Australian Law Reform Commission Access to Government Information and Standing

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A Paper presented to the
"Defending the Environment Conference" 22 May 1995, Adelaide

Introduction

In the twenty years the Australian Law Reform Commission has been in existence it has never had a reference from the Commonwealth Attorney-General specifically on the subject of environmental law. Nevertheless, it has considered environmental law in a number of contexts and in this paper I discuss references on Freedom of Information, the Costs Indemnity Rule and Standing. I also make passing reference to the Commission's work on Equality. The relevance of this work to environmental lawyers was borne home to me when I read the opening paragraph of a recent article on the Queensland Castle Hill decision[107]:

> *All members of the public hold a legitimate interest in the quality of the environment, and expect to be able to participate in the administrative processes which control pollution. The public also expects government to enact, observe and enforce adequate l aws to protect the environment. The public should also be kept fully informed on the state of the environment. When government fails to observe environmental laws, or to enforce those laws against others, a member or members of the public should be able to use the judicial system to hold the government or individuals accountable.*

I welcome this opportunity to speak with environmental lawyers because of the importance of your involvement in the law reform process. One reason is the obvious desirability of public participation in legal change. The Commission relies on advice from judges, practitioners, academics, community and business organisations and individuals to produce useful and credible recommendations for legal change. This is an important feature of its work which was recognised last year by the House of Representatives Standing Committee on Legal and Constitutional Affairs, which reviewed the Commission.[108] A second reason is that lessons learned from environmental law can be used in other areas. Difficulties faced by groups seeking access to justice in relation to environmental issues are also faced by consumers, minority groups and clients of governments. Testing of the meaning of 'public interest' in environmental cases can inform other areas of law where the 'public interest' is relevant. The sharing of knowledge and experience allows systemic problems in the legal system to be identified and hopefully addressed.

Freedom of Information

In July this year the Australian Law Reform Commission and the Administrative Review Council were given a joint project: to review the Commonwealth's 12 year old *Freedom of*

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108 Stephen Keim and Joanne Bragg "Standing on Castle Hill" (1994) 19 (2) *Alternative Law Journal 68.*

109 *The Challenge Continues* AGPS May 1994 p.60.

Information (FOI) Act. The terms of reference indicate a desire on the part of the Government for a thorough examination of the FOI Act to see whether it has achieved, and is still achieving, what Parliament originally intended it to achieve and, if it is not, for us to make recommendations about how to 'fix it'.

General Issues

Timetable. Early in October 1994, we released an issues paper (ALRC IP 12). We have distributed 4,300 copies of it which suggests there is widespread community interest in the issue. The paper outlines the background to the introduction of the FOI Act and highlights as many of the issues surrounding FOI as we could identify in the three months we had to prepare the paper. The Commission has received 120 submissions in response to the paper. A discussion paper with provisional proposals is currently being prepared for release in a few weeks. I should be happy to take the names of anyone who would like to receive a copy of that paper, free of charge. Our final report, which is to include draft legislation, is due in December 1995.

Objectives of FOI. Freedom of information legislation is, ideally, supposed to improve government accountability and open the political process to public participation. The objectives of the FOI Act include

* to extend as far as possible the right of the community to have access to information in the possession of the federal Government:

* to make government more accountable by making it more open to public scrutiny

* to improve the quality of political democracy by giving people the opportunity to participate fully in the political process including formulation of policy

* to enable groups and individuals to be kept informed of the functioning of the decision making process as it affects them and to know the criteria that will be applied by government agencies in making those decisions, and

* to enable individuals to have access to information about them held on government files so that they may know the basis on which decisions that can fundamentally affect their lives are made and may have the opportunity of correcting information that is untrue or misleading.

Whether these objectives have been achieved and whether the spirit of the Act is adhered to by government agencies and departments is difficult to assess. We are relying largely on anecdotal evidence when considering this issue, particularly that of people who work closely with the Act and those who have had experience in seeking access under the Act. It appears the success or effectiveness of the Act varies considerably depending which agency is handling the request and, of course, the degree of sensitivity of the request.

Exemptions. Not all government information is accessible under the FOI Act. Clearly some exemptions are necessary to enable government to function properly and to prevent disclosure of information that would harm the public interest. It is generally agreed that some exemptions are necessary to balance rights of access against legitimate claims for the protection of sensitive material. Finding the right balance is, however, a difficult task. Certainly, exemptions have come in for a considerable deal of criticism, including that

* there are too many (19, taking up 16 pages)

* they are drafted too broadly

* they are often claimed by agencies unnecessarily and applied incorrectly

* they dominate the Act, overshadowing its purpose

* some operate regardless of whether any harm would result from disclosure.

We are looking at how to strike the right balance. In principle, there should be no more exemptions than are absolutely necessary. Options we have considered include rationalising the exemption provisions, putting them in a schedule to the Act (to emphasise their subsidiary, rather than dominant, role), removing exemptions that prevent disclosure of documents that are already protected by another exemption provision and standardising the current variety of confusing and difficult-to-apply public interest tests. The discussion paper will make provisional proposals on these issues.

Fees and charges. The cost of obtaining information under the FOI Act is a controversial topic. There will always be tension between the policy aims of the FOI Act and the notion that users should contribute to the administrative costs of providing access to documents. Some agencies charge strictly according to the regulations, others don't bother imposing charges because the administrative costs of doing so outweigh the charges. Fees and charges are not usually applied when a person seeks access to his or her own income support documents.

When the FOI Act was passed, it contained no fees. A $30 application fee and a $40 internal review fee were introduced in 1986. There were always charges (for example, for time taken to search for and retrieve documents and photocopying) but they were increased in 1986 (for example, $20 per hour for decision-making, $15 per hour for search and retrieval). The 1986 amendments were designed to ensure that applicants contributed to the cost of administering FOI (which in 1992-93 was reported to be over $12 million). In 1992-93 the average cost (to the agency) of satisfying an FOI request was, in 26 agencies, higher than $2500. (The average administrative cost of requests to the Australian Bureau of Statistics was over $17,000). Only a small proportion of FOI administration costs are recovered in fees and charges (4.29% in 1992-93, for example). The degree to which fees and charges, including the estimate of fees and charges that agencies must provide before dealing with a request, deter people from using the Act is an important issue.

Review mechanisms. An effective and accessible mechanism for reviewing FOI decisions is fundamental to the success of the FOI Act. If few people can afford to seek review, or the available review mechanism is not worth pursuing, the incentive for agencies to administer the Act carefully and conscientiously will be reduced. Current review mechanisms are: internal review (in 1992-93, 4.4% of decisions refusing access to documents or granting access with deletions were subject to internal review; 24% of these internal reviews resulted in concessions), investigation by the Ombudsman (0.6% of FOI requests result in complaints to the Ombudsman), review by the AAT with a further appeal to the Federal Court and appeal direct to the Federal Court. Because of the cost involved, direct appeal to the Federal Court is rare.

There is a view among FOI commentators, academics and policy makers that the AAT is not providing an effective review mechanism. Some criticisms relate to the AAT itself, others more to the restrictions imposed by the FOI Act on review by the AAT. The AAT is in the process of introducing some changes to the way it handles FOI appeals — changes that are designed to address the criticisms referred to above. This is an encouraging development.
Independently of our FOI review, the ARC is currently reviewing the Commonwealth's merits review tribunals. As part of that review it is considering many issues concerning AAT review, including the advantages and disadvantages of review by a general administrative tribunal as opposed to a specialist tribunal. The ARC is due to report by mid 1995.

A different mechanism for external review of FOI decisions that we have looked at closely is that available in Western Australian and Queensland — an Information Commissioner. Neither of those States has an AAT. Their Information Commissioners have powers similar to those of the Commonwealth's AAT, including the power to set aside a decision and substitute another. Where they differ, however, is in their ability to provide a *specialised* FOI dispute

resolution service. Their offices are staffed with FOI specialists and they emphasise negotiation and conciliation to settle disputes. Their procedures are very flexible and they can, as soon as an appeal is lodged, require the production of documents that are claimed to be exempt. They can review *any* decision of an agency or a Minister regarding an FOI application. The WA Information Commissioner also has a significant 'advice and awareness' function under the Act. She must ensure that members of the public are aware of the Act and their rights under it and that agencies are aware of their responsibilities under the Act and she must provide assistance to members of the public and agencies on matters relevant to the Act. To this end she produces a regular FOI Bulletin and provides agency training. FOI legislation and decisions can be accessed by the public through on-line facilities at her Office.

The idea of having a specialist person/office to deal with FOI matters is an attractive one and one that may be more likely than current arrangements to give FOI the attention it requires. The education role is particularly important — both for the public and for officers responsible for administering the Act. If an Information Commissioner role were to be established, the issue of location would arise. Should the Information Commissioner have a separate office? Should he or she share the office of someone like the Ombudsman? Could the role be performed within an existing office, for example, the Ombudsman's Office or the Privacy Commissioner's Office? These questions are addressed in the forthcoming discussion paper.

Relationship between the FOI Act and the Privacy Act. The FOI Act gives people a right to know what information the government holds about them and to have that information corrected if it is inaccurate or misleading. The *Privacy Act (*Information Privacy Principles 6 & 7), which did not exist when the FOI Act became law, also provides for access to, and amendment of, personal information held by the government (and, in some instances, private sector bodies). In practice that right is enforced under the FOI Act because the Privacy Commissioner has taken the view that because the FOI Act provides an effective mechanism for accessing and amending personal information he will focus on complaints regarding aspects of the Privacy Act that do not overlap with the FOI Act (for example, other Information Privacy Principles, credit reporting and tax file numbers). This 'overlap' does, however, give rise to a fundamental question: would access and amendment rights in respect of one's own personal information be better dealt with under a single Act and should that Act be the Privacy Act?

Possible advantages of such a restructure may include reducing confusion regarding personal information access rights and making a clear distinction between the democratic objectives and the privacy objectives of the FOI Act. It appears that a very large majority of current FOI requests are for the applicant's own personal information. It may be that there should be better links between the FOI Act and the Privacy Act, or access to personal information should be moved out of the FOI Act in to the Privacy Act. In other countries, for example, New Zealand, Canada and the United States, personal information is made accessible under a Privacy Act, not an FOI Act.

Extension of FOI to the private sector. Our terms of reference ask us to look at whether FOI should be extended to private sector bodies and Government Business Enterprises (GBEs). This issue has drawn a considerable degree of interest from the private sector.

There are, of course, already numerous examples of private sector bodies having to disclose information to the public. Take the prospectus and continuous disclosure requirements under the Corporations Law, for example. Except in respect of consumer credit information (see the Privacy Act), private sector organisations are not, however, obliged to provide documents to individuals on request. There are overseas precedents for imposing obligations on the private sector to disclose information to individuals on request. For example, the NZ Privacy Act 1993 gives people a right of access to personal information in the possession of any person or organisation in the public or private sector provided it is not held for personal, family or household affairs purposes. The biggest issue in this area is the justification for any extension. The private sector does not govern so it is hard to see that any of the so-called 'democratic objectives' of the FOI Act are relevant to private sector bodies. Private sector bodies do, however, make decisions, based on personal information they hold, that affect people. Should

individuals have the same rights to obtain that information and, if it is incorrect, misleading etc, to have it amended as they do in respect of information about them that is held by governments?

Falling somewhere between the public and private sectors are Government Business Enterprises (GBEs). Does public ownership justify retention of FOI obligations? Clearly, if FOI is extended to private sector organisations, GBEs should be made subject at least to the same degree. In a separate review, the ARC has considered whether the Commonwealth's administrative law package, which includes the FOI Act, should apply to GBEs. Its report, *Government Business Enterprises and Commonwealth Administrative Law* was tabled on 30 March 1995 and is being considered by the government. The ARC has decided to leave the question of FOI coverage of GBEs to be determined in the course of this review of the FOI Act.

***Specific issues for environmental lawyers*.** All of the issues I have described above are important for environmental lawyers but I draw two issues in particular to your attention.[109]

Routine disclosure of information to the general public: Information in which the whole community has an interest. In our issues paper we noted that the vast majority of applications under the FOI Act are for personal information relating to the applicant and the information sought will generally be of interest only to the applicant. Some types of information, however, are relevant and of interest to a wide section of the community, if not the whole community. Although there is nothing to prevent an agency from publishing such information, most agencies do not do so. Even if an agency provides information of that sort pursuant to the FOI Act, it discloses it only to the person who requested access. Unless that person distributes the information widely, it will not be disclosed to the general public. Gaining access under the FOI Act to the 'total picture' may be difficult and costly even for the applicant if the information is spread through many agencies because applications must be made to each particular agency. There are legal requirements in some places for routine disclosure such as under the *Environment Protection Act 1970* (Vic) which requires the Environment Protection Authority to compile a public register of contaminated sites.[110]

Information about the environment[111] and about possible threats to the environment[112] may be considered of interest and relevance to the entire community. Government held information of that nature can be sought under the FOI Act but several factors make this access unsatisfactory.[113] Information held by government is fragmented. The type of information available is often limited by the reporting and licensing requirements of government agencies. The question arises whether, if information is of community-wide relevance, it should be disclosed automatically to the general public. It has been suggested, for example, that information about the chemicals stored and used in the community is of such importance and concern to the general community that the public has a 'right to know' it and that it should, therefore, be routinely publicly available.[114] Without this information, it is claimed, people cannot take protective action against any risk or participate in debate or decisions about the assessment, use and storage of chemicals. Workers have a right-to-know

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110 The text in relation to these two issues is taken mainly from ALRC IP 12.

110 s 13.

111 eg, the management of rain forests and heritage sites.

112 eg, the storage and use of hazardous chemicals.

113 See N Gunningham & A Cornwall *Toxics and the community: legislating the right-to-know* Australian Centre for Environmental Law, ANU Canberra 1994. See para 14.18 for discussion of whether such information in the possession of the private sector should be made accessible.

115 eg PIAC *Toxic Maze Pt 1 & 2* International Business Communications Sydney 1991; Jane Fuller, PIAC report *Chemicals, Communication and the Community*, Sydney 1995, p 19.

about the chemicals in their workplace,[115] but the community at large has no similar right.[116] The Public Interest Advocacy Centre (PIAC) has proposed that legislation be introduced to require the disclosure of certain information about the properties, location, storage and management of chemicals so that the community can identify the presence, risks and hazards of chemicals. The proposed community right-to-know scheme, which would require both federal and State legislation, has the following elements:

*publicly accessible information about the assessment of chemicals;[117]

*a national database of information contained in Material Safety Data Sheets;

*a national database of the location and management of chemicals, including information about occupational health and safety, dangerous goods, environmental protection, public health and safety and agricultural chemicals; and

*pre-notification of the use of pesticides.[118]

In the issues paper we asked whether government held information about the environment and dangers to the environment should have to be disclosed to the general community routinely, that is, without the need for a request? If so, what information should have to be disclosed and in what way?

I counted 9 responses to this question. They came from interested individuals, law societies. the federal Department of Environment and the Territories and 2 other organisations. As far as I can ascertain there were none from specialist environmental organisations. Perhaps this was due to inadequate distribution of the paper by us. Whatever the cause, the issue has not struck a chord with many people.

Environmental information held by private sector bodies. As I explained above,[119] we were asked whether FOI legislation should be extended to the private sector. In our issues paper we noted that Australia has various State and federal statutory disclosure requirements for environmental information. We said that the FOI Act may provide access to some environmental information in the possession of government but that it is significantly limited in providing comprehensive access to environmental information in Australia. Information regarding public safety and the environment in the possession of a private sector body may be considered information that should be accessible by the public. We quoted Gunningham and Cornwall saying:

> *Access to information is an essential prerequisite for effective community input into environmental decision-making . . . The community is no longer prepared to accept, without question, that industry and government agencies are doing what is best in the public interest.*[120]

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115 This right derives from the contractual relationship between an employer and employee and the general duty of care owed by an employer to employees. At the State level, there are minimal statutory provisions which establish general rights and obligations: see PIAC *Toxic Maze Pt 2* International Business Communications Sydney 1991, 71.

116 Both America and Canada have community right-to-know legislation.

117 Assessment of chemicals, which is a responsibility of the federal government, is carried out by a number of bodies all of which have different procedures and policies on access to assessment information.

118 PIAC report n 9 above p 22.

120. p 4-5.

121 N Gunningham & A Cornwall *Toxics and the community: legislating the right to know* Australian Centre for Environmental Law, ANU Canberra 1994, 1.

We noted the public benefits of the US 'need to know' legislation

> *[A]s a result of Right to Know legislation the community is producing scores of reports that identify toxic pollution problems and advocate solutions; negotiating directly with industry to change industrial practices; compelling enforcement of existing regulation; suing to bolster compliance and to establish pollution prevention plans; advocating passage of State toxics use reduction laws and illustrating the potential off-site consequences of sudden chemical releases.*[121]

We reported that some parts of the private sector have acknowledged the need to provide information that is of concern to the public and cited the example of the Plastics and Chemical Industry Association community right-to-know code of practice.[122] We asked whether documents that are in the possession of a private sector body and that relate to public safety and environmental information and other identified matters should be subject to FOI.

I counted 32 responses to this question. Most focussed on access to medical records which was another matter we identified. When preparing this paper I found 7 submissions that discussed environmental information. They appear to be evenly divided on whether environmental information is a special category of private sector information. Some thought there was sufficient regulation of environmental information already. Some thought FOI should be covered by environmental legislation and not the FOI Act. As far as I can ascertain there were no submissions from environmental groups although the useful and constructive submission from the federal Department of Environment and Territories refers to the use of FOI by environmental groups.

Costs Indemnity Rule

In June 1994 the Australian Law Reform Commission (ALRC) was asked by the federal Attorney-General to determine whether any changes should be made to the ways in which costs are awarded in proceedings before courts and tribunals exercising federal jurisdiction. This inquiry is to focus on the rule that the unsuccessful party to proceedings should pay the legal costs of the successful party. This is known as the 'costs indemnity rule'.

We define the costs allocation rules as the laws and practices that determine how courts and tribunals apportion the legal costs incurred by the parties to the proceedings that come before them. These legal costs include the costs of the parties' lawyers and of such things as witness expenses, expert reports, interpreters, photocopying, travelling expenses, court and tribunal charges and transcript fees. In Australia the general costs allocation rule is that the loser pays the winner's legal costs in addition to his or her own costs (the costs indemnity rule).

Costs allocation rules and access to justice. The Commission's inquiry arose from a recommendation by the Access to Justice Advisory Committee in its report *Access to justice:* an action plan. The Committee was concerned that the costs indemnity rule may adversely affect access to justice by deterring people from pursuing meritorious cases because of the risk of having to pay both their own costs as well as a portion of the other party's costs if they lose.

The costs indemnity rule can apparently be a factor in deterring litigants in environmental cases. Emma Armson argues that a widening of the rules of standing will not necessarily lead

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122 id 10 quoting P Adams & M Ruchel *Unlocking the factory door* Report on the Coode Island Review Panel by Hazardous Materials Action Group Melbourne, Victoria 1992, 17.

123 The Code requires member companies to supply to members of the community on request a wide range of information relating to health, safety and environmental data and the performanc of the company including licensed and accidental emissions to air, land or water, emergency response programs, information on health monitoring, inputs, processes, outputs and storage at members' premises, Material Safety Data Sheets and waste treatment and disposal. Exceptions include personal details of employees, commercially confidential i nformation, trade secrets and information which could endang r safety if used by extortionists.

to a flood of litigation because the amount of time and effort involved in the litigation process and the cost involved is a deterrent. [123] She cites a 1985 case the Full Court of the Victorian Supreme Court awarded costs amounting to approximately $700,000 to $750,000 against plaintiffs who were refused discretionary relief despite the fact that it had been proved that there was a breach of the *Town and Country Planning Act* (Vic) and that detriment had been suffered.

The ALRC's review process. In October 1994 the Commission released an issues paper *Who should pay? A review of the litigation costs rules* (ALRC IP 13). The paper formed the basis of consultations and public hearings held around Australia. We have received over one hundred written submissions on the matters raised in the paper including a useful submission from the Environmental Defenders Office of NSW (EDO) which focussed on environmental law proceedings and the costs allocation rules. The Environmental Law Community Advisory Service Inc. endorsed the EDO submission. A few submissions mentioned environmental law proceedings as an example of public interest litigation.[124] Research has included an examination of the laws and practices concerning the allocation of costs in each type of case that comes before federal, State and Territory courts and tribunals and the types of litigation and profiles of litigants to build a detailed picture of actual litigation practice. We have met with representatives of courts, tribunals, the Law Council of Australia, law societies, bar associations, legal aid commissions, community legal centres and national groups representing business and consumers. We have considered a range of economic analyses on the impact of the rule on the decision to file a claim, the amount spent on litigation and the decision to settle or litigate once a claim is filed. However, the various assumptions underlying these analyses and the absence of empirical data means these conclusions are of limited value.

A need for more sophisticated rules. It is clear from the work to date that the costs allocation rules need to be formulated more precisely. They must take into account aspects of Australian legal practice and conditions that have not been systematically considered. There are a number of areas where the current costs allocation rules appear to be contributing to injustice in litigation, making negotiations or resolution of a dispute more difficult, costly or open to abuse. For example, the risk of an adverse costs order can affect the ability of a person to properly present their case or to negotiate a fair settlement, especially where they may lose their house, car or livelihood if required to pay the other party's costs.

Formulating costs allocation rules. Costs allocation rules should be formulated in light of objectives that help define the contribution the rules may make to an accessible, efficient and just legal system. The rules should also take into account the reality of who actually pays for litigation and who actually uses courts and tribunals in Australia. The Commission's draft recommendations will identify these principles and use them to develop costs allocation rules for particular areas of litigation.

Timetable. In a few weeks a paper will be released setting out a number of draft recommendations. Again, I should be happy to take the names of anyone who would like to receive a copy free of charge. We will be inviting written comments on these recommendations and conducting consultations in June. The deadline for comments is 30 June 1995. A copy of the draft recommendations will be available from the ALRC.

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124 Emma Armson "Standing up for the environment" (1991) 16(4) *Legal Service Bulletin* 174, 177 n.3. Justice T Toohey has apparently agreed with Ms Armson's view. In a paper delivered in 1989 he said:

" The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the court room". Cited by Sharon Christensen n 32 below p 326.

125 g, Submissions from Stephen Keim, AFCO and PIAC.

Standing

In February 1977 the Commission was given a reference relating to the access of citizens to the courts. The reference required the Commission to report on the existing law relating to the standing of persons to sue in Federal and other courts exercising federal jurisdiction or in courts exercising jurisdiction under any law of any Territory and class actions in such courts. The Commission dealt with the reference in two reports.

Grouped Proceedings

The class actions report, *Grouped Proceedings in the Federal Court* (ALRC 46), was tabled in federal Parliament in December 1988.

The Commission's approach In carrying out its work on this reference the Commission consulted widely with consumer groups, interested individuals and other relevant organisations. Its discussion paper attracted 130 submissions and it conducted public hearings to enable the public to make further submissions on the proposals. The Commission also looked closely at the way the issue was dealt with in Canada, England and the United States. Finally draft legislation was distributed and detailed discussion held with business groups, consultants, judges and other officials.

Key Issues The Commission identified the key issues as being:

* reducing the cost of court proceedings to the individual;

* enhancing access by the individual to legal remedies;

* promoting efficiency in the use of court resources;

* making the law more enforceable and effective.

The Commission identified that the high cost of legal proceedings effectively prevented individuals and businesses who had suffered significant but small losses from claiming compensation for those losses. It stated that allowing a number of related claims to be dealt with in a single proceeding would not only reduce costs for the benefit of both sides but would ensure the most efficient use of legal resources.

Existing methods of grouping proceedings were analysed and found to have two major difficulties;

* Representative proceedings where one person commenced proceedings on behalf of other persons who have the same interest in the proceedings were restricted to seeking an injunction or declaration. If the parties wished to claim damages then individual actions had to be instituted.

* Other multiple party procedures such as joinder and consolidation allowed damages to be claimed but required the consent of the parties. Effectively those procedures represented an "opt in" process whereby all the relevant parties must be identified and consent to participation in the proceedings.

The Commission concluded that a new grouping procedure would have a number of advantages. It would:

* reduce the cost of enforcing legal remedies in cases of multiple wrongdoing

* enable people who suffer loss as a result of wrongdoing by a single respondent to enforce their legal rights in a cost effective manner

* people who might be ignorant of their rights could be assisted to a remedy if a member of a group of people all similarly effected instituted proceedings on behalf of the group.

* the grouping of a number of cases on the same issue could result in consistency of determinations

Recommendations

Accordingly the Commission recommended that a new method of grouping proceedings be adopted. This method had the following characteristics.

* ***Bundling.***
The procedure involved each person with a relevant and related claim being made a party to a separate proceeding and then bundling those proceedings together and having them conducted by one member of the group known as the principal applicant whose proceeding is known as the principal proceeding.

* ***No consent necessary .***
It was not seen as necessary for group members to consent to the commencement of their proceeding but once notified of their proceeding they had the right to "opt out" by either discontinuing their proceeding or choosing to conduct it themselves as an individual proceeding.

* ***Minimum number.***
To commence group proceedings it was suggested there should be at least seven group members plus the principal applicant although it would not be necessary to identify the grouped members by name.

* ***Similar Material Facts.***
The Commission suggested that although group members proceedings need not all be seeking the same type of relief, the material facts giving rise to each group member 's claim for relief must be the same as or similar or related to the material facts giving rise to the claim for relief in the principal proceeding. In addition there should be one question of law or fact that is common between a group member's proceedings and the principal proceeding.

* ***Damages.***
The Commission saw the grouped proceedings as including claims for damages, the amount of which may vary from person to person.

* ***Cost effectiveness.***
Where a court is unable to deal with grouped claims economically as compared to individual proceedings, because of diverse or complex claims the proceedings could be separated so that each member of the group is responsible for conducting their own claim.

* ***Impracticability of distribution.***
If the costs that the respondent would have to bear in relation to identifying group members and distributing to them any monetary relief would be excessive having regard to the total amount in issue, the proceedings should not be grouped. To preserve the right of the individual group members to conduct or to bring their own proceedings, the court should be able to separate, stay or dismiss any of the proceedings without prejudice to any further claim by group members.

* ***Conduct of proceedings.***
The Commission envisaged the principal applicant would have the conduct of group member's proceedings and group members would be bound by such steps. It was suggested that where individual issues arise the Court is to give group members the

conduct of their proceedings as far as they relate to the individual issues. It was thought that notice of commencement of proceedings and of other circumstances in proceedings could be given to group members and notice by press advertisement would be sufficient in most cases. The court's approval of settlement of case or acceptance of money paid into court or discontinuance of proceedings was seen as being required

* ***Costs.***
The Commission suggested the existing costs rule that the loser pays the winner's costs would be retained. It was envisaged that the rules would need to be amended to ensure that group members are immune from paying the respondent costs unless they had conducted their own proceedings.

Principal applicants were to be encouraged to bring proceedings though by allowing contingency fees to arranged with solicitors and by the establishment of a special fund to finance grouped proceedings.

* ***Scope of proposal.***
The Commission's recommendations related only to proceedings in the Federal Court and covered: actions under federal laws including the Trade Practices Act, administrative law Acts and Acts covering industrial and intellectual property; proceedings against the Commonwealth; and matters under the laws of the Australian Capital Territory.

* ***Implementation.***
The Federal Government has implemented the Commission's recommendations with some modification by way of the *Federal Court (Amendment) Act* 1991 Cth which enables a person to bring a proceeding on behalf of a group of persons where their claims are related and have common issues. The proceedings are of an opt out nature so that members of a group do not have to give their written consent prior to the proceedings commencing, but all members of a group will be bound by the outcome of a proceeding unless they opt out of the proceeding. These provisions are relatively untested but are apparently thought to be working well. I understand there is a suggestion that States should adopt similar rules.

* ***Standing to Sue in Public Interest Litigation***
The Commission's report *Standing in Public Interest Litigation* (ALRC 27) was tabled in November 1985. A reprint of that report is now available from the Commission.

* ***Background to report.*** The Commission defined the law of standing as the set of rules that determine whether a person who starts legal proceedings is a proper person to do so. It saw the law of standing as confused, unclear and restrictive. It pointed to the different tests of standing, depending on whether the plaintiff is seeking a declaration, an injunction or some other order from the court. It described the effect of these different rules as being that the plaintiff generally has to demonstrate some special connection with the subject matter of the proceedings—namely, that he or she is specially affected, or has a special interest, or has an interest going beyond the interests of ordinary members of the public. The plaintiff who has no such interest may approach an Attorney-General for a consent, called a fiat, which will allow him or her to take the proceedings as 'relator', usually in the Attorney-General's name. But fiats are often not granted and obtaining them may cause delay.

* ***Commonwealth reform.***
The Commission concluded that the law of standing should be reformed for some classes of actions in federal courts, Territory courts and State courts exercising federal jurisdiction. These are:

  * any proceeding in any court, to the extent that the relief sought in the proceeding is any of the following, namely, a declaration, an injunction or a 'prerogative writ', (certiorari, prohibition, mandamus, habeas corpus or an information of quo warranto), if the relief is sought:

* in constitutional litigation;
* in respect of a matter arising under any Commonwealth or Territory statute (other than a Northern Territory or Norfolk Island statute); or

* against the Commonwealth, a person being sued on behalf of the Commonwealth or an officer of the Commonwealth;

* a proceeding in any court (other than a court applying Northern Territory or Norfolk Island law), to the extent that the relief sought is an injunction or a declaration for which the Commonwealth Attorney-General could sue; and

* a proceeding in any court, seeking relief provided for by Commonwealth or Territory Legislation (other than Legislation of the Northern Territory or Norfolk Island), where the relief is similar in function to the types of relief just described.

* ***An 'open door', but with a 'pest screen'.***
The Commission recommended that the laws of standing in public interest litigation be broadened and unified. It suggested that any person should have standing to commence public interest litigation within the range outlined above, unless it could be shown that, by doing so, the person is 'merely meddling'. This criterion should be elaborated in the following respects.

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

* *Ability to represent the public interest:* Standing should be denied to a plaintiff who has no personal stake in the subject-matter of the litigation *and* who clearly cannot represent the public interest adequately.

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

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

* *Standing normally not a preliminary matter:* The question of standing should not be determined as a preliminary or interlocutory matter unless the court considers it desirable to do so for special reasons in the particular circumstances of the case. The normal approach should be to reserve standing for determination along with the merits.

* ***Related matters.***
The Commission also made recommendations about a number of subsidiary matters including intervention;[125], amicus curiae;[126] costs,*legal aid; and maintenance.

* ***Criminal proceedings***
The Commission recommended that the existing power to commence a private prosecution should continue. Any person should be able to institute a private prosecution, subject to consent requirements in the relevant statute and the existing powers of the Attorney-General and the Director of Public Prosecutions to intervene

and/or terminate.

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126 Se also below p 17.

127 See also below p 17-18.

There was concern that after committal proceedings (which may have been instituted privately) have established that there is a *prima facie* case against an alleged offender, the matter may go no further under existing law simply because the Attorney-General and the Director of Public Prosecutions take no action. The Commission suggested that any person should have the right to lay an indictment against an accused person in respect of any offence or offences for which the accused has been committed for trial. This right should be subject to the existing powers of the Attorney-General and the Director of Public Prosecutions to intervene and/or terminate. It should not be exercisable until the expiry of three months after the order of committal. If the offence in question is one for which the consent of the Attorney-General or another official is required, this would have had to be obtained before instigation of the committal proceedings; hence, it would be unnecessary to require that a second consent be obtained. It was not recommended that the leave of the court be required for a private indictment, or that courts should have the power to review exercises of the power to prosecute privately or of a Crown law officer's powers to intervene and terminate.

A further safeguard against undesirable private prosecutions was furnished by provisions requiring official consent to prosecutions for specific offences. The Commission considered that while these may be desirable in areas of acute sensitivity, the other arguments put forward in support of them (for example, that they make for consistency in prosecution policy and that they prevent frivolous or vexatious prosecutions) did not justify their continuance. Existing general restrictions on private prosecution are adequate in the majority of cases. Accordingly, the Commission recommended a review be undertaken of provisions in existing Commonwealth and Territory legislation which require the consent of the Attorney-General or some other public officer to be obtained before a prosecution is initiated, with a view to ensuring that such limitations on the right of private prosecution are consistent and no greater than is necessary. It argued consent requirements should not be included in new legislation unless it deals with highly sensitive matters (such as defence or national security) and inclusion is justified in all the circumstances.

The Commission recommendations applied to private prosecutions for offences under any law of the Commonwealth or any law of a Territory other than the Northern Territory and Norfolk Island.

Implementation The High Court has held that reform of the law of standing cannot come from the judiciary. It saw it as up to Parliament to reform the law. In *Australian Conservation Foundation Inc v The Commonwealth of Australia and Ors* [127] the majority found that it was the role of parliament, and not the judiciary, to abrogate settled law. Stephen and Mason JJ gave as a further reason the fact that the government was at that time seeking recommendations from the Australian Law Reform Commission on the standing rules.[128]

In *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, although it was not stated explicitly, it seems to have been in the judges minds that legal policy work on the law of standing was occurring at the ALRC. For example, Justice Stephen says "Moreover it may be that any general development of the law relating to standing to sue should be left to legislative action, prompted by law reform agencies"[129] and Justice Murphy refers to the Commission's paper "Standing: Public Interest Suits"(ALRC DP 4 1978).[130]
The standing provisions in the Commonwealth *Administrative Decisions (Judicial Review) Act* have been given a fairly liberal interpretation in the Federal Court. [131] The Queensland *ADJR Act,* which is based on a report of the Electoral and Administrative Review

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128 *(1979) 54 ALJR 176.*

129 Id p 185, 190.

130 p 41.

131. p 44.

132 eg, *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70 (ACF No.2); *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 71 ALR 73.

Commission, has similar provisions but they were not so broadly interpreted by the court in *Friends of Castle Hill Association Inc v The Queensland Heritage Council and Ors.*[132]

There has not been a government response to the Commission's 1985 report. The 1994 Report of the Access to Justice Advisory Committee said the recommendations appear to be sound and recommended their implementation. They thought they had a sensible balance between protecting the courts from wasting time with baseless actions while allowing individuals and groups with a real interest in a matter to be heard by the courts.

The position in the States may be somewhat better than at the Commonwealth level. I note that under the *Land and Environment Court Act* 1979 (NSW)[133] any person may bring proceedings for an order for breach of the Act whether or not any right of that person has been or may be infringed.[134] It has recently been said that 'fourteen years of open standing provisions in the Land and Environment Court has produced little more than a modest flow barely wetting the wellies'.[135]In Queensland sections of the *Local Government (Planning and Environment) Act* 1990[136]remove the need for the Court to consider if the plaintiff has standing before considering the merits of the application although it has been said that they will still consider the standing or special interests of the plaintiff under the guise of discretion.[137]

The issue of standing is important in relation to the development in the High Court of a recognition that judging should take account of community values and standards.[138] The question is how they determine those values.[139] In 1993/4 the Commission worked on a reference on Equality. It produced three reports *Equality before the Law: Women's Access to the Legal System* (ALRC 67) 1994; *Equality before the Law: Justice for Women* (ALRC 69(1)) 1994; *Equality before the Law: Women's Equality* (ALRC 69(2)) 1994. An important issue that emerged was the need for women and minority groups experience to be brought before the court. The following extract is taken from ALRC 69(2):

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

What is 'the public interest'? There is no definitive formulation of what constitutes 'the public interest'. Public interest litigation is any proceeding that, regardless of the private rights involved, also involves issues that are important to the public at large or to a section of the public.[140] There is a public interest in classifying uncertain laws and removing manifest unfairness from law. However, the public interest is not a unitary or constant thing. It is any interest which is worth protecting for social and economic reasons. Accordingly, minority or

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133 Unreported. See Stephen Keim and Joanne Bragg "Standing on Castle Hill" (1994) 19(2) *Alternative Law Journal 68.*

134 s 123(1).

134 N.S.W. *Land and Environment Court Act* 1979 (NSW) s 123 (1).

135 *Oshlack v Richmond River* (1994) 82 LGERA 236, 245 Stein J.

137 · sections 2.23 and 2.24.

138 Sharon Christensen "The Discretion to Grant Third Party Applications in the Planning and Environment Court: Is the Chancellor's Foot Still the Measure?" (1994) 24(4) *Queensland Law Society Journal* 319, 333.

139 Paul Finn "Of Power and the People: Ends and Methods in Australian Judge-Made Law" (1994) 1 *The Judicial Review* 255; Sue Tongue "The Courts as Interpreters of Community Values" *The Courts and Parliament* Papers from the 16th annual conference, Australasian Study of Parliament Group, Darwin 1994.

140 See discussion by Jeffrey Barnes of Justice Davies decision in the ACT NO.2 case (referred to in note 18 above) "Standing: Environmental Groups Get the Green Light" (1990) 18(5) *Australian Business Law Review* 338, 342.

140 For furth r discussion of what may constitute public interest litigation see ALRC 27 para 30-58.

sectional interests are considered to be public interest causes because modern, democratic society is supposed to protect minorities. Courts have a role in considering their views.[141] Public interest litigation helps the law to serve a wide range of groups.

What is a 'special interest'? The nature of a 'special interest' is uncertain and varies according to the circumstances of the case.[142] It is at least an interest going beyond the interests of ordinary members of the public. It is not sufficient that the person has a genuine concern about, say, upholding a particular law. The person must demonstrate a special connection with the subject matter of the case. Generally, the interest does not have to be a legal interest or involve property or possessory rights.[143] However, it has to be more than a 'mere intellectual or emotional concern'.[144] It is unclear to what extent the plaintiff's interest must exceed that of other people. One view is that a special interest must be more than the interest possessed by 'a diverse group of Australians associated by some common opinion on some matter of social policy which might equally concern any other Australian'.[145] Another view is that '[i]t is enough that the plaintiff's interest, even if many others have it, is not the same as that of members of the public generally'.[146]

Uncertainty for equality advocates. An advocate for women's interests seeking to establish that a federal law violates the equality principle[147] may have standing if the second interpretation of the term 'special interest' was favoured, but would be unlikely to have standing on the first interpretation. It is unsatisfactory to have the scope of this important representative role uncertain.

The law relating to intervenors and friends of the court

There are two well established procedures by which persons other than the original parties may participate in a case: either as an intervenor or as a friend of the court. Each has advantages and disadvantages for the public interest litigant. The origin of the friend of the court is quite different from that of the intervenor. The court has an inherent power to appoint a friend of the court to assist it in the administration of justice.[148] The court has no inherent power to allow the participation of an intervenor.[149] An intervenor can take a major role in litigation and in the adversarial system it is the parties' right to control the litigation. The power to allow intervention only arises by statute or by court rules.

Current law: participation by intervenors

A right to intervene in litigation may be available as of right or permitted by leave of the court. It may apply to all issues before the court or it may be limited to certain issues.[150] An intervenor becomes a party to the proceedings, and has the duties and privileges of a plaintiff

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141 Toohey J 'A government of laws, and not of men' *Speech — Conference on constitutional change in the 1990's* Darwin 4-6 October 1990.

142 For discussion of what constitutes a 'special interest' for the purposes of standing law, see *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27; *Australian Conservation Foundation Inc. v The Commonwealth* (1980) 146 CLR 493.

38 *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27, 42 & 44.

144 *Australian Conservation Foundation Inc. v Commonwealth* (1980) 146 CLR 493, 530.

145 *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27, 37 Gibbs CJ.

146i d, 44 Murphy J.

147 See ch 3 (ALRC 69 (2)). The Commission recommended an Equality Act for women.

148 *US Tobacco Co v Minister for Consumer Affairs and others* (1988) 20 FCR 520, 534.

149 *Corporate Affairs Commissioner v Bradley* [1974] 1 NSWLR 391, 397-398.

150 *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391, 396-403.

or a defendant. That is, the intervenor may file pleadings, lead evidence, cross examine witnesses, present arguments and appeal against decisions. An order for costs may be made against or in favour of an intervenor. Intervention in federal courts and tribunals is provided for in a number of statutory provisions.[151] These Acts grant a broad discretion to the court or tribunal to grant leave to an intervenor to appear.[152]

Current law: participation as a friend of the court

Friend of the court. A friend of the court is a creation of common law and has not been given statutory recognition in Australia. The role of a friend of the court has traditionally been 'confined to assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked'.[153] For instance in *Bropho v Tickner*[154] the Ballaruk people sought to be joined as a party before the Federal Court. Justice Lee refused the application for joinder but gave leave to a representative of this group of Aboriginal people to appear as a friend of the court. In recent years in Canada and the United States friends of the court have been increasingly permitted to perform an interest advocacy function, particularly in public interest litigation.[155]

Not intervenors. In Australia friends of the court are not parties. They are usually limited to the presentation of an argument by a written brief although at the court's discretion an oral argument may be permitted. Friends of the court may not file pleadings, call or examine witnesses or lodge an appeal. They may be permitted to tender evidence, usually for the sake of completeness but not where the evidence is complex and controversial.[156] The main advantage of participation as a friend of the court is that argument in the form of written briefs, with the flexibility to permit oral argument, need not take up court time and increase the parties' costs. Furthermore, a friend of the court is not subject to an adverse costs order. For these reasons, friend of the court status has been seen as useful for public interest groups and was particularly favoured in submissions as a means of presenting womens' perspectives to courts.[157]

Within the inherent power of the court. The court has a virtually unlimited discretion to allow a friend of the court to take part in proceedings provided that the interests of the parties are not prejudiced. The practice has traditionally been rare in Australian courts although there are some important exceptions.[158] The bodies which have been granted friend of the court

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151 eg *Administrative Decisions (Judicial Review) Act* (Cth) s 12; *Family Law Act 1975* (Cth) s 91, 92; *Human Rights & Equal Opportunity Act 1986* (Cth) s 11(1)(o); *Industrial Relations Act 1988* (Cth) s 43, 59; *Judiciary Act 1903* (Cth) s 78A; *Sex Discrimination Act 1984* (Cth) s 48(1)(gb).

152 The High Court and Federal Court rules do not provide specifically for intervention and applications by third parties to i ntervene are made pursuant to rules relating to joinder of actions: ALRC 27, para 275. The rules governing joinder are: Federal Court Rules O 6 r8(1); High Court Rules O 19 r1. When using these rules, the difference between joinder and intervention is the *purpose* of the appearance. A person is joined for the purpose of representing a joint interest with one of the parties, but a person intervenes to represent a different interest from that of the parties.

153 *Bropho v Tickner* (1993) 40 FCR 165, 172.

154i d, 172.

155S ee D Scriven & P Muldoon 'Intervention as friend of the court: Rule 13 of the Ontario Rules of Civil Procedure' (1985) 6 *Advocates Quarterly* 448 regarding the evolution of the concept of a friend of the court.

156 *Bropho v Tickner* (1993) 40 FCR 165, 172-173.

157e g. N Roxon & K Walker *Submission 175;* J Blokland *Submission 347;* Ministry for the Status and Advancement of Women NSW *Submission 350;* National Conference of Community Legal Centres *Submission 541;* Women Advocates for Gender Equity, Sydney *Submission 547.*

158e g in *Bropho v Tickner* (1993) 40 FCR 165. In *United States Tobacco Company v Minister for Consumer Affairs* (1988) 19 FCR 184; (1988) 20 FCR 520 the Australian Federation of Consumer Organisations Inc (AFCO) was granted lve to appear as amicus curiae before the Federal Court at first instance; on appeal to the Full Court of the Federal Court AFCO was joined as a party. In *R v Murphy* (1986) 64 ALR 498 the President of the Senate was granted l ave to appear as an amicus curiae before the Supreme Court of New South Wales. In *Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dams case) the Tasmanian Wilderness Society

status in courts exercising federal jurisdiction have tended to be government representatives or well established public interest groups.

Recent refusal of application. As the Commission was completing this report an application was made to the High Court by a public interest group for leave to intervene as friend of the court. The case involves the validity of sections of the *Racial Discrimination Act 1975* (Cth)[159] that provide a scheme for the registration of determinations of the Human Rights and Equal Opportunity Commission in the Federal Court.[160] There are similar schemes in the *Sex Discrimination Act 1984* (Cth) and *Disability Discrimination Act 1992* (Cth). The registration of a determination in a race discrimination case was challenged. The Public Interest Advocacy Centre (PIAC), an independent, non-profit legal and policy centre with considerable experience in discrimination cases, applied to appear as a friend of the court. PIAC had support for its application from four major community organisations with an interest in the issue, including the Women's Electoral Lobby and the Association of Non-English Speaking Background Women of Australia. The High Court denied PIAC leave to intervene.

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

Contrast with Canadian approach. The High Court's denial of leave can be contrasted with the approach taken by the Canadian Supreme Court. It granted leave to LEAF to intervene in the *Andrew's* case, which involved a claim of denial of equality on the analagous ground of citizenship.[161]

In the *Brandy* case the High Court clearly saw the Solicitor-General, representing the Commonwealth's interest, as a sufficient exponent of the public interest. Similarly, the possibility of an individual seeking the consent or 'fiat' of the Attorney-General to an action has been seen as overcoming the standing issue. It has been suggested that an independent body could adopt the role currently exercised by the Attorney-General in public interest litigation.[162]

I also quote from ALRC 69(1) in relation to a case where the court did not have the women's perspective brought before it.

The Dietrich decision. In 1992 the High Court held in *Dietrich v R*[163] that an accused person has a fundamental right to a fair trial and that, other than in exceptional circumstances, if an indigent person faces trial on a serious criminal charge and is unrepresented due to no fault of his or her own, the trial should be adjourned or stayed until legal representation is available. The Court said

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was granted leave to appear as amicus curiae before the High Court. In *HREOC v Mt Isa Mines* (1993) 46 FCR 301 the Public Interest Advocacy Centre was granted leave to appear as amicus curiae before the Full Court of the Federal Court. PIAC was denied leave in *Brandy v HREOC and Castan and Bell* No C3 of 1994, High Court of Australia: See para 7.18.

159 *Racial Discrimination Act 1975* (Cth) s 25ZAA, 25ZAB, 25ZAC.

160 *Brandy v HREOC & Castan & Bell* No C3 of 1994, High Court of Australia.

161 *Law Society of British Columbia et al v Andrews et al* [1989] 1 SCR 143.

57 Armson n 18 above p 176 citing GDS Taylor "Rights of Standing in Environmental Matters" in Seminar Proceedings *Environmental Law the Australian Government's Role.*

163 (1992) 177 CLR 292.

No argument was put to the court that recognition of such a right for the provision of counsel at public expense would impose an unsustainable financial burden on government. In these circumstances, we should proceed on the footing that if a trial judge were to grant an adjournment to an unrepresented accused on the ground that the accused's trial is likely to be unfair without representation, *that approach is not likely to impose a substantial financial burden on government and it mayrequire no more than a re-ordering of the priorities according to which legal aid funds are presently allocated.*[164]

The High .Court discussed extensively the basis for considering representation in serious criminal matters as essential for a fair trial. This discussion made no reference to the fact that overwhelmingly men commit more crimes (including serious crimes) than women. It did not consider other areas of law in which legal aid might be provided.[165] No one put the case that women might be disadvantaged by the decision. Given the finite resources available for legal aid, an intervener on behalf of women may have made a significant difference to the decision, or the way in which the reasons for the decision were framed.

The effect of the Dietrich decision. No data is available as to whether the *Dietrich* decision has increased the priority given to criminal matters. However, the decision clearly endorses the priority for criminal matters and may even exacerbate it. In some States LACs have already been forced on several occasions to fund criminal matters as a result of the decision. In Victoria the *Crimes Act* 1958 has been amended in response to *Dietrich*, to provide that a court can order the LAC of Victoria to provide assistance to an indigent accused person if it is satisfied before or during a trial that it will not be able to ensure that the accused will receive a fair trial without legal representation and that the accused person is unable to afford the full cost of legal representation from a private solicitor.[166] This section applies despite anything laid down in the Victorian *Legal Aid Commission Act* 1978.[167] The *Dietrich* decision may also make it difficult to change legal aid priorities. The Directors of the LACs of Australia told the Commission that since the *Dietrich* case 'it is more difficult to contemplate channelling resources from criminal law to civil and family law'.[168]

I included these quite lengthy extracts from the Equality final report because they demonstrate the use that could be made of intervenors and amicus in bringing women's experience before the courts. Useful comparisons might be made with litigants in environmental cases.

In ALRC 69(2) the Commission recommended that the provisions proposed in ALRC 27 on standing to initiate public interest litigation should be enacted and the provisions proposed in ALRC 27 regarding intervenors and friends of the court should be implemented to, in effect, codify the circumstances in which the court would grant leave to intervene or to participate as a friend of the court. It recommended that the federal parliament enact provisions to guide courts in the exercise of their discretion regarding participation by intervenors and friends of the court for the purposes of promoting women's right to equality in any court or tribunal exercising federal jurisdiction. It gave specific suggestions on the matters that should be included in the legislation.[169] The Commission also recommended the establishment of a

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164 i d at 312 per Mason CJ and McHugh J (emphasis added).

165 T he dissenting judges (Brennan and Dawson JJ) consider the question of whether the court (as opposed to the l egislature or the executive) is really the most appropriate body to make decisions which require legal aid bodies to allocate their resources in particular ways: id at 317-321 and 350.

166 s 27 *Crimes (Criminal Trials) Act* 1993 (Vic) inserted s 360A into the *Crimes Act 1958* (Vic). For a discussion see J Lynch 'Section 360A and the Dietrich dilemma' (1993) 67(9) *Law Institute Journal* 838.

167 s 360A(3) *Crimes Act 1958* (Vic).

168 Th Directors of the Legal Aid Commissions of Australia *Submission 602.*

170 R comm ndations 7.1 and 7.2.

National Women's Justice Program. One part of that Program would be the funding of test case litigation.[170]
I also note that Justice Wilcox has written that if there were an Australian Charter of Rights relaxation of the standing rules would increase the opportunities for access to the courts to test Charter points. He also noted that the cost of litigation could prevent people, and particularly public interest groups, from undertaking Charter litigation. He suggested that the government emulate the Canadian model of providing litigation funds.[171]

Other Commission work

I have concentrated on the reference work of the Commission in this paper but I shall conclude by briefly mentioning other work on foot. We are celebrating our 20th Anniversary this year by holding a conference on law reform in Canberra on 23 August. Details of the speakers and venue will be available shortly. I should be happy to advise you if you give me your name and address. We are also holding a national essay competition for undergraduate students at Australian universities on the topic of the major issues of law reform in the next ten years. I hope that if you are working at a university you will see the notice advertising the competition. A special edition of our magazine, *Reform,* will soon be released and we are also preparing two volumes of summaries of all our reports and a history of the Commission. Again, if you would like to receive details please give me your name and address. By the end of the year we hope to have all our reports on CD Rom, and we are exploring the possibility of having our reports available on a computer network. Our slogan for this year is "1975-1995 A score and more - reflecting Australia in law".

171 ALRC 67 para 4.34.

172 *An Australian Charter of Rights* Law Book, 1993 p 244-245.