LAW REFORM: WHAT’S IN IT FOR WOMEN?¹

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Introduction

Feminists in Australia, as in other countries, have a long history of engaging with law and with legal reform processes with a view to making law more responsive to women. While there is a wide range of legal change processes that we might broadly describe as ‘law reform’, for the purposes of this discussion, we generally focus on law reform arising out of specialist bodies such as law (reform) commissions, and the parliamentary committee process.²

After making some observations about why feminists might have enthusiastically embraced engagement with law reform, we argue that formal legal change processes have been, at best, of limited value to women and other disadvantaged groups. We

¹ Versions of this article have been presented at the national conference of the Women’s Electoral Lobby, Sydney, June 2004 (RG); and the Australian Lawyers and Social Change conference, Canberra, September 2004 (JM).


² This is not to suggest that other agencies and processes have been more or indeed less amenable to feminist interventions, but merely to narrow the focus of what would otherwise be a massive undertaking. Other examples of relevant processes would include policy sections or units of government departments; ad hoc inquiries established for particular processes, and a range of other non-governmental activities, some of which might be undertaken by activist groups. We also do not discuss engagement in test case litigation since this is not a major site of feminist engagement in Australia, unlike in Canada: see for a brief discussion, Reg Graycar and Jenny Morgan, “A Quarter Century of Feminism in Law: Back to the Future?” (1999) 24 Alternative Law Journal 117.
discuss three separate ways in which the processes of these types of bodies might make them particularly unable to respond effectively to issues that affect women. First, we look at the ways in which law reform questions are asked (and answered), at the (generally narrow) way that ‘terms of reference’ are often framed or constructed. Next, we consider the overemphasis on formal outcomes (in particular, the ‘implementation of recommendations’, especially in statutory form) at the expense of attention to process. Finally, we examine the rather problematic relationship with research, empirical data and socio-legal methods that formal law reform agencies have had, at least at times. Broadly, we argue that insufficient attention is paid to the real lives of those who interact with, and are impacted upon by, the law and legal system. We conclude with a reminder that changes to laws can only ever constitute a small part of any profound social change, yet for all its faults, we imagine that women will continue to turn to the law, as a potential site for ‘destabiliz[ing] and displac[ing] previously dominant meanings of gender’.  

**Why might feminists have engaged with law reform processes?**

It is easy to observe a history of laws that blatantly excluded women from public life. For example, women could not vote; married women could not own property and their participation in the paid workforce was often restricted. It may be that in the 1970s wave of feminism, women had observed that legal change had occurred and that law could respond to these exclusions – for example, *Married Women’s Property Acts* had been introduced in the latter part of the 19th and early 20th century. In 1966, the ban on married women retaining permanency in the Australian federal public service had been repealed. As law had excluded and discriminated, perhaps it could also be pushed to include and respond to women’s needs.

As Margaret Davies has put it:

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4 There are many discussions of such restrictions but one of the earliest in Australia was the “Legal Appendix” by Enid Campbell in Norman Mackenzie’s *Women in Australia: A Report to the Social Science Research Council of Australia*, Cheshire, Melbourne, 1962. See also Lee Holcombe, *Wives and Property: Reform of the Married Women’s Property Law in Nineteenth Century England*, Martin Robertson, Oxford, 1983.

5 Section 49 of the *Public Service Act 1922* (Cth) which precluded married women from holding permanent positions in the Commonwealth public service was repealed by the *Public Service Amendment Act 1966* (Cth).
Liberal-feminist-inspired law reform starts with the premise that there is a problem of inequality in some context. In the earliest years of liberal feminism this discrimination appeared to flow directly from the legal status of women. … Law reform was seen by some as providing a sufficient path to social equality. Later it was acknowledged that the disabilities were by and large not imposed by a legal status, but were social and cultural in origin.6

The 1970s was also the time when women first participated in any numbers in legal education and the legal profession,7 though it is worth noting that institutional law reform agencies in Australia were first established in the 1960s, an era prior to the development of feminist activism.8 Given that influx of women, it is not perhaps surprising that women asked much of the law, particularly in relation to their own status and their own lives. However, formal law reform processes have not, until at least very recently,9 engaged directly with issues of concern to women, other than with the law of sexual assault. By contrast, the 1980s saw a plethora of inquiries into issues such as domestic violence and child sexual abuse, usually by specially constituted bodies such as ad hoc taskforces.10

Feminist scholars have written extensively about some of the contradictions of engaging in law reform activities or in trying to use the law to achieve equality for women.11 After all, if law is inherently masculinist, or has been implicated in the oppression of women, to use the famous phrase of Audre Lord, ‘the master’s tools can never dismantle the master’s house.’12 Yet, as Margaret Thornton pointed out some

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7 See Margaret Thornton, Dissonance and Distrust: Women in the Legal Profession, OUP, Melbourne, 1996.

8 For a brief history of the earliest such agencies, see Michael Kirby, “Law Reform, Why?” (1976) 50 Australian Law Journal 459

9 We discuss the ALRC’s inquiry into Equality Before the Law below.


years ago, ‘… there is necessarily a reformist, as well as a transformative dimension within the essence of feminism’. Margaret Davies has reviewed a number of approaches that feminists have taken to these issues, and suggests that it is now common to approach this issue pragmatically:

it is not possible simply to reject or accept engagement with law: we cannot have a single position but must both engage and critique. …The argument is essentially that we can and should be working to achieve change along at least two fronts, one ‘internal’ to law and accepting (however conditionally) its power to define and redefine; the second from a position of skepticism and critique of law.

Here she refers to the well known and oft quoted statement of Mari Matsuda:

There are times to stand outside the courtroom door and say ‘this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom’. There are times to stand inside the courtroom and say ‘this is a nation of laws, laws recognising fundamental values of rights equality and personhood’. Sometimes, as Angela Davis did, there is a need to make both speeches in one day.

Davies goes on to remind us of Carol Smart’s exhortation to ‘de-centre’ law; the need not to accord law so much power, while at the same time not disengaging entirely from it. Similarly, she discusses the work of Catharine MacKinnon who has argued that law is a site of male power over women, yet has used the law on numerous occasions to engage with issues such as pornography and rape in war. So, with Davies, while we remain sceptical about the limits of the law reform project, we also believe that it is an essential site of engagement, if only to question frameworks and assumptions that have tended to underpin law reform and other legal change practices. This in turn leads to our interest in the questions asked by law reform.
The nature of the questions we ask and answer in a law reform process

Typically, a law reform commission, or a parliamentary inquiry, will be asked to look at a particular subject in accordance with a defined set of ‘terms of reference’. These may be very expansive, such as ‘what is a crime?’ but in Australia, it is far more likely that they will be quite narrow, and in that way, they may tightly circumscribe the scope of any particular inquiry. By way of example, the NSWLRC has several times been asked to review a particular section, or a particular part, of an existing statute, as has the more recently established Victorian Law Reform Commission (at least on one occasion).

In our book, _The Hidden Gender of Law_ we questioned the role played by traditional legal categories (eg tort, contract, property, family etc) in the maintenance of women’s disadvantaged status in law. We argued that since the categories into which legal problems are placed were developed at a time when women played no part in the law, women were forced to try to fit the things that happened to them into a pre-existing framework that may not be able to accommodate their experiences effectively. We suggested that those categories might have played a role in the relegation of women’s concerns to the margins of the legal terrain and indeed, to the

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19 A project currently being undertaken by the Law Commission of Canada: see www.lcc.gc.ca

20 One reference to the NSWLRC asked it to “enquire into and report on whether the offences contained in s 316 of the _Crimes Act_ 1900 (NSW) pertaining to concealing a serious offence should be abolished or amended” (see report No 93, 1999); another was “To review the operation of section 409B of the _Crimes Act_ 1900 (NSW) taking into account the purpose for which it was enacted and recent case law” (see Report No 87, 1998); and the third was “In accordance with section 562Z of the _Crimes Act_ 1900 (NSW) the Commission is to review Part 15A of that Act to determine whether the policy objectives of the Part remain valid, and whether the terms of the Part remain appropriate for securing those objectives” (see report no 103, 2003). None of these indicates the subject matters of the inquiry: respectively, they involved ‘concealing a serious offence’; the limits on the use of sexual history evidence, and the law governing apprehended domestic violence orders.

21 See for example, the terms of reference for the VLRC inquiry into ‘co-owners: “1. To review Part IV of the _Property Law Act_ 1958, with a view to introducing simpler and cheaper processes; for the resolution of disputes between co-owners; and for the sale or physical division of co-owned land. 2. To consider whether similar processes should be introduced to deal with co-ownership of other forms of property, for example chattels”. See _Disputes Between Co-Owners_, Final Report, 2002 (available at www.lawreform.vic.gov.au).


23 See _The Hidden Gender of Law_, chapter 1, for a detailed discussion. One of the examples we use is ‘abortion’ law: pointing out that in order to develop an understanding of how abortion is regulated by law, it is necessary to engage in criminal law, tort law, family law, remedies, administrative law and international law, amongst others.
subordination of women: ‘The starting point of feminist work must be found in women’s lives and not in legal definitions’. Or, as Christine Littleton has put it: feminist jurisprudence must take

women’s experience as central, and legal categories or doctrines as merely raw material – to be cut and pasted, stretched, arranged, and sewn together to fit that experience.

Hence, it may be the case that if law reform agencies narrowly circumscribe their work, their considerations might be more inclined to exclude the interests of women. The more narrow the terms of reference, the more likely that the existing legal framework will be retained. If the terms of reference contemplate only minor re-adjustment, we may preclude the possibility of developing new and perhaps more appropriate ways of responding to a legal problem than how the problem or issue was defined in the past when women and other disadvantaged groups had no input into the parameters within which an issue or problem was placed. As Mary Jane Mossman has put it:

Because law reform processes usually occur within an existing legal context and build on existing ideas, they more often promote incremental rather than fundamental change. Law reform activity inherently confines the extent of change and tends to reinforce the status quo.

Or as RA Samek so eloquently argued, as long ago as 1977:

A programme of law reform which is cast in the image of the law that is to be reformed can only add another distortion, another wrinkle to the present state of affairs for such a programme attempts to draw the future into the present and suffocates any real hope for reform.

However, not all law reform agencies approach their work constrained by traditional legal categories. The insight that social experience does not divide itself readily into legal categories informs the approach of the Law Commission of Canada, established

in 1997. When it commenced operation, the Commission chose the broad theme of ‘relationships’ to guide its work.

As founding chair Professor Roderick MacDonald said:

By taking social experience rather than legal categories as a way of framing issues to study, the Commission hopes to avoid truncating its research in deference to ministerial or jurisdictional frontiers.

When setting its first research agenda, the Commission chose four themes, all involving relationships. These were: personal relationships, social relationships, economic relationships and governance relationships.

To quote MacDonald again:

Relationships themselves, and not specific rules of law, are the point of inquiry. The selected relationships will be examined not as passive social reflections of legal concepts, but as dynamic institutions that the law attempts, often clumsily, to apprehend and modulate.

While the exclusion of women was not necessarily at the forefront of the Law Commission’s concerns when developing this approach to its work, nonetheless we would argue that an issues-based, rather than a legal doctrine or legal category-based approach to its work, is more likely to respond to the lives of those whose experiences have been omitted from law’s attentions, of whom the largest group has, historically, been women.

The Law Commission of Canada’s first major project within its relationships theme was in the context of ‘close personal relationships’, in practice, an inquiry about how the law should respond to the dynamic changes in people’s relationships (including same sex and other interdependent relationships). If we start looking at an issue like this by reference to the legal category ‘family law’, as happened in the mid 1980s when the NSW government introduced de facto relationships legislation following a

28 For a detailed discussion of the background to the development of this approach, and its rationale, see Roderick A MacDonald, “Recommissioning Law Reform” (1997) 35 Alberta Law Review 831.


31 For the outcomes of this inquiry (discussion paper, report, and a set of background papers), see http://www.lcc.gc.ca/en/themes/pr/cpra/cpra_main.asp.
NSWLRC inquiry, an obvious focus for statutory change becomes provisions that deal with property alteration after relationship breakdown. This is because the legal category ‘family law’ is usually taken to signify ‘marriage and divorce’ – especially the latter. So the focus becomes separation, property, children - the issues that are seen as central to ‘family law’ in the context of separation/divorce, and other relationships tend to be assessed by reference to how much they resemble marriage.

But by focussing on the ways in which the law impacts upon one’s relationship and the many legal consequences of how (and with whom) we order our lives, rather than on the legal category we have traditionally called ‘family law’, we get a much more comprehensive understanding of how the law structures relationships and indeed, how it should structure them. As part of its work on personal relationships, the Law Commission of Canada conducted an exhaustive ‘statute audit’, demonstrating the more than 1000 different instances of the use of ‘family descriptions’ in various Canadian laws. In other words, to engage in relationships law reform that is meaningful and effective involves looking at issues as diverse as judges’ pensions, the doctrines of competence and compellability in evidence law, conflict of interest provisions in licensing regimes, as well as the more obvious issue of how to divide property on relationship breakdown.

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34 Note however that while the De Facto Relationships Act as it was seen as the cornerstone (and therefore the focus was only on property after relationship breakdown), in fact, over the next 10 years or so, about 50 other pieces of legislation were amended to include reference to de facto relationships. For some broader discussions of ways of transcending these frameworks, see Reg Graycar and Jenni Millbank “The Bride Wore Pink … to the Property (Relationships) Legislation Amendment Act 1999”: Family Law Reform in NSW” (2000) 17 Canadian Journal of Family Law 227; and Brenda Cossman and Bruce Ryder, “What is Marriage-Like Like? The Irrelevance of Conjugality” (2001) 18 Canadian Journal of Family Law 26.


36 This has also happened in NSW following the enactment, in 1999, of the Property Relationships (Legislation Amendment) Act. Some NSW examples include: Conveyancers Licensing Act 1995, Judge’s Pensions Act 1953, Dentist’s Act 1989, Retirement Villages Act 1989; Evidence Act 1995. For a full list of those amended in 1999, see the appendix to Graycar and Millbank, ‘The Brides Wore Pink’, n * above.
The approach of the Law Commission of Canada can be seen to reflect the broad statutory objectives that guide its functions. These objectives are:

- the development of new approaches to, and new concepts of, law;
- the development of measures to make the legal system more efficient, economical and accessible;
- the stimulation of critical debate in, and the forging of productive networks among, academic and other communities in Canada in order to ensure cooperation and coordination; and
- the elimination of obsolete laws and anomalies in the law.  

In a speech to the Canadian Bar Association in February 1999, the Commission’s first President Professor Rod MacDonald referred to this last one as the role ‘traditionally given to law reform commissions’ and the one the Commission saw as their ‘least important task’.  

In his view, the Law Commission’s

role is to produce reports and studies that promote reflection and that reorient the ways in which law and legal regulation are conceived. This involves suggesting novel concepts to reframe how we use law to advance the social policies that we desire.

While we would agree that the way a project is framed plays a significant role in its transformative potential, it need not be determinative. There are other ways for law reform to engage effectively with social context, aside from establishing broad-ranging inquiries based on themes. A recent example is provided by the Victorian Law Reform Commission’s work on ‘defences to homicide’. By way of background, Jenny Morgan was commissioned to prepare an occasional paper, “Who

40 Information on the homicide reference can be found at http://www.lawreform.vic.gov.au.
The purpose of the paper was to suggest that any reform to the law governing defences to homicide should be driven by social context – in particular, by reference to the gendered violence that exists both when men kill and when women kill their partners. The paper analyses the data on homicides by reference to the various contexts in which they occur; such as those between men who are strangers; men killing women who are or have been their intimate partners, women killing men, women killing children, men killing children, homophobic homicides and so forth. While this may seem a totally obvious way of addressing the question of how the law should respond to certain homicides, it is in fact not a common legal way to do so. Instead, the law usually is analysed by reference to pre-existing legal categories such as provocation and self-defence, and then the behaviours have to be fitted into a framework created for a different context. So, to use the classic example, self-defence is often said to be organised around the model of the bar-room brawl and for that reason the law has had difficulty in responding to women who kill in response to violence from their partners. It often follows from this that, to the extent that law reform agencies identify a ‘gender issue’ in relation to homicide, it is about whether women who kill (a tiny fraction of those who kill) can avail themselves of the defence. In fact, as Who Kills Whom and Why demonstrates, far more women are killed by their partners than kill their partners; one of the most common contexts of the use of provocation is by a man who argues that he was provoked, either by sexual jealousy, or by his wife leaving him, to kill her.

In its Options Paper, Defences to Homicide published in September 2003, the VLRC organised and characterised the data on homicide by reference to the nature of the incident (whether in the context of sexual intimacy, conflict resolution, or spontaneous encounters), rather than by reference to the characteristics of the accused, or the relationship between the accused and deceased. Rather than discussing

42 See, for example discussion of these issues in the judgments of the SCC in The Queen v Lavallée [1990] 1 SCR 852; R v Malott [1998] 1 SCR 123.
43 See, for example, the discussion of whether the defence of provocation is ‘gender biased’ in the Law Reform Commission of Victoria, Homicide Prosecutions Study, Report No 40, Appendix 6, 1991.
44 For a detailed discussion, see Jenny Morgan, “Provocation Law and Facts: Dead Women Tell no Tales, Tales are Told About Them” (1997) 21 Melbourne University Law Review 237.
hypothetical situations, the study focused on reality: who actually raises the defences of provocation and self-defence, under what circumstances, and how successful the defences are. This approach allowed a more nuanced examination of the interaction between gender, domestic violence and homicide. For example, the Commission found that when men killed in the context of sexual intimacy, it was most likely to be in circumstances of jealousy or control; whereas for women it was most likely to be in response to alleged violence that had been perpetrated against her by a male deceased.\(^\text{45}\) While we do not know what the final outcome of the inquiry will be, we can at least maintain some optimism that the gendered context in which killings occur has been given some attention as part of the process.\(^\text{46}\)

This approach is in marked contrast to the approach of the Law Commission of England and Wales which was recently asked to review the law dealing with partial defences to murder “with particular regard to the impact of the partial defences in the context of domestic violence”.\(^\text{47}\) In its final report, the Commission devoted only minimal attention directly to the issue of domestic violence.\(^\text{48}\) While the report contains an appendix that includes detailed empirical material on killings and the circumstances in which they occurred, and on which defences were used, this material does not appear to have significantly informed the recommendations. On the specific effect of domestic violence on provocation, the Commission reiterated its comment from its own earlier consultation paper, viz:

> Domestic violence is an extremely worrying problem. The law must deal with it in a way which is fair and shows proper respect for human life. At the same time it would be wrong to introduce special rules relating to domestic killings unless there

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\(^\text{47}\) Law Commission, *Partial Defences to Murder*, Report No 290, 2004, at para 1.2; see also Alan Travis and Lucy Ward, “Ministers at odds over domestic violence bill”, *The Guardian*, 2 December 2003, reporting that Solicitor General Harriet Harman had proposed abolishing the defence of provocation as part of a reformed domestic violence law because it was used by men to justify killing their wives. However, Home Secretary David Blunkett is said to have supported its retention, so as to assist women who kill after years of abuse from men. The article notes that the matter was referred to the Law Commission to resolve this dispute.

\(^\text{48}\) Note that in its consultation paper (Law Commission, Consultation Paper 173, 2003), to the extent that the issue of ‘gender’ was raised, it was only in the context of women who kill in response to violence, rather than in the gendered violence used by men who kill their partners: see paras 4.166- 4.167; 5.43.
is medical or other evidence which demonstrates a need and a proper basis on which to do so.

The Commission concluded its one page section directly discussing domestic violence as follows:

3.78 As a matter of principle, the criminal law should be gender neutral unless it is absolutely necessary to depart from that principle. Our proposals do not depart from that principle.49

The commission’s recommendations, if they become law, may well indirectly have some impact on the use of provocation by men in contexts of sexual jealousy since they propose tightening and defining what constitutes provocation. To rely on the defence, a defendant will be required to have acted in response to “gross provocation” whether by words, conduct, or a combination, “which caused the defendant to have a justifiable sense of being seriously wronged” or “fear of serious violence towards the defendant or another”, and will have to show that a person of the defendant’s age and ‘of ordinary temperament’ would have acted the same way. But it does seem that the Commission, in the guise of its commitment to gender neutrality, has side-stepped the central context within which it received its reference. Violence is gendered and to echo Macklin:

One would think one had to seek permission under the [Canadian] Constitution to use a real group of people and their real life experience as the organizing principle for inquiry as opposed to an ostensibly genderless, raceless, faceless doctrine.50

In other words, an approach to law reform that is driven by a thematic conceptual approach, either via expansive terms of reference, or via an interrogation of legal categories by reliance on detailed social research, is more likely to respond to the concerns of women. Unfortunately, such approaches have been all too rare in Australia.

An overdependence on recommendations for legislative change?

A further suggestion we wish to explore is the notion that formal law reform agencies, and certainly Australian law reform commissions, have been overly wedded to coming up with “proposals” for formal legal change, often in the form of statutory

changes (including, at times, the provision of draft statutes) at the expense of other ways of engaging with change, such as, to refer to the statutory objects of the LCC, stimulating a public debate about a particular issue, or developing new ways of thinking about a particular legal concept. In her discussion of the former Law Reform Commission of Canada, Audrey Macklin commented:

A review of the Commission’s work suggests that the evil to be remedied is either flawed legislation, inconsistent common law doctrine or the lack of legislation. The cure invariably prescribed is more legislation.\(^{51}\)

The focus on legislation as the optimum outcome is common to many such agencies. Some have made it a matter of course to include draft legislation as part of a report (this was common for the ALRC until recently,\(^{52}\) and the South African Law Reform Commission still often does so).\(^{53}\) This in turn raises the question of what amounts to implementation. Many reform agencies report on implementation as a key performance indicator (KPI) of their effectiveness, but how is implementation measured? Perhaps the simplest way to assess implementation is to look at the number of statutory changes that follow a particular report (a clear example of this approach is provided by the Family Law Council\(^{54}\) in each of its annual reports which includes a section on ‘implementation’).\(^{55}\) But can all necessary legal reform be achieved by the passage of an Act of Parliament? Are there measures of effectiveness that do not involve legislation?

As Rod MacDonald has said:

Once an expert law reform commission frees itself from the obligation to produce draft statutes, it can begin to explore issues for which it might not even envision

\(^{51}\) Macklin, * at 399.

\(^{52}\) See House of Representatives Standing Committee on Legal and Constitutional Affairs, *Law Reform: The Challenge Continues*, 1994, at 3.8 et seq, where it is noted that it was common for the Commission’s terms of reference to require it to prepare draft legislation. The Committee recommended that the ALRC ought to continue to be able to include such legislation in its reports.

\(^{53}\) The SALRC, in its outline of its functioning and policies, notes that at the conclusion of an inquiry, a report is published: “The comprehensive report contains the Commission’s final recommendations and, where applicable, draft legislation to give effect to its recommendations”: [http://wwwserver.law.wits.ac.za/salc/function.html](http://wwwserver.law.wits.ac.za/salc/function.html) (at 26 August 2004).

\(^{54}\) This is a national advisory body, established under s 115 of the *Family Law Act 1975* (Cth).

\(^{55}\) See for example, *Family Law Council*, Annual Report, 2002-2003, at 7-9, and Appendix E. The Council reports that since its inception in November 1976, it has made 698 recommendations to 30 June 2003 (at 34).
the need for a legislative result. The expression “if all you have is a hammer, every problem looks like a nail” is a truism; its corollary, “if you have to use a nail, the only problems you are able to see as problems are those where hammering can be an effective activity” is less appreciated.\textsuperscript{56}

He goes as far as to suggest that it may not be necessary for law reform agencies to write reports, or indeed, to write anything at all. Rather, he argues that such bodies should be more creative in the use of new media and other communicative strategies.\textsuperscript{57} And, as part of its conclusion of the first reference it undertook, the LCC distributed a video on institutional child abuse,\textsuperscript{58} and has continued to use this medium.\textsuperscript{59}

But to return to published reports, still the dominant currency of participants in formal legal change processes, is a report that has never been implemented necessarily a ‘failure’? Quite clearly, in our view, (a view we imagine is shared by others), implementation is not all. According to the President of the ALRC, the highest number of ‘hits’ on the ALRC website is to the highly influential report on \textit{Aboriginal Customary Law}, which has essentially never been implemented.\textsuperscript{60} That is, the report remains influential, authoritative (despite being published prior to the High Court of

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\item\textsuperscript{56} Recommissioning Law Reform, at 872.
\item\textsuperscript{57} MacDonald, ‘Recommissioning Law Reform’, at 874. A similar view was expressed in 1976 by Lyon: “Lawyers are fascinated by words, and are long conditioned to believe that the world began with an Act of Parliament. A written report is an attempt to capture in a word picture a segment of life. The written report has its uses and at times is indispensable, but to try to reform a legal order entirely through written reports, many of them prepared by persons with little or no experience in the dynamics of bringing words to bear on the real world, is folly’. JN Lyon, “Law Reform Needs Reform” (1974) 12 Osgoode Hall Law Journal 421 at 426.
\item\textsuperscript{58} \url{http://www.lcc.gc.ca/en/themes/mr/ica/2000/ica00_main.asp} (the video no longer appears on the web site).
\item\textsuperscript{59} See \url{http://www.lcc.gc.ca/en/ress/video/video_main.asp} (27 August 2004).
\item\textsuperscript{60} \url{http://www.alrc.gov.au/inquiries/title/alrc31/}; In a conference paper “What’s the Value of a Full Time Standing Law Reform Commission?” delivered at \textit{Australian Law Reform Agencies Conference (ALRAC)}, 19-21 June 2002, ALRC President Professor David Weisbrot, noted: “The ALRC’s latest website usage statistics for the three-month period to November 2001 show nearly 33,000 ‘hits’ downloading material from the 1986 report on Recognition of Aboriginal Customary Laws (ALRC 31). It is the ALRC’s most requested document by a very long way — outstripping by a factor of four or five each of the next most-requested documents: the interim report on evidence law (ALRC 26); the recent review of the Judiciary Act (ALRC 92); women and equality before the law (ALRC 69, 1994); and the Managing Justice report (ALRC 89, 2000)”.
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Australia’s decision in *Mabo*\(^{61}\) and frequently cited. These are not characteristics we generally associate with the notion of failure.

We also maintain that the way issues are talked about is of central importance to legal change processes. And here we want to raise the example of our own dissenting report in the *Equality Before the Law* reference of the ALRC, on which we were commissioners.\(^{62}\) The Commission in that inquiry recommended that the Federal Parliament enact an *Equality Act*. This was meant to be a mid-stage prior to the consideration of the enactment of an entrenched equality guarantee. There was much that was positive about the proposal, in particular its nuanced understanding of what gender equality might mean, in an effort to ensure that the focus of consideration was on substantive and not mere formal equality. However, with Hilary Charlesworth, we dissented on two crucial issues and submitted a dissenting report.\(^{63}\) We, the dissenters, argued that the proposed act should NOT be gender-neutral, and SHOULD extend to equality-denying actions that occurred in the “private” sphere. On the issue of a gendered Act, we had no illusions that any Parliament was likely to enact such a law, a law that on its face sought to protect only the equality rights of women, but we did think it necessary to identify clearly the problem that needed to be addressed, and to generate a debate about that problem. The problem was (and remains) that women experience inequality; this is not a gender-neutral problem and a gender-neutral response to it is not likely to address that problem effectively. If only at the level of discourse and public discussion, we hoped to enhance an understanding of that issue and we regret that we were unable to convince our fellow commissioners to join with us in that approach. Even so, it may be that articulating our reasons for our disagreement has advanced the debate about women’s equality and to that extent, has achieved an important outcome for the inquiry.\(^{64}\)

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\(^{61}\) See *Mabo and others v Queensland (No 2)* (1992) 175 CLR 1.


\(^{63}\) See Report No 69, Part 2, chapter 16.

\(^{64}\) Compare with Adrian Howe, ‘Reforming Provocation (More or Less)’ (1997) 12 *Australian Feminist Law Journal* 127, where Howe supports the Model Criminal Code Officers
A related way of thinking about these issues is to consider the processes institutional law reform agencies use to ensure the participation of those affected by any reform. Put another way: Can a good process amount to a good law reform? Law reform agencies in Australia tend to follow fairly standard patterns and processes. Under the legislation of most Australian law reform agencies, the commissions do not have the power to initiate their own inquiries. They respond to references given to them by the relevant Attorney-General. After receiving a reference, a Commission will typically release a consultation document (e.g., an issues paper or a discussion paper) in which it frames the issues and then call for submissions from the public and relevant professional associations. After receiving (and considering) submissions, it might publish a further discussion, either a draft report or a working paper, and then proceed to a final report. Unlike the institutional bodies, Parliamentary committees frequently advertise no more than their terms of reference and rarely publish interim discussions. But our interest is in the more substantive issue of who is involved. Who gets to participate in law reform and in what ways?

First, there is the issue of who the Commissioners are and who writes the reports. We have elsewhere raised concerns about the preponderance of sitting judges amongst those involved in law reform. At the very least, it seems clear that sitting judges and practising lawyers will be the least likely to see their role as reconceptualising and finding new ways to think about legal problems, something that most critical accounts of existing law reform processes would urge is essential. Rod MacDonald has discussed the issue of who should constitute law reform agencies, and Committee recommendation to abolish the defence of provocation (see Discussion Paper, Chapter 5: Fatal Offences Against the Person, June 1998) but is highly critical of the case they made for so doing arguing that it ignores most of the research that shows that the defence was both gender biased and homophobic.

In many cases, this will be done in consultation with the Commission. Referring to the ‘neutral stance’ so frequently exhorted to by law reform practitioners, Audrey Macklin argues that those who are engaged in law reform, such as legal academics, “ought to be selected on the basis of experience and interest in the field, rather than because their ignorance of the area gives them the appearance of impartiality”: Macklin, note * above, at 410.

has also raised concerns about the efficacy of permanent staffs of legal researchers, and his concerns are consistent with those of others who see the role of law reform as being to step outside existing paradigms where appropriate.\textsuperscript{68}

In addition to who constitutes these bodies, there is the related question of how they consult, that is, how they establish how the law at issue impacts upon the communities that might be affected. Mary Jane Mossman has drawn attention to the over-reliance on traditional legal materials in the context of family law reform, in particular, the tendency to rely on reported judgments, and points out that in the area of family property, only those with considerable wealth tend to be represented in the case law.\textsuperscript{69}

At the time of a 1999 Australian debate about matrimonial property (discussed below), a survey undertaken by a national association of women’s legal services showed that, unlike what might appear from the case law, the major issue that affected their clients, none of whom had the resources to litigate, concerned debts and how to deal with them after separation and divorce.\textsuperscript{70} There is no legal aid in Australia for family law property cases, so the people who use community legal services (poor people – and in particular, women) are not represented among the pool of those who litigate about property. One of the recommendations of that report was breathtaking in its simplicity: it was that a fund should be set aside for test case litigation about how to deal with debt when couples separate. The purpose of this recommendation was to enable the Family Court to consider the issue and thus develop some jurisprudence about it so as to provide guidance to the far more numerous group with debts to divide than the small number of people with substantial property to allocate.\textsuperscript{71}

As for who writes submissions to such inquiries, beyond the institutional bodies (such as Bar Associations, and the judiciary), individuals who write are often those who are most aggrieved by the issues under examination. A number of commentators have


\textsuperscript{70} Nicola Seaman Fair Shares? Barriers to equitable property settlements for women (1999) Women’s Legal Services Network, Canberra

\textsuperscript{71} Ibid: not surprisingly, this has not been implemented.
written about the gendered constraints that limit women’s participation in law reform type processes, from child care responsibilities to unequal access to safe streets.\(^{72}\) This is particularly noteworthy in family law inquiries, especially those conducted by parliamentary bodies.\(^{73}\)

One of the most striking examples of a process that was itself central to the ultimate legal outcome is the work done by a coalition of women following the decision of the Supreme Court of Canada in 1991 to strike down the Canadian rape shield statute, in \(R\ v\ Seaboyer,\ R\ v\ Gayme.\(^{74}\) In the wake of the decision, a coalition of women formed to work on redrafting new legislation, which, incidentally, ultimately survived Supreme Court challenge in \(Darrach\ v\ R.\(^{75}\) Sheila McIntyre has written about the process that led to the enactment of the legislation.\(^{76}\) She explains why she considered it important to document the process, as much as the outcome:

> My hope is that the story of the coalition will provoke new thinking about old debates concerning whether and how women and other historically disempowered groups should pursue egalitarian social change through law. I argue for a particular model of feminist law reform whose measure of achievement is not the reform’s particular substantive legal yield or its potential as a building block for changing other laws, but the degree to which it translates principles of accountability to, inclusion of, and genuine power sharing among the broad women’s community into feminist legal practice.\(^{77}\)

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75 \(Darrach\ v\ R\ [2000]\ 2 SCR 443.

76 “Redefining Reformism: the Consultations that Shaped Bill C-49” in Julian V Roberts and Renate M Mohr (eds), *Confronting Sexual Assault: A Decade of Legal and Social Change*, University of Toronto Press, Toronto, 1994

77 McIntyre, at 293-294.
The process itself was remarkable for the extent to which the women who negotiated with government (via the Minister and the Department for Justice) achieved outcomes that both improved the law of sexual assault, and were reflective of and responsive to a wide coalition of women with different and diverse perspectives. As McIntyre described the aims of the coalition, it was to ensure that “the amendments would not only be shaped but tested by the diverse knowledge, experience, and needs of all women sexual assault law should serve”.  

Rather than tinker at the margins with, as she describes Justice’s initial approach, a “replication of the backward-looking and gender-blind legal method adopted by the Seaboyer majority [which] promised to replicate Seaboyer’s flaws,” the coalition resisted what was being presented to them and was prepared to oppose the legislation when the Minister met with the coalition and agreed to requests from the women’s coalition to auspice a 3 day national consultation.

The audience with the minister was used to confront her with our diversity, not the consensus we had reached. Those voices – Black women, lesbians, sex trade workers – who had not been at the table in the earlier meetings with Campbell, held the floor. Their failure to reach the minister on the inadequacy and unacceptability of generic drafting and false universals spawned the most innovative clauses of our final proposals.

Not only is the legislation in a form that had been largely agreed to by a very diverse constituency of women affected, but McIntyre argues, the national debate surrounding the process, including the widely publicised oppositional views of the defence bar, gave rise to a public education process that no amount of ‘no-means-no’ advertising might have delivered.

She concludes:

The pre-condition of any reform initiative must be adequate consultations among a constituency-based assembly of all who will or should benefit from legal change to ensure that when reformers conclude that something is better than nothing, those for whom nothing has been law’s historic yield concur.

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78 Ibid, at 296.
79 Ibid, at 299.
80 Ibid, at 309.
81 Ibid, at 308.
82 Sheila McIntyre, ‘Redefining Reformism: The Consultations that Shaped Bill C-49’ in Julian V Roberts and Renate M Mohr (eds), Confronting Sexual Assault: A Decade of Legal and
This process, often cited as a model by feminist legal activists contrasts markedly with a recent inquiry in NSW into the provisions of the Crimes Act dealing with domestic violence. A discussion paper was released in December 2002, and submissions were required by the end of January 2003. Australia effectively shuts down between mid December and the end of January (the summer break in the southern hemisphere) and most community organisations that meet monthly do not meet in January. Therefore, this timetable was seen as precluding consultation among those most affected. The Commission eventually agreed to accept some late submissions, but many people and organisations would have been discouraged by the short amount of time, or simply, did not know about the project until the time for submissions had passed.

We have already referred to concerns about the personnel involved in the NSW reference on sexual assault, where the views of the defence bar dominated the final recommendations, and the Commission was dismissive of government sponsored research that had documented the experiences of women sexual assault victims in court. It is of some interest to compare the conduct of an inquiry into sexual assault currently being conducted by the recently re-constituted VLRC: its terms of reference were much more expansive and called on the Commission to review the law by reference to certain other research studies and inquiries (including the Victorian equivalent of Heroines of Fortitude by Melanie Heenan and Helen McKelvie) to “ensure the criminal justice system is responsive to the needs of complainants in

83 See eg, Macklin’s discussion, note * above, at 410-411.
85 Although it is dated November 2002, it was not actually released until 13 December 2002: see http://www.lawlink.nsw.gov.au/nswlrc.nsf/pages/prdp45
87 Some were received in March 2003; the report is dated October 2003, but was not tabled in Parliament (and therefore not publicly released) until 24 June 2004: see http://www.lawlink.nsw.gov.au/lrc.nsf/pages/digest.104
88 See The Hidden Gender of Law, at 410-411; and see Graycar, “Frozen Chooks Revisited” (forthcoming), note * above. The report was Department for Women, Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, NSW, 1996.
sexual offence cases.” The Victorian terms of reference also exhort the Commission to develop and coordinate education programmes to ‘ensure the effectiveness’ of any existing or proposed laws or procedures etc. As part of its work, the Commission arranged roundtables; tried to encourage community participation: in other words, they tried to hear from at least some of the people affected. Some philanthropic foundations funded consultants to work with people from non-English speaking backgrounds and specifically facilitated submissions from the Islamic Women’s Welfare Council, Elizabeth Hoffman House (an indigenous women’s refuge) and the Disability Discrimination Legal Service. However, if any area of law illustrates the limitations of a law reform process it has to be sexual assault: the most consultative, best researched, most gendered law reform process will always be, at most, a very small contribution to ending sexual violence against women.

The role of research in law reform

There is a variety of ways that law reform processes engage with research. Some eschew research altogether, relying instead on a set of assumptions, while others use empirical research as an integral part of their work. A clear example of the former

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91 http://www.lawreform.vic.gov.au

92 This was to ensure stakeholders from ‘especially disadvantaged’ groups were contacted: Victorian Law Reform Commission (2003) Sexual Offences Interim Report Victorian Law Reform Commission, Melbourne: ix


type of inquiry is the recent work of the ‘Committee of Eminent Persons’, chaired by Justice David Ipp, and appointed by the Federal Government in 2002 to review the tort system. The terms of reference commenced by asserting that

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another.\textsuperscript{95}

The committee referred to widespread perceptions in the community that damages awards are too high; that the law is unpredictable and favours plaintiffs\textsuperscript{96} and then stated:

The Panel’s task is not to test the accuracy of these perceptions but to take as a starting point for conducting its inquiry the general belief in the Australian community that there is an urgent need to address these problems.\textsuperscript{97}

In Australia, the role and relevance of research has been especially contentious in the context of ‘reform’ in family law. John Dewar has stated:

The consistent message of all the research … is that, in its day to day operation, family law fails to protect women and children from financial and physical harm. Yet this message seems to go unheeded by family law policy makers. Family law policy often seems to be made in the teeth of, rather than on the basis of, the research and other empirical evidence available.\textsuperscript{98}

This is perhaps most clearly illustrated in the following comment made at the most recent parliamentary inquiry into family law by a member of the committee:

I am a bit of an anti-research person myself. I do apologise if I offend you. I figure it is time we get out of the research and get into delivering exactly what our families need.\textsuperscript{99}


\textsuperscript{99} Mrs Hulls, Chair of House of Representative Standing Committee on Family and Community Affairs: Hansard 29 August 2003, at 17, see their report *Every Picture Tells a Story*,
However, on other occasions, empirical research has been expressly commissioned to provide information to support the direction or process of an inquiry. A clear example of this was the ALRC’s reference on matrimonial property.\textsuperscript{100} For that project, the ALRC noted that ‘the first task was to gather evidence about the operation of the present law and its social and economic effects’.\textsuperscript{101}

The Commission organised a survey of family property proceedings at all registries of the Family Court of Australia and the Family Court of Western Australia. In addition, the Australian Institute of Family Studies, in cooperation with the Commission and the Family Court of Australia, undertook an unprecedented study of property and income arrangement of spouses during marriage, the respective economic circumstances of husbands, wives and children after separation and divorce and the experience and attitudes of divorced people relating to matrimonial property law.\textsuperscript{102}

The findings of those studies are summarised in two chapters of the report, and it is clear that they played a key role in the Commission’s formulation of its recommendations. While the Commission noted that there was a wide variation in the financial arrangements within marriages, nonetheless there was a general pattern discernible, which they summarised as follows:

- Men and women living with a new partner and children return to a standard of living close to that which they had before separation
- Men living alone, or with a new partner without children, or as sole parents, considerably improve their standard of living
- Women living alone or as sole parents sustain a drastic fall in living standards, with substantial numbers living in poverty.\textsuperscript{103}

The Commission relied heavily on this research when concluding against a ‘formal equality’ outcome:

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\textsuperscript{102} The results are published in Peter McDonald (ed), \textit{Settling Up: Property and Income Distribution on Divorce in Australia} (Melbourne, AIFS and Prentice-Hall of Australia, 1986); see also the subsequent follow up study, Kathleen Funder, Margaret Harrison and Ruth Weston, \textit{Settling Down: Pathways of Parents After Divorce} (Melbourne, AIFS, 1993).

All the evidence leads to the conclusion that equal sharing of property at the end of a marriage is not necessarily fair sharing. A just sharing of property should be based upon a practical rather than a merely formal, view of the equal status of husbands and wives within marriage. ... Thus, a just sharing of property should take into account any disparity arising from the marriage in the standards of living reasonably attainable by the parties after separation.\(^{104}\)

The ALRC report was never implemented, but that has not stopped a stream of constant calls for ‘family law reform’. However, none of the subsequent inquiries, such as the Parliamentary Joint Select Committee of 1992,\(^ {105}\) has had anything remotely comparable to rely on by way of empirical research. By way of contrast, a ‘property law reform’ proposal that came from the office of the Federal Attorney General in 1999, which purported to be based on the ‘considerable social change of the past 20 years (such as the increased proportion of women in paid work)’,\(^ {106}\) recommended a move to a much more rigid formal equality structure which, it was widely believed, would disadvantage women and the children in their care. But while the paper referred to ‘evidence’ of women’s increased financial participation, there was no empirical support for this proposition and what was omitted was reference to the ever-increasing wage gap between women and men,\(^ {107}\) and the casual and part-time nature of much of the paid work that women do.\(^ {108}\) Indeed, data from the Australian Institute of Family Studies show that full time employment rates for lone mothers have DECLINED from 28.7% in 1988, to 21.0% in 2002.\(^ {109}\) So had this


\(^{106}\) Attorney General’s Department, *Property and Family Law: Options for Change* (July 1999), available at [http://152.91.15.15/aghanecommaff/fllad/Familylaw/mpl/fullversion.html](http://152.91.15.15/aghanecommaff/fllad/Familylaw/mpl/fullversion.html). See especially Chapter 4, “Australia: The Changing Social Context” which concludes with the statement: “Th[e] evidence supports the claim that, due to increased workforce participation, women are making an economic as well as nurturing contribution to marriage”: para 4.11.

\(^{107}\) Statistics from the Australian Bureau of Statistics reveal that the difference in earnings between low and high income earners in full time jobs has been increasing and that women’s hourly earnings fell as a proportion of men’s hourly earnings between 1994 and 1998: Australian Bureau of Statistics, “ABS releases latest social trends in Australia” (4 July 2000); Australian Bureau of Statistics, *Australian Social Trends 2000* (Catalogue No 4102.0, Canberra 2000).


proposal been implemented, it would have disadvantaged women in the face of evidence that showed the continuing financial disadvantage they experience after separation and divorce, so comprehensively documented by the AIFS.\textsuperscript{110}

Of all the areas of family law that are the subject of regular calls for review, the law relating to children’s living arrangements after the separation of their parents is perhaps the most frequently under review. While there has been no comprehensive law reform commission inquiry into what is almost invariably referred to as ‘custody and access’,\textsuperscript{111} Parliamentary committee reviews are frequent in number and usually are generated by the same groups: disgruntled non-custodial parents (usually fathers).\textsuperscript{112}

In 1991-2, a group of backbenchers persuaded the government to hold a joint parliamentary inquiry into certain aspects of the Family Law Act.\textsuperscript{113} While children’s matters were considered (and were certainly the subject of many submissions), little if any substantive change was proposed in relation to children’s issues (the major focus of the report was on property). However, shortly after the Committee reported, the Attorney General asked the Family Law Council\textsuperscript{114} to inquire into and report on the possible introduction into Australia of the English Children Act 1989. After a very short period of inquiry, with various modifications, legislation that drew heavily upon the English Act was introduced, and the Family Law Reform Act was passed in 1995 and came into effect in 1996.\textsuperscript{115}

\textsuperscript{110}Note that the AIFS Divorce Transitions Projects data shows that the situation remains remarkably similar to when the original work was done in the mid 1980s: see Grania Sheehan and Jody Hughes, Division of Matrimonial Property in Australia, Research Paper No. 25, Australian Institute of Family Studies, Melbourne, 2001

\textsuperscript{111}The Family Law Act was amended in 1995 to remove references to custody and access: while custody has no legal equivalent, the person the child lives with is said to have ‘residence’ and the other parent ‘contact’.

\textsuperscript{112}See Linda Hancock, “Reforming the Child Support Agenda: Who Benefits?” (1998) Just Policy No 12, March 1998, 20 at 28-30 who notes how the majority of views put to parliamentary committees such as the 1992 Joint Select Committee come from non-resident parents.

\textsuperscript{113}Joint Select Committee, The Family Law Act 1975: Aspects of its Operation and Interpretation, 1992

\textsuperscript{114}A statutory advisory body established under s115 of the Family Law Act 1975 (Cth).

\textsuperscript{115}For a more detailed history of these developments, see Helen Rhoades, Reg Graycar and
The Family Law Reform Act made a number of significant changes to the law. The legislation removed the previous notion of ‘custody’, which clarified who had the power to make significant decisions about the child’s welfare, and replaced it with a statutory allocation of ‘joint parental responsibility’, ie, an exhortation to parents to share responsibility and to make joint decisions, notwithstanding the day-to-day care arrangements. It also introduced a set of objects and principles amongst which was a child’s right to contact with both parents, as well as a series of statutory provisions explicitly making family violence a relevant consideration in a range of different contexts under the Act, including decisions about where a child should live after the separation of their parents.¹¹⁶ In a review of the first three years’ operation of the legislation, Helen Rhoades, Margaret Harrison and Reg Graycar concluded that the ‘reforms’ responded to no clearly identified mischief, but rather, to the squeaky wheels of the fathers’ rights movement.¹¹⁷ That research also found (echoing research by John Dewar and Stephen Parker, and by Rosemary Hunter)¹¹⁸ that the right to contact provisions had ‘trumped’ the violence ones and there were many instances in which children’s safety was compromised by the newly created sense of ‘equal rights for parents’, notwithstanding that the government’s rhetoric was that this was about children’s rights, not parents’ rights.¹¹⁹ The new provisions about ‘joint parental responsibility’ were found to have created considerable confusion for parents, particularly those who were least likely to agree; litigation rates increased, though it had been claimed that they would decrease.¹²⁰ What is particularly significant is how little relevance any of the actual research prior to the reforms, and even worse, the


¹¹⁶ For the objects and principles, see especially section 60B; and for some examples of provisions on violence, see § 43(ca), s 68F(2)(j) and (f); s 68K.


¹²⁰ Helen Rhoades, Reg Graycar and Margaret Harrison (2000) The Family Law Reform Act 1995: the first three years University of Sydney and Family Court of Australia, Sydney, 59 – 61, for tables see 100-101
research evaluating the reforms, has had. Instead, in 2003, the Prime Minister acceded to persistent lobbying by the fathers’ rights’ groups in asking a parliamentary committee to investigate whether there should be a 50-50 presumption, ie, that children should spend half their time with each parent.  

Helen Rhoades and Susan Boyd have written about the process of that inquiry, showing how the committee manifested little interest in the research that had been published since the 1995 reforms came into effect, preferring instead to rely on anecdotal evidence. They quote the committee’s chair, who, in response to a researcher who provided survey data about the continuing gendered nature of children’s care, commented:

… I know that my sons have a far different role in their children’s lives than my husband had in our children’s lives. … I would consider that my sons are the primary caregivers, even though they are the primary breadwinners as well. … My concern is that all your studies show and all the indications seem to be that women are still the primary caregivers, but I am not sure that that is the case.

What Mrs Hulls seems to be relying on here is a form of ‘commonsense’, an exhortation to a belief in a shared sense of how the world works that flows, not from empirical reality but rather from personal experience.

Her stated view has considerable resonance with a comment made some years ago by one of the proponents of the 2003 inquiry. In August 1999, the national newspaper The Australian published a cover story about the Family Court in which Lone Fathers’ Association spokesperson Barry Williams is quoted as saying:

official statistics on family violence … used by the Family Court, academia, law societies and other professional bodies, are incorrect. He maintains, for example, that men and women are equally violent. ‘My ex-wife, for example, once chucked a frozen chook at me’ he says by way of illustration.

121 A proposal ultimately rejected by the Parliamentary Committee: see House of Representative Standing Committee on Family and Community Affairs: Every Picture Tells a Story, December 2003.


Angela Melville and Rosemary Hunter have noted the frequency with which such commonsense, but erroneous, assumptions are relied on in family law reform discourses. In a discussion of their empirical study of family law clients in the legal aid system, they documented, and also disproved, some of the common assumptions that are used in family law, such as ‘women fabricate false allegations of violence to refuse access’; or that ‘the Family Court is biased against men’.

In a related Canadian discussion of family law reform processes, Susan Boyd and Claire Young have noted that, when one compares evidence given by men and women before Parliamentary inquiries into family law issues, the fathers’ groups tend to make heavy use of anecdotes and personal statements, while women’s organisations ‘avoided invocation of the personal almost entirely’. Yet despite the difficulties that many women encountered in giving evidence to the 2003 Australian parliamentary committee, Roades and Boyd note that the resulting report surprised a number of those who had participated by not only acknowledging the empirical research, but relying on it in the final recommendations. Specifically, it was the empirical research that was cited in support of rejecting the original ‘equal time presumption’; instead the committee acknowledged what the research has always made clear, that is, that there are dangers in a one-size-fits-all model, given the diversity of post separation arrangements.

This example tends to suggest that when law reform bodies do rely on empirical research – ie, when they do look at who is doing what to whom and why – they are more likely to reach results that are responsive to the needs of women. However, this statement somewhat simplifies the role, relevance and indeed impact of “research”. We illustrate this with two other brief examples. In 1976, the then Victorian Law

127 Roades and Boyd, note * above, at 135. They note, however, that ‘At the same time, we have found that some law reform measures that would have better reflected the reality of families’ lives have been avoided, in part in order to placate disaffected consumers’: at 138
Reform Commissioner\textsuperscript{128} undertook a survey of a number of Victorian Police districts to examine how they handled complaints of rape. It found that out of 135 complaints of rape in 1974 and 1975, “60 or approximately 50%, were not accepted by the Police as being well-founded”.\textsuperscript{129} The Law Reform Commissioner proceeded to enumerate the circumstances in which women make unfounded allegations including a number of circumstances when

“to do so seems the only way to extricate themselves from serious difficulties.

Examples are:-

(i) Where an explanation is demanded by anxious parents, or a suspicious husband, of a return home in the early hours, and especially when recent intercourse has left some traces.

(ii) Where an explanation is needed for being found in the act of intercourse in a highly compromising situation, …

(iii) Where an explanation of pregnancy is needed by a woman who is unmarried or divorced or separated from her husband or whose husband has been sterilized or has been long absent.

(iv) Where a woman desires an abortion performed within the law.

(v) Where the contracting of a venereal disease calls for explanation.”\textsuperscript{130}

Kate Warner doubted the validity of the Commissioner’s study because of its seemingly uncritical acceptance of police statistics,\textsuperscript{131} while Paul Wilson speculated that the figures were more likely to reflect police behaviour than to indicate anything about the behaviour of complainants, much less to demonstrate the existence of ‘false complaints’.\textsuperscript{132} The police may be hesitant about the difficulties of meeting the evidentiary requirements for successful prosecution, or, as Wilson suggested, the

\textsuperscript{128} Or, more accurately, the Assistant to the Law Reform Commissioner: see Law Reform Commissioner, Report No 5, \textit{Rape Prosecutions}, Melbourne, 1976, at 13.

\textsuperscript{129} Ibid.

\textsuperscript{130} Ibid, Appendix B, at 43. Note that these statements are often referenced. By way of illustration, the first example is referenced in the following way: “It was a saying of Kinsey that the difference between a “good time” and a rape may hinge on whether a girl’s parents are awake when she finally arrives home”. This is cited to Professor John McDonald, \textit{Rape Offenders and their Victims}, Charles C Thomas, 1971. There is also a reference to an article by Hodgens et al, “The Offence of Rape in Victoria” \textit{5 Australian and New Zealand Journal of Criminology} 225.


\textsuperscript{132} Paul Wilson, \textit{The Other Side of Rape}, UQP, St Lucia, 1978, at 77.
Police may simply believe “that the majority of rape allegations are unfounded”. That is, the implications of “research” are not always straightforward and unproblematic.

This is also illustrated by the approach of various law reform agencies to the question of whether the defence of provocation is ‘gender-biased’, an issue we have traversed earlier. Here we want to focus on the way the research data has been used to attempt to address this question. As part of its review of the law of homicide, the former Law Reform Commission of Victoria undertook a large empirical study of homicide prosecutions in Victoria between 1981 and 1987. The Commission concluded that the defence of provocation was not imbued with gender bias for two main reasons: Men were more likely to raise the defence when they kill a man not a woman, and it was more likely to be rejected where a man killed a woman (36%) than if a man killed a man (12%). And, when women raised provocation they were more likely to be successful (in the study, all eight women who raised provocation in a domestic context were successful). But as Adrian Howe has pointed out, 30 men did raise provocation in a domestic context and only 8 women, and, more importantly, the study failed to address the circumstances that were alleged to amount to provocation in each category. Howe’s criticism was echoed by the NSW Law Reform Commission in its Discussion Paper on Provocation:

[I]t is ... important to be aware of what lies behind these figures. The general pattern that emerges from the cases is that men use the provocation defence when they kill their partners or ex-partners in a jealous rage and that women use it ... where they have been the victims of long term domestic abuse. The data treat these situations as commensurate - something which itself should be examined for gender bias.

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133 Ibid. Note that a relatively recent study of complaints to police in Victoria, showed that in the late 80’s the rate of classification by police as unfounded was some 5%: Victorian Community Council Against Violence, A Profile of Rapes Reported to Police in Victoria 1987-90, 1991, at v, vv, 16 and 64.


135 Adrian Howe, ‘Provoking Comment’ in Norma Grieve and Ailsa Burns (eds), Australian Women; Contemporary Feminist Thought, OUP, 1994 at 228-9.

It follows, in our view, that any assessment of whether the defence of provocation is gender-biased cannot rely solely on mathematical calculation, but must address the context in which killings by men and killings by women occur.

**Conclusion**

Like many other feminist legal scholars, we are only too aware of the limits of law, and the limits of law reform processes on achieving equality for women. But like so many others, while we continue to work in the law, we will continue to engage with reform processes, at the same time as we try to challenge and to redefine the narrow frameworks within which these issues are debated; the limited consultation processes that often leave out of account the concerns of those most affected, and the preference for ‘common sense’ anecdotal information in place of empirical data. We leave the final word to our colleague Margaret Davies:

> What is common to all the post-positivist approaches to legal change outlined above is an emphasis on fundamental transformations in the meanings of law, and a view that mere evolution in doctrine is insufficient if the goal is to achieve significant change in social relationships and values. That does not mean that law reform is always meaningless – clearly it is frequently of great significance – but that it needs to be framed by a broader context of legal and social transition.137

10, 1995. For an analysis in the English context, indicating similar gendered patterns of murder and the use of the provocation defence in that country, see Jeremy Horder, *Provocation and Responsibility*, Clarendon Press, Oxford, 1992. He states (at 187): ‘Superficial reflection on these bare statistics might lead one to suppose that it is easier for women than for men to “get off” with manslaughter on the grounds of provocation when charged with murder. If one bears in mind, though, the very large percentage of women facing a murder charge in domestic homicide cases who have themselves been battered, something rarely true of men facing such a charge, it might be thought rather surprising that the proportion of women who are convicted only of manslaughter is not much higher, compared with their male counterparts’.

137 Margaret Davies, note * above, at 171.