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LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES

By the people, for the people? Community participation in law reform: Summary report

Natalina Nheu and Hugh McDonald

Very few people in the community participate in law reform. Yet the participation of citizens, and in particular disadvantaged people, in the making of laws that affect them holds the promise of a more inclusive democracy and more responsive and efficacious law. ***By the people, for the people?*** *reports on case study research into the processes of law reform in New South Wales, with a particular focus on the opportunities for and constraints to participation experienced by disadvantaged people and the organisations that either represent them or facilitate their participation. The report draws on case study documentation, a review of available literature and collated statistics, and interviews with government officers, parliamentarians, members of government advisory bodies, civil society organisations (CSOs) and individuals. The report reveals that systemic features of law reform processes — including its variability and unpredictability, its political context, and reliance on written forms of communication — mean that the ability to participate effectively in law reform (law reform capability) is contingent upon time and resources. This is beyond the capability of many. The report identifies the range of skills and knowledge required for participation in law reform, including the fundamental importance of functional literacy. In conclusion, the report discusses the implications of the findings and suggests strategies to enhance community participation in law reform.*

AIM

By the people, for the people? is part of the broader Access to Justice and Legal Needs Research Program[1] undertaken by the Law and Justice Foundation of New South Wales, which examines the access to justice and legal needs of disadvantaged people in New South Wales. The report specifically explores:

- how law reform in New South Wales occurs
- what opportunities and constraints there are for public participation in law reform, directly and through representative bodies

[1] The Access to Justice and Legal Needs (A2JLN) Research Program is described on page 12 of this summary.

- what particular constraints there are for the participation of disadvantaged people in law reform, and
- the implications of these findings for law reform in New South Wales.

Particular attention is paid to the participation needs of disadvantaged people and the CSOs that often represent them.

Access to justice involves more than simply access to the law or to legal institutions such as courts or dispute resolution bodies. It also extends to access to law reform, as it is through law-making that conditions for justice are established.

METHOD

Following the completion of an extensive preliminary literature review, it was clear that an exploratory and flexible research design was required. A case study method was employed, which involved few assumptions about how law reform occurs or about the opportunities for and constraints to community participation.

Five instances of law reform in New South Wales were examined through case studies, variously concerning rights and responsibilities under tenancy, mental health, law and order, and civil procedure laws:

- *Residential Tenancies Amendment (Public Housing) Act 2004* (NSW)
- Legislative protection for boarders and lodgers
- Review of the *Mental Health Act 1990* (NSW)
- *Bail Amendment (Repeat Offenders) Act 2002* (NSW)
- *Civil Procedure Act 2005* (NSW).

The data comprising the basis for our analysis and conclusions primarily relates to these five case studies of law reform and included publicly available documentation concerning the case studies, as well as semi-structured in-depth interviews with 50 informants. Individuals and/or organisations identified as having been directly involved in any case studies, or as having considerable breadth and/or depth of experience in New South Wales law reform, were selected as informants. Accordingly, interviews were conducted with government officers, members of government advisory bodies, parliamentarians, staff of legal and non-legal CSOs, and individuals directly affected by law reform.

Case study data was supplemented by statistical data on the number of Acts passed by the Commonwealth and New South Wales parliaments, and the number of Bills introduced in the New South Wales Parliament for the period 2002–2006.

KEY FINDINGS

Overview

The findings of *By the people, for the people?* indicate that a number of factors affect how law reform occurs, the nature of any community participation opportunities and participants' law reform capability — that is, their ability to participate effectively in law reform.

The skills, time and resources required to participate in law reform act as formidable constraints for many people. Accordingly, most people are far more likely to be represented in law reform by CSOs than to participate directly themselves.

Disadvantaged people generally face a wide range of additional participation constraints. As such, they can generally be expected to be absent or grossly under-represented in law reform unless they are connected to CSOs, or law-making bodies are able to successfully reach out and directly include them.

Law reform participation opportunities tend to arise on an ad hoc basis, and within certain timing and timeframe constraints. A key finding of *By the people, for the people?* is that successful participation in law reform at the time that opportunities arise will often depend upon certain foundational capabilities, such as functional literacy skills, basic knowledge of the law and law reform system, and basic knowledge of the political process and how it affects law reform.

Without sufficient time and resources to participate when particular law reform opportunities arise, many people are likely to be limited to representation via those CSOs who are able to participate.

Below we expand on these key findings by examining in greater detail law reform processes, opportunities for participation and law reform capability.

Law reform processes

Our research indicates that, in general, law reform has a number of common features:

- Law reform is a cyclical and iterative activity and tends to occur in four distinct stages:

emergence, formulation, implementation and review. Issues *emerge* onto the legislative agenda, and may be *formulated* into legislative proposals to be introduced into parliament. If successfully enacted, legislation is then *implemented* and may subsequently be *reviewed*. Notably, community participation opportunities can arise at any of these stages, although the nature and scope of these opportunities depends on the stage and the consultation processes that have been established.

- Executive government is a key decision-maker across the law reform cycle, often determining what issues have legislative priority, the scope of reform, and, critically, whether there are community participation opportunities, and if so, the manner, timing and timeframe those opportunities may take.

The generalities, however, end there. Law reform is inherently political and executive decision-making is influenced by the wider social context and political circumstances. Accordingly, there is no single standard law reform process that is followed for all law reform issues. Instead, law reform:

- involves multiple law-making institutions whose roles may change depending on the stage of the cycle
- is complex and multi-faceted, and the process employed may differ from issue to issue
- is shaped by the wider political context — as influenced by public opinion, media, stakeholder and interest groups, political parties and parliamentary politics, among others.

Just how a particular law reform process will manifest varies, ranging from a slow, deliberative, proactive and highly consultative approach, to a rapid, reactive, and non-consultative approach that precludes any opportunity for community participation.

> *Sometimes the time [and] space between [law reform issue] identification and making the law is extremely short, and sometimes it can drag on for years before you get to the end of the process. … political issues are a big influence on the timeframe.* (Government officer)

The case studies suggest that public or stakeholder consultation opportunities tend to be more common to some types of issues or areas of law. Reforms in areas such as law and order tend to occur reactively, often in response to particular events, and commonly preclude public participation via a consultation process. Other areas, such as mental health legislation, are typified by ongoing reform tested through extensive public consultation. Still others, which may not be considered to be particularly 'sexy' or 'topical', such as issues principally affecting socially excluded or hidden sections of the community, may languish and be left to incubate for long periods of time before eventually becoming subjects of legislative reform.

A common theme in our case studies is the way in which law-makers (government and parliament) seek to strike a balance between competing rights or interests, with community consultation serving the instrumental purpose of helping inform decisions about how to determine the appropriate balance.

Participation opportunities are variable

Our research indicates that opportunities to participate in law reform consultation arise primarily at executive discretion and are influenced by wider political circumstances. A combination of policy intent, political constraints and executive judgment underpin how and in what form participation opportunities manifest, and whether participation opportunities are limited to particular stakeholders or if contributions are sought from the general public.

Opportunities for public or stakeholder participation can exist across all four stages of the law reform cycle. Notwithstanding that formulation sometimes occurs quickly or wholly within government, stakeholders can nevertheless often participate through the institution of parliament, or sometimes during implementation.

Generally, the earlier that participation opportunities arise within the law reform cycle — particularly during the pre-parliamentary stage of formulation — the more likely that participants will be able to engage with the scope and manner of potential reform. At later stages, and particularly once legislative proposals have been drafted and introduced as Bills into parliament, participation may be limited to identifying possible unintended consequences or detrimental impacts of the proposal.

The timeframe and timing of participation opportunities, as well as the mechanisms established by executive government for pre-parliamentary formulation — such as whether an advisory body is

tasked with conducting an inquiry or consultation — are critical to the nature of community participation opportunities.

Where government has extended public or stakeholder participation opportunities during the pre-parliamentary stage of formulation, we found that legislative proposals introduced into parliament tend to be enacted in a relatively un-amended form.

Volume of law reform activity

Statistical data on the volume of primary legislation enacted by the New South Wales Parliament indicates a steady and steep increase in the volume of law-making leading up to the mid 1980s, before tapering off to the level of the 1970s (see Figure 1). In recent decades, government is widely regarded as having adopted more consultative approaches to law-making than in earlier ages. Such a change appears to have resulted in increased opportunities for community participation in law reform.

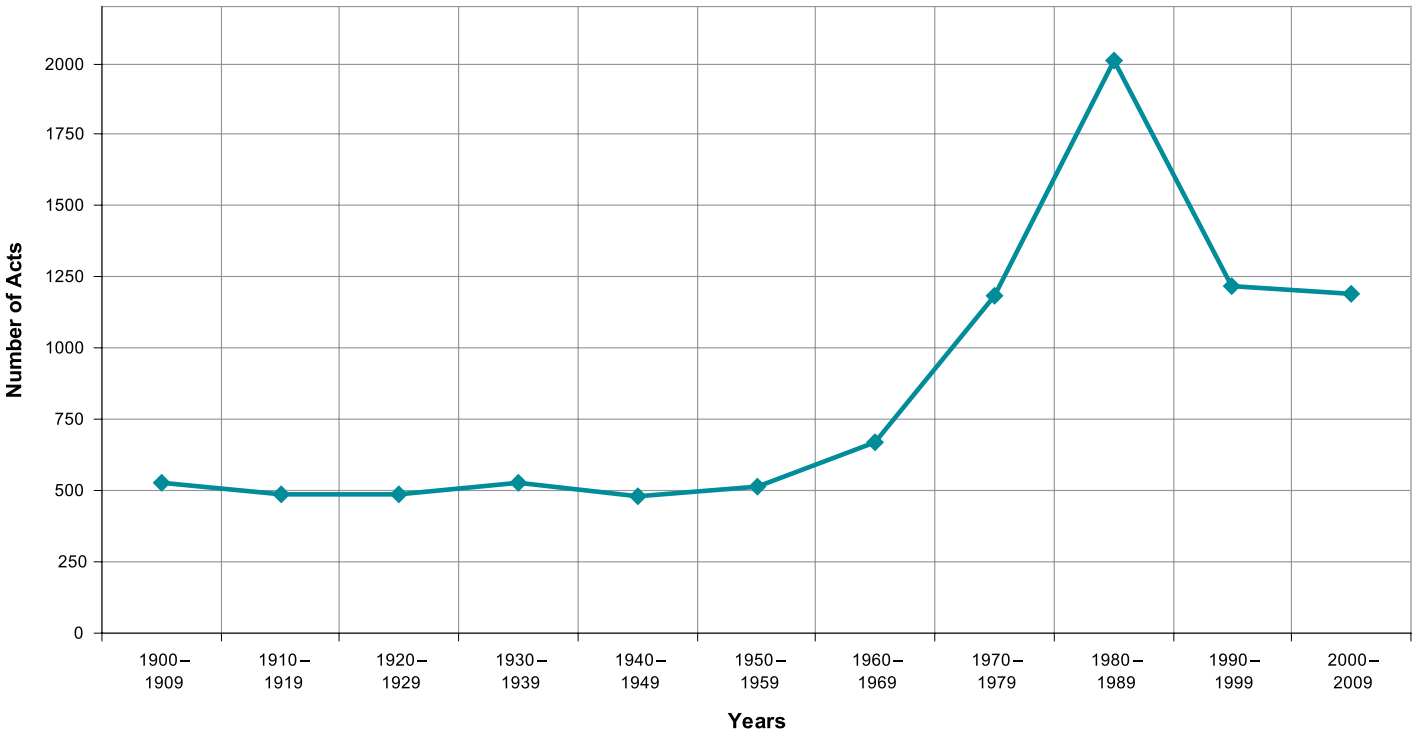
Higher volumes of public and stakeholder consultation, however, affect the time and resources available within government, parliament, as well as the community, to focus on any particular legislative reform. Our interviews indicate that the timeframe and timing of law reform can compound participation constraints, particularly when opportunities arise in ad hoc ways that are difficult to predict. Prospective participants not only have to be aware of particular participation opportunities, but also need to determine that participating is worthwhile notwithstanding competing priorities and activities.

Our case studies highlighted that different types of stakeholder organisations are affected by law reform consultation opportunities in different ways. Some stakeholder groups, particularly those with high status, expertise, or reach into particular affected constituencies, are invited by government, parliament or advisory bodies to participate in far more law reform consultation opportunities than they have either the time or resources to do, contributing to 'consultation fatigue'. In addition, the time and resources expended responding to these requests may significantly reduce the resources available for bottom-up/proactive law reform efforts concerning matters identified as being of priority to constituents.

> *… a fundamental issue across all these issues [is] the amount of responses you have to make. You know, it's mind-blowing. The number of submissions that I've written over the years …* (Non-legal CSO)

On the other hand, organisations with less established relationships and profiles are unlikely to be extended the same consultation opportunities.

FIGURE 1: NUMBER OF ACTS MADE IN NEW SOUTH WALES PARLIAMENT DURING THE PERIOD 1900–2009



Source: Figures updated from Table 2 in Tomasic, R (ed.) 1980, *Legislation and society in Australia*, Law Foundation of NSW and George Allen & Unwin, Sydney, p. 11, using NSW Parliamentary Counsel legislative database (http://www.legislation.nsw.gov.au) and the chronological tables in *Statutes of NSW* (published annually).

Experiences of law reform consultation

One-size-fits-all approaches

Participation opportunities may arise through invitations to make a submission or participate in a law reform consultation, such as a task force or working group, or to provide oral testimony. Informants indicated that participation opportunities most commonly manifest in the form of an invitation to make a written submission in response to a consultation or discussion paper, and that law reform communication predominately occurs in written form.

Further, informants indicated that documents used in law reform consultation tend to be written in a formal and legalistic style and language. The consultation process often involves a one-size-fits-all approach to potential participants that is not necessarily attuned to the particular participation needs of diverse individuals and stakeholder organisations. There is a strong likelihood that one-size-fits-all approaches will have a disproportionate impact on the ability of disadvantaged people to participate, as it is less likely that their diverse participation needs will be met.

Common frustrations experienced in participating in law reform

Among our non-government informants the general experience of law reform participation was a negative one. Informants often talked about law reform that they perceived as having disappeared into the ether, achieved little, or which had outcomes that were seemingly unexplained and/or appeared to be inconsistent with the contributions and evidence provided during the consultation process. Frustration and negative experience was typically associated with what was perceived to be a poor consultation or communication process.

Our research suggests that law reform participants generally expect that the contributions they make will be taken into account, that they will be kept informed of subsequent developments, and that they will be made aware of the rationale for outcomes. Consultation practices, however, did not always appear to match these expectations. As such, there may be a significant gap between some participants' expectations of the role of public or stakeholder consultation in the legislative process, and how particular law reform consultations and institutions operate in practice. When expectations are not met, we found that participants may not only lose trust and confidence in the law, law-making institutions, and the justice system, but that they may also lose confidence in their ability to effectively participate in law reform. Without post-participation feedback, participants may not have the opportunity to develop a greater appreciation of the factors affecting law reform outcomes. Adequate feedback — for example, that their contribution may have been considered but outweighed by other evidence or views — could alleviate at least some of the negative experiences commonly expressed.

Without a belief that they are able to participate effectively, or that their contribution has the potential to affect outcomes, participants may be less likely to regard participation in law reform as being a worthwhile endeavour.

> *… you're often responding to things that you responded to three years ago, five years ago. And government repeats processes, doesn't complete, doesn't finish, then starts again.* (Non-legal CSO)
>
> *… there was a massive number of people that put an incredible amount of time into the review … but nobody got any feedback … it just died …* (Member of government advisory body)

Confidential higher-level executive decision-making (such as cabinet deliberations) can lend an opaqueness to law reform outcomes, particularly for participants and stakeholders who do not enjoy close relationships or networks with government. Unlike legislative proposals that are given a formal explanation of the government's reasoning as part of the parliamentary process, there may be no equivalent formal explanation for the government's reasoning in declining to proceed with law reform. As such, so-called 'non-decisions' can increase frustration and uncertainty for some participants and stakeholders.

Law reform capability

A key finding of *By the people, for the people?* concerns participants' law reform capability. Being able to effectively participate in law reform was found to involve a diverse range of skills across multiple dimensions of law reform literacy.

Requisite knowledge and skills

Commonly, people only become aware of a legal issue — and law reform as a possible solution — once they are personally affected by it, or if they become

aware of difficulties and injustice experienced by others. In addition to such awareness, being able to participate effectively in law reform requires a relatively sophisticated level of functional literacy, as well as law reform advocacy skills and knowledge.

In particular, those people who are inexperienced or unfamiliar with the way government and law reform operates were found to generally struggle with the knowledge, skills and confidence necessary to participate in law reform. Although participation opportunities are frequently provided, and in many instances are formally open to all, we found that the law reform capability of people, especially disadvantaged people and the organisations that often represent them, means that those opportunities do not manifest in substantively equal ways.

> *… read any text on what our formal rights are, and we're all equal before the law and we all have theoretically the same opportunity to engage in law reform, but we all know that that's not how it works … all citizens don't come to those processes as if there was a level playing field.*
> (Member of government advisory body)

Much law reform activity involves locating, collecting, analysing and exchanging information. Fundamentally, these activities involve comprehension and communication skills — the basis of functional literacy. Systemic reliance on written communication in law reform processes means that functional literacy is a prerequisite for law reform participation. In other words, the ability to find, comprehend and respond to written information is often required to participate in law reform. In addition, law reform capability was found to involve sophisticated skills across multiple dimensions, such as knowledge of:

- the general law reform system — how law reform occurs, the roles and relationships among different law-making institutions, and that public or stakeholder participation opportunities may exist
- a specific law reform participation opportunity — awareness that a participation opportunity may exist at a particular stage of the law reform cycle, including its scope, timing and timeframe
- the specific law under possible reform — what the law is and how its operation or impact may be affected by reform
- the wider legal context of the issue — what, if any, wider legal consequences the reform may have, including any substantive and procedural implications and how significant the anticipated and unanticipated legal consequences may be
- the wider policy context of the issue — consideration of the likely impact of the law or legislative proposal on particular groups of people or interests, including how to find, use and apply information to develop, analyse and demonstrate policy positions relating to those impacts (such as identifying likely detrimental or unanticipated consequences)
- the wider political context — the constraints under which government operates, the affected interests and institutional networks associated with particular policy issues, and the advocacy skills to effectively communicate views that are useful and influential to law-makers.

Law reform capability involves drawing on each of these knowledge dimensions in a purposeful and goal-oriented way: to seek and interpret information (often written), to critically analyse reform proposals, to communicate and articulate law reform claims, and to determine the best strategy through which to 'work the system' and try to influence law reform outcomes. These are all skills involved when 'doing' and participating in law reform.

> *… the difficulty is that people don't understand the process of how laws are formed or how it's come about …* (Legal CSO)

The case studies and interviews suggest that the level of knowledge and skills usually involved in law reform participation, including functional and law reform literacy, legal and policy analysis, and research and advocacy skills, are beyond the ordinary capability of an overwhelming majority of the population.

Requisite experience and resources

Law reform capability is primarily acquired by active participation in law reform. Greater levels of participation also appear to build confidence and resilience to unfavourable outcomes. The report found negative experiences of law reform lead participants to question the credibility of the process and their ability to participate effectively. Participants with lower law reform literacy or experience appeared to be particularly vulnerable

to being cynical and disillusioned with law reform processes and outcomes.

The report also found that available time and resources are critical to whether prospective participants are able to make effective use of law reform participation opportunities as they arise.

The multi-dimensional nature of law reform literacy, the relative sophistication of the skills involved, and the one-size-fits-all consultation processes commonly adopted mean that law reform participants tend to comprise a relatively narrow set of 'usual suspects' — principally, people or organisations who are relatively well educated, well resourced, and who are well connected to institutional and organisational networks. The skills, time and resources involved in law reform are formidable constraints for many people, and indeed are the main reason why most individuals are more likely to participate in law reform through, or be represented by, CSOs, than they are to participate directly themselves.

Disadvantaged people

Disadvantaged people and groups often have a unique insight into the practical operation and impact of certain laws. Providing public participation opportunities, and especially extending them to marginalised and disadvantaged groups, may enable more informed and nuanced reforms.

The personal circumstances of many disadvantaged people, however, were identified by CSO informants as being fundamental constraints on their ability to participate in law reform. Disadvantaged people generally face significant additional participation constraints, including needing to devote disproportionate time and resources to primary needs such as food, safety and shelter. Social stigma and the often hidden nature of disadvantage and social exclusion further marginalise disadvantaged people from law reform processes and institutions. This inturn severely restricts their participation and can make reaching out to them to meet their participation needs both time and cost prohibitive, should law reform agencies wish to do so.

According to informants, disadvantaged people are also more likely to have lower levels of trust and confidence in government and its processes, and are less likely to take up opportunities to participate in law reform. Disadvantaged people commonly experience governance institutions as being remote and daunting. Historical marginalisation also means that some groups of disadvantaged people may be less confident that their views will be valued or taken seriously. Fear of the possible consequences of 'speaking out', or of the potential for social stigmatisation associated with public processes, are some further reasons disadvantaged people are more likely to be wary and distrustful of government and of processes such as law reform.

Lower levels of functional literacy and other constraints associated with physical, cognitive, cultural and geographic factors mean that disadvantaged people generally have participation needs that, if not sufficiently considered in the consultation processes instituted, are likely to disproportionately exclude them from participating effectively in law reform.

> *… in lots of cases, because they have such low literacy skills, a) they can't read it, or b) they like to cover up the fact that they can't read it so they won't contact anybody.* (Non-legal CSO)

Further, since disadvantaged people with complex needs tend to put off dealing with legal problems because other essential life needs have higher priority, participating in law reform will often simply not be on their radar. Accordingly, disadvantaged people can be expected to be absent or grossly under-represented in law reform unless they are connected to CSOs who participate, or if law-making bodies are able to successfully reach out to them directly. In the absence of law reform consultation tailored to the participation needs of particular groups of disadvantaged people, their participation in law reform may necessarily be limited to representation by or through CSOs, if they are to participate at all.

> *… if you were genuine about increasing participation in law reform you would be increasing people's standard of living. I mean, very basically. You would be getting people out of poverty, you would be making sure that they're housed and that there's a basic level of literacy. You give people enough stability and happiness in their lives to actually be able to either self-advocate or go and find someone to advocate for them … There's no easy tinkering, like people say, you know, 'hold a public forum and they will come' — well no, not necessarily.* (Legal CSO)

Civil society organisations (CSOs)

The case studies suggested that the ability of CSOs to act as experts and link constituents to government plays an important role in including disadvantaged people in law reform. CSOs' greater access to information, resources and skills means that their constituent members often depend on them to represent their views and interests in law reform consultations.

Our research found that one of the ways human sector CSOs are able to overcome participation constraints is by collaborating, networking and sharing law reform expertise and knowledge. In particular, peak bodies were found to play a critical role in raising awareness about law reform participation opportunities and fostering collaboration.

> *We see our role as facilitating views held by our member groups, based on expertise that we can access … we need to get the information from the experts. We need to get it to the membership.* (Non-legal CSO)

CSOs' law reform capability

While disadvantaged people may depend on CSOs for participation, our research indicated that CSOs differ greatly in their law reform capability. Having insufficient time and resources was an oft cited participation constraint.

> *Probably time is always a constraint … being able to be aware of what the issues are. Being up with whatever reading or whatever changes are going on. It can be a really complex world, understanding what's going on with different departments, different proposals, whatever's going on there. I think time would be the main challenge.* (Non-legal CSO)

By the people, for the people? found that one-size-fits-all consultation processes disproportionately affect the participation ability of those CSOs with less access to law reform expertise and available resources. In particular, non-legal CSOs were found to often need additional time to source legal expertise, consider the implications of reform, and engage with their constituencies. Non-legal and other CSOs with lower law reform literacy or access to law reform expertise were also found to be more likely to mistakenly assume that law reform submissions should take the form of a legal critique or be presented in a legalistic manner.

> *… the risk is … people take the legal advice as the policy position they should take. And it's like, no, they're completely different things.* (Legal CSO)

Where non-legal CSOs were able to successfully meet their law reform literacy needs by accessing legal expertise, their law reform capability was enhanced. While a number of non-legal informants stated that having access to pro bono legal expertise was beneficial to their law reform work, the nature of law reform consultation deadlines meant that this was only really practicable when there was a pre-existing client–adviser type relationship.

CSOs' funding for law reform

Importantly, *By the people, for the people?* found that funding constraints limited the ability of CSOs to engage in law reform work. For many CSOs, law reform is additional and ad hoc work for which resources have to be found or stretched. In practice this means that law reform capability may depend upon volunteers or staff working in their own time. Where CSOs have less in-house law reform expertise, and less access to resources, they may feel incapable of effectively participating in law reform and of influencing decision-making. They therefore may prefer instead to expend their limited time and resources on activities perceived as having more tangible and direct outcomes for their constituents.

A consequence of prohibitive time and resource pressures is that law reform work may increasingly become the domain of peak bodies, which may not only further distance and filter CSO constituent participation, but also erode the law reform capability of CSOs across the human services sector.

IMPLICATIONS OF THE FINDINGS

The findings from this study suggest that the general public and many CSOs lack the law reform capabilities they need to confidently and/or effectively participate in law reform. A number of important implications follow.

Just-in-time participation

On a day-to-day basis, the law and law reform is not front of mind for most people. Because people

tend to experience legal problems in clusters and around particular stages of their lifecycle, law reform participation opportunities generally do not coincide with when people experience problems. Accordingly, when law reform opportunities periodically arise the issues will typically be considered by many people to be too minor, transient, irrelevant or too remote for them to get involved.

If members of the community are interested in an issue they need to be able to participate at the time that issue is on the law reform agenda — not necessarily when the issue is most pressing for them. This can be challenging, as law reform participation opportunities generally arise in an ad hoc fashion and with certain timing and timeframe constraints. Participation will often be specific to a particular law reform issue, and will vary depending on the levels of functional literacy and the law reform capabilities of prospective participants.

However, successfully meeting just-in-time participation needs is likely to be challenging on a reform-by-reform basis. With a lack of or partial law reform literacy, people or organisations who are potentially affected by law reform may fail to perceive participation opportunities, fail to perceive what aspects of law reform they do not understand, or may not know where or how to seek assistance with their particular law reform needs.

Foundational law reform capabilities

By the people, for the people? suggests that to participate successfully when the opportunities arise, participants need foundational capabilities such as:

- functional literacy skills
- basic understanding of the law and law reform system, and
- basic knowledge of the political process and how it affects law reform.

These foundational capabilities enable participants to interpret, consider and seek information about law reform. They also help participants to understand what further information or help they may need and where they may be able to find it. Inherent in this, however, is knowing that public participation opportunities exist, understanding the form that participation opportunities generally take, as well as some awareness of the role of community consultation within the legislative process.

The importance of functional literacy as a foundational capability for effective law reform participation cannot be overstated. The report found that because a disproportionate number of disadvantaged people tend to have lower levels of functional literacy, they are therefore likely to have a reduced capacity for law reform participation — particularly given the preponderance of law reform and legal information that is distributed in written form.

Law reform capability

Foundational law reform capabilities are necessary yet not sufficient to ensure effective participation in law reform. Time and resources are also required. The multi-dimensional nature of law reform capability means that facilitating the inclusion of disadvantaged people in law reform has to take into account the particular and diverse communication and participation needs of communities, and also of the CSOs that represent them. Such a tailored approach will inevitably be inconsistent with the one-size-fits-all approach to law reform consultation.

Participants with lower levels of functional and law reform literacy are liable to misunderstand the complexities and vagaries of law reform, and the particular roles of various law reform institutions — including the dominant role of executive government in setting and controlling the legislative agenda. They are also more likely to be discouraged and assume they are incapable of effectively participating or influencing law-makers.

The research data suggested that the relatively few people and organisations who continue to participate in law reform do so because they are passionate, tenacious and resilient to uncertainty, setbacks, delays and unfavourable outcomes. Most importantly, law reform capability was found to be accumulative, with greater experience of law reform advocacy increasing not only a participant's law reform literacy and capability, but also their resilience.

The systemic features of law reform appear to advantage those types of interests and organisations who have more time, resources and law reform literacy. If law-making bodies are to reach out beyond the relatively narrow set of 'usual suspects' and 'repeat players' that tend to have greater law reform capability, they will need to consider how time and resource constraints disproportionately affect those people and organisations that have lower levels of

functional and law reform literacy, and who have less access to available resources. Such organisations include many of the human services sector CSOs that often play a critical role in facilitating the participation or representation of the general public and disadvantaged people in law reform.

Dependency on CSOs

Government, communities and constituent members of CSOs are likely to remain dependent upon the ability of CSOs to facilitate constituent participation or representation in law reform unless direct communication between law-making institutions and the public is enhanced. However, direct participation was found to depend heavily upon law reform literacy across multiple dimensions, such as awareness of particular participation opportunities, the law being considered, and the possible impacts of its reform. Raising functional literacy is, however, a challenging whole-of-government and whole-of-community task that has to be a matter for longer-term public policy. In the short term, CSOs are therefore likely to remain critical to community participation in law reform, particularly for disadvantaged people.

STRATEGIES

On the basis of these findings, it is clear that a multi-pronged approach that mirrors the multi-dimensional nature of law reform capability is required. Accordingly, we propose the following five broad approaches to help overcome the systemic constraints to law reform and enhance the law reform capability of the general public, disadvantaged people, and CSOs:

1. Provide the public and stakeholders with adequate time for law reform consultation. Timeframes and timing of law reform consultation should be commensurate with the significance of the issue, its breadth and complexity, as well as the participation needs of stakeholders.
2. Ensure that the information in law reform consultation documents is accessible.
3. Improve public access to information about law reform, including information about opportunities to participate.
4. Enhance the capacity of CSOs to participate and represent their constituencies, particularly disadvantaged communities, in law reform.
5. Ensure that the scope and aims of law reform consultation processes are clear to participants, and that processes match the participation needs of affected stakeholders. Where appropriate, tailor consultation processes in line with the specific participation needs and expectations

Specific strategies associated with these five approaches are summarised in Table 1.

By the people, for the people? also identifies possible improvements to the transparency, accountability and rigour of law-making practices, as well as broader institutional reforms that may provide for more effective public and stakeholder participation opportunities.

Strategies to enhance public and stakeholder participation will, in large part, depend on two related factors. First, effective participation for individuals is contingent upon having functional literacy and being able to meet law reform literacy needs within timeframe constraints. Second, effective participation opportunities are contingent on government and advisory bodies being able to invest time and resources in the provision of consultation processes that are capable of meeting the diverse participation needs of affected people and interests.

The proposed strategies, however, involve significant commitment and resources, some of which may not be realistic in the shorter term. Investment to improve the law reform capability of communities is, however, an investment in robust democracy. Further, unless law reform adequately considers disadvantaged and socially excluded groups — including consideration of their particular participation needs — there is a significant risk that legislative reform may exacerbate or reproduce disadvantage.

Although the strategies proposed are focused on New South Wales, their relevance — and especially the findings on the constraints stemming from a lack of functional and law reform literacy — is likely to extend to other jurisdictions and levels of government. Indeed, a consequence of Australia's federal system of government is that fragmentation of institutional responsibilities heightens the law reform literacy demanded of Australians.

The full report, *By the people, for the people? Community participation in law reform* is available at **www.lawfoundation.net.au/report/lawreform**.

TABLE 1: STRATEGIES TO ENHANCE THE EFFECTIVENESS OF PUBLIC AND STAKEHOLDER PARTICIPATION OPPORTUNITIES IN NEW SOUTH WALES LAW REFORM

Possible broad approach	*Rationale*	*Strategies*
1. Provide public and stakeholders with adequate time for law reform consultation. Timeframes and timing of law reform consultation should be commensurate with the significance of the issue, its breadth and complexity, as well as the participation needs of stakeholders.	Time constraints adversely affect people's capacity to participate in law reform, and disproportionately affect the capacity of people with less functional literacy, law reform literacy and access to resources. CSOs need time to inform and consult constituencies, and to formulate law reform submissions. Law reform consultation providing insufficient time for participants risks being perceived as being a 'sham' or 'non-genuine', potentially eroding confidence in government and the inclination to participate in future.	• Provide advance notice of consultation (advance notice may depend on participants' or stakeholders' resources, the nature of their disadvantage, and their level of functional law reform literacy). • Where circumstances prevent or limit adequate consultation during the formulation of law reform submissions, opportunities can be provided at a later stage of the law reform cycle, such as during implementation and/or review.
2. Ensure information in law reform consultation documents is accessible.	Consultation documents should not assume participants have sophisticated levels of literacy, knowledge, or have law reform experience or expertise. Information about the issue, the law reform process, and the purpose of the consultation, communicated in accessible formats and language, enhances the capacity of the public, disadvantaged people, and the CSOs who represent them, to participate.	• Recognise that producing law reform consultation documents in plain and accessible language is a sophisticated communication task, for which government standards need to be developed. • Information should, at a minimum, set out in accessible language an overview of the particular law reform process and the legal issues and implications (including practical implications) of the proposed changes. Further references should be provided for those who are interested. • Where circumstances necessitate, it may be appropriate to produce multiple documents in alternate formats that better meet the needs of diverse participants: for example, a detailed version that extensively canvasses the legal and policy issues; a plain language version; and versions tailored and accessible to particular stakeholders.
3. Improve public access to information about law reform, including information about opportunities to participate.	Lack of knowledge about participation opportunities is a fundamental barrier to people participating in law reform. The volume of law reform activity, fragmented across different law-making institutions, makes it difficult for stakeholders and the general public to keep abreast of particular law reform issues. Providing a 'one-stop shop' for information about law reform activities across law-making institutions may help people monitor law reform and promote social inclusion.	• Develop and maintain an up-to-date centralised website that acts as a portal to coordinate and manage information about the range of law reform activities across the New South Wales Government, as well as associated participation opportunities where they arise. The website should include information about the law reform system, the role of different institutions, and how the public is able to participate. This would make it easier for people to navigate both to and through law reform. An advantage of a centralised online resource is that periodic updates can be made, which would be particularly useful given the myriad — and at times rapid — changes that can occur in law reform. In addition, the website could enable people to subscribe to information updates about particular law reform issues. • Fund community education, information programs, and plain language resources to promote general understanding of the political and legal systems (for example, how to access legislation and Bills of parliament), law reform processes, governance institutions, and how the public can get involved in law reform. • Continue to promote and strengthen civics education in schools. • Resource CSOs to provide information resources that are appropriately tailored to the particular needs of disadvantaged communities (such as Indigenous communities, people from non-English-speaking backgrounds, people with disability, young people, older people and other socio-economically disadvantaged communities).
4. Enhance the capacity of CSOs to participate and represent their constituencies, particularly disadvantaged communities, in law reform.	But for participation through or representation by CSOs, most people — and particularly disadvantaged people — are excluded from law reform. CSOs perform a unique and critical role in bridging constituents with governance institutions. CSOs' ability to reach particular groups should be valued on the basis that they act as representatives and/or as experts in law reform, have on-the-ground knowledge of the operation or impact of laws on specific communities, and can bring otherwise unheard voices to a law reform process. The law reform work of many CSOs can be strengthened by helping them meet their law reform needs in areas such as research, legal and policy analysis, and constituent engagement.	• Support CSOs to attract and retain people with law reform skills, particularly CSOs who represent marginalised and disadvantaged people and groups. • Fund the law reform work of CSOs, including community legal centres, where appropriate, particularly where it enhances the ability of socially and economically disadvantaged people to contribute information that would not otherwise be available to government. • Support the important information, networking, communication, translation and interpretation roles peak CSOs perform for their member organisations. • Support and promote opportunities for collaboration between legal and non-legal CSOs for the purposes of law reform work. • Support capacity building programs that aim to increase the ability of individuals and the CSO sector to undertake systemic law reform advocacy. • Support and strengthen pro bono relationships that facilitate CSO access to legal assistance. (Given the time constraints of law reform, pro bono legal assistance is more likely to be effective when there is a prior existing relationship between organisations.) • Promote policy or research partnerships between human services sector CSOs and tertiary institutions. • Harness CSOs' on-the-ground knowledge of the effects of legislation, particularly where they represent or have knowledge of hard-to-reach disadvantaged or marginalised communities.
5. Ensure the scope and aims of law reform consultation processes are clear to participants, and that processes match the participation needs of affected stakeholders. Where appropriate, tailor consultation processes to the specific needs and expectations of stakeholders.	To maintain public confidence in law reform and its consultation processes, stakeholder expectations of the process need to be appropriately managed. Non-government stakeholders should understand that consultation does not mean 'shared decision-making' and does not necessarily mean that particular options will be pursued. The provision of effective participation opportunities also has to consider the law reform capabilities of the diverse people and groups potentially affected by reform proposals. This will increase the likelihood of more complete information being collected and will help inform executive decision-making. The capacity of government agencies and public officials to conduct law reform consultations that are tailored to the needs of the individuals and/or CSOs should be supported and enhanced.	• Law reform consultation documents should provide a clear statement about the purpose and intent of the consultation, what type of information is being sought and in what form, how the information submitted will be considered, what may happen after the information has been submitted, details concerning any likely subsequent participation opportunities, as well as details outlining what needs to happen before legislation can be enacted. Such information should seek to clarify expectations concerning the scope of the consultation and the subsequent law-making process. • Increase the capacity of public officials to reach out, engage and communicate with members of the public, stakeholders, communities and CSOs when undertaking law reform. • Engage relevant stakeholders when designing law reform consultation processes. • Engage experts to advise on designing the most appropriate law reform consultation methods for particular disadvantaged and marginalised communities. • Where law reform affects diverse interests, it may be appropriate to employ multiple consultation methods, using different modalities (for example, phone, internet, face-to-face, or other). While technology can facilitate wider reach to members of the public, this may not be so with respect to marginalised and disadvantaged people and communities.

Note: Similar strategies can apply to more than one broad approach.

The Access to Justice and Legal Needs Program

The Law and Justice Foundation of NSW has undertaken the Access to Justice and Legal Needs (A2JLN) Research Program to identify the access to justice and legal needs of disadvantaged people in NSW. The objectives of the program are to examine the ability of disadvantaged people to:

- obtain legal assistance (including legal information, advice, assistance and representation)
- participate effectively in the legal system
- obtain assistance from non-legal advocacy and support
- participate effectively in law reform processes.

The program employs three methodological streams to address these objectives:

- the analysis of legal service usage data, giving particular insight into expressed legal need
- original quantitative legal need surveys, giving insight into expressed and unexpressed/unmet legal need
- in-depth qualitative research into the needs of particular disadvantaged groups.

Specific research published as part of this program to date includes:

Public consultations is a summary of the submissions received from organisations and individuals as part of the initial consultation process for the A2JLN Research Program.

The Data Digest is a database for examining expressed legal need as identified through enquiries handled by public legal services. It currently includes legal enquiries to Legal Aid NSW, LawAccess NSW, and community legal centres in NSW. The inaugural Data Digest report, published in 2004, presents service usage data from 1999–2002. A number of reports produced using the Data Digest are available on the Foundation's website www.lawfoundation.net.au. It is planned for public legal services to have secure access to a number of interactive online Data Digest tools.

Justice made to measure: NSW legal needs survey in disadvantaged areas is a quantitative survey of legal needs in six 'disadvantaged' regions of NSW, measuring a wide range of legal events, including those where help is sought from legal or non-legal advisers (expressed legal need), those handled without outside help and events where no action is taken (unmet legal need).

The Bega Valley pilot survey is a quantitative survey of the legal needs of 306 people conducted via telephone in Bega Valley. This was the pilot survey undertaken for the survey reported in *Justice made to measure.*

The legal needs of older people in NSW is a qualitative study into the legal issues commonly experienced by older people in NSW and the barriers faced by older people in accessing services to resolve legal issues.

No home, no justice? The legal needs of homeless people in NSW is a qualitative study into the capacity of homeless people in NSW to obtain legal assistance, participate effectively in the legal system and obtain assistance from non-legal advocacy and support agencies. The study also details the legal issues commonly experienced by homeless people.

On the edge of justice: The legal needs of people with a mental illness in NSW is a qualitative study into the legal issues faced by people with a mental illness in NSW, their capacity to obtain legal assistance, participate effectively in the legal system and obtain assistance from non-legal advocacy and support agencies.

Taking justice into custody: The legal needs of prisoners is a qualitative study of the legal and access to justice needs of prisoners and ex-prisoners. The study identifies the range of criminal, civil and family law issues prisoners face at different stages of incarceration, and the opportunities and barriers they face to addressing these issues.

By the people, for the people? Community participation in law reform examines the participation of disadvantaged people in law reform in NSW. It describes key law reform processes and the opportunities and challenges for both the public and disadvantaged groups to participate in them.

LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES

© Law and Justice Foundation of New South Wales

Street Address: Level 14 130 Pitt Street Sydney NSW 2000
Mailing Address: GPO Box 4264 Sydney NSW 2001
e: lf@lawfoundation.net.au t: +61 2 8227 3200 f: +61 2 9221 6280
www.lawfoundation.net.au