

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Madam / Sir,

Family Violence Inquiry

I am writing in response to the current Family Violence Inquiry and thank the Commission for the opportunity to make a submission as well as for the extension of the time limit.

My interest in this subject comes as a result of having acted as the National Research Officer of Relationships Australia from 2005 to 2007 and from my work as a human rights lawyer, consultant and campaigner in Indonesia and East Timor from 1996 to 2004.

In this capacity, I have become most concerned about, firstly, the use of false statistics on family violence to silence male victims, and secondly, the use of human rights arguments to effectively subjugate the human rights of others.

Human rights aspects of family violence proposals:

Unfortunately, all the worst aspects of discriminatory domestic violence policy are contained in the Australian Law Reform Commission's Consultation Paper and its list of proposals¹. The main flaw is contained within Proposals 4-22 and 4-23 in which it is proposed that domestic violence be legislatively prescribed as "gendered" and that this prescription even be extended to the recently reformed Family Law Act 1975.

Further, Proposal 4-22 recommends that the preamble to the Family Violence Protection Act 2008 (Vic) be adopted as a model. This preamble states that "family violence is predominantly committed by men against women, children and other vulnerable persons". Gender or racial and ethnic profiling of offenders is controversial in law enforcement, but for the ALRC, given its human rights focus, to recommend it in legislation is absolutely extraordinary. As I am sure you would be aware, gender or racial profiling of offenders in legislation violates Australia's international human rights obligations since it creates a bias in the minds of judges and magistrates that a particular class of defendants is more likely to be guilty by reason of his gender or race than would be the case if he were of a different gender or race (and likewise the other gender more likely to be innocent).

¹ I understand that this is partially due to the discriminatory and offensive Terms of Reference over which the ALRC has no control providing only for measures to protect "women and *their* children" whilst excluding male victims.

This gender profiling then effectively turns all the other ‘rubber’ proposals into extremely powerful tools to subjugate the due process rights of male suspects and the protection rights of male victims. In this regard, while it is certainly the right of all members of society of whatever sex to feel safe in their own homes, it is important to remember that this inquiry deals with family violence and most of the proposals recommend extending the already far-reaching powers of police and judicial authorities to engage in the forcible break-up (whether temporary or permanent) of families and the removal of parents from their children.

We have only in recent decades reached the point where we no longer deem it acceptable for police or the criminal law system to intervene in domestic bedrooms. We therefore need to be extremely careful in granting the State wide-ranging power to intervene in the economic and domestic arrangements of Australian families as would be entailed in the extension of domestic violence to cover economic and psychological abuse. This is even more so if the laws upon which the interventions are founded base themselves upon discriminatory gender or racial profiling of offenders that is inconsistent with international human rights instruments.

Examples of some of the ‘rubber’ recommendations with far-reaching potential to violate the rights of suspects are Proposals 5-6, 6-5 and 6-7 which seem to provide for the arbitrary eviction of property owners from their home on the basis of an allegation of psychological intimidation or controlling behaviour. This would, in my view, violate Article 17 (2) of the Universal Declaration of Human Rights which states that “no one shall be arbitrarily deprived of his property”. It is aggravated by Proposal 9-4 which provides that the division of family property may be determined on the basis of such family violence.

I wish to emphasise, however, that the main human rights shortcoming within the proposals is the gender profiling of offenders in Proposal 4-22. The other ‘rubber’ provisions could be ameliorated were the sex discrimination element within the legislation and any accompanying instruments to be removed.

In that respect, I wish to draw the Commission’s attention to Articles 2, 4 and 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia became a party in 1980, and which in turn reflect the rights set out in Articles 2, 7, and 16 (1) of the Universal Declaration of Human Rights. These provisions are quite explicit and uncompromising in prohibiting discrimination based on sex. They are certainly not consistent with gender profiling of offenders in legislation. Article 26 of the ICCPR, in particular, guarantees “to all persons equal and effective protection against discrimination on any ground such as, *inter alia*, sex”.

The ICCPR even contains a particular provision dealing with family violence, especially the type of controlling emotional and/or economic abuse which the ALRC recommends be encompassed within the ambit of family violence laws. This is Article 23 (4) requiring Australia to “take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution”. Family violence,

particularly of the controlling type, is undoubtedly the most egregious and abhorrent crime that a person can possibly suffer as a result of entering into marriage. If family violence policy effectively makes protection - through advocacy, service delivery, legislative prescriptions and the terms of reference of inquiries such as this one – contingent on the victim's gender, this would mean that a woman suffering domestic violence or spousal abuse during marriage would have access to an extensive range of processes to afford her protection, while a husband who suffered the same violence or abuse in marriage could be precluded due to his gender. This clearly violates Article 23 (4) of the ICCPR as it produces inequality of rights and power imbalance during marriage.

Subsequent human rights instruments, such as the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Declaration on the Elimination of Violence Against Women did not purport to repeal or restrict the above rights and protections afforded by the Universal Declaration on Human Rights or the ICCPR any more than instruments dealing racial discrimination could be used to annul the rights of, for instance, Zimbabwean whites.

Use of false statistics to justify human rights abuse:

Presumably, the rationale of those advocating discriminatory family violence laws and policies, including the gender profiling of offenders as recommended by the ALRC, is that male victims of domestic violence, while they do exist, are numerically so insignificant that discrimination in this area is justified. But is this really the case?

A relevant question in this respect would be: what percentage of the total victim population does the target group of the government initiative need to make up before discriminatory laws are justified? Is it 99 per cent, 95 per cent? Or is 80 percent perhaps sufficient? Would an overwhelming gender or racial imbalance in rates of victimization render valid a law that might otherwise violate Australia's international human rights obligations?

In respect of the first matter, you would be aware that the Australian Bureau of Statistics in its Personal Safety Survey, Australia, 2006 (ABS Catalogue No. 4906.0) surveyed the extent to which respondents had experienced physical violence in the home within the previous 12 months. It found that 60,900 men had experienced such domestic violence by a female perpetrator, compared to 125,100 women reporting acts of physical violence by a male perpetrator. That makes roughly one-third of domestic violence incidents occurring within the 12 months prior to the survey involving male victims at the hands of female perpetrators.

In addition, nearly all peer-reviewed academic population-based studies published in academic journals around the world have found that at least one-third, and often one half or more, of the victims of domestic violence are men. An example in our part of the world is: "Partner Violence and Mental Health Outcomes in a New Zealand Birth Cohort" by Fergusson, Horwood & Ridder published in the *Journal of Family and Marriage* (vol. 67. no. 5, Dec 2005, pp. 1103-1119). Its key findings were that men and

women have similar incidence of victimization and perpetration of domestic violence and that the mental health effects of domestic violence are equally as severe for men as for women. Martin Fiebert of the Department of Psychology, California State University, Long Beach has even compiled a bibliography of hundreds of scholarly investigations indicating that women are as physically aggressive as men in their relationships with their spouses or male partners. The URL of this bibliography can be found at: <http://www.csulb.edu/~mfiebert/assault.htm>.

Even the two other related Family Law Reviews and Public Inquiries displayed on this Inquiry's home page do not adopt a discriminatory or gendered approach to this issue. Rather, they follow the humane path of recognizing that men also suffer from and deserve equal protection from family violence.

The first of these, the *Family Courts Violence Review* by Richard Chisholm released in January this year states that "it is not necessary that this report be based on any particular view about the connection between gender and family violence" (at p.46). The other, the Australian Institute of Family Studies' *Evaluation of the 2006 Family Law Reforms* found that a relatively high 17 per cent of fathers surveyed reported that their partner had physically hurt them before or during separation compared to 26 per cent of mothers – well above the rule-of-thumb one in three figure (at page 26 of the report).

The discourse on this issue thankfully is slowly but surely moving toward a humane centre ground that recognises the appalling harm that family violence inflicts regardless of the victim's gender or socio-demographic characteristics. It therefore seems extraordinary that a respected legal body would take a contrary view and recommend embedding gender discrimination in proposed changes to the law.

Conclusion:

In my view, any attempt to reform family violence law must fulfill a number of important prerequisites if it is to achieve acceptance in the community. Firstly, it must be humane and protect the rights of men, women, and especially children. Secondly, it must be compliant with international human rights law. Thirdly, justice must be seen to be done with fair treatment and unequivocally equal protection to all demographics within the Australian community.

In their current form, the proposals fail to achieve any of these prerequisites. Frankly, I believe that the proposals, due to the sexist and anachronistic Terms of Reference for the inquiry (over which admittedly the ALRC had no control) and the proposed embedding of sexist language in the Family Law Act (Proposals 4-22 and 4-23) will be seen merely as an attempt to severely further disadvantage men in family law proceedings – not as a genuine effort to reduce violence and abuse in families – especially since the bulk of the provisions grant potentially far-reaching parental and property rights to women who allege family violence. I believe that the effect will be to increase rates of depression, family break-up, parental suicide and entrenched conflict that will harm Australian children.

Further, it is not improbable that the proposals will actually lead to an increase in family violence in the community by giving the implicit message, through gender profiling of offenders, that it is acceptable for women to act violently and abusively in the knowledge that the police and judicial authorities will likely blame their male partner for the violence.

Every day, approximately five Australian men commit suicide with family law discrimination and family breakdown being anecdotally possibly the number one cause. Please do not add to the toll of suffering through judicially and legislatively prescribed discrimination.

I would urge you to uphold the human rights principles that we have signed up to as a civilization and to the fair, equal, and humane treatment of Australian men, women and children.

Sincerely,

Roger Smith, CLA member
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