Australian Government
Australian Law Reform Commission

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Dear Committee Secretary

Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee

The Australian Law Reform Commission (ALRC) makes the following submission to the Senate Standing Committee for the Scrutiny of Bills Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee. The ALRC welcomes the opportunity to contribute to a discussion on the future direction and role of this very important Committee.

In order to assist the Committee with its inquiry, the ALRC has conducted a survey of recommendations in past ALRC reports that relate to the role and function of the Committee. We offer these as background to assist the Committee. This submission draws on recommendations made in ALRC inquiries into:

- the federal civil justice system, culminating in the report *Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (1999) (ALRC Report 89) (available online at http://www.austlii.edu.au/au/other/alrc/publications/reports/89/);
- women's equality before the law, which concluded with the release of *Equality Before the Law: Women's Equality*, Report No 69 Part 2 (1994) (ALRC Report 69 Part 2) (available online at http://www.austlii.edu.au/au/other/alrc/publications/reports/69part2/); and
- multiculturalism and the law, which resulted in the release of *Multiculturalism and the Law*, ALRC Report 57 (1992) (ALRC Report 57) (available online at http://www.austlii.edu.au/au/other/alrc/publications/reports/57/).

***Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (1999)**

ALRC Report 89 represents the culmination of a major four year inquiry, which commenced with terms of reference directing the ALRC to consider 'the need for a simpler, cheaper and more accessible legal system'. The ALRC inquiry focused on practice, procedure and case management in federal civil courts and tribunals, such as the Federal Court of Australia, Family Court of Australia and Administrative Appeals Tribunal (AAT), as well as on issues such as costs, delay, legal ethics, legal and judicial education, judicial accountability, alternative dispute resolution, legal aid and expert witnesses.

The report contains 138 recommendations, covering a wide range of issues and current problems, aimed at the variety of participants and institutions which influence the general quality, and the particular practices and procedures, of the federal civil justice system.

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Chapter 4 identifies issues which impact on legal costs and explores the causes of high costs for legal services. The ALRC's empirical research showed that the complexity of cases, the number of court or tribunal case events and lawyers' charging practices were the most significant influences in determining the amount of private costs. In the ALRC's view, it followed that a reduction or control on legal costs requires a collaborative approach from lawyers, government, courts and tribunals.

The ALRC acknowledged governments have a limited capacity to influence private legal costs.[1] However, the ALRC noted that the government also affects litigation and legal costs through the legislation it passes. In Australia the number of Acts has steadily increased, and that legislation is now significantly more complex. The ALRC referred to an article by former High Court Justice, Justice Michael McHugh, which suggested a direct correlation between the quantity and scope of legislation and a growth in litigation, and stated that:

> [c]omplex legislation increases litigation because it becomes harder, if not almost impossible for people to know their rights and duties under the law without recourse to litigation.[2]

The ALRC noted that there were clear signs that government was attentive to the relationship between legislation, rights based and regulatory regimes and subsequent litigation pressures. The ALRC observed that legislative schemes were increasingly including a role for alternative enforcement and dispute resolution mechanisms. However, the ALRC also referred to an Ontario Legal Aid Review which stated that the complexity of the law may 'impose an obligation on the state to facilitate access to the effective use of that law',[3] and noted that when changing legislation, the government should consider the impact this may have on litigation.[4]

The ALRC looked at the role of the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances. The ALRC also noted that the Access to Justice Advisory Committee (AJAC)[5] had considered the role of such committees. The ALRC agreed with AJAC's observations on the need for improved scrutiny of legislation, and endorsed the AJAC recommendation for the need for these committees to have better resources to fulfil their role.[6] However, the ALRC also noted that there is presently no requirement on either Committee to consider the impact that new legislation may have on cost, complexity and volume of litigation or administrative review, and recommended that:

> The Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances should have their standing orders modified, directing them, when considering new legislation, to have regard to the likely impact of the proposed legislation, ordinance or regulation on the cost, complexity and volume of litigation or administrative review.[7]

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[1] The ALRC noted that Government can regulate the processes for, and mandate fair and reasonable contracts between clients and their lawyers, it can set up lower level and lower cost courts, subsidise alternative dispute resolution processes, raise, lower or exempt filing or hearing fees for courts and tribunals, and work indirectly to influence legal costs through competition policy principles within the legal profession. Governments also impact on legal charges and fees via the scales set for costs awards in litigation: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (1999), [4.56].

[2] M McHugh, 'The Growth of Legislation and Litigation' (1995) 69 *Australian Law Journal* 37, 38–42.

[3] Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (1998), Ch 5.

[4] B Walker, *Speech: ALRC Cost of Justice Seminar*, Sydney, 19 May 1999.

[5] Access to Justice Advisory Committee, *Access to Justice—An Action Plan* (1994).

[6] Ibid, [21.47], Recommendation 21.4. See also Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice—Checks and Imbalances—Second Report* (1993), [2.29]–[2.34], Recommendation 4–7.

[7] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (1999), Recommendation 28.

***Equality Before the Law: Women's Equality*, Report No 69 Part 2 (1994) (ALRC Report 69 Part 2)**

In Chapter 4 of ALRC Report 69 Part 2, the ALRC recommended a federal Act to guarantee women's equality and discussed how this Act might assist women. In the ALRC's view, an Equality Act would be a means by which women could challenge laws, procedures and practices that create or perpetuate inequality. Its underlying goal would be to assist in transforming legal concepts to make them more responsive to the needs and concerns of women.

Key recommendations for an Equality Act included that:

- equality in law should be protected through an ordinary Act of Parliament. The entrenchment of the Equality Act in the Constitution should be the long term goal;
- the Equality Act should define 'equality in law' to include equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms;
- the Equality Act should provide that any law, policy, program, practice or decision which is inconsistent with equality in law on the ground of gender should be inoperative to the extent of the inconsistency.[8]

Chapter 5 of ALRC Report No 69 Part 2 examines the impact of the recommended Equality Act on the federal and state and territory governments. The ALRC noted that, at that time, the Senate Standing Committee on Scrutiny of Bills scrutinised bills for provisions 'which trespass unduly on rights or create ill-defined powers'. The ALRC noted that a number of submissions to the ALRC inquiry had supported a Parliamentary Committee being required to scrutinise legislation for gender bias, like a 'Gender Impact Statement'.[9]

The ALRC observed that the *New Zealand Bill of Rights Act 1990* requires the Attorney-General to bring to the attention of Parliament on the introduction of a bill or as soon as practicable after its introduction any provisions that appear to be inconsistent with the *New Zealand Bill of Rights Act*. In the ALRC's view, this process was seen as an improvement on the scrutiny of bills process previously employed in New Zealand, as it ensures that the rights set out in the *New Zealand Bill of Rights Act 1990* are considered in the legislative process as guidelines to the making of laws. This process is intended to 'alert' members of Parliament at the earliest possible stage that there are or may be inconsistencies in the bill so that parliament can then make a 'conscious choice ... rather than an inadvertent oversight' whether to implement, amend or reject the proposed legislation.[10]

The ALRC also noted that the Queensland Electoral and Administrative Review Commission (EARC) similarly recommended that the Attorney-General should report to Parliament on any bill inconsistent with its proposed Bill of Rights for Queensland.[11]

The ALRC concluded that an Equality Act would provide any committee that scrutinises bills with a concrete focus for their scrutiny. In the ALRC's view, simply requiring a committee to consider the impact of a proposed law on women will not necessarily assist them in detecting gender bias. The ALRC considered that the Senate Standing Committee on Scrutiny of Bills was the most effective committee to carry out this function, noting that the Committee had established terms of reference to which the principle of equality could be added. The ALRC therefore recommended that:

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[8] See Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69 Part 2 (1994), Recommendations 4.1–4.8.

[9] Ibid, [5.19].

[10] P Fitzgerald, 'Section 7 of the New Zealand Bill of Rights Act 1990: A Very Practical Power or a Well-Intentioned Nonsense' (1992) 22 *Victoria University of Wellington Law Review* 135, 136.

[11] Queensland Electoral and Administrative Review Commission, *Report On Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* (1993), [7.98].

> The terms of reference of the present Senate Standing Committee on the Scrutiny of Bills should be extended to include the scrutiny of bills for compliance with the Equality Act.[12]

The ALRC notes that since the release of ALRC Report 69 Part 2, Senate *Standing Order 24* has been amended to require the Committee to report on whether Bills or Acts 'trespass unduly on personal rights and liberties' or 'make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'. The ALRC notes, however, that none of the requirements set out in Standing Order 24 specifically address 'equality in law'.

***Multiculturalism and the Law,* ALRC Report 57 (1992)**

The ALRC's inquiry into multiculturalism and the law looked at a range of federal laws to determine whether they were appropriate to a society made up of people from differing cultural backgrounds and from ethnically diverse communities.

Chapter 4 of the report considered family law and the *Family Law Act 1975* (Cth). Of relevance to the Committee's current inquiry, is the discussion in the Chapter about how law and policy can take into account diverse family arrangements.[13] The ALRC considered the Federal Governments *Access and Equity Revised Requirements and Guidelines* (1990), and the role of Senate Standing Committee for Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances, and recommended that:

> 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.[14]

I hope this information is of some help to Committee members.

Yours sincerely,

[12] Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69 Part 2 (1994), Recommendation 5.4. The ALRC also recommended that the Equality Act should contain a provision that requires the Attorney-General to report on the compliance of a government bill with the Equality Act on the introduction of that bill to Parliament. The Attorney-General should be required to report on bills introduced by private members as soon as practicable after their introduction: Ibid, Recommendation 5.4.

[13] See Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 58 (1992), [4.12]–[4.30].

[14] Ibid, [4.30] and Recommendation 16.