out of the swearing of witnesses. It is often assumed that a witness is a Christian and will swear on the bible unless a contrary instruction is given.<sup>64</sup> Where a non-Christian is sworn on the bible, some lawyers and magistrates are sceptical about the binding effect of the oath. Misconceptions about some minority religious beliefs worry people, who fear that their evidence may not be taken seriously. Appropriate religious texts are not always available in the court.<sup>65</sup> The training for clerks of the court includes learning every form of oath by heart but the Commission has been told that this is not always apparent from what happens in court. A witness may be

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58 In some jurisdictions, a witness has to establish a basis for not swearing the religious oath (for example, that he or she has no religious beliefs or that to swear an oath is contrary to them). In others, the court may administer an affirmation where the particular form of oath is impractical to administer or it is not possible to establish the appropriate form of oath.

59 Constitution s 80. Parliament decides whether an offence is to be tried on indictment or summarily.

60 Constitution s 20.

61 Judiciary Act 1903 (Cth) s 68.

62 A person must be a citizen to be on the roll.

63 But see Director of Public Prosecutions, New South Wales, Prosecution Policy and Guidelines, 1991, 16, which provides that in exercising the right of challenge of the Crown no attempt should be made to select a jury which is not representative as to age, sex or ethnic origin.

64 eg R Langen-Zueff OAM *Submission* February 1990.

65 There is a perception in Muslim communities that a copy of the Koran is not always available in magistrates courts.

reluctant to swear an oath for religious or other conscientious reasons. If this is not understood, the witness's reluctance may be taken as a lack of truthfulness and his or her evidence may be unfairly discredited.<sup>66</sup>

10.43. ***Cultural bias in assessments of witness demeanour.*** Although there are no formal rules about the assessment of a witness's demeanour (non-verbal communication), it is widely considered to be one of the indicators of his or her honesty and reliability. A person who has seen a witness give evidence is supposed to be able to assess the witness's credibility more accurately than someone who has not. There are cultural variations in body language. The Commission has been told of concern that adverse assessments are made of the demeanour of Aboriginal and ethnic minority witnesses because their demeanour has been misunderstood. For example, eye contact considered appropriate among those of European origin may be considered disrespectful or confrontational among many other cultural groups. Avoiding eye contact can be a non-verbal way of communicating recognition of an authority relationship. But this can be misinterpreted as inattention, evasiveness or even dishonesty. Displays of emotion may be taken to signify a lack of control and dignity. Smiling and laughing can be an expression of pleasure or an expression of anxiety. It is also associated with subordination. Readings of facial expression, eye contact, and other non-verbal communication can be very unreliable. A review of psychological research conducted by the Commission for its Evidence inquiry concluded that as little reliance as possible should be placed on demeanour.<sup>67</sup> It is not a good indicator of the honesty of the witness or of the value of his or her evidence.

10.44. ***Problems with the system of jury trial.*** Trial by jury is not a feature of all criminal justice systems. The Commission's community language consultation reveals that many people who come from countries where it does not feature are totally ignorant of the jury system. People who are unfamiliar with the tradition of jury trial sometimes express alarm at the notion of being judged by 'twelve people of average ignorance'. It is incomprehensible, or even frightening, to those accustomed to putting their faith in 'experts' and in the judiciary. Juries do not reflect the cultural diversity of the community because individuals who are not registered on the electoral roll or do not have an adequate command of the English language are excluded. The fact that juries are not truly representative of the community affects the perceived legitimacy of the jury system. It also reduces the opportunity of people from non-English speaking backgrounds to participate in the criminal justice process, which is an important aspect of citizenship. The Commission has been told that some people fear that jurors' hostility and suspicion towards people of non-English speaking backgrounds may prejudice the chances of a fair trial where the accused or any witnesses or victims belong to particular ethnic minorities.

## Responses to the problems identified

### The adversary system

10.45. ***The Commission's provisional proposal.*** The Commission did not propose that the essential features of the adversary system should be changed. It provisionally proposed that the inherent power the court has to do what is necessary to ensure the fair and efficient disposition of criminal matters should be made more explicit and a positive duty should be imposed on the court to do what is necessary to overcome any disadvantage a defendant may suffer because he or she is unrepresented, does not speak English or does not understand court procedures. This would include the power to question witnesses and a duty to elicit all relevant evidence from the witnesses called

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66 H Campbell *Submission* June 1990.

67 L Re and T Smith, *Manner of Giving Evidence*, Evidence Research Paper No 8, Australian Law Reform Commission, 1982, 61.

by the prosecution and the defence where the parties fail to do so and it is in the interests of justice. A court support service should be available to provide some explanation of the system, to refer people to community services and to organise interpreters.

10.46. **General support was expressed for this view.** The Commission's proposal is supported in a number of submissions,<sup>68</sup> although there is some opposition to the proposal that the judge take a more active role in the criminal trial even when all relevant parties are represented. It was suggested that there is no evidence of unfair trials, or appellate decisions that the failure of a judge to intervene resulted in a miscarriage of justice, which would justify this proposal. On the other hand, there are many decisions that the intervention of the judge has resulted in a miscarriage of justice in that it deprived the accused of an opportunity fairly open of being acquitted.<sup>69</sup> Others take the view that the court's existing powers are enough.<sup>70</sup>

10.47. **Need to increase judicial awareness of cultural differences.** Whether or not judicial powers of intervention are increased, all judges, magistrates, and other judicial officers should be specifically alerted to the difficulties faced by persons who do not understand the system and the language used in court, particularly young people.<sup>71</sup> There is a need for training and recruitment of ethnically diverse personnel at all levels, as a possible response.<sup>72</sup>

10.48. **Emphasis on court support.** Submissions agree that the provision of support services to people using the courts is a crucial issue.<sup>73</sup> Some courts do frequently attempt to assist persons who exhibit difficulty or a lack of understanding. However, there is a line beyond which the judicial officer cannot and ought not go. The real issue is the provision of adequate facilities to ensure that persons of non-English speaking backgrounds are adequately represented before the court. Submissions suggest that paralegal personnel should be attached to the court. Their role would be to ensure that accused persons fully understand what is asserted against them, the processes of the court, their rights, and the need, where appropriate, to obtain proper legal advice and representation. It is recognised that this is essentially a resource problem.<sup>74</sup>

10.49. **Legislative provision for disadvantaged witnesses.** In Queensland the *Evidence Act 1977* (Qld) makes provision for witnesses who may be disadvantaged by having to give evidence in the usual way. It defines a 'special witness' as a person who, as a result of intellectual impairment or cultural differences, would in the court's opinion be likely to be disadvantaged as a witness. It also includes a person who would be likely to be so intimidated as to be disadvantaged as a witness, if required to give evidence in accordance with the usual rules and practice of the court. The court may make various orders—either on its own motion or on the application of a party—to make it less intimidating for the witness to give evidence. Options include obscuring the witness by a screen, exclusion of certain persons from the court, the presence of a particular person to provide emotional support to the special witness, or the videotaping of the witness' evidence. The accused must be able to see and hear the special witness while the witness is giving evidence.<sup>75</sup>

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68 Northern Territory Police *Submission* June 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* August 1991; Department of Immigration, Local Government and Ethnic Affairs (Cth) *Submission* September 1991; South Australia Police Department *Submission* September 1991; Presbyterian Women's Association of Australia in NSW *Submission* August 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* July 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* August 1991; D K Malcolm, Chief Justice Supreme Court of Western Australia *Submission* August 1991; Judge HH Jackson, President, Children's Court of Western Australia *Submission* June 1991.

69 Judges of the County Court of Victoria *Submission* June 1991.

70 Save Australia (Tas) *Submission* July 1991; P Berman *Submission* July 1991.

71 DK Malcolm Chief Justice Supreme Court of Western Australia *Submission* August 1991.

72 Federation of Ethnic Communities' Councils of Australia *Submission* August 1991.

73 DK Malcolm, Chief Justice Supreme Court of Western Australia *Submission* August 1991.

74 South Australian Government *Submission* November 1991.

75 *Evidence Act 1977* (Qld) s 21A. GR Milliner Minister for Justice and Corrective Services (Qld) *Submission* July 1991.

10.50. ***Relevant provisions in the Evidence Bill 1991 (Cth).*** The Bill sets out the powers of the Courts in relation to witnesses. It provides that

- the court may question any witness, exclude non-party witnesses from the court, and in exceptional circumstances call a witness<sup>76</sup>
- the court may regulate the manner in which witnesses are questioned<sup>77</sup>
- subject to the court's control, it is up to the parties to determine how to question witnesses. However, a witness may give evidence wholly or partly in narrative (rather than question and answer) form<sup>78</sup>
- a court may disallow a question put to a witness, or inform the witness that he or she need not answer it, if the question is misleading or unduly annoying, harassing, offensive, oppressive or repetitive, and in doing so, is to take into account 'any relevant condition or characteristic of the witness, including age, personality or education' and any mental or physical disability<sup>79</sup>
- a party may put a leading question to a witness in cross-examination unless the court disallows it or directs the witness not to answer, and in doing so, the court is to take into account the extent to which 'the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers'<sup>80</sup>
- an admission made by a defendant is inadmissible unless the circumstances in which it was made make it unlikely that the truth of the admission was adversely affected, and in deciding whether those circumstances exist the court is to take into account 'any relevant condition or characteristic' of the defendant, including age, personality and education and any mental, intellectual or physical disability, and the nature of any questioning and any threat or promise made.<sup>81</sup>

## Swearing of witnesses

10.51. ***The Commission's provisional proposal.*** In DP 48, the Commission proposed that there should continue to be a requirement that witnesses be sworn but that witnesses should have the option of affirming without giving reasons, or taking a religious oath. The legislation should specify that it is the court's duty to advise the witness of these options. The form of words should be simplified. The Commission suggested 'I swear (or promise) by Almighty God (the person to be sworn may name a god recognised by his or her religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth' or 'I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth'.<sup>82</sup> Swearing on a religious text should not be required.

10.52. ***Support for the proposal.*** Many submissions support the Commission's proposal.<sup>83</sup> The Commission was told that the courts in South Australia routinely enquire of persons as to what type of affirmation or oath they wish to make.<sup>84</sup> If a person is to have an option of swearing an oath or affirming, there should be equal value assigned to each. It may be appropriate to impose a positive duty upon judges to inform the jury before the choice is made of the importance of attributing the same weight to evidence whether sworn or affirmed. It may be useful to include a brief explanation

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76 cl 28.

77 cl 29.

78 cl 32.

79 cl 45.

80 cl 46.

81 cl 91.

82 This was recommended in ALRC 38.

83 Northern Territory Police *Submission* June 1991; Ethnic Communities' Council of Queensland Ltd *Submission* July 1991; P Berman *Submission* July 1991; Anglican Diocese of Sydney, Social Issues Committee *Submission* August 1991; Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee *Submission* September 1991; P Kaufmann *Submission* September 1991; South Australia Police Department *Submission* September 1991.

84 South Australian Government *Submission* November 1991.

of the importance of respecting the beliefs of others whether or not they accord with one's own.<sup>85</sup> A few submissions take the view that the religious oath should be abolished altogether,<sup>86</sup> while a few believe more emphasis should be placed on the religious oath.<sup>87</sup>

10.53. ***Evidence Bill 1991 (Cth)***. The Bill provides that a person may not give evidence or act as an interpreter in court unless he or she has sworn an oath or made an affirmation. The forms of oath or affirmation are as set out in para 10.51. An affirmation has the same effect as an oath, and it is for the person giving evidence to choose what to do. A religious text need not be used in swearing an oath.<sup>88</sup> It does not say it is the court's duty to advise the witness of the options, or to explain to a jury that the same weight is attached to evidence given under oath or affirmation.

## **Witness demeanour**

10.54. ***The Commission's provisional proposal***. In DP 48 the Commission proposed that, in summing up for the jury the court should warn the jury that the witness's demeanour is unlikely to assist in evaluation of evidence and that they should be cautious in drawing conclusions from their observations of demeanour of the witness.

10.55. ***Support for the proposal***. There is some support for the proposal.<sup>89</sup> In consultation it was often noted that the issue of demeanour is a very important one. The court situation can be especially frightening for people not familiar with the Australian legal system and not fluent in English and this can affect demeanour. Warning the jury not to make assumptions or jump to conclusions about the demeanour of a witness or the accused would help to minimise the damage done by ignorance or prejudice.<sup>90</sup> Commentators with recent experience of an Independent Commission Against Corruption (NSW) hearing say that the witnesses who made the most favourable impression were those who were 'forthright', who established eye-contact with the questioner and spoke clearly and confidently. This, they said, took no account of the fact that such behaviour is often regarded as rude, impolite or disrespectful in some cultures.<sup>91</sup>

10.56. ***Disagreement with the proposal***. Some submissions disagree with the Commission's views on the value of witness demeanour. However, they suggest that, as a matter of commonsense, a jury should be warned not to draw conclusions from demeanour without allowing for the background of the witness.<sup>92</sup> One suggests that, rather than ignore a witness's demeanour when assessing his or her honesty, it would be preferable for the judiciary (and jury) to receive instruction in cultural differences in demeanour, for example regarding eye contact.<sup>93</sup> It was suggested that it would be difficult to implement the Commission's proposal.<sup>94</sup>

## **Improving community understanding of and participation in the jury system**

10.57. ***The Commission's suggestions for making juries more representative***. In DP 48 the Commission suggested a number of ways of increasing participation in the jury system:

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85 Attorney-General's Department (ACT Government Law Office) *Submission* January 1992.

86 The Brethren *Submission* July 1991; Humanist Society of Victoria Inc *Submission* July 1991; I H Pike, Chief Magistrate (NSW) *Submission* November 1991.

87 J V Coombs *Submission* June 1991; K A McKenzie *Submission* August 1991; J Flach *Transcript* Hobart 3 October 1991.

88 cl 27. Also see cl 10 and 12 of the *Evidence Bill 1991* (NSW).

89 Northern Territory Police *Submission* June 1991; South Australia Police Department *Submission* September 1991.

90 There was support in consultation for this.

91 J Rossi & J Horiopoulos *Submission* September 1991.

92 Judges of the County Court of Victoria, Law Reform Committee *Submission* June 1991; South Australian Government *Submission* November 1991.

93 K A McKenzie *Submission* August 1991; P Berman *Submission* July 1991.

94 Anglican Diocese of Sydney, Social Issues Committee *Submission* July 1991.

- Encourage people to take up citizenship and register on the electoral roll.
- Increase access to English classes and ensure that the classes include basic instruction about the criminal law.
- Review procedures for testing proficiency in English.
- Write the jury summons form in plain English.

10.58. ***Submissions support Commission's approach.*** There is considerable support for the suggestions made by the Commission.<sup>95</sup> One submission suggests that there should be a continuing education campaign to encourage people to take up citizenship and register on the electoral roll and increased provision of community funding to agencies providing instruction in the English language. In addition to revising the jury summons form, the after-hours telephone information service for jurors should be improved.<sup>96</sup> The form of the Northern Territory jury summons is currently under review.<sup>97</sup> A submission suggests monitoring the actual participation of non-English speaking background citizens and embarking on an information campaign throughout the Australian community in the next couple of years.<sup>98</sup> If summonses are to be produced in a variety of languages, the question is how many languages ought to be used.<sup>99</sup> Some scepticism was expressed about the likely effectiveness of the strategies proposed by the Commission.<sup>100</sup> Some submissions indicate that the Commission's proposals had been misunderstood as a proposal for 'positive discrimination' in the selection of jurors.<sup>101</sup>

## Recommendations

### Extending the court's control

10.59. The Evidence Bill will go some way to achieving the objectives of the Commission's provisional proposal—that is to make the court's inherent powers more explicit. It also provides for more flexibility in the way witnesses may give their evidence and addresses some problems of disadvantaged witnesses. However, it does not refer specifically to cultural factors as a matter to which the court should be alert in controlling the way in which a witness may give evidence. The Commission recommends that those provisions in the Evidence Bill which specify characteristics of the witness to which a court is to have regard in exercising its control over the questioning of a witness, or the admissibility of evidence, should be amended to include cultural background and language of the witness or defendant. The Commission recommends that these provisions should apply to all trials of federal offences but leaves it to negotiation between the Commonwealth and the States whether this is done by introduction of uniform evidence provisions in all jurisdictions or by application of federal evidence law in State and Territory courts.

### Court support services

10.60. Many defendants will continue to be unrepresented in the criminal courts, especially the lower courts, and people not fluent in English will be particularly disadvantaged by the lack of

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95 Northern Territory Police *Submission* June 1991, P Berman *Submission* July 1991, Anglican Diocese of Sydney, Social Issues Committee *Submission* July 1991, Department of Attorney-General (NT) *Submission* August 1991; South Australia Police Department *Submission* September 1991.

96 General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* August 1991.

97 Department of the Attorney-General (NT) *Submission* August 1991.

98 Springvale Community Aid & Advice Bureau Inc *Submission* August 1991.

99 South Australian Government *Submission* November 1991.

100 Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee *Submission* September 1991.

101 Judges of the County Court of Victoria, Law Reform Committee *Submission* June 1991.



representation. The Commission considers that the provision of advice, assistance and support to those involved in the criminal justice system, as complainants or defendants, is very important. Court support services staffed by paralegals could provide a cost-effective means of ensuring that people have more access to information about their rights, about how the system works, and the options available to them. There are already court support services operating in some jurisdictions. The availability of these services improves the efficiency and fairness of the criminal justice process. Governments and funding bodies should encourage their development. Access and equity principles should be built into the services to ensure they are able to meet the needs of a culturally diverse community.<sup>102</sup>

## **Swearing of witnesses**

10.61. Enactment of the *Evidence Bill 1991* (Cth) provisions concerning the swearing of witnesses will resolve many of the problems and concerns identified in the Commission's consultation and in submissions. The court should be under a duty to advise the witness that he or she may choose whether to swear or affirm and that these are equally valid ways of undertaking to tell the truth to the court. The Commonwealth should continue to encourage the States and Territories to adopt these measures on uniform basis.

## **Witness demeanour**

10.62. The Commission appreciates that this is a difficult issue, not least because to require a judge to warn a jury about the dangers of drawing conclusions from demeanour would risk placing further emphasis on it. However, in the context of this inquiry, the Commission has become concerned that the weight traditionally attached to demeanour in assessments of credibility could disadvantage witnesses whose behaviour is misinterpreted on the basis of inappropriate cultural assumptions. However, it is not possible to address this by legislative means. Courts should become aware, through judicial training and in other ways, of the desirability of warning the jury to make proper allowance for the cultural background of the witness in drawing conclusions from demeanour.

## **Increasing participation in the jury system**

10.63. The Commission considers it important that the pool from which juries are formed should be as representative as possible and that any barriers to the participation of people of non-English speaking background should be identified and removed. The ignorance in some sections of the community about the jury system and about jury duty as both a right and a responsibility of citizenship needs to be addressed. The Commission recommends that

- when migrants become citizens, they should be given an opportunity to register immediately on the electoral roll;
- the Department of Immigration, Local Government and Ethnic Affairs should include information about the jury system and jury duty in the information package supplied to applicants for citizenship.

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102 For details of one model for a court support scheme for people appearing in local courts, which has been recently evaluated, see: Women's Domestic Violence Court Assistance Scheme, Evaluation, Redfern Legal Centre, 1991.

# PART V—CONSUMER CONTRACTS

## 11. Credit contracts

### Introduction

#### Credit contracts

11.1. ***Credit contracts.*** A credit contract, like any other contract, confers benefits and obligations on both parties to the contract. Legislation, State and federal, protects the interests of consumers making credit arrangements. Legislation governs many of the terms and conditions of some kinds of credit contracts. At the most basic level, a credit contract is one in which parties agree that one will lend money to the other. However credit legislation covers a much wider range of credit arrangements.<sup>1</sup> The effect of laws regulating credit is that many credit contracts are very similar to each other, whichever company is providing the credit.

11.2. ***Banking and credit.*** The credit industry has undergone major changes in the last ten years. Banks rather than finance companies are now by far the major suppliers of credit. A large percentage of credit is now supplied through credit cards. This chapter focuses on consumer credit generally without specifically discussing issues relating to contracts between bank and customer. However, a recent parliamentary inquiry into banking (the ‘Martin Inquiry’) found that the law relating to banker and customer is in need of review. It has recommended that this Commission should conduct this review.<sup>2</sup>

#### Why credit contracts need special attention

11.3. ***The importance of credit to settling migrants.*** Migrants and refugees may arrive in Australia with special needs which make them more reliant on credit than other members of the community. They may have no savings and few of the possessions needed to establish themselves in Australia. The Ethnic Affairs Commission of NSW’s submission confirms the critical importance of this issue and states that the downgrading of government sponsored post-arrival accommodation and recent government imposed bond requirements for certain categories of migrants have made this need for credit even more immediate.<sup>3</sup> Also, for a range of reasons, many find that setting up a small family business is the only way they can get an income. Most need credit to raise the necessary capital. Lack of established credit history may make it more likely that they are required by a credit provider to have a guarantor or co-borrower.

11.4. ***Why credit contracts cause special problems for some groups of people.*** There are many factors that disadvantage some people of non-English speaking background, recently arrived migrants, ethnic minorities and Aboriginal people when they enter into credit contracts. They may have communication difficulties if their first language is not English. This means that there is a greater information imbalance.<sup>4</sup> The law’s reliance on writing in credit contracts may cause

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1 Current State credit acts have a complex set of rules about which credit arrangements they cover and include among other things, credit card and hire-purchase contracts.

2 House of Representative Standing Committee on Finance and Public Administration *A Pocket Full of Change: Banking and Deregulation*, AGPS, Canberra, 1991, 390.

3 See Ethnic Affairs Commission of New South Wales *Submission* December 1991.

4 See eg Marrickville Legal Centre & Children’s Legal Service *Submission* November 1991; South Australian Government *Submission* February 1992.

difficulties for people who have a tradition of communicating important information orally. Some people may be unfamiliar with, or have different expectations about, credit, financial institutions and the way transactions take place.<sup>5</sup>

11.5. ***Particular problems that credit contracts raise.*** The Commission's consultation shows that people suffering from these disadvantages are particularly vulnerable to unfair practices such as overselling of credit, leading to overcommitment, inadequate or misleading information about terms and conditions and inappropriate reliance on guarantors and co-borrowers to protect lenders's interests.<sup>6</sup>

11.6. ***Discussion paper's approach.*** DP 49 raised the question how the law can ensure that people affected by these factors do not assume legally enforceable obligations unless they have fully and freely consented to them.

## **Draft Credit Bill 1991**

### **The move towards simplicity and uniformity**

11.7. In September 1986, the Standing Committee of Consumer Affairs Ministers (SCOCAM) agreed that simplified uniform credit laws were desirable. It approved the formation of a working party to co-ordinate the preparation of proposals for credit law reform. The working party released the latest draft of proposed legislation, the draft Credit Bill 1991, in September 1991. The Bill is to provide uniform nation regulation of all consumer lending by all credit providers. It seeks to outline clearly the rights and obligations of parties to credit transactions while allowing for product development. This will simplify procedures for the national finance industry and provide cost benefits to consumers.

### **Proposals build on the draft Credit Bill**

11.8. The working party has been consulting with industry and consumer groups on the 1991 Bill and proposes to have it ready to be introduced in all state and territory parliaments in the autumn sittings of 1992. The Commission is using this proposed Bill as a basis for its recommendations in the area of consumer credit. Its approach is to ensure that the Bill takes into account the ethnic and linguistic diversity of Australia and provides for the needs and interests of all Australians.<sup>7</sup> The specific issues it has identified in the consumer credit area will be relevant to industry and consumer groups working for change in other areas of consumer contracts.

## **Many people enter agreements that they do not understand**

11.9. Many of the problems the Commission has been told about arise because people enter into binding agreements they do not understand. One reason for this is that contracts are hard to read and

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<sup>5</sup> See eg South Australian Government *Submission* February 1992.

<sup>6</sup> See eg Roger Westcombe, 'Bad money business', (1990) 2 *Aboriginal Law Bulletin* 6; Consumer Credit Legal Centre (NSW) *Submission* January 1990; Barnfield and Somerville *Submission* April 1990; Migrant Resources Centre (Nthn Tas) *Submission* August 1990; Suzanne Mortier, *Ethnic Awareness*, Research Paper prepared for the Department of Public and Consumer Affairs (SA), April 1989, 2; Marrickville Legal Centre & Children's Legal Service *Submission* November 1991; Ethnic Affairs Commission of New South Wales *Submission* December 1991 cites as an example a recently announced investigation by the NSW Minister for Consumer Affairs into allegations that Spanish speaking families were led by a real estate agent into mortgages that they could not meet; Tasmanian Muslim Association *Submission* January 1992; Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992; South Australian Government *Submission* February 1992.

<sup>7</sup> The draft Credit Bill makes specific reference to cultural disadvantage as a relevant factor in determining whether conduct has been unfair: see eg cl 7(2)(d).

are written in complex language that is hard to translate.<sup>8</sup> Another reason is that people are often not given a genuine opportunity to read and to get independent advice about the contract they propose to enter into. This chapter discusses three ways in which these problems can be addressed. These are by requiring that credit contracts be easy to read and be written in clear and simple language, that people have a genuine opportunity to understand and get advice about a contract before they are bound by it and that, where credit is provided at point of sale, borrowers should have a cooling off period during which he or she can withdraw from the contract of credit and sale.

## Credit contracts should be easy to read and in clear and simple language

### Discussion paper proposal

11 10. ***'Plain English' proposals.*** DP 49 proposed a number of measures designed to make it easier for all Australians to understand their rights and obligations when they enter into consumer credit contracts. Its central proposal was that credit legislation should provide that credit contracts be easy to read and be written in plain English, that is 'in language that is clear and easy to understand'. It proposed that regulations should specify print size and colour and paper colour. The Commission suggested that government or a government agency develop model contracts to give the finance industry guidance about how it could meet these requirements. It also proposed that credit legislation provide a 'pre-clearance' procedure whereby the relevant tribunal could approve credit contracts. Neither borrowers nor tribunals would be able to challenge or criticise approved contracts in relation to their legibility or comprehensibility. DP 49 suggested some sanctions that a tribunal might apply if credit providers fail to meet legibility or comprehensibility requirements.<sup>9</sup>

11.11. ***In principle support for plain English contracts.*** Submissions and consultations show strong support for the principle that credit contracts should be easily read and understood. This support comes from both industry and consumer groups.<sup>10</sup> Industry groups pointed to a number of problems that arise from the Commission's proposals to promote legible and plain English contracts by means of legislative regulation.

11.12. ***Concern about restrictions.*** Some industry representatives expressed concern that legislation setting exact print size and colour and paper colour would be too restrictive.<sup>11</sup> Companies use colours in print and paper on contracts and forms to promote company identification and image. Industry representatives told the Commission that layout may be more important to achieving legibility than print size. Exact specification of print size may inhibit companies from developing layout that is easy to read.

11.13. ***Difficulties in defining comprehensibility.*** Submissions and consultations show greater concern about the Commission's proposal to use legislative provisions to promote language that is

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8 For example, many credit forms and contracts are in small and light coloured print. Layout is often cramped and the language includes words such as 'joint and several liability', 'herein', 'disbursement', and 'accrued credit charge'.

9 These included the power to set aside or substitute the provision or contract, or to order the credit provider not to use the provision in future and to impose a penalty.

10 Presbyterian Women's Association of Australia in New South Wales *Submission* November 1991; Australian Bankers' Association *Submission* December 1991; C Stain *Submission* December 1991; Ministry of Consumer Affairs (WA) *Submission* November 1991; Dr J Watson, Minister for Multicultural & Ethnic Affairs (WA) *Submission* December 1991; Ethnic Affairs Commission of New South Wales *Submission* December 1991; V Chadwick, Minister for School Education and Youth Affairs (NSW) *Submission* December 1991; Marrickville Legal Centre & Children's Legal Service *Submission* November 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* December 1991; CC Adams *Submission* December 1991; Department of Consumer Affairs (NSW) *Submission* January 1992; Life Insurance Federation of Australia Inc *Submission* December 1991; Australian Banking Ombudsman *Submission* September 1991; Young Women's Christian Association of Perth (Inc) *Submission* October 1991; Australian Retail Financial Network (Ltd) *Submission* January 1992; Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992; South Australian Government *Submission* February 1992; Redfern Legal Centre *Submission* March 1992; Trade Practices Commission *Submission* February 1992; Victorian Government *Submission* March 1992.

11 This came out of consultations the Commission conducted with the Australian Finance Conference and the Insurance Council of Australia.

clear and easy to understand. A number of submissions said that legislation cannot define the requirement of 'comprehensibility' sufficiently clearly to enable credit providers to comply with it easily.<sup>12</sup> They raised questions about the standard of comprehensibility the provision would require. Would the provision require that the language be comprehensible to people with low levels of literacy or education? Or will contracts meet the requirement if people of 'average' education and literacy can understand them?

11.14. ***Pre-clearance and models.*** Some industry and many other submissions supported the Commission's proposal for a pre-clearance procedure. However submissions and consultations show that providing a pre-clearance procedure does not necessarily solve definition difficulties and may create other problems. For example, a general approval process may not detect all comprehensibility problems and may be too cumbersome.<sup>13</sup> If the criteria tribunals use for approval differ from jurisdiction to jurisdiction, the thrust of the SCOCAM initiative towards uniformity will be undermined. Submissions and consultation show general support for the development of non-compulsory model contracts by a government agency.<sup>14</sup> Supporters saw models as an important means of educating credit providers about plain English techniques.<sup>15</sup> Some thought that credit providers who used models would be more certain that their contracts could not be challenged for legibility or comprehensibility. The Consumer Credit Legal Centre (NSW) pointed out that a standard model developed as a result of negotiation between consumers and industry groups can address a much greater level of detail relevant to the relationship between suppliers and consumers than governments can achieve through legislation.<sup>16</sup> Another submission cautioned that spending government funds to develop models can only be justified if industry is committed to using them.<sup>17</sup>

11.15. ***Sanctions for non-compliance.*** A number of submissions expressed concern that tribunals should not be able to set aside or substitute provisions of a credit contract or impose harsh penalties where credit providers fail to comply with comprehensibility requirements.<sup>18</sup> They argue that the risk is too great of the tribunal creating contracts which bear no resemblance to the intentions of the parties.

## **What the draft Credit Bill says**

11.16. The draft Credit Bill provides that credit contracts, notices and related securities must be 'easily legible', must conform with provisions of the regulations as to type-face and size of print and 'must be expressed in language that is readily comprehensible'.<sup>19</sup> If the relevant tribunal established under the draft Bill is satisfied, on an application, that a provision of a credit contract does not comply with these requirements, it can

- declare the provision void

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12 See eg General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* December 1991; Life Insurance Federation of Australia Inc *Submission* December 1991.

13 General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* December 1991.

14 See Australian Bankers' Association *Submission* December 1991; Dr J Watson, Minister for Multicultural & Ethnic Affairs (WA) *Submission* December 1991; Ethnic Affairs Commission of New South Wales *Submission* December 1991; V Chadwick, Minister for School Education and Youth Affairs (NSW) *Submission* December 1991; Marrickville Legal Centre & Children's Legal Service *Submission* November 1991; Consumer Credit Legal Centre (NSW) Inc *Submission* December 1991; CC Adams *Submission* December 1991; Department of Consumer Affairs (NSW) *Submission* January 1992; South Australian Government *Submission* February 1992; Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992; Redfern Legal Centre *Submission* March 1992; Victorian Government *Submission* March 1992.

15 See eg General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* December 1991.

16 Consumer Credit Legal Centre (NSW) Inc *Submission* December 1991.

17 See Marrickville Legal Centre & Children's Legal Service *Submission* November 1991.

18 See eg Australian Bankers' Association *Submission* December 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* December 1991.

19 cl 33(1).

- substitute some other provision
- prohibit the creditor from using the provision in future credit contracts.<sup>20</sup>

The contract document must conform to the requirements of the regulations as to its form and the way it is expressed.<sup>21</sup> The draft Bill does not provide for a pre-clearance procedure, but it does give the Commissioner for Consumer Affairs the power to publish model contracts. Contracts which conform to such a model cannot be called into question on the grounds of form, legibility or comprehensibility.<sup>22</sup>

## Issues to be resolved

### 11.17. *Should credit contracts have to be easy to read and written in clear and simple language?*

The Commission has concluded that, in a linguistically, culturally and ethnically diverse society, it is not appropriate for the law or for credit providers to assume that borrowers will somehow be able to make sense of the language currently used in credit contracts. The draft Credit Bill should require that credit contracts, and the other documents covered by cl 33, be easy to read and written in clear and simple language. This must be the starting point for any attempt to ensure that people understand the contracts they enter into. Having these documents written in this way will make them easier to translate. They will be better understood by sellers and credit providers who, in turn, will be better able to explain them to borrowers. Where people understand their obligations, there are less likely to be disputes later on. This is of particular importance to people for whom there are language, financial and other barriers to the use of dispute resolution procedures. Given that progress in this area appears to be slow, a legislative standard is necessary. However, legislation requiring plain English contracts should not prevent parties from contracting in a language other than English.

11.18. *What standard should be set for legibility and comprehensibility?* The standard set to be set by the draft Credit Bill for legibility and comprehensibility should be general. Standards which are too prescriptive would restrict industry's ability to develop new products and to produce documents which reflect corporate identity. However, if a standard is framed in general terms, credit providers will not be entirely certain in all cases that they have met the standard. The Commission's judgment is that it is reasonable for credit providers to bear some of the risk that borrowers will not understand the documents. It is not appropriate or realistic for credit providers to conduct their business on the basis of certainty that all borrowers are equally able to understand the documents they draw up. There is now a considerable body of literature on the principles of producing plain English documents<sup>23</sup> and there are a number of bodies with rapidly developing expertise in the area.<sup>24</sup> If credit providers draw upon this knowledge, they should be able to achieve an acceptable level of certainty that their material meets the general standard. A general standard is therefore appropriate. Any uncertainty will be more than set off by the flexibility allowed in layout and design. Credit providers would be helped when developing clearer forms and contracts if they used their own research about educational and literacy levels of their client groups and the principles for communicating information underlying their marketing strategies. If plain language documentation is used, there will be less risk that the credit provider will breach laws prohibiting misleading, deceptive and unconscionable conduct.<sup>25</sup>

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20 cl 33(2).

21 cl 12(2).

22 cl 32.

23 eg RD Eagleson *Writing in Plain English* AGPS, Canberra, 1990.

24 eg the Law Foundation Centre for Plain Legal Language based at Sydney University.

25 Trade Practices Commission *Submission* February 1992.

11.19. ***What should be the consequences for non-compliance?*** The Credit Bill should provide that, if a court or the tribunal finds, on application from a borrower, that a provision of a contract or document covered by cl 33 does not meet the general standard of being easy to read and written in clear and simple language, the consequences set out in cl 33(2) should follow. These are that the court or the tribunal will be able

- to declare the provision void
- to substitute some other provision that the tribunal considers more appropriate in form, or in form and effect
- to prohibit the creditor from using a provision in the same or similar terms in future credit contracts.

However, it would be unjust to have these consequences follow automatically. Given that the object of the recommendation is to maximise the chances that borrowers will actually understand the contracts they are entering into, the court or tribunal should not be able to act on this ground unless it finds that the borrower or other party affected did not in fact understand the effect of the provision. This approach is consistent with the Commission's view that the credit provider, being the party who has drawn up the contract, holds the responsibility for ensuring that a borrower understands the provisions. Where the meaning of a provision is unclear, the court or tribunal should give it a meaning that favours the borrower.

11.20. ***Government agencies—model contracts.*** Credit providers should be responsible for ensuring that credit contracts comply with standards of legibility and comprehensibility. However, relevant government agencies, for example, Commissioners of Consumer Affairs, can help and advise credit providers to meet the standard the law sets. One way of doing this is by encouraging industry and consumer groups to negotiate the development of model contracts in consultation with government. Commissioners for Consumer Affairs should have the power to publish these or other model contracts and to monitor contracts used in the industry. They would need to be aware of changes in the industry and to encourage the development of new models where it is necessary. The Commission, however, is not in favour of a pre-clearance or other process which would make any contract or model developed unable to be challenged for on legibility or comprehensibility grounds. Such processes have in general not been successful in the past, and a government agency would not necessarily be able to assess fully whether a contract would be easily understood by people suffering from the disadvantages discussed in paragraph 11.9. All model contracts should be able to be tested in a court or tribunal. It would, however, be appropriate for the court or tribunal, when determining what to do with a provision that it has found to breach the general standard, to take into account the fact that a credit provider had, in good faith, used an appropriate published model provision. As various provisions are tested and approved by tribunals over time, credit providers can be more confident that the model meets the standard.

11.21. ***Practical considerations.*** At first, there would be some additional research, preparation and printing costs to credit providers who have to change their documents to meet the plain English standard. However, research costs would not be high for those who used the negotiated model. Research and the experience of companies such as NRMA Insurance Ltd, which uses plain English documents, shows that initial costs are quickly balanced by the savings in staff training, reduction in the time spent processing forms and explaining contracts to consumers and savings in legal costs.<sup>26</sup>

11.22. ***Further role for governments.*** As well as helping settle model contracts, Commissioners for Consumer affairs and other relevant government agencies can play another role in relation to the

comprehensibility of contracts. If a Commissioner believes that a provision of a credit contract does not meet the general legislative standard, he or she should have the power to suspend the use of the provision by the credit provider concerned. The suspension should only apply for a very limited period, say, 28 days. Within that period, the Commissioner would have to apply to the relevant court or tribunal for a direction that the provision no longer be used. The suspension would lapse if no application was made within the period. This approach is consistent with that adopted in a number of European Community member countries.

## Recommendations

### 11.23. The Commission recommends that

- the draft Credit Bill require that contracts, guarantees and related notices should be easy to read and be written in clear and simple language
- regulations under that Bill should specify a minimum print size and state that print should be easy to read and in a colour that stands out clearly against the colour of the paper—the minimum print size should not be small as to discourage consumers from reading the contract
- the draft Credit Bill should provide that, if
  - a provision of a credit contract does not meet these requirements and
  - the borrower or other party has not understood the effect of the provisionthe court or tribunal should have the powers set out in cl 33(2) of the draft Bill,<sup>27</sup> but in exercising these powers, the court or tribunal should take into account, if it is the case
  - the fact that parties have used a language other than English
  - the fact that the credit provider used a model contract published by the Commissioner of Consumer Affairs
- Commissioners for Consumer Affairs should have the power
  - to monitor credit contracts used by credit providers
  - to suspend the use of a particular contract and apply within a specified period to the court or tribunal for a direction that the contract not be used
- governments should encourage industry and consumer groups to negotiate the development of model contracts, but there should be no provision in the draft Credit Bill that use of such a model makes the contract immune from challenge on the ground that it does not meet the legislatively prescribed general standards of being easy to read and written in clear and simple language.

## Promoting understanding of the main terms of a credit contract

### Discussion paper proposal

11.24. ***Plain English summary and warning.*** DP 49 proposed that, before a credit contract is signed, the credit provider would be obliged to give the borrower a short, plain English summary of the main terms of the contract. It proposed that regulations would specify what must be in the summary. The summary would be part of the contract, but on a separate page. It proposed that, where the contract is to be provided immediately, there would be an onus on the credit provider to read it to the person or to give the person a genuine opportunity to read it before the contract is signed. The borrower would have to initial a box on the contract to show that this had been done.

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27 See para 11.16.



The summary would also contain a warning in community languages of the importance of understanding the information provided. The Commission proposed that failure to meet these requirements would result in the credit provider forgoing credit charges. The Commission asked for submissions on what should be included in the summary.

1125. **Support for plain English summary.** Submissions and consultations show a high level of support for the Commission's proposal.<sup>28</sup> One submission said that a plain English summary is not necessary if the contract is in plain English.<sup>29</sup> Suggestions about the information that should be in the summary show a high degree of agreement. It falls into two categories. The first is information about cost, time and place. This includes

- the amount borrowed or secured<sup>30</sup>
- the period of the contract<sup>31</sup>
- the percentage rate of interest<sup>32</sup>
- the total amount of interest payable in dollar terms<sup>33</sup>
- the total when the amount borrowed and interest are added together<sup>34</sup>
- repayment arrangements, for example how many payments should be made, how much should be paid per instalment, and the date on which it should be paid<sup>35</sup>
- what the lender can do in case of default<sup>36</sup>
- liability of borrower in case of default<sup>37</sup> including a warning that the total maximum amount will attract interest in case of default until it is all paid<sup>38</sup>
- the cooling off period (if there is one)<sup>39</sup> and how to exercise one's rights under it.

The other category is information about rights and general obligations under the contract. These include

- what the consumer should do if things go wrong<sup>40</sup>

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28 See Presbyterian Women's Association of Australia in New South Wales *Submission* November 1991; C Stain *Submission* December 1991; Ethnic Affairs Commission of New South Wales *Submission* December 1991; V Chadwick, Minister for School Education and Youth Affairs (NSW) *Submission* December 1991; Marrickville Legal Centre & Children's Legal Service *Submission* November 1991; CC Adams *Submission* December 1991; Department of Consumer Affairs (NSW) *Submission* January 1992; Life Insurance Federation of Australia Inc *Submission* December 1991; Bar Association of Queensland *Submission* November 1991; Young Women's Christian Association of Perth (Inc) *Submission* October 1991; Australian Retail Financial Network (Ltd) *Submission* January 1992; Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992; Redfern Legal Centre *Submission* March 1992; South Australian Government *Submission* February 1992; Trade Practices Commission *Submission* February 1992.

29 Australian Bankers' Association *Submission* December 1991.

30 Bar Association of Queensland *Submission* November 1991; Life Insurance Federation of Australia Inc *Submission* December 1991; Redfern Legal Centre *Submission* March 1992.

31 Presbyterian Women's Association of Australia in New South Wales *Submission* November 1991; Life Insurance Federation of Australia Inc *Submission* December 1991; CC Adams *Submission* December 1991.

32 Bar Association of Queensland *Submission* November 1991; Young Women's Christian Association of Perth (Inc) *Submission* October 1991; Presbyterian Women's Association of Australia in New South Wales *Submission* November 1991; Life Insurance Federation of Australia Inc *Submission* December 1991; CC Adams *Submission* December 1991; Redfern Legal Centre *Submission* March 1992.

33 CC Adams *Submission* December 1991; Bar Association of Queensland *Submission* November 1991; Presbyterian Women's Association of Australia in New South Wales *Submission* November 1991; Redfern Legal Centre *Submission* March 1992

34 CC Adams *Submission* December 1991; Redfern Legal Centre *Submission* March 1992.

35 CC Adams *Submission* December 1991; Marrickville Legal Centre & Children's Service *Submission* November 1991; Redfern Legal Centre *Submission* March 1992.

36 Bar Association of Queensland *Submission* November 1991; Young Women's Christian Association of Perth (Inc) *Submission* October 1991; Marrickville Legal Centre & Children's Legal Service *Submission* November 1991; Life Insurance Federation of Australia Inc *Submission* December 1991.

37 Marrickville Legal Centre & Children's Service *Submission* November 1991; Ethnic Affairs Commission of New South Wales *Submission* December 1991.

38 Bar Association of Queensland *Submission* November 1991; Young Women's Christian Association of Perth (Inc) *Submission* October 1991.

39 Bar Association of Queensland *Submission* November 1991; Young Women's Christian Association of Perth (Inc) *Submission* October 1991; C Stain *Submission* December 1991.

- advice that the whole contract should be read and that legal advice should be obtained<sup>41</sup>
- a statement whether an interpreter was present and the person understood the summary.<sup>42</sup>

Other submissions suggested that the summary should include information about any early repayment penalties and any special terms<sup>43</sup> and which Acts are applicable.<sup>44</sup> Some submissions and some people consulted by the Commission were strongly in favour of requiring credit providers to give debtors a translated version of the summary.<sup>45</sup> These people considered that this requirement would not be too onerous if the summary was kept short and straightforward. They pointed to the fact that there are now some very good computer programs for translation.

## What the draft Credit Bill says

11.26. The draft Credit Bill does not make any direct provision for a plain English summary. It sets out the information which the contract document must contain.<sup>46</sup> Credit providers who fail to meet key information requirements lose their right to interest charges.<sup>47</sup> The Bill also requires a creditor, before a credit contract is formed, to provide the debtor with a statement of the debtor's statutory rights and obligations in the form required by the regulations.<sup>48</sup> Providing a prescribed statement of rights and obligations is already required under most current credit legislation.<sup>49</sup>

## The Commission's approach

11.27. ***Aim of plain English summary.*** The Commission's aim in proposing a plain English summary was to make it easier for a borrower to make an informed decision about whether to enter into the contract. This is more likely to be achieved if the key terms of the contract are set out very clearly and in simple language on one page. The role of the summary was also to warn people that before they sign the offer or application form they should read the whole contract and get help if they are unable to read or understand any document. Having the warning in a range of community languages was designed to ensure, at the very least, that people who are unable to read English are aware of the need to understand the contract they are entering into.

11.28. ***Practical difficulties.*** There are a number of practical problems with using a separate one page summary to achieve this aim. Normal procedure in many credit negotiations is for the borrower to fill out an offer form, the terms of which become binding when the credit provider later accepts the offer. All the information mentioned in submissions would not fit on one page. If it was a page separate from the offer and contract, much of the information would have to be repeated in the offer. A better approach may be to require that the information relating to cost and payments be presented in summary form on the front page of all offers for credit. When a court or tribunal is assessing whether a contract meets the standard of legibility and comprehensibility it should take into account whether the front page of the offer was in this summary format. The layout approach taken in the 1981 Truth in Lending Regulations (US) would be a good starting point. It would not be practical to include in the offer a warning in a wide range of community languages. However the

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40 C Stain *Submission* December 1991; Ethnic Affairs Commission of New South Wales *Submission* December 1991; Redfern Legal Centre *Submission* March 1992.

41 Presbyterian Women's Association of Australia in New South Wales *Submission* November 1991; Bar Association of Queensland *Submission* November 1991; Young Women's Christian Association of Perth (Inc) *Submission* October 1991.

42 Presbyterian Women's Association of Australia in New South Wales *Submission* November 1991; Young Women's Christian Association of Perth (Inc) *Submission* October 1991.

43 Life Insurance Federation of Australia Inc *Submission* December 1991.

44 Marrickville Legal Centre & Children's Legal Service *Submission* November 1991.

45 See eg Ethnic Affairs Commission of New South Wales *Submission* December 1991.

46 cl 12.

47 cl 41(l).

48 cl 11.

49 See eg Credit Regulations NSW Sch 1 Form 4.

credit provider would be required to give a borrower, before he or she signs the offer, a brightly coloured page which sets the warning out in a large number of community languages.

11.29. ***Statement of rights and obligations.*** Information about rights and obligations should not be in a summary, but should be given as a separate prescribed statement before the borrower signs the offer. The statement should include, as a matter of priority, the information that submissions suggest is needed. The question and answer format which credit providers are required to provide under existing credit legislation<sup>50</sup> is a good starting point. However the language, print size and layout may need some revision. If this is a prescribed statement which all credit providers must give borrowers, there is no reason why it could not be translated into a range of community languages. The draft Credit Bill should require that, before a prospective borrower signs the offer form, the credit providers should have to give him or her a copy of the statement of rights and obligations, in a language the borrower understands, on request or if the credit provider knew or ought to have known that the borrower is not fluent in English. Modern technology should enable credit providers to print these as needed.

11.30. ***A genuine opportunity to read and consider is needed.*** The Commission doubts whether this alone will ensure that borrowers understand better the agreement they are proposing to enter and can make an informed decision. These are first steps. In addition, the borrower should have a genuine opportunity to read the contract and get advice. This is particularly important for people who need the contract to be explained to them in a language other than English. This is unlikely to happen unless the offer, contract and statement of rights and obligations are taken away from the office before the offer is signed or before the borrower becomes finally bound. The Commission considers that, to achieve this, borrowers may well need a cooling off period. The Commission has not consulted on this option, but it should be given careful consideration by SCOCAM in its further work on the draft Credit Bill.

## Recommendations

11.31. The Commission makes the following recommendations.

- ***Front page summary.*** The draft credit Bill should require credit providers to include on the front page of their offer documents, a statement, in clear and simple language, of
  - the amount borrowed (the amount of credit given)
  - the credit charge (the dollar amount the credit will cost)
  - the total establishment and other fees (the amount the credit provider has spent in organising the loan)
  - the annual percentage rate (the cost of credit as a yearly rate)
  - if the interest rate is variable—the terms on which it can be varied
  - the total of payments (the amount that will have been paid after all payments as scheduled have been paid.)
  - details of repayments, such as the number of payments, the amount of the repayments and the date they are due
  - if there is a cooling off period—that the borrower should get a separate notice about rights under the cooling off period.

The summary should refer the borrower to the relevant provision of the contract for an itemisation of the fees. Any statement required by legislation to be made about consumer credit insurance should also be included on the front page of the offer.

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50 See eg *Credit Act 1984* (NSW) s 34, Credit Regulations clause 11, Schedule 1 Form 4.

- **Consequences for failing to have front page of offer in summary form.** The draft Credit Bill should provide that the sanction for failure to set out the front page of the offer as prescribed are the same as for failure to meet the general standard for legibility and comprehensibility.<sup>51</sup>
- **Statement of rights and obligations.** The draft Credit Bill should require that a statement of rights and obligations, which is easy to read and in clear and simple language, be handed to the borrower, along with a copy of the whole contract, before he or she signs the offer form. The statement of rights and obligations should include information suggested in submissions.<sup>52</sup> On request, or if the credit provider knew or ought to have known that the borrower is not fluent in English, the statement should be given in a specified community language that the borrower understands.
- **Warning to read and get advice.** The draft Credit Bill should require there to be a warning in a box next to where the borrower signs the offer. The warning should state that the borrower should read the offer, the entire contract, the statement of rights and obligations and any other documents they are given before signing the offer. On request, or if the credit provider knew or ought to have known that the borrower is not fluent in English, the statement should be given in a specified community language that the borrower understands. In such a case, the statement should advise the borrower to get someone to explain the contract in a language he or she can understand before they sign the offer.
- **Sanction for failure to provide statement of rights and obligations and warning notice.** The Credit Bill should provide that, if a credit provider fails to comply with the obligation to give the borrower the statement of rights and obligations or the warning in community languages, it should lose its right to interest charges.

These recommendations are not to be regarded as a comprehensive statement of what should be in a credit contract.

## Cooling off period for point of sale credit

### Discussion paper proposal

11.32. **Three day cooling off period.** DP 49 proposed that, where credit and goods are sold together, legislation should provide for a cooling off period of three business days during which the borrower would be able to withdraw from the credit contract and from the related contract for the sale of the goods. The provision would apply to transactions above \$500. The seller would keep the goods until the end of the cooling off period, when the buyer can collect them. If the buyer fails to return at the end of three days, the seller must keep the goods for three more days. After that time the goods can be sold to someone else. The seller would be permitted to take a deposit of \$40 or 1% of the purchase price of the goods (whichever is the greater). DP 49 proposed that half the deposit would be refundable if the buyer notified the seller of his or her intention to withdraw within the cooling off period. It proposed that the seller would retain the whole deposit if the buyer did not indicate an intention to withdraw within the extended time. Notification of intention to withdraw could be by phone or in writing.

11.33. **Benefits of cooling off.** The Commission's community languages consultation shows that people of non-English speaking backgrounds and people working with those people were very much in favour of having a period in which to think about a point of sale credit contract. None of these people raised concerns about the proposed restriction on them having immediate possession of the goods.<sup>53</sup> Few customers seem to want to take the goods straightaway. Rather they are cajoled into signing up and taking the goods immediately with the threat of 'it won't be here tomorrow' or 'we can only offer it at this special price today'.<sup>54</sup> Financial counsellors and legal aid lawyers also

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51 See para 11.16.

52 See para 11.25.

53 A concern raised by Presbyterian Women's Association of Australia *Submission* November 1991.

54 Consumer Credit Legal Centre *Submission* December 1991.

generally agreed that many of their clients would have benefited from a cooling off period.<sup>55</sup> Some of these said their clients very often have only sought help after they have signed up and have had a few days to reflect. One submission said that the cooling off period would give creditors the opportunity to assess more thoroughly a consumer's ability to repay and lessen the burden on the credit provider to explain the credit contract to the consumer.<sup>56</sup> The question of waiver of the right to a cooling off period was raised, some submissions requiring that, if waiver be possible, it should only be on legal advice.<sup>57</sup> Whether the period was long enough, or whether the period should be a 'reasonable' one, was also raised.<sup>58</sup> Finally, several submissions pointed out that a cooling off period would only be effective if there was a thorough education campaign among ethnic communities to let them know about it.<sup>59</sup> People needing advice in a language other than English would need to know about and have access to organisations able to provide it.

## What the draft Credit Bill says

11.34. The draft Credit Bill does not make any direct provision for a cooling off period. However, cl 39 provides that a creditor applying unfair pressure on a debtor, (which could include for example pressure to sign the contract immediately) would be guilty of unfair conduct.<sup>60</sup> In determining whether a contract is fair, the tribunal should have regard to whether the creditor took adequate measures to ensure that the debtor or guarantor understood the nature and implications of the transaction.<sup>61</sup> It may be that credit providers can only be sure they have acted fairly in these respects if they give a point of sale borrower a cooling off period.

## Questions to be resolved

11.35. *Should there be a cooling off period?* The aim of reform to the law in this area is to ensure that people do not enter into binding contracts unless they know what their rights and obligations are. There are particular pressures associated with credit contracts entered into where goods are sold which include the fact that transactions can be completed in a very short space of time. It is therefore particularly difficult to ensure that people involved in these transactions get enough information about their rights and obligations. This is especially so where they have communication difficulties and are unfamiliar with credit transactions. Providing in the law that there should be a cooling off period is a preventative measure. It takes into account the fact that the information necessary for a person to make a proper decision about credit cannot always be gained in the time usually available where credit is sold at point of sale. A cooling off period would enable the borrower easily to withdraw from both the contract of sale and the credit contract with only minimal financial loss.

11.36. *How long should it be?* The cooling off period should be long enough to give people the chance to get the advice they need. The needs of people living in remote areas are important. However, making the length of the cooling off period dependent on the concept of what is 'reasonable' would not necessarily meet these needs. This approach would leave both the borrower and the seller in a very uncertain position. The seller would not know when he or she could safely sell the goods he or she has been required to hold. The borrower would be vulnerable to being told by a seller that it is too late to withdraw because a reasonable time has passed. The only way to solve that kind of dispute would be in court. The Commission considers that the period should be

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55 See eg Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992, which was a co-ordinated response from 11 financial counsellors around Australia with experience or an interest in working with Aboriginal people.

56 See eg Marrickville Legal Service & Children's Legal Service *Submission* November 1991.

57 Australian Bankers' Association *Submission* December 1991; South Australian Government *Submission* February 1992.

58 Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992.

59 See eg Ethnic Affairs Commission of New South Wales *Submission* December 1991.

60 Department of Consumer Affairs (NSW) *Submission* January 1992.

61 cl 39(3)(c).

specified but accepts that a three day period may be too long. The provision of a further three-days after the end of the cooling off period appears to be unnecessary and too restrictive. A period of two whole business days, (that is, excluding weekends and public and bank holidays) strikes a balance between the need for the purchaser to get advice and the need for the seller to sell the goods. The cooling off period would begin from the time the borrower signed the offer for credit. This time would also be deemed to be the time at which the borrower becomes bound to purchase the goods.

11.37. ***Should there be a right of waiver?*** Giving a person the right to waive the cooling off period is one way of providing for the situation where a person needs to take goods away on the spot. However, the pressures that borrowers are under to complete a transaction at point of sale are likely to be applied to a borrower to waive the right to a cooling off period.<sup>62</sup> Requiring a person to get legal advice before waiving the right is unlikely to be practical given that most of these kinds of transactions take place on weekends when legal advice would be hard to get. For a cooling off period to be really effective there should be no right of waiver. If people want to take their goods away as soon as they have agreed on the purchase they will have to arrange their credit beforehand.

11.38. ***The need for a deposit.*** The seller is required to hold the goods and not sell them to anyone else during the cooling off period. Requiring a borrower to give a deposit at the start of the cooling off period will discourage a borrower from setting up a chain of contracts in search of the best deal. Such action would be unfair to a seller who would be required to hold on to goods even where a buyer has no genuine commitment to complete the transaction. The deposit needs to be set at a level high enough to deter a borrower from setting up a number of transactions but not so high that a borrower will be reluctant to withdraw from the transaction if he or she genuinely changes his or her mind. The deposit should also not be so high that a seller receives more than is needed to compensate for his or her real loss if the borrower cools off. That loss would arise from the inability of the seller to sell the goods to someone else and from any costs incurred in trying to set up credit for the borrower. A credit provider could avoid incurring the second type of loss by postponing inquiries about credit until after the end of the cooling off period. Taking all these factors into account, the seller should be permitted to take a deposit of \$20 or 1% of the purchase price of the goods (which ever is the greater) up to a limit of \$100. To keep the process simple, the borrower would lose the entire deposit should he or she choose to withdraw from the contract at any stage. If the contract goes ahead, the deposit will be taken off the purchase price of the goods.

11.39. ***Notification.*** To ensure that the borrower gets the benefit of the cooling off period, the borrower must know about the cooling off period and how to notify the seller of his or her intention to withdraw from the transaction. The right to a cooling off period should be prominently stated in the summary discussed in paragraph 11.31. To reduce the chances of dispute, notification of withdrawal should have to be in writing. Before the borrower signs the offer for credit, the borrower must be handed a separate cooling off notice which must be printed in large letters and red ink. The notice should explain, in language that is clear, simple and easy to understand, what a cooling off period is, how long it is, where to get advice, how much deposit has been paid and where to serve the notice of withdrawal. It should provide a standard form for withdrawal so that the borrower has only to fill in the relevant gaps and tear it off from the rest of the notice before giving it to the seller. There should be a space in which the seller can sign on receiving the termination notice as proof that the seller has received it. The form should make provision for a carbon copy underneath so both parties will have a copy. The borrower should be warned that it would be advisable to take a witness in the event that the seller refuses to sign the notice.

11.40. ***Store and credit cards not included.*** The cooling off period should not apply where store charge or credit cards are used to purchase goods. Store or credit cards are generally arranged in advance. The borrower will have had a chance to find out his or her rights and obligations under the contract. Where a store or credit card is used the goods are not security for the credit. If difficulties with payment arise the borrower is not faced with both losing the goods when the credit provider repossesses them and also having to repay the (often large) balance still owing.

## **Recommendation**

11.41. The Commission recommends that the draft Credit Bill provide for a cooling off period of two whole business days for all point of sale credit transactions of more than \$500, except those involving credit cards or store charge cards. The period should begin when the borrower signs the offer for credit. The seller should have to hold the goods for that period and the borrower should have to pay a deposit of \$20 or 1% of the purchase price of the goods (which ever is the greater) up to a limit of \$100. The deposit should be lost if the transaction is terminated. Before signing the contract, the borrower should have to be handed a cooling off notice as set out in paragraph 11.39. Agencies responsible for administering credit legislation will need to conduct comprehensive education campaigns to ensure a general community awareness of the cooling off right.

## **Guarantors**

### **Many people are becoming guarantors without understanding the risks or the consequences of the borrower defaulting**

11.42. A guarantee is a contract in which one party (the guarantor) agrees to meet the debt obligation of another (the borrower) should the borrower fail to do so. Generally the guarantor gets no direct financial benefit from the transaction. Many people enter into contracts of guarantee under family or social pressure and without enough information to make an informed decision.<sup>63</sup> For some, the concept of 'the future', which is so important to the notion of a guarantor, is alien or not fully understood in terms of risks or penalties.<sup>64</sup> They do not know that they may have sell their family home if this is the only way they can pay the borrower's debt. Often there is a high risk that the borrower will be unable to pay the debt.<sup>65</sup> This is the reason why the credit provider has asked the borrower to have a guarantor. Usually, the guarantor does not have as much information about the borrower as the credit provider and there is no way he or she can find out what the risk is. In communities where the obligation to support members of the family, including the extended family, are particularly strong, the pressure to agree to guarantee a loan may be overwhelming. Extreme family and social discord, which may last much longer than the life of credit contract, can often result when the guarantor is called upon to pay the borrower's debt. This is an issue in some Aboriginal communities.<sup>66</sup> It is also an issue for recently arrived migrants who may need credit to establish themselves and may not have the assets or a savings or employment history which would enable them to get a loan in their own right.

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63 See eg Ethnic Affairs Commission of New South Wales *Submission* December 1991; South Australian Government *Submission* February 1992; Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992; also Commission's consultation through the Office of Multicultural Affairs group facilitator program showed that a majority of participants knew of people who as guarantors had ultimately to repay money borrowed by relatives.

64 See eg Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992 which was a collation of views from financial counsellors with an interest in or experience with counselling Aboriginal people.

65 Often the repayments on the loan are doomed from the start: see eg E Swart Consumer Credit Legal Centre (Vic) *Transcript* Melbourne October 1991; see also South Australian Government *Submission* February 1992.

66 Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992.

11.43. ***Co-borrowers distinguished from guarantors.*** Much of the unfairness relating to guarantees arises because the guarantor may be called upon to pay a debt from which he or she has received no benefit. This can also arise where a person is joined in a contract as a co-borrower rather than a guarantor. There are, however, special factors affecting guarantees which have led the Commission to concentrate on guarantees. In a transaction involving co-borrowers, fully informed parties will know that immediately on signing the contract, each is liable to pay the whole amount. On the other hand, a guarantor will only be liable if the borrower does not pay the debt. Under the current law, even a guarantor fully informed of his or her rights and obligations will not know what the risk of becoming liable is.

## Discussion paper proposal

11.44. ***Information about financial risk to guarantor.*** DP 49's proposals were aimed at ensuring that a person has all the information he or she needs to make an informed decision about whether or not to be a guarantor. A majority of the Commission proposed that the creditor should be obliged to inform the guarantor of his or her obligations and to give the guarantor the financial information on which it has based its assessment of risk of default. It did not propose that the use of guarantees be banned entirely.

11.45. ***Several submissions favour restricting or banning guarantees.*** A number of submissions argued strongly for banning the use of guarantees entirely. These mostly came from lawyers and financial counsellors who had seen too often the social destruction caused when a creditor calls in a guarantee.<sup>67</sup> However, most submissions agreed with the Commission's proposal not to prohibit entirely the use of guarantees.<sup>68</sup> The most common reason was that legislation prohibiting guarantees may unduly restrict the access of newly arrived migrants to badly needed credit.<sup>69</sup> However, the Commission has found that many of those who were consulted and who made submissions strongly support placing some limit on a creditor's ability to require a guarantee. The Australian Banking Ombudsman suggested that the Commission consider the approach taken in South Australia that a guarantee is not enforceable unless countersigned by the guarantor's solicitor.<sup>70</sup> During a number of workshops community workers told the Commission that many problems would be solved if creditors were prohibited from enforcing guarantees on the family home.<sup>71</sup>

11.46. ***Guarantees and ability to repay.*** A number of submissions saw a clear link between the creditor's assessment of the ability to repay and the requiring of a guarantee. If a lender can require a guarantee, there is less incentive to ensure that the borrower has a reasonable capacity to meet the payments. The result is that the risk of the loan is passed to the guarantor, even when there is little chance of the payments being made.

Requiring the provision of a guarantor should only be of assistance to 'marginal borrowers' (those just able to meet the term of the contract). Borrowers who are unable to meet the terms of a contract, in any 'reasonable' assessment of their financial situation, should not have their ability to borrow extended by providing a guarantor.<sup>72</sup>

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67 See eg E Swart Consumer Credit Legal Centre and R Harper Legal Aid Commission Vic *Transcript* Melbourne October 1991; Australian Financial Counselling & Credit Reform Association Inc *Submission* February 1992.

68 See Australian Bankers' Association *Submission* December 1991; C Stain *Submission* December 1991; Ethnic Affairs Commission of New South Wales *Submission* December 1991; Marrickville Legal Centre & Children's Legal Service *Submission* November 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* December 1991; CC Adams *Submission* December 1991; Victorian Government *Submission* March 1992.

69 See eg Ethnic Affairs Commission of New South Wales *Submission* December 1991.

70 Australian Banking Ombudsman *Submission* September 1991.

71 See also South Australian Government *Submission* February 1992.

72 Marrickville Legal Centre & Children's Legal Service *Submission* November 1991.



One financial counsellor said that, in 99% of the cases seen by the service, the use of the guarantor was inappropriate and the loan simply should not have been made.<sup>73</sup>

11.47. ***Providing information to guarantors.*** A number of submissions pointed out that, under the system now operating, guarantors need to be in a position to make informed decisions.<sup>74</sup> The proposals the Commission has made regarding plain English contracts, summaries and cooling off periods are therefore of equal importance to guarantors. Many submissions considered that prospective guarantors need much more accessible information about guarantees and guarantors' obligations.<sup>75</sup> There was also strong support in submissions for the Commission's proposal regarding the provision of financial information about the borrower to the guarantor.<sup>76</sup>

### **What the draft Credit Bill says**

11.48. The draft Credit Bill requires that, before a credit contract is secured by a guarantee, the creditor must give the prospective guarantor the guarantee document, a copy of the credit contract and the prescribed document explaining the obligations of the guarantor. It does not require that the creditor provide the guarantor with information about financial risk. On the issue of ability to repay, the Bill includes, in its examples of unfair conduct under cl 39, the situation where the creditor enters into a credit contract or security when it knows, or could ascertain by reasonable enquiry, that the debtor or guarantor could not comply with the terms of the contract or security, or not without substantial hardship. Where the tribunal is satisfied that the creditor has engaged in unfair conduct it may annul or vary a contract or provision, or order restitution or compensation.

### **Questions to be resolved**

11.49. ***Are guarantees an appropriate financing mechanism?*** The Martin Inquiry into Banking questioned the appropriateness of the common use of guarantees and there are strong arguments for concluding that guarantees are seldom an appropriate financial instrument in ordinary consumer transactions. In their submission to the Martin Inquiry, consumer groups outlined a number of features which in their view make guarantees inherently unfair:

- guarantees are usually required only where there is doubt about the borrower's capacity to pay
- guarantors do not have access to details of the borrower's financial situation or other aspects of the transaction
- guarantors are often under emotional pressure to enter the contract
- guarantees are not well understood in the community
- guarantors are not taking on an immediate liability and so are less likely to scrutinise the details of the transaction.<sup>77</sup>

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73 B Vogels Credit Line Financial Counselling Service (NSW) *Transcript* Fairfield September 1991.

74 See eg Marrickville Legal Centre & Children's Legal Service *Submission* November 1991.

75 See eg Presbyterian Women's Association of Australia in New South Wales *Submission* November 1991; Marrickville Legal Centre & Children's Legal Service *Submission* November 1991; Ethnic Affairs Commission of New South Wales *Submission* December 1991; Victorian Government *Submission* March 1992.

76 See eg C Stain *Submission* December 1991; Ethnic Affairs Commission of New South Wales *Submission* December 1991; Consumer Credit Legal Centre (NSW) *Submission* December 1991; CC Adams *Submission* December 1991; Young Women's Christian Association of Perth *Submission* October 1991; Australian Retail Financial Network *Submission* January 1992; R Harper Legal Aid Commission Vic *Transcript* Public Hearings Melbourne October 1991; R Westcombe, Australian Consumer Association *Transcript* Sydney September 1991; South Australian Government *Submission* February 1992; Trade Practices Commission *Submission* February 1992, the Trade Practices Commission is currently undertaking a national study of the use of consumer loan guarantees.

77 Home of Representative Standing Committee on Finance and Public Administration *A Pocket Full of Change: Banking and Deregulation* AGPS, Canberra, 1991, para 20.166.

11.50. ***Banning guarantees entirely, or on the family home?*** Banning the use of guarantees entirely may be the only fully effective way the law could protect people from family pressure that obliges people to be a guarantor regardless of the consequences. However, after further consideration, the Commission adheres to its view that to ban guarantees altogether would be too drastic a step. One reason for this relates particularly to this inquiry. On the evidence currently available, it would make it too difficult for people such as settling migrants who may be especially in need of credit to establish themselves or start a business and who are just able to meet repayments, to get the money they need. Banning the use of the family home as a guarantee would, in practical terms, amount to a ban on the use of guarantees altogether. The Commission has therefore decided not recommend this kind of restriction on the use of guarantees.

11.51. ***When is the use of a guarantee clearly not appropriate?*** The use of guarantees is not appropriate when on any reasonable assessment of the situation the borrower is not going to be able to repay the loan. Evidence before the Commission shows that when (as is generally the case) credit providers insist on guarantors in this kind of situation, the result can be much conflict in families. To avoid this kind of conflict, credit providers should not be able to make loans when the borrower is clearly unable to repay it. The provisions of the draft Credit Bill regarding ability to repay<sup>78</sup> would prevent credit providers granting loans in this situation. In such cases the better course is to require the borrower and would-be guarantor to enter into the contract as co-borrowers, so that the guarantor gets the full benefit of all the protections given to borrowers.

11.52. ***What sort of information is needed to make guarantees fairer?*** The lack of understanding of guarantees in the community generally and in Aboriginal, newly arrived migrant and some people in non-English speaking background communities in particular, is a major problem. If guarantees are to continue to be used in credit transactions a major community education campaign which caters for any special needs of these groups will be necessary. In addition, procedures will need to be set up to ensure that a guarantor has enough information before he or she signs the guarantee. A person who is considering becoming a guarantor needs to know

- what a guarantee is
- the obligations of a guarantor
- the maximum liability of the guarantor under the contract
- the risk of the borrower defaulting
- where to get independent legal and financial advice.
- that, with the borrower's consent, they can obtain information about the borrower's financial position.

There should be community legal advice and financial advice centres where people can go to get the advice they need in a language they can understand.

11.53. ***Problems caused by recent amendments to the Privacy Act.*** Recent amendments to the *Privacy Act 1988* (Cth) may have made it more difficult for a credit provider to give a guarantor information about the financial position of the borrower. The Privacy Act allows credit providers to give information contained in credit reports about the borrower to guarantors only for the purpose of enforcing a guarantee.<sup>79</sup> It may be—the Act is very unclear on this point—that the Act does not provide for, or allow, information to be given to the guarantor for any other purpose, even with the consent of the borrower.

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<sup>78</sup> See para 11.48.

<sup>79</sup> s 18N(1)(ba)

## Recommendation

11.54. The Commission recommends that

- the draft Credit Bill provide that credit providers must inform guarantors why a guarantee is required
- the draft Credit Bill provide that credit providers must disclose to prospective guarantors all material facts known to it relating to the borrower and the proposed transaction; failure to do so should render the guarantee voidable unless the credit provider can show that
  - the failure was inadvertent and
  - the guarantor knew of the relevant fact and
  - it is just to enforce the guarantee
- the *Privacy Act 1988* (Cth) be amended to make it clear that credit providers, with the consent of borrowers, are permitted to disclose information about the borrower or prospective borrower to a prospective guarantor
- the summary on the front page of an offer document for a contract of guarantee should include a statement that the borrower has the right to be informed about the borrower's circumstances and a warning in large print that the guarantor could lose assets and property, including the family home, if the borrower does not repay the debt.

## Consumer credit Bill protection for small business

### Discussion paper proposal

11.55. ***Increase jurisdiction of credit legislation.*** DP 49 proposed that credit legislation should apply to non-consumer credit transactions for sums up to \$100 000. The Commission's intention in making the proposal was to ensure that newly arrived migrants and others setting up small businesses would have the same protection as those who are defined under legislation as consumers. The Commission was told that people setting up small businesses often suffer from the same linguistic and other disadvantages as those outlined in para 11.3-4.

11.56. ***Support for increase.*** Submissions showed general support for the principle of increasing the jurisdiction of credit legislation to include credit transactions for sums of up to \$100 000.<sup>80</sup> One submission points out that many people who are setting up small businesses have much more in common with the average consumer than big business.<sup>81</sup>

### What the draft Credit Bill says

11.57. The draft Credit Bill removes the monetary limits contained in currently applying Credit Acts. However, the Bill will only cover consumer credit transactions, that is, where credit is provided wholly or partly for private purposes.<sup>82</sup> Its provisions will cover housing loans.

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80 See Presbyterian Women's Association of Australia in New South Wales *Submission* November 1991; Ethnic Affairs Commission of NSW *Submission* December 1991; Consumer Credit Legal Centre (NSW) Inc *Submission* December 1991; CC Adams *Submission* December 1991; Australian Retail Financial Network (Ltd) *Submission* January 1992.

81 See CC Adams *Submission* December 1991.

82 cl 4.

## Discussion

11.58. The draft Credit Bill effectively excludes credit provided for the purpose of setting up a small business from the protection of credit legislation. It also excludes a number of groups of people who need credit or who are involved in credit transactions as guarantors who are just as much in need of protection as those who come under the Bill's definition of consumer. The rationale for excluding those seeking credit for business purposes is based upon the assumption that those involved in business know how the market operates and are equipped to deal with the 'cut and thrust' of the open market. However, many people who are setting up small businesses have much more in common with the average consumer than with big business. Research shows that ethnic small businesses are an increasingly important feature of economic life in Australian cities. Many of those setting up these businesses are people, who by virtue of retrenchment, unemployment, lack of skills recognition or discrimination are unable to find work in the mainstream labour market.<sup>83</sup> They may lack capital and may need credit to set themselves up. They are often no less disadvantaged than other newly arrived migrants.

11.59. ***Protection for private guarantors.*** The draft Credit Bill does not protect private individuals, who are often family members, who guarantee a small business loan. If the policy of the draft Credit Bill is to protect private individuals involved in credit transactions then clearly these people should be protected. This is particularly so as people falling into this category are facing the most problems.<sup>84</sup>

11.60. ***How to extend protection to small business?*** It is in the interests of everyone that it is easy to work out what transactions credit legislation applies to. Any attempt to include small business must be framed as simply as possible but should not undercut the policy of the current Bill to give protection to all consumers including those seeking housing loans. Attempting to include small business by means of a definition which distinguishes them from 'big' business may be difficult to achieve simply and with certainty. The imposition of a \$100 000 limit which would apply regardless of the purpose of the credit would make it easy to assess whether the legislation applies. It would cover all purposes for which a consumer is likely to require credit, except for housing. Housing loans, which are easily distinguishable, should have the protection of credit legislation regardless of the amounts involved.

## Recommendation

11.61. The Commission recommends that the draft Credit Bill should apply to all credit contracts, including contracts for business purposes, for sums up to \$100 000. All housing loans would also be covered by the legislation regardless of the amounts involved.

## Other issues of importance

### Informal credit raising schemes

11.62. During this reference the Commission has been told about a number of informal credit raising schemes used by members of some communities. One such scheme is the 'Hui' scheme which is commonly used by members of the Vietnamese community and a similar scheme called 'Tontine' which is used by members of the Cambodian community. These schemes provide

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83 See eg David Tait et al 'Understanding Ethnic Small Business: A Case Study of Marrickville.' (1989) 24 *Australian Journal of Social Issues*, 183, 192.

84 See House of Representatives Standing Committee on Finance and Public Administration *A Pocket Full of Change* AGPS, Canberra, 1991, 414.

members with a familiar and accessible means of raising capital. It seems that, generally speaking, the schemes function well, with everyone fulfilling their contribution requirements. However, because these schemes tend to operate outside the protection of consumer and contract law, contributors have very little protection if a member does not meet the obligations or acts dishonestly in relation to the scheme. The Commission has been told that in recent years there is an increasing number of incidents of contributions being stolen by scheme organisers or of obligations not being met.<sup>85</sup>

11.63. ***An issue worth pursuing.*** The Commission has been unable to pursue this issue in the course of this reference. It is complex, and would require detailed consultations with the relevant communities. However, it is an issue which should be pursued. These schemes are meeting important social and credit needs that mainstream financial institutions appear to be either unable or unwilling to meet. Consideration should be given to the question of how members of these schemes can be protected without destroying a much needed source of credit. The extent to which currently regulated 'Starbowketts' schemes might be used by these communities to ensure protection should also be explored.<sup>86</sup>

11.64. ***Institutions not meeting needs.*** One incentive for newly arrived migrants to participate in these informal schemes would be removed if financial institutions explored reasons why these groups of people are bypassing mainstream institutions. They may need to develop better methods of assessing credit risk.<sup>87</sup> They may need to develop new products and take special measures to attract these people. There appear to be considerable amounts of money circulating in these schemes which, given the right approach, could possibly be attracted to more secure institutions. It is surprising that this avenue for expansion appears to have been largely ignored.

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85 See eg Ethnic Affairs Commission (NSW) *Submission* November 1991.

86 See Ethnic Affairs Commission (NSW) *Submission* November 1991.

87 A recent report prepared by the Brotherhood of St Laurence showed that people on social security benefits and low incomes have a very good record of repayment of loans. These people rarely have access to loans through normal channels because under current criteria they are regarded as a high credit risk: see J Chalmers & B Prosser *Credit to the Community* Brotherhood of St Laurence, Melbourne, 1990.

## 12. Insurance contracts

### Introduction

#### Insurance contracts

12.1. An insurance contract is an agreement by which one person (the insurer) agrees to pay money to another person (the insured) when a given event happens, for example, the death or injury of a person or the destruction of property. This is in return for the payment of a sum of money (the premium) by the person (the insured). The most common insurance contracts involve houses and their contents and motor vehicles. The rights and obligations of the parties under the agreement are found in a contract known as an insurance policy. Generally speaking, insurance contracts are regulated by the *Insurance Contracts Act 1984* (Cth). This implies into a contract of insurance, among other things, a requirement that each party act towards the other in matters relating to the contract ‘with the utmost good faith’.<sup>1</sup> This means that neither party—insurer or insured—can rely on a provision of the contract if to do so would be a breach of good faith.

#### The focus of the Commission’s inquiry

12.2. In the context of the Commission’s inquiry into multiculturalism and the law, the main issues are

- what is needed to ensure that consumers who may be unfamiliar with the concept of insurance and may have limited understanding of English understand their rights and duties under the contract, in particular, the duty of disclosure?
- what in particular should the insurer have to do to discharge its obligation of the utmost good faith to an insured who may be unfamiliar with the concept of insurance and who may have limited understanding of English?
- what are the most appropriate dispute resolution mechanisms for resolving disputes between insurers and consumers who may be unfamiliar with the concepts of insurance and who may have limited understanding of English?

#### Insurance raises problems for many people of non-English speaking background

12.3. The Commission’s consultation shows that insurance raises problems for many people of non-English speaking background, mostly because of a lack of knowledge and lack of information at critical times. These problems arise at every stage of the process: from deciding to insure to disputing a rejected claim. The Commission has been told that many people do not know what insurance is, how it works, whether or not they need it and, if so, how to decide how much to buy. Many people do not understand their obligations until a claim has been rejected because they had failed to comply with them. Others do not understand when they can make a claim. In some cases, people do not know that they have insurance.<sup>2</sup> These problems are not confined to people of non-English speaking background and to people from ethnic minority communities.<sup>3</sup> However, they are

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1 s 13.

2 This applies to consumer credit insurance.

3 See eg R Drake *When you hit a brick wall*, Australian Consumers Association, Sydney 1990; S Meyer *Staking a claim*, Australian Federation of Consumer Organisations, Canberra, 1991.

more likely to occur and are more difficult to overcome when a person is unfamiliar with the insurance market place or has limited English skills.

## The insured's duty of disclosure

### Discussion paper proposal

12.4. ***The duty of disclosure explained.*** When a person approaches an insurance company to arrange insurance (or is approached by the company or its agent) he or she fills out a form (a proposal form) which includes questions relevant to the assessment of the risk that the event on which the insurer will have to pay money will occur. The insured must answer these questions truthfully. However, the duty of disclosure goes beyond this: the insured is expected by the law to disclose 'every matter' known to him or her that

- the insured knows is a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms or
- a reasonable person in the circumstances could be expected to know is a matter so relevant.<sup>4</sup>

12.5. ***The insurer's duty to explain the duty of disclosure.*** Before a contract of insurance is made, the insurer must clearly inform the insured in writing of the general nature and effect of the duty of disclosure.<sup>5</sup> If an insurer fails to comply with the duty to inform, it may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent. A form of writing which may be used by the insurer to inform the insured of the duty of disclosure is set out in the schedule to the regulations under the *Insurance Contracts Act 1984* (Cth).

12.6. ***Two alternative options for reform.*** In DP 49 the Commission put forward two options for reform:

- limit the insured's duty of disclosure at the time of entering the insurance contract to the duty to answer all the questions in the proposal form to the best of his or her knowledge, recollection or belief
- ensure that the form of words used to inform insureds of the nature and effect of the duty of disclosure is in clear, simple language.

The first option would limit the insured's duty of disclosure to the duty to answer all the questions in the proposal form to the best of his or her knowledge, recollection and belief. This would put the onus on the insurer to identify all the matters about which it required information. It was envisaged that the questions would include a general question asking the insured if there was any other matter that he or she knows or believes is a matter relevant to the decision of the insurer whether to accept the risk and, if so, what premium to charge. The matters that would have to be disclosed in answer to the general question would be those that the insured actually knew or believed to be relevant (whereas, under the law as it now stands, the duty of disclosure extends to things the insured ought reasonably to have known is relevant). The second option would not change the nature of the insured's duty of disclosure. It would require the insurer to inform the insured of the duty of disclosure in clear and simple English. The Commission suggested a possible form of words.

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4 s 21(l).

5 s 22(l).

## Responses to the proposals

12.7. There is overwhelming support in submissions for the proposal that the form of words used to inform insureds of the nature and effect of the duty of disclosure should be in clear, simple language.<sup>6</sup> Submissions are divided on whether the insured's duty of disclosure at the time of entering the insurance contract should be limited to the duty to answer all the questions in the proposal form to the best of his or her knowledge, recollection and belief. Reasons for not supporting the proposal include fear of increasing the potential for fraud and practical difficulties of implementing it, particularly that the form would be very long.<sup>7</sup> The nature of insurance is that the facts relating to the risk are generally facts within the knowledge of the insured; the insurer relies on the insured to give it all the information necessary for it to determine whether to undertake the proposed risk.<sup>8</sup> The proposal does not take account of the fact that much insurance business is initiated by telephone and most consumer insurance contracts, for example, car, house and contents, are simply renewed every year without the completion of a new form.<sup>9</sup> On the other hand, potential unfairness towards claimants underlies the submissions favouring the proposal: for example, one need only compare the cursory questions on the policy proposal with the extensive questions on the claim form.<sup>10</sup> Questions on the proposal form should include all those on which insurers base their decisions to refuse insurance.<sup>11</sup>

## Competing considerations

12.8. **Insurance fraud.** The Commission has been told that 15% of all claims are fraudulent and that insurance fraud costs \$1.7 billion a year.<sup>12</sup> Failure to disclose matters known to be relevant to the insurer's decision whether to accept the risk and, if so, on what basis, is fraudulent. The cost of claims that are in fact fraudulent is borne by all holders of insurance policies. Limiting the insured's duty of disclosure at the time of entering a contract to the duty to answer all the questions in the proposal form to the best of his or her knowledge, recollection and belief would not of itself increase the incidence of fraud. It would, however, make it more difficult for the insurer to prove fraud. It would be more difficult to prove that, at the time of filling out the proposal, a particular person knew that a particular matter was relevant than to show that a reasonable person in the circumstances could be expected to know it.

12.9. **Who should bear the onus of what?** The nature of insurance is such that insurers have to be able to estimate the degree of risk that the event on which they must pay out will occur. Many matters relevant to this assessment are known only to the person taking out the insurance. The onus of informing the insurer of these matters must rest with that person. However, assessing risk is the business of insurers and insurers know better than anyone else what kind of matters are relevant to their decision whether to accept a particular risk and, if so, on what terms. The onus of telling insureds what matters are relevant, or at least what sort of matters are relevant, to assessing the risk in a particular case must rest with the insurer. The obligation imposed on the insurer to inform the insured of the nature and effect of the duty of disclosure is directed towards this end. The form of

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6 eg Insurance Council of Australia Ltd *Submission* February 1992; Marrickville Legal Centre and Children's Legal Service *Submission* November 1991; General Synod of the Anglican Church of Australia, Social Responsibilities Commission and Multicultural Advisory Committee *Submission* December 1991; CC Adams *Submission* December 1991; SIO Consumer Appeals Centre (Vic) *Submission* October 1991; Trade Practices Commission *Submission* February 1992; South Australian Government *Submission* February 1992; Victorian Government *Submission* March 1992.

7 eg Presbyterian Women's Association of Australia *Submission* November 1991; Insurance Council of Australia Ltd *Submission* February 1992; Life Insurance Federation of Australia Inc *Submission* December 1991; NRMA Insurance Ltd *Submission* February 1992.

8 Australian Bankers Association *Submission* November 1991.

9 SIO Consumer Appeals Centre (Vic) *Submission* October 1991.

10 Consumer Credit Legal Centre (NSW) Inc *Submission* December 1991.

11 Department of Consumer Affairs (NSW), *Submission* January 1992; South Australian Government *Submission* February 1992.

12 Insurance Council of Australia Ltd *Submission* February 1992.



words to be used for this purpose should indicate that the insured must tell the insurer matters 'relevant to the insurer's decision whether to accept the risk and, if so, on what terms'.

12.10. ***Difficulties inherent in the duty of disclosure.*** The duty of disclosure now imposed by law requires the insured to tell the insurer matters that he or she knows or that 'a reasonable person in the circumstances could be expected to know' are relevant. To comply with this duty the insured must not only consider whether there is anything he or she knows that is relevant to the insurer's decision but must also consider whether there is anything that 'a reasonable person in the circumstances could be expected to know' is relevant. The insured has to try to work out what is relevant to an insurer in order to comply and is at risk that a court might later decide that he or she did not comply. The duty may impact unfairly on persons who are unfamiliar with the concept of insurance. The concept of the 'reasonable person' is not value-free and may not operate fairly in a culturally diverse society. On the other hand, the circumstances of a particular insured, including his or her ethnic background, familiarity with insurance and language skills, would be taken into account in deciding what he or she could be expected to know. Nevertheless, the duty is difficult to comply with and difficult to express in simple language. The consequences of failing to disclose matters that the person should have known were relevant, but did not, are serious: the person is effectively uninsured and will be unaware of this until he or she makes a claim.

12.11. ***Practical considerations.*** Practical difficulties stand in the way of demanding that insurers include on the proposal form a question directed towards every kind of matter which might be relevant to their decision whether or not to accept the risk and how much to charge. Many questions of no relevance to most people would have to be asked and answered by everyone. The form would be very long and, the longer it were, the more difficult it would be to complete, especially for people whose language skills were limited, and the more likely it would be that people would make mistakes. A similar form would have to be completed every time the policy were renewed. This would add significantly to the costs of insurance, which would be passed on to insureds.

12.12. ***A more limited approach.*** Motor vehicle insurance and house and contents insurance are the kinds of insurance most likely to give rise to a dispute. Prior claims and criminal convictions are the matters most likely not to have been disclosed.<sup>13</sup> If these and other matters likely not to be disclosed were highlighted, inadvertent failure to disclose relevant matters might be avoided in many cases. It has also been suggested to the Commission that many people do not understand that insurance is about assessing risk and that they must answer the questions on the proposal form and tell the insurer of other relevant matters so that the insurer is able to assess the risk. Many people do not understand the consequences of failure to disclose the relevant information. If the relationship between the duty of disclosure and the questions on the form was made clearer and the purpose of the questions and the failure to comply with the duty were spelt out more clearly, problems at the claims stage might be avoided.

## **Recommendation**

12.13. The Commission is of the view that the duty of disclosure may operate unfairly on consumers in some cases for the reasons outlined in paragraph 12.7. Consideration should be given to changing it to reduce the unfairness that might occur. However, in the context of this reference, the Commission does not recommend that it should be changed. Instead, it recommends that greater efforts should be made to explain clearly the nature and effect of the duty of disclosure and the consequences of breaching the duty. The form of words prescribed under the *Insurance Contracts Act 1984* (Cth) that can be used to tell insureds of the general nature and effect of the duty of disclosure should be changed to make it clear that a person who tells the insurer of every matter he

or she knows or believes might affect the insurer's decision might still be at risk and that a court might subsequently decide that there were other matters that he or she should have disclosed. It is the insurer's responsibility (as part of its duty of the utmost good faith) to do what is necessary to ensure that the insured understands his or her obligations. The Commission suggests the following:

#### WHAT YOU MUST TELL US

Before we decide to insure you, we need to know exactly what the risk is that we are insuring against and the likelihood that you will make a claim.

You know more about these things than we do.

The law says that you must be completely honest in telling us what we need to know to decide

- whether to give you insurance
- how much to charge for it and
- if any special conditions should apply to the policy

To help us decide, you must

- answer all the questions on this form as best you can
- tell us of anything else you know about that you know or believe would or might affect our decision.

You should know that, even if do this, a court might decide that there were other matters that a reasonable person in your circumstances would have told us about. This will affect whether we have to pay out on any claim you make under the policy. So if you have any doubt about whether you should tell us about something, you should tell us about it.

If you do not follow these instructions, we may be able to cancel your policy or reduce the amount we pay on any claim you make under the policy.

## **Proposal forms and insurance contracts should be easy to read and understand**

### **Discussion paper proposal**

12.14. In DP 49 the Commission proposed that the *Insurance Contracts Act 1984* (Cth) should provide that proposal forms and insurance contracts for the classes of insurance to which standard cover applies<sup>14</sup> should be written in language that is clear and easy to understand. It should also

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<sup>14</sup> Motor vehicle insurance, homeowners insurance, householders insurance, sickness and accident insurance, consumer credit insurance and travel insurance.

specify the print size and colour to be used and the colour of the paper. There should be provision for pre-approval by a government agency,<sup>15</sup> in which case the document would be deemed to comply. The court should have the power to order that a proposal form or contract that did not comply with the provision should not be used again.

## Responses to the proposal

12.15. Submissions generally favour the proposal in principle, except for the suggestion that there should be provision for pre-approval by a government agency. This, it is said, would hamper the efficient working of the insurance industry<sup>16</sup> and would be cumbersome, expensive and time-consuming.<sup>17</sup> Some submissions assert that responsibility for insurance contracts should remain with insurance companies.<sup>18</sup> Plain English should not be required by the *Insurance Contracts Act 1984* (Cth); it should be a matter for Insurance and Superannuation Commission (ISC) guidelines.<sup>19</sup> Concern was expressed that mandatory print size would be too inflexible; that it may be better to use smaller print so that the document can fit on one page; mandatory paper and print colour would take away corporate identity and reduce competition; and an appropriate lead time would be needed.

## Competing considerations

12.16. ***Legible and comprehensible documentation is in the interests of all parties.*** A consumer enters an insurance contract on the basis of the information in the proposal form. The contract contains the parties' rights and obligations. If the consumer is to be able to understand his or her rights and obligations, he or she must be able to understand the proposal form and the contract or, at least, have it explained. The trend towards simplifying insurance documents (and legal documents in general) noted by the Commission in its 1982 report *Insurance Contracts*<sup>20</sup> has continued. Much has been done by the industry already. It is clearly in the interests of insurers and of their clients that documentation be legible and comprehensible. Legible and comprehensible documentation gives consumers an opportunity to inform themselves about the different products on the market, thereby stimulating competition, and to make an informed choice. As a consequence, consumers are less likely to find themselves in dispute with their insurer. On the other hand, legibility and comprehensibility would make no difference at all to consumers of domestic insurance who did not read their policies or who were, despite simplification, unable to understand them. There is a fear on the part of insurers that rewriting contracts in plain English would impose on insurers the risk of being made subject to unexpected liability through drafting errors or through abandonment of technical wording.<sup>21</sup> The proposal in DP 49 raises some serious practical problems. In the absence of a procedure for pre-clearing contracts, which would be costly and cumbersome, it would be very difficult to set an appropriate standard of comprehensibility. Rules about format, including print size and colour of print and paper, have to take into account practical considerations, such as the cost of re-formatting and reprinting contracts, and the desirability of ensuring that insurers can promote their corporate image. However, it may be possible for industry and consumer groups to establish standards and to develop guidelines. A clear standard of legibility might be set, for example, by specifying print size, or at least a minimum print size.

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15 eg the Insurance and Superannuation Commission.

16 Presbyterian Women's Association of Australia *Submission* November 1991.

17 Australian Bankers Association *Submission* November 1991.

18 Department of Consumer Affairs (NSW) *Submission* January 1992; cf SIO Consumer Appeals Centre (Vic) *Submission* October 1991.

19 Life Insurance Federation of Australia *Submission* December 1991.

20 Australian Law Reform Commission, Report No 20, *Insurance Contracts*, AGPS, Canberra, 1982 (ALRC 20).

21 These were the grounds on which the Commission rejected the possibility of setting standards of comprehensibility of policies in 1982: ALRC 20, para 43.

12.17. ***Who should be responsible for legibility and comprehensibility?*** If legibility and comprehensibility are desirable ends, the question is, who should be responsible for ensuring that proposal forms and policies meet the required standards? To what extent, if any, should these matters be the subject of regulation? Providing, for example, that documents should be written ‘in language that is clear and easy to understand’, would lead to uncertainty because the fact that a particular document was not would be determined by a court in retrospect and well after many thousands of similar documents had been used. Specifying the colour of paper and print would unduly diminish corporate identity and make it difficult for consumers to distinguish between the products of different companies. What is considered appropriate may differ from time to time and may also vary according to the nature of the policy. Industry bodies are better placed than government to develop comprehensible policies. The *Insurance Contracts Act 1984* (Cth) already provides for requirements as to legibility to be prescribed<sup>22</sup> but as yet none has been.

12.18. ***Recommendation.*** The Commission supports the initiatives taken by some insurance companies to ensure that their documents are easy to read and understand. It recommends that the Insurance and Superannuation Commission establish a task force comprising industry and consumer groups and the Law Reform Commission to establish standards and to develop guidelines for standards of legibility and comprehensibility of documents. Regulations should, however, specify a minimum print size.

## **Reasons for rejecting a claim or cancelling a policy**

### **Discussion paper proposal**

12.19. ***Insurers may refuse a claim or cancel a policy in some circumstances.*** An insurer is entitled to refuse to pay a claim made under a contract of insurance or to cancel a policy under some circumstances. It may refuse to pay a claim, for example, if, in filling out the proposal form, the insured had not disclosed relevant matters. It may cancel a contract where the insured has fraudulently failed to disclose relevant matters or has made a fraudulent misrepresentation.

12.20. ***Proposal.*** Insurers do not always give reasons for refusing a claim. In DP 49, the Commission proposed that the insurer should be required, on request, to tell the insured the reasons for refusing a claim or cancelling a policy and to state the facts on which the decision was made. If the reasons relate to a statement made by the insured, the DP suggested that a copy of that statement should have to be sent to the insured.

### **Responses to the proposal**

12.21. ***Cancelling a policy.*** Submissions note that insurers are already under a statutory duty to inform a person who has requested it in writing of their reasons for

- not accepting an offer to enter a contract of insurance
- cancelling a contract
- not renewing cover provided under a contract of insurance and
- offering insurance cover on less advantageous terms.<sup>23</sup>

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22 s 72.

23 *Insurance Contracts Act 1984* (Cth) s 75; see eg SIO Consumer Appeals Centre (Vic) *Submission* October 1991; Life Insurance Federation of Australia Inc *Submission* December 1991; Insurance Council of Australia *Submission* February 1992.

12.22. ***Rejecting a claim.*** Generally speaking, submissions favour the proposal in the discussion paper though with some reservations. The reservation included concern that considerations of privacy and confidentiality should be retained<sup>24</sup> and that the failure of an insurer to include a particular reason for denying liability should not preclude the insurer from relying on additional facts found out later.<sup>25</sup> Some submissions go beyond the Commission's proposal, suggesting that a person whose claim has been rejected should have the right to see his or her personal file.<sup>26</sup> The Insurance Council of Australia distinguishes between rejecting a claim on the basis of an exclusion clause in the policy, in which case, as a matter of practice, insurers generally provide an explanation, and rejecting a claim where fraud is suspected. Fraud, it is said, is difficult to prove and giving a fraudulent claimant information held by the insurer may make it even harder for the insurer to prove its case. Where the insurer alleges the insured has connections with organised crime or has been guilty of arson, giving reasons might put the insurer or its informant at risk.<sup>27</sup>

## Competing considerations

12.23. ***Making claims raises problems.*** The Commission's consultation shows that making claims is the main problem area for consumers generally, and people of non-English speaking background in particular.<sup>28</sup> This is supported by the results of a phone-in conducted by a number of consumer groups.<sup>29</sup> A claimant who is denied reasons for the insurer's rejection of a claim is denied a real opportunity to dispute the matter. The consequences of rejection of a claim are serious. Having paid premiums over a period of time to insure against a particular loss, he or she must bear the loss. The duty of disclosure demands that the consumer disclose the fact that a claim has been rejected in any future application for insurance and this may make it very difficult to get insurance in the future.

12.24. ***Fraud.*** In the Commission's view the mere possibility of fraud is not sufficient justification for denying reasons for refusing a claim. While it is true that an insured who does not accept an insurer's decision can institute court proceedings, in which case the facts on which the insurer's decision was based can be obtained, this is simply not a realistic option for most insureds. Litigation is very costly and beyond the reach of most consumers. What is surely atypical, even if relatively common, should not be the basis on which reasons for rejecting a claim should be routinely made.

## Recommendation

12.25. Under the present law, an insurer must give an insured, on request, a statement of the reasons for

- not accepting an offer to enter into a contract of insurance
- cancelling a contract of insurance
- indicating that it does not propose to renew a contract of insurance and
- offering insurance cover to the insured on less advantageous terms than usual because of a special risk relating to the insured or the subject matter of the contract.<sup>30</sup>

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24 Australian Bankers Association *Submission* November 1991.

25 General Synod, Anglican Church of Australia *Submission* December 1991.

26 eg SIO Consumer Appeals Centre (Vic) *Submission* October 1991.

27 Insurance Council of Australia *Submission* February 1992; see also NRMA Insurance Ltd *Submission* February 1992 which distinguishes between fraudulent and non-fraudulent claims.

28 eg Ethnic Affairs Commission of New South Wales *Submission* December 1991.

29 Australian Federation of Consumer Organisations, *Staking a Claim*, March 1991.

30 s 75.

It is anomalous that the law does not explicitly require the insurer to give the insured, on request, a statement of reasons for refusal to pay a claim. The Commission recommends that the *Insurance Contracts Act 1975* (Cth) be amended to require an insurer to give an insured, on request, a statement of the reasons for refusing a claim. The basis of this right should be the same as the right to obtain reasons for cancellation etc. This is consistent with the insurer's obligations to act towards the insured in matters relating to a claim with the utmost good faith.

## **Relief under legislation that provides for relief from harsh, unjust or unfair contracts**

### **Discussion paper proposal**

12.26. The *Insurance Contracts Act 1984* (Cth) s 15 provides that an insurance contract cannot be made the subject of relief<sup>31</sup> under any other federal, State or Territory legislation that provides for relief

in respect of harsh, oppressive, unconscionable, unjust, unfair or inequitable contracts

from the consequences in law of making a misrepresentation.

The effect of s 15 is that a person may not be able to take action under the *Trade Practices Act 1974* (Cth) or equivalent State legislation.<sup>32</sup> The *Trade Practices Act 1974* (Cth) prohibits a wide range of conduct on the part of business,<sup>33</sup> including

- misleading and deceptive conduct or conduct that is likely to mislead or deceive<sup>34</sup>
- unconscionable conduct<sup>35</sup>
- false or misleading representations.<sup>36</sup>

This means that, to obtain relief of this kind for an insurance contract, a consumer will in some cases have to take court action. The relevant government agency, the Insurance and Superannuation Commission, does not have the function, as the Trade Practices Commission (TPC) has, of taking action on behalf of consumers. The TPC can only take action for relief under the Trade Practices Act. DP 49 proposed that the *Insurance Contracts Act 1984* (Cth) s 15 should be amended so that the consumer protection provisions of the *Trade Practices Act* could operate in respect of insurance contracts. The proposal would retain any right of action a consumer may have under the *Insurance Contracts Act 1984* (Cth) based on the breach by an insurer of the duty of good faith. The proposal was that, until such time as there is uniform state fair trading legislation, insurance contracts would remain excluded from the operation of the equivalent State consumer protection provisions.

### **Responses to the proposal**

12.27. Submissions in favour of the proposal focus on the high cost of taking court action. There is no public agency which enforces the Insurance Contracts Act as there is for the Trade Practices

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31 eg damages or variation or avoidance of a contract.

32 eg credit, contract review or fair trading legislation: see *Swann Insurance (Aust) Pty Ltd v Fraillon* (1991) ASC 56-075; see also *Trade Practices Act 1974* (Cth) s 87(1E).

33 For constitutional reasons, the application of the *Trade Practices Act* is, generally speaking, limited to corporations; State Fair Trading Acts apply to individuals and businesses that are not incorporated.

34 s 52.

35 s 52A.

36 s 53

Act.<sup>37</sup> Insurance is the only area of consumer dealings where this is so. Submissions opposing the proposal focus on the substance of the law. The Insurance Contracts Act, it is said, provides enough protection for consumers; the duty imposed on the insurer to act with 'the utmost good faith' is arguably more onerous than a requirement not to engage in conduct that is, in all the circumstances, unconscionable.<sup>38</sup> In any case, the existing provisions of the Insurance Contracts Act are under-utilised.<sup>39</sup>

## Competing considerations

12.28. ***The duty of good faith.*** A contract of insurance is based on the utmost good faith and implied in a contract of insurance is a provision requiring each party to the contract to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith. Consistently with this principle, neither party may rely on a provision of the contract if to do so would be to fail to act with the utmost good faith.<sup>40</sup> The duty of the utmost good faith is arguably more onerous than the duty imposed by the *Trade Practices Act 1974* (Cth) s 52A not to engage in conduct that is, in all the circumstances, unconscionable. The concept of the utmost good faith is familiar to insurers and, although there have been few cases where it has been used to protect consumers, it could become more widely used as its implications become more familiar to lawyers.<sup>41</sup> There is no reason why a wide range of factors, including cultural values and linguistic difficulties, should not be taken into account in deciding whether there had been a breach of good faith by an insurer as they have been in determining whether a corporation has engaged in unconscionable conduct.

12.29. ***A separate regulatory framework for insurance.*** The utmost good faith principle could be said to justify leaving insurance contracts out of the operation of the consumer protection provisions of the *Trade Practices Act 1974* (Cth) and other State legislation dealing with unfair contracts. They are, it could be said, already covered by comprehensive provisions. Application of the consumer protection provisions of the *Trade Practices Act 1974* (Cth) to insurance contracts might create uncertainty in the industry.

## Recommendation

12.30. The Commission does not consider that the arguments against bringing insurance contracts under the provisions of the *Trade Practices Act 1974* (Cth) have continuing validity. It is difficult to distinguish the provision of insurance services from the provision of other consumer services that come within the ambit of the *Trade Practices Act 1974* (Cth). The mechanisms used by the Trade Practices Commission to enforce the *Trade Practices Act 1974* (Cth) on behalf of consumers, particularly the representative action which enables the Commission to institute proceedings on behalf of a number of consumers, should be available to consumers of insurance as it is available to consumers of other services. If the duty of the utmost good faith is at least as onerous as the requirements imposed on suppliers of other services, insurers have no cause for anxiety. If, on the other hand, the provisions of the *Trade Practices Act 1974* (Cth) are more stringent, then there is no reason why consumers of insurance should not have the benefit of them. For these reasons the Commission recommends that s 15 should be amended so that the consumer protection provisions of the Trade Practices Act should apply to insurance contracts. The *Insurance Contracts Act 1984*

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37 eg Consumer Credit Legal Centre (NSW) Inc *Submission* December 1991; Trade Practices Commission *Submission* February 1992; D Nelthorpe, Consumer Credit Legal Service (Vic) *Transcript* Melbourne; Victorian Government *Submission* March 1992.

38 eg Insurance Council of Australia *Submission* January 1992.

39 NRMA Insurance Ltd *Submission* February 1992.

40 *Insurance Contracts Act 1984* (Cth) s 13, s 14(1).

41 See Insurance Council of Australia *Submission* January 1992.

(Cth) s 33 and 55, which provide exclusively for remedies for the insurer for misrepresentation and failure to comply with the terms of an insurance contract, should not be disturbed.

## Dispute resolution

### Dispute resolution mechanisms

12.31. If the consumer protection provided by the *Insurance Contracts Act 1984* (Cth) or, if s 15 is amended as recommended by the Commission, the *Trade Practices Act 1975* (Cth) is to be of any use to consumers, there must be quick, easily accessible and cheap means of dispute resolution available to consumers. Litigation is not an option for most people—it is far too expensive and legal aid is rarely granted for civil cases. Alternative dispute resolution mechanisms do, however, exist. In most States there are small claims tribunals which can deal with disputes involving sums of between \$2 000 and \$6 000. In Victoria and Western Australia, at least, the tribunals may hear claims arising out of general insurance contracts. Tribunal procedures are informal and, generally speaking, lawyers are not encouraged. The insurance industry has established a Claims Review Panel to handle complaints about personal insurance claims. A person who is dissatisfied with a decision of a participating insurer can take his or her complaint to the Insurance Council of Australia who will refer it back to the company involved. If the consumer is still not satisfied, he or she may lodge the complaint with the Panel which makes a decision that is binding on the insurance company but not on the consumer. There is no charge to the consumer. The Victorian State Insurance Office (SIO) has set up a Consumer Appeals Centre which can be used by SIO consumers who have been unsuccessful in their attempts to negotiate a settlement of a dispute with the company. The Centre investigates and conciliates or mediates the dispute. If that fails, it can make a recommendation which is binding on the SIO but not on the consumer.

### Barriers to exercising rights

12.32. Many consumers do not use even mechanisms less formidable than litigation to enforce their rights or to resolve disputes that arise out of consumer contracts. The TPC has found that ‘a significant minority of consumers’ do not exercise basic rights. Only 20% of people could identify any relevant agency other than public consumer affairs bodies as being a service through which they could resolve consumer complaints.<sup>42</sup> People of non-English speaking background comprise a significant part of that group who are least able to resolve their problems. People who were not of European origin were more reluctant than others to take action; however, there was an increase in reluctance across all groups in proportion with the decrease in English language skills. A person’s education level was another significant factor in willingness to take action.<sup>43</sup> The Commission’s consultation reveals a number of reasons why people do not exercise their rights.

- **Lack of knowledge.** The main reason why people do not exercise their rights is lack of knowledge about what rights they have and what mechanisms exist for resolving disputes. Overcoming ignorance of the law is difficult for anyone but it is even more difficult for people whose first language is not English. Generally speaking, there has been very little information available in community languages to consumers of non-English speaking backgrounds and very little information tailored to meet the needs of particular language groups, although this is changing. In the absence of alternative sources of information, people rely on friends, relatives and members of their communities for information which may be inaccurate and misleading.

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42 L Winton *Survey of Consumer Opinion in Australia*, Trade Practices Commission, AGPS, Canberra, 1987.

43 Trade Practices Commission *Disadvantaged Consumers: Survey of consumer opinion in Australia, a supplementary report*, AGPS, Canberra, 1987.



- ***Fear of legal institutions and procedures.*** Some people are fearful of exercising their rights if doing so involves contact with public institutions such as courts and bureaucracies. This may be because they have come from repressive regimes and have a fear and distrust of authority or it may be because they are unable to express themselves adequately in English.
- ***Language difficulties.*** A person with limited English may have difficulty negotiating with a service provider, such as an insurance company, or preparing a case to present to a decision maker, be this in an informal setting or in a court or tribunal. He or she may need an interpreter which may add to the cost.

## Review

12.33. The Commission understands that the operation of the Claims Review Panel will be reviewed and evaluated late in 1992. Any such review and evaluation should examine specifically the extent to which persons with limited English skills have access to the Panel's services, and how to remove the barriers to access that do exist.

## Consumer credit insurance

### What is consumer credit insurance?

12.34. Consumer credit insurance protects the insured against being unable to pay credit instalments because of death, disability caused by an accident or illness or, in some cases, unemployment. It may be purchased directly from the credit provider or through the retailer of goods or a broker. The *Insurance Contracts Act 1984* (Cth) provides that the insurer must clearly inform the insured in writing

- of the amount or rate of the premium payable under the contract
- of the nature of any benefit to be received by the agent (for example, the credit provider or the retailer) for arranging the contract and, if the insured so requests, the amount of the benefit and
- that the insurance may be arranged with the insurer of the insured's choice.<sup>44</sup>

Under the uniform credit legislation, it is an offence to require credit insurance as a condition of a loan or to represent that it is a condition of a loan.<sup>45</sup> The *Trade Practices Act 1974* (Cth) prohibits a credit provider that is a corporation from engaging in misleading or deceptive conduct or in unconscionable conduct.<sup>46</sup>

### Consumer credit insurance is of particular significance to recent arrivals

12.35. Newly arrived migrants rely on credit to buy the goods necessary to establish themselves in Australia.<sup>47</sup> Credit providers may be particularly anxious to ensure that they take out credit insurance because they may not have a credit history or a savings record in Australia. Recent migrants are vulnerable to unemployment and may need to make a claim on credit insurance. The Commission's consultation shows that consumer credit insurance is not well understood. Reforms to consumer credit insurance law should take into account the needs of people of non-English speaking background and newly arrived migrants.

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44 s 73.

45 In NSW, Vic, the ACT and WA: Credit Act s 127.

46 s 52, s 52A.

47 See para 11.3.

## Trade Practices Commission report

12.36. **Recommendations made.** Late in 1991 the TPC published a report which identified a number of problems in the marketing of consumer credit insurance.<sup>48</sup> It made recommendations for reform to overcome disadvantage suffered by consumers because of a lack of

- clear, relevant and timely information for consumers
- effective and accessible remedies and avenues of redress.

12.37. **Recommendations for reform—information.** The report recommends, among other things, that

- clear, plain English, written information be provided in a standardised format at the point of sale on
  - the nature of the cover
  - the terms, conditions and exclusions
  - the ‘duty of disclosure’
  - the right to choose insurance
  - the right to cancel the policy at any time
- clear, standardised, written disclosure to be provided at the point of sale of
  - the consumer credit insurance premium
  - the amount of any commission, fee or benefit to the agent
  - the total amount being borrowed, the total interest cost and the monthly debt service cost with the insurance cost included
  - the total amount being borrowed, the total interest cost and monthly debt service cost without the insurance cost included
- post-sale information be provided to the consumer credit insurance policyholder in the form of a confirmation letter detailing the terms, conditions and cost of the policy and the consumer’s rights and obligations
- a cooling off period of a minimum of 14 days be allowed in which policies can be cancelled.

12.38. **Recommendations for reform—remedies and redress.** The report recommends, among other things, that

- the Insurance and Superannuation Commission should review the adequacy of relief for consumers and the need to amend s 15 of the *Insurance Contracts Act 1984* (Cth)
- consideration should be given to the inclusion of equivalent obligations on consumer credit insurers to those currently imposed on credit providers
- consideration should be given to extending the jurisdiction of credit, commercial and small claims tribunals to enable them to deal with all actions in relation to consumer credit insurance
- consideration be given to giving the Trade Practices Commission and State and Territory consumer affairs agencies power to enforce the provisions of the *Insurance Contracts Act 1984* (Cth).

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48 Trade Practices Commission, *The market for consumer credit insurance: A study of competition, efficiency and the welfare of consumers*, Trade Practices Commission, Canberra, 1991.

## **The Commission's approach**

12.39. The recommendations made by the TPC are, generally speaking, consistent with the Commission's recommendations in this report. The Commission endorses the TPC recommendations. At the time of writing this report, the Government had not responded to the TPC report but it is expected that it will do shortly.

# Appendix A

## Draft legislation

- Draft *Law Reform (Multiculturalism) Bill 1992* (Cth)
- Explanatory Memorandum to draft *Law Reform (Multiculturalism) Bill 1992* (Cth)
- Draft infringement notice provisions from proposed *Customs and Excise Bill 1992*, to be recommended by the Commission in its forthcoming report, *Customs and Excise*

## LAW REFORM (MULTICULTURALISM) BILL 1992

### TABLE OF PROVISIONS

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- 85ZKC. Interpretation  
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75A. Reasons for refusing to pay claims to be given

#### **PART 5—AMENDMENT OF THE *TRADE PRACTICES ACT 1974***

19. Principal Act

20. Other orders

### **A BILL FOR An Act to amend certain laws to take greater account of the multicultural nature of the Australian community**

The Parliament of Australia enacts:

#### **PART 1—PRELIMINARY**

##### **Short title**

1. This Act may be cited as the *Law Reform (Multiculturalism) Act 1992*.

##### **Commencement**

2. This Act comes into operation on the day on which it receives the Royal Assent.

#### **PART 2—AMENDMENTS OF THE *FAMILY LAW ACT 1975***

##### **Principal Act**

3. In this Part the *Family Law Act 1975* is referred to as the Principal Act.

##### **When decree becomes absolute**

4. Section 55 of the Principal Act is amended:

- (a) by omitting from subsection (1) all words after “1 month” and substituting “1 month:
  - (a) after the making of the decree;
  - (b) if an order under section 55A has been made—after the making of the order;
  - (c) if an order under subsection 55B(3) has been made—after the making of the order”; and
- (b) by adding at the end of paragraph (5)(b):
  - “(iii) an order under subsection 55B(3) in relation to the proceedings in which the decree *nisi* was made;”.

5. After section 55A of the Principal Act the following section is inserted:

##### **Decree absolute etc. where impediments to later re-marriage<sup>1</sup>**

“55B. (1) This section applies in proceedings between the parties to a marriage, or by the parties to a marriage, except proceedings in relation to a child, and so applies in addition to section 55A.

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<sup>1</sup> One member of the Commission, Justice Nygh, dissents from this: see para 5.40.

“(2) This section applies if the court, on application, at any stage of the proceedings, finds that:

- (a) a party to the proceedings (the ‘**first party**’) has asked the other party to remove a specified impediment to the first party’s remarriage that it is solely in the other party’s power to remove; and
- (b) the other party has not complied with the request; and
- (c) the first party has removed, or has undertaken to remove, any impediments to the other party’s remarriage that it is solely in his or her power to remove.

“(3) In the case of proceedings for dissolution of marriage, a decree *nisi* does not become absolute unless the court, by order, declares that it is satisfied that:

- (a) the impediment has been removed; or
- (b) the other party has genuine grounds of a religious or conscientious nature for not removing the impediment; or
- (c) there are circumstances because of which the decree *nisi* should become absolute even though the court is not satisfied as mentioned in paragraph (a) or (b).

“(4) In any other case, the court may, at any stage, adjourn the proceedings for a period specified by the court, and may do so more than once. However, if the court, on application before the end of the period, finds that:

- (a) the impediment has been removed; or
- (b) the other party has genuine grounds of a religious or conscientious nature for not removing the impediment; or
- (c) there are circumstances because of which the court should continue the hearing of the adjourned proceedings even though the court is not satisfied as mentioned in paragraph (a) or (b);

the court may continue the hearing of the adjourned proceedings.

“(5) ‘**Impediment to remarriage**’ includes such an impediment according to the person’s religion or cultural background.

“(6) This section applies to proceedings instituted before the commencement of this section as well as to proceedings commenced after that time.”.

### **Powers of court in custodial proceedings**

6. Section 64 of the Principal Act is amended:

- (b) by omitting paragraph (1)(bb) and substituting the following paragraph:

“(bb) the court is to take the following matters into account:

- (i) the nature of the child’s relationship with each of his or her parents and with persons with whom the child has a relationship that is important to his or her upbringing or development; and
  - (ii) the desirability of the child’s maintaining his or her links with the culture, language and religion of each of the persons mentioned in subparagraph (i); and
  - (iii) the effect on the child of any separation from, or break in the relationship with, any of the persons mentioned in subparagraph (i);”<sup>2</sup>
- and

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2 One member of the Commission, Stephen Mason, would insert after paragraph (a):

“(aa) by inserting after subparagraph 64(1)(bb)(v) the following subparagraph:

‘(vaa) the effect of any proposed order on the child’s parents and on the persons mentioned in subparagraph (i); and’”.

- (c) by inserting after subsection (2) the following subsection:
  - “(2A) The Court must, before making an order under this section, explain or cause to be explained to the parties, in language likely to be understood by them:
    - (a) the purpose and effect of the proposed order; and
    - (b) the reasons for the proposed order.”.

## **PART 3—AMENDMENTS OF THE *CRIMES ACT 1914***

### **Principal Act**

7. In this Part the *Crimes Act 1914* is referred to as the Principal Act.

### **Matters to which court to have regard in passing sentence etc.**

8. Section 16A of the Principal Act is amended:

- (a) by inserting in paragraph (2)(m) “, cultural background” after “means”; and
- (b) by inserting after paragraph (m) the following paragraph:
  - “(ma) if the person did not know that what the person did was an offence and it was reasonable for the person not to know—that fact; and”.

### **Discharge of offenders without proceeding to conviction**

9. Section 19B of the Principal Act is amended by inserting in subparagraph (1)(b)(i) “cultural background,” after “age,”.

### **Right to communicate with friend, relative and legal practitioner**

10. Section 23G of the Principal Act is amended by inserting after subsection (1) the following subsection:

“(1A) The information must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing.”.

### **Aboriginal persons and Torres Strait Islanders**

11. Section 23H of the Principal Act is amended:

- (a) by omitting from subsection (1) “believes on reasonable grounds that” and substituting “has reasonable grounds to believe that”; and
- (b) by omitting from paragraphs (2)(a) and (b) “believes on reasonable grounds that” and substituting “has reasonable grounds to believe that”.

### **Persons under 18**

12. Section 23K of the Principal Act is amended by omitting from paragraphs (1)(a) and (b) “believes on reasonable grounds that” and substituting “has reasonable grounds to believe that”.

### **Right to an interpreter**

13. Section 23N of the Principal Act is amended by omitting “believes on reasonable grounds that” and substituting “has reasonable grounds to believe that”.

14. After Part VIIB of the Principal Act the following Part is inserted:

## **“PART VIIBA—OFFENCES RELATING TO RACIST ACTIVITIES**

### **Interpretation**

“85KZC. In this Part, ‘**identifiable group**’ means a section of the public distinguished by colour, race, religion or national or ethnic origin.

### **Racist offences involving violence**

“85ZKD. (1) If:

- (a) a person commits or threatens to do an act of violence that, if it had been committed in the Jervis Bay Territory, would be an offence specified in the Schedule against a law in force in that Territory; and
- (b) the person intended the act or the threat to cause, or ought reasonably to have foreseen that the act or threat would cause, members of an identifiable group to fear for their physical safety because they are members of the group; and
- (c) the act or threat is likely to cause members of the group to fear for their physical safety because they are members of the group;

the person is guilty of an offence punishable on conviction by a penalty not exceeding one and a half times the penalty prescribed as the maximum penalty for the act under the law concerned.

“(2) An offence against subsection (1) is not an indictable offence unless, because of that subsection, the act is punishable by imprisonment for a period of more than 12 months.”.<sup>3</sup>

## **Schedule**

15. The Principal Act is amended by adding at the end the following Schedule:

### **SCHEDULE 2**

#### **Section 87ZKD**

*[to be completed]*

## **PART 4—AMENDMENTS OF THE *INSURANCE CONTRACTS ACT 1984***

### **Principal Act**

16. In this Part the *Insurance Contracts Act 1984* is referred to as the Principal Act.

### **Certain other laws not to apply**

17. Section 15 of the Principal Act is amended by inserting after subsection (1) the following subsection:

“(1A) Subsection (1) does not affect the operation of the *Trade Practices Act 1974* Part V Division 1 and, so far as it relates to the enforcement of that Division, Part VI of that Act, but this subsection does not affect the operation of sections 33 and 55.”.

18. After section 75 of the Principal Act the following section is inserted:

### **Reasons for refusing to pay claims to be given**

“75A. (1) If an insurer refuses payment, either in whole or in part, of a claim under a contract of insurance, the insurer must, if the insured so requests in writing given to the insurer, give to the insured a statement setting out the reasons for refusing to pay the claim.

Penalty: \$5,000.

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3 Two members of the Commission, the President, Justice Evatt, and Stephen Mason, would add a further section:

#### **Incitement to racist hatred or hostility**

“85ZKE. (1) A person must not publish, by any means, anything that is based on ideas or theories of superiority of any race or group of persons of one colour or ethnic origin over another, or promotes hatred between such races or groups, if the person intends that the publication will incite hatred or hostility towards an identifiable group and the publication is likely to incite hatred or hostility towards an identifiable group.

Penalty: ?.

“(2) ‘**Publish**’ means publish to the public or to a section of the public.”.



“(2) If the state of health of the insured was the reason, or one of the reasons, for the refusal, the insurer may require the insured to nominate in writing a legally qualified medical practitioner to whom the statement may be given. It is enough compliance with subsection (1) in relation to the request if the insurer gives the statement to the nominated medical practitioner.

“(3) In the case of a contract of life insurance, if the insured is not the life insured, the statement must not include any reference to the state of health of the life insured.

“(4) It is a defence to a prosecution for an offence against subsection (1) if it is proved that giving the statement would have unreasonably put at risk the interests of the insurer or of some other person.”.

## **PART 5—AMENDMENT OF THE *TRADE PRACTICES ACT 1974***

### **Principal Act**

19. In this Part the *Trade Practices Act 1974* is referred to as the Principal Act.

### **Other orders**

20. Section 87 of the Principal Act is amended by omitting subsection (1E).

# LAW REFORM (MULTICULTURALISM) BILL 1992

## EXPLANATORY MEMORANDUM

### OUTLINE

1. This Bill implements recommendations of the Law Reform Commission in its report *Multiculturalism and the Law* (ALRC 57, 1992). That report concluded that changes need to be made to Australia's family law, to its criminal law and to aspects of its consumer contract law to take fuller account of the multicultural nature of Australian society, and to help ensure that all Australians have equal access to the law.
2. The amendments in relation to family law comprise a number of amendments to the *Family Law Act 1975*. These are designed to draw the attention of the court, and of lawyers and officials who have to deal with people of different ethnic backgrounds, to the need to take into account different cultural factors and sensitivities.
3. The primacy of the principle that, in matters affecting children, the welfare of the child is the paramount consideration is not disturbed by these amendments.
4. The amendments also include provision covering a special case of religious or cultural divorce.
5. The criminal law amendments are:
  - the *Crimes Act 1914* is amended to ensure that an offender's cultural background is taken into account on sentencing and in deciding whether not to proceed to a conviction
  - for suspects under arrest, rights to communicate with a friend etc. are to be explained in a language the suspect is likely to understand
  - a minor amendment is made to the rules that state when a police officer must arrange for an interpreter or an interview friend to be present when questioning suspects;
  - new provisions dealing with racist violence are included in the *Crimes Act 1914*.
6. Two amendments are made to consumer contract laws. The consumer protection provisions of the *Trade Practices Act 1974* are applied to insurance contracts, and insurers are to be required to give reasons for refusing a claim. The Law Reform Commission found that these were particular problems for people from non-English speaking backgrounds.

### FINANCIAL IMPACT

7. The proposed amendments are not expected to have any significant adverse financial impact on Commonwealth government expenditures.

## NOTES ON CLAUSES

### PART 1—PRELIMINARY

#### *Clause 1—Short title*

#### *Clause 2—Commencement*

8. These are formal clauses, providing for the short title and commencement of the Bill. The Bill will commence immediately upon enactment.

### PART 2—AMENDMENTS OF THE *FAMILY LAW ACT 1975*

#### *Clause 3—Principal Act*

9. This clause identifies the *Family Law Act 1975* as the Principal Act for the purposes of this Part.

#### *Clause 4—When decree becomes absolute*

10. This clause makes amendments consequential on proposed new section 55B.

#### *Clause 5—Proposed section 55B—Decree absolute etc. where impediments to later re-marriage*

11. This proposed section applies in a case where one party to proceedings under the Act refuses to remove a religious or cultural impediment (defined in proposed subsection 55B(5)) to the other party's remarriage. The most common example is a refusal to grant a religious divorce. Such a refusal can, in some communities, adversely affect the other party and the children of any later marriage that that party may contract.

12. Proposed subsection 55B(1) provides that the proposed section

- applies in addition to section 55A (which requires the court to declare that it is satisfied that there are satisfactory arrangements for children before a decree *nisi* can become absolute)
- does not apply in proceedings relating to children.

13. Proposed subsection 55B(2) limits the circumstances in which the provision applies. The court must find that

- the party who seeks to invoke the clause has or will remove all impediments to the other's remarriage that it is within his or her power to remove
- the other party has been asked, but has refused, to remove the impediment
- the impediment is one that it is solely within the other party's power to remove.

14. Proposed subsection 55B(3) provides for the case where this issue is raised in proceedings for dissolution of marriage. In such a case, the decree *nisi* is not to become absolute until the impediment is removed. However, the court has a discretion not to require compliance with the clause in 2 cases:

- the other party has genuine grounds of a religious or conscientious nature for not removing the impediment or
- there are circumstances because of which the decree should be come absolute.

15. Proposed subsection 55B(4) makes similar provision in other kinds of proceedings under the Act. There, the court is given a discretion to adjourn the hearing until the impediment is removed. Again, the court has a discretion not to continue to adjourn if

- the other party has genuine grounds of a religious or conscientious nature for not removing the impediment
- there are circumstances because of which the court should continue to hear the proceeding.

16. Proposed subsection 55B(7) provides that the proposed section applies to current proceedings as well as to new proceedings.

#### ***Clause 6—Powers of court in custodial proceedings***

17. This clause amends section 64 of the Principal Act, which deals with the court's powers in respect of children.

18. Subsection 64(1) lists factors that the court must consider in making decisions about children.

19. The paramount consideration is to be the child's welfare (paragraph 64(1)(a)).

20. Paragraph 64(1)(bb) of the Principal Act requires the court to have regard, subject to the overriding concern for welfare of the child, to the relationships of the child with other persons. Paragraph 6(a) of the Bill substitutes a new paragraph 64(1)(bb) which emphasises the child's links with persons significant to his or her development. Within that framework, the court's attention is directed to the desirability of maintaining contact with those people's culture, language and religion, and the effect of separation or breaks in those relationships.

21. Paragraph 6(b) of the Bill inserts a new subsection 65(2A) in the Principal Act. That new subsection directs the court, in making an order about children, to ensure that the parties to the proceeding have the purpose and effect, and the reasons for, the order, explained to them. The explanation must be given in a language that the parties are likely to understand.

### **PART 3—AMENDMENTS OF THE *CRIMES ACT 1914***

#### ***Clause 7—Principal Act***

22. This clause identifies the *Crimes Act 1914* as the Principal Act for the purposes of this Part.

#### ***Clause 8—Matters to which court to have regard in passing sentence etc.***

23. Section 16A lists the matters to which the court must have regard when deciding what sentence to impose on a person for a federal offence. Clause 8 amends it in two respects:

- it adds the offender's cultural background to the list of matters that the court must consider and

- it requires the court, where the offender did not know that what he or she did was an offence, and it was reasonable for the offender not to know this (for example, because of language difficulties or cultural differences), to take that matter into account.

***Clause 9—Discharge of offenders without proceeding to conviction***

24. Section 19B applies where the court finds a person guilty of a federal offence. It allows the court, if it considers, having regard to matters listed in section 19B, that it would be inexpedient to inflict punishment, or more than a nominal punishment, for the offence, not to convict, but to put the person on a bond. Clause 9 adds the offender’s cultural background to the list of matters in the section that the court must take into account.

***Clause 10—Right to communicate with friend, relative and legal practitioner***

25. Section 23G of the Principal Act requires that a person arrested for a federal offence must be told that he or she has the right to communicate with a friend or relative to let them know where he or she is, and with a lawyer, to get legal advice. Clause 10 adds a new subsection 23G(1A) that requires the information to be given in or translated into a language that the person is reasonably fluent in. It parallels a similar provision in section 23F of the Principal Act (which requires the standard caution to be administered to arrested persons).

***Clause 11—Aboriginal persons and Torres Strait Islanders***

***Clause 12—Persons under 18***

***Clause 13—Right to an interpreter***

26. Section 23H of the Principal Act requires a police officer who is about to question a person whom he or she “believes on reasonable grounds” to be an Aboriginal person or a Torres Strait Islander to inform an Aboriginal legal aid service and not to start the questioning until an interview friend is present or the person has waived the right to have such a friend present.

27. Section 23K of the Principal Act requires a police officer who is about to question a person whom he or she “believes on reasonable grounds” to be under 18 not to start the questioning until, among other things, an interview friend is present.

28. Section 23N of the Principal Act requires a police officer who is about to question a person whom he or she “believes on reasonable grounds” to be unable, because of inadequate knowledge of the English language, or a physical disability, to communicate fluently in English, not to start the questioning until an interpreter is present.

29. Clauses 11, 12 and 13 amend these sections by relaxing the very high standard—belief on reasonable grounds that the person is an Aboriginal person, a Torres Strait Islander, under 18 or cannot speak English well enough. The sections, as amended, will require the police officer to act when there are reasonable grounds to believe that the person is an Aboriginal person, a Torres Strait Islander, under 18 or cannot speak English well enough, whether or not the police officer actually believes it. This will improve the protection afforded by the section to these groups.

***Clause 14—Insertion of new Part VIIBA—offences relating to racist activities***

30. This clause inserts a new Part in the Principal Act, dealing with racist violence.

31. Proposed new section 85ZKC defines the term ‘identifiable group’ as any section of the public distinguished by colour, race, religion or national or ethnic origin.

32. Proposed section 85ZKD creates a new offence: racist offence involving violence. It directly attacks the problem of racist violence.

33. A racist violence offence consists of the following elements:

- an act of violence (such as an assault, or an attack on property) or a threat of such an act—these are listed in a Schedule to the Principal Act
- the act of violence must be such that, if it were committed in Jervis Bay, it would be an offence against a federal law or a Jervis Bay law (the criminal law of Jervis Bay is, essentially, the criminal law of the Australian Capital Territory)
- the accused must have intended the act or the threat to cause members of an identifiable group to fear for their physical safety because they are members of the group; and
- it is enough if the accused ought reasonably to have foreseen that the act or threat would cause that fear
- the act or threat must be of a kind that is likely, in the circumstances, to cause members of the group so to fear.

For example, a person who threatens (say, by a bomb threat) members of a firm of solicitors who happen to be of a particular ethnic origin will not have committed this offence if the person merely wanted revenge for, say, some alleged overcharging. To commit this offence the person would have to intend to cause the lawyers to fear for their physical safety *because* they were of that ethnic origin.

34. The proposed section does not require that the person attacked be a member of the target identifiable group. Thus, the proposed offence covers attacks on supporters of particular ethnic groups.

35. The maximum penalty for a racist violence offence is 1.5 times the maximum penalty for the offence against Jervis Bay law. This will ensure that penalty relativities between different kinds of acts of violence are maintained, while the additional element of racist violence which calls for separate punishment is reflected in the overall increased penalty level.

36. Proposed subsection 85ZKD(2) ensures that offences against proposed subsection 85ZKD(1) are not indictable unless the maximum penalty for the particular act under that subsection is more than 12 months imprisonment.

#### ***Clause 15—Addition of new Schedule***

37. Clause 15 adds a new Schedule 2 to the Principal Act, to list the offences covered by the racist violence section added by clause 14.

### **PART 4—AMENDMENTS OF THE *INSURANCE CONTRACTS ACT 1984***

#### ***Clause 16—Principal Act***

38. This clause identifies the *Insurance Contracts Act 1984* as the Principal Act for the purposes of this Part.

***Clause 17—Certain other laws not to apply***

39. Section 15 of the Principal Act excludes, in relation to insurance contracts, the consumer protection provisions of the *Trade Practices Act 1974*, particularly the prohibition in section 52A of that Act on unconscionable behaviour. While insurers are under the duty to act with the utmost good faith towards insureds and intending insureds, enforcement of the Trade Practices Act provisions has proved easier for consumers than enforcement of the duty of good faith imposed under the Principal Act. For example, the Trade Practices Commission can take action on behalf of consumers for breaches of the Trade Practices Act, but not for breaches of the duty of the utmost good faith by insurers.

40. Clause 13 amends section 15 to give consumers access to the Trade Practices Act provisions while retaining their rights under the Insurance Contracts Act. However, special provision is made to preserve the operation of 2 provisions in the Principal Act that set out an exhaustive, and precisely designed, set of remedies for non-disclosure and misrepresentation in relation to insurance contracts (sections 33 and 55 of the Principal Act). The operation of these provisions is consistent with both the duty of the utmost good faith and the Trade Practices Act.

***Clause 18—Insertion of new section 75A—Reasons for refusing to pay claims to be given***

41. The Principal Act gives an insured who is refused a policy or a renewal of a policy, or whose policy is cancelled or who is offered cover on less advantageous terms, to seek reasons from the insurer (section 75). Clause 14 adds a new section 75A to the Principal Act giving insureds a similar right where a claim is refused in whole or in part. Like section 75, proposed section 75A creates a criminal offence. Like section 75, proposed section 75A includes provision to protect personal privacy in health matters and provides that the statement of reasons need not be given if to do so would unreasonably put at risk the interests of the insurer or of someone else. This provision is designed to protect informants and legitimate investigations of criminal offences.

**PART 5—AMENDMENT OF THE *TRADE PRACTICES ACT 1974***

***Clause 19—Principal Act***

42. This clause identifies the *Trade Practices Act 1974* as the Principal Act for the purposes of this Part.

***Clause 20—Other orders***

43. Clause 17 amends section 87 of the Principal Act by omitting the restriction on giving relief under that Act for unconscionable dealing (section 52A) in relation to an insurance contract. It is consequential on the amendment to the *Insurance Contracts Act 1984* made by clause 13.

# Infringement notice scheme—Customs and excise offences

**THESE CLAUSES ARE A DRAFT OF PART 33 OF A *CUSTOMS AND EXCISE BILL 1992* (CTH), TO BE RECOMMENDED BY THE COMMISSION IN ITS FORTHCOMING REPORT, *CUSTOMS AND EXCISE***

## **PART 33—OFFENCES: INFRINGEMENT NOTICES**

### **Offences to which this Part applies**

3300. This Part applies to all customs or excise offences [*that is, all offences proposed in the draft Customs and Excise Bill 1992*] except the following:

- (a) an offence punishable by imprisonment;
- (b) an offence the maximum pecuniary penalty for which, in the case of a natural person, is not more than \$10,000.

### **Infringement notices**

3301. (1) If a Customs officer believes on reasonable grounds that a person has committed an offence, that or some other officer may serve an infringement notice, or cause an infringement notice to be served, on the person.

(2) The notice is to be as prescribed, but must do each of the following:

- (a) state the name and address of the person served;
- (b) state the offence alleged to have been committed;
- (c) set out the particulars of the offence including the day on which, and the place at which, the offence is alleged to have been committed;
- (d) specify the maximum penalty that may be imposed by a court for the offence;
- (e) specify the penalty to be paid if the matter is to be dealt with under this section;
- (f) contain a statement to the effect that, within 21 days after the notice is served, the person may:
  - (i) pay, as indicated in the notice, the amount of the infringement notice penalty, in which case no further proceedings will be taken against the person in respect of the alleged offence; or
  - (ii) notify the Comptroller, in the way set out in the notice, of any facts or matters that the person says ought to be taken into account in relation to the alleged offence; or
  - (iii) apply to the Comptroller to pay the amount of the infringement notice penalty by instalments;but that if none of these is done, the person may be prosecuted for the alleged offence;
- (g) specify how that penalty is to be paid;
- (h) contain a statement, in such languages as are prescribed, that a translation of the notice will be given to the person in any of the prescribed languages on request, and setting out how such requests can be made.

(3) The statement of the offence, and the particulars, are to be enough to allow the person served to identify the offence and when and where it is alleged to have been committed.

(4) The notice is to be served on the person not more than 12 months after the alleged offence was committed.



(5) It may be served personally or by post or, if a law of the Commonwealth prescribes another way of service infringement notices, for example, by computer, in that other way.

(6) “**Customs officer**” means a Customs officer authorised in writing by the Comptroller for the purposes of this section.

Note: For payment by instalments see section 3304; for taking other matters into account see section 3305.

### **Maximum amount of infringement notice penalty**

3302. The amount of the infringement notice penalty for an offence is to be \$250 or, if another amount, not more than \$1,000, is prescribed in relation to the offence, that other amount.

Note: This section allows different infringement notice penalties to be prescribed for different prescribed offences.

### **Where infringement notice penalty paid**

3303. If the amount of the infringement notice penalty specified in an infringement notice is paid as required by the notice or by an arrangement for payment by instalments, proceedings are not to be taken by a Customs officer, or by the Commonwealth or a person on behalf of the Commonwealth, against the person served with notice in respect of the alleged offence.

### **Payment by instalments**

3304. (1) The Comptroller may enter into an arrangement with a person served with an infringement notice for the payment of the amount of the infringement notice penalty by instalments.

(2) So long as payments on account of the infringement notice penalty are being made in accordance with such an arrangement, proceedings are not to be taken by a Customs officer, or by the Commonwealth or a person on behalf of the Commonwealth, against the person served with notice in respect of the alleged offence.

### **Where infringement notice disputed**

3305. (1) If a person served with an infringement notice notifies the Comptroller as mentioned in subparagraph 3301(2)(f)(ii), the Comptroller is to determine whether to withdraw the infringement notice.

(2) Withdrawal of a notice does not prevent the issue of another notice.

(3) The Comptroller is to give written notice of the determination, or cause it to be given, to the person. If the Comptroller determines not to withdraw the infringement notice, the notice of the determination is to contain statements to the effect of the following:

- (a) if the amount of the infringement notice penalty is paid, as indicated in the notice, within 21 days after service of the notice, no further proceedings will be taken against the person in respect of the alleged offence;
- (b) if that amount is not so paid, the person may be prosecuted for the alleged offence;

and is to contain a statement, in such languages as are prescribed, that a translation of the notice will be given to the person in any of the prescribed languages on request, and setting out how such requests can be made.

(4) Evidence of an admission made in a notification under subparagraph 3301(2)(f)(ii) is inadmissible in a customs and excise proceeding against the person served with the relevant notice.

**Action not to be taken for 21 days after notice**

3306. (1) If:

- (a) an infringement notice is served on a person; or
- (b) a notice under subsection 3305(3) is served on a person;

proceedings in respect of the offence specified in the infringement notice are not to be commenced against the person before the end of 21 days after the notice is served.

(2) If a person who has been served with either notice asks for a translation of the notice in one of the prescribed languages, the period until the translation is given to the person is not to be counted in the 21 days.

(3) If a person applies to the Comptroller to pay the amount of an infringement notice penalty by instalments, the period until the Comptroller notifies the person in writing whether the Comptroller will enter into an arrangement is not to be counted in the 21 days.

**Matters to be taken into account in determining sentence**

3307. If a person served with an infringement notice is prosecuted for and convicted of the offence, then, in determining the penalty to be imposed for the offence, the court is not to take into account the fact that the person chose to have the matter dealt with by a court rather than pay the infringement notice penalty.

## Appendix B

### List of submissions

#### Written submissions

Abraham S	July 1990
AbuJehad AH	May 1990
Adams CC	December 1991
Allan M	July 1990
Administrative Services, Department of (Cth)	November 1989
Ahmed S	April 1991
Akdenk Dr M	July 1990
Aldridge J	May 1990
Allan M	July 1990
Anderson Justice DR, Family Court of Western Australia	April 1990
Anderson K	July 1990
Angelev G	April 1990
Anglican Church of Australia, Diocese of Riverina	May 1991
Anglican Diocese of Sydney, Social Issues Committee	August 1991
	May 1991
Apple Rabbi R	June 1990
Apple Rabbi R, Sydney Beth Din	March 1991
	October 1991
Arnot RH	August 1991
Arts, Sport, the Environment, Tourism and Territories Department of (Cth)	November 1989
	March 1990
Association of Rabbis & Ministers of Australia & New Zealand supported by Executive Council of Australian Jewry	July 1991
Association of Superannuation Funds of Australia Limited (South Australian Division)	January 1992
Attorney General, Department of (NT)	August 1991
Attorney-General's Department (ACT Government Law Office)	January 1992
Attorney-General's Department (Cth)	December 1989
Attorney-General, Department of (Qld)	July 1991
Aughterson C	July 1990
Australian Association for Marriage Education	May 1991
Australia-India Society of Victoria Inc	May 1990
Australian Anti-racist Movement	February 1991
Australian Bankers Association	December 1991
Australian Banking Ombudsman	September 1991
Australian Catholic Social Welfare Commission	May 1991
Australian Civil Liberties Union	September 1991

	October 1991
	October 1991
Australian Family Association (NSW)	April 1991
Australian Federal Police	July 1991
Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee (J Hussain)	August 1991
Australian Federation of Islamic Councils Inc, Law Reform Sub-Committee (S Ahmed)	August 1991
Australian Federation of Women's International Zionist Organisations	April 1991
Australian Financial Counselling & Credit Reform Association Inc	February 1992
Australian Jewish Democratic Society Inc	October 1991
Australian Jewish Welfare Society	April 1991
Australian Retail Financial Network (Ltd)	January 1992
Australian-Asian Society of Queensland	December 1989
Australian-German Welfare Society, Victoria	December 1989
Baltic Women's Association of South Australia	March 1990
Baptist Union of NSW, Social Issues Committee	July 1990
	November 1991
Baptist Union of Queensland	May 1991
Bar Association of Queensland	October 1991
	November 1991
Baric M	November 1991
Barnfield & Somerville, Barristers and Solicitors	April 1990
Beeney AJ	February 1990
Berger A	April 1991
Berinson J, Attorney General (WA)	November 1991
Berman P	July 1991
Bladel F, Minister for Administrative Services & Consumer (Tas) Affairs	November 1991
Blight G	April 1991
	April 1991
	May 1991
Borham J	July 1990
Braham MM	April 1990
Brethren The	July 1990
	April 1991
	July 1991
Broeren AMJ	July 1990
Bryceson B	October 1991
Buonaiuto Dr M	November 1990
Bursztyn T	July 1990
Bury K	August 1990
Byrne E	August 1990
	March 1991
COMITES (Comitato degli Italiani all'Estero)	August 1991
Cain B	March 1990

Campbell H	June 1990
Canon Law Society of Australia and New Zealand	June 1991
Cary J	July 1990
Casa House	July 1991
Catholic Multicultural Council	April 1991
Catholic Society for Marriage Education	May 1991
Catholic Women's League Australia	May 1991
Chadwick V, Minister for Family and Community Services (NSW)	January 1990
Chadwick V, Minister for School Education and Youth Affairs (NSW)	December 1991
Chinese Professional and Businessmen's Association of Victoria	May 1990
Chisholm R	April 1991
Christian Science Committee on Publication for Victoria	July 1991
Co.As.It. NSW (Italian Association of Assistance)	July 1991
Collaery B MLA (ACT)	November 1989
Commonwealth-State Council on Non-English Speaking Background	
Women's Issues, Office of the Status of Women (Cth)	July 1991
Community Services & Health, Department of (Cth)	May 1991
Community Services Victoria	June 1991
Consumer Affairs Bureau (ACT)	November 1991
Consumer Affairs, Department of (NSW)	January 1992
Consumer Affairs, Federal Bureau of	January 1991
Consumer Affairs, Office of (Tas)	October 1991
Consumer Credit Legal Centre (NSW) Inc	January 1990
	December 1991
Cook P, Minister for Industrial Relations (Cth)	May 1990
Coombs JV	February 1990
	February 1991
	March 1991
	June 1991
Council of Progressive Rabbis of Australia & New Zealand	April 1991
Council of Western Australian Jewry Inc	May 1991
Country Women's Association of New South Wales	May 1991
Cowling J	July 1990
Crafter G, Minister of Education, Minister of Children's Services (SA)	May 1990
Crosswell DJ	March 1990
Danaoui A	October 1991
Daw Dr RC	February 1991
Daylesford Secondary College Year 8	March 1991
Defence, Department of (Cth)	February 1990
Djordjevic M	October 1991
Dunlop C	July 1990
Eades Dr D	July 1991
Edwards H	September 1991
Encel Professor S	April 1991
Endeavour Forum	February 1991
Esgate J	February 1990

	May 1990
Ethnic Affairs Commission of New South Wales	June 1990
	June 1991
	August 1991
	December 1991
Ethnic Communities' Council of New South Wales	July 1991
Ethnic Communities' Council of New South Wales, Anti-Racism Task Force	August 1991
Ethnic Communities' Council of Queensland Ltd	July 1991
Ethnic Health Unit, Health Department Victoria	April 1991
Evans DM MLC (Vic)	November 1989
Evelyn	April 1991
Evenden R	July 1990
Executive Council of Australian Jewry, Jewish Women's Issues Committee	November 1990
	April 1991
Family & Community Services, Department for (SA)	June 1991
Family Court of Australia, Counselling Section, Hobart	May 1990
Family Law Council	May 1990
	September 1991
Faraone S	July 1990
Federation of Community Legal Centres (Vic) Inc, Access to Interpreters Working Group	July 1991
Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group	July 1991
Federation of Ethnic Communities' Councils of Australia Inc	August 1991
	August 1991
Filipino Women's Group of the Filipino Australian Club of Perth Inc	April 1991
Finlay Dr HA	May 1991
Fisher R	October 1991
Fleming JC	October 1991
	October 1991
	November 1991
Ford Dr Rev N	October 1991
Frogley Pastor PG	August 1990
Frydenberg J	July 1990
Geelong Ethnic Communities Council Inc	May 1990
General Synod of the Anglican Church of Australia, Social Responsibilities Commission	September 1990
General Synod of the Anglican Church of Australia, Social Responsibilities Commission & Multicultural Advisory Committee	May 1991
	August 1991
	December 1991
George Right Rev I	June 1991
Giamage Dr S	May 1991
Glindemann R	July 1990

Goldsmith Dr M MLC (NSW)	April 1991
Goodman S	February 1992
Gordon A	April 1991
Gregory RJ, Minister of Labour, Minister of Marine, Chief Secretary (SA)	November 1989
Grieve B	February 1991
Group of Spanish & Latin American Health Professionals Inc	April 1990
Gudiksen V	May 1991
Hamilton P	April 1990
Hammer G	April 1991
Hammond J	May 1991
Hannan PJ	December 1991
Hannebery J	July 1990
Hansen G	July 1990
Harris T, Minister for Education (NT)	November 1989
Hartwig A	March 1991
Hasso C	November 1991
Haywood RG	May 1991
Hecker AJ	April 1991
Herbert Rev HJ	August 1991
Hope RM QC & Weisbrot D	May 1991
Humanist Society of Victoria Inc	October 1990
	May 1991
	July 1991
Hungarian Institute in Australia	April 1990
Hunter Rev H	August 1990
Immigration, Local Government & Ethnic Affairs, Department of (Cth)	June 1991
	September 1991
Imrei M	May 1990
Indo-Australian Christian Society of NSW	May 1990
Insurance Council of Australia Limited	May 1990
	January 1992
International Christian Embassy Jerusalem (Australian Branch)	November 1991
Iskander M	October 1991
Islamic Council of Victoria	April 1990
Jackson Judge HH, President Children's Court of Western Australia	June 1991
Jackson N	July 1991
Jessep Dr OD	September 1991
Jewish Secular Humanistic Society	August 1991
	September 1991
Johnstone IM	March 1990
Jones J	August 1991
	October 1991
	October 1991
Jones N	April 1990
Jones U	April 1990

Judges of the County Court of Victoria, Law Reform Committee	June 1991
Kamins Rabbi JB	April 1991
Kaufmann P	September 1991
Kay Justice JV, Family Court of Australia	March 1991
Keegan E	March 1990
Kenos Dr AT	May 1990
	August 1991
	April 1991
	October 1991
Knox S	May 1991
Lally A	July 1990
Langen-Zueff R OAM	February 1990
Latvian Women Students' & Graduates' Association	October 1991
Law Council of Australia, Family Law Section	May 1991
Law, Department of (NT)	June 1990
Leader-Elliott I	October 1991
Legal Aid Commission of Victoria, Staff Law Reform Group and Law Reform Committee	September 1991
Legal Aid Commission of Victoria	October 1991
Legal Aid Commission of Western Australia	September 1990
Lewis A	July 1990
Lewis P MP (SA)	October 1989
Life Insurance Federation of Australia Inc	December 1991
Local Government, Department of (NSW), Animal Welfare Branch	April 1990
Lu A	July 1990
Macdonald A	July 1990
Majarich M	July 1991
Makinson Dr KR AM	February 1991
Malcolm DK Chief Justice Supreme Court of Western Australia	August 1991
Maloney J	July 1990
Mann Bishop Dr R	May 1991
	June 1991
	July 1991
	August 1991
Manning District Domestic Violence Monitoring Committee	
MARIA, Professional Development Group for Women from non-English-speaking backgrounds in Education	May 1990
Markman A	July 1990
Marrickville Legal Centre & Children's Legal Service	May 1991
	October 1991
	November 1991
	November 1991
Matepi H	
McCarthy T, Minister for Labour, Administrative Services and Local Government (NT)	November 1989
McDiven C	May 1991
McDonald A	July 1990
McGinty J, Minister for Housing (WA)	December 1991



McKenzie DJ	May 1991
McKenzie KA	August 1991
McMahon G	July 1990
McVernon L	July 1990
Mellowship J	June 1990
Migrant Resource Centre, Northern Tasmania (Inc)	August 1990
Migrant Women's Interests Committee (WA)	May 1991
Milliner GR, Minister for Justice & Corrective Services (Qld)	July 1991
	November 1991
Ministry of Consumer Affairs (WA)	November 1991
Moore C MLA (NSW)	November 1989
Morfuni C	June 1990
Morrow W	March 1990
Moss D	July 1991
Murphy DT	June 1991
Myles LB	April 1991
	July 1991
NRMA Insurance Ltd	February 1992
NSW Animal Welfare League	April 1990
National Council of Jewish Women of Australia	April 1991
	June 1991
	August 1991
National Spiritual Assembly of the Baha'is of Australia Inc	June 1990
National Status of Women Council	May 1991
Naylor A	May 1991
Nelson B, Minister for Family Services (Qld)	November 1989
Nemes I	April 1991
New South Wales Police Department, Legal Services Branch	September 1991
Nguyen VU	February 1991
Nock P	January 1990
North Melbourne Legal Service Inc	September 1990
North Richmond Community Health Centre Inc	July 1991
Northcote Ethnic Communities Council	September 1991
Northern Territory Police	June 1991
O'Connell AL	July 1990
Office of Ethnic Affairs (NT)	August 1991
Orsini A	July 1990
Padgham-Purich N MLA (NT)	June 1991
Parish Council of St Thomas' Anglican Church, Narrandera	June 1990
Parkinson P	September 1991
Pauline G	July 1990
Pavlakis N	July 1990
Peacocke GB, Minister for Business and Consumer Affairs (NSW)	November 1989
Penon M	September 1991
Perth Jewish Ecclesiastical Court	April 1991
Pike IH, Chief Magistrate (NSW)	November 1992

Police Commissioner's Conference	September 1991
Premier, Economic and Trade Development, Department of (Qld)	June 1990
Presbyterian Women's Association of Australia in NSW	April 1991
	August 1991
	November 1991
Presbytery of the Presbyterian Church of Tasmania	September 1990
Public Service Commission (Cth), EEO Unit	May 1991
Purdey A	July 1990
Purvis V	August 1991
Queensland Law Society Inc, Family Law Committee	June 1991
Queensland Police Service	July 1991
Quota Club of Nowra Inc	September 1991
Rana R	April 1990
Ranki Dr V	April 1991
Razmilic Z	November 1989
Redfern Legal Centre	March 1992
Rennie S	July 1990
Retail Traders' Association of New South Wales	January 1992
Returned & Services League of Australia Ltd	May 1990
	April 1991
	August 1991
Rickard M	July 1991
Roach TA	September 1990
Robles H	September 1991
Rossi J & Horiatopoulos J	October 1991
Royal Society for the Prevention of Cruelty to Animals NSW	July 1990
Russell M	July 1990
Rutter C	July 1990
S Maria	August 1990
SIO Consumer Appeals Centre (Vic)	October 1991
SPAN Co-operative, Community Project for Older and Retired People	May 1990
Salkin V	December 1991
Samoa Association in Brisbane Inc	July 1991
Save Australia (Tas)	July 1991
Schwarcz T	May 1991
Scott G QC	September 1991
Serbian Community of SA Inc	May 1990
Sgro' G MLC (Vic)	February 1990
Sharples Rev K	July 1991
Shew W	July 1990
Sikh Council of Australia	September 1991
	February 1992
Singleton M MLA (NSW)	November 1989
Smith Dr K	May 1991
Smolicz Professor JJ	May 1990
Sobolewski T	January 1991

Social Security, Department of (Cth)	September 1991
South Australia Police Department	September 1991
South Australian Government	May 1990
	September 1991
	November 1991
	February 1992
South Brisbane Community Legal Service Inc	July 1991
South Brisbane Immigration and Community Legal Service Inc	September 1991
Springvale Community Aid & Advice Bureau Inc	April 1991
	August 1991
Sripathy M	August 1991
Stafford K	July 1990
Stain C	December 1991
Star P	August 1991
Staub S	July 1990
Stolarek Dr G	July 1990
	September 1990
Stoneman M, Minister for Primary Industries (Qld)	November 1989
Strachan P	January 1991
Strachan PL	May 1991
Strum A	April 1991
Swan GAH	May 1991
Swee TH	October 1991
Sydney Anglican Diocese, Ethnic Workers Forum	May 1991
	August 1991
Tasmanian Muslim Association	January 1992
Tavares V	April 1991
Thomson K MLA (Vic)	October 1989
Tidswell DB	April 1990
Toffar Sheikh AK	November 1989
	March 1991
	April 1991
Trade Practices Commission	February 1992
Transport and Communications, Department of (Cth)	April 1991
	July 1991
Transylvanian Association of Canberra	August 1991
Unifam Marriage and Family Counselling Service	June 1990
United Christian Action, Blaxland Branch, NSW	May 1991
United Nations Association of Australia Inc (WA Division)	March 1990
Uniting Church in Australia New South Wales Synod, Board for Social Responsibility	November 1991
Vale R, Minister for Youth, Sport, Recreation and Ethnic Affairs (NT)	November 1989
Victoria Police, Law Review Unit	April 1990
	August 1991
Victorian Government	March 1992
Waldron Judge G, Chief Judge, County Court, Victoria	November 1991

Wall CF QC	April 1990
Walsh ND	February 1990
Warda J	January 1992
Watson Dr J, Minister for Multicultural & Ethnic Affairs (WA)	December 1991
Webb D	July 1990
Webb, Stagg, Tonkin & Spark, Barristers & Solicitors	February 1991
Weissenfeld K	July 1991
Western Australia Police Department	September 1991
Wigg JC	May 1991
Willoughby-Thomas M	January 1992
Wilson Right Rev B	May 1990
Women's Information & Referral Exchange, Office of Women's Interests (WA)	December 1990
Women's International Zionist Organisation NSW	April 1991
Women's Legal Resources Centre	July 1991
Wood M	April 1991
Woods C	July 1990
Yates T	August 1991
Yeo S	May 1991
Young C & B	October 1991
Young Women's Christian Association of Perth (Inc)	October 1991
Yung S	January 1992
Zahra Al-Muslim Association	October 1990
Zancanaro G	January 1992

### **The following gave oral submissions at the public hearings**

Ahmed S, Australian Federation of Islamic Councils, Law Reform Sub-committee  
 Aleck J  
 Ayan A, Islamic Society of Victoria  
 Ayyoush M  
 Azar J  
 Back D  
 Bouzalas A  
 Buonaiuto Dr M  
 Burnard DH, Family Relationships Institute  
 Byrne E  
 Cheng L  
 Chynoweth Bishop N, Batterham Rev K & Curtis L, Anglican Diocese of Canberra & Goulburn  
 Cidade B  
 Clark J  
 Cullen P  
 Cumming J & Smythe E, Catholic Women's League of Tasmania  
 Darmon A  
 De Luca J, Ethnic Communities Council of the Northern Territory

Devos J  
Dikmen HB  
Dorrington CM  
Essaber F, Consumer Credit Legal Service (Vic)  
Feeney J  
Flach J,  
Fonseca J  
Frances B & Butts M, Endeavour Forum  
Galliano-Vuocolo G & Mathrick P  
Gate R  
Gouttman Dr R  
Haldane-Stevenson JP  
Haler S, Croatian Pensioner Invalid Group  
Hall A & Grimes A  
Harper R  
Harris L  
Hill PR  
Hussain Dr S, Townsville Islamic Society  
Hussain Dr S & Johnson D, Ethnic Communities Council of Townsville  
Jagdev BS & Sidhu Dr GS  
Jenkins B  
Johnson P  
Jung T, United Ethnic Communities of South Australia  
Kaufmann P  
Khalsa RRS & Bhalia PPS, Sikh Council of Australia  
Kronhill J  
Lavroff A  
Ly TV  
Mansour A  
Manzouri S  
McLeod G  
Mikula C, Consumer Credit Legal Service (Vic)  
Muirden GW, Australian Civil Liberties Union  
Murphy B, Northern Territory Police  
Narayanan N  
Nelthorpe D, Consumer Credit Legal Service (Vic)  
Nguyen A  
Nguyen V  
Nicholson G  
Niemoetko W  
O'Mara J  
Ooi C  
Ottavi T, Italian Culture & Welfare Association  
Ottley W, Combined Pensioners Association of New South Wales Inc  
Panagiotidis S, Legal Aid Commission of Victoria  
Pap I & Weedon B, Family Law Reform Association

Percy Rev LJ  
Perez L  
Petersen R  
Ploegmakers R  
Poe B  
Port D  
Puccetti R  
Restuccia A, Hampshire A, Ferracin L, Federation of Ethnic Communities Councils of Australia  
Rogers PW  
Rosenblum L, Queensland Jewish Board of Deputies  
Rossi J & Horiatopoulos J  
See Kee C  
Seren Z  
Sharp N  
Shorten B  
Simpson B  
Smith Dr K, Baptist Union of Queensland  
Smith S, SIO Consumer Appeals Centre (Vic)  
Smith M, Presbyterian Women's Association in NSW  
Sobolewski T  
Soch B  
Solomon Dr J  
Swart EM, Consumer Credit Legal Service (Vic)  
Syme D & Hooshmand F, Conflict Resolution Service Inc (ACT)  
Tang Nu Tu  
Tasynski J  
Taylor GW, Voluntary Euthanasia Society of NSW (ACT Branch)  
Ton-that QD  
Turner JN  
Tzannes R, Ethnic Communities Council of New South Wales  
Vidal L & Kushwaha SK, Association of Non-English Speaking Women of the ACT  
Vogels B & Evans B, Credit Line Financial Counselling (Fairfield)  
Wang JF  
Ward W  
Westcombe RS, Australian Consumers Association  
Williams RA, Consumer Credit Legal Service (Vic)  
Zanetti M