



Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

28 January 2011

Dear Ms Dennett,

Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Law Reform Commission; Submission by Victorian Women Lawyers

On behalf of Victorian Women Lawyers ('VWL'), thank you for the opportunity to make a submission to the Legal and Constitutional Affairs Committee's inquiry into the Australian Law Reform Commission ('ALRC').

VWL is a voluntary association that promotes and protects the interests of women lawyers and engages with legal and social justice issues that affect women.

VWL has consulted its Executive and Law Reform Committees to provide the following submission to the parliamentary inquiry:

The importance of ALRC input into law reform - legal expertise and standing of members

A major factor of the ALRC's influence on Australia's legal landscape is the calibre of the Commission's membership. Chairpersons have included respected members of the judiciary and legal academia. The commission is renowned for thorough examination of legal doctrine, as seen in the dozens of reports completed by the commission. Attesting the value of the Commission's reports and their impact on the law, Justice Kirby wrote that the:

"...use of ALRC reports is now perfectly common in courts throughout Australia. In part, such use occurs in cases involving the interpretation of legislation based on ALRC reports."¹

The Commission is also skilled in creating policy that ultimately supports the operation of the law and increases access to justice. Examples of policy include a recommendation in an interim report

¹ Justice Michael Kirby, 'The ALRC: A Winning Formula' (2003) 82 *Reform* 58.

tabled during the *Equality before the Law* inquiry for the immediate establishment of a National Women's Justice Program,² and the 'integrated response' recommendations made in the *Family Violence* final report.³

VWL understands that the post-July statutory framework⁴ will allow the appointment of non-legal professionals to the ALRC. While it is important for the ALRC to retain a strong legal membership, VWL recognises the importance of inter-agency collaboration and a multidisciplinary approach to some legal issues, such as the integrated response discussed in Part H of the *Family Violence* report. A broader perspective on legal issues and access to justice by involving other disciplines in the law reform process could positively assist disadvantaged groups and women in general.

The importance of the ALRC as a monitoring body to ensure protection of rights and access to justice, independent of the Australian Government

Based on strong consultative skills, the ALRC has maintained a leading role in improving access to justice since establishment. The Commission does not only update, simplify and advocate to remove defects from the law; the Commission is also required to focus on providing improved access to justice in its work.⁵

The monitoring role of the ALRC, particularly in creating cohesive legislation across the nation, and leading national approaches to law reform is a unique and important role.⁶ Additionally, federal legislation resulting from ALRC inquiries has affected many Australians. In particular, the recent *Family Violence* report, as discussed below, addressed access to justice and human rights issues for some of Australia's most marginalised individuals. VWL believes the ALRC's approach to community consultation allows otherwise voiceless individuals to partake in law-making.

The ALRC is in a unique position to survey and synthesise laws from across the country, as well as observing the laws of international jurisdictions and human rights instruments. Accordingly, VWL notes the repeal of the express reference to the International Covenant on Civil and Political Rights (ICCPR) from the *Law Reform Commission Act 1996* (Cth), substituted by 'Australia's international obligations that are relevant to the matter' as a matter to which the ALRC must have regard in performing its functions under s 24.⁷ VWL believes it is important for the Commission to maintain its role in assessing international obligations throughout various inquiries.

The Importance of ALRC's role in educating and engaging the community

Most importantly, the ALRC has the discretion to consult with those in the community as it deems appropriate. In 1995, Alan Rose AO, who was then President of the ALRC, highlighted the similarities between the ALRC's functions and the law making by the government, executive and judiciary, noting "...there are also important differences, most particularly that the ALRC develops proposals for change only after broad community consultation".⁸ VWL particularly notes the *Before the law:*

² Equality before the Law - Interim Report (ALRC Report 67) see Chapter 4 'A national women's justice program'.

³ Australian Law Reform Commission, *Family Violence - A National Legal Response*, Report No 114 (2010) rec 29.

⁴ As implemented by amendments in the *Financial Framework Legislation Amendment Act 2010* (Cth).

⁵ *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(a).

⁶ An example is the leading role the ALRC played in the joint report completed with the NSW Law Reform Commission and Victorian Law Reform Commission on unifying evidence law. See Australian Law Reform Commission et al, *Uniform Evidence Law*, Report No 102 (2006).

⁷ *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 29.

⁸ Alan Rose, 'Reform and Renovation: Reassessing the Role of the ALRC' (1995) 67 *Reform*.

Women's equality inquiry, involving submissions in person in every State and mainland Territory and Norfolk Island. A major finding was that for "...gender bias in the law to be corrected and lawyers to become more responsive to women's needs, there must be training for the legal profession to understand issues relating to women".⁹

This is an essential part of ensuring that the law reform that takes place in Australia is relevant, functional and effectively established to benefit all members of the community, particularly women.

In recent times the ALRC has been subject to significant budgetary restrictions. This affects the ability of the ALRC to engage in extensive consultation. The greatest impact of the narrowing of the consultation process is on disadvantaged groups due to geographical location, access to information and various social barriers including sex, age and race.

One of the most significant areas of reduction in ALRC spending has been in relation to public education and information services¹⁰.

The community education and consultation functions performed by the ALRC play an important role in linking the legal community to members of society who may not otherwise have the opportunity to engage in the law reform process within this country. It is particularly important for the ALRC to have the opportunity to engage with members of society, such as women and minority groups, who may not otherwise have equal representation within government and the legal community.

VWL supports the provision of additional funding to the ALRC to ensure that its education and community consultation functions are restored to full capacity.

The importance of ALRC's role in reforming areas of law of particular interest and concern to women

As a national body with the power, scope and expertise to drive federal law reform and to review and synthesise State, Territory and Commonwealth laws, the ALRC plays an important role in the protection and promotion of women's rights and interests.

Since establishment, the ALRC has played an important role in the reform and development of progressive laws and policies that have a direct and significant impact on women, for example:

- the Domestic Violence inquiry in 1986¹¹ which led to the enactment of new legislation concerning domestic violence in the Australian Capital Territory, as well as the Domestic Violence Crisis Service¹²;
- the Matrimonial Property inquiry¹³ in 1987 which led to the recognition of non-financial contributions in the distribution of matrimonial property in family law property proceedings¹⁴;
- The Women's Equality inquiry¹⁵ which led to amendments to federal sex discrimination, migration and family law legislation and contributed to the federal government's National

⁹ Jonathan Dobinson, 'Equality before the law (ALRC 67 and 69)' (2003) 83 *Reform* 37.

¹⁰ Background Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the ALRC, 2010, page 27

¹¹ Australian Law Reform Commission, Domestic Violence, Report No 30 (1986).

¹² See <http://www.alrc.gov.au/inquiries/domestic-violence>.

¹³ Australian Law Reform Commission, *Matrimonial Property*, Report No 39 (1987).

¹⁴ See *Family Law Reform Act 1995* (Cth).

¹⁵ Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69 (1994).

Women's Justice Strategy and the creation and upgrading of specialist women's legal services around the country¹⁶; and

- the many inquiries relating to family law and children¹⁷.

2010/11 Family Violence Inquiries

Most recently, the ALRC has conducted an extensive inquiry into Family Violence¹⁸ and has a further expanded "spin-off" inquiry currently underway.

The 2010 *Family Violence - A National Legal Response* inquiry presented a unique opportunity for the ALRC to consider broad reforms to multiple legal frameworks in order to better protect the safety of women and children. Specifically, the terms of reference required the ALRC to consider the practical interaction between the *Family Law Act 1975* (Cth), State and Territory family/violence and child protection laws and relevant Commonwealth, State and Territory criminal laws, as well as the impact of inconsistent laws relating to sexual assault occurring in a family context. The ALRC was able to take a broad overarching approach and review the treatment of family/domestic violence and sexual violence in at least 26 legislative regimes.

This kind of broad, inter-jurisdictional approach is crucial for meaningful reform to improve the efficacy of laws relating to family violence and sexual assault, as well as the experiences of victims (who are overwhelmingly women and/or their children). As the ALRC noted in its final report, the boundaries between the different jurisdictions were not always clear. There was considerable overlap, duplication and fragmentation of legal issues concerning family violence, meaning that victims seeking legal recourse or protection from family violence (most frequently women on their own and/or their children's behalf) could be required to engage with multiple legal systems and processes, oft with differing rules of evidence and definitions of violence.

The ALRC conducted broad-ranging consultations and public communication campaigns as part of this inquiry. The ALRC conducted 236 consultations and received 240 submissions from a wide range of people and agencies including individuals; academics; lawyers, community legal centres and law societies; support services for men, women and children; Indigenous legal and other services; directors of public prosecutions, Commonwealth and State and Territory; State and federal government departments and agencies; victims' support groups and rape crisis centres; and judicial officers, including heads of jurisdiction.

The recommendations resulting from this inquiry will be of benefit in improving legal consistency, and access to justice for women. Such recommendations include those directed to developing:

- "A. a common interpretative framework, core guiding principles and objects, and a better and shared understanding of the meaning, nature and dynamics of family violence that may permeate through the various laws involved when issues of family violence arise;*
- B. corresponding jurisdictions, so that those who experience family violence may obtain a reasonably full set of responses, at least on an interim basis, at whatever point in the system they enter, within the constraints of the division of power under the Australian*

¹⁶ See <http://www.alrc.gov.au/inquiries/equality-law>.

¹⁷ See Australian Law Reform Commission, *Child Care for Kids*, Report No 70 (1994), Australian Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No 73 (1995), Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).

¹⁸ Australian Law Reform Commission, *Family Violence - A National Legal Response*, Report No 114 (2010).

Constitution;
C. improved quality and use of evidence; and
D. better interpretation or application of sexual assault laws.”¹⁹

In its final report, the ALRC indicated that there were issues beyond the scope of that inquiry which it recommended be pursued by a follow-up inquiry, namely the impact of Commonwealth laws other than the *Family Law Act 1975* on those experiencing family/domestic violence. On 9 July 2010 the Attorney-General accordingly issued terms of reference requiring consideration of the treatment of family/domestic violence in Commonwealth legislative regimes including child support and family assistance law, immigration law, employment law, social security law, superannuation law and privacy provisions. The ALRC is currently conducting the *Family Violence and Commonwealth Laws Inquiry* with a report due to be finalised by 30 November 2011.

This kind of overarching review and reform is of fundamental public importance, particularly to traditionally disadvantaged communities including women. VWL believes it is vital that the ALRC is properly resourced to allow it to continue to fulfil such a role.

Gene patents (Report 99) and Human Genetic Information (Report 96)

The ALRC’s role and standing also affords it the opportunity to address sensitive and controversial areas of social importance, for example, the *Essentially Yours: The Protection of Human Genetic Information in Australia* inquiry²⁰ and *Genes and Ingenuity: Gene patenting and human health* inquiries²¹. These inquiries had particular relevance for women, taking place in a context of growing concern around corporations’ patents over predictive and diagnostic testing methods for breast and ovarian cancer and the potential such patenting could have for restricting scientific research and innovation and access to healthcare.

VWL hopes that the ALRC will remain sufficiently resourced to produce thorough, nuanced and effective recommendations in similarly complex and important inquiries in future, with the capacity to continue its broad-ranging consultative practices and its consideration of the impact of such reforms on women and vulnerable or otherwise disadvantaged communities.

VWL would be happy to discuss these comments and suggestions with you in further detail. We otherwise look forward to receiving your response.

Yours faithfully,

Kate Ashmor
Convenor, Victorian Women Lawyers

¹⁹ Australian Law Reform Commission, *Family Violence – A National Legal Response*, Final Report Summary, Report No 114 (2010), 16.

²⁰ Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* Report No 96, (2003)

²¹ Australian Law Reform Commission, *Genes and Ingenuity: Gene patenting and human health*, Report No 99 (2004).

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