

Equality Before The Law: Mission Impossible? A Review of the Australian Law Reform Commission's Report *Equality Before The Law*

BRONWYN NAYLOR*

In August 1992 Mr Justice Bollen of the South Australian Supreme Court notoriously directed a jury hearing a case alleging rape in marriage, on the issue of consent, that a husband could properly try to persuade his wife to have intercourse by 'a measure of rougher than usual handling'. The case went on appeal in 1993,¹ and led to a major public debate on judicial attitudes.²

The negative media coverage triggered various government reactions. A Senate Committee was established in May 1993 specifically to report on 'Gender Bias and the Judiciary'. Projects on legal gender bias and the law were established in Western Australia and New South Wales, and when the Federal Government presented its New National Agenda for Women in February 1993 as part of its 1993 election campaign it also announced a reference on the question of women's equality before the law to the Australian Law Reform Commission (ALRC). The ALRC's Final Reports are the primary focus of this review.

The 1990s have in fact seen an unprecedented number of reports and initiatives around the issue of women and justice. The ALRC in its Final Report commented that it had been 'both catalyst and beneficiary' in this high level of activity.³ In 1992, for instance, the House of Representatives Standing Committee on Legal and Constitutional Affairs published *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*, a wide-ranging examination of the extent to which women could be

* Senior Lecturer, Law Faculty, Monash University. I would like to thank, for helpful advice and comment, Hilary Charlesworth, Beth Gaze, Jenny Morgan, Marcia Neave, Peter Sallman, Donna Stuart, Ania Wilczynski, several officers of the Attorney-General's Department, and an anonymous reviewer.

¹ The Court of Criminal Appeal held that the direction as to consent was wrong in law: *Case Stated by DPP (No 1 of 1993)* (1993) 66 ACrimR 259.

² Other comments also received media publicity, in particular Mr Justice O'Bryan's comment that a young rape victim was 'not traumatised' by the rape because she was unconscious (10/11/92; see The Parliament of the Commonwealth of Australia, *Gender Bias and the Judiciary*, Report by the Senate Standing Committee on Legal and Constitutional Affairs, 1994, 7), and Judge Bland's observation that 'no often subsequently means yes' while sentencing in a rape case in April 1993 (see Committee Report p 8ff). These events rekindled an ongoing media interest in the area.

³ ALRC Part II, 5. The ALRC's reference set out a number of reports to be taken into account; subsequent initiatives are listed in Interim Report 67, 5-7 and Final Report Part I, 5-6.

said to have equal opportunity to participate in the life of the community.⁴ The Office of the Status of Women also presented the Government's *National Strategy on Violence Against Women*. Since 1993 other initiatives have addressed issues of women and justice, including the Access to Justice Advisory Committee's *Access to Justice: An Action Plan* in 1994 and the federal Attorney-General's 1995 *Justice Statement*.

Some of these initiatives have clearly been electorally and politically driven. This in itself is a noteworthy phenomenon, reflecting the importance of the women's vote, the activism of Australian feminists, and also the influence of feminists in the bureaucracies of government. Women have been more successful in influencing government policies and structures in Australia over the past two decades than in most comparable countries.⁵ Marian Sawer, for instance, highlights the women's movement's success in achieving the establishment of specialised machinery at state and federal level to ensure that government addressed women's needs. She argues that this has been due to, amongst other things, a political tradition in Australia of using the state to achieve social goals, and 'the election of reformist governments at national and State levels at a time when the political energy of the contemporary Australian women's movement was at its height.'⁶ There have of course been major political changes in Australia over the last few years. In 1990 five out of six States and the Commonwealth had Labor governments; in 1996 all but one government is conservative, the most recent change being at the federal level, in March 1996. A reduced responsiveness to gender-based concerns may perhaps be anticipated.⁷

The ALRC's reference was very broad⁸ — to recommend changes to Commonwealth laws, including new laws and necessary changes to procedure, having regard to the principle of equality in law and Australia's international obligations, 'so as to remove any unjustifiable discriminatory effects of those laws on . . . women with a view to ensuring their full equality before the law'.⁹ The Commission rapidly produced a Discussion Paper in July 1993,¹⁰ to which there was a massive response. The ALRC reported that around 630 submissions were received, almost the largest public response

⁴ The Parliament of the Commonwealth of Australia, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*, Report by the House of Representatives Standing Committee on Legal and Constitutional Affairs, 1992.

⁵ For example Marian Sawer, 'Why has the women's movement had more influence on government in Australia than elsewhere?' in *Australia Compared: People, Policies and Politics* (Francis G Castles, ed, 1991) 258; Sophie Watson (ed), *Playing the State: Australian Feminist Interventions* (1990); Hester Eisenstein, *Inside Agitators: Australian Femocrats and the State* (1995).

⁶ Sawer, *op cit* (fn 5) 260.

⁷ See postscript.

⁸ It had 'very wide terms of reference (and an almost impossible deadline)', according to Regina Graycar and Jenny Morgan, two of the Commissioners, in 'Including Gender Issues in the Core Law Curriculum' *Conference Proceedings, Women, Culture and Universities: A Chilly Climate?* University of Technology, Sydney Women's Forum, 1995.

⁹ Report No 69 *Equality Before the Law: Justice for Women Part I*, ALRC 1994, xv.

¹⁰ DP 54 *Equality Before the Law* ALRC 1993.

ever received by it. In March 1994 an Interim Report was published¹¹ and the Final Report, in two parts, appeared later in 1994.¹²

Major issues raised in the public consultation were violence against women, especially within the family, and women's lack of access to justice. These central and connected issues were the focus of the Interim Report. The legal system was seen as failing women, both as a mechanism for dealing with violence (amongst other things), and also more generally as a body of substantive law. The Interim and Final Reports addressed violence and access to justice as integral to the achievement of equality for women.

Part I of the Final Report, subtitled *Justice for Women*, deals with existing measures to combat discrimination and proposes changes to the federal *Sex Discrimination Act*. It examines women's access to justice, making recommendations regarding legal aid, specialist women's legal services, court support schemes, and court facilities and processes. It also deals with violence, particularly in relation to family law, immigration law and the ascription of refugee status.

Part II, *Women's Equality*, has as its central theme the proposal for a legislative guarantee of equality, an Equality Act. It considers how such an Act might influence the operation of government and the courts, together with (amongst other things) women's advocacy in the courts, issues around legal education and the legal profession, economic issues affecting women, and the situation of women in remote communities.

It is not possible here to review all the areas covered by the ALRC. In the space available I will look briefly at some aspects of the analysis of gender bias in the law, gender bias and legal training, access to legal services, and violence against women.

GENDER BIAS IN THE LAW

There is now a considerable body of literature on the failure of the substantive law to take account of the different experience of women and other groups and to offer protection of their interests comparable to the protection given men's interests.¹³ ALRC Report Part II discusses such examples as the concept of the 'reasonable man', distribution of property on divorce, the undervaluing of women's unpaid work in areas such as family, tort and trusts law, and the regulation of employment contracts.

¹¹ Report 67 *Equality Before the Law: Women's Access to the Legal System* ALRC 1994.

¹² *Equality Before the Law: Justice for Women* ALRC Report No 69 Part I, ALRC 1994; *Equality Before the Law: Women's Equality* ALRC Report No 69 Part II, ALRC 1994.

¹³ For example, R Graycar and J Morgan, *The Hidden Gender of Law* (1990); N Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990); J Scutt, *Women and the Law: Commentary and Materials* (1990); C Smart, *Feminism and The Power of Law* (1989); Susan SM Edwards, *Sex and Gender in the Legal Process* (1996); C MacKinnon, *Toward a Feminist Theory of the State* (1989); C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); and the two-volume collection edited by Frances E Olsen, *Feminist Legal Theory I and II* (1995).

A major example is the law's failure to deal adequately with women's pervasive experience of violence. This will be discussed further below. Violence affects women's lives as parents and spouses, as employees and citizens. It limits many women's participation in public life, and can have particular additional impact depending on the cultural, economic and social situations of women. Violence against women was a major issue raised in the submissions following Discussion Paper 54 and Part I of the ALRC's Report examined the occurrence of violence in connection with family law, immigration, and in relation to women's refugee status, following the identification of these as specific areas of concern in submissions.

The legal system's inability properly to protect women needs to be seen in the context of the well-documented structural disadvantages which women as a group still experience, and which entrench gender inequality. As outlined in the Report Part I, chapter 2, these include the fact that women are on average poorer and have less access to financial resources than men, the undervaluing of women's work (paid and unpaid), women's inequality in the workplace, women's restricted contribution to legal and political institutions, and women's specific experience of violence.

One legal approach to inequality has been the passage of anti-discrimination legislation. Statutory schemes have however been more limited in their effect than many had hoped. The 1992 Report *Half Way to Equal* identified a number of deficiencies in the *Sex Discrimination Act 1984* (Cth) and recommended reforms,¹⁴ as did the ALRC in its Report Pt I. Many of these have been implemented, and the legislative amendments were passed late in 1995.¹⁵ They include a new preamble proclaiming the equality before the law of women and men, a simplified definition of indirect discrimination and a shifting of part of the onus of proof of indirect discrimination with the requirement that the *respondent* justify the reasonableness of the discriminatory requirement, and proscription of discrimination on the ground of potential pregnancy.

A Legislative Equality Guarantee

The ALRC took this issue further in Part II of its Report, starting from the premise that inequality must be dealt with as a systemic problem, and proposing a general legislative guarantee of equality (Report Part II, chapter 3).

It has been proposed by Elizabeth Sheehy and others that there are at least three approaches to dealing with inequality through the legal system:¹⁶

(1) The 'formal equality' or 'gender neutral' approach, which requires strictly identical treatment of women and men. This approach is useful in challenging overt examples of discrimination, such as the exclusion of women or other groups from the right to vote or entry to professions. But it assumes

¹⁴ See Report ch 10.

¹⁵ By Act No 165 of 1995.

¹⁶ Elizabeth A Sheehy 'Background Paper "Personal Autonomy and the Criminal Law: Emerging Issues for Women"' in *The Hidden Gender of Law* (R Graycar and J Morgan, 1990) 40; see also ALRC Report Part II, 44.

that women and men start from the same position, which is historically incorrect and tends to compound women's disadvantage. Further, it accepts the male standard as the norm, ignoring differences in the experience, background and career path of the 'Other' groups.

Anti-discrimination legislation broadly applies a formal equality approach. The provision of women-only health services, for instance, to address the particular and additional health needs of women and redress existing inequalities, will *prima facie* be discriminatory.¹⁷

(2) The 'difference' approach, which requires women's differences from men to be taken into account, for instance in the provision of maternity leave. Taking difference into account can clearly benefit women. It can however also have the effect of entrenching discriminatory practices, for instance the exclusion of women from dangerous jobs on biological or social grounds.¹⁸ It also maintains the male benchmark as the standard against which women are to be measured.

(3) The 'subordination' or 'dominance' approach. This approach defines women's inequality in terms of subordination to men rather than in terms of differences between women and men.¹⁹ It asks whether a particular law or policy has the effect of maintaining women in a subordinate position, whether it harms women or is detrimental to them by obstructing the achievement of equality.²⁰ It provides a different starting point for an equality analysis by focusing on issues of power, and the impact of the rule or policy on women's economic, social and political disadvantage. The result may not differ from a formal equality approach in some cases. But in others it may offer a quite different perspective. For example, the ALRC in Report Part II notes that women-only health services treat men and women differently, but their existence does not disadvantage men, given the nature of health services generally available. It would therefore not be said on this analysis that establishing women's health services discriminated against men (Report Part II, 51).²¹

The ALRC concluded that neither existing legislation nor the common law provided an adequate guarantee of equality for women. It favoured a constitutionally entrenched guarantee. It did not however advocate this approach in the short term, largely because of the notorious difficulties in the way of achieving constitutional amendments. Instead the ALRC proposed an Equality Act, which might prove a forerunner of an entrenched provision.

¹⁷ *Proudfoot v ACT Board of Health* (1992) EOC 92-417; see discussion in ALRC Report Part II, 49ff. The services were nonetheless held to be lawful as falling within the statutory exemptions for 'special measures' under the *Sex Discrimination Act* 1984 (Cth).

¹⁸ See ALRC Report Part II, 46, discussing, *inter alia*, *Human Rights and Equal Opportunity Commission v Mount Isa Mines* (1992) EOC 92-420.

¹⁹ Sheehy, *op cit* (fn 16) 42; see also Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* *op cit* (fn 13) ch 2.

²⁰ See ALRC Report Part II, 48.

²¹ The application of this model is not without possible problems. For instance, can it be assumed that judges will be able to make the necessary evaluations? and how will subordination or disadvantage be shown? Beth Gaze also identifies its failure 'to link directly into issues such as the role of social structures and the formation of individual subjectivity' in 'Equality Rights in Theory and Practice' conference paper for NILEPA Workshop 'Rethinking Rights for the Twenty-first Century', 1995, 12.

The Act would provide a basis for challenging legislation and legislative programs which were inconsistent with equality in law on the ground of gender, and would override inconsistent provisions in subsequent acts unless specifically excluded.²²

'Equality in law' would be defined broadly to include 'the full and equal enjoyment of human rights and fundamental freedoms'.²³ Importantly, the ALRC identified the centrality of context to any evaluation of 'inequality', and proposed that the Act would require a focus on the effects of the particular law or practice under challenge, assessed in its historical, social and economic context.²⁴ The Equality Act was to provide relief 'not only from laws that create inequality but also from laws that reinforce or exacerbate it'.²⁵ This was intended to reflect a 'subordination' approach to equality, an 'analysis based on an understanding of power and disadvantage', requiring consideration of 'the context of the law or practice to decide whether there is a real or practical inequality'.²⁶

It was proposed that the Act include an objects clause stating (*inter alia*) that the government is committed to achieving women's equality; that the Act aims to address violence against women as a factor in maintaining women's current inequality, together with recognition of the use of special measures to assist women to secure equality; and acknowledgement of diversity among women (that is, that 'women' is not a single homogeneous category, and that race, class, sexuality and so on are all also relevant, with gender, to a person's position and needs).

A person or group would be able to apply for remedies equivalent to the prerogative writs or a declaration or injunction where their right to equality was at risk. For instance, a declaration could be obtained that a law is in conflict with the Equality Act; a prohibition-like remedy could be obtained to prevent a public official from carrying out an infringing action; or an order of mandamus requiring a public official to reach a decision or carry out a duty, including requiring the decision-maker to decide in accordance with the Equality Act.²⁷ For example, the ALRC cited a case in the United States of a woman who brought an action against her local police for failing to protect her from her husband's violence, suggesting that mandamus might be available under the Equality Act in such a case. The Act could also broaden the matters a court can consider. An example given was that of a woman charged in New South Wales in relation to carrying a spray can of formaldehyde. The court in that case rejected her argument that she had a 'reasonable excuse' or was carrying it in self-defence based on her fear of attack from her husband. The ALRC observed that under an Equality Act evidence of women's fear of violence and its impact on their behaviour could have been raised and used to

²² Report Part II, 65.

²³ Report Part II, 64.

²⁴ Report Part II, 66.

²⁵ Report Part II, 95.

²⁶ Report Part II, 333.

²⁷ Report Part II, 91-4.

challenge the court's interpretation of the meaning of a 'reasonable excuse'.²⁸

A contextualised analysis of cases brought under the Equality Act will inevitably require a wider range of evidence than is currently drawn upon. The Commission notes the role of its Reports as extrinsic materials to be taken into account in the interpretation of the Act.²⁹ Empirical and statistical material may also be important adjuncts to a decision whether, in all the circumstances, a law or practice can be said to lead to disadvantage or inequality. The effectiveness of the Act would depend on the courts' taking seriously their obligation to ascertain disadvantage. Further, it would require willingness to allow a range of evidence beyond that currently accepted under the rubrics of 'expert evidence' and 'common knowledge', concepts which have not served women well to date.

The ALRC also proposed a widening of the rules of standing to ensure that women's views could be presented to the courts, calling for the implementation of its own earlier recommendations on standing.³⁰ It recommended in addition the establishment of a national women's advocacy fund, recognising the practical limitations on access to the courts for many interest groups due to financial cost.³¹

The Equality Act would be available in addition to existing anti-discrimination legislation and in some instances would provide an alternative remedy. The ALRC recommended an expansion of the roles of the Sex Discrimination Commissioner and the Human Rights and Equal Opportunity Commission to allow them to initiate a challenge under the Act, or to intervene in a relevant matter.³²

Two features of the proposed Act merit further comment. First, its effect would be limited to public decision-makers. It would not directly provide a basis for action against private individuals or organisations.³³ Second, the legislation was to provide a guarantee of equality of both men and women. These aspects were the subject of a separate minority report by three of the Commissioners, Professor Hilary Charlesworth, and Associate Professors Regina Graycar and Jenny Morgan.

The Commission's argument on the first point was essentially that at present the community understands such legislation in the 'public', or State, sphere, but would not accept it if it were extended to private institutions and individual relations.³⁴

The public/private distinction is one which operates in many spheres of law. It has traditionally been used to delimit areas in which the law will intervene from those which are seen as providing an unregulated 'private' zone of

²⁸ Report Part II, 104.

²⁹ Report Part II, 72.

³⁰ ALRC Report 27, *Standing in Public Interest Litigation*, 1985, recommended (inter alia) that any person should have standing to initiate public interest litigation unless the court concluded that they were 'merely meddling'.

³¹ ALRC Report Part II, 133.

³² ALRC Report Part II, 76.

³³ See discussion at ALRC II, 105ff.

³⁴ Report Part II, 106.

life.³⁵ The distinction has often been used to preclude legal intervention in areas most closely affecting women such as the family, sexuality, and domestic violence, and less regulated areas of paid work such as casual and 'outwork'.³⁶

The minority Commissioners favoured extension of any equality guarantee across both spheres. They stated, 'In our view, the promotion of equality in the non-governmental sphere is a pre-requisite to the achievement of women's equality in law.'³⁷

Second was the question of the coverage of the legislation: should the proposed legislation address women's inequality specifically, or be expressed in terms of a guarantee of equality for both women and men?

The Report canvasses the approaches in Canada, the US, the EEC and New Zealand. The majority ALRC view was that 'the very nature of equality is that it includes everyone, women and men.'³⁸ There was concern that a gender-specific Equality Act could reinforce existing gender stereotypes and limit the scope for interpretation of the concept of equality.³⁹ The goal was nonetheless stated to be addressing women's inequality. The majority of the ALRC argued that the requirement that the social context be taken into account when deciding whether equality rights have been impinged upon would ensure that measures to overcome disadvantage would not be undermined, and would prevent the Act being used to further disadvantage women.⁴⁰

A 'subordination' or 'disadvantage' model would seem to direct the operation of the Act in practice to questions of *women's* inequality. This is consistent with the emphasis in the proposed preamble on women. It is not clear, however, how compatible the preferred gender-neutrality of the Act is with its intended target of women's disadvantage. Beth Gaze has argued that a gender-neutral Equality Act makes it unlikely that courts will take context seriously:

The way in which a neutral prohibition denies the significance of social structures of discrimination and disadvantage is important. Even if context is later admitted, such legislation only allows it limited significance.⁴¹

The minority commissioners favoured legislation specifically to address women's inequality and applying to women alone: a Status of Women Act (Report Pt II, ch. 16). They reiterated that 'the central issue in gender equality is the power imbalance between women and men, rather than mere differences between them' (Report Pt II, 335). Men may on rare occasions experi-

³⁵ For example Katherine O'Donovan, *Sexual Divisions in Law* (1985), and M Thornton (ed), *Public and Private: Feminist Legal Debates* (1995). 'Private' can refer to the intimate and personal, but the public/private concept also refers (for example) to the dichotomy of government and non-government institutions.

³⁶ On the last point see further Rosemary J Owens, 'The Peripheral Worker: Women and the Legal Regulation of Outwork' and Laura Bennett, 'Women and Enterprise Bargaining: The Legal and Institutional Framework' in Thornton, op cit (fn 35).

³⁷ Report Part II, 334.

³⁸ Report Part II, 67.

³⁹ Report Part II, 68.

⁴⁰ Report Part II, 67.

⁴¹ Gaze, op cit (fn 21) 12.

ence discrimination on the ground of their sex, but this is not a product of systemic discrimination entrenching male disadvantage, and could be dealt with under existing, or reformed, anti-discrimination legislation.

The minority approach would parallel the international sex equality situation. The International Covenant on Civil and Political Rights deals with discrimination on the ground of sex, but was found inadequate to address women's inequality, leading to the passage of the women-specific Convention on the Elimination of All Forms of Discrimination Against Women in 1979.

In common with other social institutions, the law can be said to presuppose one original, 'neutral' category and various categories of 'others' — women, ethnic minorities, and other marginalised groups. They are 'marked' categories — a 'woman lawyer' or 'female plaintiff', an 'Aboriginal judge'. The ostensibly neutral ('unmarked') category, whose members' gender and race are invisible, is the category of those who are in fact white and male. We do not hear routinely of the 'male judge' or the 'white lawyer' in a case. The existence of this framework makes clear the power structures involved. It is not a matter of equally located but different groups but of groups with fundamentally different access to advantage.⁴² The challenge for any reform is (1) tackling the question of equality as a question of power and disadvantage; and (2) making explicit that everyone is a gendered person (and person of their particular race, sexuality and so on) whose knowledge and understanding — and decision-making and judging powers — are partial.⁴³

The majority approach adopts a pragmatic reform agenda in preference to a perhaps more fully theorised feminist analysis. The legislation advocated by the ALRC would no doubt involve major changes to the laws and legal culture of Australia, and is thus politically and symbolically significant. It does not however address or challenge the fundamental power imbalances in Australian society. The minority report, on the other hand, does not deal with the practical implementation of its proposal.

National consultations on the ALRC's proposed Equality Act were planned by the previous Labor government, in view of its intended application across all levels of government (ALRC Recommendation 5.1). Some consultations with state and territory governments commenced prior to the March 1996 change of government. It is as yet unclear how the new federal government plans to deal with this aspect of the ALRC's Reports.

GENDER BIAS AND THE JUDICIARY

As noted earlier, the issue of gender bias in the judiciary may be seen as having been the catalyst for a number of the reform initiatives set in motion since 1993. More generally however, it raised the question of the nature of the legal

⁴² The majority and minority of the ALRC appeared to agree on the nature of gender bias: Report Part II, 329.

⁴³ See following discussion on gender and the judiciary.

knowledge being imparted and practised in Australia. The content of the curriculum in law schools — what is included and what excluded — is fundamental to the understanding of law with which the lawyer will practise. At least as important, however, will be the ways in which the content is taught: the engagement with critical and alternative perspectives, and the extent to which the new lawyer's particular standpoint — of gender, class, race, sexuality — is challenged and identified as providing a partial understanding of the world.

The Judiciary

The specific issue of judicial gender bias was dealt with in the report of the Senate Committee, *Gender Bias and the Judiciary* published in May 1994.⁴⁴ The Committee's brief, given in May 1993, was to consider:

- (a) whether recent publicity surrounding judicial comment in sexual offence cases is a proper reflection of a failure to understand gender issues by the judiciary; and
- (b) the appropriate response to any such failure.⁴⁵

The Committee concluded that there was not generally overt prejudice among the judiciary, but there was a problem which was 'wider than a handful of isolated instances' (p xiv). The Committee recognised the necessity of looking at systemic gender bias in the legal system itself, in statutes and case law, in teaching at law schools, in attitudes prevalent at the Bar, and that gender bias may be revealed in use of 'antiquated and inappropriate gender myths and stereotypes when judges sum-up to juries' (p xiv). Such stereotypes were, the Committee concluded, not necessarily overt. As one submission quoted by the Committee put it, they were often part of sets of assumptions applied routinely as 'natural', often arising out of lack of information about the particular group and/or the mistaken assumption that other groups' life experience is the same as that of the decision-maker.⁴⁶ Given the Committee's (possibly generous) analysis — lack of information and limited individual experience — its proposals focused on changes to the process of judicial selection and composition of the judiciary, and initiatives in judicial and legal professional education (chapter 5).

The Committee noted the predominance in the Australian judiciary of men of Anglo-Saxon background and non-government education.⁴⁷ It also examined the process of judicial appointment, which it found to be characterised by secrecy and narrowness of consultation. It proposed more transparent and accountable methods of appointment, and greater diversity in judicial appointments, to include more women and appointees from a wider pool of practitioners. Two arguments for having more women judges were

⁴⁴ See also Attorney-General's Department Discussion Paper *Judicial Appointments: Procedure and Criteria* 1993.

⁴⁵ The Parliament of the Commonwealth of Australia, *Gender Bias and the Judiciary*, Report by the Senate Standing Committee on Legal and Constitutional Affairs, 1994, ix.

⁴⁶ Submission of Kathy Mack, cited in the Senate Report, *Gender Bias and the Judiciary*, 1994, 21.

⁴⁷ See Senate Report, 91ff.

particularly noted. First, to maintain public confidence in the judiciary, it must be *seen* to reflect the different parts of the population it serves and to offer role models for women. And second, the appointment of significant numbers of women is likely to affect the nature of judicial decision-making, through potentially different decision-making styles, and by redressing areas of law developed from distinctly male perspectives such as those dealing with women's sexuality.⁴⁸

Judicial education was seen as important to bring about change, together with the development, more broadly, of an inclusive curriculum in law schools dealing with issues of gender and race. The Senate Committee recommended the funding of the Australian Institute of Judicial Administration (AIJA) as a national body to develop specific gender awareness programs which should be voluntary, and developed in consultation with the courts.⁴⁹

The ALRC reported considerable support for judicial education amongst its participants, particularly as to the extent and nature of violence towards women, the impact of violence on women's lives, and social attitudes towards women.⁵⁰ It was however also argued that it was more important to provide such an education earlier in lawyers' careers. ALRC Report Pt I specifically recommended the introduction of training for decision makers dealing with violence, in particular in the context of family law, immigration, and refugee issues.

The then federal Attorney-General announced funding for professional development programs for judges and tribunal members, to focus on gender and cross-cultural issues, in his *Justice Statement* of May 1995.⁵¹

The AIJA had of its own initiative earlier proposed to offer gender-awareness training, and had obtained Commonwealth funding for this purpose. It held a three-day Equality and Justice Conference in October 1995 in Ballarat, Victoria, for members of the judiciary, dealing with gender equality and diversity, women's economic position in Australian society, sexual assault and domestic violence, and gender issues around language and judging. This conference was seen as offering a prototype for use in other jurisdictions and a package of papers is to be available. There are, however, apparently no immediate plans for further gender awareness programs by the AIJA. It was involved in 1994 in a program for newly appointed judges and magistrates, including gender-awareness training, and this program is to be repeated later in 1996.⁵² Individual programs may of course be developed by

⁴⁸ See Senate Report, 96–100, and ALRC Report Part II, 201ff. The debate over whether women judges would in fact 'make a difference' is outside the scope of this paper. But see for example Marcia Neave, 'The Gender of Judging' (1995) 2 *Psychiatry, Psychology and Law* 3; Regina Graycar, 'The Gender of Judgments: An Introduction' in Thornton, op cit (fn 35) 262.

⁴⁹ Senate Report, 117.

⁵⁰ ALRC II, 171.

⁵¹ Attorney-General's Department, *The Justice Statement* Commonwealth of Australia, May 1995, 63. The *Justice Statement* also included a promise to 'seek to . . . identify a broader field of candidates for judicial office': 63.

⁵² Information provided by Peter Sallman, Executive Director, AIJA.

the courts themselves; the Family Court, for instance, has been active in this area.

It is always likely that such seminars will be preaching to the converted, or at least the interested, as long as attendance is at the discretion of individual decision-makers. A substantial majority of magistrates and County Court judges, and some members of non-Victorian courts including the Federal Court attended the Ballarat conference, and most of the Chief Justices of these courts were also present. The conference was opened by the Victorian Governor, Sir Richard McGarvie, who was extremely supportive of measures to enhance gender awareness in the judiciary.⁵³ Regrettably, only a small number of judges of the Victorian Supreme Court attended. Members of the lower courts probably have more day-to-day impact on the community than does the Supreme Court, but it is surely vital that senior members of the profession show leadership and support if there is to be any real change in legal cultures.

In view of the initiatives already being undertaken in judicial education, the ALRC did not ultimately make any separate recommendations. It noted however the need 'to ensure that the programs are co-ordinated and adequately funded' (Report Part II, 175). The ALRC has exhausted its existing funding for gender awareness training, with the major Ballarat conference, and it appears that future programs will depend on the continuing interest of individual states and courts. This is therefore an area which does call for careful monitoring, if the impetus is not to be lost.

The Law Schools

The ALRC also examined the need for reform in legal education (Report Part II, chapter 8). It takes as its premise that legal education is 'both a source of and a solution to the inequality women experience before the law.'⁵⁴

The content of the core curriculum prescribed under the rules for admission to practice across Australia (the 'Priestley rules') are criticised by the Commission as being:

in direct conflict with the movements in legal education over the last decade towards diversity and the inclusion of critical and theoretical dimensions in legal education. (Report Part II, 143)

There is no requirement for legal theory as a separate subject — a subject which might incorporate feminist jurisprudence — and subjects are omitted which have been described as being associated with 'the less powerful sectors of society' and which may have particular relevance to women's experiences such as family law, labour law, consumer law, and human rights law (Report Part II, 143).

In its Discussion Paper No 54 the ALRC asked whether feminist legal theory should be included in the core curriculum, and (perhaps not

⁵³ See R E McGarvie, 'Equality, Justice and Confidence', Equality and Justice Conference, 18/10/95.

⁵⁴ ALRC Report Part II, 134.

surprisingly) received mostly affirmative submissions.⁵⁵ It notes in Part II of its Report that:

[F]eminist legal theory . . . challenges the traditional nature of legal reasoning and provides insights into solutions and new approaches . . . [I]t leads to a re-examination of traditional subjects, their content and assumed boundaries. It redefines the law, changing its emphasis, correcting bias and including new material that . . . demonstrate[s] the law's particular application to women. (Report Part II, 144)

However there is obviously a problem of appearing to relegate feminist issues to a separate subject, whether compulsory or elective. Several submissions to the ALRC pointed out the importance of incorporating feminist perspectives into 'mainstream' legal subjects to ensure an understanding of the gendered nature of legal concepts and practices.

The latter approach should be assisted by a project funded by the Department of Employment, Education and Training from the National Priority Reserve Fund to provide 'gender inclusive curriculum material for use in core undergraduate law courses' (Report Part II, 149). The project, announced in March 1994, has as its primary aim:

to ensure that law students are made aware of or at least gain an appreciation of, the inadequacy of existing legal principles and structures when considering the reality of women's lives.⁵⁶

Curriculum materials have been developed under this project around three key areas: violence, work and citizenship. The themes cut across traditional subject boundaries, and gender-inclusive materials have been collated for use by teachers as relevant, in such core subjects as contract, property, torts, evidence, procedure, litigation, equity, criminal, constitutional and administrative law.⁵⁷

The Commission endorsed the importance of including curriculum content of relevance to women's experience and ensuring that feminist legal theory is offered in law schools. It also noted the importance of practices to reduce gender stereotypes in law schools such as the use of gender-inclusive language, the inclusion of women in hypothetical problems used in teaching and assessment, and the recognition of women in law texts and case books.⁵⁸

Ensuring that lawyers — male and female — are informed about the lived experiences of women, and other members of marginalised groups is clearly important and valuable. It could be seen as a sort of 'equal opportunity' model of knowledge. But it does not, on its own, address the fundamentally gendered nature of knowledge. Not only does an individual not know others' experiences, but an individual's own experience is specifically produced by their gender (and race and class). Women and racial minorities are not alone in

⁵⁵ ALRC Report Part II, 146.

⁵⁶ Department of Employment, Education and Training *Consultancy brief: gender issues and the law school curriculum*, cited in ALRC Report Part II, 149.

⁵⁷ See further, Special Issue *Legal Education Review*, 1996.

⁵⁸ ALRC II, 151ff; and see R Hunter, 'Representing gender in legal analysis: a case/book study in labour law' (1991) 18 MULR 305.

having partial and unique experiences. As Beth Gaze has argued, judges, and other lawyers:

must also be educated or encouraged to reflect on the internal as well as the external: the extent to which their own experience is partial and not universal. The experience of whiteness and maleness, and the implications of its standpoint need to be explored rather than just paid lip service.⁵⁹

A legal system which is genuinely responsive to the position of the 'Others' needs not only information but also reflexivity. It needs 'recognition of the female subject of law (which necessarily calls for reconstitution of the male legal subject)'.⁶⁰ Rethinking the teaching of law in law schools may be such a starting point.

ACCESS TO LEGAL SERVICES

The ALRC in Interim Report 67 proposed the establishment of a National Women's Justice Program. This would co-ordinate reforms aimed at ensuring women's equality before the law, in particular relating to equal access to justice. Measures were to include access to legal advice and representation, community legal education, and improvements to court facilities.

In its Final Report the ALRC recommended the establishment and funding of specialist women's legal services in each state, including a separate component for programs to assist women of non-English speaking background, and women in rural areas, and the establishment of legal services for Aboriginal and Torres Strait Islander women.⁶¹

It also advocated reconsideration of Legal Aid guidelines to better meet the needs of women, after the federal Attorney-General's department found that the current distribution of legal aid amounted to indirect discrimination against women.⁶² Legal Aid funds are distributed with priority to criminal law applicants, in view of the threat to the applicant's liberty posed by criminal proceedings. Most applicants in criminal matters are men — in 1992–3, 80% of legal aid applications in criminal matters were from men. Women are more likely to require assistance in family and civil matters (including applications for restraining orders, and sex discrimination claims), areas in which funding has been cut to better service criminal representation. Whilst recognising the important principles at stake in supporting funding in criminal matters, the Commission recommended that the Commonwealth take a more active role in directing legal aid priorities to take account of the needs of women.

The Access to Justice Advisory Committee gave in principle support in May 1994 to the ALRC's recommendations.⁶³ The implementation of a number of these recommendations was ultimately announced in the Attorney-

⁵⁹ Gaze, *op cit* (fn 21) 13.

⁶⁰ Ngairé Naffine, 'Sexing the Subject (of Law)' in Thornton, *op cit* (fn 35) 21.

⁶¹ See generally ALRC Report Part I, ch 5.

⁶² See generally for discussion and statistics ALRC Report Part I, ch 4.

⁶³ Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, 59.

General's *Justice Statement* of May 1995 as part of the National Women's Justice Strategy. It included the establishment of a national network of women's legal centres, national toll-free telephone access to legal advice through the women's legal centres, refocussing legal aid to redress gender bias, providing funding to family support services to address family violence, and measures to address the needs of rural women, Aboriginal women and women from non-English speaking backgrounds.

In November 1995 the then federal Attorney-General Michael Lavarch launched the National Network of Women's Legal Services in Victoria.⁶⁴ Funds were provided for the expansion of the Women's Legal Resource Group, including the establishment of a satellite service in Melbourne's western suburbs. Centres have now been established, or expanded, in each state and territory. The Centres' funding includes a requirement that a toll-free telephone advice line be installed. Rural outreach officers have been appointed and special projects established for indigenous women.⁶⁵

The former Attorney-General also announced that the government would be allocating additional funding to legal aid to provide assistance in family law and civil law cases, to address the inequity found by the ALRC in women's access to the legal aid dollar, given legal aid's priority of criminal matters.⁶⁶ To date this appears to have taken the form of encouraging state Legal Aid Commissions to enhance their information and advice lines, and to develop projects in areas of greater concern to women such as family law. The funding of community legal centres can also be seen to be targeting legal services of value to women. The fledgling Australian Legal Assistance Board, which was set up to co-ordinate national legal aid delivery, may in addition be able to promote gender equity policies.⁶⁷ However there are already clear indications of a change in the political agenda, and potentially substantial reductions in Legal Aid funding, with the change of government.⁶⁸

VIOLENCE

In its Interim Report and in Part I of the Final Report the ALRC highlighted the prevalence of violence against women and the limitations of the current legal responses. Many submissions gave powerful evidence of the impact of violence, particularly within the family, on women's lives, and of the failure of the legal system to deal adequately with this violence.

The ALRC emphasised the importance of re-conceptualising violence to understand its real impact on women. This re-thinking can usefully begin with the law school curriculum. As noted above, course materials for use in a range of law subjects have recently been developed to assist law teachers to broaden

⁶⁴ Helen Meadows, '\$150000 grant for women's legal services' (1996) 70 LIJ 16.

⁶⁵ Information provided by the federal Attorney-General's office.

⁶⁶ *Justice Statement* ch 6.

⁶⁷ Information provided by the federal Attorney-General's office.

⁶⁸ See for instance K Middleton, 'Legal aid bodies call for details on federal cuts' *Age* 2/7/96.

their teaching around issues such as violence. Violence is traditionally seen as appropriately dealt with within criminal law. Even here, however, gender issues around the availability of legal defences to women killing an abusive spouse, domestic violence, and matters of law, evidence and procedure in sexual assault cases, are not always clearly articulated.⁶⁹ Violence against women can also be an issue in tort law and labour law, for instance in sexual harassment cases,⁷⁰ in equity,⁷¹ in succession and social security cases,⁷² in international law and human rights.⁷³

In Part II of its Report the ALRC emphasised that its proposed Equality Act should apply to ensure that violence was understood as integral to women's inequality. Violence against women has been a matter of international concern, leading to (amongst other things) the adoption in 1993 of the United Nations Declaration on the Elimination of Violence Against Women. The ALRC stated:

The law's failure to deal effectively with men's violence against women denies women the equal protection of the law and the equal enjoyment of human rights and fundamental freedoms. (Report Part II, p 71)

The ALRC found that violence in family law, immigration law, and the ascription of refugee status were priority concerns and dealt with these areas in some depth.⁷⁴ Space does not permit a full examination of the ALRC's very detailed chapters. Many of the Commission's specific proposals were picked up in the 1995 *Justice Statement*.⁷⁵ The National Women's Justice Strategy, announced in the *Justice Statement*, included a number of initiatives aimed at family violence. Those currently being piloted include prevention and intervention services to families where violence is at risk or occurring, and supervised handover and visiting centres to facilitate child access. Reforms to the *Family Law Act* have occurred and the National Women's Justice Strategy includes a commitment to consult with women on the model Criminal Code on matters relating to violence against women.⁷⁶

⁶⁹ See ALRC Report Part I, ch 12. See also J Stubbs (ed), *Women, Male Violence and the Law* (1994); C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); C MacKinnon, *Toward a Feminist Theory of the State* (1989); C Smart, op cit (fn 13).

⁷⁰ See R Graycar and J Morgan, op cit (fn 13) ch 13.

⁷¹ See D Otto, 'A Barren Future: Equity's Conscience and Women's Inequality' (1992) 19 MULR 808; L Sarmas, 'Uncovering Issues of Sexual Violence in Equity and Trusts Law' (1996) *Legal Education Review* 207.

⁷² See ALRC Report Part I, 162, 165.

⁷³ See for instance H Charlesworth and C Chinkin, 'Violence Against Women: A Global Issue' in J Stubbs (ed), op cit (fn 69); D Otto, 'Integrating Questions of Gender into discussion of the "Use of Force" in the International Law Curriculum' (1996) *Legal Education Review* 219.

⁷⁴ ALRC Report Part I, chs 9-11.

⁷⁵ *Justice Statement*, ch 5.

⁷⁶ *Justice Statement*, 89.

CONCLUDING COMMENTS

Public debate around women and justice, and women's relationship to the state, has been lively during the 1990s, and the ALRC's Equality Reports are a valuable contribution. Their recommendations are aimed at ensuring responsiveness to women's concerns in substantive and procedural aspects of the legal system. The ALRC has powerfully identified the connection between the violence experienced by women and women's continuing inequality. Its recommendations on improving women's access to justice, some of which have already been implemented, have the potential both for empowering individual women and for beginning the process of incorporating women's experience into law's knowledge-base. And its proposal of a legislative equality guarantee can be seen as part of the ongoing Australian rights debates.

The Reports are not the definitive work on gender bias, or women's inequality, in the justice system. They must be read as documents which are explicitly consultation-based, produced within a tight time-frame, and aimed at law reform.

The Reports can claim to address, at least in part, the real concerns of women: women's voices have been taken seriously, and are incorporated in the text of the Reports, giving the analysis immediacy and providing valuable insights. A limitation of this style of submission-driven project however is that discussion tends to be based on anecdote and example, with reduced scope for a broader systematic analysis.

The Reports also have the limitations, or at least characteristics, of a law reform project. Solutions are seen in terms of bureaucratic and/or legislative reforms, whilst law and legal processes are in fact only an element in, and one means of addressing, the broader question of women's inequality.⁷⁷ The resulting recommendations are thus at times unsatisfying. They presuppose the continued existence of current relations and social structures, and are not able to offer a broader critique. The measures proposed to improve access to justice, for instance, or in response to violence, are arguably necessary but not sufficient. They assume that 'justice' is possible in the current system provided a few amendments are made. Some other writers in the area have argued that the legal system and its method are far more intransigent, and even inaccessible to feminist challenges.⁷⁸

These reservations are to do with the nature of law reform itself. Law reform solutions have to be capable of implementation, using the tools of government — legislation, state programs and so on. And they have to be politically acceptable; adoption is always dependent on the interest and will of

⁷⁷ Some of the broader structural issues are explicitly discussed in the Reports, eg Part I, ch 2.

⁷⁸ See for example C Smart, *op cit* (fn 13); Carol Smart says in her concluding remarks, 'The feminist movement (broadly defined) is too easily 'seduced' by law and even where it is critical of law it too often attempts to use law pragmatically in the hope that new law or more law might be better than the old law.' 160; and see M Heath and N Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law "Reform"' (1994) 3 *Aust Fem LJ* 30.

the government of the day. Accepting the (explicit) terms of the project, the ALRC's Final Reports are both important and usable. As noted at earlier points in this paper, many recommendations have already been implemented or are under consideration. The Reports provide a commendable range of avenues for improving women's position in the law and advancing the goal of women's equality.

POSTSCRIPT

Since submission of this article, the federal coalition government has given clear indications of a very limited commitment to gender equality in institutional terms,⁷⁹ and has effectively cut back, or abandoned, many of the initiatives established or proposed in the *Justice Statement*.⁸⁰ These include gender and ethnicity training for the judiciary, a major domestic violence research project, and various other access to justice programs.⁸¹

Drastic and controversial cuts to legal aid funding at state and federal levels are also having a significant impact on the access of many people to justice.⁸²

⁷⁹ See Virginia Trioli, 'Women lose their place in new halls of power' *Age* 5/3/97.

⁸⁰ See for instance Jodie Brough, 'Spending axe falls on justice programs' *Sydney Morning Herald* 9/9/96.

⁸¹ Domestic violence may, however, be examined in the context of the federal government's new National Campaign Against Violence and Crime.

⁸² See for instance Cathy Laird, 'Legal aid cuts condemned' (1996) 70 (10) *Law Institute Journal* 10.