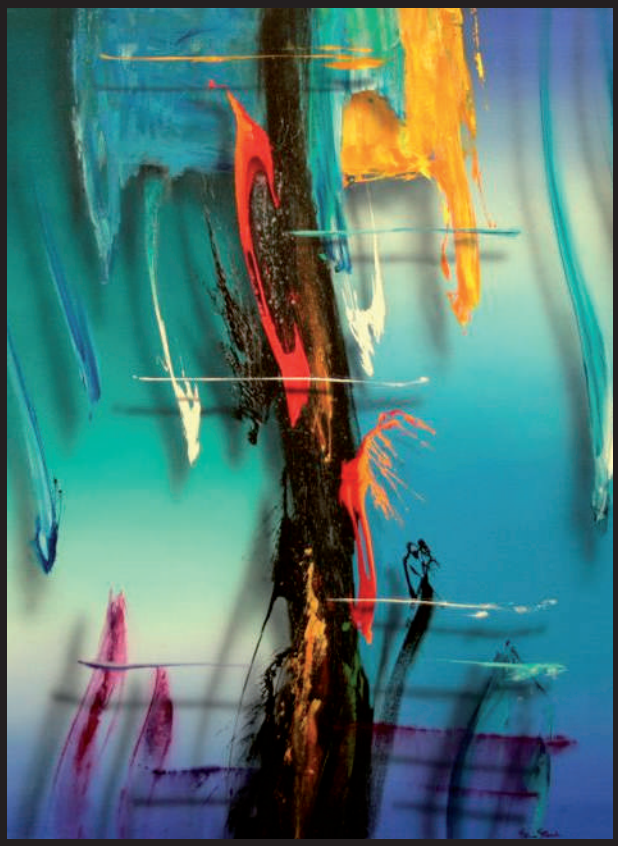
ACCESS TO JUSTICE AND LEGAL NEEDS

By the People, for the People?

COMMUNITY PARTICIPATION IN LAW REFORM

November 2010



LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES

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Volume 6

By the People, for the People?

COMMUNITY PARTICIPATION IN LAW REFORM

November 2010

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The series is aimed at researchers, policy-makers, government, the legal community and others interested in legal need and access to law and justice. It is a scholarly, refereed series. Monographs are refereed by at least two appropriate external referees who are independent of the Foundation and any other organisations/authors involved in the publication.

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Foreword

The objects of the Law and Justice Foundation of New South Wales (the Foundation) are to contribute to the development of a fair and equitable justice system and to improve access to justice by the community, particularly by economically and socially disadvantaged people.

In 2002 the Foundation commenced the Access to Justice and Legal Needs (A2JLN) research program, which aims to examine the ability of disadvantaged people to:

- obtain legal assistance
- participate effectively in the legal system
- obtain assistance from non-legal advocacy and support
- participate effectively in law reform processes.

By conducting a rigorous and sustained assessment of the legal as well as the access to justice needs of the community, especially of disadvantaged people, the A2JLN research program aims to provide evidence to inform government, community and other organisations in developing effective policy and planning service delivery. The program is challenging, involving an interconnected set of projects and employing a range of qualitative and quantitative methodologies.

Importantly, the Foundation's A2JLN program has a number of important features that distinguish it from many other legal needs and access to justice studies undertaken to date in Australia and internationally. To begin with, this program adopts a broader definition of legal need and access to justice, going beyond the narrow 'access to a lawyer' and sometimes 'access to a

lawyer in a court' approach common in many studies to also examining non-legal advocacy and support and the ability to participate in the justice system. Secondly, the program is the first to incorporate data collected from legal service providers, original survey data and targeted qualitative studies in three separate but interrelated methodological streams.

Thirdly, the program includes a specific examination of the ability of the community, and disadvantaged people in particular, to participate in law reform processes as an essential element of the access to justice matrix. This report is the product of that research.

While initially we had hoped to collect sufficient data on participation in law reform processes through the three main project streams, we soon discovered that the data was almost silent on this issue — perhaps revealing a very low level of community engagement in law reform processes. To address this knowledge gap we decided to include this specific stand-alone project examining the opportunities and constraints to the participation of disadvantaged people — and the community more generally — in law reform processes in New South Wales.

By the People, for the People? is based on five case studies of law reform in New South Wales concerning housing, mental health, law and order, and civil procedure laws. It draws from publicly available literature and in-depth interviews with a number of informants involved in these case studies, as well as general literature and data on the number of Bills introduced and enacted in the New South Wales Parliament.

The report highlights the many constraints to the participation of disadvantaged people in law reform, and identifies a range of strategies that might be considered if the most disadvantaged people in the community are able to effectively participate.

For many in the community, participation in law reform generally fails to rate highly in people's personal priorities. While it is important that participation levels are increased — especially by disadvantaged members of the community — it may be unrealistic to expect a great increase in that regard.

This is especially so when the complexity of law reform is taken into consideration. Perhaps not surprisingly the findings from this study demonstrated a significant gap between the 'law reform capabilities' required for effective participation and the levels of law reform capability among the

general population, and even among the community service organisations that represent many. A number of important implications flow from such a finding for those interested in engaging the community in law reform.

One such implication is that in addition to time and resources, law reform capability involves a wide range of knowledge, skills, and confidence. Importantly, functional literacy is a key underpinning factor in an individual's capability to participate in law reform. While it is beyond the scope of this research to address these broader educational and individual capability questions, it is important to note that any strategy developed to increase the engagement of disadvantaged people in law reform must take into account the hardship and realities of life for these people.

While this report 'stands on its own', it should be read in the context of the other main reports produced in the A2JLN program, including:

- *Stage 1: Public Consultations* (2003)
- *Stage 2: Quantitative Legal Needs Survey, Bega Valley (Pilot)* (2003)
- *Data Digest* (2004)
- *The legal needs of older people in NSW* (2004)
- *No home, no justice? The legal needs of homeless people* (2005)
- *Justice made to measure: NSW legal needs survey in disadvantaged areas* (2006)
- *On the edge of justice: The legal needs of people with a mental illness* (2006)
- *Taking justice into custody: The legal needs of prisoners* (2008).

Geoff Mulherin
Director
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Abbreviations

ABA	Acceptable Behaviour Agreements
AGD	Attorney General's Department
AJAC	Access to Justice Advisory Committee
ALRC	Australian Law Reform Commission
BLAG	Boarders and Lodgers Action Group
BOCSAR	Bureau of Crime Statistics and Research
BRO	Better Regulation Office
CLC	community legal centre
CSO	civil society organisation
DADHC	Department of Ageing, Disability and Home Care
DJAG	Department of Justice and Attorney General
DPC	Department of Premier and Cabinet
MHAIMC	Mental Health Act Implementation Monitoring Committee
MHCC	Mental Health Coordinating Council
NCOSS	Council of Social Service of New South Wales
NGO	non-government organisation
NSW LRC	NSW Law Reform Commission
OECD	Organisation for Economic Co-operation and Development
PCO	Parliamentary Counsel's Office
PIAC	Public Interest Advocacy Centre
RIS	regulatory impact statement
TOR	terms of reference

Executive summary

Background

This study is part of a research program undertaken by the Law and Justice Foundation of New South Wales concerning the access to justice and legal needs of disadvantaged people in New South Wales. The specific aims were to investigate:

1. how law reform in New South Wales occurs
2. what opportunities and constraints there are for public participation in law reform, directly and through representative bodies
3. what particular constraints there are for the participation of disadvantaged people in law reform and
4. the implications of these findings for law reform in New South Wales.

Particular attention is paid throughout the report to the participation needs of disadvantaged people and civil society organisations (CSOs).

Access to justice involves more than simply access to the law or legal institutions such as courts or dispute resolution bodies. It also extends to access to law reform, as it is through law-making that the conditions for justice are established. Participation by citizens, and in particular disadvantaged people, in making laws that affect them holds not only the promise of more inclusive democracy but also more responsive and effective law.

This study employed a case study method. Five instances of law reform in New South Wales variously concerning housing, mental health, law and order, and civil procedure laws were examined in detail:

- *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) Bill 2002* (NSW)
- *Civil Procedure Act 2005* (NSW).

The data that forms the basis of our analysis and conclusions comprises publicly available information concerning our five case studies, as well as in-depth interviews with 50 informants. Data was also collected 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

A number of factors affect how law reform occurs and the nature of any public or stakeholder participation opportunities, and particularly whether socially and economically disadvantaged people and the CSOs that tend to represent or facilitate their participation in law reform are able to participate. In particular, we found that a participant's law reform capability draws on a range of knowledge, skills and attitudes, underpinned by functional literacy, which facilitate and constrain their ability to participate effectively in law reform.

Law reform processes

Our research indicates that there are a number of features of law reform that affect how law reform occurs:

- Law reform is generally a cyclical and iterative activity. Issues emerge onto the legislative agenda and ideas are formulated into legislative proposals and introduced to parliament. Where successfully enacted, legislation is implemented and may subsequently be reviewed.
- Dominating law reform, and a key decision-maker across all stages of the law reform cycle, is executive government. Executive government determines legislative priorities and many aspects of how reform occurs, including the scope of reform, its timeframe and timing, its implementation, and importantly, the nature of any opportunity for public or stakeholder participation which may arise during the stages of formulation, implementation and review.

The generalities concerning how law reform occurs however end there:

- Law reform is complex and multi-faceted and the particular process followed may differ from issue to issue.
- Law reform is inherently political and involves multiple law-making institutions whose roles may change depending on the stage of the cycle.
- The wider political context — as influenced by public opinion, media, stakeholder interest groups, political parties and parliamentary politics, among others — shapes how the law reform process manifests across a spectrum ranging from a slow, deliberative, proactive and consultative approach to a rapid, reactive, non-consultative approach which may preclude any opportunity for public or stakeholder participation.

Our case studies suggest some patterns are common to certain types of issues or areas of law. Reforms to areas of law such as law and order matters tend to occur reactively, often in response to particular events, and commonly preclude public participation via a law reform consultation process. Some other areas of law, such as mental health legislation, are typified by repeated rounds of reform tested through public consultation. Still others, especially those not seen as being particularly 'sexy' or topical, and which may principally affect marginalised or hidden sections of the community, may need to incubate for long periods of time before they become the subjects of legislative action. Law reform processes, and their outcomes, are ultimately expressions of public policy purpose and political constraints.

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 views as to how to cast the appropriate balance sometimes being contested.

Participation opportunities are variable

Law reform consultation occurs primarily at executive discretion and is influenced by wider political circumstances. A combination of policy intent, political constraints and executive judgment underpin the highly variable way in which opportunities to participate in law reform manifest. Together, they determine whether participation opportunities exist, are limited to particular stakeholders or specific groups, or are available to the general public.

Opportunities for public or stakeholder participation may exist across all 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. Where government has extended public or stakeholder participation opportunities during the pre-parliamentary stage of formulation, we found that legislative proposals tended to be subsequently passed by parliament relatively un-amended.

Generally, the earlier that participation opportunities arise within the law reform cycle — particularly during the pre-parliamentary stage of formulation — the more likely it is that interested participants will be able to engage with the 'what' and 'how' questions of law reform. At later stages participation may be limited to identifying possible unintended consequences of formulated reform proposals. The timeframe and timing of participation opportunities, as well as the mechanisms established by executive government for pre-parliamentary formulation and implementation, such as whether any advisory body is tasked with conducting public consultation, are therefore critical to the ability of the public and CSOs, and particularly disadvantaged people, to participate in law reform.

Volume of law reform activity

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. In recent years, however, government has been characterised as having adopted a more consultative approach to law-making. Such a change appears to have resulted in significantly increased law reform participation opportunities.

Higher volumes of public and stakeholder consultation necessarily affect the time and resources available within government, parliament, as well as the community, to focus on any particular legislative reform. The timeframe and timing of law reform may compound constraints on public or stakeholder participation where opportunities arise in ad hoc ways that are difficult to predict. Prospective participants not only have to be aware of participation opportunities, they also have to determine that participation is worthwhile notwithstanding other competing priorities and activities.

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, time and resources expended responding to government or parliament initiated law reform consultation may significantly reduce resources available for bottom-up law reform concerning matters identified as being of priority to constituents.

Experiences of law reform consultation

Participation opportunities may arise through invitations to participate in a law reform task force or working group, or to provide oral testimony as part of a formal consultation process. The informants we interviewed reported that participation opportunities most commonly manifest in the form of an invitation to make a written submission in response to a consultation paper, and that law reform communication predominately occurs in written form.

Further, law reform consultation documents are generally written in a formal and legalistic language that adopts a one-size-fits-all approach to potential participants, and which may not necessarily be attuned to the particular participation needs of diverse individuals and stakeholder organisations. There is a higher likelihood that the participation needs of particular groups of disadvantaged people may not be sufficiently met with a one-size-fits-all approach.

Among our non-government informants we found that their previous involvement in law reform resulted in a preponderance of negative experiences and frustration. Informants often talked about consultations that disappear into the 'ether', achieve little, or have outcomes that were unexplained and/or appeared inconsistent with the contributions and evidence provided during law reform consultation.

We found that law reform participants generally expect that their contributions 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. 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. When expectations are not met, we found participants may not only lose trust and confidence in the law, law-making institutions, and the justice system, they may also lose confidence in their ability to participate effectively in law reform.

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.

The law reform decision-making inherent in confidential cabinet deliberations may result in some outcomes appearing to be opaque, particularly for those participants who do not enjoy close relations or networks with government. Government decisions not to pursue law reform — that is, so-called 'non-decisions' — may also contribute to a lack of explanation of law reform consultation outcomes, unlike a proposal for legislative reform before the parliament where a formal statement is made by a minister with carriage of the issue.

Law reform capability

It is often not until people are personally affected by a legal issue or a problem that they may become interested in or be aware of law reform issues, as a perceived cause or possible solution to any difficulties or injustice experienced. We found, however, that the sophisticated level of functional literacy, as well as the law reform advocacy skills and interest involved, suggest that relatively few people have an effective opportunity to determine whether or not to participate in public consultation opportunities.

Participating in law reform is challenging, complex, and time and resource intensive. We found that where people are inexperienced or unfamiliar with the way government and law reform operates, they generally struggle with the level of knowledge, skills and confidence required to participate effectively in law reform. Although participation opportunities are frequently provided, and in many instances are formally open to all, we found that the abilities of people, especially disadvantaged people and the organisations that often represent them, do not manifest in substantively equal ways.

Law reform capability is underpinned by functional literacy, and effective participation in law reform requires sophisticated skills based on multiple-dimensions of knowledge about:

- law reform system — how law reform occurs, the roles and relationships of different law-making institutions, including principles governing citizen-government relations

- specific law reform process — the occurrence of a particular law reform event or stage of the law reform cycle which may involve opportunities for public or stakeholder participation
- specific law — what the law is and how its operation with respect to the particular reform issues is likely to be affected by proposed change
- legal context of the issue — what the wider legal consequences of change are, and how significant they are likely to be
- policy context — the impacts of the legislation or proposal on particular interests or groups of people
- political context — the constraints under which government operates, as well as the institutional networks associated with the policy issue.

Law reform capability involves applying these skills in order to 'do' law reform: seek and interpret information (often written), critically analyse reform proposals, communicate and articulate law reform claims, and determine the best strategy through which to 'work the system' and try to influence law reform outcomes.

Not only is law reform capability primarily acquired by active participation in law reform, it also appears to be critical to building confidence and resilience to disappointing outcomes. We found negative experiences of law reform cause participants to question the credibility of the process and of their ability to participate effectively. Participants with less experience or law reform literacy appear to be particularly vulnerable to being cynical and disillusioned with law reform processes and outcomes.

Our data suggests that the level of knowledge and skills usually involved in law reform participation, including functional and law reform literacy, legal analysis, policy and/or research, and advocacy skills, are beyond the ordinary capability of an overwhelming majority of the population.

The multi-dimensional nature of law reform literacy, the relative sophistication of the skills involved, and the one-size-fits-all approach commonly adopted, means that law reform participants tend to comprise a relatively narrow set of 'usual suspects' who are relatively well educated, 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 reasons why most individuals are more likely to

participate in law reform through, or be represented by, organisations within the civil sector.

We found time and resources are critical to whether or not prospective participants are able to understand and make effective use of particular law reform participation opportunities as they arise.

Disadvantaged people

The personal circumstances of many disadvantaged people were reported by many of our CSO informants to be fundamental constraints limiting motivation and capability to participate in law reform. Disadvantaged people generally face significant additional constraints to participating in law reform, including the need to devote a disproportionate use of their time and resources to meeting immediate 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, and make reaching them to meet their participation needs time and cost prohibitive.

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. Social and historical marginalisation of some groups of disadvantaged people mean they may be less confident that their views will be taken seriously or accepted as being valid or important. Fear of the consequences of speaking out, or of the potential social stigmatisation associated with participating in public processes, are further reasons disadvantaged people are more likely to be wary and distrustful of government and of activities such as law reform consultation.

Lower levels of functional literacy and other constraints associated with physical, cognitive, cultural, geographic and continuity (of place) factors, mean that disadvantaged people generally have participation needs which if not sufficiently considered in law reform consultation are likely to disproportionately exclude them from being able to participate effectively in law reform.

In circumstances where disadvantaged people with complex needs put off dealing with unmet legal problems because other essential life demands have a higher priority, participation in law reform will often simply not be

on their radar. Therefore, disadvantaged people can be expected to be absent or grossly under-represented in law reform unless they are either connected to CSOs or law-making bodies who are able to successfully reach out and include them. In the absence of law reform consultation tailored to the needs of disadvantaged people, their participation in law reform may necessarily be limited to representation by CSOs able to represent their views or else merely speak about them.

Civil society organisations (CSOs)

CSOs' ability to act as experts and link constituents to government is particularly important with respect to the inclusion of disadvantaged people in public or stakeholder consultation. CSOs' greater access to information, resources and skills means that government, as well as their constituent members, often rely on CSOs to represent the interests of the particular disadvantaged group in law reform consultations.

Collaborating and networking are key ways in which CSOs share their expertise and knowledge and may help them to overcome time and resource constraints. We found that peak bodies often play a critical role in communicating awareness about participation opportunities and in fostering collaboration.

CSOs, however, differ greatly in their law reform capability. We found that one-size-fits-all law reform consultation processes disproportionately impact upon those CSOs with less available resources and less access to law reform expertise. Non-legal CSOs in particular, and especially those with reach into disadvantaged communities, will often use up time sourcing legal expertise, considering the possible implications of reform, as well as engaging with their constituents. Non-legal and other CSOs with less law reform literacy or access to law reform expertise may also be more likely to mistakenly assume that law reform submissions should take the form of a legal critique or analysis, or that their proposals need to be presented in a legalistic manner.

Where non-legal CSOs were able to successfully meet their law reform literacy needs by accessing legal expertise, their law reform capability was greatly enhanced. A number of non-legal informants suggested that while having access to pro bono legal expertise is beneficial, it is only realistic where there is a pre-existing client–adviser relationship, as often the time constraints of law reform consultation mean that trying to access pro bono advice on an ad hoc basis is not practical.

Importantly, we found that the law reform work of CSOs within the human services sector, particularly CSOs dependent upon recurrent government funding, is shadowed by funding concerns. For many CSOs, law reform is additional and ad hoc work for which resources have to be found or stretched. In practice this means much of that work relies on volunteers and staff working in their own time. Where CSOs have less law reform expertise and less access to resources they may feel less capable of influencing law-making decisions, and may prefer to expend their limited time and resources on activities perceived as having more tangible and direct outcomes for constituents.

The consequences of these pressures are that law reform work is increasingly the domain of peak bodies, further distancing and filtering the participation of CSO members and constituents, as well as contributing to loss of law reform skills among human services sector CSOs.

Implications

The findings from this study demonstrate a significant gap between the law reform capabilities required for effective participation, and the levels of law reform capability among the general population and many CSOs. A number of implications follow.

Just-in-time participation

People's experiences of legal problems are generally patterned and tend to cluster around particular stages of their lifecycle that are unlikely to coincide with political or law reform cycles. Therefore law reform issues that arise will typically be considered by many people to be too minor, transient, irrelevant, or remote to interest or motivate them to make use of law reform participation opportunities.

The way in which individuals tend to relate and think about the law and law reform suggests that participation in law reform is simply not a priority. Further, the episodic nature in which law-related problems arise in people's lives may mean that, should they be interested, their ability to participate may depend on meeting their participation needs on a just-in-time basis — that is — as and when needed.

Just-in-time participation needs are particularly salient as law reform participation opportunities generally arise in an ad hoc fashion and with certain timing and timeframe constraints. They will often be specific to the particular

law reform problem or issue, the possible consequences for a certain interest group, and will vary depending on the levels of functional literacy and law reform capability of individuals.

Just-in-time participation needs in law reform are likely to be difficult and challenging to meet on a reform-by-reform basis. Lack of, or partial, law reform literacy means people or organisations who are potentially affected may fail to perceive participation opportunities or recognise what aspects of law reform they do not understand, or know where or how to seek assistance with the legal or policy dimensions of law reform.

Foundational law reform capabilities

Indeed our study suggests that being able to meet the particularities of law reform on a just-in-time basis requires certain foundational capabilities:

- 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 seek, interpret and consider information about law reform. Inherent is the knowledge that public participation opportunities exist and awareness of the form those opportunities generally take, as well as the role and stage of public or stakeholder consultation within the legislative process. Meeting just-in-time participation needs may also require awareness about where information about the law and the law reform process may be available.

Unless individuals or organisations that represent or facilitate the participation of disadvantaged constituents are able to recognise the legal or law reform dimensions of the issues that they may need help with, and know where and how to access help, they may be precluded from taking up a law reform participation opportunity.

The importance of functional literacy as a foundational capability for effective law reform participation cannot be overstated. As a disproportionate number of disadvantaged people have lower levels of functional literacy, they are also likely to have a reduced capacity for meeting just-in-time participation needs through written materials.

Without the time and resources to meet particular needs, or to enable CSOs with reach and capacity to represent disadvantaged constituencies, the law

reform capability of people from disadvantaged and marginalised communities may be limited to involvement through those CSOs which have sufficient law reform capability, but who may be proxy organisations only able to 'speak about' these communities.

Law reform capability

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 affected people, communities, and also the CSOs able to represent them. Such a tailored approach will, however, generally 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 and cabinet confidentiality). They are also more likely to be discouraged and assume they are incapable of effectively participating or influencing law-makers.

Our data suggests people and organisations who continue to participate in law reform do so because they are passionate, tenacious and resilient to the setbacks, delays and uncertain or unfavourable outcomes. Most importantly, greater law reform advocacy experience appears to increase not only law reform literacy and capability, but also resilience.

The systemic features of law reform appear to advantage those types of interests and organisations that have greater time, resources, law reform literacy, and the ability to repeat their participation. If law-making bodies are to reach out beyond the relatively narrow set of usual suspects and repeat players that have greater law reform capability, they will need to take account of how time and resource constraints disproportionately impact on those people and organisations with lower levels of functional and law reform literacy, and who have less access to resources. This includes many of the human services sector CSOs that have a critical role in facilitating the participation or representation of the general public and disadvantaged people in law reform consultation.

Dependency on CSOs

Government and constituent members of CSOs are therefore likely to remain dependent upon the ability of CSOs to facilitate constituent participation or

representation in law reform unless a) direct communication between law-making institutions and the public is enhanced, and b) the general level of functional literacy and law reform literacy increases. Increasing functional literacy and direct communication is, however, a challenging whole-of-government and whole-of-community task, and in a practical sense is a matter for longer-term public policy. In the short term, CSOs are therefore likely to remain crucial to public participation in law reform, particularly for disadvantaged people.

Strategies

On the basis of these findings, we propose strategies to promote participation in law reform and enhance the law reform capability of the general public, disadvantaged people and CSOs so as to better overcome systemic constraints to their participation in law reform. Broad approaches suggested include:

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 processes in line with the specific needs of stakeholders.

We also identify possible improvements to the transparency, accountability and rigour of law-making practices and broader institutional reforms that may help to provide for more effective public and stakeholder participation opportunities.

Strategies to enhance public and stakeholder participation will, in large part, remain dependent on two related factors. First, effective participation is contingent upon having functional literacy and being able to meet law reform

literacy needs within timeframe constraints. Secondly, effective participation opportunities are contingent upon government being able to invest time and resources in providing consultation processes which are capable of meeting the diverse participation needs of affected people and interests. We acknowledge that the proposed strategies involve significant resources and commitment, some of which may not be realistic in the shorter term. As long as opportunities to participate in law reform continue to be formally available, however, we suggest both these factors will affect the extent to which people, and particularly disadvantaged people, are able to participate in law reform effectively.

1 Introduction

To provide equal access to the law and justice system, access to justice concerns must arguably extend beyond access to legal information, advisers, and dispute resolution institutions, and include access to the institutions and processes which establish and set the conditions for doing and providing justice, namely law reform processes. This report sets out key findings of a study examining the ability of people, and particularly disadvantaged people, to participate in New South Wales law reform processes.

The topic is timely. Participation of citizens in making the laws which order, govern and structure our society is increasingly being recognised as not only potentially leading to better laws, but also to a more robust democracy (OECD, 2001; Argy and Johnson, 2003; BRO, 2008). At the same time a growth in the volume and complexity of legislation suggests that participating in law reform is becoming an increasingly frequent and challenging task.

While research has looked at the ability of people to get assistance for their legal problems, little has been done which looks at the capacity of people, particularly disadvantaged people, to participate in law reform.

1.1 Research questions

This study explores:

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

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

The origins of these research questions can be traced to an extensive public consultation process, held by the Foundation in 2002, which raised accessibility of law reform processes as a key access to justice and legal needs issue for socially and economically disadvantaged people in New South Wales (Schetzer and Henderson, 2003).

We use case studies of actual and proposed law reform in New South Wales to explore these questions, and purposely selected those case studies having direct significance for groups identified by the Foundation as being disadvantaged under its Access to Justice and Legal Needs research program. The case studies involve issues affecting public housing tenants, boarders and lodgers, people affected by mental illness, and previous offenders:

- *Residential Tenancies Amendment (Public Housing) Act 2004* (NSW) — referred to in this report as *Acceptable Behaviour Agreements Case Study*
- Protection sought by the NSW Boarders and Lodgers Action Group (BLAG) — or the *Boarders and Lodgers Case Study*
- Review of the *Mental Health Act 1990* (NSW) — or the *Mental Health Act Case Study*
- *Bail Amendment (Repeat Offenders) Act 2002* (NSW) — or the *Bail Amendment Act Case Study*
- *Civil Procedure Act 2005* (NSW) — or the *Civil Procedure Act Case Study*.

1.2 Key concepts and definition of terms

Our research questions involve four key concepts:

- law reform and law-making
- participation
- civil society organisations (CSOs) and
- disadvantage.

Here, we discuss each of these concepts and how these terms are used. In addition we also define the term ‘stakeholder’ as it is frequently employed in this report.

Law reform and law-making

Many textbooks outline the legislative process as covering the period from the introduction of a legislative proposal to Cabinet to its passage into legislation. This however is only part of the law reform process. Although law reform involves activities that are not clearly defined, it commences before the formal legislative process starts and continues into the implementation of legislation and its potential review.

This study is primarily concerned with legislative law reform — that is, law reform associated with actual or proposed change to legislation. Legislation includes Acts of parliament[1] as well as Regulations[2] which contain the administrative or operational details that support the primary legislation. While common law or so-called judge-made changes to law are important sources of, as well as triggers of, law reform, they are beyond the scope of this inquiry.

In this report we distinguish 'law-making' from law reform activity. We define law-making as activity that only parliamentary or government institutions, and their advisory bodies, are able to do. Law-making includes considering, developing, investigating, approving, or revising proposed or existing legislation. Law-making bodies include government departments, parliament and its committees, and advisory bodies like the New South Wales Law Reform Commission (NSW LRC), or Ministerial or Advisory Councils.

Law reform is distinguished from law-making in that it includes attempts by the public or stakeholder groups to influence law-makers to change the law, or their participation in law reform consultation processes. The distinction between law-making and law reform activity — between the tasks of formulating, making, and revising legislation as opposed to activities which seek to contribute to or influence law-making — suggests there are insiders and outsiders in law reform processes. The public and stakeholders can participate in law reform, but they cannot make law. Our research looks at opportunities available to the community to participate in law reform, and the capacity of the public and non-government stakeholders to take up these opportunities.

Participation

Central to this study is the notion of participation — the capacity of citizens to be a part of and have a say in — law reform. The concept of participation

1 Acts of parliament are also known as primary legislation or statutes.

2 Regulations are also known as secondary, subordinate or delegated legislation.

does not have a settled and accepted meaning in the literature. There are many forms of participation as well as debate about what it ought to involve.

We define participation in this report as any communication between individuals or groups and law-making bodies, which aims to present information, views or concerns about a law reform issue or legislative proposal. Such communication may occur through provision of information, a written submission, taking part in a consultation process, or collaborating through a taskforce or advisory process.

Participation is widely seen as being both an instrumental means to a desirable end, and a desirable end in itself. In the context of law reform, participation has been seen as not only affording a more inclusive law reform process, but as also helping to secure more effective, efficient and just laws. Indeed the promise of participation lies in its potential benefits for both outcome and process. Arnstein (1971) for example stated that an indicator of 'effective' participation is the degree to which participants are able to influence final outcomes and the extent to which decision-making power is shared.

An important tension between 'participative' and 'representative' ideals and practices of democracy has been noted by a number of authors (see Byrne and Davis, 1998; Bishop, 1999). Participative practices suggest that citizens actively participate in deliberation and decision-making about what law or policy should be. Representative practices, on the other hand, provide for the interests of citizens to be represented in decision-making by their elected or nominated representatives.

Australian government and our system of democracy are largely premised on representative institutions and practices, although participation opportunities may be provided through public or community consultation. The interests of individuals are generally either articulated on their own behalf or via interest groups. As we will see below these institutional arrangements present a number of challenges for more participative forms of law-making.

Civil society organisations (CSOs)

Organised interest groups facilitate the participation and representation of people in governance, including in activities such as law reform. The literature variously refers to such groups as community, non-profit, non-government (NGOs), third sector or civil society organisations (CSOs).

We use the term civil society organisations (CSOs) in this report to refer to the range of organisations, including peak bodies,[3] involved in law reform that are not government agencies or private businesses. CSOs vary in their purpose, type, membership, resources, level of organisation and activities. They include consumer, interest, advocacy, industry and professional organisations or associations, as well as non-government and not-for-profit service providers.

Some CSOs are relatively new groups having informal structures and have few resources or members, and little or no public profile. Some have a short lifespan, being formed to advocate for or against a particular reform. Others may be more established and have considerable standing, profile, membership and resources.

CSOs operate in and across a range of sectors. In terms of law reform affecting disadvantaged people, CSOs within the human services sector, comprised of the community, health and legal sectors, are of primary interest in this study, particularly where they represent or facilitate the participation of the public and/or groups of disadvantaged people.

CSOs are noted as having a vital role in mediating citizen-government relations (see Peterson, 2001; Woolcock and Narayan, 2000) and their ability to represent the interests of their members or constituents and/or facilitate their participation or involvement means CSOs are important avenues through which individuals are able to take part in law reform.

Indeed CSOs are widely identified as having an especially vital role in facilitating the inclusion of marginalised and disadvantaged people and groups in public and political life (Dalton and Lyons, 2005; NSW Department of Community Services and the Forum of Non-Government Agencies, 2006; Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs, 2010). They are key institutions through which both horizontal and vertical networks enable collective action (Healy, 2007). CSOs, for example, assist people to bridge social divides and form relationships across identity differences, and are vital for linking individuals and communities to resources or opportunities beyond personal networks. CSOs also provide links between individual members of organisations and those in government, and facilitate access to state institutions and agencies as well as the business sector (see Woolcock, 1998).

[3] Peak bodies are associations of organisations within an industry or sector. For example, the NSW Council of Social Service (NCOSS) is the peak body for the community services sector in New South Wales, a sector which consists of a mix of service providers, consumer groups and advocacy organisations. Peak bodies may be funded by government for the purpose of enhancing communication among organisations within a sector, and between the sector and government.

Disadvantage

There are many ways of conceiving of disadvantage, and here we adopt the definition of disadvantage as used in previous Foundation work. This definition identifies groups of people who are socially and economically disadvantaged in the justice system, including people with disability (physical, intellectual, sensory, psychiatric, acquired), people from culturally and linguistically diverse backgrounds, Indigenous Australians, children and young people, older people, people living in remote, rural, regional and disadvantaged urban areas, people with low levels of education and literacy, gay, lesbian and transgendered people, women, people living in institutions (i.e. prisoners, juvenile corrections, immigration detentions, nursing homes, psychiatric institutions) or released from institutions, people on low incomes, homeless people, and people who face multiple disadvantages (Schetzer and Henderson, 2003).

There are, however, problems with grouping disadvantage by socio-demography, as it suggests that a person is either disadvantaged or not. Disadvantage is also relative to an 'other': the advantaged, haves or privileged. People with multiple forms of disadvantage experience compound effects that are not always recognised and which may call for qualitatively different policy interventions (Anttila and Wright, 2004: 9).

To help examine participation issues common across multiple groups experiencing different forms of disadvantage, we draw on Sen's capabilities approach. Sen (1999) describes disadvantage as being the deprivation of capabilities required to have a real opportunity to undertake an activity. His capabilities approach focuses on what people are doing or being (functioning) and what freedom they have to effectively assert choices relating to their wellbeing (capability). Having a capability means having the freedom to achieve particular functionings (Robeyns, 2003).

A key idea of the capabilities approach is that individuals need to have the freedom to choose whether or not they undertake activities before they can be considered to have had a real and substantive opportunity to do so, and they need to be capable of doing or engaging in those activities. Sen's approach notes that disadvantaged people generally have lower freedoms and functional capabilities which limit their participation in social, economic and political life.

Sen's approach also anticipates that functional capabilities differ among people. While some differences are individual, others are structural and are a consequence of the normative characteristics of institutions, communities

and social groups. A person's experience of disadvantage may therefore be a consequence of her individual capabilities (such as physical condition, gender, reading skills, or intelligence) as well as her social and environmental context. Social context includes public policies, social status or norms and gender roles, and environmental context includes institutions, infrastructure and environment. A feature of the capabilities approach is that it sees disadvantage as arising in diverse ways. As Sen noted, human diversity is not a secondary complication or consequence, it is a fundamental aspect of equality (Robeyns, 2003: 17).

Extending this approach to participation in law reform, the freedom to choose whether or not to participate is thus unlikely to be equally available to all people because of a range of individual, social and systemic factors which go beyond socio-demography.

The capabilities approach is especially useful because it helps us identify factors which limit or constrain *opportunities* to participate in law reform. This is a useful distinction for our purposes because participating in law reform is a voluntary action. We see below that literature examining public confidence in governance institutions suggests many people choose not to participate in governance activities, even where they are capable of doing so. Considering what freedoms and capabilities people have to participate in law reform allows us to examine what is needed to have the freedom to choose to participate without assuming that it is necessary or should happen. Rather than assuming that people would or should want to participate, our key concern is therefore whether people have open to them an effective opportunity to choose to participate.

In this study we identify factors that constitute law reform capability — what knowledge, skills and abilities individuals or groups need in order to have the freedom to choose to participate effectively in law reform.

Stakeholder

The term 'stakeholder' is frequently used in this report in two major ways. As a noun the term refers to any interest across different sectors of society likely to be affected by an issue, and includes disadvantaged individuals and/other individuals, organisations in the business and third sector (community and civil society), media, as well as government agencies or bodies. The use of the term 'stakeholders' in relation to our case studies, such as in Chapter 4, therefore relates to those interests — including individual and organised interests — potentially affected by the issues or law in the relevant case study.

We use the term differently to describe a consultation process. For example a 'stakeholder consultation' refers to consultation that is limited or restricted to specific or particular interests, while a 'public consultation' is used to describe a consultation where the views of the general public are solicited. 'Public and stakeholder consultation' on the other hand, describes a consultation that may contain a mix of limited consultation with specific stakeholders as well as consultation with the general public.

1.3 Significance of the research

This study is significant for a number of reasons which we discuss in turn. Legislation is a key policy instrument that is frequently used to try to improve the circumstances of people, including disadvantaged people, access to law reform is an important access to justice issue, and public and stakeholder participation is a feature of best practice law reform.

Legislation is a key policy instrument

Legislation is a key policy instrument frequently used by governments to 'do things'. This includes to facilitate or allow a course of action, to coerce, require or prohibit certain behaviour, to create and govern institutions, and to state aspirations and social values (Bridgman and Davis, 2004: 75). By spelling out the rights and responsibilities of individuals, bodies and governments and regulating the social and legal relationships between parties, legislation is a tool for doing justice (Bridgman and Davis, 2004: 75).

Other policy tools for social ordering include information and education campaigns, financial instruments such as subsidies or user charges, and government action such as delivering services or promoting codes of practice (Office of Regulation Review, 1998: E7; Bridgman and Davis, 2004: 69).

Bridgman and Davis' influential *Australian Policy Handbook* (2004: 26) depicts the public policy process as a continuous and iterative cycle involving a series of stages which is discussed in more detail in Chapter 2. The legislative reform process has particular legal, constitutional and institutional conditions which distinguish it from other policy instruments, and which can limit the scope for public participation.

Changing or 'reforming' the law often connotes progressive — as opposed to retrogressive — improvements to a state of affairs. Indeed, Ross (1982: 6) defined law reform as being:

> *... the restructuring of our society by the use of law with the goal of improving the quality of life for all its citizens but especially those that are disadvantaged under the present system.*

Tomasic (1980) suggested that the community expects government to 'legislate continuously' to improve society, and more recently Glanfield (2005: 290) similarly noted that the community has high expectations about government's ability to 'do something' about a problem and has come to see legislative reform as a 'panacea' for much social ill.

The importance of participating in law reform has risen as legislation is increasingly being used by government to regulate more and more aspects of life. Anecdotal evidence suggests the volume and complexity of legislation in Australia has rapidly increased since the 1970s. In the mid 1990s McHugh (1995: 37–38) noted that:

> *... throughout this century, successive Parliaments have legislated to control more and more social and economic conduct. As a result, the rules of the common law and equity are constantly being modified by statute law. The growth of legislation appears to have reached almost exponential levels.*[4]

More recently the then Chief Justice of Australia, Justice Gleeson, identified that popularisation of legislative reform in Australia dating from the 1970s has resulted in few areas of social, public or economic life that are not now affected by some form of legislation outlining legal rights, responsibilities, or otherwise prescribing or proscribing behaviour or procedural requirements (Gleeson, 2008: 3). Gleeson (2008: 2–3) further noted that as the public has become accustomed to more detailed statutory regulation of their personal and economic activities, parliament has become 'a standing law reform agency constantly turning out detailed rules affecting the rights and obligations of citizens'.

The rise in the use of legislation can be expected to have important consequences for participation in law reform. The volume of law reform not only risks 'regulatory overload', but there are now so many laws and regulations which

[4] Different commentators have noted the evidence for increase in volume of legislation. McHugh found that the length of legislation had grown between 1970s to early 1990s. He reported that Commonwealth legislation had increased in length by 325 per cent over this period, whereas New South Wales legislation had increased by 300 per cent. Similarly the number of Regulations (subordinate legislation) in both these jurisdictions had also increased (see McHugh, 1995 for detailed discussion of increase in volume of legislation). In 2003 Banks (2003: 3–5) pointed to indicators which suggested the volume of legislation had continued to increase. He speculated that the growth of legislation in State and Territory governments may be higher than that of the Commonwealth, with often more direct impacts on the activities of business and the community. In mid 2005 it was reported that over the previous 15 years some 450,000 pages of legislation had been enacted in Australia and that the stock of new Acts and Regulations continues to increase each year by about 10 per cent (Skotnicki, 2005).

are so frequently being reviewed and amended that it is increasingly difficult for people to stay abreast of the law and their legal obligations (see Gleeson, 2007). The increasing volume and complexity of legislation can be expected to contribute to public and stakeholder participation in law reform also becoming increasingly challenging.

Yet, Kirby (2008) identified law reform as being harder to achieve now than it has been previously because of a number of features, including: increasing complexity of social problems; evidence-based research becoming essential for law reform that is likely to be of lasting value; a proliferation of CSOs which has made consultation more diffuse, time consuming and exhausting; greater realisation of the complex economics of law reform and the 'price' of reforming legislation; the policy choices underlying what the law is or ought to be are now more explicit, and considering and explaining them more intellectually taxing and politically contentious; and members of the public may have strong opinions about the policy choices involved and achieving a democratic consensus may be unrealistic, particularly where different views derive from deeply held religious or moral viewpoints.

Importantly, Kirby (2008) also suggested that an endemic institutional weakness of our system of government is that our democracy operates through filters, which means some minorities (especially unpopular or marginalised ones) are frequently incapable of gaining the attention of law-makers in order to redress their perceived injustices.

Legislative reform therefore often involves a struggle over ideas about what and how the laws need to change, what would work for the better, how improvements in quality of life can and ought to be measured, and who should benefit. Elsewhere Kirby (cited in Ross, 1982: 6) noted:

> *... [it is] precisely because it involves change for the better that law reform is a controversial business. The fact is that different people will have different ideas about what is 'better'.*

Participating in a process that determines law reform outcomes is important for the reason that it can significantly change rights and affect interests.

Access to law reform is an access to justice issue

Questions about access to justice have evolved from concern with 'access to law' to 'access to law-making' (Macdonald, 2001). Macdonald (2005: 23) contends:

> *... true access to justice requires that all people should have an equal right to participate in every institution where law is debated, created, found, organised, administered, interpreted and applied.*

In other words, access to justice not only requires access to legal assistance and legal protections, but also to the very administrative and legislative processes by which law is made and administered (MacDonald, 2001: 319).

In Australia access to justice thinking has similarly evolved. In 1994 the Access to Justice Advisory Committee (AJAC) was asked to recommend reforms to the Commonwealth legal system which would enhance access to justice. Among other things, the AJAC (1994: 461) recommended improving access to legislation and identified two aspects of access to legislation: first, that people are able to physically access and understand what the legislation says, and secondly, that they have the opportunity to provide input during the process of making legislation.

In the Commonwealth Government's response to the AJAC report, public consultation in law reform was identified as an element of 'best practice in developing legislation, including delegated legislation', and AJAC's view that access to law-making was crucial for improving access to justice was supported (Commonwealth Attorney-General's Department, 1995: 118–120):

> *Where appropriate, consultation should take place with interested parties both within and outside government.*

Since 1995 there has been a range of reforms and public legal information programs intended to improve access to legislation. Legislation produced in all Australian jurisdictions is now publicly available online,[5] and the parliamentary counsel's offices of Australian governments have been tasked with drafting legislation using plain English principles.[6]

The extent to which the ideals expressed by Macdonald (2005) and AJAC (1994) can be realised has significance with respect to how marginalised, diverse and disadvantaged people are able to access justice. For instance, commentators have noted that strategies to redress poverty, disadvantage and inequality have traditionally failed to harness the expertise and lived

[5] For example, the Australian Legal Information Institute (AustLII) website is a free online information resource which holds all current primary (legislation, treaties and decisions of courts and tribunals) and secondary (law reform and royal commission reports) legal materials in Australia and its jurisdictions, see <http://www.austlii.edu.au/>. For current NSW legislation, Bills and consultation drafts of Bills, see <http://www.legislation.nsw.gov.au/>.

[6] For NSW PCO see <http://www.pco.nsw.gov.au/corporate/plainlanguagepol.pdf>; for federal OPC see <http://www.opc.gov.au/about/docs/pem.pdf>.

experiences of the people those strategies were intended to help (Serr, 2004). The extent to which the views and experiences of particular affected groups are taken into account and considered in law reform may consequently affect the extent to which the resultant laws effectively respond to their needs and circumstances, and how just they consider them to be.

Participation is a feature of best practice law reform

Since the 1970s a number of studies and surveys have reported a decline in the level of public confidence in governance institutions among Western democracies (Blind, 2007: 9–10; World Economic Forum, 2002).

Consistent with this picture, Australians' confidence in their democratic institutions has been found to be relatively low. Brenton (2005) examined data from national surveys conducted in 2003 and 2004[7] and found that while people were satisfied and proud of the general concept of 'Australian democracy', they were generally mistrustful of its institutional bodies: parliament, politicians, courts and legal system, and the public service. Importantly, he found that disillusionment was patterned and that people who are socio-economically disadvantaged have lower levels of trust in governance institutions (Brenton, 2005).

One response to low public confidence in governance institutions has been to promote public participation as a means to (see OECD, 2001; Byrne and Davis, 1998; Gregory, 2007):

- improve the quality of policy as sources of information are widened
- produce policy that is more responsive to increasing complexity, speed and interdependence of issues
- respond to public expectations of being heard and considered in decision-making
- enhance the public legitimacy and credibility of government decisions
- raise government transparency and accountability as it increases public scrutiny of decision-making
- increase the likelihood of successful policy implementation or compliance as stakeholders find outcomes more acceptable
- improve the quality of democracy and citizen-government relations

[7] The 2004 Australian Election Study (AES) and the 2003 Australian Survey of Social Attitudes (AuSSA), see Brenton (2005).

- improve public confidence in policy-making process and
- strengthen civic capacity for future involvement in governance activities.

The Organisation for Economic Co-operation and Development (OECD) identified public participation as a key mechanism for renewing public confidence and trust in democratic institutions, and issued best practice guidelines for public participation in policy-making (see OECD, 2001: 15).

Some governments have made use of new information communication technologies to better involve the public in governance activities through web-based discussion, online polling, online panels, bulletin boards, and websites containing information (OECD, 2001: 50). The Queensland Government, for example, provides an online bulletin board listing policy issues currently being considered, and provides information about how interested participants can make a submission or get further information.[8]

The potential benefit of public participation for legislative reform was noted by the Commonwealth Government's response to the AJAC inquiry (Commonwealth Attorney-General's Department, 1995: 118):

> *... public consultation in the development of laws ... contributes to a greater understanding of new laws, and makes those laws more responsive to community needs. Public consultation can also assist in improving the clarity and content of proposed legislation.*

It is widely contended that public participation in law reform can increase the likelihood that reforms will work in practice, gain the support of those most likely to be affected, and improve the quality of law (Opeskin, 2002). Its occurrence in government law-making however, is discretionary.

Public consultation is included in the Commonwealth's *Legislation Handbook* as a feature of legislative law reform best practice (ALRC, 2002: 219). Similarly in recent reforms of its law-making practices, the New South Wales Government issued a *Guide to Better Regulation* intended to promote best practice law-making across government that ascribes a role for public consultation (Better Regulation Office (BRO), 2008).

Increasing interest in participation in law reform may be linked to recognition that many social problems faced by communities are complex and beyond the information and understanding of a single body, agency or organisation. Policy

[8] See <http://www.getinvolved.qld.gov.au/consultqld/>.

issues characterised as being 'wicked social problems' — experienced by many individuals and groups identified as being disadvantaged and socially excluded — are difficult to deal with because they have unclear underlying structures or causes, or raise matters involving competing priorities (Bridgman and Davis, 2004: 43–44). Increasing public participation, and especially participation by marginalised and disadvantaged groups, affords greater opportunities for legal and policy reforms to be more informed and nuanced.

While public participation has been widely contended to be a feature of best practice law-making, evidence has yet to establish that it results in better or more just laws. The strongest arguments for public and stakeholder participation being a feature of best practice law-making is likely, for the foreseeable future, to depend on furthering democratic ideals: that governance practices should provide opportunities for robust citizen participation in the issues and outcomes which affect them.

1.4 Previous research

It is noteworthy that while there is valuable research concerning law reform, participation and disadvantage, there is comparatively little research bringing these three topics together.

One common approach to redressing disadvantage and social exclusion has been to actively encourage the participation of disadvantaged and marginalised people in the decision-making of local bodies such as local governments, schools, precincts or cities (see Everingham, 1999). Such strategies are often based on community development or community building approaches intended to empower people by helping them to build the skills, knowledge and confidence required to more actively and effectively participate in social life. A growing body of knowledge in this area of inquiry suggests that individuals need to recognise the issues as being personally relevant to them and feel that they are capable of influencing the outcomes before they are likely to participate (Pateman, 1970; Fung and Wright, 2003).

Research on the participation of disadvantaged people in law reform however remains lacking. We summarise below some previous research on participation in governance processes, and identify knowledge gaps which this study attempts to redress.

Participation in policy-making

Much of what is known about participation in law reform is informed by literature and research about participation in policy-making. Although more established in policy fields such as urban planning, development, and natural resource management, participative practices are widely recognised and used by government in other policy areas, such as health policy. Little is known, however, about how public or stakeholder participation affects policy outcomes and evaluation of public or stakeholder participation has been scant (Gregory, 2007: 5).

There are many tools or techniques used to facilitate public and stakeholder participation in policy-making.[9] Aside from well-known methods such as consultation and focus groups, deliberative techniques such as referenda, citizens' panels, citizens' juries, consensus conferences and deliberative surveys have also been explored and used in Australia (Carson and Gelber, 2001; Hartz-Karp 2005). Deliberative techniques sometimes involve a random selection of participants (to reflect the target population affected by policy), availing them with access to the 'facts' of the issues presented from various perspectives, and providing them with opportunities to question, challenge and discuss the issues.

Researchers and authors have variously characterised the different participation techniques. Arnstein (1971) placed different techniques on the rungs of a ladder, from low levels of participation providing little opportunity for input, to high levels of participation characterised by partnerships or greater control over outcomes. More recent descriptions have depicted a continuum of involvement (see Shand and Arnberg, 1996; cited in Bishop and Davis, 2002). The OECD, for example, organised different techniques along a spectrum ranging from passive to more active modes of public involvement in policy-making — from information provision, consultation, to 'active participation' or partnership (2001: 2).

Bishop and Davis (2002) characterised participation techniques into six typologies — consultation, partnership, standing, delegation, consumer choice, and control (see Appendix 1.1 for an overview of this typology). Importantly they characterised participation in government policy-making as a discontinuous set of methods which do not conform to a single

[9] For example see the Public Participation Toolbox by the International Association for Public Participation, at <http://www.iap2.org/associations/4748/files/toolbox.pdf>.

methodology and as being heavily influenced by local context, usually being ad hoc, and having no shared theoretical base. Rather, participative practices are shaped by the issues at hand, the techniques and resources available, and, importantly, political judgments about the need for participation (Bishop and Davis, 2002: 21).

During the 1990s the New South Wales Government commissioned two studies to canvass the extent of public and stakeholder participation in New South Wales policy-making. These studies highlighted the significant time and resource demands of public participation in policy-making and its considerable challenges for the public, stakeholders and government.

The first study, *Participation and the NSW Policy Process: A discussion paper for the Cabinet Office of NSW*, examined the approaches to public and stakeholder participation across Australian governments and found that consultation was the most frequent and dominant type of participation practice in Australian policy-making, including in New South Wales (Byrne and Davis, 1998).

Byrne and Davis (1998) found confusion within government concerning responsibility for and the practice of public and stakeholder participation, and suggested that the level of participation provided was shaped by the government's outlook on issues and political factors such as electoral considerations (Byrne and Davis, 1998: 35). The task of undertaking consultation was often delegated by senior officers to less experienced officers and was infrequently documented (Byrne and Davis, 1998: 35). The use of consultation protocols was found to vary across government and contributed to consultation practices being fragmented, uneven, and varying from case to case. While centralised whole-of-government guidelines may help to provide for greater consistency in consultation practice, the authors reported that bureaucrats had little enthusiasm for a centrally mandated participation procedure manual (Byrne and Davis, 1998: 81).

The second study commissioned by the New South Wales Government, *Public Participation in Legislative and Significant Policy Processes* (Community Solutions, Public Interest Advocacy Centre and Environmental Defender's Office, 1995), identified the formal points of access to government policy and law-making across four key platforms: government, parliament, community, and courts/tribunals. It found that while participation opportunities existed across these platforms, they were neither well known nor utilised and

identified the following key barriers to public participation in policy-making (Community Solutions, PIAC and EDO, 1995: 3–32):

- **Inadequate participation processes**:
  Methods used to consult stakeholders did not match their needs, particularly the special and particular needs of disadvantaged and marginalised communities. Consultation processes were generally found to be insufficiently resourced, have unclear objectives, provide insufficient time for stakeholder response, have inadequately and inconsistently identified stakeholders, and lack mechanisms for providing feedback about outcomes of consultation.
- **Lack of stakeholder capacity to participate**:
  Stakeholders had needs which related to the particular policy issue (insufficient information, time or resources to respond) and/or broader policy process (insufficient knowledge or understanding of government and democratic processes). Failure to meet these needs prevented people and groups from participating.

More recent studies also identify similar barriers. For instance, a survey of CSOs' perceptions of government consultation processes identified tight timelines, fluctuating quality of processes, insufficient resources and inaccessible consultation forums as being common experiences (Rawsthorne and Christian, 2004). A lack of resources, and in particular funding, has been frequently identified as a key restriction on CSO participation in policy debates (Melville and Perkins, 2003; Maddison, Denniss and Hamilton, 2004).

These studies suggest facilitating public and stakeholder participation in policy-making requires time, resources, skills and commitment from government and non-government participants alike.

Participation in law reform

The few studies that have examined public participation in New South Wales law reform suggest that law reform provides additional and particular challenges for participants.

Johnston (1983) examined public access to the legislative process using a number of case studies of legislative reform,[10] as well as interviews with parliamentarians, bureaucrats and interest group representatives. He found

[10] These case studies related to *Public Hospitals (Amendment) Bill 1982*, the *Motor Traffic (Road Safety) Amendment Bill 1982*, and government proposals for closure of a public hospital.

that while the parliamentary phase was the most public phase of the law reform process, and provided opportunities for public participation, the legislative process at that stage is 'already moving like an express train' and there was little opportunity for the public to influence outcomes. Johnston (1983: 6) suggested that access before the law reform issue reaches parliament was key to influencing outcomes, but found opportunities to participate at the pre-parliamentary phase were limited because the key decision-makers within government were generally not known to the public.

Other studies suggest that understanding the law, as well as law reform processes, are also significant challenges for many people. For instance, a lack of general awareness or understanding of law reform processes and procedures, such as parliamentary inquiries or law reform consultations, has been identified as a participation constraint (Schetzer and Henderson, 2003; Blue Mountains CLC, 2000). The type of language used in law reform consultation documents was also seen as tending to be formal, complex, and not easily comprehended by many members of the public (Schetzer and Henderson, 2003).

At the heart of law reform is the particular 'legalistic' language and form of law. A wide range of literature has identified lack of legal knowledge among the general public concerning their rights and the operation of the legal system, and which tends to be greater among disadvantaged people (Canadian Bar Association, 1992; Buck, Pleasence and Balmer, 2007; Coumarelos, Wei and Zhou, 2006). While such a lack of knowledge has important consequences with respect to the kinds of strategies people employ to deal with their civil justice problems, findings that point to issues with legal literacy, as well as knowledge and understanding of law reform issues and processes, are likely to have important implications for participating in law reform.

1.5 Scope of study

The ambit of this study is bounded by four considerations. First our research is confined to law reform processes of New South Wales, primarily because that is the focus of the Foundation's statutory terms of reference.

Second, preliminary discussions with informants having considerable experience in government, parliament and the civil sector informed the scope of the research questions (for details see Chapter 3). These informants spoke about how a range of opportunities to participate in law reform exists, but opportunities tend to be taken up only by those having the capacity to

participate. They suggested that a more important and significant outcome of the inquiry would point to ways of improving access to law reform for a more diverse pool of individuals and groups. Accordingly, this study focuses on exploring opportunities for and constraints on public and, in particular, disadvantaged people's, participation in law reform.

Third, participation in law reform can be examined in two quite different ways: first by examining capacity to participate, and secondly, by examining capacity to influence outcomes. The question of influence is important but beyond the scope of this study. Literature suggests that attributing law reform outcomes to particular events or participants is problematic and that often there are competing accounts and explanations for outcomes (Johnston, 1983; Dearing and Rogers, 1996). This study instead seeks to identify law reform participation opportunities, what constraints there are, and how participation opportunities may be improved. The focus is therefore on law reform processes, rather than their outcomes.

Finally our system of representative democracy provides that, apart from four-yearly public elections, access and involvement in governance activities primarily occurs through representation by groups and organisations. Our study therefore also examines factors affecting CSOs' capacity to participate in law reform. Rather than examining how well CSOs represent their constituents, this study focuses on CSOs' ability to represent or facilitate the participation of their constituents in law reform.

1.6 Structure of this report

This report is in three main parts:

- background (Chapters 2 and 3)
- analyses (Chapters 4, 5, 6 and 7) and
- discussion (Chapter 8).

The *Background* orients readers to the law reform process, the major law-making institutions in New South Wales, and outlines the methods used in this study. In particular it describes:

- law-making institutions and notes their procedural requirements (Chapter 2) and
- the method used to collect data in this study (Chapter 3).

The *Analyses* chapters overview the case studies and report the major themes identified through our interviews. They cover the following:

- case study analysis of New South Wales law reform (Chapter 4)
- how and how much law reform happens in New South Wales (Chapter 5)
- opportunities and constraints for the general public and disadvantaged people to participate (Chapter 6) and
- opportunities and constraints for participating in law reform through CSOs (Chapter 7).

Finally, the *Discussion* (Chapter 8) considers implications of our findings for individual and CSO participation in New South Wales law reform, and suggests a number of strategies to improve the participation of the general public and disadvantaged people.

Names of government bodies

During the period from inception to completion of this study, the names of a number of government departments in New South Wales have changed. These names in Chapters 1, 2 and 8 are updated and current as at the time of the publication of this report. In the *Analyses* chapters (Chapters 4, 5, 6 and 7) however, we refer to the names of relevant departments as they were known and referred to by our informants, during 2006 to 2009.

2 New South Wales law reform processes

As opportunities for participating in law reform arise through institutions of law-making, in this chapter we describe these institutions and the legislative reform process in New South Wales. Much of what is covered here will be familiar to students and practitioners of law, government or public policy. The purpose of this chapter is to introduce the concept of law reform as a cyclical activity with a focus on its processes, and provide a context for the data we present in later chapters.

2.1 The law reform cycle

We noted in Chapter 1 that Bridgman and Davis (2004) described the policy-making process as a continuous cycle involving a series of stages. These events consist of identifying the issues, policy analysis, choosing policy instruments, consultation, coordination, policy decision-making, implementation, and evaluation — leading back to identifying the issues. Sound policy-making, they suggest, is iterative as it allows ideas underpinning policy and legislation to be tested, evaluated, rethought, and readjusted in the light of evidence and changing circumstance (Bridgman and Davis, 2004: 131).

Law reform has been similarly depicted as occurring iteratively through a series of stages. Cranston (1987) identified four stages in law-making: emergence, form, implementation and impact. Studies on the emergence and implementation of legislation (see Bottomley and Parker, 1997; Cranston, 1987) also describe staged processes and suggest that ideas for reform first have to successfully *emerge* onto the legislative agenda of government, before they are *formulated* into legislative proposals and introduced into parliament. If successfully enacted, legislation may need to be *implemented* to have effect,

and will often subsequently be evaluated or *reviewed*, following which it may re-emerge onto the legislative agenda for amendment or reform.

For the purposes of this study, we draw on the idea of a policy cycle to conceptualise law reform as an iterative process marked by four stages or periods:

Emergence — an issue makes it onto the legislative agenda of government and enters the law reform cycle.

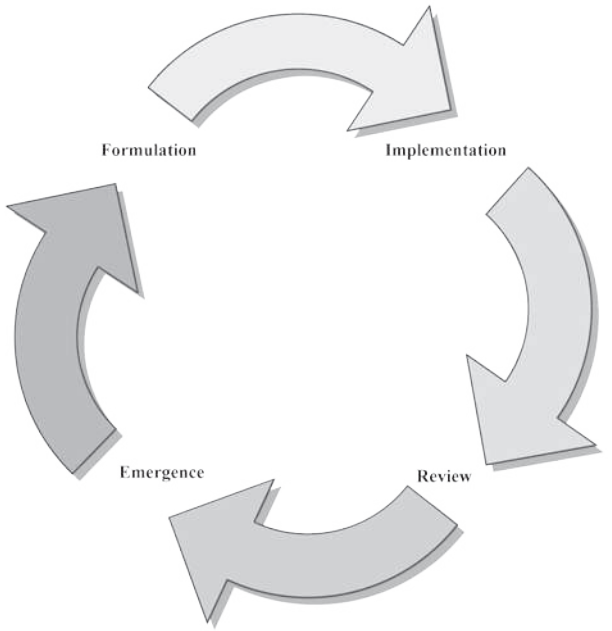
Formulation — an issue is transformed into a legislative proposal, culminating in its successful enactment into legislation by parliament.

Implementation — legislation is enacted until its review or possible amendment, including subordinate legislation required to effect, apply or use the legislation.

Review — legislation becomes the subject of assessment, evaluation or review until it is remade, amended or repealed.

The conception of law reform as a cycle, depicted in Figure 2.1, frames our discussion of law reform processes in this chapter and in the report more generally.

Figure 2.1: The law reform cycle



The law reform cycle is principally a tool to broadly describe complex and contingent processes. While Figure 2.1 suggests a continuous and sequential process, it is important to note that neither law nor policy reform processes are necessarily linear. Rather, the literature indicates that their processes are fluid, often chaotic, with different stages occurring simultaneously within different institutions (Bridgman and Davis, 2004).

At each stage of the law reform cycle, different institutional relations may be involved. For example, public servants within government departments identify and advise issues for reform, while ministers in Cabinet decide whether an issue gets onto the government's legislative agenda. Once legislation is enacted, departmental officials play a prominent role in its monitoring and implementation.

Therefore, before describing how issues progress through the law reform cycle, we first describe the key institutions involved in legislative law reform.

2.2 The institutional context

Institutions that undertake law-making include parliament, senior executive government (Cabinet), lower executive government (bureaucracy or public service), and their advisory bodies. Three key principles of the Westminster system of government determine the functions and inter-relationships of these institutions: the separation of powers, responsible government and federalism. Before we discuss institutions in detail, a brief explanation of these principles is worthwhile as they underpin law reform processes.

Government is separated into three branches of power: the legislative, executive and judicial branches. The legislative branch (parliament) scrutinises activities of government and enacts laws. The executive (Cabinet, ministers, the bureaucracy and its departments or agencies) manages public resources, and administers and enforces the law. The judicial branch (courts) applies and interprets the law to particular instances or cases. These three heads of power are said to be independent of, and provide checks and balances for, each other. The separation of powers prevents state power from being consolidated in any single body and limits the scope for absolute rule.

Our system of government is based on principles and institutions of representative and responsible government. It is representative because governments gain their authority through the electoral process. The people

elect representatives to serve in parliament and to exercise power on their behalf. In this sense members of parliament are said to be representatives of 'the people'. It is also responsible government because it is premised on a chain of accountability from the bureaucracy to the electorate: bureaucracy advises the executive government, the executive government makes decisions and is responsible and accountable to the parliament, and parliament in turn is responsible and accountable to the people.

Finally, Australia has a federal system in which legislative power is constitutionally divided between the Commonwealth and State governments, and neither level of government has total legislative power. The *Australian Constitution* identifies specific areas over which the Commonwealth Parliament has legislative power (s 52), as well as areas over which the Commonwealth and States have concurrent power (s 51). The areas that remain are those over which States have exclusive legislative power.

These three principles are important because they structure the functions and roles of law-making institutions, and set the boundaries for what is possible and what is not when considering changes that might improve public access to law-making. As an example, federalism means that even if public access to New South Wales law-making was enhanced, there are significant areas of Commonwealth law-making which may not be.

We turn now to the different institutions involved in making legislation. The description that follows is purposely brief and intended to give an overview of the system of responsible government in New South Wales. It must be noted that many of these institutional arrangements and practices are based on Westminster conventions and are fluid and can evolve, such as with a change of government, Premier or minister.

The executive government

The executive government in New South Wales consists of a number of agencies, coordinated at the top by the Cabinet. Cabinet is the central decision-making authority of government, and oversees the formulation of all government legislation.[11] At the lower level is the bureaucracy: public servants in government departments whose work is driven by the policy priorities of executive government.

[11] While most legislation is government-sponsored, a minority of proposals for legislation such as Private Member Bills, are non-government.

Cabinet

The Cabinet (or ministry) is an institution where all significant executive decisions on political, policy and legislative matters are made. The Cabinet is a group of ministers appointed by the Premier which is the senior executive government. By convention, all members of Cabinet must be members of parliament. Each minister is responsible for a number of portfolios, including administration of various laws, policies and programs within these portfolios.

For the benefit of stable government, certainty of administration, and confidence in the Lower House of parliament, the convention of cabinet confidentiality ensures all cabinet meetings, documents and deliberations are confidential.[12] This convention enables frank ministerial debate and robust deliberation of policy options, and means that whatever the internal dissent, the Cabinet will act and speak publicly with a single voice once a decision has been made. Ministers, as members of Cabinet, are by convention collectively bound by and responsible for decisions made in Cabinet, and are also expected to publicly support these decisions. The convention of cabinet confidentiality means that the rationale for cabinet decisions is not publicly explained (Twomey and Wilkins, nd; Singleton, Aitkin, Jinks and Warhurst, 2003).

By convention all government proposals for primary legislation, as well as all proposals for significant or sensitive subordinate legislation, require Cabinet consideration and approval. Cabinet approval is also required before documents can be released for public consultation or comment (Twomey and Wilkins, nd). Cabinet is a key gatekeeper of executive law-making. Cabinet takes into account government priorities, other legislative proposals and activities, as well as emergent issues, in deciding government's legislative agenda. Its decision-making determines which issues become the subject of law-making and which do not, as well as the mechanisms by which legislation is to be formulated, implemented and/or reviewed.

Public service

The public service is ideally an apolitical bureaucracy which advises the government and implements government policies and legislation. Public servants range from front line officers involved in service delivery, to policy officers with links to stakeholder groups and policy networks, through to senior executives having close contact with ministers. In theory while it provides

[12] Note that under the *Government Information (Public Access) Act 2009*, the confidentiality of New South Wales Cabinet documents generally ceases 10 years after their creation, unless exemptions apply.

Cabinet with policy or specialist advice, the public service leaves political decisions to Cabinet and parliament.

Public servants may recommend, develop and implement legislative proposals. They may conduct stakeholder consultations, monitor law reform developments, and participate in policy networks. It is noteworthy that, as a key source of policy advice to government, public servants advise and filter the information on which cabinet decision-making is based. Indeed Sawer (1976: 120) suggested that one of the ways in which public servants affect law-making is by offering their own expertise about relevant legislation, and ministers may be less inclined to propose legislative change in the face of internal departmental advice criticising a proposal.

The bureaucracy has been described as comprising line and central agencies (Bridgman and Davis, 2004). Line agencies administer different portfolio areas, while central agencies coordinate and manage operations across government. Central agencies which play a particular role in law reform in New South Wales are the Department of Premier and Cabinet, the Department of Justice and Attorney General (previously called the Attorney General's Department), Treasury and the Parliamentary Counsel's Office.

The *Department of Premier and Cabinet* (DPC) advises the Premier on matters that come before Cabinet for decision. It has a key role in: reviewing policy and legislative proposals; checking that proposals are suitably timed, logical, considered, and consistent with other government announcements, programs and policies, as well as with intergovernmental and international obligations; and ensuring proposals meet cabinet guidelines.

The *Better Regulation Office* (BRO) within the DPC, established in 2008, scrutinises all regulatory proposals and advises Cabinet on the adequacy of impact statements as well as compliance of proposals with identified principles of better law-making practice, as outlined in its *Guide to Better Regulation* (BRO, 2008).

The *Department of Justice and Attorney General* (DJAG) assesses whether a need for legislation, given the policy objective, has been established. It provides advice as to the legal implications of the proposal, including the appropriateness of its content, particularly in relation to penalties or enforcement mechanisms.

The *Treasury Department* (Treasury) reviews and certifies the accuracy of the budgetary impacts identified in the legislative proposal, and determines the financial impact of legislative proposals within the broader context of the government's budget and other proposed policies.

In practice, securing cabinet approval for a legislative proposal will often require the support of both Treasury and the DJAG, or the support of influential members of Cabinet. Proposals with significant financial implications may have to be considered within the context of the broader policy priorities identified in the budget process.

The *Parliamentary Counsel's Office* (PCO) turns proposals approved by Cabinet into legislative form. The PCO also provides the bureaucracy with preliminary advice about legislative proposals, including steps to be taken in order to introduce legislation (PCO, 2000: 6, para 2.2).

Multiple government bodies are therefore involved in the development and formulation of legislative proposals. While Cabinet is the apex of government authority in law reform, its decision-making is based on a considerable amount of policy and legislative formulation by public servants (Bridgman and Davis, 2004: 79; Cranston, 1987: 7).

Government often seeks information and input from a range of sources, in a number of ways. For the purposes of law reform it may choose to seek the views of public or stakeholders by going to them directly, or consult them through their network of advisory bodies, policy groups and committees for advice. The choice of who and when to consult, the scope of consultation, and the use of the information gathered, remain firmly within the control of the executive.

Observations in the literature suggest that executive discretion to consult, and hence opportunities for public or stakeholder involvement in law reform, is contingent on the political context of the particular issue. Bridgman and Davis noted that deciding whether to conduct a public participation or consultation process is as much a 'political judgement as a procedural issue', although it may sometimes be a 'legal requirement', and will often be 'just smart policy making' (2004: 78–79). Glanfield (2005) also noted that political circumstances such as public controversy, public interest considerations, and an election mandate, can affect executive discretion to consult internally or externally.

Issues that are 'burning' or a 'crisis', or perceived to threaten community safety, may compel government to undertake law-making immediately,

leaving little to no prospects of consultation (see Glanfield, 2005; Bridgman and Davis, 2004). However Glanfield (2005: 293) suggested that the vast majority of government policies and legislation can be developed both in a timely and consultative manner, particularly given that government already has extensive links to community views through a range of advisory bodies and their processes.

Advisory bodies

Advisory bodies may be involved in law-making because of their expertise in a specific issue and/or relative independence from government. They respond to ministerial requests for advice or independently raise issues for government attention. Their role is to advise government, and government is not bound to act on their advice.

Some advisory bodies are ad hoc and established by government to look at a specific issue, while others have statutory functions which can include monitoring particular policy or legislative issues. Examples of advisory bodies include ad hoc commissions of inquiry such as Royal Commissions, public or independent bodies such as the NSW LRC, the New South Wales Ombudsman and a range of advisory boards, ministerial advisory councils, committees, stakeholder forums, taskforces, as well as bodies perceived to have expertise in specific issues, such as professional bodies.

Advisory bodies vary in terms of their functions, expertise, independence, permanence, composition and the mechanisms they employ to consult stakeholders. Some advisory bodies may have members of constituent communities on their boards, such as that seen on the board of the federal Australian Mental Health Consumer Network or the Disability Council of NSW.

When and how advisory bodies are involved in law reform is principally at the discretion of the executive. Advisory bodies are usually given terms of reference (TOR) by the government, specifying the issues and scope for investigation, and a timeframe for reporting. The TOR, timeframe and available resources affect how an advisory body conducts its inquiry, including whether public or stakeholder views will be sought and considered.

The NSW LRC is a specific example of an advisory body with expertise in complex social and legal issues. While the NSW LRC can only commence work on an issue after receiving a reference from the Attorney General, it can also suggest topics to the Attorney General for a reference.

The NSW LRC, along with the Australian Law Reform Commission (ALRC), pioneered a staged inquiry approach in their law reform work which includes stakeholder consultation. Their method of work is distinguished by the use of diverse consultative methods,[13] and in some instances adapting these methods to the needs of the target audience to facilitate their participation, including audiences who are highly disadvantaged and marginalised. Its staged approach has been adopted by government bodies as well as other advisory bodies.

The NSW LRC's *Community Law Reform Program* also enables members of the public to identify issues or areas of the law which the Commission may investigate, although limited resources and specified criteria constrain the type and scope of topics that it will take on.[14] Following an initial investigation of suggestions made by the public, the NSW LRC advises the Attorney General on those considered most suitable for a formal term of reference. The Commission has examined and reported on a range of matters brought to its attention in this way, including matters relating to insurance law, wills, and credit and debt.

While they are not bound to accept the views of those they consult, advisory bodies often consider stakeholder submissions before making recommendations. Their reports also add to the stock of evidence about an issue, and may help propel government action to change the legislative status quo at some point in the future.

The role of advisory bodies in law reform also needs to be seen in its wider political context. For example, executive government may refer an issue to an advisory body because it wants to ensure an issue is thoroughly investigated and considered. Or it may do so as a way of being seen to take action concerning a highly contentious issue, while buying time until the inquiry has been completed. By the time an advisory body reports, issues may be overtaken or swamped by other events or circumstances which are accorded higher priority. There is a history of executive government seeking advice from advisory bodies or commissioning studies which, for various reasons, do not subsequently result in immediate legislative action (Edelman, 1971).

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[13] These methods have included seeking submissions to consultation papers, telephone phone-in lines, public meetings or forums held across the State, focus groups with affected interest groups, public opinion surveys, and talk-back radio interviews.

[14] The NSW LRC will not consider suggestions that are: too complex, already being reviewed by AGs or another government department or agency, likely to involve contentious policy issues, involve unsuitable matters (i.e. those falling outside of New South Wales jurisdiction). Details of the Community Law Reform Program can be found on the New South Wales Attorney General's website at <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_clrp>.

Parliament

The roles of parliament are to represent the people, pass legislation, and scrutinise government administration and expenditure.[15] By debating legislative proposals and scrutinising government activity — primarily through its committees — parliament has a central role in law reform. As politics is publicly manifest in parliament, parliament also provides opportunities for public involvement in law reform, whatever the stage of the law reform cycle.

Parliamentarians, and through them, members of the public, can in theory highlight issues and bring them to the attention of the government, media or wider community. Where government decides to formulate and introduce legislation without prior public or stakeholder consultation, parliamentary processes may be the primary if not only channel for public input in law reform.

The New South Wales Parliament contains two Houses, the Legislative Assembly (Lower House) and the Legislative Council (Upper House). As the political party with the majority of representatives voted into the Lower House forms government, government usually dominates that House.

A different electoral system in the Legislative Council means that minority parties may hold the balance of power, and for this reason the Upper House is often an important counter-point to executive dominance in the Lower House. In practice, legislative proposals by the government may pass easily through the Lower House, while being debated more rigorously in the Upper House.

Parliamentarians also scrutinise executive law-making through the committee system. A parliamentary committee is a group of representative members appointed by one or both Houses, or by a minister, to undertake specified tasks. These tasks may include investigating the operation and impact of a specific policy or legislation, or examining the appropriateness or impact of proposed legislation.

Each House of parliament has a number of select committees[16] and standing committees.[17] The Legislation Review Committee, for example, is a standing

[15] For an overview of the role and function of parliament in New South Wales, see <http://www.parliament.nsw.gov.au/>.

[16] Select committees are ad hoc, established to inquire into a particular event or issue.

[17] Standing committees are permanent, established under parliamentary standing orders or by resolution of the House for the duration of parliament, and have a continuing scrutiny function over specified government activity.

parliamentary committee which scrutinises all Bills and Regulations introduced in parliament[18] and publishes its findings in the *Digest* to inform parliamentary debate on legislative proposals.

Inquiries held by parliamentary committees can raise public awareness and debate concerning particular legislative proposals or legislation. Committee inquiries can point to additional policy issues for legislative consideration, how a legislative proposal may be developed, how existing legislative frameworks may be improved, or the need for assessing whether legislation is in fact doing what it should be doing.

Parliamentary committees may consult with members of the public and representative organisations by holding public inquiries and inviting oral or written submissions.[19] Inquiries by parliamentary committees are important channels through which stakeholders can 'speak directly' to law-makers, and provide opportunities to present their concerns to parliamentary members and place them on the public record.

2.3 How law reform occurs

Law reform therefore involves multiple institutions. Which institutions and what roles they play in law reform may change across the law reform cycle. Table 2.1 summarises the key institutions, decisions and potential for public access across the law reform cycle. In the discussion that follows, we draw on the concept of a law reform cycle and its different stages to describe the law reform process. Note that as the law-making institutions and their practices change across the cycle, so do opportunities for public input.

[18] Among other functions, the Committee examines whether Bills unduly trespass upon personal rights and liberties, make rights or liberties unduly dependent on insufficiently defined administrative powers or non-reviewable decisions, or inappropriately delegate legislative powers, see *Legislation Review Act 1987* (NSW) s 8A.

[19] For example, the Legislative Council's public guide to making a submission suggests that submissions can have the purpose of alerting committee members to relevant information, demonstrating how a person, community, or organisation feels about an issue, or helping the committee decide who to call to give evidence at hearings (Legislative Council, *Making a Submission*, <http://www.parliament.nsw.gov.au/Prod/Web/common.nsf/key/CommitteesLCSubmissionsHowToGuides/$file/Making+a+submission+brochure.pdf>. The guide also suggests that submissions address some or all of the terms of reference and include facts, opinions, arguments or recommendations for what the committee should do.

Table 2.1: Key law-making institutions, decisions and public access through the law reform cycle

	Emergence	*Formulation*	*Implementation*	*Review*
Stages of law reform cycle	Everything leading up to law reform issue being placed on executive's legislative agenda	Once law reform issue on agenda, until legislation is enacted by parliament or the issue fails to pass parliament	From enactment of legislation until its review	From commencement of a review until legislation is amended, remade or repealed
Key decision-making institution	Executive government, in response to issues across whole of society	Executive government and parliament	Executive government	Executive government
Key decisions	Add an issue to government's legislative agenda	Key decisions of executive include: – the timing and timeframe of formulation – whether external advisory bodies will be involved and – whether there will be opportunities for public or stakeholder consultation, and if so, what form that consultation will take Important executive decisions also include consideration of how the legislation will be implemented and whether sunset or statutory review clauses will be included Key decisions of parliament include: – whether government-sponsored Bills are subject to a parliamentary committee inquiry – whether the committee receives submissions or conducts public hearings and – whether the Bill is amended or rejected	Key decisions of executive include: – how the legislation is to be implemented – whether advisory bodies or representatives of stakeholders or the public are included in any monitoring and implementation committee or program, or what other opportunities will be provided Decisions for parliament may arise as a result of parliamentary scrutiny of the government's implementation and operation of the legislation	Key executive decision is to commence review of legislation unless required as a consequence of a sunset or statutory review clause. Other key decisions include: – how the review will be conducted – whether external advisory bodies will be involved and – whether opportunities for public or stakeholder consultation will be provided, and if so, what form that consultation will take Key decisions of parliament: scrutiny and/or inquiry to conduct review of legislation Key decisions of CSO sector relate to consultation processes, advocacy
Potential public access to law reform	Opportunities arise through a cross-section of institutions Specific government departments, agencies or advisory bodies may provide particular public participation opportunities through which law reform issues may emerge	Public and stakeholder consultation processes: issue, discussion or consultation papers; public forums, exposure draft legislation Membership or representation on advisory bodies and policy networks Consultation requirements associated with regulatory or other impact statements	Consultation associated with regulatory impact statements, particularly for Regulations Membership or representation on monitoring or implementation body or other advisory body	Sunset provisions Statutory review Executive initiated review Parliamentary inquiry or review

Emergence

Emergence is the process by which ideas, issues or problems become subjects of possible law reform. Table 2.2 highlights the breadth of social and political spheres from which ideas may be identified as suitable for law reform.

Table 2.2: Sources of ideas for law reform

Government	**Advisory bodies**
Policies, party platform and election promises	Standing commissions
Political party leaders, ministers, their advisers and staff	Public authorities
Public service	Regulatory bodies
Council of Australian Governments and Ministerial Councils	
Parliament	**Business / Third sector**
Members of parliament	Professional associations
Parliamentary committee inquiries	Peak bodies — industry, trade union and human services
	Lobby, interest, advocacy and consumer advocacy groups
Courts	**Media / Public opinion leaders**
Decisions of courts and tribunals	Influential and popular media
Judicial officers	Public opinion leaders
	Publicity of events forming a ‘disaster’, ‘scandal’ or ‘crisis’
	Individuals or communities

Some sources of law reform are identified as being more influential than others (see Cranston, 1987: 7; Glanfield, 2005: 290). For example, much policy activity, including law-making, is generated by public servants within government departments who monitor policy issues, amend government organisation and administration, review statutory or regulatory bodies and the operation of existing legislation as well as conduct regular programmed reviews of legislation (Bridgman and Davis, 2004: 38).

The diversity of sources from which issues may emerge suggest there are many ways to raise an issue for potential law reform, including courting supportive media interest, building a coalition of political support, issuing research or position papers justifying reforms, writing letters or submissions, conducting public protests, and lobbying members of government or parliament (Cranston, 1987: 8). The Public Interest Advocacy Centre (PIAC) highlights the range of ways that the public and stakeholders can use parliamentary processes to draw the attention of political representatives to an issue (PIAC, 2003: 24–27). In addition, many government agencies and

advisory bodies have formal processes whereby members of the public can bring issues to the policy attention of public authorities or administrators.[20]

A sub-set of the many issues identified will be selected by government for formulation. By placing an issue onto its legislative agenda, executive government recognises the issue requires a legislative solution and deserves government time and public resources.

Why some issues successfully emerge while others do not is complex and contingent on a number of factors (Cranston, 1987: 2), and is also extensively studied within a range of social science and legal disciplines. Law reform issues compete with prior government commitments, recurring financial business, as well as administrative reform issues. Members of the Cabinet draw on the internal advice of the bureaucracy as well as their political advisers and staffers when deciding the legislative agenda, and are subject to a range of influences, including parliament and their colleagues, the party they represent, interest groups and political donors, the media and public opinion (Bridgman and Davis, 2004: 35–36).

An important conclusion from studies of emergence is that successful emergence of ideas owes more to creativity, chance and politics than any analytical method (Bridgman and Davis, 2004: 45; Dearing and Rogers, 1996). A combination of 'right issue', at the 'right time', from the 'right source', can cause an issue to emerge — an 'aligning of the stars' which shifts the executive government's agenda. The set of influences and events which come together and shift issues onto the executive government's agenda, called 'external drivers', may include economic forces, media attention, opinion polls, legal changes through court decisions, State-federal and international relations as well as demographic shifts (Bridgman and Davis, 2004: 37). These drivers shape government agendas as well as limit the kind of policy responses available to government.

A systemic influence which may make it harder for issues to emerge onto the legislative agenda is government concern with reducing red tape, or the burden associated with administering and complying with legislation. This concern has resulted in government preference for non-regulatory solutions

[20] Mechanisms may exist through which members of the general public can raise policy issues, including law reform issues, with various government departments in New South Wales. Under the *Government Information (Public Access) Act 2009* (NSW), government agencies are required to provide a guide about the department containing information that 'specifies any arrangements that exist to enable members of the public to participate in the formulation of the agency's policy and the exercise of the agency's functions' (s 20(1)(c)).

over legislation. Unless the benefits of legislation can be shown to outweigh its costs, public servants are encouraged to propose non-regulatory options when addressing identified policy problems (BRO, 2008: 13).[21] In practice this means an issue needs to pass a double threshold before it gets onto government's legislative agenda. First, it needs to be recognised as a policy problem, and secondly, legislative solutions are seen as being the better option for addressing the problem.

There are few formal requirements on executive government to consult externally during emergence, although, depending on the circumstances, it may choose to provide opportunities for public or stakeholder input.

Formulation

Formulation commences when an issue has emerged onto the government's legislative agenda, and continues until either the legislation is enacted, executive government declines to change the status quo, or the proposal fails to be passed by parliament.

Formulation is one of the most prescribed stages of the law reform cycle. For example, the pre-parliamentary process for developing legislative proposals — Acts as well as Regulations — is prescribed by the following instruments and documents:

- *Legislation Review Act 1987*
- a number of Premier's memoranda
- the PCO's *Manual for the Preparation of Legislation* (PCO, 2000)[22]
- *Subordinate Legislation Act 1989* and
- more recently, the BRO's *Guide to Better Regulation* (*the Guide*; BRO, 2008).[23]

Legislative proposals have to meet the requirements of both the executive government and parliament in order to become law, and some of these requirements may include the consultation of people affected by the proposal.

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[21] See Principle 3 of *Guide to Better Regulation*. A legislative proposal which restricts competition will have to demonstrate further that benefits of legislation will outweigh its costs, and the objectives of legislation can only be achieved by restricting competition (BRO, 2008: 17).

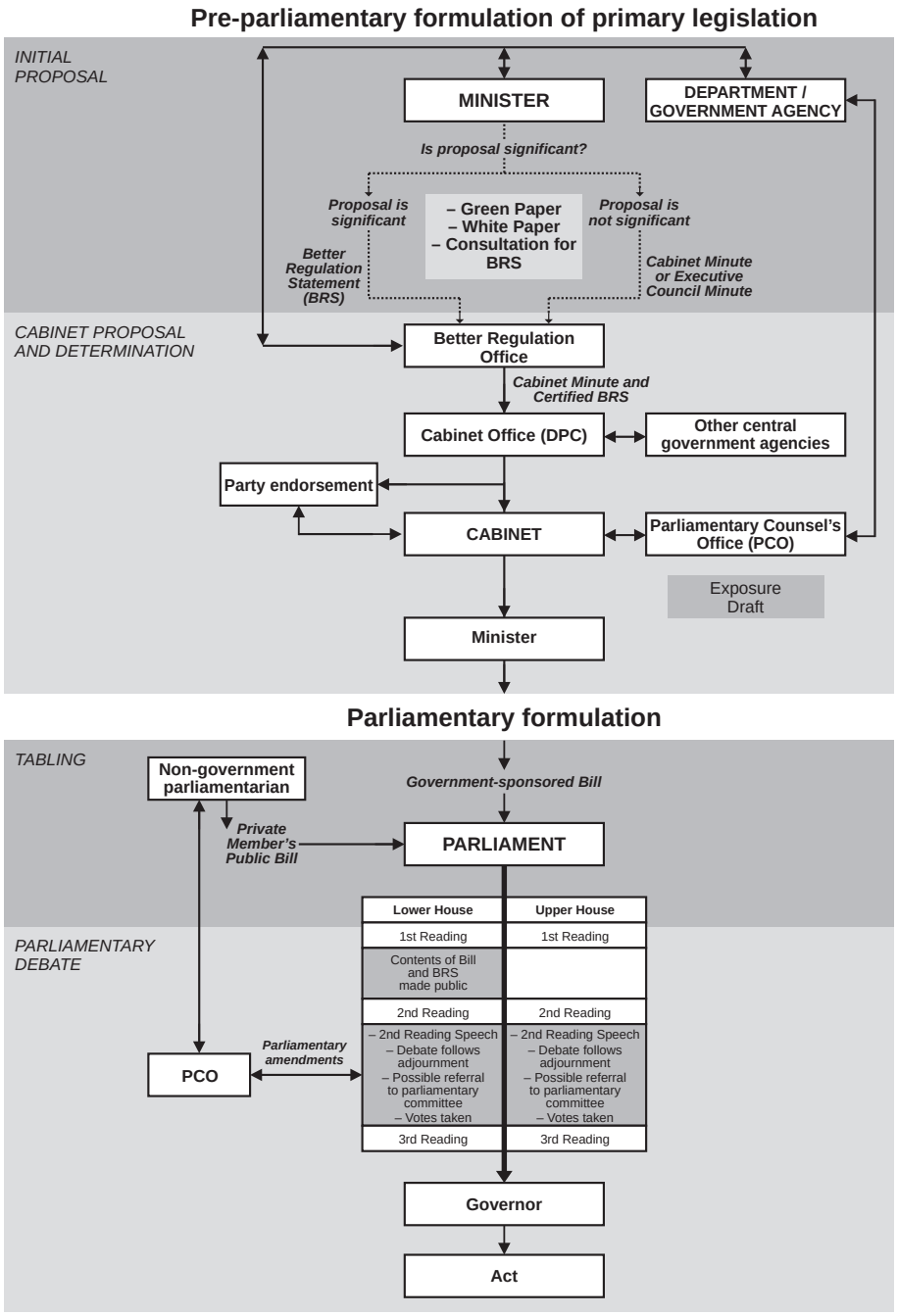
[22] Note that the PCO has a separate manual for the drafting of non-government legislation: *Manual for the Drafting of Non-Government Legislation* (PCO, 2007).

[23] The Guide replaces the guideline *From Red Tape to Results, Government Regulation: A Guide to Best Practice* (Regulatory Review Unit Cabinet Office, 1995).

That said, it is important to note that practices and conventions change according to trends in policy-making and law-making practice, as well as the preferences of particular governments, leaders and ministers. Non-compliance with these requirements does not affect the validity of the proposal or any resulting legislation. Cabinet can determine to suspend or ignore its own procedure, including the requirements for a cabinet minute, and there is no formal sanction for non-compliance with procedural requirements other than refusal by Cabinet to consider a submission.

Formulation has a pre-parliamentary phase — led and controlled by the executive government — and a parliamentary phase (see Figure 2.2).

Figure 2.2: Formulation of primary legislation



Pre-parliamentary phase

Pre-parliamentary formulation is dominated by the executive government, and involves the preparation of the initial proposal for cabinet consideration. Public servants in government departments, particularly line agencies, have a principal role in developing and formulating the content of legislative proposals.

Initial proposal

Once an issue is selected for legislative consideration, an initial proposal is formulated within a government agency, under the authority of the minister responsible. The line agency proposing the legislation liaises with the central agencies to determine the financial and legal implications of the proposal.

Where proposals for legislation are determined 'significant' by the minister,[24] or involve making a principal Regulation (that is, a new rather than an amending Regulation),[25] an impact statement is required. Public servants are required to demonstrate, in the regulatory impact statement (RIS), that the legislative proposal is justified and preferred to other alternative solutions, and that principles of sound regulatory development were followed in developing the proposal.[26] Importantly the *Guide to Better Regulation* recommends but does not mandate that public or stakeholder consultation is undertaken to inform the range of policy options available, their feasibility and cost, and their impacts. Requirements for RIS may therefore provide opportunities for public and stakeholder input in the formulation process.

Table 2.3 below identifies the regulatory impact statements (RIS) required in law-making, and whether they involve consultation with stakeholders affected by the legislation. These statements must also be made publicly available.

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[24] A proposal is generally significant if it involves a major new regulatory initiative, significant impact on individuals, community, or sector of community, significant impact on business, imposes material restriction on competition and imposes significant administrative cost to government. The Portfolio Minister determines whether the proposal is significant or not, but the decision is subject to review by the Premier and Cabinet, informed by the Minister for Regulatory Reform (BRO, 2008: 24).

[25] See *Subordinate Legislation Act 1989* s 5(2)(b).

[26] The *Guide to Better Regulation* outlines seven better regulation principles: 1. need for government action should be established; 2. objective of government should be clear; 3. impact of government action should be understood by considering costs and benefits of a range of options, including non-regulatory ones; 4. government action should be effective and proportional; 5. consultation with business and community should inform regulatory development; 6. consider simplifying, repeal, reform or consolidation of existing regulation; and 7. regulation should be periodically reviewed and if necessary reformed to ensure its continued efficiency and effectiveness (BRO, 2008).

Table 2.3: Requirement for impact statements during pre-parliamentary formulation of legislation

Impact statement	*Required for what proposal?*	*Consultation with affected group(s) required?*	*Is statement publicly available?*
Better Regulation Statement (BRS)	All significant proposals for new and amending legislation (Bills or Regulations)	✓ where relevant government agency considers appropriate (*Guide to Better Regulation*)	✓ when legislation introduced in parliament (*Guide to Better Regulation*)
Regulation Impact Statement	All new principal Regulations	✓ (*Subordinate Legislation Act 1989* s 5)	✓ upon gazettal of Regulation (*Subordinate Legislation Act 1989* s 5)

RISs need the certification of the BRO for compliance with better regulation principles (BRO, 2008: 25), before the proposal along with its RIS is submitted to Cabinet. It is noteworthy, however, that apart from those required by the *Subordinate Legislation Act 1989* (NSW), impact statements are not mandated by legislation. Furthermore under this Act, impact statements are not required in certain specified circumstances.[27]

In a few specified instances, cabinet minutes may require public officials to prepare and include other impact statements,[28] some which do not necessarily involve public or stakeholder consultation.

Any stakeholder or public consultation undertaken as part of the legislative development process requires cabinet permission (Twomey and Wilkins, nd: 5). Government may choose to canvass public views about the feasibility of a range of potential options for reform by issuing a Green Paper[29] or seek to test public opinion on a developed proposal by issuing a White Paper.[30] Timeframes for consultation vary, although the BRO's *Guide to Better Regulation* suggests that stakeholders need to be given at least 28 days to comment on the proposal (BRO, 2008: 37).

[27] Circumstances which exempt the requirement for an RIS include where compliance is not practicable in the circumstances, where the public interest warrants exception, where another Act has already required processes that obviate the need for an RIS, or where the rule is implementing agreed national or international reforms or standards. See *Subordinate Legislation Act 1989* (NSW) s 6 and Schedule 3.

[28] For example, a rural communities impact statement is required for all government proposals, policies and programs which could impact on rural communities (see Cabinet Memorandum 97-05 and 96-17). An Aboriginal impact statement, based on internal advice from the (then) Aboriginal Justice Advisory Council, was required for all legislative and Cabinet proposals developed by the (then) Attorney General's Department, see the *Aboriginal Justice Agreement* (p. 3).

[29] A Green Paper is a discussion or consultation document which presents the issues in a relatively open-ended way. It may set out the problem and identify options or proposals on which government seeks public views and opinions.

[30] A White Paper may follow a Green Paper, and is more definite about the direction government intends to take. For example, it may be a consultation paper on the details of legislation, but there is a clear intention to progress the proposal into law.

Cabinet proposal and determination

The BRO reviews all regulatory proposals and advises the Premier and Cabinet on their adequacy and compliance with better regulation principles (BRO, 2008: 23). Proposals found to be inadequate may have cabinet consideration deferred unless compliance can be demonstrated (BRO, 2008: 25).

Once distilled into a cabinet minute, the proposal — including any attached RIS — is circulated by the DPC to members of Cabinet, who will seek advice on the proposal from their respective departments.

Upon Cabinet's in-principle approval of the proposal, the PCO drafts the Bill in liaison with the responsible government agency. In some instances and at this stage of the process, government may, with cabinet approval, seek the views of the public or select stakeholders using an exposure draft Bill.[31] If consultations were undertaken before the final draft Bill, the consultation process and its results are outlined in submissions to Cabinet.

A finalised draft Bill is returned to Cabinet for consideration. The minister responsible will brief the party's parliamentary members, and a vote is held for or against introducing the Bill into parliament. A draft Bill approved by Cabinet is allocated priority and a slot on the government's legislative timetable. Bills assigned lower priority may lose their slot to subsequent Bills assigned higher priority.

The pre-parliamentary phase is therefore prescribed by a number of bureaucratic procedures designed primarily to serve the accountability requirements and decision-making functions of executive government. This level of bureaucracy makes the law-making process — especially pre-parliamentary formulation — complex and cumbersome, particularly to those outside government.

Parliamentary phase

Once in parliament, the process of turning draft legislation into legislation is governed by parliamentary rules such as standing orders. Primary legislation can only be made when a Bill has been passed by both Houses of parliament and has received royal assent by the New South Wales Governor, who acts upon the advice of senior members of the executive government.

[31] An exposure draft of a government Bill is a draft of the Bill released for the purposes of public consultation, before the Bill is introduced into parliament.

As the power to make subordinate Regulations is conferred by primary legislation, our discussion below focuses on parliamentary formulation of primary legislation.

Parliamentary tabling and debate

Once a government-sponsored Bill is allocated a slot in the legislative program, it is ready to be tabled in either House of parliament[32] (usually the House in which the minister responsible for the portfolio sits). Bills can also be tabled by non-government members of parliament (private members). These members can, in response to concern from their electorate, stakeholder groups, the media or public opinion, instruct the PCO to draft a Bill,[33] called the Private Member's Public Bill.

The party forming government usually has sufficient votes in the Lower House to pass government-sponsored Bills, reject Private Members' Public Bills, and control the business and legislative agenda of that House.[34] The executive government often enters into preliminary negotiations with opposition parties and crossbenchers to gauge likely support for its legislative proposals before introducing and debating the proposal in parliament. Faced with the prospect of having its legislative proposal defeated in the Lower House, executive government can choose to withdraw the proposal altogether and refine it to increase its chances of enactment.

A Bill goes through three readings in the House, each of which has a different protocol and purpose.

During the First Reading, the Bill is read but no debate or vote is held. The Bill becomes a public document for the first time and copies, including any RIS, are made available on the New South Wales Parliament's website.[35] At the Second Reading, the responsible minister makes a Second Reading Speech (now also known as an Agreement-in-Principle Speech), outlining the principles of the Bill, its objectives, and why the government is proposing the legislation. Where public or stakeholder consultation was undertaken during

[32] The exception is Money Bills, which must originate in the Legislative Assembly.

[33] Note that the extent to which the PCO can assist with drafting non-government legislation is limited. See *Manual for the Drafting of Non-Government Legislation* (PCO, 2007).

[34] Australian parliaments do not have a strong tradition of either passing private members' Bills or of parliamentary members voting against the instructions of their political party. A party member crossing the floor to vote with the opposition in contravention of party instructions occurs infrequently, and is likely to lead to party disciplinary action such as expulsion from the party or the loss of pre-selection by the party for the next election (McKeown, Lundie and Baker, 2005).

[35] See <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/V3BillsListCurrent>.

legislative development, the minister's speech often outlines how consultation occurred and who was involved.

The Second Reading is adjourned, usually for five days after the Second Reading Speech, to allow parliamentary members and their political party to consider the Bill before debating. During this period,[36] parliamentary members may seek comments on the Bill published by the Legislation Review Committee, as well as the views of their electorate and other stakeholders. Equally they may receive representations from the public or stakeholder groups relating to the Bill.

When the Second Reading debate resumes, members debate the Bill and propose amendments. If there are amendments to be considered, the House itself forms into a 'committee of the whole' to examine the Bill in detail. Alternatively, by a ministerial reference or a majority vote of the House, the Bill can be referred to a parliamentary committee for further inquiry and investigation.

If by a majority vote the House agrees to a final version of the Bill, it goes to a third stage. At the Third Reading no further debate is had, and with agreement of the House, the Bill is sent to the other House, where it goes through the same three reading process.

The level of support necessary to secure the passage of government-sponsored Bills — particularly through the Upper House — can affect substantive provisions of the final legislation. If there is amendment in the second House, the Bill needs to be returned to the House of origin for consideration of those amendments. If the Bill passes the second House without amendment, it has been passed by parliament.[37]

A Bill that has passed both Houses is forwarded to the Governor for assent, upon which it is enacted. The Bill, now an Act, will have a clause indicating whether it comes into force by assent or proclamation. If by assent, the Act will come into force 28 days after assent.[38] If by proclamation, the date it commences will be appointed by the responsible minister. Not all clauses of an

[36] In some instances standing orders may be suspended to allow urgent consideration of a Bill, in which case parliamentary members and interested stakeholders will have a period of less than five days in which to consider the Bill.

[37] If agreement cannot be reached between the two Houses and the originating House refuses to lay the Bill aside, either a joint sitting of both Houses can be held to discuss the Bill or the Legislative Assembly can submit the Bill to the people by referendum (*Constitution Act 1902* (NSW) s 5B).

[38] See *Interpretation Act 1987* s 23.

Act necessarily come into force at the same time. Different sections of an Act may be proclaimed to commence at different times, although government is required to lodge notification with parliament of all legislation which remains unproclaimed 90 days after passage through parliament.

Parliamentary formulation of Regulations differs from that of Acts in that less parliamentary scrutiny is afforded. For example, a Regulation takes on formal existence upon its publication in the *Government Gazette*,[39] at which time notice of the Regulation is also tabled in each House of parliament. Regulations are only debated in parliament when a member of either House lodges a motion to disallow part or all of the Regulation within 15 sitting days of the notice of the Regulation being tabled.[40] A Regulation can only be disallowed upon majority vote of a House.[41]

Public access to law reform during parliamentary formulation is largely through members of parliament who are political representatives of their electorates.

Implementation

Implementation begins when legislation commences, up until its potential review.

Implementing legislation often requires planning, administrative resources, designing enforcement schemes, creating new roles and responsibilities, and an information program to educate stakeholders about the reform, including how they are likely to be affected.

Where the administrative detail required to implement legislation has not already been considered during its formulation, Regulations may need to be formulated and promulgated in order to implement the legislation. A reason why an Act may be commenced by proclamation is to enable Regulations to be formulated.

Implementation is often led by bureaucratic government, although parts of it such as information or education programs, or the monitoring of impacts of legislation, may be outsourced to other bodies such as parliamentary committees or CSOs. Support from the bureaucracy, particularly from senior personnel,

[39] Upon its gazettal, notice of the Regulation is tabled in each House of parliament.

[40] See *Interpretation Act 1987* (NSW) s 41.

[41] Once a Regulation has been disallowed, it cannot be remade within four months. See the *Subordinate Legislation Act 1989* (NSW).

is key to successful implementation (Cranston, 1987). Without sufficient resources and government commitment, implementation can be frustrated and legislation may not operate in the way envisaged (Johnston, 1983).

Public or stakeholder participation in the implementation of legislation can take different forms. Depending on the nature of the reform, government may establish mechanisms to monitor the operation of legislation, develop an implementation strategy, or resolve issues arising from implementation. Such mechanisms may include stakeholder reference groups or other advisory bodies such as task forces or committees, and are often contingent upon the discretion of executive government. In other instances, such as when legislation extends police powers, independent bodies like the Ombudsman may be tasked to monitor the implementation of that particular legislation. As part of their monitoring process, these bodies may involve or consult stakeholders.

Bridgman and Davis (2004: 128) suggest implementation goes through much iteration. Problems are identified and analysed, options are developed, and decisions are made to address problems which may then lead to the identification of further problems. Depending on the reforms, government will consult with the relevant public or stakeholders to identify problems or solutions concerning the operation of the legislation to facilitate implementation. This is particularly the case when successful implementation depends on the cooperation of stakeholders who are affected by it.

Implementation is principally an executive-led process. Although parliament has an ongoing role in reviewing and scrutinising the implementation of legislation, and in monitoring the performance of departments and agencies, its capacity to do so is relatively limited.

Review

Legislation which has been implemented may later become the subject of a review process.

Reviews of legislation are generally the responsibility of government departments, although occasionally consultants are briefed to conduct them. Reviewing the operation of legislation involves examining whether legislation is working as it was intended, has had any negative or unforeseen effects, and whether it can be improved by being amended or whether it should be repealed. Where the review finds legislation should be amended, this may lead to further formulation of a legislative proposal.

There are four different types of review in New South Wales which differ in how they are triggered — sunset clauses, statutory review clauses, executive initiated reviews, and parliamentary reviews.

Sunset clauses are clauses in Acts or Regulations which terminate or repeal the legislation or parts of it either after an identified period of time or upon a specified date. Unless further action is taken upon its expiry, the legislation will cease to take effect.

Sunset clauses are used to trial legislation, and are usually found in legislation which extends the powers of public or government officials, such as the police. Although these clauses do not require legislation to be reviewed, parliament generally does not re-enact legislation which has a sunset clause without considering how the legislation has operated, including whether there have been any unforeseen impacts.

Only some Acts have sunset clauses. All Regulations, however, are subject to s 10 of the *Subordinate Legislation Act 1989*, which provides for the automatic repeal of regulations five years after they are published. A number of regulations made each year in New South Wales are simply expired regulations which are being re-enacted.

These provisions have the effect of requiring that Regulations be reviewed and remade, if still needed. Where the Regulation is principal regulation, a regulation impact statement is required and hence the likelihood of consultation with public or affected stakeholders.

Unlike sunset clauses, statutory review clauses in legislation mandate that a person or body, usually the responsible minister, review the legislation after a specified period of time has passed.[42] Statutory review clauses do not terminate legislation. Irrespective of whether a review has been conducted or of the outcome of any review, the legislation will continue to have effect. As at 1 June 2008, all Bills require a statutory review clause.[43]

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[42] This period of time is usually five years after the date of its assent. Periods of review however may vary depending on the circumstances. Longer periods may apply where impacts are minor or the policy is settled. Shorter periods may be warranted where the legislation is controversial, has significant impact or costs, or there is uncertainty about how it will operate in practice (BRO, 2008: 22). Shorter review periods for example have been used where the legislation grants government officials new powers or limits the rights of people.

[43] Before reforms which established the Better Regulation Office in 2008, it was New South Wales government policy to include statutory review clause in principal Acts only, that is, new Acts that are not amending Acts. See Nick Greiner, *Memorandum No. 92-10, Review Clauses in Legislation*, NSW Premier's Department, 1992.

The statutory review usually examines whether the objectives, principles and application of the legislation remain valid, and whether the terms of the Act remain appropriate for securing these policy objectives. While the statutory review clause requires principal Acts to be reviewed, it does not prescribe a process to be followed and consultation is not mandated. The body or agency conducting the review decides whether and how any consultation will occur.

Reviews associated with both sunset and statutory review clauses differ from other reviews because they arise around a specified date. This enables stakeholders to anticipate when a consultation opportunity may arise.

The impetus to review legislation may also arise in more spontaneous ways within executive government or parliament. In response to emerging issues or public concern, or to ensure that legislation is still relevant to changing policy and social needs, executive government may conduct a review of the whole or part of a legislative scheme. It may task an internal agency or an external advisory body, including a parliamentary committee, to investigate the operation of legislation and propose ways in which it can be reformed to address identified problems. Often such reviews will lead to the formulation of a legislative proposal to amend or remake the legislation. Executive-initiated reviews are often substantial law reform projects and can involve opportunities for public and stakeholder participation.

Legislation may also be reviewed by a select or standing parliamentary committee, although the scope of these reviews is often limited by a term of reference usually determined by the House or responsible minister. Glanfield (2005: 296) noted that executive government may choose to refer a matter or legislation to be reviewed by a parliamentary committee where the issues require bi-partisan or widespread support before policy recommendations may be given effect.

2.4 Summary

This chapter briefly describes the law reform process in New South Wales by outlining the key institutions as well as introducing the law reform cycle. While each law reform process is unique, the law reform cycle provides us with a conceptual framework within which to present our analysis of the data in later chapters.

Law reform is undertaken by multiple institutions. The law-making practices of these institutions are based on a mix of policy, convention and legislation

which are important to understand because while some of these practices restrict public participation in law reform, others may hold opportunities for public or stakeholder input. Further, the roles of these institutions may change depending on the stage of the law reform cycle, and as their roles change so may the opportunities for public access to law reform.

Executive government, however, has substantial discretion and the prerogative at all stages of the law reform cycle. For example, executive government determines what issues emerge onto its legislative agenda, the timing and timeframe of the formulation process, whether advisory bodies are involved, whether their recommendations will be pursued, and importantly whether to extend opportunities for public or stakeholder participation.

Government law-making practices therefore significantly determine the nature of these opportunities. While consultation with the public or stakeholders in government law-making may be required, these requirements are primarily based on policy and convention. In practice executive government has the prerogative to suspend any policy requirement in any instance of law reform, and equally it also has the prerogative and ability to afford substantial opportunities for public or stakeholder input.

As a result of government convention, law-making (such as pre-parliamentary formulation) is generally a process that is closed to the public or stakeholders, unless government chooses otherwise. The conventions of collective responsibility and cabinet confidentiality for example, have the consequence that pre-parliamentary formulation of legislation is subject to strict cabinet confidence. Unless legislative proposals are the subject of a Green or White Paper, or Exposure Draft, they are not publicly known until after the legislation been introduced into parliament. To ensure that legislative proposals are prudent, based on the best available evidence, and have the best possible chance of succeeding, government may choose to seek the views of stakeholders during this stage.

Executive government, however, operates in a wider political context that is not only evident in parliamentary processes (as through parliamentary formulation) but in other spheres of society including advisory bodies, media and organised groups. As such, this wider context makes public access to law reform highly variable. In later chapters we draw on our data to explore what this means for law reform processes, as well as challenges for non-government participation in these processes.

3 Method

This study explores, primarily through case studies, the capacity of people, particularly disadvantaged people, to participate in law reform. The research strategy was informed by a number of considerations. We held initial consultations with four senior staff members of the (then) NSW Attorney General's Department (AGD), an ex-parliamentarian with extensive experience in the New South Wales Legislative Assembly, and a chief executive officer of a specialist community legal centre (CLC) which focuses on the interests of the general public and disadvantaged people in law reform. A preliminary literature review was also conducted in order to get a broad understanding of New South Wales law reform processes, the key institutions involved, and to identify formal opportunities and constraints to public participation.

Our institutional informants and the literature review confirmed that law reform processes vary significantly, depending on the circumstances and context. We also wanted to examine experiences of and constraints to participation, rather than describe the opportunities that formally exist. These considerations suggested a case study methodology was our most appropriate research strategy (Yin, 1994).

The case study method is a research strategy to empirically investigate a particular phenomenon within its real context, using multiple sources of evidence (Yin, 1994). As multiple case studies increase the power and validity of findings (Yin, 1994: 53), we selected and examined five cases of law reform in New South Wales. We outline the methods used and introduce the five case studies below.

3.1 Data collection

Overall the data collection for this study occurred over a period from 2006 to 2009. As we shall discuss below however, some data was collected over specified periods within this timeframe.

We gathered relevant documentation and interviewed key informants for each case study. To get a broader sense of law reform activity in New South Wales, we also collected 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 during the calendar years 2002–2006.

Documentation

Documentation relating to the case studies provided an additional source of evidence to corroborate and triangulate data collected in the interviews.

The documentation that was collected and analysed for each case study included: parliamentary and Hansard records, explanatory memoranda, government publications, annual reports, newspaper or briefing articles, organisational press releases, reports of inquiries, newsletters and campaign kits. Press releases, policy papers, reports and parliamentary documents comprised the majority of our documentation. Documentation also included any additional materials or information referred to us by our informants.

Interviews

We conducted face-to-face interviews with informants during June 2006–March 2007.

Sampling

A purposive (or snowball) sampling method was used for each case study. Potential informants, individuals and/or organisations were first identified from documents relating to the case studies. Additional informants were also suggested by some informants. These leads were followed up if the individual had a particular stakeholder view that had yet to be captured for the case, the stakeholder perspective was relevant to research concerns, and there were sufficient project resources to include them in the study.

For each case study we sought to capture a cross-section of the following stakeholder viewpoints:

- **government officers** including policy officers, legal advisers, or senior staff members of government bureaucracy
- members of a **government advisory body** including senior staff members of bodies tasked to provide government with independent policy or law reform advice
- **parliamentarians**
- staff of **legal CSOs**, where a legal CSO is a service provider or professional association whose primary expertise is in the law
- staff of **non-legal CSOs**, such as service providers, consumer organisations or professional associations
- **individuals**, including individuals affected by the law reform, or officers or members interviewed in their personal capacity.

Given the central role of the executive in law reform and in order to ensure a balance of views was captured, we approached and invited the participation of informants from all of the government departments involved in the case studies. We also spoke with informants who had a breadth or depth of experience of New South Wales law reform processes, whom we classified as 'general' informants. Some general informants were also involved in specific case studies. Interviews averaged two hours in duration.

The distribution of our informants across the five case studies and across the different stakeholder classifications is outlined in Table 3.1. Of the 41 individuals or organisations we approached, 40 agreed to participate. In some instances more than one informant from the same organisation participated in the interview such that a total of 50 informants were interviewed for the study. Informants who were interviewed for more than one case study are listed separately for each case study.

As can be seen in Table 3.1, most of our informants were CSO stakeholders. Seventy-two per cent of all our informants worked in CSOs — with 50 per cent from non-legal CSOs and 22 per cent from legal CSOs. We deliberately over-sampled CSO informants, as it became apparent that it is through CSOs that disadvantaged people have the most opportunity to participate in law reform. Government officers comprised 10 per cent of our sample. A little over half of our informants provided a system-wide perspective of law reform in New South Wales. Noteworthy is the small number of individual informants, who comprised only 6 per cent of our informant sample. This

is a key limitation of the study, and is discussed in more detail in *Section 3.2* below.

There was some overlap of informants across case studies, particularly between the *Boarders and Lodgers Case Study* and the *Acceptable Behaviour Agreements Case Study* as both of these cases involved housing issues. Overall, 54 per cent of our informants spoke about the *Boarders and Lodgers Case Study* while only 10 per cent of our informants discussed the *Civil Procedure Act Case Study*. The small number of informants in the latter case study is in part due to the nature of the issues involving technical and administrative reforms to court procedure and management of civil litigation. The informants in this case study were the last to be interviewed for the study, and we stopped interviewing once we formed the view that additional informants were unlikely to add new information to our research questions.

Table 3.1: Distribution of informants by case study and stakeholder classification

Case study	*Government officer*	*Member of advisory body*	*Parliamentarian*	*Legal CSO*	*Non-legal CSO*	*Individual*	*% of total interviewed (sample size of case study)*
Boarders and Lodgers Case Study	-	2	2	5	18	-	54% (n=27)
Acceptable Behaviour Agreements Case Study	-	1	2	2	11	3	38% (n=19)
Mental Health Act Case Study	1	2	1	-	7	-	22% (n=11)
Bail Amendment Act Case Study	1	-	2	3	4	-	20% (n=10)
Civil Procedure Act Case Study	1	-	-	4	-	-	10% (n=5)
General (across cases)	5	3	2	6	10	1	52% (n=26)
% of total interviewed	**10% (n=5)**	**8% (n=4)**	**4% (n=2)**	**22% (n=11)**	**50% (n=25)**	**6% (n=3)**	**(N=50)**

Note: columns do not add to total, as some people spoke on one or more case studies.

Interview schedule

We piloted an initial version of the interview schedule with two informants involved in the *Acceptable Behaviour Agreements Case Study* and *Boarders and Lodgers Case Study*, which allowed us to test the questions for their relevance, operation and validity.

The pilot interviews suggested that some standard questions could be asked of all our informants. We also found however that many of our original questions

were not sufficiently receptive to the diversity of law reform processes, nor to the widely differing perspectives and experiences of stakeholders. Following the pilot period we refined the questions so as to be more open-ended and flexible, with coverage of the following areas:

- the informant's role in, and experiences of, law reform
- factors and constraints perceived to affect the involvement of the general public and/or disadvantaged individuals in law reform processes and
- suggestions for enhancing the participation of the general public as well as disadvantaged people.

Particular questions varied depending on the circumstances of the relevant case study, the informant's perspective, and the extent of their expertise and involvement in both the relevant case study as well as in New South Wales law reform generally. See Appendix 3.1 for questions in the generic interview schedule.

Procedure

Potential informants were initially contacted by letter and telephone to explain the purpose of the study, provide background information, and invite participation in the study. Where interest was not immediate, we followed up with a second telephone call.

The majority of interviews were held one-on-one and face-to-face, with two interviews conducted by telephone. At the beginning of each interview, informants were asked to sign a consent form (see Appendix 3.2).

Two researchers were usually present at any one interview. Often one researcher would lead the interview while the other researcher took notes, including of observations on any interesting aspects of the interview not otherwise captured.

All interviews were tape recorded, with interview data being treated in confidence and only accessible to members of the research team. Where informant comments are used in the report, they are attributed to the class of the stakeholder group to which the informant is classified. For some informants, the circumstances of the particular case meant that their identity could not be protected, and this was explained by the researcher and clearly stated in the consent form. For informants who did not wish to be quoted, care was taken to use the information provided in a way that would not reveal its source.

Two transcribers were contracted by the Foundation to transcribe the majority of the interviews. Where an informant explicitly expressed a concern about confidentiality, or a wish that they not be directly quoted, their tape recordings were transcribed by the researchers themselves. The external transcribers were experienced in handling confidential social research interview material and were required to sign a confidentiality agreement and meet specified security arrangements with the data. All transcription files, once created, were password protected and kept in project folders with restricted access.

3.2 Data analysis and reporting

Both case materials and interview data were entered into and analysed using the qualitative software program QSR NUD*IST Vivo (NVivo).[44] We analysed the data in two stages. In the first stage case documentation was coded using NVivo. Coding was done by highlighting segments of text and then allocating them to analytical themes. To enhance consistent coding across the documentation collected, a small number of documents were coded separately by two researchers on the research team and then compared. From this process, a common coding system was developed. To enhance consistency, both researchers regularly checked and compared notes on coding decisions with each other.

A similar process was used to code the transcribed interviews, serving to further refine and develop identified themes. We also used observational or interview field notes during this process. When coding of each interview material was completed, an interview summary sheet was written up to summarise the key points in the interview. The interview summaries were produced to further reduce and structure the data.

In the second stage, the coded data was analysed in NVivo. During this stage major themes were refined and additional themes identified and developed. This iterative process was used to identify commonalities, patterns and systematic relationships.

This iterative systematic approach to the analysis is the basis of the conclusions reported here. It should be said that because a quotation has been used or interpreted in a certain way, does not mean it is the only

[44] This program stores, organises and retrieves qualitative data.

interpretation possible. The aim of our analysis is to understand the processes and experiences of how law reform processes in New South Wales occur and the opportunities and challenges for participating in them by the general public and disadvantaged individuals. As the data is qualitative, the themes that we identify and describe were selected not so much for their frequency (although in some instances the strength of a theme may be related to the extent to which it is mentioned), but for the range of views and experiences of law reform and participation in law reform.

For the purposes of this report, we attribute the views expressed by our informants using parentheses to indicate their stakeholder viewpoints. For example a view expressed by a legal CSO informant may be reported as 'an informant suggested that … (legal CSO)'. Views may be attributed to more than one informant in the parentheses.

Data limitations

Ideally, a study about the participation of disadvantaged people in law reform would include consultation with a range of disadvantaged people who had actually experienced these processes. However, our data was largely drawn from interviews with CSO, government and advisory body informants.

We account for this limitation by making a number of observations. First, this gap in our sample reflects a key aspect of the very issues we are studying. It is consistent with the view, expressed during preliminary consultation with our institutional informants and in the literature, that many members of the public, and particularly the disadvantaged public, do not participate directly in law reform.

Secondly, it was beyond the resources of this study to identify and source more informants who had been involved in our case studies and who also spoke directly from the perspective of the general public or a disadvantaged person.

3.3 Case studies

The following five case studies were selected for more detailed exploration of participation in law reform processes in New South Wales:

- *Acceptable Behaviour Agreements*
- *Boarders and Lodgers*
- *Mental Health Act*
- *Bail Amendment Act* and
- *Civil Procedure Act* case studies.

These case studies were selected to allow us to explore a wide range of factors which may influence participation in law reform, including:

- *The stage of the law reform cycle*: are issues identified as requiring a legislative solution and hence emerging, is a legislative response being formulated, is the enacted legislation being implemented, or is it undergoing review?
- *The institution instigating the process*: which body is instigating the reform — government whether by itself or through an advisory body, parliament, or CSOs?
- *The timing (and timeframe) of the process*: is the proposal or reform a reaction to public or other pressures (reactive law-making), or is it more deliberate and planned (proactive law-making)?
- *Institutional requirements*: is there a procedural requirement to consult the public or stakeholders?
- *The issues which are the subject of law reform*: does the proposal or reform seek to primarily change substantive rights of people or groups of people, or effect changes to administrative practices?
- *Specificity of potential impacts*: is the proposal or reform likely to impact the general population or more specific groups in the community?

Table 3.2 summarises our case studies, indicating their coverage across these factors of interest.

Table 3.2: Selected cases of New South Wales law reform, along dimensions affecting public participation in law reform

Case study	*Stage of cycle*	*Leading institution*	*Reactive or proactive?*	*Procedural requirement?*	*Nature of proposal*	*Specificity of impact*
Acceptable Behaviour Agreements Case Study	Formulate / Implement	Executive government	Reactive	-	Substantive	Specific
Boarders and Lodgers Case Study	Emerge	CSOs	Not Applicable	-	Substantive	Specific
Mental Health Act Case Study	Review	Executive government and CSOs	Proactive	✓	Substantive	Specific and general
Bail Amendment Act Case Study	Formulate	Executive government	Reactive	-	Administrative and Substantive	Specific
Civil Procedure Act Case Study	Formulate / Implement	Executive government	Proactive	-	Administrative	General

The case studies selected had to be either current or finalised no more than four years before the time of data collection (June 2006–March 2007), to reduce difficulties associated with locating suitable informants and their recall of events.

We describe each case study in the following chapter, outline the key issues and the objective of the proposal or reform, the people or groups likely to be affected, and provide a brief chronology of the relevant events.

4 Case studies

In this chapter we provide an overview of the five law reform case studies which are the empirical basis of this report. We describe each case, noting its stage in the law reform cycle, the genesis of its reform issues, public participation opportunities, and how stakeholders, particularly disadvantaged people, groups and organisations, were able to participate.

To do this for each case, we first outline the law reform issue and process, including what reform proposals were being considered and what law-making institutions were involved. We then identify the key features of interest in each case.

Following this discussion, we note how public participation opportunities vary across the five case studies, and identify some key themes which become the subject of further analysis in the report.

4.1 Boarders and Lodgers Case Study

The *Boarders and Lodgers Case Study* concerns the issue of statutory protection of tenancy rights for boarders and lodgers in New South Wales. For more than 30 years, advocates and numerous reviews and reports have recommended legislative reform to recognise and protect the rights of boarders and lodgers (see Tenants' Union of NSW, 2004; Mowbray, 1989; Griffith and Roth, 2008). This case exemplifies a law reform issue which has not successfully emerged onto the legislative agenda of government, and nor has developed into legislation that is passed by parliament.

The terms 'boarders' and 'lodgers' are legal terms which cover people living in a range of accommodation: boarding houses, residential centres, group

homes, supported care, overnight shelters, domestic violence crisis centres, student residences, bed and breakfasts, serviced apartments, hotels and motels, backpackers and hostels, and other forms of informal tenancies such as a room in a private house. Boarders and lodgers can be either short-term or long-term residents who have agreed, often orally, to pay to occupy a room. In addition to occupying a room, they usually have access to other areas that are shared with other occupants, such as a living room, kitchen or laundry (Tenants' Union of NSW, 2004: 3).

At common law 'boarders' are distinguished from 'lodgers' because they pay for 'bed and board', that is, accommodation in the form of a room, or a bed in a room, and some meals. Lodgers pay for accommodation and usually do not receive meals, although they may pay for meals separately. It should be noted that not all boarding houses provide meals, and that the distinction between a boarder and lodger turns on further common law tests.

Under New South Wales law a person residing at an accommodation is a licensee — that is, a person with the owner's permission to be on the property — if it cannot be established that they are a tenant. As licensees, boarders and lodgers can be evicted by an owner withdrawing permission for them to be on their property. Although licensees may have contractual rights, they are not recognised as being tenants and do not have tenancy rights under the *Residential Tenancies Act 1987 (RTA 1987)*.

Boarding and lodging are more flexible and affordable forms of accommodation than private or public tenancies. They have lower entry and ongoing costs, such as not having to pay four weeks' rent in advance as a bond, or for furnishing or additional utility fees or connections. They do not entail the commitment of a lease. Residents of boarding housing are some of the most disadvantaged members of the community and are vulnerable to homelessness and seeking accommodation from crisis care should they be evicted (legal CSO).[45]

[45] Studies of boarding houses have found that residents are predominately male; a high proportion of residents have a physical or psychiatric disability; residents often rely on government benefits such as a pension and rent assistance as their only source of income; residents have few assets or savings; often residents have little or no family support or contact, and tend to be socially isolated; residents have lower levels of education and literacy; often residents have had periods of institutionalisation; a significant proportion of boarding house residents, and particularly older residents, stay in boarding houses for long periods of time; amongst longer-term residents, affordability is the most commonly cited reason for living in a boarding house (see Mowbray, 1989; National Shelter, 1996; Davidson, Phibbs, and Cox, 1998; Newtown Neighbourhood Centre, 2003; Allen Consulting Group, 2003; NSW Ombudsman, 2006).

The issue of legislative protection for boarders and lodgers potentially affects a broad range of stakeholders, including a wide mix of accommodation providers, as well as boarders and lodgers.

Law reform issue

The law reform issues in this case study concern whether there should be statutory recognition and protection of the tenancy rights of boarders and lodgers, and if so what form those rights should take. The issue of what rights boarders and lodgers should have is, however, also embedded in wider economic and public policy concerns about what effect statutory recognition of boarders' and lodgers' rights may have on the boarding house industry and the provision of low-cost housing.

An important aspect of the law reform issue in this case is the widespread misunderstanding about the legal rights of boarders and lodgers. Our informants reported that boarders and lodgers, as well as the wider public, often just assume that they have rights (legal CSO; legal CSO), and that boarders and lodgers may not be aware of their lack of legislative rights until they have a problem and seek help (Harrison, 2005: 25–27):

> *... people that ended up in boarding house situations or students who are living in those types of situations just always assume that there was a law to protect them and were really surprised when it wasn't there ...* (Legal CSO)

Boarders and lodgers live in situations which are very similar to tenants covered by the *RTA 1987*.[46] Yet their residency agreements are specifically excluded from the types of residential tenancy agreements covered by the *RTA 1987*, and as such boarders and lodgers and their landlords do not have any of the rights or responsibilities contained in that legislation,[47] and do not have recourse to the Consumer, Trader and Tenancy Tribunal (Tribunal) for any disputes they may have. The only legal recourse boarders and lodgers have for enforcing their rights is costly court litigation that is unlikely to provide a worthwhile or timely remedy (legal CSO).

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[46] The rights and responsibilities of tenants and landlords are set out in the *Residential Tenancies Act 1987*. This legislation covers various issues, including access to premises, repairs, rent increases and termination of a tenancy, and also provides a mechanism for resolving disputes between tenants and landlords concerning tenancy rights and responsibilities by providing that an application can be made to the Consumer, Trader and Tenancy Tribunal (Tribunal).

[47] See *Residential Tenancies Act 1987* s 6(d). Premises that the *RTA 1987* does not apply to include hotels and motels, premises ordinarily used for holiday purposes, a part of an educational institution, hospital, or nursing home, a part of a club, any premises providing care within the meaning of the *Aged Care Act 1997* (Cwlth), or to residence contracts within the meaning of the *Retirement Villages Act 1999*.

The practical consequences of lack of statutory protection is that boarders and lodgers may be less able to successfully complain about problems and resolve disputes, such as whether or not rent has been paid; the quality or disrepair of a room, furnishings or amenities, such as broken windows, hot water or plumbing systems; the application of any of the boarding house operator's 'house rules'; invasion of privacy; broken windows, furnishing or shared amenities; leaking plumbing or roof; noise or harassment by other occupants; or vermin or other unsanitary conditions. Another practical consequence of the lack of legislative protection and an accessible dispute resolution mechanism concerning tenure, rent, termination, repairs, privacy and rights of entry is that boarders and lodgers are vulnerable to unscrupulous landlords who can 'pretty much do whatever they liked' (legal CSO).

The diverse types of accommodation outside the meaning of a residential tenancy for the purposes of the *RTA 1987*, also means that proposed boarders and lodgers law reform affects a broad set of stakeholders. From home owners renting out a room in a family house, to providers of crisis and emergency accommodation, to proprietors of boarding houses, and through to the wider hotel and motel industry, a wide range of accommodation providers would potentially be affected by law reform on this issue (legal CSO).

In particular, boarding house owners have contended that regulation of the boarding house industry and recognition of rights for boarders and lodgers would impose financial burdens that would drive operators out of the industry, further threatening the existence of low-cost housing (Shelter, 1999: 7; Property Owners Association of NSW, 2009). Disinvestment in low cost housing options would arguably increase demand on crisis care accommodation and increase the level of homelessness.

Boarders and lodgers law reform therefore has an economic context that goes beyond the legal questions and matters in the reform. Questions about what is feasible from a legal point of view, or desirable from a social justice point of view — how tenancy rights could and should be extended to boarders and lodgers — also involve wider economic debates about the ongoing viability of boarding houses, the role of boarding houses in the private rental market, and in providing affordable housing.

Law reform process

Legislative protection for boarders and lodgers has been pursued by advocates, and has repeatedly been a subject of government and advisory body inquiries since the mid 1970s. In this section we briefly sketch a history of boarders and lodgers law reform noting some of the impetus and opportunities for public and stakeholder participation.

In 1975 the Commission of Inquiry into Poverty found that the common law and legislation applying to landlords and tenants was unfair to poor, vulnerable and disadvantaged tenants living outside of rent controlled premises (Sackville, 1975). This was a fillip for residential tenancies law reform across Australia (Mowbray, 1989:1). The Commission of Inquiry into Poverty recommended that residential tenancies law reform should extend to 'boarders, roomers and lodgers', and that among other things, protection from excessive rent or improper eviction, mechanisms for the return of bond money and access to a tribunal should be provided (Sackville, 1975: 59–60).

However, when the *RTA 1987* was developed boarders and lodgers were specifically excluded from the proposed residential tenancies legislation by the Landlord and Tenant Act Reform Committee, which recommended that boarders and lodgers law reform should be further considered and investigated by a separate committee (see Mowbray, 1989: 3). When the *RTA 1987* was debated in parliament, the Minister for Consumer Affairs undertook to establish a review committee to oversee the implementation of the legislation and consider extending the application of residential tenancy legislation to boarders and lodgers (see Mowbray, 1989: 2).

After a change of government, a committee was established to examine the operation of the *RTA 1987*. This committee however was not given a reference to examine the issue of boarders and lodgers. Since boarders and lodgers were first excluded from the *RTA 1987*, the issue of legislative reform has been an ongoing and recurrent issue.

In the 1990s a coalition of CSOs, led by the Tenants' Union of NSW, the peak community legal centre for tenancy issues, formed an action group, the Boarders and Lodgers Action Group (BLAG) to campaign for legislative protection. BLAG was formed as a coalition of tenants, housing, legal and community organisations and boarders and lodgers, which raised boarders and lodgers law reform in a wide range of forums and inquiries.

In 1990, the Tenancy Commissioner, following extensive consultation with stakeholders, released a *Report on Boarders and Lodgers in New South Wales* which recommended 'development of specific legislation to direct the relationships between owners of boarding/lodging houses and boarders/lodgers' (New South Wales Legislative Council, Hansard, 3 December 1991: 5213; see also Power and Mott, 2003: 151).

Subsequently, the government formulated and introduced the *Boarding Houses and Lodging Houses Bill 1991* into parliament, however it lapsed due to a New South Wales State election. At that election, part of the Labor Party's campaign platform was that the *RTA 1987* be amended to extend tenancy rights to boarders and lodgers and also protect the rights of boarding house proprietors (Power and Mott, 2003: 151).

When the *Boarding Houses and Lodging Houses Bill* was later reintroduced by a minority Liberal Government, BLAG lobbied against the provisions of the Bill which it considered to be inadequate. BLAG negotiated amendments to the *Boarding Houses and Lodging Houses Bill* with the Tenancy Commissioner as well as boarding house and hotel industry representatives, and eventually 'a compromise' was reached (non-legal CSO). The Tenancy Commissioner advised the minister that an agreement among the stakeholders had been reached, but the Liberal Government declined to take further action and the Bill again lapsed (Power and Mott, 2003: 151).

In 1993 a task force examining private for-profit hostels found that a significant proportion of residents of licensed boarding houses had psychiatric and/or intellectual disabilities and recommended tenancy-type contracts be created by reforming the *RTA 1987* (Power and Mott, 2003: 151–152). About the same time the Burdekin Report — the *Report of the National Inquiry Concerning the Human Rights of People with Mental Illness* — recommended that all boarding houses having mentally ill people as residents be subject to licensing and regulation by State governments (Human Rights and Equal Opportunity Commission, 1993: 397).

Also in the mid 1990s, the Commonwealth Department of Housing and Regional Development issued a report documenting variations in State and Territory residential tenancy legislation, and suggested minimum legislative standards be established for residential tenancies in Australia. This report also

proposed that there should be standard terms for boarding house occupancy[48] (see National Shelter, 1996: 42; Da Silva, 2005: 28).

In 1996 the newly elected Labor Government's Social Justice Direction Statement *Fair Go, Fair Share, Fair Say* indicated that the government would examine ways to protect the rights of people living in nursing homes, hostels and boarding houses through the review of relevant legislation and policy during 1997–1998 (see Power and Mott, 2003: 152). In 1998 the government instructed the Department of Fair Trading to convene a working party to investigate the need to regulate boarding houses. The working party conducted stakeholder consultation and received submissions from organisations such as BLAG, whose submission included a draft Boarders Bill (Power and Mott, 2003: 152). Some of our CSO informants contended that when the working party prepared its final report, there was majority support for boarders and lodgers legislative reform (non-legal CSO; legal CSO), although the final report was not subsequently published (see Alexander, 2004: 78; Power and Mott, 2003: 152).

Later, in 2001, a consultant's review of the DADHC's Boarding House Reform Program again noted that many residents were 'denied control over their lives and lack basic rights, such as tenancy rights which are held by other Australians', and recommended that a statement of proprietor responsibilities be incorporated into legislation (Alt Beatty Consulting, 2001: 10–16).

A further investigation of licensed boarding houses, under the *Youth and Community Services Act 1973* (*YACS 1973*), was commissioned by DADHC, and after conducting stakeholder consultations the subsequent consultant's report recommended that licensed boarding houses should enter into a residential tenancy agreement with each resident (Allen Consulting Group, 2003). The report also stated that unless tenancy rights were extended to all boarding houses, there would be an incentive for operators to re-orient their business away from providing accommodation for people with disabilities under the licensing regime of the *YACS 1973*, so as to avoid any compliance costs associated with tenancy rights under that legislation (Allen Consulting Group, 2003: 76).

[48] Additional proposals include: require disclosure of fees and changes and residents' rights; specify minimum standards in relation to termination, bond, rent in advance, ability to sub-let and right of association of residents. See National Shelter (1996) and Da Silva (2005).

In 2003 in response to questioning by an Independent member of parliament, Clover Moore, who outlined 'the long saga of working parties, bills, reviews and task forces about the need to provide a legal framework for boarders and lodgers', the Minister for Fair Trading replied:

> *The government recognises the need to protect the rights of those who live in boarding houses. I understand that a preliminary boarders and lodgers review on regulation in this industry has been completed. As a range of complex issues is involved, we support a more detailed examination, including a whole of government assessment.*
> (Hansard, Legislative Assembly, 19 November 2003: 5316)

This examination however again failed to lead to a cabinet decision to reform the law.

More recently, beginning in 2007, the Department of Fair Trading again conducted consultations concerning reform of the residential tenancies law, including the prospect of amalgamating the *RTA 1987* and the *Landlord and Tenant (Rental Board) Act 1977*. Providing protection for boarders and lodgers was not in the terms of reference, although advocates again proposed legislative reform for boarders and lodgers (see Tenants' Union of NSW, 2005).

In response to a question in Budget Estimates hearings about why boarders and lodgers had been exempted from the latest review of the *RTA 1987*, the Minister for Fair Trading acknowledged:

> *I think it is accepted that all boarders and lodgers have probably the least protection under legislation in [NSW]. Residents of boarding houses and similar premises have been given statutory rights in relation to residential agreements in all [other] jurisdictions except, WA and the Commonwealth.*
> (The General Purpose Standing Committee No. 2, Examination of proposed expenditure for the portfolio area: Fair Trading, Youth and Volunteering, Transcript, 15 October 2007, pp 8–9; cited in Griffith and Roth, 2008: 33)

The Office of Fair Trading released a draft *Residential Tenancies Bill 2009* for community consultation in late 2009 (Fair Trading, 2009), which again excluded boarders and lodgers from the residential tenancies legislation.[49]

[49] Although no longer specified as a separate category of agreements or premises which the legislation does not apply to, a note to s 10 states that 'Boarders and lodgers are not covered by this Act' (see draft *Residential Tenancies Bill 2009* s 10).

Key features

A key feature of this case is that boarders and lodgers law reform has not been successful, notwithstanding its recognition as a social justice issue and frequent topic of investigation over more than 35 years. As a consequence, advocates reported high levels of frustration and a feeling of having been 'stuffed around by endless inquiries' and over-consultation that did not seem to get anywhere (non-legal CSO; legal CSO).

Informants reported being disheartened by how difficult achieving boarders and lodgers reform in New South Wales appears to be when in most other Australian jurisdictions, legislative reforms have been made (legal CSO; non-legal CSO). They suggested that the advocacy efforts of BLAG and other organisations have just not been able to garner the political will necessary to change the legal status quo (legal CSO; non-legal CSO).

Informants reported that proposals for boarders and lodgers law reform have been supported by the Office of Fair Trading, but have been 'killed off' a couple of times at the cabinet stage of the law reform cycle (legal CSO), particularly when the wider implications of boarders and lodgers reform get considered as part of the cabinet process (parliamentarian).

This case highlights difficulties experienced by advocates working from outside government, from a 'bottom-up' or grassroots position, when seeking to reform the law. Informants suggested that BLAG did everything possible to raise the issue of law reform with government, and in countless submissions made to numerous inquiries (non-legal CSO; legal CSO).

Another important feature of this case is how legal arguments may be compelling, yet are dwarfed by questions concerning the economic consequences and the viability of the boarding house sector more generally (legal CSO). Proponents of statutory recognitions and protections for boarders and lodgers had to contend with a fear of what may happen if boarding houses are regulated and operators decide to close them down (legal CSO). Accordingly, advocates for legislative reform have had to try to carry an evidentiary burden concerning the wider economic consequences of reform.

An important feature of this case study concerns the role of advocacy organisations such as BLAG as well as tenancy, housing, legal and other human services organisations in persistently raising the issue of boarders and lodgers law reform. People living in boarding houses are some of the

most disadvantaged members of the community and they face a number of significant constraints to participating in law reform. These constraints, and the abilities and resources required of disadvantaged people to participate in law reform, are important themes that we explore in further detail in the remaining chapters of this report. But for the ongoing advocacy of CSOs with knowledge about the legal and social impacts of a lack of legislative protections for boarders and lodgers, people living in boarding houses are unlikely to have participated or have been represented in law reform efforts concerning this issue.

4.2 Acceptable Behaviour Agreements Case Study

The *Acceptable Behaviour Agreements Case Study* concerns the *Residential Tenancies Amendment (Public Housing) Act 2004* (*RTA Act 2004*) which enacted powers and new procedures intended to help control anti-social behaviour by public housing tenants. Although the *RTA Act 2004* made a number of legislative changes, to simplify our analysis of this case we focus here on changes concerning acceptable behaviour agreements (*ABAs*).

An *ABA* is a written agreement between the New South Wales Land and Housing Corporation, the public housing landlord, and a public housing tenant in which the tenant gives a written undertaking not to engage in specified anti-social behaviour.[50] A tenant who fails or refuses to sign an *ABA*, or engages in behaviour that seriously or persistently breaches an agreement, may have their tenancy agreement terminated by the Consumer, Trader and Tenancy Tribunal (Tribunal).[51]

The *RTA Act 2004* affected the rights of around 269,000 public housing tenants (Megarrity, Hansard, Legislative Assembly, Second Reading, 3 June 2004: 9640). Public housing tenants include some of the most vulnerable people in the community, with many having complex needs and low incomes.

The *Acceptable Behaviour Agreements Case Study* is an example of executive government formulating a legislative proposal without providing opportunities for public or stakeholder consultation at the pre-parliamentary stage. This case also shows how law reform is affected by stakeholder participation during the parliamentary formulation and implementation stages of the law reform cycle,

[50] *Residential Tenancies Act 1987* s 35A (1).

[51] See *Residential Tenancies Act 1987* ss 63I(1)(a) and (b) and 64(2D)(a) and (b).

and how government decisions about how to operationalise and implement legislative schemes affect the substance of the legislation. In this case study, the *ABA* scheme continued to be developed during the implementation stage of the legislative process, before seemingly being abandoned.

The *RTA Act 2004* had its genesis in a decision of the New South Wales Government to implement 'a new strategy to reduce anti-social behaviour in public housing communities across NSW' and help manage the anti-social behaviour of a small number of individuals considered to be having significant negative impacts on people living in public housing (NSW Department of Housing, 2004: 1).

Law reform issue

At the heart of the social and legal issues in this case are the interests of socially and economically disadvantaged people living in public housing. On the one hand, public housing tenants have an interest in living free from anti-social behaviour, while on the other they have an interest in having secure tenancy and protection from unfair or unjust eviction.

The cumulative effects of anti-social behaviour were characterised as stigmatising public housing and draining limited Department of Housing resources through fixing vandalism and damage, dealing with complaints, and transferring tenants. The *RTA Act 2004*, formulated by the government, was intended to provide additional tools to help manage nuisance and anti-social behaviour among public housing tenants.

When the government's legislative proposal became public, stakeholder organisations identified a range of concerns about how *ABAs* would operate, what they would cover, and how they would or could be used by the Department of Housing. In particular the definition of anti-social behaviour as the 'emission of excessive noise, littering, dumping of cars, vandalism and defacing of property' was seen to lack clarity about what behaviour would be considered anti-social (legal CSO).[52] Stakeholders were also concerned that some public housing tenants, because of intellectual disability or mental illness, may have a reduced capacity to negotiate and understand the terms of an *ABA*, may have less control over their own behaviour, and may be more likely to engage in some behaviour more likely to be considered to be anti-social by neighbours due to unmet needs for health or social services (Mental Health Coordinating Council, 2005).

[52] *Residential Tenancies Act 1987* s 35A(6).

Many stakeholder organisations also objected to public housing tenants being subjected to additional behaviour obligations that do not apply to people in private rental housing (non-legal CSO; legal CSO). A particularly contentious issue among stakeholder organisations was the way in which the proposed legislation made a person subject to an *ABA* responsible for the behaviour of any other person lawfully occupying the property.[53] This meant that a family or household potentially faced eviction because of the behaviour of one person.

The Tenants' Union of NSW pointed to a number of circumstances in which it would be unfair or unjust to require a tenant to enter into an *ABA* or hold them responsible for the behaviour of another person (see Martin, 2004: 220–230), including:

1. *Tenant A has a mental illness that causes sleeplessness and delusions. The Department sends a notice requesting that A signs an ABA, but A fails to respond.*
2. *Tenant B has signed an ABA stating that B's husband will not engage in loud or threatening behaviour. B is the victim of domestic violence perpetrated by her husband — in the course of which he breaches the ABA.*
3. *Tenant C has five children under the age of 14. The eldest has been caught with friends writing graffiti on a fence, and C signs an ABA in relation to the child's graffiti and congregating with groups. Late one night the child sneaks out and is caught congregating with his friends again.*

Many stakeholders highlighted a lack of safeguards and protection in the legislation for disadvantaged and vulnerable public housing tenants, exacerbated by other proposed changes which would reverse the ordinary onus of proof and remove discretion from the Tribunal to consider the wider circumstances relating to applications to terminate a tenancy agreement for breach of the terms of an *ABA*.[54] Procedural reforms associated with *ABAs* meant that when the department applied to terminate a tenancy agreement on the basis of a tenant failing or refusing to enter into an *ABA*, or for breach of an *ABA*, the Tribunal would have no discretion not to terminate the tenancy agreement.

The effect of removing discretion from the Tribunal was that the actions of the department would not be subject to any administrative review other than by appeal to the Supreme Court for an error of law. Putting the onus of proof upon

[53] *Residential Tenancies Act 1987* s 35A(2).

[54] *Residential Tenancies Act 1987* s 64(2D)(a) and (b).

the tenant to show that an *ABA* has not been breached was criticised as being particularly onerous for disadvantaged and vulnerable public housing tenants, especially those suffering from a mental illness or intellectual disability. Without appropriate safeguards, vexatious neighbours, or those with greater capacity to exploit the *ABA* process to further their own ends, may be able to unfairly abuse the *ABA* scheme.

Law reform process

The government's intention to reform the residential tenancies legislation and enact the *ABA* scheme was announced on 4 May 2004. A Department of Housing information sheet issued two days later stated that many aspects of how the *ABAs* would work still needed to be determined and that the Department of Housing was committed to consulting with staff, tenants and stakeholders and that *ABAs* would be trialled prior to being implemented across the State (NSW Department of Housing, 2004: 1–2).

Less than a month later, on 3 June 2004, the government introduced the *Residential Tenancies Amendment (Public Housing) Bill 2004* (the *RTA Bill 2004*) into parliament and stated that opportunities for stakeholder consultation would be provided during implementation of the reforms (Megarrity, Hansard, Legislative Assembly, Second Reading, 3 June 2004: 9640).

Non-government stakeholders had no advance warning that the *RTA Bill 2004* had been formulated, and were not consulted on the terms of the proposed legislation (legal CSO; non-legal CSO). On the same day as the *RTA Bill 2004* was tabled in parliament, housing and social services stakeholder organisations were called to be briefed on the *RTA Bill 2004* by the Department of Housing:

> *... we and some other NGOs were called to a meeting by the Department who gave us a briefing on their new anti-social behaviour strategy — that there was going to be law reform, that there was going to be ABAs introduced into legislation ... And ... 'by the way, this legislation was introduced into the House last night' ... That's how that briefing went. There had been a couple of mentions of an anti-social behaviour strategy, or the government is looking at things ... in the months before that ... but no substantial proposal.*
> (Legal CSO)

Informants reported that the *RTA Bill 2004* 'got pushed through really fast', being passed by parliament just over three weeks after it first became public on 3 June 2004 (non-legal CSO; legal CSO).

After the introduction of the *RTA Bill 2004* in parliament a number of stakeholder organisations made representations about concerns with the operation and use of the *ABA* with the Minister for Housing, government, opposition and crossbench members of parliament. A number of our informants identified the Tenants' Union, Shelter NSW, People With Disability and the Council of Social Service of New South Wales (NCOSS) as taking the lead in proposing amendments to the *RTA Bill 2004* in negotiations with the Housing Minister and his office (legal CSO; non-legal CSO). These CSOs quickly produced a briefing paper outlining a number of amendments to provide some safeguards in the Department of Housing's use of *ABAs* (legal CSO; non-legal CSO; also see NCOSS, 2004).[55]

A CSO informant reported that they sought to negotiate with the government on the basis that while they opposed the changes being made, they should:

> *... negotiate with them on the basis of pointing out where this policy would do things that they didn't intend ...* (Legal CSO)

The *RTA Bill 2004* was characterised as being 'woefully short on detail' and as lacking procedural safeguards to protect the rights of vulnerable and disadvantaged tenants (legal CSO).

The parliamentary record shows that a number of members of parliament raised concerns with the content of the *RTA Bill 2004* based on representations from stakeholder organisations. For example, an opposition member of the Lower House reported receiving 'a significant number of representations from a number of groups in the community, in particular those that have an interest in the protection of tenants' rights' (Page, Hansard, Legislative Assembly, 22 June 2004: 9800).[56] In both Houses of parliament the opposition supported the *RTA Bill 2004* but raised reservations concerning its particular application to people with a mental illness and those with an intellectual disability, as well as reversal of the onus of proof.

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[55] Particular concerns raised in the NCOSS briefing paper were that the wording of the *RTA Bill 2004* did not provide measures to protect people with intellectual disabilities, mental illness, acquired brain injury, did not protect the interests of children and people living with domestic violence and that no allowances were made for refugees experiences trauma or for people accused of bad behaviour by neighbours when they pursue their own cultural traditions. Removing judicial scrutiny over the Department of Housing's actions and reversing the onus of proof in eviction cases involving *ABAs* — making eviction by the Tribunal mandatory should a tenant fail to sign an *ABA* or disprove its breach — were identified as being the 'worst' aspects of the proposed changes (NCOSS, 2004: 2).

[56] Members of parliament reported receiving representations from organisations including the Council of Social Service of New South Wales, Forum of Non Government Agencies, People With Disability Australia, Carers Association, Mental Health Co-ordinating Council, Public Housing Customer Council, Shelter NSW, Tenants' Union NSW, Tenants Advice and Advisory Program, Central Coast Tenants Advice and Advocacy Service Inc.

The government responded to the concerns raised by stakeholder organisations and other members of parliament by stating:

> *As with any new legislative provisions, a policy regarding the implementation of the new measures will be prepared. The policy will provide guidelines to ensure the measures are used appropriately and effectively, and to avoid any unintended consequences. The department will develop and provide training for client service staff to enable them to effectively and sensitively implement the measures outlined in the bill and reduce the incidence of abuse of acceptable behaviour agreements at a local level.*
>
> *... The Government is committed to ongoing consultation with stakeholders about the operation of the measures.*
>
> *The Government will make public the guidelines that will apply to the use of acceptable behaviour agreements, which will be published in the Government Gazette. In addition, the Minister has stated that a review of the operation of the provisions will be carried out after 12 months to ensure there are no unintended consequences.* (Della Bosca, Hansard, Legislative Council, Second Reading in reply 29 June 2004: 10378)

Following the enactment of the *RTA Act 2004* tenancy, disability and legal stakeholder organisations continued to raise concerns about the operation of the *ABAs* directly with the minister and his office, and at senior levels of the Department of Housing.

Some informants reported that the Department of Housing subsequently convened a reference group to develop the policy guidelines and sought ideas from stakeholders about what should be included in these guidelines (legal CSO; non-legal CSO). The *ABA* policy guidelines became a standing agenda item at ongoing network meetings among stakeholder organisations (legal CSO), and informants reported that they thought it was important to monitor the extent to which appropriate safeguards were included in the policy guidelines and ensure they were in line with the undertakings of the minister's office (legal CSO; non-legal CSO).

The Department of Housing subsequently provided draft *ABA* policy guidelines for pilot trials of the scheme in Wagga and Newcastle to a number of groups and individuals (NSW Department of Housing, 2005).

In April 2005, 10 months after the *RTA Act 2004* was enacted, the Department of Housing released its *Anti-Social Behaviour Strategy* documenting the policy guidelines developed for the pilot trials and which had been revised

following stakeholder feedback. Many informants described these guidelines as having knocked the 'worst edges' off the legislation by providing safeguards concerning how the *ABAs* would be used (non-legal CSO; legal CSO).

The *ABA* policy guidelines adopted a definition of anti-social behaviour similar to that already used in the department's *Good Neighbour Policy* and public housing residential tenancy agreement.[57] The policy guidelines also limited the use of the department's power to require an *ABA* only when (NSW Department of Housing, 2005:1):

- a tenant or someone they are responsible for (an occupant of the household or an invited guest) has a history of causing disturbances and other efforts to change behaviour, such as warnings and mediation, have not worked
- the tenant is able to make and keep an *ABA* and their behaviour is not related to an illness or disability for which they need support and
- the tenant has already been given a specific performance order by the Tribunal.

The policy guidelines also stated that tenants living in a situation of family or domestic violence would not be required to enter into an *ABA* concerning the anti-social behaviour of the household, that the Department of Housing would work with the tenant and household to reduce further anti-social behaviour, and that the Department of Housing should be fair and just when asking a tenant to enter into an *ABA* as well as giving tenants the ability to appeal the department's decision to seek an *ABA*.

During the pilot, *ABAs* would be limited to six to 12 months in duration. Tenants would have the right to have an advocate or support worker present to help them during any meetings with the Department of Housing to discuss an agreement. Tenants also had the right to an interpreter if hearing-impaired or if they had difficulty understanding English, and to be helped to obtain services to assist with their support needs.

Our informants had mixed views about how the *ABA* pilot trial was conducted and what it concluded. One informant reported that 'there wasn't one single use of the *ABA*, as far as I know, in either Newcastle or Wagga'

[57] Antisocial behaviour was defined as behaviour that interferes with the peace, comfort and privacy of other people who are not in your household, for example harassing, intimidating or threatening neighbours or passers by and/or causing damage to any property (NSW Department of Housing, 2005: 1).

(non-legal CSO). Another reported that the Department of Housing had been close a couple of times to asking for an *ABA* (member of government advisory body). No evaluation report of the pilot trial was published by the Department of Housing.

Some informants speculated that the Department of Housing had been unable to apply the *ABAs*, had not found them to be useful for managing anti-social behaviour, and that the scheme was difficult to implement (non-legal CSO; member of government advisory body). We were told by an informant that *ABAs*:

> *... exist ... they're still there but ... people have been told not to use them ... the official reason is that they're cumbersome, time consuming and ineffectual.* (Non-legal CSO)

Although the *ABA* powers have not been used, an informant cautioned that because they were still 'law on the books' the government could simply change its policy and decide to use those powers because the policy guidelines limiting their use are vulnerable to being changed quickly (legal CSO).

Key features

The law reform process in this case — particularly the speed and manner in which the *RTA Bill 2004* was formulated without providing opportunities for public or stakeholder consultation — meant that public participation was principally limited to representation by certain stakeholder organisations, mainly housing, disability, legal and advocacy organisations and peak bodies. We found that public housing tenants were most likely to have first become aware of the reforms after the legislation had already been enacted.

The *ABA* legislation as formulated was a relatively blunt policy tool for a complex social problem. The policy guidelines subsequently developed in consultation with stakeholder groups and for the pilot, were more nuanced in the way *ABAs* were to be applied.

The *Acceptable Behaviour Agreements Case Study* highlights how policy decisions may affect not only whether and how the law is reformed, but also whether and how that law is used and applied. Where law reform gives government additional legislative powers, government may make subsequent policy decisions which affect how those powers are used. As such, public or stakeholder participation opportunities concerning the use of legislative powers during implementation can significantly affect the operation, impact and consequences of the law.

In this case, participation was principally limited to consultation with stakeholder organisations about 'how' *ABAs* would be implemented, rather than consultation with stakeholders or the people directly affected about what would help reduce anti-social behaviour.

We found that it was mainly peak human services sector organisations, specifically tenancy and advocacy organisations, who participated in the reform by representing the interests of their public housing constituents during both the parliamentary phase and implementation stages of the legislative process.

A key feature of this case study is therefore how those people most affected by the proposed reforms — public housing tenants — had little opportunity to participate in the *ABA* law reform process other than by having their interests represented through CSOs. This meant public housing tenants were largely dependent upon the ability of CSOs to mobilise within the short timeframe of the parliamentary process and use their knowledge of the legal and policy issues to analyse the implications and consequences of the *RTA Bill 2004*, work with constituents and other organisations to develop a response, and draw on relationships with the minister, Department of Housing and parliamentarians to make representations seeking amendments and safeguards. Stakeholder organisations subsequently continued to make representations concerning the use of *ABAs* in consultations and negotiations with the Department of Housing concerning the implementation of the *ABA* pilot.

The factors that affect the ability of CSOs to represent the interests of their constituents and participate in law reform are key themes we explore in further detail in the following chapters of this study.

4.3 Civil Procedure Act Case Study

Our *Civil Procedure Act Case Study* concerns the emergence, formulation and implementation of the *Civil Procedure Act 2005* (*CPA 2005*) and *Uniform Civil Procedure Rules 2005* (*UCPR*). Together the *CPA 2005* and *UCPR* were a legislative package of civil procedure reforms which sought to reduce the cost of litigation by streamlining civil procedure and practice rules across the Supreme, District and Local Courts, and Dust Diseases Tribunal. A feature of this case is how key stakeholders, including representatives of legal professional associations, had a central role in formulating and implementing the package of reforms.

The *CPA 2005* was precipitated by a confluence of a number of factors. Civil procedure reform had been a long-standing issue pursued unsuccessfully by legal professional associations, particularly by the NSW Law Society, over many years (legal CSO). However increasing public and media criticism of the time and costs of resolving court cases had called the performance and efficiency of courts into question (Lindsay, 2005: 38–39), and an inquiry into court waiting times was commenced by the Public Accounts Committee of the New South Wales Legislative Assembly. The Public Accounts Committee's 2002 report recommended rationalising and simplifying the practice and procedure rules across the Supreme, District and Local Courts to improve efficiency and reduce waiting times. The committee further recommended that the Attorney General's Department and courts convene a working group to rationalise and simplify New South Wales civil court rules.[58]

At the same time the Attorney General's Department was also developing a computer case management system, CourtLink, to be used for the Supreme, District and Local Courts. CourtLink would modernise court registry management, standardise information processing, and enable legal practitioners and other court users to lodge court documents electronically. The task of developing CourtLink would be simplified by having standardised practice and procedures among the courts.

Informants identified the Public Affairs Committee report and CourtLink as being a 'huge impetus' for civil procedure reform (legal CSO; government officer) and the catalyst for the emergence and formulation of uniform civil procedure.

Law reform issue

The law reform issues in the *Civil Procedure Act Case Study* span from ideals about improving and modernising civil court practices and administration, through to technical legal minutiae of specific court rules and practice.

Simplifying procedures and removing unnecessary differences among the courts would help remove barriers to accessing justice, and uniform civil court rules could help to reduce the cost of litigation by requiring that practitioners need only keep up to date with a single set of court rules (legal CSO). Legal professional associations identified cost savings with having a reduced number of court forms and simplified computer systems (Spigelman, 2005: 9). The

[58] Recommendation 13, Report of the Public Accounts Committee of the Legislative Assembly (2002: 44).

overriding purpose of the civil procedure reforms was to facilitate the just, quick and cheap resolution of the real issues in court proceedings (Lindsay, 2005: 56).

Another important aspect of the civil procedure reforms was the importance of judicial case management as a mechanism for increasing courts' efficiency. Empowering judicial officers to manage litigation in order to meet the needs of each case could help tailor proceedings to particular cases. An important issue was therefore how judicial case management should strike a balance between protecting the interests of justice in an individual court case, with the interests of other court users and the community in having efficient and accessible courts (Spigelman, 2005: 9).

While the general community may share an interest in having accessible and efficient civil courts, the subject matter of the civil procedure reforms was a mass of procedural and adjudicative rules sometimes known or described as being 'lawyer's law' because it is predominately legal professionals who have knowledge of and are aware of the operation of civil procedure rules.

Following the recommendation of the Public Accounts Committee, the Attorney General's Department convened a working group to recommend what the uniform court rules should be. An informant characterised this task as a 'meticulous project' involving significant labour to systematically work through the rules of each of the courts (government officer).

Law reform process

The *CPA 2005* was principally formulated during its pre-parliamentary stage by the advisory body — the Civil Procedure Working Party (the Working Party) — convened by the Attorney General's Department. The *Civil Procedure Bill 2005* (*CP Bill 2005*) developed by the Working Party was subsequently accepted, passed and enacted by the New South Wales Government and the New South Wales Parliament without amendment.

Key stakeholders were invited to nominate representatives to be members of the Working Party. Membership included judicial officers from the civil jurisdictions of each of the Supreme, District and Local Courts, representatives nominated by the Bar Association and Law Society, and staff from the Attorney General's Department.

The members of the Working Party meet weekly, and at other times for more intensive periods, from March 2003 through to May 2005. After initially

considering possible model civil procedure rules used in other jurisdictions, the Working Party reached a consensus that New South Wales law and precedents should be maintained in order to minimise the scope of change (government officer; legal CSO). The Working Party also aimed to simplify and consolidate civil procedure provisions in a single Act, supported by a common set of rules, but without making radical change in either substance or form (government officer; Atkinson and Olishlager, 2005: 247).

Although the Working Party predominately worked through the reform issues, contributions were invited and received from the public through publishing information on the Attorney General's Department website, and by publishing the *CP Bill 2005* as an exposure draft (government officer). The Working Party also sought comment and feedback from other organisations such as Legal Aid and the Combined Community Legal Centres Group, and from time to time particular court stakeholders were invited to participate and provide information about aspects of the rules and how they worked (legal CSO; government officer).

The Working Party also formulated a mechanism to oversee and monitor the implementation and operation of the *CPA 2005* and *UCPR* by proposing that a Uniform Rules Committee, composed of similar stakeholder members to that of the Working Party, be established by the *CPA 2005* and replace the current rules committees of each of the courts.

The Uniform Rules Committee provides stakeholders with a forum in which to raise concerns over the way the *UCPR* is operating, and it is a key mechanism through which they monitor impacts and identify further suggestions to reform court practices.

Key features

The *Civil Procedure Act Case Study* has a number features suggesting important implications for public participation in law reform. In this case we found that although opportunities for public consultation were provided, few members of the public acted upon those opportunities. Further, although some members of the public did make use of public consultation opportunities, most of the comments received by the Working Party were made by legal professionals (government officer). This is unsurprising given that civil procedure is an area of law in which comparatively few members of the general public have knowledge or interest (government officer).

The case study is an example of an issue where there is a dislocation between identification of the general problem and the suggested law reform solution. Identifying general concerns with court costs and efficiency was a qualitatively different task to determining what and how to reform the court rules in order to achieve court efficiency. The formulation of the legislative solution necessitated a high level of technical legal knowledge and expertise. This is a feature shared in many areas of law reform. The Working Party is an example of a group of expert stakeholder representatives invited by government to provide it with expert advice on how to achieve an identified policy purpose through proposed reform. In turn, the New South Wales Parliament relied on the expertise of the members of the Working Party by enacting their suggested reforms without amendment.

In this case we found that the members of the Working Party drew on the breadth of their experience and contact with the public in developing the reforms. For example, the experiences and views of court registry staff having contact with the public every day were gathered during the Working Party process (government officer). In this respect the general public and disadvantaged people were dependent upon the experience and expertise of the members of the Working Party to consider their particular needs and interests, just as both the New South Wales Government and Parliament were, to consider the wider interests of court users, the civil court system and the community in the context of formulating the reforms.

Where law reform involves highly particularised areas of knowledge and expertise, and members of the general public are unlikely to be interested, engaged, or able to contribute, it will often fall to government and key stakeholders to act for the common good and wider community interest, in formulating law reform. This case suggests that government sometimes affords a primary role to expert stakeholders in law reform.

Another key feature of this case study is the way in which the key stakeholders had a central role not only in formulating the reform, but also in monitoring its impacts and implementation, as well as ongoing reform of court rules. In this respect the key stakeholder representatives on the Working Party and Uniform Rules Committee can be described as having been ascribed a quasi-legislative role in formulating and implementing the *CPA 2005* and *UCPR* package of reforms.

A number of other features concerning the way in which the Working Party operated suggest other implications for public and stakeholder participation in law reform. The Working Party faced few of the constraints many other advisory bodies experience. In particular, it was not limited by pre-existing government policy or a preferred view of what the content of the court rules should be, nor did it face resource or time constraints which restricted the scope of its deliberations, or lobbying from competing interest groups. In part this reflects the apolitical nature of the particular law reform issues and the absence of a political agenda among the members of the Working Party (government officer).

The Working Party was also composed of senior and experienced stakeholder representatives who had similar levels of expertise, putting them on a more or less 'equal footing'. Lack of a political agenda or pre-conceived solution fostered a shared commitment among members of the Working Party to develop reforms that would be as good and as workable as possible (government officer). A deliberative approach to the issues, and consensus based decision-making further promoted stakeholder collaboration.

Unlike the *Civil Procedure Act Case Study*, many other law reform issues involve competing stakeholder interest groups and greater disparity of interests, power, influence and commitment to reform. The particular nature of the issues and stakeholder interests are important factors which affect how law reform occurs and what opportunities stakeholders have to participate, and which we explore in more detail later in the report.

4.4 Bail Amendment Act Case Study

The *Bail Amendment Act Case Study* concerns the *Bail Amendment (Repeat Offenders) Act 2002* (*Repeat Offenders Amendment 2002*), and explores how the issue of repeat offenders emerged onto the government's legislative agenda and was formulated into legislation.

This *Bail Amendment Act Case Study* is an example of law reform intended to close an identified gap in the operation of bail law with respect to 'offenders who commit less serious offences and are likely to do so again' (Marien and Hickey, 2002). Like the *Acceptable Behaviour Agreements Case Study*, this case study is an example of legislation formulated within government without opportunities for public participation, and with minimal external stakeholder consultation, during the pre-parliamentary stage.

Bail is defined under the *Bail Act 1978* as authorisation to be at liberty instead of in custody.[59] Bail gives permission for a person charged with a criminal offence to be released from custody on the basis that they undertake to attend court and comply with any specified conditions. Failure to comply with a bail undertaking or condition may be an offence and lead to bail being revoked.[60]

Bail law underpins fundamental principles concerning a person's right to be at liberty unless otherwise lawfully held in custody according to the rule of law, and based on the principle of the presumption of innocence. Bail law, however, is also intended to protect the community from harm, and therefore strikes a balance between competing individual and community rights. In this case the government sought to 'offer further protection to the community from the risk of repeat offenders' (Debus, Hansard, Legislative Assembly, Second Reading, 20 March 2002: 818).

The *Bail Act 1978* has different requirements for bail depending on the type of offence alleged to have been committed, and the characteristics of the person. It prescribes the criteria to be applied by police and courts in determining applications for bail and assessing the probability that an accused person will appear in court.[61]

When first enacted, the *Bail Act 1978* prescribed a presumption in favour of bail for all but a small number of offences (Brignell, 2002). Since then it has been frequently amended — a total of 78 times between 1979 and 2007, at an average of 2.7 times per year, or approximately once every 4.5 months, making it one of the most frequently amended statutes. A feature of bail law reform has been the progressive restriction on the presumption in favour of bail by successive amendments, intended to provide greater protection to the community. Table 4.1 outlines changes made to the presumption in favour of bail in the years preceding the *Repeat Offenders Amendment 2002*.

[59] *Bail Act 1978* s 4.

[60] *Bail Act 1978* ss 50 and 52.

[61] *Bail Act 1978* ss 31 and 32.

Table 4.1: Amendments reducing the presumption in favour of bail 1986–2002

Amendment Act	*Removed presumption in favour of bail with respect to:*
Bail (Amendment) Act 1986	Serious drug offences
Bail (Personal and Family Violence) Amendment Act 1987	Certain domestic violence offenders
Bail (Domestic Violence) Amendment Act 1993	Murder, domestic violence or contravention of an apprehended domestic violence order where the person has a 'history of violence'
Criminal Legislation Amendment Act 1995	Murder-related offences
Drug Misuse and Trafficking Amendment (Ongoing Dealing) Act 1998	Offences concerning supply of prohibited drugs on an ongoing basis
Bail Amendment Act 1998	Certain serious offences of a sexual or violent nature
Police Powers (Drug Premises) Act 2001	Offences under *Firearms Act 1996*, s 7
Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001	New offence of aggregated sexual assault in company
Bail Amendment (Repeat Offenders) Act 2002	Defendants on bail, parole, or serving a non-custodial sentence, and those previously convicted of an indictable offence or failing to appear in court

Many of these amendments have been attributed to public outrage concerning particular shocking, abhorrent and high profile incidents (see Brignell 2002).

The particular circumstances of the *Repeat Offenders Amendment 2002* has been described as a period of intense legislative activity occurring in the lead up to the New South Wales State election in 2003, during which 'at a rough count over 30 criminal justice statutes' were enacted as the government and opposition vied to persuade the electorate that they were tougher on law and order (Brown 2002: 64).

According to Marien and Hickey (2002), the *Repeat Offenders Amendment 2002* had its genesis in studies by NSW Police and the Bureau of Crime Statistics and Research (BOCSAR), which were interpreted to suggest that a 'gap' in bail law was being exploited by offenders as:

> *... literature, research and anecdotal evidence all pointed to the fact that the problem concerning bail being granted to repeat offenders was due to the types of offences these persons are alleged to have committed. These offences are generally lower down the scale in criminality in comparison to say, murder, malicious wounding, or drug trafficking, and would include the offences of theft, receiving, break and enter, shoplifting, driving offences and minor assaults.*

Taken together the NSW Police and BOCSAR research suggested that people committing minor offences were responsible for a disproportionate amount of crime, continued to offend while on bail, and had a greater tendency to abscond whilst on bail (Marien and Hickey, 2002).[62]

Law reform issue

The issue of repeat offenders getting bail was seen as a problem to be solved by targeted law reform. Repeat offenders were characterised as a significant drain on NSW Police and court resources and exposed the community to an unacceptable risk of crime (Marien and Hickey, 2002).

One important issue stemming from the NSW Police and BOCSAR research concerned how much crime could be attributed to people on bail. A figure provided in a press release by the Minister of Police was later relied upon during parliamentary debate to substantiate the need for legislative reform:

> *We have to get tough on repeat offenders. Police research shows that they commit 80 per cent to 90 per cent of all crimes. That means that if those people are stopped, we are well on the way to stopping crime …* (Iemma, Hansard, Legislative Assembly, Second Reading, 10 April 2002: 1276)

This figure had been refuted by BOCSAR, as was subsequently clarified by the Attorney General:

> *According to the Bureau of Crime Statistics and Research 14 per cent of persons who have been convicted more than twice account for 40 per cent of all court appearances in the Local Court. That is somewhat less than the 80 per cent figure that has been cited by a number of speakers today. That figure is one that is promulgated by the Police Service ... I suspect that the amount of crime committed by repeat offenders lies somewhere between the two estimates I have just mentioned. Either way, what is significant is that this figure represents a significant concern to both our police and our community.* (Debus, Hansard, Legislative Assembly, Second Reading in reply, 10 April 2002: 1340)

Preventing further offending was therefore portrayed as having potentially significant and far reaching implications with respect to reducing the general level of crime in the community.

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[62] That is, fail to attend court in accordance with their bail undertakings.

The *Repeat Offenders Amendment 2002* proposed to enact additional exceptions to the presumption in favour of bail where the person accused was on bail, parole or serving a non-custodial sentence, or was subject to a good behaviour bond, at the time the offence was allegedly committed,[63] or had been previously convicted of the offence of failing to appear before a court in accord with their bail undertaking.[64] The presumption would also be removed for persons accused of committing an indictable offence who had previously been convicted for one or more indictable offences.[65]

As evidenced in parliamentary debate in the Legislative Council, a number of concerns about the possible effects of the *Repeat Offenders Amendment 2002* were raised by individuals and groups. These include further increasing the remand population and the number of Aboriginal people accused and denied bail, remandees preferring to plead guilty so as to get a classification and sentence rather than wait on remand for a court date, increasing the proportion of suicides by remandees, further draining limited legal aid and court resources as increasing numbers of defendants are refused bail by police, and that the *Bail Act 1978* already adequately dealt with the issue of repeat offenders (see Hansard, Legislative Council, Second Reading, 7 May 2002: 1557–15649; and 9 May 2002: 1888–1919).

Law reform process

The *Bail Amendment (Repeat Offenders) Bill 2002* (*Bail Bill 2002*) was principally formulated within government and provided little scope for public participation other than by making representations directly to members of parliament. Therefore while there was no formal public consultation, we found that some individuals and organisations made representations to parliamentarians that led to modifications in parliament.

The New South Wales Government formed an inter-agency working party to formulate legislation and other policy in response to the identified gap in bail law. The working party included representatives from a number of government agencies — NSW Legal Aid Commission, Department of Juvenile Justice, Probation and Parole Service, Department of Corrective Services, NSW Police, Police Ministry and Attorney General's Department — and developed a 'generally agreed upon' proposal (Marien and Hickey, 2002).

[63] *Bail Act 1978* s 9B(1).

[64] *Bail Act 1978* s 9B(2).

[65] *Bail Act 1978* s 9B(3).

The *Bail Bill 2002* was introduced by the New South Wales Government in the Legislative Assembly where it passed without amendment. After several successful amendments moved by crossbench members of the Legislative Council, the *Bail Bill 2002* returned to the Legislative Assembly where it was subsequently passed in its amended form.

Members of the Legislative Council cited a variety of research and reports by parliamentary committees, advisory bodies and law reform commissions during parliamentary debate. The parliamentary record also indicates a number of people and organisations made representations to members of the Legislative Council, which led to some amendments concerning the special needs of particular groups of people.

Individuals and organisations who made representations to parliamentarians included legal professional associations, advocacy organisations, religious organisations, Indigenous leaders and organisations, and academics with particular interest in the criminal justice system. The Law Society drew particular attention to, among other things, a report of the then Aboriginal Justice Advisory Council concerning the application of bail to Aboriginal defendants.

Crossbench members proposed 12 amendments to the Bill, of which four were agreed and supported by government members on the basis they were consistent with the government's intent and did not affect its determination to remove the presumption in favour of bail for repeat offenders.

Two successful motions to amend the *Bail Bill 2002* were moved by the Greens to add Aboriginal and Torres Strait Islander persons to the categories of persons whose 'special needs' were to be considered,[66] and also to provide for the background and community ties of Aboriginal and Torres Strait Islander people to be assessed.[67] Two more amendments were successfully moved by the Independent member, the Hon. Helen Sham-Ho MLC, to add mentally ill persons to the category of persons whose special needs were to be considered,[68] and also provide that the mentally ill be added to the category of offenders to be considered in the statutory review of the *Repeat Offenders*

[66] See *Bail Act 1978* s 32(1)(b)(vi).

[67] See *Bail Act 1978* s 32(1)(a)(i). These amendments were accepted by the government as being based on research of the Aboriginal Justice Advisory Council documenting difficulties Aboriginal and Torres Strait Islander defendants have with satisfying the criteria used to determine bail and because of the unique disadvantages they experience within the criminal justice system.

[68] See *Bail Act 1978* s 32(1)(b)(vi).

Amendment 2002.[69] These amendments were motivated by concerns that leaving the mentally ill out of the categories of people with special needs had been an oversight (see Hansard, Legislative Council, Second Reading, 9 May 2002: 1888–1889).

Another amendment, moved by the Independent member, the Hon. Richard Jones MLC, provided that the Minister of Corrective Services should ensure that adequate and appropriate accommodation for placing persons on bail was available. This amendment was not agreed to by the government, but was nevertheless successfully made with the support of the opposition and sufficient members of the crossbench (Hansard, Legislative Council, Second Reading, 9 May 2002: 1904–1907).

Key features

A key feature of this case study is the lack of public consultation opportunities provided by government, which is reported to be a common feature of how the law reform process tends to operate for criminal justice issues (Brown 2005; Weatherburn 2004). Criminal justice law reforms such as the *Repeat Offenders Amendment 2002* are generally crafted within government agencies without the provision of public or non-government consultation opportunities (see Brown 2005: 347–348). The details of these reforms usually first become public when they are introduced by government into parliament, although consultations may occur with prominent stakeholder bodies such as legal professional associations.

Law and order issues were repeatedly identified by many of our informants as having a wider political imperative that significantly affects how the law reform process operates:

> *When it's law and order type laws the processes used are not very consultative.* (Legal CSO)

The often heated public, media and political debate surrounding law and order issues tends to sideline both external advisory bodies and public consultation as governments prefer to use in-house departmental research and policy units to formulate its proposed legislation (Brown, 2005: 348).

Popular support for 'tough' criminal justice law reform is a key factor affecting how these issues are framed:

[69] See *Bail Act 1978* cl 17(2), Schedule 1.

> *... the public generally seems to support strong law and order, and you can present all the arguments in the world that, a whole range of offences have gone down and, you know ... it just tends to be ignored …* (Parliamentarian)

Some informants reported that when the major political parties 'sing from the same song', such as with the same 'tough' on crime rhetoric, it is very difficult for anyone to offer dissenting views (non-legal CSO; legal CSO). An informant suggested that the political nature of the parliamentary debate in reforms like the *Repeat Offenders Amendment 2002* is such that it may not be possible for concerned people to do much more than attempt to 'tone down' the scope of the proposal and seek minor amendments to protect identified groups of vulnerable people (legal CSO). In this case minor amendments were successfully made to provide some safeguards for Aboriginal and Torres Strait Islander and mentally ill persons.

We found however that only a small number of individuals and organisations were able to make representations to parliamentarians, mainly:

> *... social welfare groups, legal professional bodies and groups like the Council for Civil Liberties ... so that's still pretty much one fairly small voice in the scheme of things*. (Legal CSO)

The ability of the general public and disadvantaged people to participate in this case was therefore predominantly limited to their elected representatives or to their representation by a narrow set of civil society organisations having direct contact with parliamentarians.

In this case participants not only had to quickly analyse the implications of the proposed reform, they also had to get to grips with the statistics and research evidence which inspired the reform. This left a relatively small window of opportunity in which interested participants could seek to make representations to parliamentarians. The case also demonstrates how law reform issues which emerge from within government departments or agencies can quickly become law.

Together these circumstances suggest there are times when the ability of the public, as well as disadvantaged people, to participate is restricted to those individuals or organisations with the capacity to make representations during the parliamentary stage of the legislative process.

In the following chapters we identify features which affect the ability of people and organisations to participate in law reform and, in particular, how

knowledge of law reform, the wider political context, and status, expertise and networks can facilitate participation notwithstanding that formal public or stakeholder consultation opportunities have not been provided.

4.5 Mental Health Act Case Study

The *Mental Health Act Case Study* concerns the review of the *Mental Health Act 1990* (*MHA 1990 Review*). For the purposes of this case study we conceive of the review as having commenced in 2003 with the issuing of discussion papers by NSW Health, and as continuing through to the subsequent formulation and enactment of both the *Mental Health Act 2007* (*MHA 2007*) and *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* (*Forensic Provisions 2008*).

The *MHA 1990 Review* is an example of government-led review of legislation that provided extensive public consultation opportunities during pre-parliamentary formulation. It is an example of proactive and consultative law-making led by a New South Wales Government department, in this case NSW Health, and how public consultation processes are used to canvass public and stakeholder views concerning the operation, impact and proposed reform of legislation.

A distinguishing feature of the *MHA 1990 Review* is its long-running and multiple public consultation opportunities, making it one of the largest public law reform consultation events undertaken in New South Wales.

The *MHA 1990* establishes the legal framework for the care, treatment and control of people with a mental illness within the meaning of the legislation, and provides statutory recognition and protection of their rights. It also governs how the mental health system and hospitals operate. In particular, the legislation establishes the legal basis and authority to detain and treat a person with a mental health issue without their consent, governs the detention and release of forensic patients[70] as well as the operation of the Mental Health Review Tribunal, and other issues such as the regulation of treatments like psychosurgery and electro-convulsive therapy.

Mental health law reform in New South Wales appears to be distinguished by a well-established tradition of formal public consultation, and tends to

[70] Forensic patients include people found not guilty of committing a crime by reason of mental illness, people found unfit to stand trial, and sentenced correctional inmates who have been transferred to a mental hospital for care.

follow a pattern of public discussion papers and exposure draft Bills being released for public, consumer and stakeholder comment. Indeed, a key feature of the formulation, implementation and review of the *MHA 1990*, and of the subsequent formulation and implementation of the *MHA 2007* and *Forensic Provisions 2008*, is the provision of recurring public and stakeholder consultation opportunities.[71]

The *MHA 1990 Review* stemmed from previous public and stakeholder consultation associated with the implementation and statutory review of the *MHA 1990*, and also from the government's response to, first, a New South Wales Parliamentary Committee inquiry into mental health services in New South Wales, and secondly, the report of an independent committee reviewing sentinel events.[72] Although this background history is convoluted, and involves a mix of governmental, parliamentary and independent advisory bodies, we briefly outline it here as it is both informative and illustrative of the practice of mental health law reform in New South Wales, and of the genesis of the issues canvassed in the *MHA 1990 Review*.

The *MHA 1990* was one of the first New South Wales statutes to include a statutory review clause requiring the minister to make a report identifying any proposed amendments within two years of its commencement.[73] The Minister for Health established an independent body — the Mental Health Act Implementation Monitoring Committee (MHAIMC) — to monitor the implementation and operation of the legislation during the first two years of its operation. The MHAIMC included representatives of a number of affected interest groups, including service providers, mental health advocacy groups and community representatives. The MHAIMC held public consultations throughout New South Wales and received 124 written submissions from government agencies, service providers, community groups and individuals (Phillips, Hansard, Legislative Assembly, Second Reading, 14 April 1994: 1242).

The MHAIMC's report found that the *MHA 1990* afforded an effective and humane balance between providing involuntary treatment for people whose

[71] Appendix 4.1 collates the public and stakeholder consultation which occurred in New South Wales for the *MHA 1990* during the period 1990 to 2008.

[72] A sentinel event is any unanticipated or unexpected event in a healthcare setting resulting in death, serious physical or mental injury to a patient or patients, not related to the natural course of the patient's illness. Such an event tends to reflect healthcare system and process deficiencies.

[73] See *Mental Health Act 1990* s 304. As noted in Chapter 2, this practice is now a feature of law-making in New South Wales.

state of mind requires intervention, while also protecting the civil liberties of all persons in the community. However it also made several recommendations concerning the most appropriate mechanisms for care and control which were contested by some members of the committee and consumer organisations, on the basis that they would detrimentally and inappropriately affect patients' rights and civil liberties.

The less contentious recommendations of the MHAIMC, largely concerning operational and procedural reforms, were incorporated into the *MHA 1990* in 1994 (Phillips, Minister for Health, Hansard, Legislative Assembly, 14 April 1994: 1243), a period coinciding with the period of minority government from 1991 to 1995. A number of our informants identified the MHAIMC as having provided a good opportunity to identify and fix problems with the legislation (government officer; legal CSO).

Those MHAIMC recommendations considered to be more contentious subsequently became the subject of a NSW Health discussion paper. Another committee was then established to continue to monitor the effectiveness of the *MHA 1990* to identify further reforms, and to consider the submissions received in response to the discussion paper.

Further amendments to the *MHA 1990* were made in June 1997 after the release of another discussion paper and exposure draft Bill, with a three-month public consultation period during which nearly 100 submissions were received.[74]

There was little further formal or public review of the *MHA 1990* until the Legislative Council Select Committee on Mental Health was established in December 2001 to inquire into the operation of mental health services in New South Wales (the Pezzutti Inquiry). The Pezzutti Inquiry had been prompted by community and stakeholder concerns about the adequacy of and access to mental health services, and the lack of access of carers and family to information about care and treatment.

The Pezzutti Inquiry invited stakeholder participation, conducted public hearings and site visits, and also held a public forum at Parliament House. It received 303 submissions from private citizens, mental health professionals, government and non-government organisations, and heard evidence from 91 witnesses (Legislative Council Select Committee on Mental Health, 2002: xv). Its Final

[74] The 1997 amendments included reforms to the definition of a 'mentally ill person', duration of community treatment orders, procedures concerning official visitors, police powers and electro-convulsive therapy for involuntary patients.

Report, issued in December 2002, made 120 recommendations, including a number of recommendations for legislative reform concerning operational matters and to allow for limited disclosure of confidential information about clients of mental health services to guardians, family and carers.

At the same time as the Pezzutti Inquiry was being conducted, a separate independent committee inquiry, the New South Wales Mental Health Sentinel Events Review Committee (the Baume Committee), was established by the Minister for Health in May 2002 to review and report on morbidity and mortality issues associated with the care, management and control of persons suffering from a mental illness (NSW Mental Health Sentinel Events Review Committee, 2003: 3).

An informant identified that the emergence of the *MHA 1990 Review* stemmed from the Pezzutti Inquiry and Baume Committee and associated public, media and government concern about a 'crisis' in mental health services (non-legal CSO). In response to the two inquiries, the government undertook to conduct a comprehensive review of the operation of the *MHA 1990* involving extensive consultation with consumers, carers and service providers (NSW Health, 2004: 3).

Law reform issue

While it is beyond the scope of this case study to fully outline all of the legal issues canvassed, the *MHA 1990 Review* has been generally described as asking whether the current legislation permits proper disclosure of information to carers, and associated other questions such as (Burton, Hansard, Legislative Assembly, 26 October 2004: 11959):

> *... who should be informed of what information, and by whom? Should this information be limited, and at what point should a carer have access to information when a patient is incapable or in a more general treatment setting? How should information be obtained? Should there be limitations on the sort of information disclosed? Should carers be included in discharge planning? Indeed, what is the definition of a 'carer' for legislative purposes? Should a person have the right to prevent the disclosure of information to carers when he or she regains his capacity?*
>
> *... whether the definition of 'mental illness' needs to be broadened to include people who suffer from a personality disorder or anorexia nervosa, and whether mental health services have a duty of care to those people.*

> *... who should conduct assessments and within what time frame? Are the current leave provisions, including community treatment orders, adequate? Do we need to reconsider the current separation of the roles of the court and the Mental Health Review Tribunal in relation to assessing patients? One of the most difficult areas in the health system is forensics. NSW Health has put forward a range of suggestions to balance the needs of victims, patients, and natural justice in that very grey area of health. The retention of the executive discretion in New South Wales has been controversial. Most other States have done away with this system as they have revised their legislation. Many have placed the decisions relating to the treatment, care, and release of these patients within the court system. This is certainly something that needs to be considered by the Parliament.*

To simplify this discussion, we focus on three of these issues:

- the rights of carers and others to access information
- the statutory definition of mental illness
- 'executive discretion' governing the detention and release of forensic patients.

Whether and how family and carers should have rights to access information concerning the treatment or release of persons they cared for, potentially created a conflict between the rights of consumers and those of carers. Carer organisations were concerned that the *MHA 1990* did not adequately recognise their role in the care of a person with a mental illness. In addition, privacy legislation had caused confusion concerning the ability of carers to access medical information (Burton, Hansard, Legislative Assembly, 26 October 2004: 11959). Carer access to information had been a high profile issue at the Pezzutti Inquiry, which had recommended legislative reform to recognise the rights of carers and family to access medical information.

The statutory definition of 'mental illness', a 'mentally ill person', and a 'mentally disordered person' in the *MHA 1990* are distinct from the clinical or medical definitions of mental illness used by mental health professionals. Some mental health issues, such as personality disorders, anorexia nervosa, phobias and alcohol or drug abuse or addiction problems — commonly diagnosed and treated by clinicians — may not, in themselves, be considered 'mental illness' for the purposes of the *MHA 1990*. What types of mental health problems should (or should not) come within the statutory definition of mental illness, and thus also the powers concerning care, treatment and control under

the other provisions of the *MHA 1990*, is an issue that has repeatedly been canvassed in public consultation concerning mental health legislation.

The release of forensic patients was governed by 'executive discretion' under the *MHA 1990*. Executive discretion meant that the release of a forensic patient required a collective decision of ministers in Cabinet, seen by critics as being political decisions based on non-medical and other factors. The continuation of executive discretion in New South Wales had long been contentious, especially after it had been abandoned by most Australian and other similar jurisdictions, and both the Burdekin Report (Human Rights and Equal Opportunity Commission, 1993) and NSW Law Reform Commission (1996) had recommended that new procedures should be enacted.

Law reform process

The *MHA 1990 Review* involved a number of phases that provided opportunities for public and stakeholder participation. The discussion below outlines the chronology of consultation for the *MHA 1990 Review*, and is summarised in Appendix 4.1.

The *MHA 1990 Review* commenced in October 2003 with NSW Health writing to a range of stakeholders seeking views about what issues the review should cover. Those initial stakeholder consultations together with the Pezzutti Inquiry, previous *MHA 1990* public consultations, and the first report of the Baume Committee, informed two discussion papers issued by NSW Health, inviting public submissions for the *MHA 1990 Review*. The discussion papers also stated that the New South Wales Government would develop and release exposure draft legislation for public comment.

The first paper, *Discussion Paper 1: Carers and Information Sharing* (*DP1*), canvassed a range of issues concerning the use and sharing of information within the health system, and its impacts on people with a mental illness and their carers, friends and family. The second paper, *Discussion Paper 2: The Mental Health Act 1990* (*DP2*), canvassed operational issues and proposed a number of options for reform relating to each chapter of the *MHA 1990*. In particular, it sought comment on key definitional, treatment and operational issues, including the definition of 'mental illness' and whether the system of executive discretion should be retained with respect to forensic patients.

In addition to the two discussion papers, the Parliamentary Secretary to the Minister for Health — the Hon. Ms Cherie Burton MP[75] — conducted site visits and held more than 30 public forums to discuss the issues raised in the *MHA 1990 Review* (NSW Health, 2006: 1). The public forums were attended by consumers, carers, staff and representatives from non-government organisations, with NSW Health staff involved in the *MHA 1990 Review* and clinicians available to answer and discuss questions.

NSW Health received more than 300 letters, submissions and comments in response to the two discussion papers from a range of people identified as being patients, carers, clinicians, stakeholder groups and interested members of the community (NSW Health, 2006: 1).

Two and a half years after the publication of *DP1*, NSW Health released its *Review of the Mental Health Act 1990 Report* (*MHA Review Report*) and the *Exposure Draft Mental Health Bill 2006* (*Exposure Draft*). The *MHA Review Report* (NSW Health, 2006: 1) noted that the submissions received in response to *DP1* and *DP2* expressed:

- general support for the overall content of the *MHA 1990*
- support for recognising the role of carers and their being able to access information, provided the process adopted involved the patient and gave the opportunity to identify an appropriate person
- support for changes to provisions concerning treatment and a range of operational issues.

The *MHA Review Report* identified two strong themes in the submissions concerning access of carers to information. First, carers should have access to information and a role in care decisions, and secondly, patients should also be involved in care decisions and have an ability to control who has access to information about them.

The potentially competing interests of patients and carers led to new provisions being formulated to:

- allow a person to nominate a primary carer to receive information, and also identify persons they do not wish to be identified as primary carer

[75] The Hon. Ms Cherie Burton MP later became the Minister Assisting the Minister for Health (Mental Health).

- establish procedures to identify a primary carer when no notification has been given and
- outline what information should be provided to a primary carer, and how mental health service providers should involve carers in care decisions.

NSW Health received more than 50 submissions in response to the *Exposure Draft*. Nineteen days after close of submissions, the *Mental Health Bill 2006* was introduced into the New South Wales Parliament. This Bill later lapsed on prorogation of parliament for the New South Wales State election in 2007, but was subsequently reintroduced in a slightly amended form after the Labor Government was re-elected, and passed without amendment, becoming the *Mental Health Act 2007*.

The *MHA Review Report* also stated that another review would be undertaken concerning the administration of the Mental Health Review Tribunal and forensic provisions of the *MHA 1990* (the *Forensic Review*) by a task force convened to further examine and consider options for reform. The *Forensic Review* outlined the current law and identified options for reform. Consultations were undertaken with staff, patients and other interests in the forensic mental health system (James, 2007: 2–3). Fifty formal submissions were received from a range of people and organisations.

The *Forensic Review* reported that the submissions had identified a range of problems with the system of executive discretion, and in particular, difficulties caused to patients, carers and victims by the lack of a formal and transparent decision-making process. The *Forensic Review* recommended a specialist division within the Mental Health Review Tribunal replace executive discretion. The report also made other recommendations regarding detention, care, treatment and release of forensic patients, and specified that victims should have a role in the process. The government accepted a majority of the recommendations of the *Forensic Review*, and the *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* was subsequently enacted, finally completing the *MHA 1990 Review* after more than four and a half years.

Key features

A number of features of the *Mental Health Act Case Study* suggest some key factors relating to the ability of the general public and disadvantaged people to participate in law reform. In particular, mental health law is one area in which proposals for reform tend to be tested through public and stakeholder consultation.

Public consultation processes used for mental health law reform have, however, generally adopted a one-size-fits-all approach of inviting written submissions in response to discussion papers and exposure draft legislation. In this case we found that while extensive opportunities for public participation were provided, those opportunities had particular time, resource and literacy demands which are significantly more suited to, and accessible by, some sections of the community.

The people and organisations who participated in the *MHA 1990 Review* were described as being the 'standard stakeholder groups' plus 'maybe a dozen, but that's a lot' of forensic patients, as well as an assortment of individual consumers, carers and clinicians (government officer). The stakeholder groups were mainly peak body organisations, consumer and carer organisations, health professional associations, victim of crime groups, advocacy groups, service providers and other professional associations.

The materials and consultation techniques employed in this case were identified by all our case informants as involving a relatively sophisticated level of legal, policy and information communication skills, and as being both 'legalistic' and challenging. The *Exposure Draft* was particularly challenging as it had a much shorter consultation period and had, according to an informant, a peculiar legislative form that was significantly more difficult for non-lawyers to interpret and analyse. Additional challenges, associated with the timeframe and legalistic nature of the *Exposure Draft*, appear to be reflected in the significantly fewer submissions which were made (50) as compared to the number of submissions received for the discussions papers (more than 300).

People with a mental illness are arguably some of the most disadvantaged and vulnerable people in the community. When questioned about their ability to participate in the *MHA 1990 Review*, our informants identified the nature of mental illness as being a primary and overwhelming constraint on participation, particularly as mental illness may periodically affect a person's capacity to participate in activities such as law reform (government officer). People with a mental illness were identified as having been able to participate in the *MHA 1990 Review* in three main ways (government officer):

1. Through the public forums held near people's homes or in facilities they were familiar with and which enabled their direct participation in the consultation process.

2. Through any group or organisation that they were involved with, or that they get support from, that was making a submission.
3. By accessing the discussion papers and making a submission, although in this way their situation would be no different from that of any other member of the community.

All our informants identified consumer, service provider, advocacy organisations and peak bodies, especially the MHCC and NCOSS, as important avenues through which consumers were able to participate, or were assisted to participate, in the *MHA 1990 Review*, although an informant cautioned that representation is not the same as participation (non-legal CSO).

Given that mental health legislation is foundational to the framework for the operation of the mental health system, periodic and ongoing review of the legislation is likely, particularly given evolving views of consumers, carers and clinicians about mental health issues and service needs.[76] In the following chapters we examine a number of features of this case, including the ability of individuals and stakeholder organisations to access and analyse discussion papers, exposure drafts and make written submissions.

4.6 Lessons from case studies

Taken together our case studies suggest a number of features affect how law reform occurs and public and stakeholder participation opportunities.

An important feature of the *Boarders and Lodgers*, *Mental Health Act* and *Civil Procedure Act* case studies is how the particular circumstances affected the emergence and formulation of the reform proposals. In both the *Mental Health Act* and *Civil Procedure Act* case studies events prompted the government to invest significant time and resources in engaging stakeholders when formulating new legislation. In contrast, the wider economic and political circumstances in the *Boarders and Lodgers Case Study* contributed to government resistance to changing the status quo of the rights and responsibilities of boarders and lodgers and their landlords.

Variability in law reform processes among our case studies suggests that law reform is complex: the process for one issue may be very different from that of

[76] For example, in debating the *Mental Health Bill 2007* mental health law reform was described as a complex public policy task where thorough consultation was essential and was a matter that 'we will need to return to in the future' (Tebbutt, Hansard, Legislative Assembly, 29 May 2007: 382).

another. Our case studies further suggest, however, that some types of issues or areas of law tend to follow established patterns.

In both the *Bail Amendment Act* and *Mental Health Act* case studies we found well-established patterns in how law reform occurs. Bail law reform proposals tend to be formulated wholly within government and with little or no consultation outside of legal professional associations. In contrast, mental health law reform is characterised by periodic in-depth public consultation. The patterns of bail and mental health law reform may represent two ends of a consultation continuum in law reform, and it may make more sense to talk about 'law reform processes' rather than a single process.

Key factors affecting law reform processes appear to be the wider political context and the nature of the stakeholder interests. The *Bail Amendment Act Case Study* was identified by informants as having a high public profile and as being significantly more 'political' than reforms in the *Civil Procedure Act Case Study*. Indeed, an important feature of the civil procedure reforms was the apolitical nature of the issue and how stakeholders came together to work through the reform. In both cases the government convened working parties during pre-parliamentary formulation. Unlike the working party convened for the civil procedure reform, the inter-agency governmental working party convened for bail reform did not include any non-government participants. The process established by government for pre-parliamentary formulation is therefore critical to the nature of public and stakeholder participation opportunities.

A particular law reform issue may have multiple consultation processes. The *Bail Amendment Act*, *Mental Health Act*, and *Boarders and Lodgers* case studies all illustrate the reiterative and repetitive nature of some law reform, with issues being repeatedly considered at either the same or across other stages of the law reform cycle.

Our case studies also suggest that different law reform cases may have different implementation processes. Whereas reforms in the *Acceptable Behaviour Agreements Case Study* needed to have policy and procedures developed outlining how the Department of Housing would use *ABAs*, the reform in the *Bail Amendment Act Case Study* was implemented immediately through police and courts applying the new legislative provisions. The *Mental Health Act* and *Civil Procedure Act* case studies on the other hand afforded stakeholders

with opportunities during pre-parliamentary formulation to consider how the reform would be implemented.

Public consultation at the pre-parliamentary stage appears to affect parliamentary formulation. The proposed reforms to the *Civil Procedure Act* and *Mental Health Act*, both involving extensive public and stakeholder consultation opportunities, were subsequently passed without amendment. In contrast, in those cases lacking a public consultation process (the *Bail Amendment Act* and *Acceptable Behaviour Agreement*), parliament received and considered stakeholder representations opposing or proposing change to the government's legislative proposals. This suggests that where government undertakes public consultation during formulation, parliament may be less inclined to make amendments, particularly where the proposed reforms are being supported by stakeholder organisations.

In our case studies we found a pattern of particular types of people who are more likely to be affected or more likely to be 'subjects' of unintended consequences of law-making. Where law reform may have wide or general application, it appears from our case studies that disadvantaged people — particularly people with complex needs — may be disproportionately affected by how one-size-fits-all laws are applied to them. People with a mental illness for example were potentially affected in each of the *Mental Health Act*, *Acceptable Behaviour Agreements*, *Boarders and Lodgers* and *Bail Amendment Act* case studies. As we saw with the *Acceptable Behaviour Agreements Case Study*, unless general legislation applying to all public housing tenants considers the particular circumstances of people with a mental illness, people with a disability, and especially people with multiple disadvantages, the legislation is likely to have unintended consequences in how it is applied.

Another common theme in our case studies concerns the way in which law-makers (government and parliament) seek to strike a balance between competing sets of stakeholder rights or interests. As a consequence, there are often contested views about what or how competing rights or interests should be appropriately weighed and balanced, making law reform an inherently political activity. Public and stakeholder consultation enables stakeholders to provide information and supporting evidence about how particular groups or interests are affected by law, or may be affected by its legislative reform. It also provides opportunities for government and other stakeholders to critically analyse and test different stakeholder claims about the likely impacts or consequences of change.

Our case studies suggest that law reform is not a singular process or phenomenon, although it does involve decision-making at different stages. Variability in the law reform process has two important consequences. First, participants' knowledge, understanding and expectations of law reform are likely to be partial or fragmented, with different stakeholders having particular knowledge and experience of how the law operates and/or how particular people or interests may be affected by its change. Importantly, this is information which may not be available or well understood within government. Secondly, experience and understanding of how law reform has occurred for one issue may not be informative of how it may occur in another, although experience of multiple instances is likely to add to participants' accumulated knowledge and experience of law reform. Participants with greater knowledge and experience may therefore have greater access and capacity to make use of participation opportunities.

The remainder of this report draws on data across all our case studies as well as other data, to examine the systemic features of law reform and the ability of individuals and stakeholder organisations to exploit and make use of participation opportunities.

5 Law reform processes and participation opportunities

A wide range of factors influence the ability of people to participate in law reform, with many arising from how law reform occurs. As described in the previous chapters, there is no single standard law reform process. Instead, these processes appear to vary in terms of timing and timeframe, the stage of the law reform cycle, and the institutions and stakeholders involved. The way any one instance of law reform unfolds affects public or stakeholder participation opportunities.

In this chapter we draw on interviews with informants involved in our case studies to explore the factors which influence how issues become the subject of, and progress through, a law reform process, with a particular focus on how these factors affect participation opportunities. We start by exploring two key and overriding themes which informants identified:

- executive dominance in law reform and
- the broader political context.

As a consequence of these overriding influences, there are features of law reform which significantly affect participation opportunities:

- timing and timeframes of law reform
- the unpredictable nature of law reform processes and
- the volume of law-making.

We explore each of these features in turn, and conclude this chapter by exploring the consultation practices routinely undertaken in law reform.

5.1 Executive dominance in law reform

Law reform is a governance activity and executive government has the prerogative to determine its legislative agenda. Unlike other law-making institutions, the executive has a central role across all stages of the law reform cycle. Where the process is at arm's length from government, such as that undertaken by an advisory body or a parliamentary committee, government retains its prerogative to act on recommendations or not. As a parliamentary informant noted about parliamentary inquiries, executive government is not only a major stakeholder in law reform, it also determines both its process and outcomes:

> *... the executive outside of the Cabinet will in a sense get two bites of the cherry here ... you've got the ombudsman, the ICAC, the Department of Health, the police ... all making submissions to the parliamentary inquiry. The parliamentary inquiry then comes up with a range of recommendations ... That then goes to ... the Cabinet Office. All those bodies then feed into the Cabinet Office, without the questioning which occurred in the parliamentary committee process. So quite often they get the second bite at the cherry, and what comes out the other end quite often will have no relationship to what the committee came up with*. (Parliamentarian)

The dominance of executive government over law reform extends to determining whether the public or stakeholders will be consulted, and if so who will do the consultation (non-legal CSO). This section examines how executive decisions affect public and stakeholder opportunities.

Setting law reform priorities

A consequence of responsible government is that the executive has power to determine which issues shall be the subject of law reform as well as the extent to which the issue is to be subject to reform:

> *Government can make and unmake any law. That's our democratic system.* (Non-legal CSO)

> *... the government's the government — government determines its priorities ...* (Legal CSO)

> *... once it becomes an issue where there's possible legislation or developing a legislative proposal, it's entirely up to the government. Basically the thing has to go through Cabinet in order to become legislation ... it's the Government who calls the shots*. (Government officer)

Informants reported that raising an issue onto the government legislative agenda — particularly from outside government — is challenging. The *Boarders and Lodgers Case Study* is an example of such an issue, where informants suggested that proposals for legislative protection for boarders and lodgers failed to pass the internal scrutiny of the cabinet process (parliamentarian). Informants also noted that influencing the law reform priorities of government was particularly difficult because no legislation exists on the issue:

> *... it's a lot more difficult than saying, 'Okay well there is legislation but it just needs to be amended, for various reasons.' Because you're suggesting to the law-makers that, 'hey you've left this big gap'. And that's obviously going to be a lot more difficult ... because you're starting from scratch ... . Convince us why we need it. I think that if there is legislation there then there's already an understanding that there needs to be legislation. Whereas if there isn't, then it's like ... why do we need legislation? We've survived this long without it ...* (Legal CSO)

Government's procedural requirements for the emergence and formulation of legislation, including the requirement to justify the need for legislation, were noted by an informant as making it harder for previously unlegislated issues to be recognised as a law reform priority:

> *... the current focus on getting rid of unnecessary regulation and so on could very well mean that the process between identifying the issue and something actually happening ... the middle bit where you're assessing the different options and all the rest of it ... will just take forever ... it could really make that particular process lengthen out a long way while you're convincing all the different gatekeepers that something actually needs to be done …* (Government officer)

Informants also suggested that proposals for legislative protection in the *Boarders and Lodgers Case Study* failed because the issue was not found by government to be of sufficient priority:

> *It's a simple answer to why there's been no change to boarders' legislation — because the government does not want to do it ... [it] just wasn't enough of a priority.* (Non-legal CSO)

Government discretion about what is and is not subject to law reform means that participation will usually involve either establishing a convincing case to government concerning the need for legislation (bottom-up participation),

or else responding to legislative reforms suggested by government (top-down participation).

Determining mechanisms for law reform

Executive government determines the methods by which law reform issues are investigated, formulated, implemented or reviewed. Glanfield (2005: 291–292) for example, noted that the executive is ultimately responsible for deciding and managing the policy and law reform process, including the outcome sought, the extent of consultation required, who should be consulted, who will advise and who will develop any policy options and solution, the timeframe, the reform outcomes, and the strategy for implementing those reforms.

Our case studies indicate that the mechanism chosen to reform the law has significant implications for participation opportunities, affecting who is involved, whether consultation will be held, and also its timing and timeframe. For instance, a government informant in our *Civil Procedure Act Case Study* reported that establishing the Working Party and giving it time to systematically work through reform options was:

> *... a really invaluable forum because you've actually got the benefit of more time to sit and thrash issues out. And you can actually debate things and work out whether or not an idea is good or not.* (Government officer)

Through the Working Party, invited stakeholders had a say in the scope of the reforms and how they would be implemented.

This mechanism is in stark contrast to that adopted in the *Acceptable Behaviour Agreements Case Study*, where the government announced its intention to reform the law only shortly before that legislation was introduced into parliament without any external public or stakeholder input. As the *RTA Bill 2004* went through parliament, stakeholders, through members of parliament, were able to identify a number of possible unintended consequences of the proposal.

Government decision to internally formulate the legislation in that instance significantly changed the nature of opportunities for non-government participation. One of the first things the department did during implementation was to convene a stakeholder reference group which enabled stakeholders to suggest how the legislation could be best implemented (legal CSO). As our informants noted, instead of being able to have an input about 'what' would be

formulated, stakeholders were limited to considering 'how' a legislation could best be implemented after the event (legal CSO; non-legal CSO).

The differences in our case studies illustrate how mechanisms selected by executive government determine participation opportunities. In particular, opportunities that arise early in the law reform cycle, during pre-parliamentary formulation, provide participants with greater opportunity to have a say about whether and what law reform is an appropriate policy response, whereas opportunities post-formulation primarily involve participants in a different question of how particular legislation might be applied.

Discretion to consult

The executive's decision to consult varies on a case by case basis, and until only recently there has been no whole-of-government consultation guideline or manual (government officer). The recent *Guide to Better Regulation* outlines the New South Wales Government's consultation policy, which aims to promote consistent consultation practices and highlights some of the factors to be considered by public servants when deciding whether or not to consult (BRO, 2008).

In some circumstances, consultation may consume too many resources and too much time relative to the scope of the issues, and the benefits of obtaining input from particular stakeholders such as disadvantaged people or their representative organisations, have to be balanced against the additional cost of reaching out to those communities, particularly as the costs are borne by taxpayers (government officer).

Generally, government seeks to ensure that law reform has the best possible chance of being accepted in order for it to work, and including stakeholders in the process can be critical to maximising the efficacy of legislation (government officer). For example stakeholder consultation processes involving exposure draft legislation was seen as being a 'very useful test' of how the draft legislation reads, and also provides government with an opportunity to iron out operational issues (government officer).

However our government informants also identified a number of other factors which make consultation less likely. Circumstances involving public crises, emergencies of state, or threats to state security often preclude public or stakeholder consultation, as government is expected to respond swiftly in the public interest (government officer). For instance legislation increasing police

powers following the Cronulla riots was conceived, formulated and passed by the parliament in five days, leaving little scope for external consultation (government officer).

Importantly, informants identified executive discretion to consult as also being affected by broader political circumstances:

> *... if certain things are done for reasons of politics, the government of course isn't going to want us to be out there putting around their policies because they may well be developing them for an election or announcement, or something like that. So there might be very many reasons why we do or don't consult*. (Government officer)

Informants reported that government may consider public or stakeholder consultation to be too controversial, risky or difficult to manage (non-legal CSO; legal CSO). Indeed we found our informants routinely characterised participation opportunities in terms of the surrounding political circumstances, such that it was often difficult to divorce the nature of the consultation opportunity from this political context:

> *... when government wants to do something and they're quite determined to do it, and their advisors in the Department tell them to do it, but they know it will bring a negative response, well then they don't seek any consultation because they don't want it ... The only time they tend to put [consultation documents] out ahead, it's either because they're genuinely seeking community response, they're testing the waters, or they don't really want to do it anyway, so they want to get a lot of negative response ...* (Non-legal CSO)

Our data suggests that executive discretion on whether and how to consult in law reform tends to be 'elastic' and depends on a number of factors, and this elasticity in turn affects how opportunities to participate in law reform manifest:

> *... depending on the nature of the project the government will have different consultation strategies ranging from a long term consultation which may initially involve for example say a Law Reform Commission review then might move on to an issues paper, then a draft Bill for exposure, and then the Bill being introduced into parliament. That's an example of a very consultative process ... to something which hits the parliament one day and we know bugger all about it.* (Legal CSO)

Control of parliamentary formulation

As law reform issues move to the public forum of parliament, executive dominance continues. We demonstrate this by an analysis of the origin and outcome of all Bills that have been successfully passed by the New South Wales Parliament.

We examined all of the Bills introduced in the New South Wales Parliament during the calendar years 2002 to 2006 and noted whether it was:

- a government-sponsored or private member's Bill
- an amending or new Bill
- tabled in the Lower (Legislative Assembly) or Upper (Legislative Council) House and
- whether it had an exposure draft.

We also looked at the outcome of the Bill and the length of time, in calendar days, from the date it was first tabled until its resolution.[77]

Source of Bills

The overwhelming majority of Bills introduced in the New South Wales Parliament during 2002–2006 were government-sponsored (78% of N=724) rather than private members' Bills. Most originated in the Lower House and were amending (74% of N=724) rather than new Bills. These trends did not differ significantly between years and so this data is combined to report aggregate trends for this period. There were relatively few exposure draft Bills — a total of 16 in the five year period, comprising only 2 per cent of the total number of Bills.

Notably, of the total number of Bills introduced by government, 75 per cent were amending, indicating that a high proportion of government legislation sought to amend or reform existing legislation (for the distribution of government-sponsored and private members' Bills that are new or amending, see Appendix 5.1). This finding suggests that most law-making stems from within government and involves amending or refining existing legislation.

[77] Note this data is an under-representation of the volume of law reform activity given that not all law reform issues considered by government actually result in a legislative proposal.

Outcome of Bills

The overwhelming majority of Bills introduced into parliament were subsequently passed and assented (83% of total). Government-sponsored Bills however accounted for nearly all of the legislation made by the New South Wales Parliament (98.5%). As indicated in Table 5.1 below, 96 per cent of all Bills introduced by government were given assent.

When we consider that government-sponsored Bills account for most of the Bills introduced in parliament, we found that nevertheless government Bills were significantly more likely to be assented than private members' Bills.[78] We found that private members' Bills can and do end in legislation — there were nine during the years 2002 to 2006 — however these comprised only 8 per cent of all private members' Bills.[79]

Table 5.1: Sponsorship by outcome of Bill

Outcome of Bill	***Private Member*** *Number (and %) of total private members' Bills*	***Government*** *Number (and %) of total government Bills*	***Total*** *Number (and %) of total Bills introduced*
Assented	9 (8%)	592 (96%)	601 (83%)
Lapsed	11 (10%)	1 (0.2%)	12 (2%)
Negatived	41 (38%)	0 (0%)	41 (6%)
Withdrawn	1 (1%)	1 (0.2%)	2 (0.3%)
Discharged	5 (5%)	5 (1%)	10 (8%)
Lapsed on prorogation prior to election	40 (37%)	18 (3%)	58 (8%)
Total	**107**	**617**	**724**

We used logistic regression analysis to examine the contribution of various factors to the outcome of Bills introduced in parliament. In particular we looked at the extent to which sponsorship of Bills (private members' or government-sponsored), type of Bill (amending or new), House of origin, and the election cycle,[80] predicted the outcome of the Bill (that is, whether it was assented or not).

After removing those factors which did not appear to independently contribute to the explanation of the outcome of the Bill, our final regression model indicated that the sponsorship of the Bill and the election cycle each

[78] Likelihood Ratio $\chi^2(5)=417.6$, p=.000.

[79] Instead, the majority of private member Bills were either negatived (that is defeated by a parliamentary vote in the House on Second or Third Reading) (38%), lapsed on prorogation of parliament prior to election (37%), or simply lapsed (10%).

[80] A dummy variable was created, where if the date of introduction of the Bill was in the period 12 months before the election of March 2003 or March 2007, it was coded '1', and otherwise coded '0'.

significantly predicted and accounted for 42 per cent of the total variation in outcome of the Bill (see Appendix 5.2).[81] When a Bill is government-sponsored or introduced 12 months before an election, it is significantly more likely to be assented.

These findings demonstrate the dominance executive government has over the legislative business of the New South Wales Parliament, and reflects our system of responsible government. Although parliamentarians not members of the party forming government may be avenues for highlighting particular law reform issues, executive support and sponsorship of legislative reform proposals is necessary to achieve law reform (that is, unless the government of the day is a minority government).

Parliamentary formulation times

The time it takes for Bills to pass through parliament — that is, time in calendar days from its introduction to its resolution — was found to be heavily skewed. As such we used the median rather than average value of time taken, to indicate the duration of parliamentary formulation of legislation.

The median time taken by parliament to resolve Bills was 36 calendar days, although this ranged widely from as short a resolution on the same day the Bill was introduced, up to 1152 calendar days. The majority of Bills however (up to the 75th percentile) took up to 78 calendar days or less (equivalent to 2.5 months or less) to resolve in parliament.

We undertook a multiple regression analysis to look at the extent to which sponsorship of Bills (private members' or government-sponsored), type of Bill (amending or new), House of origin, and election cycle[82] contributed to parliamentary formulation times. We found that both sponsorship of Bill and parliamentary House of origin each significantly contributed to variations in parliamentary formulation times, and together accounted for 31 per cent of the total variation in parliamentary formulation times.[83] Bills that are government-sponsored or originate in the Lower House have significantly shorter parliamentary formulation times.[84]

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81 Cox and Snell $R^2 = .418$, $\chi^2(5)=392.240$, $p=.000$.

82 A dummy variable was created, where if the date of introduction of the Bill was in the period 12 months before the election of March 2003 and March 2007, it was coded '1', and otherwise coded '0'.

83 $R^2 = .307$, $F(2, 720) = 159.684$, $p=.000$.

84 For details of the regression model, see Appendix 5.3.

Our analysis of the source, timing and outcome of Bills is an indication of the extent to which government dominates the legislative process in parliament, and is consistent with findings elsewhere. In his study, Sawer (1976: 118–120) reported that legislation and law-making was controlled by the executive arm of government for a range of reasons including that it controls nearly 100 per cent of the time in parliament in which mostly government Bills are considered and the time available for consideration of legislative proposals is severely limited by prior commitments, including recurring financial business and amendments arising from suggestions of the public service and statutory corporations. Review and scrutiny of government operations and political debate further restricts time for consideration of legislation, and government has electoral commitments and policies which invariably have priority over other proposals for reform.

Importantly, Sawer (1976) indicated that a 'good deal' of political skill and knowledge of particular issues is likely to be required to successfully put a law reform idea to executive government, as a proposal will have to compete with other proposals and the ongoing and considerable business of government and parliament.

Our data also suggests that once government-sponsored legislative proposals reach parliament, the timeframes for resolution are usually relatively short. Therefore any participation opportunity that arises during pre-parliamentary formulation is likely to be important. In the absence of such opportunities, there may be limited opportunity to participate through members of parliament.

Implementing reform

Bureaucratic decisions and policy can affect how legislation works in practice, and executive government may extend opportunities to the public and stakeholders to influence how legislation is implemented.

A government informant contended that implementation is where 'the rubber hits the road' (government officer) and legislation takes on practical meaning, with implications for those people who are directly affected. At this stage government may decide a multi-stakeholder implementation committee is warranted to ensure that legislation operates as intended, such as the MHAIMC in the early years of the *MHA 1990*.

Conversely, informants in our *Acceptable Behaviour Agreements Case Study* reported that the bureaucracy 'wasn't keen on the idea' of *ABAs* (non-legal

CSO; legal CSO), and suggested that a lack of bureaucratic support for the scheme led to it not being implemented (individual; individual).

Government dominates all stages of the law reform cycle, and significantly affects public and stakeholder participation opportunities.

5.2 Political context

The decisions of executive government are shaped by the broader political context. As one of our informants with significant law reform experience inside and outside government observed, textbook understandings of the law reform process:

> *... tend to avoid the crass political reality. And at the end of the day that's the prime motivator for why things work as they do.* (Legal CSO)

An important complicating factor is that the 'crass political reality' — the wider political context of law reform — is shaped by a variety of factors which together make law reform a highly variable activity. Our data suggests a number of features of the political context, including public opinion, the nature of affected interests, and parliamentary and party politics, all influence both the law reform process and opportunities for participation.

Public opinion

The profile and perceived public consensus surrounding law reform issues affect political responses to them. An important intermediary in this process is the media, which both reflects and shapes public opinion. For instance the media was consistently identified by many informants as a primary source of public information about political and law reform issues:

> *I think the general public, as a whole, are almost entirely dependent on the media, finding out what's happened ... to get a feel for what's going on ... whether that's television, radio, or print media.* (Legal CSO)

Informants also identified that media coverage of issues affects political perceptions of what the public wants (legal CSO; member of government advisory body). Researchers elsewhere have noted how media and public opinion affect political agendas, including the law reform agendas of governments (see Dearing and Rogers, 1996).

Informants identified both public opinion and law-makers' perceptions of what the public expects of government, as being key drivers of law reform.

Together, they can 'tip' an emergent issue onto the government's legislative agenda, and affect the law reform process:

> *... one of those generators of change in the law is public outcry.* (Parliamentarian)

> *[What makes laws change?] ... when there's enough cry or dissent from the community ... [when] voices for change are really overwhelming from different areas ... [or] there's been some crisis ...* (Non-legal CSO)

Informants suggested some types of issues are more liable to attract public concern than others. For example law and order issues were identified as arousing a great deal of public interest (legal CSO):

> *... taking criminal law as an example, because the whole community is affected, because it's such an area of interest, because everyone's got a view on it, that then makes it a major political issue*. (Legal CSO)

Those issues more prone to public attention and concern were opined as being more likely to become subjects of law reform, as well as subject to reactive law-making. Informants for our *Bail Amendment Act Case Study* characterised law and order reform as tending to be driven by particular high-profile incidents widely reported in the media:

> *... a lot of the law and order stuff is obviously a knee-jerk reaction to ... the press ... whether it's toughen the bail laws or ... mandatory life imprisonment.* (Parliamentarian)

> *I mean generally law and order type laws are changed ... usually ... in reaction to a particular incident or particular media outcry about something.* (Legal CSO)

Many informants also identified numerous instances where perceptions of a public clamour for government 'to do something' directly led to law reform:

> *... change is caused by basically people jumping up and down ... it's caused, when there's a political problem for somebody ... If there's bushfires and peoples' houses are burning down, there's a political problem for the government because they're saying, 'Where were the services to protect us when our house burnt down?'* (Non-legal CSO)

While some issues are high profile, others are less so and do not compel public interest. They are reported as being more difficult to raise onto government's legislative agenda (legal CSO; legal CSO). Informants suggested the issues in

the *Boarders and Lodgers Case Study* primarily affected only three inner-city Sydney electorates and involved issues that are 'not very sexy' nor of concern to a significant or influential section of the community (legal CSO):

> *... often, if the Government sees that there's no particular electoral gain to be garnered ... it won't act. You know, why should it? If it's just going to cost it more money and sometimes it'd prefer to leave things, not to draw attention to things ... the Government says, 'Well why, if there's a group out there, they're not sufficiently visible within the community. Why do anything?'* (Parliamentarian)

Issues attracting limited public interest, which may affect disadvantaged people and have less political currency, require 'champions' within government to become subjects of law reform:

> *... the trouble with anywhere in the social policy area is it tends not to, unless it's something like child abuse matters, it tends not to be a very sexy political issue ... it actually is one of those issues where it requires a politician or Cabinet Minister to go in there because they've got a personal bee in their bonnet. You know, it's an ideological thing rather than a populist thing. There's no political points to be gained.* (Parliamentarian)

Our case studies suggest that different types of issues are likely to have different 'tipping' points in law reform which depend on the profile of the issue and the stakeholders affected. Issues attracting higher community concern, such as repeat offenders or law and order, appear to have lower tipping points for the legislative agenda. Other issues, particularly issues affecting less visible sections of the community, appear to involve higher thresholds or may need to incubate longer and build to a particular point before legislative action is taken.

As an example, mental health has been the subject of slow and incremental law reform, as mental illness has been demystified over time and has become a subject of broader public concern. A number of informants identified that the impetus for the review in our *Mental Health Case Study* stemmed from widespread concern over a perceived 'public crisis' in the provision of mental health services:

> *... what got it on the agenda was the crisis in service provision*. (Non-legal CSO)

> *It's just become so prevalent ... with the Richmond Report, the closing of institutions, the turfing of so many people onto the streets, the development of jails as de facto hospitals, mental institutions, the spread of drug addiction*

> *... It's now a problem in everybody's face. There can't be anyone who doesn't have a relative, whether it's a grandchild or a nephew or a niece, who hasn't had problems.* (Parliamentarian)

> *... it's all incremental ... there has definitely been incremental change.* (Non-legal CSO)

These observations suggest that as the public profiles of issues change over time, so do their tipping points before becoming subjects of law reform. Issues which come to public profile in a sudden and spectacular way may prompt government into action, while issues less visible to the broader community may need longer to evolve in the public domain before becoming candidates for legislative action.

An informant in the *Boarders and Lodgers Case Study* suggested that law reform, particularly relating to issues affecting disadvantaged people, in part reflects a deeper tension in the public sphere about which social issues should have priority and are deserving of public resources associated with law reform:

> *When you actually start identifying, these are the people who are going to suffer as a result of this lack of protection, then you do strike a [public] chord ... my feeling [is that] most of the Australian electorate's of a general view [that] we're a wealthy society. We've got a certain base of responsibility for these individuals ... But it doesn't translate into any sort of political move or political vote. I mean you know, if the option is a tax cut or money going into support some old bloke in a boarding house well they'll do the tax cut first ... And that's what this group has got to, in a sense, overcome. It's not just a matter of convincing the politicians, it's actually overcoming, to some extent, a deeper societal issue*. (Parliamentarian)

Some types of issues, and particularly those confined to marginal sections of society, may require wider social and political change before they get onto the legislative agenda of government.

Ironically, non-government informants also suggested that law reform sometimes works best outside of the public glare where there is less political concern as to perceived public opinion, and there is more scope to reach 'sensible' outcomes, at least with respect to issues affecting disadvantaged people and communities:

> *... there are processes that work, but the ones that work best are often things that are able to take place behind the scenes and not in the full glare of the*

> *media … that may seem a bit contradictory … yet sometimes I think the best processes work where it's not in the full public eye …* (Legal CSO)

Once law reform issues lacking wide public appeal, including many issues that affect disadvantaged people, get onto the legislative agenda they can be subjects of considered proactive reform. For example, fines reform (see Chapter 7, p 233) was described as being not 'particularly sexy … not the kind of thing that's splashed all over the newspapers' (legal CSO) and therefore government was open to considering more reform options:

> *… the fact that it's the kind of issue that is generally not in the media, it means that you can do a lot of work behind the scenes, and that governments can change their policy and make it a bit more, well, try to do things to ease the hardship on disadvantaged people without being criticised too much and without it being a hot potato*. (Legal CSO)

Similarly, a government informant reported that while departments work on a range of law reform topics, it is overwhelmingly the more visible topics, 'the reactionary stuff' which are reported and discussed in the public domain, while more deliberate law reform work which they 'spend years doing' goes unreported (government officer).

In short, public opinion affects law reform in complex ways, and is an important factor affecting whether or not, and if so, how, a particular issue may become the focus of law-making activity. The public profile of an issue can affect law reform processes and participation opportunities differently. High levels of public concern may tip an issue onto the government's law reform agenda, but result in quick reactive law-making with little time for meaningful consideration and consultation. Unless participants know how to 'work behind the scenes', opportunities for stakeholder participation in such processes may be restricted to those that are extended by government or law-makers. In contrast, a lower profile issue may take longer to get onto the agenda, but once on, may result in a more deliberate law reform process with potentially more opportunities for public or stakeholder participation.

Stakeholder interests

An important element of the political context which shapes law reform is the different stakeholder interests involved. A number of informants contended that processes can be straightforward and relatively uncontroversial when fewer stakeholders are involved, such as where the issues affect a defined and discrete target group:

> *... fines [reform] present a nice segue because government's already got a problem. They've got lots of fines that they can't recoup from poor people. So, there's a political reality there that they've recognised that that's never going to be viable so they need to think up a different solution ... there's less stakeholders in that case.* (Legal CSO)

Where stakeholder groups and government agree on the need for reform, consultative processes are more likely to be adopted to determine the objectives of and/or mechanisms for reform. A government informant in our *Civil Procedure Act Case Study* attributed the process and outcome to the fact that the reform objectives in that case study had the general support of all of the stakeholders, and because the issue was:

> *... completely apolitical. Both sides of government support things like this. There's not an agenda with something like this. Everyone wants to make courts easier, cheaper, better to use for people. And not having any sort of political overtones ... by and large the civil side of the jurisdiction people aren't interested in elevating to a political debate.* (Government officer)

Stakeholders who are on an 'equal footing' in terms of resources, ability to participate, and access to law-makers, may be more receptive to a consultative and constructive law reform process (government officer).

Unlike in the *Civil Procedure Act Case Study*, many law reform issues however involve stakeholders with competing interests who come to law reform unequally. Our informants identified a number of instances in which disparities between stakeholders affected government decision-making concerning the process and outcome of law reform. For example a government informant noted that the likelihood of an issue emerging and making it onto the government legislative agenda increases where the interests of key stakeholders coincide with those of government:

> *There are obviously some groups in society who've lobbied effectively for law reform in particular areas ... perhaps their issue is one where the government of the day has found — their two interests have coincided — and so laws have been changed ...* (Government officer)

Another example was provided of a minister 'sitting' on a report and reserving a law reform decision so as not to affect relatively prominent, powerful and resourced interests opposed to changing the status quo (non-legal CSO).

Stakeholders also differ in their ability to provide evidence to support their law reform claims. Informants in the *Boarders and Lodgers Case Study*, for instance,

thought that the government had demanded a higher threshold of 'evidence' and 'proof' to support the claims of some interest groups, but not others. In particular, claims by the boarding house industry were seen as being overwhelming:

> *... their argument always will be industry will disinvest. They're appealing to an economic argument that has ... held sway for a couple of decades in government now. Interestingly, without sufficient evidence …* (Legal CSO)

> *... you've got to overcome this entrenched view ... that you will destroy the boarding house market if you give protection to people resident in boarding houses ... It's either true or it's not. And as far as I can ascertain, there is absolutely no firm data that indicates that that is the case ... that is the great unstated in this economic argument. ... there's a problem getting the data in relation to confronting and overturning this economic argument ... But I don't know how you go about pinning that down.* (Parliamentarian)

Advocates found having to argue and present evidence for the negative — that legislation would *not* result in disinvestment in the boarding house industry — to be too onerous (legal CSO):

> *... we always try to articulate BLAG in that context about just regulation of rights and responsibilities, but it was always tied to a wider debate about the role of boarding houses, affordable housing, investment in boarding houses and those kinds of things ... the biggest crusher of any of BLAG's arguments was always economic arguments and you know we never really had that economic expertise to refute it ... the economic arguments were also about government not wanting to invest in the boarding house sector ... even trying to have a confined debate about just legislative rights ... could not be successfully discussed without talking about the viability of the boarding house sector more generally.* (Legal CSO)

In instances such as the *Boarders and Lodgers Case Study*, the burden of having to make 'a case' for law reform in economic terms is particularly onerous for those most affected by lack of legislative protections.

Bearing the burden of establishing the benefits, as well as countering the anticipated detriments to other stakeholders, was suggested to be a common challenge shared by many advocating for legislative protections for the public, consumers or disadvantaged people vis-à-vis industry, organisations or interests:

> *... often it's the consumer groups who are making submissions about the need for better regulation or introduction of some sort of regulation, who will put*

> *the case, rather than the industry groups who may be arguing that there's too much regulation or the wrong sort of regulation*. (Government officer)

Informants also suggested that government policy bias for cutting red tape may mean that some stakeholder claims are more persuasive than others:

> *... businesses have been given the opportunity to make submissions that say there is too much regulation, there's too much red tape and it's just, often seems to be accepted without a huge amount of evidence to back it up, I'd have to say.* (Government officer)

While stakeholders are affected differently by legislation, not all effects are quantifiable, nor can they be quantified in equally rigorous or persuasive ways. Not only are there different types of 'evidence', there are also different ways of measuring and evaluating this evidence. A government informant suggested that government preference for particular analytical approaches for identifying and measuring legislative impacts can be problematic for some issues and some stakeholder groups. Some impacts, particularly those associated with social justice or equity, may be 'costs' borne by individuals but for which assessment is value-laden, subjective and contestable:

> *... cost benefit analysis is a very difficult tool ... it's often very difficult with consumer type issues to be able to produce something that's so measurable that everyone can see the arguments, so it really can become very subjective. So suggestions to make regulatory impact statements more rigorous can in fact, not act to the benefit of groups like consumer groups simply because more rigorous usually means more facts and figures. More economic analysis, more stuff that's very difficult to apply to their issues. So in the end, they won't get what they want at all because ... they'll say 'you haven't got the evidence'. Because if it comes down to a matter of something that, when you start talking about social justice or social equity ... not everyone's going to agree with that or they'll think there's other ways of achieving it ... So there's an argument for better evidence being provided, but it's the type of evidence and how much weight you put on it and so on that's the difficult one.* (Government officer)

Analytical tools such as cost-benefit analysis, which support evidence-based law reform, may therefore be a better fit with interests or stakeholders with resources to collect and provide information in a form which speaks to government:

> *... we've got this tool for one side but we haven't got it for the other side, but we're expected to come up with an argument that looks at cost and benefits for both sides ... working out benefits and costs to consumers of the marketplace is a very difficult issue ... it's because there are social impacts and a lot of this [impact analysis] is only interested in economic impacts, so it's being able to do an assessment which takes both into account. Or have it accepted that there should be an assessment that takes both into account ...*
> (Government officer)

Some stakeholders will be more adept where there is a preference for evidence that can be costed or quantified in economic terms, and can be expected to have more influence than others in law reform.

Parliamentary and party politics

Parliament is the most public law reform forum. When legislation has been reactively or internally formulated, parliament may provide the only opportunity for interested members of the public to seek to challenge or modify a law reform proposal. As a forum, parliament may also help to draw public attention and pressure to particular issues. Parliamentary and party politics, however, also make parliament the most public and politicised law reform forum. Here, we note some of the ways parliament affects law reform participation opportunities.

Law reform positions adopted by political parties in relation to an issue are influenced by a number of factors such as party factions and strategy, the convictions of individuals wielding influence within the party, and whether or not key marginal electorates are affected (non-legal CSO; non-legal CSO; parliamentarian).

The ability of individual parliamentary members to successfully amend, modify, vote down a proposal, or refer an issue to a parliamentary committee, requires first, the support of their own political party, and secondly, a sufficient majority in the relevant House of parliament (parliamentarian). Where majority support is not assured, parliamentary votes required to successfully pass or amend a law reform proposal are contested, subject to negotiation among political party leaders, and become something of:

> *... a horse trading exercise. And you know with all the sort of pluses and minuses that sort of exercise has, you'll find something totally unrelated to the Bill in question ... [raised] in order to achieve somebody's vote.*
> (Parliamentarian)

Executive government typically dominates the Lower House and its internal party discipline usually ensures it is able to control the legislative process in that House. In contrast, Upper House members will often have more opportunity to scrutinise legislative proposals, for example through parliamentary committee inquiries. A different electoral system in the Upper House reduces the likelihood of government control in that House.

In our case studies we found that parliamentary debates in the Upper House tended to canvass a wider spectrum of issues and stakeholder interests than the Lower House (in particular see differences in debate between these Houses in the *Bail Amendment Act Case Study* in Chapter 4). When government is less confident of political support for a proposal it may adopt a more consultative approach to secure preferred outcomes in parliament.

Although rare, informants' observations on periods of minority government, such as the 50th Parliament of New South Wales, demonstrate how law reform processes are dramatically shaped by changes in political circumstances:

> *... it was very frustrating, but it actually seemed to work fairly reasonably. The government's a lot more consultative, controversial issues would be slowed down for community consultation and all that kind of thing. So it was a more democratic structure in terms of the way government and the community interacted.* (Legal CSO)

> *... that was just brought about by political circumstance.* (Legal CSO)

As reported by one parliamentary informant, executive dominance over parliament and party discipline means that, for the most part, the scope for individual parliamentarians to affect law reform is severely limited:

> *... in terms of actual intervention in the legislative process, we can try to amend things. This is not often successful but we can try ... To some extent what one can do in parliament is very limited.* (Parliamentarian)

Although parliament may be the forum through which the public may first discover or hear about a particular reform, informants suggested that this will often come too late for them to participate:

> *... certainly if you're almost ready to get something into parliament, it's really too late at that point. You can lobby members of the Opposition about changes, but, quite often that's really, it's getting right to the end ... when you're in parliament ... the debate's being had ... your capacity to be able to influence at that point is difficult.* (Government officer)

> *... probably the parliamentary process is the easiest to take part in. It's also ... arguably the least effective. It's got potential to have effect but it's not necessarily going to deliver a result.* (Parliamentarian)

These observations indicate some important primary constraints on the ability of people to participate in law reform. Unless executive government decides to consult the public or stakeholders during pre-parliamentary formulation, people are unlikely to know about the details of a legislative proposal until it becomes public with its introduction in parliament. By this stage however it may be too late to participate and influence law reform outcomes.

We now turn to examine the consequences of the dominance of the executive and the wider political context, for the way in which particular law reform processes manifest.

5.3 Timing and timeframe of law reform

The timing of law reform refers to the particular time in the year, electoral cycle or other timeline during which a law reform process occurs. The timeframe is the period during which a law reform activity takes place. Executive government determines both the timing and timeframes of law reform, including law-making activities undertaken by advisory bodies, through a term of reference specifying the time when bodies are required to report:

> *... if the government wants it to happen they can make it happen very quickly.* (Government officer)

Informants identified the importance that both timing and timeframes in law reform have on opportunities for participation.

Informants noted that the timeframe of law reform activities may be related to how 'political' an issue is:

> *Sometimes the time space between identification and making the law is extremely short, extremely short, and sometimes it can drag on for years before you get to the end of the process. But the same sort of process is always gone through ... I think political issues are a big influence on the timeframe.* (Government officer)

> *... the political nature of the proposal, whatever it is, very often will result in very short lead time if any.* (Legal CSO)

They also noted that the timing of law reform can be affected by how controversial the issues are, as well as the timing along the election cycle. Law-making is noted as becoming more acute during election years:

> *What happens in election years would be legislative proposals coming to try and win votes and that sort of thing.* (Legal CSO)

Some law reform issues may rise to prominence during an election year, while others are postponed to a less politically sensitive time. An informant in the *Mental Health Act Case Study* speculated that decisions relating to the potentially controversial forensic provisions were deferred in the context of a lead-up to the 2007 New South Wales State election because:

> *... they [government] didn't want that as part of an election issue ... So that seems to be politically driven around the election.* (Non-legal CSO)

Many informants report that government regard for public expectations, and its political judgment about what it 'should' do about particular issues, can drive quick, reactive law reform processes that appear (member of government advisory body):

> *... arbitrarily at ministerial whim ... usually they're reactionary policies, or legislation enacted to placate the taxpayer ... it's a political response ... It's not actually done as a response to a problem*. (Individual)

Notably, the greater the 'political priority' or perceived public pressure for a quick and decisive response, the less time there is for participation and consultation about the issue that is the subject of reform (non-legal CSO). This was seen in the *Bail Amendment Act Case Study*, where an informant observed that law and order reform processes:

> *... are not very consultative, they're not very considered. They're piecemeal, they're reactive, they're knee-jerk and they are really unsatisfactory.*
> (Legal CSO)

Longer timeframes for consultation were seen as providing a 'good opportunity for involvement' (legal CSO), and the timeframes of processes conducted by bodies such as the Ombudsman, law reform commissions, or parliamentary committees were identified as being generally appropriate (legal CSO):

> *... where there's a parliamentary inquiry into something ... There's usually quite a long timeframe so that you can actually spend some time really working on your submission. And I think that does offer quite a good opportunity for involvement ...* (Legal CSO)

A cross-section of our non-government informants commonly identified, however, that timeframes in government-led law reform processes tended to be short, making it very difficult for participants to respond adequately (non-legal CSO; legal CSO; non-legal CSO):

> *Unfortunately some of the government inquiries and reports come on so quickly and have such short timeframes for submissions that often there's not enough time to coordinate a response.* (Legal CSO)

> *... they never ever give you enough time to do things. It's always given to you and you've got to do it ASAP. Very rarely do you get enough ... time to study it.* (Non-legal CSO)

Indeed, the need for sufficient time to participate effectively in law reform was a key theme raised by informants in this study.

Short timeframes were identified as also affecting the ability of parliamentarians to scrutinise law reform proposals (legal CSO), and the capacity of bureaucrats and drafters of legislation to formulate legislation:

> *... there's good, intelligent, thoughtful lawyers trying to do their best when they're responding to such things inside government departments. But they're working against deadlines and have to get our feedback and then incorporate what we say and what somebody else says into a draft legislation ... I just don't see how we can get through without making some mistakes along the way.* (Member of government advisory body)

The timing and timeframe of law reform consultation affects whether or not stakeholders perceive the opportunity as being 'real', 'proper', 'serious' or 'genuine' (legal CSO; non-legal CSO). Informants opined that the timeframe gave a strong indication as to whether or not government was serious about receiving and considering stakeholder views, or whether the consultation was a 'sham' or mere formality:

> *... the timeframe is really important and obviously the perception is the shorter the timeframe the government is taking it sort of in the least serious way ... or [they are] less open to ... change their mind ... whereas the ones that have extended timeframes then there's the perception that's more of a genuine consultation.* (Legal CSO)

In some instances informants wondered whether timeframes were deliberately short so that government can manage the political circumstances and preclude stakeholder input:

> *Look I think some legislation is just pushed through really really fast and deliberately so people can't contribute ...* (Non-legal CSO)

Indeed a key finding in relation to timing and timeframes in law reform is the extent to which our informants associated the political context of the issues with how law reform consultation opportunities manifest. As an informant observed, the political context can be the difference between a law reform process that is proactive and deliberative, and one that is reactive and knee-jerk, and this in turn affects opportunities for public participation:

> *... there's sort of a spectrum there, isn't there? There's a well thought through participation process ... That's one end. And then you've got the really nasty, almost tabloid driven responses, and often in the area of law and justice ... that's ... purely politically-driven rather than policy-driven. ... So there's a scale there, isn't there? ... and the challenge we have is that we participate in both ends of that spectrum and probably everything in-between, if it's relevant to our constituency.* (Non-legal CSO)

The highly variable nature of timing and timeframes in law reform processes are characteristic of how these processes are experienced by participants. Both these factors affect participation opportunities because they establish the conditions which determine the ability of interested participants or the public to be involved. In Chapters 6 and 7 we see that short timeframes impact unequally on stakeholders with limited resources for participating in law reform.

5.4 Unpredictable nature of law reform

There is no standard law reform process. Issues may emerge onto the law reform agenda from a variety of sources at different speeds, may or may not reach formulation, and may or may not be implemented or reviewed. Influenced by the range of factors discussed earlier in this chapter, some law reforms go from emergence to implementation within days, while others take years and result in no change. This reality makes law reform difficult to know or predict in any particular instance, and makes participation a challenge, particularly for people outside or unfamiliar with government.

We found that the unpredictability of law reform, reported by our informants, was related to:

- a lack of transparency concerning decision-making
- fragmented and repetitive processes and
- the confluence of other events or factors.

We discuss how these factors can affect participation in law reform.

Lack of transparency in law reform decision-making

The rationale of government law reform decision-making is often not made public. While the formal objectives of a law reform proposal may be outlined in parliament during the Bill's Agreement-in-Principle Speech, how information has been weighed and considered is often omitted. Some of our informants in the *Mental Health Act Case Study* for example, wondered about the motivation or impetus for re-examining particular parts of mental health legislation:

> *So ... okay, it's 16 years. Fine, that's good enough reason to re-look at anything. But section so and so ... why are they changing it? What has actually happened? What is the evidence ... or is it something that's actually just politically expedient at this point?* (Non-legal CSO)

Similarly in our *Acceptable Behaviour Agreements Case Study*, a number of informants speculated about the source and motivation of the proposed amendments (non-legal CSO). Cabinet confidentiality shrouds the reasons for government's law reform priorities, and fosters speculation about motivations for law reform.

Non-government informants expressed particular frustration with trying to understand why government decides *not* to pursue law reform. Such a 'non-decision' may indicate government does not consider the issue to be of sufficient priority, or considers that a pre-existing state of affairs should continue (Bridgman and Davis, 2004: 44–45). Similarly where external advice has been sought, government is not obliged to adopt the advice nor explain why it has not done so (legal CSO; parliamentarian).[85] In the history of the *Boarders and Lodgers Case Study*, lack of public explanation for non-decisions led a number of our informants to hypothesise as to why legislative reform did not proceed.

Some informants complained that they did not understand why certain decisions were made because they are rarely debriefed on the outcome of

[85] In some instances however government may choose to make a formal response to the report containing the advice.

law reform processes (legal CSO; non-legal CSO; member of government advisory body). However, a government informant noted that while debriefing participants would be ideal, it is often not practical:

> *... it's all a matter of ... [giving] everyone an opportunity but, trying to listen, at least to listen to their argument and as far as you can, to say 'yes, we hear what you say but these are the reasons why we may not do what you want us to do'. And that doesn't always happen either, sometimes you just don't get the chance. You don't get the time or it gets into parliament and a whole lot of political processes take over and you don't really get an opportunity to go back and say 'well sorry but this is why we didn't do it'.* (Government officer)

Since advice prepared by public servants is subject to confidential cabinet decision-making, participants may be left wondering and speculating as to what happened. An informant in the *Bail Amendment Act Case Study* noted:

> *... they [government department] call for submissions, but then often you don't hear any more about it. The [review of the] bail and then the repeat offenders [amendment], well where's that gone? We made a submission ... years ago ... And we haven't heard anything about it. ... have they done a report on it, we don't know. So you just don't get back much feedback from that kind of review. Because I guess what they do is they probably prepare a report to the Attorney and then it just goes into the ether. The Attorney gets rolled in Cabinet and that's the end of it ...* (Legal CSO)

Lack of feedback about the outcomes of law reform consultation means that reform processes can at times appear to participants to be inscrutable or to dissipate into 'the ether'. Non-government informants identified that, where participation has involved significant time, work and resources, such inscrutability is very frustrating:

> *... there was a massive number of people that put an incredible amount of time into the review ... but nobody got any feedback, 'thank you for your time' or 'thank you for your submissions' ... it just died ...*
> (Member of government advisory body)

These experiences of law reform reflect the fact that consultation processes are primarily designed to serve the needs of government, rather than those of stakeholders or participants. The task of briefing participants on the progress of particular law reform and explaining how law reform decisions have been reached is not explicitly recognised as being anyone's responsibility. Our data suggests that lack of feedback about the rationale for decisions, as well as the

stage that processes have reached, can make participation in law reform trying and frustrating.

We see in Chapter 6 that lack of transparency about law reform consultation can make people question the worth of participating, and sceptical about the value of future participation opportunities.

Fragmented and repetitive processes

A cross-section of our non-government informants described their experiences of law reform as being fragmented, discontinuous, and/or repetitive. A common observation for example, is that sometimes law reform just disappears:

> *... that does happen in government I have to say, things vanish without a trace.* (Member of government advisory body)

> *... people just never again hear from any bit of the process ...*
> (Member of government advisory body)

A government informant noted that intervening events or changes in the wider political circumstances affect executive decision-making:

> *... sometimes what might have started out with some genuine concern to get all sorts of people's opinions, depending on the politics of the day, the report may languish and never see the light of day. Because circumstances have changed or ministers have changed or governments have changed and they're just not interested in what's been proposed anymore.*
> (Government officer)

These changing events and their impact on government decision-making, however, may not be public knowledge. All that spectators may see of a process is a series of fragmented events which do not appear to follow a logical order, and which may appear to repeat:

> *... 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)

> *... the same issues are raised every time ... the same issues come up in exactly the same way.* (Non-legal CSO)

Recurring processes, particularly those which do not appear to reach an outcome, were identified as exasperating and frustrating for our informants:

> *... you get to the stage where you think 'well what is the point of it?'*
> (Non-legal CSO)

> *... there's a real sense of frustration with ongoing, never ending standards, regulations, whatever it is.* (Non-legal CSO)

Law reform processes that repeat and revisit the same issues with no apparent decision may cause participants to question the government's motivation. An informant in the *Boarders and Lodgers Case Study* noted that that law reform has been 'hovering in the wings for 30 years' and is 'just a time delay' (non-legal CSO).

Delaying a process or deferring an issue to another round of consultation can make participants question the credibility of the process. In the *Mental Health Act Case Study*, some of our informants regarded the postponed decision on forensic provisions to yet another law reform consultation process with some reservation and doubt:

> *We're not sure in terms of the forensic area ... there's this twelve month review ... we're not happy about that, we think it's just being postponed.* (Non-legal CSO)

> *I'm not really sure what to make of that. On one hand doing that may actually concentrate time and attention on that particular issue, which is absolutely required. But on the other hand it's just sort of being delayed further.* (Non-legal CSO)

We found that some types of issues, such as those involving the *Bail Act 1978* or other law and order issues, appear to be particularly susceptible to extensive and repetitive law reform.

Repeated or postponed processes also made informants feel that in order to have their views considered they needed to be 'on tap' and be prepared to 'repeat' their contribution, even where this demands yet more of their time and resources, the alternative being to decline to participate when opportunities rearise.

Informants reported that it is not uncommon for participants to find law reform an alienating experience, where they are being called on to 'serve' government needs when and as required, rather than being included in a process:

> *They're [government departments] forever sending out stuff or changing. And it seems to be tiny little points every time ... it's probably because they're in that cycle and yes, they are up to another little point. But you lose track of the end-point ... You don't feel like you're on the ride with them. I think that's the problem. You just feel like you kind of duck in here and there, and call out your expertise, and they go off and leave you isolated in the process until next*

> *time they need you. You don't feel that you're being included in some bigger process.* (Non-legal CSO)

Lack of transparency in law reform decision-making, combined with the fragmented, discontinuous and recurring nature of these processes, with little guarantee of outcome or closure, means participants are often required to be self-directed, resourceful and resilient.

Alignment of stars

Bridgman and Davis (2004: 38) characterised policy and law reform as occurring when 'a unique aligning of stars' shifts government priorities enough to move it to act on an issue previously considered unimportant, vexed or too expensive. While certain events and factors may contribute to a shift in the political landscape, they are difficult to anticipate.

Law reform is often contingent on contemporaneous events 'lining up'. A government informant in our *Civil Procedure Act Case Study* noted that although the need to reform civil procedures had been recognised and raised by stakeholders for a number of years, reform only eventuated as a result of the alignment of factors such as CourtLink and the findings of the Public Accounts Committee (government officer).

Similarly in the *Mental Health Act Case Study*, an informant noted that mental health reforms appear to have resulted from a confluence of a number of events over a period of time:

> *It's very random ways of making changes to the structure of our laws … A lot of different things coming together at one point.* (Non-legal CSO)

This 'unique aligning of stars' has a number of important implications for public and stakeholder participation in law reform.

First, opportunities for participation may be provided, but the masked and volatile nature of political factors surrounding a law reform issue, and its influence on the reform process, can make it difficult for participants working outside of government to 'read' whether any one opportunity is 'real' or 'meaningful', and is likely to lead to legislative change. Participants therefore have to be realistic about the significance and nature of participation opportunities as they arise, or risk having their expectations unfulfilled.

Nevertheless, the unpredictable and highly variable nature of law reform suggests that participants need to make the most of participation opportunities

that do arise, even if that involves repeated effort and contribution and even if it does not immediately lead to law reform outcomes:

> *... what is useful perhaps is that if a time comes when the political pendulum sort of swings or the cycle changes, then if you want to seize the moment and say 'okay, now is the time to review the Bail Act' or 'now is the time to review', whether it's the Mental Health Act or the sniffer dog legislation or whatever, you can draw on quite a good body of research and say 'look at all these inquiries and reviews and things that the Ombudsman has done. Look at the evidence'. So at least it gives you some kind of evidence and resources for possibly a future campaign.* (Legal CSO)

A strategy of 'seizing the moment' is identified as maximising the chances of an idea being adopted by law-makers if, and when, the stars align:

> *The 'aha' idea whose time hasn't quite arrived, but whose time will arrive in five years when the appropriate people take it up.* (Non-legal CSO)

The seemingly non-linear confluence of chance occurrences combining to trigger law reform was characterised by an informant as being an 'X factor' that is difficult to read:

> *... it's that difficult thing about political cycles and political will and opportunity, I think is really difficult. For me, lots of the issues have remained the same in terms of the client group that I have worked with but there have been differing levels of political engagement and eagerness. So, I think one of the interesting things about law reform processes is that X factor about when something becomes politically viable ... I think that's the big challenge for law reform and policy work ...* (Legal CSO)

Attempting to 'seize the moment' however can make participation onerous and demanding. Informants reported that periodically doing advocacy on a reform issue over a prolonged period of time was tiring, and required passion and commitment to overcome the associated fatigue and frustration:

> *[It] can be really hard ... because it's tiring. To be constantly agitating for something. And so I think things come in peaks and troughs, so you might get a lot of outcry depending on if something's happened ... and you get a lot of voices coming, rising up and yelling, and media attention. And then it will go down again ... It takes a lot of passion too, to keep that interest up. Because it is a very long haul, a marathon. You're running a marathon ...*
> (Non-legal CSO)

The cost of sustained participation over a prolonged period of time can be prohibitive as well as gruelling:

> *... it does feel like groundhog day because lots of the time we were just redoing the work of the past, and we have moments where we do a lot of work around an issue and there would be changes: staff, people would go away or be less active, and then it would be like reinventing the wheel again ... Yeah, it's just that general feeling of exhaustion around the issue.* (Legal CSO)

The extended advocacy in the *Borders and Lodgers Case Study* for example was suggested to have been mainly sustained by 'a few key groups [which are] … keeping it going', and that were maintaining a level of enthusiasm largely based on the strength of their convictions (legal CSO).

There is no 'how to guide' or manual to which participants can refer that covers all law reform and circumstances. For those with less experience and understanding of law reform, its unpredictability is a key constraint to participation.

5.5 Volume of law-making

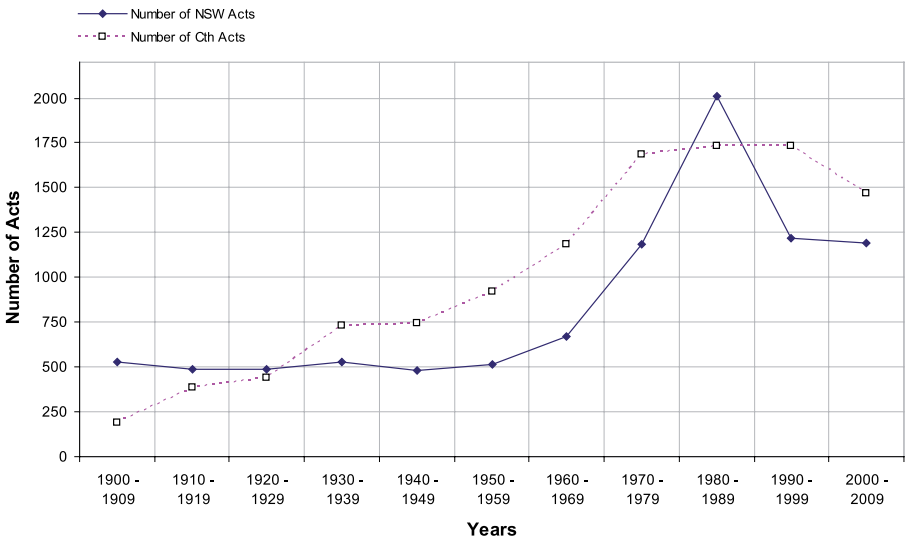
We noted in Chapter 1 the rise in the quantity, length and complexity of legislation in Australia. The volume of law-making in New South Wales affects opportunities for participation and, as we demonstrate below, this volume is increasing. We also report on the impact this volume has on participation.

The number of Acts and their length is one measure of the volume of law-making. The volume of law-making activity, however, also includes myriad contemplated or proposed legislative changes which do not subsequently result in legislative change. Measures of law-making based on the number of Bills or Acts, the total stock of legislation in force, or the average length of legislation, therefore under-represent the total volume of law-making because it does not include those activities which fail to result in legislative change.

That said, counts of Bills or Acts do provide us with some idea of the volume of law-making. Each year, new and amending legislation affecting the people of New South Wales is enacted by both the Commonwealth and New South Wales parliaments and while this activity may not necessarily increase the total stock of legislation in force, it does affect the volume of law-making.

Figure 5.1 charts the average number of Acts introduced and passed each year in the New South Wales and Commonwealth parliaments for the period 1900 to 2009.

Figure 5.1: Number of Acts made in New South Wales and Commonwealth parliaments during the period 1900–2009



Source for Commonwealth data: Figures updated from tables in Tomasic, R (ed) 1979 *Legislation and Society in Australia*, The Law Foundation of NSW and George Allen & Unwin, Sydney, NSW, p.11; and in Bottomley, S and Parker, S 1997 *Law in Context,* 2nd edn, The Federation Press, Sydney, n 100 at p.93); using figures reported in the *Parliamentary Handbook of the Commonwealth of Australia* (Handbook for the Fortieth Parliament), p.12; *House of Representatives Practice 2001,* 4th edn, updated on <http://www.aph.gov.au> website — new edition 2005); and Chronological tables in *Acts of the Parliament of the Commonwealth of Australia*.

Source for New South Wales data: Figures updated from table in Tomasic, R (ed) 1979 *Legislation and Society in Australia*, The Law Foundation of NSW and George Allen & Unwin, Sydney, NSW, p.11, using NSW Parliamentary Counsel legislative database; and Chronological tables in *Statutes of NSW* .

As can be seen in Figure 5.1 there appears to be a relatively steady increase in law-making, as reflected in the number of Acts made in both jurisdictions until the 1980s. In the case of Commonwealth law-making, this increase appears to date from Federation, but plateaus during the 1980s and lessens during this decade.

Law-making in New South Wales on the other hand appears to have remained relatively constant until the 1960s, after which it rises steeply and steadily until the 1980s, when it reduces dramatically to the levels found in the 1970s.

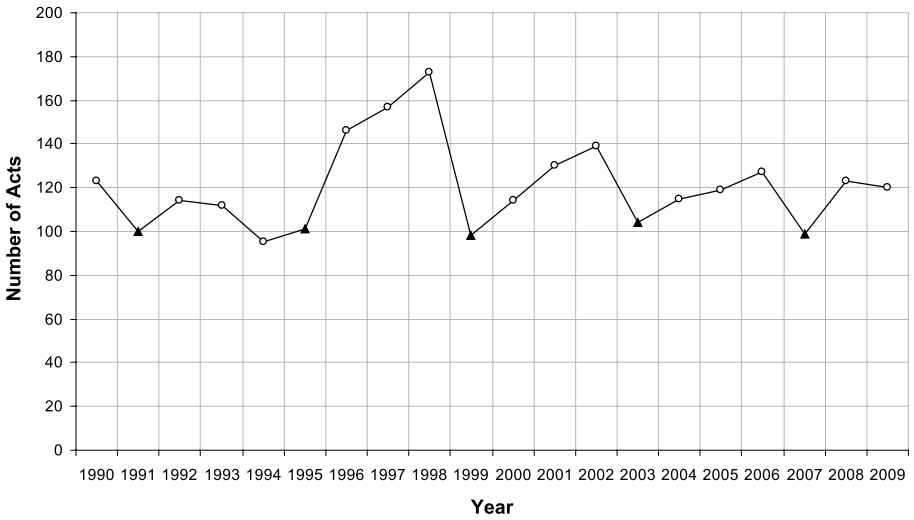
The increase in legislative activity in both jurisdictions leading up to the 1980s has been attributed to a variety of factors (IPART, 2006; Kirby, 2008), including:

- increased expectations on governments to meet social and environmental goals
- development of new technology and associated new markets
- new information about the risks and adverse impacts of certain technology and by-products
- society's reduced tolerance to risk and
- tendency for regulation to build on itself (for example where one piece of legislation leads to unanticipated impacts which may require counter-measures and so on).

The increase in the volume of legislation has given rise to concern about the costs of regulatory compliance, and is a subject of ongoing inquiries and reform programs during the 1990s aiming to cut red tape (Regulatory Review Unit, 1995: 26; IPART, 2006; BRO, 2008), which may in part explain reductions in law-making in New South Wales during this period. We note the lower volume of legislation in New South Wales during the 1990s may also be attributed to the period of the minority Greiner Government during 1991 to 1995, when legislative processes in parliament may have slowed.

When we look at the period 1990–2009 and examine the volume of New South Wales legislation in more detail (see Figure 5.2), the number of Acts made from year to year is seen to fluctuate. Generally the number of Acts is lower in years in which there is an election, in part because of the reduced time that parliament sits and the period during which a caretaker government takes over while electoral votes are determined.

Figure 5.2: Volume of New South Wales Acts per year, for the period 1990–2007



Note: Values denoted by dark triangle (▲) represent number of Acts passed by New South Wales Parliament during election years.

Source: Compiled by searching the NSW Parliamentary Counsel Office's online legislation database <http://www.legislation.nsw.gov.au/>.

It is worth noting that in the years preceding an election, the volume of law-making activity tends to be higher. This trend is consistent with earlier observations made by our informants that the timing of law reform is affected by the electoral cycle. Similarly in periods following an election, the volume of law-making tends to rise, indicative of the political party winning office implementing their policy platforms through legislation.

The number of Acts made also appears to be higher in the years following a change of government, compared to when a government has been re-elected. For example while the number of New South Wales Acts has been steadily increasing over the last 18 years, the number of Acts for the period 1996 to 1998 is markedly higher, coinciding with the first term of the Carr Labor Government. This pattern also suggests that the election process provides an important opportunity to participate in law reform, albeit at an aggregate level and in the context of voting in a general election.

According to Figure 5.2, a median of 117 Acts were passed by the New South Wales Parliament each year between 1990 and 2009[86] — or approximately one Act every three calendar days.

[86] The median value was used as opposed to the average value, as the number of Acts across this period fluctuated and is not normally distributed.

The volume of law-making limits the ability of parliamentarians and the Legislation Review Committee to perform its scrutiny functions (legal CSO). Since 2003 the Committee has consistently requested that the standing orders of both Houses of parliament be varied so as to give it sufficient time to properly undertake its legislative scrutiny function (Legislation Review Committee, 2009: 10). In 2006–2007 the Committee further noted that the New South Wales Parliament has one of the shortest adjournment periods (being the period between the introduction and parliamentary debate of Bills) of all parliaments in Australia (Legislation Review Committee, 2008: 11).

Importantly an increase in the volume of law-making may increase participation opportunities, particularly as government is reported as adopting increasingly consultative practices (government officer; see also Chapter 7). The volume of law-making therefore has time and resource implications for non-government participants, particularly in terms of the pressure to respond to invitations to participate and the fatigue associated with doing so.

In our interviews with informants, the volume of law-making activity was repeatedly identified as being a key challenge to participating:

> *... 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)

Some informants reported that a high volume of requests to participate meant they had to be judicious about what they chose to participate in:

> *... I think almost all the organisations that I've spoken to over the years find getting that balance [right] really tough ... getting that balance between what you need to be doing, because it's important in the context of your agency, your members and your stakeholders, versus what the external environment throws at you, that in the moment you think you should do.* (Non-legal CSO)

> *... we are selective in what we do, otherwise it's simply not possible.* (Legal CSO)

CSOs and other informants identified the volume of law reform consultation and its continuous nature, as at times overwhelming and as a 'never-ending cycle' creating fatigue (non-legal CSO):

> *I think our organisation, I'd have to say we've got it. I know individually I am in that rut ... [it] has become almost unmanageable in recent times. There probably is this fatigue around it.* (Non-legal CSO)

> *... you can only go back to the well of consultation so many times and, depending upon the complexity of an issue three times maybe would be top weight, because after that you're starting to annoy people.* (Individual)

Some social problems or groups of people, including public housing tenants and Aboriginal people, also appeared to our informants to be over-researched, interviewed and consulted (non-legal CSO). Particularly where consultation does not appear to lead directly to reform, repeated consultation adds to the frustration and fatigue:

> *They're fed up with it. Because they have been consulted, insulted ... every -sulted that you can think of, and the government, the departments actually recognise it now ... There's that many miles of reports and things, and no-one reads them, no-one takes any notice of them.* (Individual)

The volume of law-making and law reform consultation, combined with lack of transparency in government-led processes and decision-making, can make both the law and the law reform system more confusing for people, and can potentially make participation in law reform a more complex undertaking. The greater the volume of law, and the more frequently it is changed, the harder it is for people to know what the law is, let alone what may be happening with its reform.

5.6 Consultation practices in law reform

Whether the general public or stakeholders have an opportunity to participate in law reform largely depends on whether law-makers extend these opportunities to include them in their law-making activities. Here we look at how opportunities to participate are affected by the consultation practices of advisory bodies and government agencies.

Advisory bodies

Our data suggests law reform consultation is a fluid practice which varies from issue to issue, and differs depending on the advisory body involved.

In *Section 5.3* above we noted how some advisory bodies like the NSW LRC, parliamentary committees, or the Ombudsman, were identified as being relatively more accessible than other bodies because they tended to provide participants with more time. Some advisory bodies are also known as being more consistent in their consultative practices. The NSW LRC in particular was known for using a variety of consultation methods, tailored to the

particular stakeholders and issues, and an executive decision to refer an issue to the NSW LRC may reflect the fact that government wants a consultation process to occur.

The staged consultation approach generally used by the NSW LRC involves preliminary research and consultation with stakeholders, publication of its inquiry, release of one or more consultation or research papers outlining the relevant issues and options for reform, inviting public submissions, public consultations, and publication of its findings and recommendations. In recent years, these features have been adopted and adapted by a range of other advisory bodies (legal CSO).

Government agencies

Most opportunities to participate in law reform — particularly top-down participation — are provided and managed by executive government and its agencies.

Informants noted that government departments have adopted a staged consultation process similar to that of the NSW LRC, starting with an information or discussion paper followed by a report outlining findings or recommendations (government officer; legal CSO). However unlike other law-making institutions and because of cabinet confidentiality, consultation outcomes (reports or recommendations) in government-led processes go to the minister and may not be publicly released (legal CSO).

Executive decision to consult non-government stakeholders is essentially a ministerial prerogative, and is usually informed by internal policy advice (government officer; government officer). Here we examine government consultation practices, including their methods of consultation, identification of stakeholders, and some government expectations of law reform submissions.

Methods of consultation

In practice, the consultation methods used by government vary greatly. Within our own case studies, consultation varied from extensive stakeholder collaboration quite early in the formulation process as seen in the *Civil Procedure* and *Mental Health* case studies, to limited consultation during implementation such as in the *Acceptable Behaviour Agreements Case Study*.

Many of our informants commonly described variable practices and quality of law reform consultation in government-led processes (legal CSO; non-legal

CSO). Once an executive decision has been made to consult publicly, how the consultation occurs as well as who is consulted are generally matters left to the agency (government officer). Informants also commonly reported that although government-led consultations can follow a staged process similar to that used by the NSW LRC, they tended to be more inconsistent, ad hoc, and more variable in terms of the timeframes provided for participant contribution.

In our case studies and interviews we found that consultation methods varied across government departments, and relied on the preferences and styles of people in relevant policy positions and the circumstances of the particular law reform issue. For example, one government informant described the consultation practices used within their department as having evolved internally over a significant period of time, and as being adapted by new staff as the need arises (government officer). Government informants also reported that the method used in any one instance reflects the breadth, significance and nature of the issues and stakeholders involved in the reform (government officer; government officer).

Despite the variability in consultation practice, informants suggested public consultation by government agencies tends to follow a standard one-size-fits-all approach in which written comments or submissions are sought in response to consultation or discussion papers (non-legal CSO; non-legal CSO).

Identification of stakeholders to consult

Government informants said that law reform issues with broad impacts across the community required consultation methods which canvass 'as wide a possible range of opinions', and in some cases media may be used to publicise the law reform issue and invite submissions (government officer; government officer). In contrast, where the law reform issue predominantly affects an identifiable group in the community, 'quite targeted' consultation of specific stakeholders, particularly those with certain information or expertise, may be adopted (legal CSO):

> *If it's a really narrow little area of law that has very limited public impact you might write to the stakeholders in that area and seek their views.*
> (Government officer)

Government informants reported that stakeholders are identified in a range of ways, although the methods tend to be ad hoc and dependent on the experience, knowledge, relationships and networks of departmental staff responsible for consultation, including:

- compiling a list of stakeholders or interested people who have previously made submissions to the department on a related issue, or who have been involved in advisory bodies sponsored or associated with the department (government officer)
- identifying organisations representing particular constituencies (government officer)
- harnessing the experience and personal knowledge of senior departmental policy officers about the stakeholders involved in a particular policy sector (non-legal CSO) and
- seeking expert advice from trusted CSOs, advisory bodies or other departments to help identify relevant stakeholders (government officer).

The way stakeholders are identified also depends upon how policy officers have conceptualised the law reform issues and affected stakeholders. Non-government informants suggested that this can at times exclude some stakeholders:

> *... there is this kind of set idea about who belongs in what department and that is sort of like a systemic issue that creates ideas about who would be interested in [particular law reform] ... that kind of siloing ... just creates gaps for people.* (Non-legal CSO)

An informant in our *Mental Health Act Case Study* noted that they thought their organisation had been left off the initial list of stakeholders for consultation:

> *... when the review happened we were not on the list and we found out through other means that this review was happening ... governments often think in very strict categories of what they're dealing with. So we don't have mental health in our name ... therefore we are ... not readily identified as ... an organisation that would see themselves as having a place in the consultation process. And there may well have been other organisations that found out by default that this was taking place.* (Non-legal CSO)

These observations suggest that the ways in which officers working within government characterise a law reform issue and those likely to be affected by reforms, may determine who is consulted and who is not.

Government expectations of law reform submissions

Government officers reading and analysing law reform submissions do so with a critical eye (government officer). Government informants reported receiving

law reform submissions that greatly varied in their utility and persuasiveness. They characterised features of a 'good' contribution or submission as being written in plain language and clearly outlining well-supported arguments. Content, form and style are all important (government officer). Submissions that are more persuasive were described as being 'very well thought-out and presented, and supported by evidence' (government officer) and as being more developed and complete:

> *... the first thing we have to do ... is we have to research it and see, what the problems are, what the benefits are, we go into that aspect. If a group is writing into us and saying 'look, we've done this research, we've talked to these people, there's this problem here and we think that a solution might be to do this' obviously, the more well developed an idea is, the easier it is.* (Government officer)

Some non-government informants also reported that law reform submissions which are clear, concise and backed up by evidence tended to be taken more seriously:

> *You always have to be factual ... If they're not accurate they'll rubbish you. So it has to be accurate, factual, readable, concise.* (Non-legal CSO)

> *... we try to be very simple, clear, to the point about what we're arguing.* (Non-legal CSO)

Government informants further identified that better submissions avoid articulating views in a 'legalistic way' (government officer), and that some of the worst submissions they receive are written by lawyers because these tend to be characterised by long and complicated arguments and analyses based on broad philosophical discussions that do not necessarily carry much weight (government officer).

Government informants suggested participants should be mindful of the following features of law reform submissions:

- Ministers rarely read submissions, instead they rely on the analysis of departments or agencies (government officer)
- Officers within government often have to read many submissions (government officer)
- Short and sharp submissions often help to communicate key messages (government officer)

- Submissions which are practical and illustrated with examples make it easier for government officers to understand the nature of the problem and argument (government officer)
- Well-developed and complete submissions are easier for government to consider (government officer)
- Other stakeholders with competing interests also make submissions (government officer)
- Usually there are at least two different viewpoints, and often several, and not everybody may be happy with the solution (government officer)
- There are many reasons an argument may not be successful, some are political, or an argument may not 'stack up' (government officer).

These observations underline that for government, a key function of consultation is to obtain information to make law reform decisions, with a number of important implications.

First, consultation is generally initiated by government, at and within a time of their choosing, to assist and inform their decision-making. Second, consultation tends to be structured around issues of concern to government, rather than issues of concern to advocates or individuals. Finally, as consultations may be an information-gathering and communication exercise, participants will not necessarily get feedback about their involvement or be kept up to date with progress concerning the particular issues. As we examine in more detail in the following chapters, experience of law reform may help participants understand these limitations associated with consultation.

5.7 Summary

A fundamental feature of law reform which in turn affects participation opportunities, is the dominance of the executive across all stages of the law reform cycle. Governments are elected to govern and this includes making changes to the law as and when needed, as well as implementing them. Executive government decides key aspects of the law reform process, including priorities, mechanisms for achieving reform, timing and timeframes, the method of implementation, and whether select stakeholders or the public will be involved. An important implication of this dominance is that members of the public, stakeholders and advocates wishing to effect reform from the bottom-up, will need to compete with and are often pre-empted by, the

routine and high volume of reform associated with the ongoing business of government.

The law-making decisions of executive government however, are not made in isolation. Government operates in a wider political context shaped by such considerations as public opinion, the nature of stakeholder interests affected by reforms, and parliamentary and party politics, as well as national and global events among others.

The political context affects both the timing and timeframes of law reform, contracting some processes while expanding others. Similarly a process may suddenly be suspended or seem to be abandoned. An issue may undergo reactive law-making while another undergoes a proactive process. Importantly, government decision to consult is itself subject to executive judgment about the political context, making opportunities for participation 'elastic' — contracting and expanding depending on the political circumstances of the issue.

Our data suggests that where participation occurs early in the law reform cycle, particularly during pre-parliamentary formulation, participants are involved in the question of 'what' and 'whether' proposals will work. Participation later in the cycle when legislation is in place is likely to involve participants in the question of 'how' legislation is to operate.

While law reform is a patterned activity with identifiable stages, its processes are highly variable and differ from issue to issue. The process is often experienced by participants as being discontinuous, fragmented, and at times repetitive. Similarly a confluence of other events, an alignment of stars, may transpire to trigger a law reform process that is difficult to predict. The process and its outcomes are contingent on so many factors that what appears to have worked in one instance, may not work in another.

The volume of law-making, and an identified tendency by government to be increasingly consultative in its law-making, has significant time and resource implications for non-government participants.

The unpredictability of law reform is in part due to lack of accountability relating to law reform consultations as well as a lack of transparency in government decision-making. Lack of feedback following government law reform consultations is a common experience. Further while government's law reform priorities are evident in its publicly announced legislative program,

reasons are not made public for those law reform issues which have not been pursued by government. Cabinet confidentiality surrounding government law-making means that processes therefore may stall, repeat, or go into the 'ether' without explanation, often leading non-government participants to speculate on the reasons. Importantly such a lack of transparency can erode public confidence and credibility in these processes, with important implications for the likelihood of future or repeat participation.

Our data also suggests law reform consultations are generally undertaken by government to gather information for the purposes of decision-making. Where participation opportunities are provided, participants are expected to respond in a relatively standard way. That is, contributions are generally expected to be in written form, well articulated, concise, with claims supported by evidence, and preferably anticipate and counter competing arguments. In practical terms, these requirements may exclude participation in law reform, particularly by disadvantaged people. We discuss the skills needed for participation in Chapter 6.

The political context of law reform suggests that participants need to be realistic about what can be achieved in the short term, while maintaining focus on the longer term objective. An ability to 'seize the moment' as participation opportunities arise requires pragmatism, opportunism, tenacity, and much (political) nous. In the next two chapters, we look at those factors which affect the law reform capability of people and groups.

6 Capabilities for participating in law reform

In this chapter we draw on the views of informants involved in our case studies, to identify those factors that constrain individuals from participating in law reform. We focus particularly on the information, knowledge, skills and resources that individuals draw on when participating in law reform.

We saw in previous chapters that through the institutions and processes of law-making, opportunities exist for individuals to participate in law reform (government officer):

> *... it's so multi-faceted ... you've got the parliamentary side, the executive side, etcetera ... members of the public do lobby politicians ... people do have an opportunity to do something.* (Government officer)

> *... it is not something which is done in camera ... if you look at any law reform commission's website, they ask for interested persons to make a submission. And if you look at the parliamentary website and you look at the Bill and you're dissatisfied with any of the provisions there you can fire off a letter to the minister concerned or you can send a copy of your submissions to the leader of the opposition or to a cross-bencher and they will look at it. So the avenues are open ...* (Legal CSO)

Informants also reported that executive government is increasingly choosing to consult people about their policies and activities (government officer):

> *... a trend which has increased over the last few years at least I'm sure compared to what used to happen ... [is that] government has generally become more consultative ...* (Legal CSO)

However while opportunities to be involved are formally available and open to all, many of our informants reported that relatively few individuals take these up:

> *... any person can make a submission ... If it's a bill before parliament, any person is entitled ... the reality is that very few individuals do.* (Legal CSO)

Informants working in law-making institutions also noted that attempts to consult the general public directly are often poorly attended:

> *... many times we have them [community consultations] and no-one turns up. And I can tell you stories about not just legislation, huge halls in local areas, and everyone saying, 'Geez, there's only five people here.' ... So there's an issue of community want to be engaged and then they don't turn up.* (Government officer)

> *... even if you set those mechanisms up, it's a sort of case where you can lead the horse to water but you can't make it drink.* (Parliamentarian)

Furthermore a cross-section of our informants noted that those who do get involved tend to be the same set of 'usual suspects' described as being very educated, informed, and with 'enough interest and enough knowledge to attend' (non-legal CSO):

> *... you've got a fairly informed public, if you like, making submissions on the Act as to how that Act could work better.* (Parliamentarian)

> *... the simple fact of the matter is ... people from our types of backgrounds, by which I mean better educated, middle class ... of a certain age, tend to get involved more than others.* (Member of government advisory body)

People passionate about particular issues were also identified as being more likely to take up opportunities to participate in law reform (legal CSO).

While individuals directly affected by a particular law reform may not take up formally available opportunities to participate, their views and concerns are nevertheless important to reform outcomes. The consequences of legislative proposals are difficult to anticipate, although some can be 'glaringly obvious' for individuals who live and inhabit the issues (non-legal CSO):

> *... the thing with legislation and all policy is there's the obvious, and then there's unintended consequences. And it's the unintended consequences that you really need to be mindful of. So when law-makers are making law and policy, they think, 'that'll do that, that'll do that,' but it's the 'ugh?' that occurs*

> *that we're often concerned about. And the question is: How do you get the people affected by that un-intended consequence to be able to articulate their concerns when the whole point of the exercise is that it's not intended; they hadn't even thought about it.* (Non-legal CSO)

A value of public and stakeholder participation lies in the prospect that the knowledge and concerns of people affected by the reform may contribute to better decision-making.

This chapter explores those factors which constrain individuals, including disadvantaged individuals, from participating in law reform, and focuses on the following:

- comprehension and communication skills (functional literacy)
- law reform literacy
- other participation constraints and
- time and resources.

These factors affect individual law reform capability in different ways. Some affect the extent to which participation in law reform is effective, while others are critical to whether individuals are capable of making the choice to participate at all.

In what follows, we describe how these constraints affect many, with a focus on the disproportionate impact of these factors on disadvantaged individuals. Our analysis also indicates, and we shall describe in *Section 6.5*, that these individuals also experience specific constraints that are over and above those that are more commonly experienced.

6.1 Comprehension and communication skills

Much law reform activity involves locating, collecting, analysing and exchanging information. Fundamentally, these activities involve comprehension and communication skills — the basis of functional literacy.

Functional literacy

Law reform is generally reliant upon the written word. Information about a proposed reform is often contained in a background or issues paper, or exposure draft legislation, which becomes a basis for consultation (government officer).

Many informants noted that public or stakeholder contributions to law reform are commonly required to be in written forms (government officer; non-legal CSO):

> *Yes, look that's typically a written submission. Depending on the extent and importance of the issue that might be as simple as providing some comments by email. But more normally it would be a fairly detailed written submission ...* (Legal CSO)

Literacy is the set of information-processing skills required to locate, understand, use and then respond to written information (ABS, 2008), and by the term 'literacy' we also include the ability to comprehend and respond to oral information. To have functional literacy therefore is to be capable of applying these information-processing skills in a goal-directed, purposeful manner to achieve particular purpose(s).

Many informants identified the way in which law reform consultation documents are written as being a key constraint on public participation. For example, discussion or consultation documents were described as being written in a particular format which 'most of the population wouldn't read to the end of' (member of government advisory body), often being overwhelming for people in general (non-legal CSO), and containing information that is 'very hard for a lay-person to get around' (non-legal CSO). Each of our informants referred, explicitly or implicitly, to the often sophisticated level of literacy required to participate in law reform:

> *I mean when the Law Reform Commission puts out from time to time, some discussion paper, they're pretty dense documents aren't they, and they're pretty, let's face it, you almost need to be a trained lawyer to make sense of them. So it's not easy for the ordinary lay person to participate in that sort of argument.* (Non-legal CSO)

Documents concerning 'technical' areas of law were regarded as being even more inaccessible (member of government advisory body).

These observations suggest there is a gap between the levels of functional literacy of the general community and the levels of literacy usually demanded in law reform, and are consistent with the findings of the ABS's 2006 *Adult Literacy and Life Skills Survey* (*ALLS Survey*). The *ALLS Survey* provides an empirical measure of the level of literacy skills among Australians aged 15–74 in non-remote areas across a number of functional domains required to meet the complex demands of everyday life and work, including:

- **prose literacy —** required to understand and use information from narrative texts, including editorials, news stories, brochures and instruction manuals
- **document literacy** — required to locate and use information contained in various formats including job applications, payroll forms, transportation schedules, maps, tables and charts
- **numeracy** — required to effectively manage and respond to the mathematical demands of diverse situations and
- **problem solving** — goal-directed thinking and action in situations for which no routine solution is available — understanding the problem situation and its step-by-step transformation, based on planning and reasoning (ABS, 2008).

The ABS found that almost half of Australians aged 15–74 scored below the minimum standard on prose, document and numeracy literacy.[87] These findings indicate that about half the general population in Australia can be expected to have considerable difficulties reading and following instructions found on many printed materials encountered in everyday life, such as on a medicine label, or in filling out a printing requisition form to indicate the number of original pages and required copies (prose literacy). A similar proportion would lack the knowledge and skills required to effectively locate and use information in various formats (document literacy). Furthermore the survey also found that almost three quarters of the general population (70%) can be expected to have difficulty using information in a goal-directed way to solve a problem (ABS, 2008: 5).

These findings have important implications for participating in law reform. Law reform involves a range of relatively sophisticated information-processing skills which involve finding, using and responding to information in a problem-solving and goal-directed way. For example, a common practice of calling for written submissions in response to an inquiry or discussion paper is a task expected to require high levels of prose and document literacy, and to the extent that the submission also involves marshalling supportive data, numeracy. The identification of law reform and the preparation of submissions is a problem-solving task requiring interpretation and analysis of (usually)

[87] There are five skill levels for each of these three domains, and the minimum standard is defined as scores less than Level 3, and is the standard required 'for individuals to meet complex demands of everyday life and work in the emerging knowledge-based economy' (ABS, 2008: 5).

written information, and the formulation of a goal-directed (usually) written response. The findings of the *ALLS Survey* suggest that a majority of the Australian adult population can be expected to lack the foundational literacy skills to participate in law reform.

Importantly, the *ALLS Survey* also found that literacy skills were patterned along socio-demographic lines (ABS, 2008: 9–13). People having more years of formal education, who were employed, or having higher levels of income, were found to have higher literacy skills and were more likely to use the internet (ABS, 2008: 12). Older people and people from non-English speaking backgrounds were found to have lower literacy skills than the general Australian population. In short the findings of the *ALLS Survey* suggest a significant proportion of the Australian population have relatively basic literacy skills, and that socio-economically disadvantaged people were disproportionately more likely to have poor literacy skills.

Our data suggests that the prevalence of lower literacy levels among disadvantaged people may disproportionately exclude these groups from participating in law reform. For example, CSO informants reported lower levels of functional literacy among their disadvantaged constituents as being a significant and primary constraint on constituents' participation in law reform (legal CSO; non-legal CSO):

> *... to have them actually directly participate in the process ... is not completely impossible but extraordinarily rare. And they generally need to have a reasonable degree of literacy, and English literacy to start off with, and that's not necessarily the case.* (Legal CSO)

> *... literature has to be written in a very simple, easy to read fashion because the education level of people with disabilities and often disadvantaged groups is often low.* (Non-legal CSO)

Individuals with poor literacy skills were identified as being likely to struggle with understanding the information contained in written law reform consultation documents:

> *A lot of the information is written in ways that they don't understand. It's too high brow ... 'Why do they have to use all the big words?' they say ...* (Individual)

It was further contended that oral information about law reform in public forums or consultation processes can also be difficult to comprehend:

> *... you invite people to a forum with a PowerPoint presentation, they haven't got a clue what you're talking about ... So you have to use the terminology that they use and then explain it.* (Non-legal CSO)

Poor literacy skills can exclude individuals from law reform in other ways. An informant suggested that — out of shame or stigmatisation — these individuals may be less willing to seek assistance even where it may be available:

> *... unless people are given it [the information] verbally, 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)

Informants suggested that differences in literacy skills may be a factor explaining why, even among a group of disadvantaged individuals, participation opportunities are not taken up equally:

> *... if you see a meeting of tenants where they're being consulted about an issue ... A lot of the people who are going to those conferences are your older tenants, longer term housing tenants who've had, well they're not people who have been advantaged at all in life. They're not experiencing the multi-, they may have a physical disability but they're well read or they've had work or they've got good social networking skills. And they're often English speaking.* (Member of government advisory body)

These observations suggest that unless law reform consultation is accessible, in 'laymen's terms', in 'a form [people] can understand', and in a 'summarised, less legalistic format' (legal CSO) many individuals will not have a real opportunity to determine whether a law reform participation opportunity is something that they would have an interest in or wish to take up.

A number of informants further suggested that it may be necessary to tailor participation processes to the literacy levels of the intended audience, to ensure the method of delivery and information is 'in a language that the audience understands' so as to provide equal participation opportunities (non-legal CSO):

> *We've got multiple ethnic groups, you've got to make sure you've got good translators and you've got a range of people who can communicate effectively with those people.* (Non-legal CSO)

We found that individuals also had difficulties with communicating their views in law reform.

Articulating views

Informants referred to the value of public forums as providing individuals with the opportunity to contribute first-hand accounts of their experiences and views of a reform. A CSO informant noted the power of direct testimony in public hearings, taking as an example a hearing held by a federal parliamentary committee on the *Family Law Act*:

> *... a number of clients [came] in and tell the parliamentarians something of their experiences ... it was having the clients actually tell them that this is the real way things happen; not the rhetoric that the groups you've been listening to to-date have been telling you, you know? ... So you could tell that it was having an impact on them. And you can't do that easily in written submissions.* (Non-legal CSO)

On the other hand, our analysis also suggests individuals need to be able to articulate their views and argue their position to a particular standard. Participants deeply affected by law reform issues may respond emotively which, according to some informants, can be taken by law-makers to reflect the quality and value of what is being said:

> *... individuals are often marginalised ... because their personal experience makes them emotional about a situation ... I would imagine, certainly advisors, they'll get the sort of letter from the person who's been desperately trying to change something for years, and they'll just go 'no', you know ... I'm pretty sure there are people whose voice is completely lost in that way, because they don't have the language and the sophistication to take the emotion out of it.* (Legal CSO)

Indeed some informants also reported perceptions that law-makers expect participants to respond to law reform proposals at a relatively sophisticated level (non-legal CSO; non-legal CSO).

Individuals who experience difficulties with communication, or with the English language, are identified as being at 'a big disadvantage' in law reform, particularly in public or group forums involving oral participation (non-legal CSO). An impaired ability to communicate one's views was reported as potentially undermining the credibility or authoritativeness of participants:

> *... even in [a] room of people with disabilities who should be more aware, there's some nervousness about 'for god's sake, you take so much time to key in the information. Are you sure? Is what you're going to say really worthwhile? It's going to take so long to hear it'. And if you can get that*

> *among associates with disabilities then it's that much more likely that in a public meeting, she's not going to be taken with the same kind of value. And yet she's a lawyer ...* (Member of government advisory body)

People lacking confidence in their ability to express their positions can be excluded from law reform. CSO informants identified that people who are historically marginalised and not used to articulating their needs find speaking out a particular challenge:

> *... it's always very difficult for clients to speak out when they're used to being voiceless. Sometimes it's just really hard for them to even think about what their needs are in a way that we're used to speaking about our needs ... Most people can state their needs but a lot of our clients have been institutionalised and perhaps never really listened to. So it's not a habit to have that insight, to talk about what changes you'd like or even possibly to hope that we could have changes ...* (Non-legal CSO)

Lacking confidence that their circumstances may be changed, and a belief that they can participate in that process, is particularly salient for people with complex needs, which we explore in *Section 6.3*. In addition to functional literacy, the ability to effectively participate in law reform also involves a number of different knowledge and skill domains. We turn to these below.

6.2 Law reform literacy

To participate in law reform, one needs to know that a process exists, how it works and how to work within it:

> *... the fact that you can participate, there's no doubt. Every member of this community can participate in law reform. It is a question of people knowing that they can do it and how they should do it.* (Legal CSO)

We use 'law reform literacy' to collectively describe the knowledge and skills which affect people's ability to participate in law reform, and which entail awareness or knowledge of:

- how law reform occurs generally
- when particular law reform occurs
- the specific law under reform
- the relevant wider legal context

- the issue's policy context and
- its political context.

Law reform literacy is therefore multi-dimensional. Further, our data also suggests that to participate in law reform, individuals need the skills — or law reform advocacy skills — to apply this knowledge in a 'functional' and applied sense in order to pursue their law reform interests. We now turn to these knowledge and skill domains.

Awareness of how law reform occurs

Informants repeatedly identified a general lack of understanding of the law reform system and its processes, as limiting public participation:

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

> *... it's ... great for someone who understands the processes, but for [your] average Joe in the community who's going to be affected by the legislation but doesn't know the processes of legislative change, how laws come about ... it's just not going to happen.* (Legal CSO)

Informants also reported that a general level of 'confusion' existed about how law-making institutions function and relate to one another (government officer):

> *... [among] members of the public generally, there really is a lack of understanding as to how laws, and how government work.*
> (Government officer)

> *Great public ignorance of the mechanisms. Certainly tremendous confusion about the role of the Upper House, and difficulty often ... even quite well-informed people, you know, confusion between what happens at the State and the Federal level.* (Parliamentarian)

A general awareness of the law reform system and of the role of governance institutions is like a 'map' which enables individuals to locate information about where to go, what to do, or who to talk to, should they wish to get involved (government officer). This includes knowing one's rights in governance, that citizens can 'speak up and be involved' (non-legal CSO) as well as knowing where to 'raise the issues in the correct places' (non-legal CSO).

Having such a map is an important starting point, as it helps to point out opportunities for public participation. For example, in the *Boarders and*

Lodgers Case Study an informant reported confusion about which law-making body to approach in order to seek greater legislative protection for the rights of boards and lodgers:

> *... there's no-one responsible, who do you advocate with? You see, when it comes to the licensed [boarding houses], we can advocate with DADHC and the government and there is a definite body that's responsible and there at least is a law, even though it's inadequate and out of date. There at least is a legal basis. There's no legal basis for the unlicensed [boarding houses] ... Like who do you talk to?* (Non-legal CSO)

A lack of knowledge of the basic aspects of the law reform system makes it difficult for individuals to contemplate the idea of advocacy and why they might participate in a law reform process, as is starkly illustrated for disadvantaged individuals. For example, informants identified how lack of knowledge about one's civic rights can isolate newly emergent and migrant communities from the law reform system:

> *... [our non-English speaking consumers] have different ideas of what government's about or, not knowing the system, how to work the system. And if they come here and they've been in a country where ... [you] don't have any sort of support for people with disability at all ... those concepts don't exist ... Even advocacy, we spend a lot of time talking about what it is.*
> (Non-legal CSO)

Informants further suggested that people who have lived under different systems of government may actively avoid participating in law reform for fear of personal reprisals or unwanted government or political attention:

> *Our constituents don't like complaining. It's a sort of no-no, if you complain the government might ... grab you and put you in jail for it ... you'll just end up with a hassle ... or you might be treated badly after you've made a complaint ... the laws are for the government to make, our responsibility is to stay out of the government's way ... for our own safety or whatever.*
> (Non-legal CSO)

Without a general awareness and understanding of the law reform system, people may not be able to conceive of, or answer, questions such as 'How can I participate in law reform?' 'Where do I go?' 'What do I have to do?'

Awareness of when particular law reform occurs

Law reform and opportunities to participate are time-bound. Knowing the timing of a particular law reform and any opportunity for input, affects an individual's ability to participate.

Many CSO informants reported that although opportunities for public or stakeholder participation in law reform may exist, people may not take them up because they are not aware of them. For example, reforms to the law were identified as not always well known or publicised among affected groups:

> *There's lots of changes that are made in the general law that you don't even know has changed because nobody tells anybody.* (Non-legal CSO)

Further, informants suggested that law reform tended to be publicised in venues and publications not normally accessed by those likely to be affected by the reform (non-legal CSO; individual).

Knowing when a particular law reform is happening and what, if any, opportunities exist to participate, appear largely based on an individual's connection to relevant institutions and information networks (individual). Some informants suggested that unless individuals are part of these networks, or actively monitor media and law-making institutions, it is difficult for them to know about a particular law reform event or participation opportunity (legal CSO; individual).

A commonly reported experience is hearing about a law reform event too late to participate. Informants in the *Acceptable Behaviour Agreement Case Study* for example reported that many public housing tenants only heard about the reforms well after the legislation had been passed in parliament:

> *They [public housing tenants] basically found out about it after the legislation had been enacted … there was no consultation prior with the tenant body, who after all were the people who were going to be affected.* (Individual)

Informants suggested a number of ways of improving public or stakeholders' awareness of specific law reform events, including holding 'information sessions about the consulting process or about some issues coming up' with particular affected groups or communities (non-legal CSO), or having a centralised website as a portal to law reform events, including law reform participation opportunities:

> *All proposed law should be available in a standard location on the web. So for example, it might be under the State Parliament section. All proposed laws and regulation changes and drafts should all be available on the website.* (Non-legal CSO)

A broad understanding of how law reform occurs can also alert people to when particular law reform events are going to happen. For example, knowing that legislation is periodically reviewed may alert people to potential participation opportunities, such as where a particular piece of legislation is scheduled for statutory review.

Understanding the specific law

At the heart of being able to participate in law reform, is an ability to understand what the specific law currently is, how it operates, and analyse the effects that changing it will have. Informants reported that without such an understanding, individuals are unable to assess the personal significance of the reform and respond:

> *If you don't know what the law is in the first place then you have no idea how you would feed into changing it.* (Non-legal CSO)

Law is, however, more than a single piece of legislation, and is more often than not an amalgam of statutes, regulations and court case decisions. Knowing what a particular law is and how it operates can therefore be a complicated task involving legal interpretation and analysis of multiple texts.

Further, both the form and language of law have a structure intended to connote particular meaning, based on legal concepts and conventions that are often unstated and assumed. The Canadian Bar Association Task Force on Legal Literacy reported that legal materials were predominantly written, and written in a manner 'peculiar to the legal system' (1992: 10). In addition to reading and comprehension skills, the task force identified that literacy in the law also requires familiarity with the particular legal context, the ability to guide oneself through a process to obtain information, as well as an understanding of how the law can be used in a functional goal-oriented way to answer particular questions (1992: 52–53).

Indeed, understanding the law has been noted elsewhere as requiring a level of literacy that is beyond the ordinary capacity of most. A Canadian study found that irrespective of their literacy levels, most people found it difficult to understand and use legal material. Although they may understand the

words being used, they may not comprehend the particular legal concepts and meaning contained in those words, and will often not understand their legal implications (Council of Canadian Administrative Tribunals 2005: 11). The language of the law may therefore imply one thing, and apply differently depending on particular definitions, exceptions to the rule, and so on which affect how the law operates in practice.

In this section we note how the form, language and interpretation of legislation make understanding the law and legal issues challenging for many people, and make participating in law reform a complex, intimidating and overwhelming task.

Form of law

A source of reported difficulty relates to the number of different places that a law is located (non-legal CSO; non-legal CSO). Understanding what a specific law is, how it operates, and what effects it has, may involve not only knowing what the common law or an Act says, but also how it has been changed by any legislative amendment, as well as how it has been implemented and operates in day-to-day life.

Our data suggests that the form taken by legislation is relatively inaccessible for lay people (non-legal CSO; government officer). Informants identified that the consultation documents outlining and explaining proposed changes to the law also tend to be lengthy and complex:

> *... a lot of these documents end up being 100 pages, 200 pages long. And I mean, if you're limited for time and resources, and whatever, they're very hard to find your way around ...* (Non-legal CSO)

They reported experiencing difficulties with conventions used to organise the content of legislation, and finding it challenging to navigate through legislation:

> *... there was very little cross-referencing, which would have been really useful ... you know, 'look at this section when you're looking at that'. She [draft legislator] said 'You can't ... you can't put end-notes [in legislation] ... ' ... I didn't know that. But ... it seemed quite the logical thing to have something at the bottom that said another Act, and the section of that Act. But no, they don't do it like that.* (Non-legal CSO)

Meaning of legislation or legislative proposals

The particularly formal and 'precise' language in which legislation is written can be perplexing for people who are not trained in the law, especially when consultation involves draft legislation (member of government advisory body):

> *... it's written in a particular format ... when I got my copy of the [Act] which wasn't a particularly complicated piece of law reform, I had to read it very very closely to make sure I understood what its consequences were ...* (Member of government advisory body)

> *... a piece of legislation ... is a legal document which a layman is not going to understand.* (Legal CSO)

The language in legislation was identified as being difficult to decipher, making it challenging to figure out what is being proposed in the first place and what people are being asked to comment on:

> *They kind of give you the words themselves without really articulating what this [legislation] is aiming to achieve, what the outcomes of these changes to legislation are supposed to be about.* (Non-legal CSO)

While many informants acknowledged that there are reasons for the rigour in the language, they also suggested that it makes the law difficult for people to understand, and consequently can be excluding:

> *... the need that's felt for laws to be precise, to tie things down, to be written in accordance with the rules, traditions, history of law-making ... themselves exclude people.* (Member of government advisory body)

They also suggested that 'a lot of the problem is how information is presented to us in the first place', and the level of 'expected knowledge' in these documents, including consultation documents (non-legal CSO). Some legislative proposals, such as the *Workplace Relations Bill*, were reported as being so long and complicated that 'even lawyers' and an 'academic in industrial relations' who 'understands the processes' had great difficulty understanding them (legal CSO).

The task of interpreting legislation was identified by some informants as being even more difficult where the subject matter has its own particular terminology or jargon. The *Mental Health Act 1990* for example was thought to cover a 'narrow specialist area' of law (government officer) in which comparatively few legal professionals have the relevant expertise. The medical dimension of

the issues was identified as adding a layer of complexity to the interpretation, comprehension and analysis of the legislation (government officer):

> *... there is a double thing. There is a jargon threshold ... when you've got the interface of law and medicine, there's some quite complicated concepts for anyone to try and, and just the complexity of processes like admission, leave, leave for medical treatment. All these different categories.*
> (Government officer)

However a cross-section of informants suggested that people with practical experience of the operation of the *Mental Health Act 1990* — people with mental illness, clinicians, carers, police and a range of mental health interest and advocacy groups, professional associations and service providers — were more likely to understand the legislation:

> *... when you're talking to your main area, people who have the most direct not just personal interest but livelihood interest in that it affects them the most, they will understand the concepts ... the funny thing is with mental health, there's a lot of carers and consumers and clinicians who are far more savvy in understanding the Act than most lawyers. Because they use it all the time.* (Government officer)

For members of the public to participate in mental health law reform, informants suggested that the contents of legislation may have to be 'provided in simplistic terms' (legal CSO; non-legal CSO).

Government informants noted that legislation and law reform consultation papers are drafted in plain English (government officer) however, it is far easier to use plain English where the legal issues are relatively contained, the concepts simple, or involve few parts or sections of an Act (government officer).

These informants noted that using plain English in law reform can be difficult and problematic, particularly where the issues are complex, technical or involve the whole operation of an Act (government officer):

> *... the more complex the issue the more difficult it is to have consultative democracy about [it] ... It's much more difficult because it's all very complicated.* (Government officer)

While the content of law reform proposals and consultation materials needs to be accessible, it must not over-simplify the issues. Government informants suggested there is a debate concerning 'what you lose by being simplistic', and whether you are 'talking down to people too much' (government officer).

They observed that consultations to review the mental health legislation in the United Kingdom involved preparing a very plain English consultation guide as well as a 'meatier' paper with more details (government officer), as a way of 'getting that balance right' (government officer), however:

> *... while I thought initially that's great, when I read them in detail there was also an element of 'dumbing down' which means some of the critical concepts get lost. So there's also a balancing act on that basis as well.*
> (Government officer)

The range and complexity of some law reform issues may require tailoring the information to audiences with different levels of understanding about these issues. Informants in the *Mental Health Act Case Study* noted for example that for people with more sophisticated understanding, a public information session involving an 'interpreter' with both medical expertise and legal knowledge was useful because:

> *... it was [an] opportunity at least for people who had enough interest and enough knowledge to attend, and had particular questions they wanted answered ... That really did assist ... it did allow people to talk about some of the principles like least restrictive practice ... So those sort of conversations were handled in that forum, and that I think is very useful.* (Non-legal CSO)

A government informant however contended that tailoring the communication of particular law reform to different audiences may be impractical in the face of limited time and resources (government officer).

Substance and procedure of law

Without an understanding of what the law says and how it operates in practice, it is difficult to know what the consequences of legislative change may be for particular people.

Knowing the significance or meaning of the law involves knowing both its substantive and procedural aspects. The substance relates to the 'what' of the law — its intent, principles, or objectives, and indicates the rights and responsibilities being conferred or changed. Its procedural aspects, on the other hand, relate to how the legislation operates or is to be applied, such as in the operational detail in subordinate legislation (parliamentarian).

While the substance of legislation may be laid out in the definitions section outlining key terms as well as in a maze of sections and subsections, the legislation's procedural aspects establish its operation and effects. For example,

without procedural aspects prescribing some enforcement mechanism, legislation may be no more than an aspirational statement lacking tangible consequences (but perhaps holding some symbolic power). Legislation with procedure that is difficult to implement can remain on the books and hold little practical meaning or significance. Our informants identified that legislation in the *Acceptable Behaviour Agreements Case Study* was such an instance:

> *... instead of changing the legislation, we change the way that that legislation would be used ... in the end it was so watered down, that there wasn't one single use of the acceptable behaviour agreement.* (Individual)

Procedural aspects of legislation are also important because while rights may in principle be conferred on people, procedure affects 'how' these rights are enforced or can be accessed in practice.

Lack of knowledge about the substantive and procedural aspects of law can be confusing for individuals who wish to participate in law reform. In our *Mental Health Act Case Study* for example, informants identified that individuals without a legal background tended to expect or assume that the legislation would contain some clear statement about what needed to change in the Act to provide access to mental health care or services:

> *... that's the big difficulty for people who don't have a legal background to actually really understand the difference between what needs to happen in the legislation which will then allow the policy to do what you want it to do. And you know, we kept on having all sorts of issues brought up and ... Is that the thing that really is law or is that actually around policy? ... But in fact the law is quite open-ended in a way because it therefore allowed for the policy to be developed. But ... it looked to somebody who wasn't a lawyer, just appeared not to be doing anything ...* (Non-legal CSO)

Furthermore it is possible to agree with the intent of the legislation while disagreeing with the proposed method of achieving it:

> *... they also don't necessarily understand the difference between changing a policy as such and complaining about the way a law has been applied. You know, you may not like the fact that you were pinged for doing something, and you're unhappy that you've been pinged when in fact society as a whole, it is to the value of, prohibiting a certain type of behaviour.* (Government officer)

It is often in the detail of the procedural aspects that the practical consequences of what is being proposed become clearer.

Informants suggested that most people are likely to want to know about the procedural aspects of legislation because of their practical significance. They identified that, in particular, individuals with disadvantage and a limited understanding of law reform may benefit from translation which focuses on the consequences of legislation for their daily lives:

> *You've got language issues. You've got education issues, or lack of education, lack of understanding of the processes. So yes, simplification. Like okay: this is the legislation. This is what we want to introduce. This is how it will affect you on a day to day level. Rather than referring to Section 3a of which they're not going to understand. So making it understandable on a how it will affect you basis. And then ask for comments in that regard.* (Legal CSO)

Two of our case studies — the *Acceptable Behaviour Agreements Case Study* and the *Boarders and Lodgers Case Study* — illustrate how lack of clarity about either or both the substance and procedure of legislation makes it difficult for participants to respond to law reform.

All non-government informants in the *Acceptable Behaviour Agreements Case Study*, as well as other documentation on the case study, suggested that 'anti-social behaviour' — the substance of legislation — was not adequately defined (Martin, 2004; non-legal CSO). Case documentation revealed some of the problems stakeholders experienced in trying to understand the meaning of the proposed legislation.[88] Similarly, informants reported confusion as to how the legislation would operate and what it 'meant' for public housing tenants:

> *... [we were] trying to understand it ... and we actually asked questions ... if you attack a Department of Housing representative, that could be classed as antisocial behaviour. And we said 'explain attack. Are we talking about abuse, are we talking about physical attack, what are we talking about?'* (Non-legal CSO)

Such procedural detail — referred to by an informant as the 'devil in the detail' (legal CSO) — is what enables an understanding of how reforms will be operationalised, and in turn, an assessment of whether reforms are likely to achieve what is intended. Yet these details were not forthcoming when the Bill was introduced in parliament,[89] making it difficult to deconstruct and understand the potential consequences.

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[88] See for example the minutes of the Non-English Speaking Background (NESB) Housing Taskforce, dated 15 December 2004, at <http://www.shelternsw.org.au/nht/nht-minutes041215.html> accessed 1 December 2009.

[89] Note in Chapter 4 that when the relevant Bill was introduced in parliament the details of its implementation had yet to be worked out, and the commencement of the Act was to be proclaimed.

In that case, lack of clarity about critical terms was identified as leading to uncertainty about what rights were being changed, what responsibilities were being imposed, and what practical consequences legislative change would have for individuals.

Furthermore an ability to identify the practical unintended consequences of legislation, based on their knowledge of their constituents, is what enabled housing CSOs to argue that *ABAs* would be a 'failure of justice' (Martin, 2004: 230):

> *... if somebody was making lots of noise in your flat and there was frequent complaints, then you get an anti-social behaviour order on you and you could lose your tenancy. And you had to prove that you should keep it. We kept saying, 'Oh okay, so while you're getting beaten up by your partner, and the noise, and you know ... the punch through the wall, etc. Oh okay so you get evicted. Good.' And that's the way the law was written. And it was interesting in the negotiations over that. They said, 'But we didn't, no that's not what we mean.' [Well] 'that's what it allows. That's what it says. You may not mean what you mean but ... '* (Non-legal CSO)

It was in the procedure, the 'how' of legislation, that housing CSOs were also able to suggest that safeguards be incorporated in order to mitigate some of the identified undesirable consequences, and which were later incorporated in the Department of Housing's *Anti-social Behaviour Strategy* (NSW Department of Housing, 2005).[90]

An understanding of both the substantive and procedural aspects of legislation was also identified as critical to an ability to participate in law reform in the *Boarders and Lodgers Case Study*. In this case study the definition of who is a boarder or lodger is complicated, relies on the common law,[91] and has broad coverage across different accommodation types, including boarding houses, residential centres, group homes, boarding in private homes, informal tenancies, hotels and hostels (Mowbray, 1989: 15; Da Silva, 2005: 18–19; parliamentarian; legal CSO).

Informants identified that the result is a degree of confusion even among members of a relatively aware public about who are boarders and lodgers, what rights they have, and in turn what the consequences of reform may be:

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[90] Some of these safeguards specify the set of circumstances before an ABA is to be used, including that the tenant has to be able to make and keep an ABA and that their behaviour is not related to an illness or disability for which they need support.

[91] As boarders and lodgers are defined by default to be persons who are not tenants under the *Residential Tenancies Act 1987* (NSW), they are therefore deemed licensees under the common law. See Chapter 4.

> *If you talk to a person who has even a passing knowledge of the issue of boarding houses, they'll talk about boarding house tenants. And of course they're not. If they were tenants they'd be protected by the Act. But they're not. They're licensees and they can be tossed out in 24 hours. And when you actually confront people who actually raise that: 'No that's not right. You know, you've got to give notice to do this and ... ' blah, blah, blah. No. You don't.* (Parliamentarian)

Such confusion made it difficult for people to understand the need for law reform:

> *... we found that even community workers were aware of the problems but really didn't understand the legal vacuum.* (Legal CSO)

Indeed informants identified that mis-matches between substance and procedure in the law is a particular issue for disadvantaged communities with less means for accessing generally prescribed rights:

> *... you can say, 'Well we give people the right.' And this is what happens to disadvantaged people all the time. You can pass legislation all day long giving people rights. But if they've no practical way of exercising those rights, well it isn't worth anything to them ... if they've got to go to the Supreme Court and pay $1,000 to lodge the case, well ... they won't get any benefit from that. So I think access to justice is not just a case of laws, it's a case of procedures. You know? How can people come along ... and actually access their rights.* (Non-legal CSO)

Disadvantaged people in particular are more likely to be disproportionately affected by how one-size-fits-all laws are applied to them. If the knowledge or experiences of marginalised or minority interests are overlooked in law reform, the danger of unforeseen consequences of legislation — often found in its procedural aspects — for disadvantaged people can be disproportionate.

Importantly, people are likely to 'know' or understand the legislation differently, depending on their relative experience, role and interest in the issue. It is unlikely that any one person has knowledge of all facets of a legislation, and particularly complex legislation. Practical experience of the issues enables individuals and stakeholders affected by particular legislation to identify some unintended consequences of proposals which may not be obvious to policy officers or drafters of legislation.

Knowledge of the wider legal context

Law reform occurs in a broader legal context which provides a normative standard by which to judge whether a proposal is 'just' or 'fair'. A full appreciation of the reform issue may draw on an awareness of other elements of the legal system, including:

- other relevant State and Commonwealth legislation
- the relationship between the common law and statute law
- the legal principles and/or conventions associated with legal interpretation, such as precedence, superseding legislation, natural justice, due process, onus of proof and right to silence and
- the relationships between different laws resulting from federalism, including Commonwealth, State and local government arrangements.

Our informants reported that people without legal knowledge or skills are less likely to appreciate this context and its significance for law reform. For instance, non-legal informants in the *Mental Health Act Case Study* reported they had difficulty understanding how the *Privacy Act* affected the meaning of the *Mental Health Act* (non-legal CSO):

> *... we have a lot of issues around the Privacy Act ... what took precedence ... Was it the Mental Health Act or the Privacy ... when you've got conflict ... Which overrides the other one.* (Non-legal CSO)

Individuals unfamiliar with principles and doctrines associated with constitutional law, statutory interpretation, conflict of laws and precedence — which may affect a legislation or legislative proposal — may fail to appreciate the significance or scope of what is proposed.

Further the wider legal context may make legislation seem even more impenetrable and difficult to comprehend. Without an appreciation of this wider legal context, a perception that legislation is fluid and changeable may not only frustrate and impede participation in law reform but also reduce confidence in, as well as understanding of, the role of law:

> *Laws need to be interpreted by the courts in the way that they're written and not operated on in terms of precedents ... the law as it stands ... [is] not based on the Act at all ... the Act is something that starts the system going and because the Act gets manipulated and changed because of Regulations, precedents, courts, all the other things ... that's a major problem for all of the participants in the law.* (Non-legal CSO)

In many instances across our case studies however, we find that participants' ability to draw upon their understanding of the wider legal context enabled them to engage with the issues and suggest a range of law reform solutions. Informants in the *Boarders and Lodgers Case Study* drew on knowledge of this broader legal context to identify alternative law reform solutions:

> *... it is very easy, to offer the protection for the person who is renting out the single room, to protect their interest. And indeed you could simply apply the principle that currently applies in the Residential Tenancy Act, that one of the reasons to terminate a lease or not renew a lease is that a family member requires the space ... That same principle could very easily apply to a room in a private residence.* (Parliamentarian)

As no single Act applies in that case study, knowing the wider legal context was particularly helpful for identifying additional participation opportunities. CSO advocates for example, seized on the legislative review of the *Youth and Community Services Act 1973*[92] as an opportunity to argue for rights of boarders in general, whether they be in licensed or unlicensed premises (Allen Consulting, 2003: 76).

Similarly, advocates looked to the legislative treatment of this issue in other Australian States and Territories to provide a benchmark for what was possible:

> *What's so hard about boarders and lodgers legislation in NSW when all the other states are doing it ... WA and NSW are the only people who make no provision at all for boarders and lodgers.* (Legal CSO)

> *... every other state except Western Australia has got tenancy rights, and New Zealand has tenancy rights ... what is so different about New South Wales?* (Non-legal CSO)

Indeed advocates' knowledge of what had been done and how legislation had operated in other jurisdictions also informed their positions and approach to this law reform (legal CSO; Tenants' Union of NSW, 2005: 2).

Common legal principles in the wider legal context act as touchstones for assessing whether a reform deviates from the norm, whether it is 'just' or 'unjust'. This knowledge is important because it enables comprehension of whether a legislative proposal is in line with accepted and established legal norms or principles, and informs advocacy of a law reform position. We illustrate this by drawing on the *Bail Amendment Act* and *Acceptable Behaviour Agreements* case studies.

[92] This Act governs licensed residential boarding houses.

Balancing competing ideals that an individual has a right to be presumed innocent until proven guilty on the one hand, and ensuring community safety on the other, is at the heart of the wider legal context underpinning bail law.[93] Advocates and informants in the *Bail Amendment Act Case Study* referred to these fundamental ideals to articulate a position for what the appropriate balance should be (legal CSO; Sham-Ho, Hansard, Legislative Council, Second Reading, 9 May 2002: 1888).

Knowledge of the wider legal context enables benchmark comparisons of what is 'fair' or 'unfair', by reference to the principles or standards enshrined in other laws. It also enables comparison of 'like cases'. For example advocates in the *Acceptable Behaviour Agreements Case Study* argued that the proposed legislation imposed a 'harsher standard for public housing tenants' which was 'fundamentally unjust' (Martin, 2004: 229), a view echoed by our CSO informants:

> *... really this is subjecting people to a different standard of behaviour expected, contingent on their housing. It's literally second class citizen stuff ...* (Legal CSO)

Similarly, knowledge of the wider legal context enabled parliamentarians and advocates to question the need for reversing the normal onus of proof,[94] by arguing that it is a rarity in the law that sets 'a dangerous legislative precedent' (Martin, 2004: 229), 'is contrary to basic legal principles' (Chesterfield-Evans, Hansard, Legislative Council, 29 June 2004: 10376) and:

> *... represents a movement away from the traditional situation between landlord and tenant.*
> (Page, Hansard, Legislative Assembly, 22 June 2004: 9801)

A reversed onus of proof was claimed to be unjust because it led to a treatment of public housing tenants which was historically reserved for a few specific groups:

> *... the antisocial behaviour ... actually put us on the same levels as ... paedophiles and terrorists ... we actually had to prove that we weren't breaking the law*. (Individual)

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[93] A number of fundamental principles underpin the criminal justice system, including a right to be presumed innocent until proven guilty and the right to liberty unless lawfully held in custody. The criminal justice system however is also concerned with protecting the safety and welfare of the general community and ensuring that accused persons appear in court to face charges.

[94] If a public housing tenant signs an acceptable behaviour agreement and then has their tenancy terminated for breach of the agreement, the legislation places an onus on tenants to prove in a tribunal that they did not breach the agreement, see *Residential Tenancies Amendment (Public Housing) Act 2004* s 64(2A).

These are just some of the examples which illustrate how people have drawn on an understanding of the wider legal context of legislative proposals to articulate, rationalise and present their concerns about particular law reform.

While it is important to understand a law in order to know its intent and how it will go about achieving that intent, its wider legal context provides a benchmark for whether a proposal is 'just' or whether it deviates from legal norms. This broader view also informs an analysis of whether equivalent issues or groups are treated similarly or differently, and provides a rationale for claiming that a reform is 'unfair', 'unjust' or 'wrong'.

Indeed without a wider legal context it may be difficult to assess the reach or legal significance of a law reform proposal. In circumstances where there is a gap and legislation has yet to emerge, as in the *Boarders and Lodgers Case Study*, this wider context can be particularly critical to the capacity to participate. Our data suggests that understanding the wider legal context is beyond many, particularly people without legal or public policy experience.

Knowledge of the issue's policy context

Law reform operates in a policy context that is shaped by the relevant issues and their history, competing interests, the factors which may have contributed to identified problems, policy initiatives attempted previously and elsewhere to address the problem, and whether they have worked or not. Without an appreciation of this context, individuals are less likely to question or challenge the need for law reform or to consider alternative policy solutions.

Understanding of the policy context contributes to an ability to judge the appropriateness of particular policy strategies, to determine the policy merit of a proposal, and to assess whether legislation is an appropriate or preferred solution. As suggested by a cross-section of our informants, law is not always a necessary, desirable, or better solution to identified problems (member of government advisory body):

> *You know, not every problem needs a law to solve it ... [people] say 'oh, you know, there ought to be a law against it, oh, there ought to be a law against it'. Well not necessarily. Maybe there should be more communication between people to sort out problems rather than a new law about it.* (Non-legal CSO)

The wider policy context of public housing — reduced public funding, rising demand for affordable housing, and a shrinking housing stock with which to meet that demand (see Caulfield, 2000) — suggested to some informants

in the *Acceptable Behaviour Agreements Case Study* that housing estates are increasingly sites of concentrated and multiple disadvantage (non-legal CSO) and led to the assessment that the legislative proposal was unlikely to achieve its intent:

> *... there's no point just saying 'well we'll move this person out somewhere else' because the next place you move them to is going to be the same ... you've got people with complex needs who need particular types of housing ... but you don't have the housing or the locations to match their needs.* (Member of government advisory body)

A previous government policy, the *Good Neighbour Policy* (NSW Department of Housing, 2007) having a similar intent[95] to the legislative proposal, but observed to have been infrequently applied, led informants to question the motives for the proposed reform (individual; non-legal CSO).

A number of stakeholders and parliamentarians identified the issue of anti-social behaviour in public housing as being a symptom of 'bigger' social issues concerning the concentration of socially and economically disadvantaged people in public housing, which really 'ought' to be addressed by a whole-of-government approach:

> *... we must examine this problem in the context of an entire policy. This Bill is a blunt instrument ... those who have behavioural issues that are beyond their capacity to manage and who have no other housing choices should not be evicted if they cannot be placed in suitable programs. This Bill contains no whole-of-government approach to that problem*.
> (Forsythe, Hansard, Legislative Council, 28 June 2004: 10320)

An understanding of the policy context of an issue therefore enables responses that go beyond the law reform proposal itself to a wider analysis of what the focus of law reform 'should' be and what 'ought' to be done for an identified problem.

Understanding the connections between disparate policy issues may also inform a response which goes beyond a 'gut' reaction (legal CSO). For example, a CSO informant experienced in housing issues recognised that boarding houses are a critical component in policy strategies to address homelessness. They suggested that one way of raising the issue onto the government's law reform agenda therefore may be to highlight these 'policy connections' in the public domain:

[95] That policy sought to reduce nuisance and annoyance in public housing by empowering the Department of Housing to evict a tenant if they have breached a requirement not to cause nuisance and annoyance.

> *I've done Hansard searches in relation to boarding houses and boarders and lodgers and it doesn't get mentioned very often ... You have lots of debates about homelessness but people don't make the policy connections in relation to regulation of boarding houses, availability of public housing. So, it's making those connections in the public debate ...* (Legal CSO)

An ability to make policy connections between different issues can add to the strength of particular law reform claims or positions, and make a difference to reform input that is compelling for decision-makers.

Knowledge of the political context

Informants identified the importance of understanding the political context to people's ability to participate in law reform, and suggested that many people do not have a good understanding of this context:

> *... there is a lot to be said for educating people about the political process and the political cycle.* (Government officer)

> *... there's a real general lack of understanding about the political process and ... about how people can have input.* (Legal CSO)

Some law reform submissions were identified as demonstrating little appreciation of the political and fiscal constraints within which government operates, and therefore risked being unrealistic:

> *... going some of the way and actually achieving [something] is better than asking for the world and getting nothing ... an idea that might cost ten million dollars to implement when there is not ten million dollars there to implement it. You know, yes it might be a good idea, but you're far better off coming back and coming up with something that works.* (Government officer)

An awareness of the political reality of government decision-making can result in a more sophisticated and nuanced participation in law reform.

Knowledge of the political context of law reform can be facilitated through one's connections and access to a policy network of law-makers, CSOs and other bodies. Access to these networks was identified as enabling individuals to 'know who to call on, know who to contact' (non-legal CSO). Through access to law-making institutions and their networks, individuals can acquire inside understanding of the sector, the actors who are influential, as well as the dynamic inter-relationship between relevant bodies.

Informants identified that access to networks can create additional opportunities for participation. A CSO informant reported one instance in which access to 'insider' information about a law reform issue enabled a coordinated response to be rapidly mobilised (non-legal CSO).

In other instances such as boarding house reforms, CSO informants identified that not knowing what is 'politically viable' (legal CSO) can make participation frustrating and difficult:

> *... [it is] a key area of reducing disadvantage and it should be a really obvious law reform thing and it just never had any political will. Getting beyond that and working out what makes things work is really difficult.* (Legal CSO)

Not all individuals are equally connected to law-making institutions or policy networks. Our informants reported that individuals who are relatively educated, articulate, experienced in the sector, or who for a variety of reasons have developed a profile of legitimacy, enjoy greater access to law-making institutions than others (member of government advisory body). Informants noted that the closer and more connected an individual is to institutions involved in law-making, including government and parliament, the easier it is for them to navigate their way through law reform processes:

> *... the nearer you are to the centre of power, the easier it is to negotiate the law reform process ... The further you are away from being part of that power elite, if you want to use those kind of terminologies, the more difficult it is to exercise your rights such as they exist within the processes of reform.* (Member of government advisory body)

Socially marginalised individuals are less likely to have such connections. Some informants identified that individuals who are particularly disadvantaged are likely to be socially isolated and distanced from not only law-makers, but also CSOs which bridge individuals to law-makers (non-legal CSO; legal CSO).

Law reform advocacy

Capability to 'do' or participate in law reform involves more than knowledge inherent in law reform literacy. It also involves skills that apply and use this knowledge in order to determine whether or not one would want to participate.

Law reform advocacy is the applied 'know-how' of law reform literacy, enabling individuals to understand what is proposed and to respond, to communicate effectively and confidently, to critically analyse a law reform

proposal, to plan, strategise and determine how and when to best 'work the system' to try to influence decision-makers. Advocacy is a key aspect of law reform capability or an ability to participate effectively. While advocacy is a skill that in our data was most evident with respect to CSOs, and is more fully examined in Chapter 7, we introduce it here as we found that it was a key component of functional law reform literacy which significantly limits the participation capability of individuals.

A part of law reform advocacy skill is the ability to 'pitch' or frame one's concerns in a way that is more likely to persuade and influence decision-makers:

> *... you have to be very careful because you don't want to get government offside when you are actually trying to persuade them ... the point of advocacy is to try and persuade someone about your point of view ...* (Legal CSO)

Informants suggested that individuals often go to CSOs to pursue law reform concerns because of their perceived greater law reform advocacy skills. For instance one informant reported how an individual with a 'bee in her bonnet' about disabled parking pursued reform through CSOs:

> *... some of the people [in the non-government organisation] ... were saying 'yeah, yeah, yeah, we all know this is a problem but it's not a priority' ... But [she] just kept at it. She kept opening the door and saying, 'I think it is, I believe it is, I want you to do something about it'. And ... some people will have said 'god, let's do something because at least she'll shut up'. And others will have thought 'well, maybe she has a point, let's see'. And that seems to me to be a kind of reality about how individuals can contribute to the process.* (Member of government advisory body)

Many non-government informants reported that disadvantaged individuals differ greatly in their capacity for law reform advocacy, including organising and using existing representative structures for the purposes of pursuing their law reform interests (non-legal CSO; non-legal CSO). Informants observed that there has been an increase in advocacy by organised groups of disadvantaged people:

> *... one of the great things that has changed in the last twenty or thirty years, is increasingly sectors are represented by people who experience the life of the sector.* (Legal CSO)

The diverse and at times unstable circumstances of disadvantaged individuals, particularly people with complex needs, were also identified as making it particularly difficult for them to self-organise and do advocacy:

> *... with people who are homeless ... it might be harder to organise in a way ... and it's not a stable group ... Where people have a disability they're going to continue to have a disability and so there's a continuity, if you like, around it. And I think where people come in and out of the system, it's much harder to actually have a community ...* (Non-legal CSO)

It often falls to CSOs to advocate on behalf of the law reform interests of very marginalised groups, as we found in the *Boarders and Lodgers Case Study*.

Our analysis suggests that law reform advocacy, as a functional dimension of law reform literacy, is one of the most important constraints on participation in law reform, particularly given the changing dynamics of a wider political context which often lacks transparency (legal CSO).

Having a sense of what is 'politically viable' (legal CSO) may have to be developed through experience of law reform. Informants suggested that advocacy skills are predominately gained while up 'close to the system':

> *...firstly to participate you've got to have a knowledge of how the law-making process operates. And you know, you may have a basic understanding ... if you pay attention in high school you learn that. But you don't really have a complete appreciation of how it works until you've actually worked quite close to the system. So I think there's no simple way of informing people about how it all works.* (Legal CSO)

Informants from CSOs with extensive experience in law reform demonstrate this knowledge and skill by making assessments about participation opportunities, and making decisions as to whether an opportunity is worthy of their time, resources and effort:

> *... you might say, 'I'm not going to get anywhere arguing with the government on that. But actually it's not going to amount to any great changes. It's just a lot of window dressing.' Right?* (Non-legal CSO)

By comparison, individuals, and especially disadvantaged individuals, are less likely to have established the connections, experience, and exposure to law reform to have developed sophisticated law reform capability. Instead they are often dependent on the greater networks, resources and law reform advocacy of CSOs.

6.3 Other individual constraints to participation

In addition to knowledge and skills, people's capacity to participate in law reform may be affected by the perceived personal relevance of the issues, their confidence in being able to participate and their trust in law-making institutions, as well as their previous experiences of participating in law reform.

Personal relevance

Not all law reform is significant for everyone, and much may have little direct relevance for most people. For example financial or administrative reforms that tend to be routine, mechanistic or technical may have little personal relevance for individuals and therefore general interest in such reforms is unlikely. Other reforms however, such as workplace relations, can be topical, have potentially widespread impacts, 'cause a lot of concern' and 'generate a lot of submissions' (legal CSO).

Much law affects people's lives only in particular circumstances or periods of time. Tenancy laws, for example, are only likely to be relevant when people rent premises (legal CSO). A cross-section of informants commonly reported that unless people perceived law reform issues as directly affecting them, they are unlikely to be interested or want to be involved:

> *... people really are only interested when it actually impacts on them. If you're not going near a court, why would you look at court rules ... people just aren't interested in what doesn't affect them.* (Government officer)

Further, law reform does not promise quick fixes for individual problems. It often involves 'bigger picture' systemic issues (non-legal CSO) that tend to be complex, with uncertain outcomes. More fundamentally, people are identified as not being generally interested in governance, including law reform, because they expect governments to govern (government officer; parliamentarian).

People are reported as being more inclined to want to be involved, however, when they are directly and adversely affected by the operation of particular laws, because that is usually when their personal significance becomes apparent (legal CSO; government officer). In the *Boarders and Lodgers Case Study*, CSO informants suggested that boarders and lodgers law was not relevant to most members of the public:

> *... people don't know what boarding houses are ... So, boarding houses aren't in people's minds as an issue. It only becomes an issue if they become evicted and they've got nowhere to live. So, it's not an issue that resonates with people. So, the extent to which a concerned citizen wants to get involved in that law reform campaign is probably really minimal ...* (Legal CSO)

A number of our informants also suggested that people may be ignorant about laws in general:

> *... I think it's just ignorance about the law as well. People assume a lot of the time that they have protections ... That was what we found more and more often — was that people that ended up in boarding house situations or students who are living in those types of situations just always assume that there was a law to protect them and were really surprised when it wasn't there ...* (Legal CSO)

An informant speculated that an increase in the number of regulatory and statutory bodies tasked with monitoring particular pieces of legislation, like the Ombudsman, the Australian Securities and Investments Commission (ASIC) or the Independent Commission Against Corruption (ICAC), may have also resulted in reduced community interest and activism in law reform (legal CSO).

Even when individuals do see a law reform issue as being personally relevant, they may be so overwhelmed by their current circumstances as to have little interest in the broader issues which are the topic of reforms:

> *When people have a problem they want it resolved now ... sometimes consumers are so consumed with their own life they don't care about other issues. Or they'll just see their issue, which is fair enough, as the most important issue.* (Non-legal CSO)

Informants reported that even where individuals do participate, their inability to see the 'bigger picture' can 'distract' from the consultation process (legal CSO), particularly when individuals 'not really very well informed about an issue are ostensibly given a say in something' (legal CSO). For example a CSO informant in the *Acceptable Behaviour Agreements Case Study* observed:

> *I've seen the forums ... where people who are upset understandably about their own personal situation are arguing ... about what is going to be done about their neighbour and they're not talking about the general issues or the principals involved in the law reform that we really want to focus on.* (Legal CSO)

For individuals with entrenched disadvantage, unmet basic needs often have higher priority than even the immediate legal issues they face (Forell, McCarron and Schetzer, 2005), much less law reform issues. Our informants observed that needs such as survival, shelter, safety and health can leave people with little energy or interest for something as remote or abstract as law reform:

> *... usually they're homeless at the point they come to see you, and so their capacity and interest and inclination to be involved in a wider event is extremely limited.* (Legal CSO)

> *It's incredibly difficult for these people, who may not have the perception that their problem is part of ... this broader large scale social injustice problem ... it takes a great deal of clarity of thought to make that leap when you don't have enough food to eat.* (Legal CSO)

Indeed informants contended that unless more fundamental needs are being met at 'the grassroots level', many disadvantaged people will not be 'empowered' to participate (legal CSO):

> *... 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, you would be making sure that their kids could go to school 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)

The personal circumstances of individuals, and particularly those who are socially or economically disadvantaged, may mean that unless their more immediate needs are met, they may not be capable of engaging with the bigger picture perspective that is often required to participate in law reform (non-legal CSO).

Confidence in law-making institutions

While overseas and Australian studies point to a general lack of public confidence in governance institutions, our data suggests it is a particular deterrent to the participation of disadvantaged people in law reform, for a variety of reasons.

CSO informants said that many of their disadvantaged clients often find negotiating government processes a daunting and 'overwhelming' experience because they fear they will not be taken seriously or be able to make a difference (non-legal CSO):

> *... there's a sense of hopelessness for our clients when they deal with those big organisations, that they're not going to be able to make their way through the maze. And they're not going to be heard, and they're not going to get what they need. And it's sort of a bit crushing.* (Non-legal CSO)

Perceptions of governance institutions as being remote and unresponsive are also identified as engendering a sense among disadvantaged individuals that involvement in processes such as law reform will be unproductive:

> *... most of this client group wouldn't give a stuff ... If you said to a lot of our clients 'Are you interested in coming and talking to politicians? It's like, 'no thank you I'd rather sleep in today' you know' ... because they're so separate from that process and so separate from a lot of that part of society ... it's really hard to motivate them to do it because their ultimate belief will be that they're just wasting their time.* (Non-legal CSO)

Informants suggested that a history of socio-political marginalisation prevents disadvantaged individuals from feeling confident about articulating their views and trusting that their views will be accepted as valid:

> *... a lot of people I think worry that they might appear to be wrong or that their opinion isn't valid ... quite recently ... in New South Wales people with disability have become increasingly interested in and engaged with processes of law reform ... But in the kind of subconscious background, there's two hundred years of 'they're not really valid are they, these human beings who happen to have disability ... or who have to be cared for at home by their parents, so why should we listen to what they have to say about tort law reform ... '* (Member of government advisory body)

For people with mental illness, social marginalisation was identified as having a particularly 'disempowering' effect on their capacity for social involvement, including in law reform (non-legal CSO). For others, fear of the consequences of participation was identified as a basis for unwillingness to be involved in law reform:

> *People will know who you are and what your name is, it's an incredible fear. Like when we did the ASIO laws of all things, people got fired up and said 'well what do we do?' And I said 'oh, you can write submissions' and that*

> *sort of thing and you'd just see all these shutters go down and people saying 'what, the government might know who we are?' ... So there's a great deal of fear about being singled out and not being anonymous.* (Legal CSO)

In other disadvantaged communities, such as those groups directly affected in the *Bail Amendment Act Case Study*, informants reported that shame and social stigmatisation may mean families of prisoners, who 'have a stronger ability to participate', prefer to remain hidden and remote from public and political processes, including law reform:

> *They are so hidden and so fearful of community stigma that they work harder than any other group, even an offender population, to keep their identity hidden, as being a family member ...* (Non-legal CSO)

Many CSO informants identified the importance of building trust among communities so that individuals feel comfortable about taking part in law reform and governance processes. They also suggested however that overcoming community distrust of governance institutions can take 'a long time' (non-legal CSO) and is a matter of 'ongoing groundwork' (legal CSO), particularly among disadvantaged communities:

> *... they don't like dealing with issues that is the Government. And one of our biggest barriers in trying to build a rapport with our clients is that if you come from a government organisation they don't want to know you.*
> (Non-legal CSO)

> *... the Aboriginal community is an absolute classic [example]. If you don't have two or three years ... it is not worth doing. Because the local community will say 'this person is coming in and they're not here for the long term. Why should we trust them, why should we participate, they're not going to be around' ... So that's I suppose the difficulty.* (Legal CSO)

Some individuals may have entrenched disadvantage and lack capacity and resources, such that they are unlikely to conceive of change as being possible, only responding to the most critically adverse events in their lives (individual). People who are homeless or boarders and lodgers for example, were reported to have:

> *... an expectation that the law is going to be unfair ... that this is what happens ... [it] comes from processes not ever working for them, poor self esteem, lack of resources. So, their sense of entitlement is diminished and the extent to which they're going to get uppity about lack of boarding house regulation [is unlikely] ...* (Legal CSO)

Without representatives or CSOs to advocate on their behalf, these individuals are disproportionately excluded from law reform.

Our analysis suggests lower levels of confidence in government and law reform processes among disadvantaged individuals mean they are less likely to take up opportunities to participate. Instead, promoting their direct participation may first have to involve building trust in formal institutions of governance, or working through groups with established relations and networks in their communities.

Expectations of law reform consultation

Government and parliamentary informants reported that non-government participants in law reform often interpret an opportunity to participate as an opportunity to affect or determine law reform outcomes. They note that such unrealistic expectations can in turn lead to dissatisfaction with the opportunities they have had to participate (parliamentarian):

> *... you're always going to have people who are going to be unhappy with the process ... they may feel they weren't participating in it at all, we may feel that we allow them a great deal of participation. But because the outcome wasn't to their liking they won't be happy with it.* (Government officer)

> *... we need to communicate to people as well that, we're grateful to receive ideas, but, the fact you have an idea doesn't mean it will actually be implemented.* (Government officer)

We found that different informants, depending on their experience and capability to participate in law reform, had different expectations of law reform consultation. Some informants, particularly those with less experience, expected to see their input reflected in the final outcome (individual; non-legal CSO).

Non-government informants consistently and commonly identified issues with the management of law reform consultation processes, rather than law reform outcomes. They reported that where input to a consultation process had been made, it was unclear that they had been heard or considered:

> *There is no transparency of how they actually dealt with that [submission] ... no response ... Because they're not going to write back to you and say, 'We read your submission. We like clause number whatever. We thought your reasons were valid. We didn't like clause number 2 because of ... ' There's no feedback.* (Non-legal CSO)

Non-government informants suggested that often participants in a consultation were not kept informed about what stage a process had reached, or 'never hear again from any bit of the process' (member of government advisory body):

> *... they call for submissions, but then often you don't hear any more about it ... We made a submission ... ages ago, years ago probably, I can't remember how long ago. And we haven't heard anything about it ... is the [Department] recommending amendments ... have they done a report on it, we don't know.* (Legal CSO)

Not knowing what is happening means that law reform consultation more often than not appears to be impenetrable (non-legal CSO). Lack of feedback about whether or how their contributions have been considered can leave participants feeling uncertain, incapable of influencing law reform, and questioning the general worth of contributing to a law reform process:

> *... somebody sits a year after they were consulted about something and says 'whatever happened to that guy that came and asked us about something? We never heard anything about that.' And so people go 'oh, well, you know, why bother, they never listen to a word you say'.* (Member of government advisory body)

Many non-government informants suggested that participants become cynical when law reform outcomes are perceived to be inconsistent with evidence submitted during consultation:

> *People ... [are] often frustrated and become cynical when they realise that despite the wealth of evidence that may be produced, the Government could just turn around and ignore it.* (Parliamentarian)

Cynicism with the process is damaging because it reduces the likelihood of future involvement. A CSO informant in the *Boarders and Lodgers Case Study* noted the extensive campaign history and the number of consultations with select stakeholders conducted over the years, and in light of government non-decision in that case study regarded the significance of future consultation on this issue with some scepticism:

> *... a good example of being stuffed around endlessly would be issues around boarding houses ... They've had endless inquiries ... in the end it's just a time delay in the process. It's just dragging the chain ... So endless consultation is worse than no consultation. It's just a way of covering up.* (Non-legal CSO)

Not knowing how a law reform outcome has been reached or indeed whether a decision has been made, it was argued, can erode confidence and promote disillusionment not only in law reform but governance processes in general:

> *... the real problem comes for one's confidence in the system of reform of anything, is if you just never hear, if the system never lets you know what it decided ... that's the worst position to leave people in, because it encourages, or allows the development of a cynicism about political processes.*
> (Member of government advisory body)

Informants also opined that participants would benefit from law-makers articulating a rationale for the law reform outcome in 'a response … like a post-discussion paper' (non-legal CSO), which accounts for how the end point was reached in light of the concerns raised:

> *... they do need to provide some feedback as to why something got up and something didn't. There must be broad areas that they can speak to. And not make us go back to the Act and trawl through, and say, 'Well did this get up and didn't that get up?'* (Non-legal CSO)

It was suggested that where concerns have been acknowledged and accounted for, participants are more likely to be confident in the final outcome even if they may not agree with it:

> *... I think that most people are mature enough to understand the word no ... if they go through a process that they're involved in and it comes out and somebody says at the end of the process 'well, we've looked at everything and here's where we're going. And I recognise that's not what you wanted but this is the direction which we're headed in'. That, if that's explained well enough people will go 'okay, don't mind that'.* (Member of government advisory body)

Indeed, non-government as well as government informants argued that consultation should ideally be a conversation, allowing participants to openly engage with the concerns and positions of other interests (government officer):

> *... the best process is one that's participatory. 'Cause in that process you hear the most voices, but those voices also hear other voices. So I go with an agenda of five things that I really want to win, and at the end of the day I might get one or two up, but I understand why I haven't gotten the other two or three up. 'Cause that was explained to me in the process.* (Non-legal CSO)

The above observations suggest that participatory modes of involvement not only promote participants' confidence in outcomes, they also build positive experiences of law reform processes.

Therefore it appears that repeated experiences of consultation processes which fail to meet participants' expectations of transparency and accountability can leave people feeling distanced from, and cynical about, not only law reform, but governance more broadly (member of government advisory body).

Our findings show that taking part in a law reform consultation process leads participants to expect, realistically or otherwise, that they will be heard, will be kept informed of developments and the rationale for the final decision. When these expectations are not met, participants can become disillusioned and disengage and are unlikely to participate in future law reform. In the face of what appears to be a relatively impenetrable process, only individuals with passion, experience, resources and realistic expectations of law reform consultation can sustain participation.

These findings highlight a need for better managing law reform consultation processes, and particularly ensuring that stakeholder expectations of the consultation process are realistic. Chapter 7 discusses how more experienced participants — those who tend to work 'close to the system' — are more likely to be resilient to having these expectations unmet.

6.4 Personal time and resources

Non-government informants overwhelmingly reported that participants in law reform often have little time and resources with which to respond:

> *... most times ... participants are not arriving with background knowledge so they can make a decision from an informed base. Instead they come into a hall or a room or whatever, they are bombarded with views and asked to make a decision on the spot.* (Individual)

They contended that not having sufficient time or resources is a key constraint on individual participation, and undermines people's ability to make meaningful law reform contributions (non-legal CSO):

> *... if law reform agencies turned up and say 'well we're here to reform, we think we need to reform some bit of law and we've got three weeks to do it, can you give us your opinion'. Well should any of us be surprised if people go 'oh wait a minute, I think I may need a bit longer than that because it's*

> *complicated and it's hard and I've never thought how to reform law before'.* (Member of government advisory body)

The more complex a law reform issue or proposal, the more time and resources an individual may need (non-legal CSO). Participatory processes also demand time and resources of individual participants, as seen in the *Civil Procedures Case Study*:

> *... at various times during the project people would meet four-thirty to six every Wednesday night ... week after week ... that's a huge level of commitment. We would do work outside the meeting, so people would have to go away and report back on stuff for the following meeting. And ... we were able to have a week, three four five periods of time where we met for a week at a time ... this was all done free of charge in terms of the time.* (Government officer)

Indeed our data suggested that individuals interested in participating in law reform have to find the time and resources to do so and that, consequently, those less able to do so are disproportionately excluded:

> *... not everybody ... have the access to resources ... and I think lots of people with disability will find themselves discouraged from participation.* (Member of government advisory body)

> *... the people who do not have that fortune and are in that most marginalised group rarely have the resources to do anything about it ...* (Legal CSO)

Informants suggested that the particular circumstances of disadvantaged individuals mean they face constraints to participation that are additional to that experienced by the general public, such as those imposed by distance on public housing participants living in rural and remote areas:

> *... it's impossible for them to have monthly meetings because of the cost. Whereas we live more in a public transport area so we can get the people to our monthly meetings, but for them, some of them have got to have overnight accommodation because they have to travel so far ... it is a cost constraint.* (Non-legal CSO)

CSO informants reported that individuals with different levels of functional literacy may require the proposal to be interpreted or 'distilled' before they can be capable of responding:

> *'Cause you're not only having to consult with people but you're often having to consult with people who you have to get up to speed ... you also have to deal with communication challenges and everything else. And that's not just*

> *true of disability, it's true of indigenous communities and you name it, it's there.* (Legal CSO)

Many informants contended that for interested stakeholders and groups to directly participate, particularly disadvantaged groups, information needs to be distilled (member of government advisory body), which requires:

> *... time and a proper process and an accessible process and a way to develop a meaningful session where there is some information provided and feedback given around something as complex as a legal document which you have to explain 'this is what it's saying, what do you think about that?'*
> (Non-legal CSO)

Without a 'proper and accessible process', consultation can risk being 'tokenistic' (non-legal CSO; non-legal CSO). Disadvantaged individuals, and particularly individuals with complex needs, are likely to require tailored processes which may involve translating and interpreting legalistic information into plain language, other languages, or other accessible formats, and conducting information and discussion sessions and forums in accessible ways.

The vignette below of the NSW LRC's statutory review of the *Disability Services Act 1993 (DSA 1993)* provides an example of a highly consultative and inclusive law reform process involving disadvantaged individuals. The vignette demonstrates how with the provision of sufficient time and the commitment of significant resources, the inclusion of people with particular needs can be facilitated using tailored rather than standard methods of consultation.

Review of the *Disability Services Act 1993*

In June 1998 the NSW Law Reform Commission (NSW LRC) undertook a statutory review of the *Disability Services Act* (the *DSA 1993*). The *DSA 1993* affects the interests of people with disabilities, specifically in relation to services. The purpose of the review was to consider if the policy objectives of the Act were still relevant; that is, to establish what people with disabilities sought to achieve from services provided and whether these needs had changed since the commencement of the Act (see NSW LRC, 1998).

The NSW LRC undertook an extensive staged and multi-layered consultation process. With the assistance of the Disability Council of NSW the NSW LRC established a 10 member reference group consisting of representatives from peak CSOs. The reference group met on four occasions and provided advice on the conduct of the review as well as comments on drafts of Issue Papers (the *IP*) and the Report (NSW LRC, 1999).

Prior to drafting the *IP* the LRC wrote to a large range of CSOs, met with key organisations and visited large residential services to ask for their preliminary views and submissions on issues they wished to have addressed. In September 1998, the LRC widely distributed the *IP* in multiple formats; large-print and spiral-bound, diskette, on the Commission's website, a large-print summary, and a summary on audio tape, as well as publicising the review in six newspapers for a variety of non-English speaking populations, on SBS radio, community radio stations and 2DAY-FM radio (NSW LRC, 1999). The NSW LRC accepted submissions in response to the *IP* up until February 1999. Many CSOs made submissions after extensive consultation with their members often attended by the NSW LRC.

The NSW LRC also held seven public seminars over three weeks between 18 November 1998 and 2 December 1998 to allow key stakeholders to discuss the issues raised in the *IP* and to raise further issues not already covered (NSW LRC, 1999). Four seminars were held in Sydney for CSOs and individuals, with separate seminars held for people with disabilities, advocates and service providers (NSW LRC, 2000). Three regional seminars were held for anyone with an interest in the *DSA 1993* (NSW LRC, 1999).

Understanding that people with disabilities may be less likely than the general public to attend public seminars and write submissions, the NSW LRC widened their consultation to target difficult to reach groups through the commission of three consultancy organisations. These organisations used tailored methods to consult participants that included people with intellectual, physical, sensory and psychiatric disabilities, autism and acquired brain injury, Aboriginal and Torres Strait Islander people and people from a non-English speaking background, children with physical disabilities and young people in care and formerly in care, who were identified through peak CSOs. Small focus groups and in-depth one-on-one interviews were conducted in regional and metropolitan New South Wales in November 1998.

In July 1999 the NSW LRC published *Report 91 (1999) — Review of the Disability Services Act 1993* (NSW) which detailed the LRC's review findings and final recommendations based on the consultation and research undertaken.

While tailored approaches can be time consuming and costly, without them some disadvantaged people may well be precluded from direct participation in law reform (non-legal CSO):

> *... if you want to get access to disadvantaged people who may have been excluded from the processes of law reform over their entire life, you can't rush that ... if we want people to participate we have to accept that that costs time and money.* (Member of government advisory body)

Having sufficient time and resources is therefore critical because they help to 'level the playing field' for individuals with less capacity to participate

(individual). Where time is short — as it is often observed to be in law reform — the ability to participate may be predicated on being able to access and marshal sufficient resources to overcome time constraints, or rely on CSOs to participate on your behalf.

6.5 Particular constraints to participation by disadvantaged people

This chapter has so far discussed key factors affecting people's ability to participate in law reform, and where relevant has highlighted particular factors relating to disadvantaged individuals. Additional constraints experienced by disadvantaged people stem from physical, cognitive, cultural, geographic and continuity factors (such as continuity of place), and the above discussion has already touched on some of these. These types of factors alienate disadvantaged people from law reform processes in different ways, and suggest diverse participation needs. In this section we discuss how the additional constraints that disadvantaged people face, if not actively recognised and addressed, can disproportionately exclude them from participating in law reform.

The formality of law reform processes, including the structures and surroundings within which they tend to take place, was suggested as being especially intimidating and distancing for many disadvantaged people:

> *... people who maybe come from Mt Druitt and who come to exercise the democratic right to speak to their representative, those factors are real. They're most real in the minds of people who are most out of place when they go into Governor Macquarie Tower or go into the Parliament building ... They kind of look around and go 'well I've never been in a place like this before' and you're already at a disadvantage in the dialogue.*
> (Member of government advisory body)

We noted earlier in this chapter how lower levels of functional literacy and insufficient resources constrain an individual's ability to participate in law reform. The higher prevalence of literacy and resource constraints among disadvantaged individuals disproportionately and further limits their ability to participate. An informant reported that increasing reliance on internet-based communication technology facilitates the participation of some people, and distances others:

> *... particularly for our constituency, for marginalised and disadvantaged people, the digital divide is a huge issue ... There's information haves and*

> *information have nots ... [technology] is a really powerful mechanism for engaging ... But for people who are actually poor, probably less useful.* (Non-legal CSO)

If technology is relied on as the primary means for information exchange in law reform, some communities will be excluded unless their information technology and comprehension needs can be met.

Disadvantaged individuals may also be excluded from law reform in very practical and direct ways, such as by using inaccessible consultation documents, not producing meeting agendas or other materials in braille or on tape for blind people (member of government advisory body).

The participation of people with cognitive disabilities, it was suggested, required that their particular needs be acknowledged and actively supported in a participation process:

> *... the communication style with people with intellectual disability might be slightly different than other consumers ... so there's careful considerations about how you go about it and how to facilitate it and to make it meaningful.* (Non-legal CSO)

Informants also suggested that people with mental illness may have difficulties which, if not addressed or acknowledged, will preclude them from participating (government officer):

> *... [a] barrier ... is that people with a long standing mental illness are likely to have a psych disability as well ... if it's a consultative process that's going to go on for twelve months, you want somebody who's there with an advocate plus a substitute because the mental illness is a transitional thing and can come back. The very pressure of sitting on a committee like that could bring it back.* (Non-legal CSO)

Communities from diverse linguistic and cultural backgrounds, including Aboriginal communities, were reported as being alienated and removed from participating in formal consultation processes (non-legal CSO).

Diversity among disadvantaged people and groups, particularly where some have high levels of complex need, such as being homeless, means these groups are likely to need significant assistance to facilitate their participation and representation:

> *... they're not a homogenous group of people, yes, they have something all in common being the fact that they're homeless. But you've got a variety of age ranges, a variety of issues in that, whether it be drug and alcohol, mental illness, trauma, things like that as well. So you can't necessarily say one thing is going to fit all of these people to get a representative view.* (Non-legal CSO)

The personal circumstances of many individuals may be such that their participation in law reform will primarily be through others, particularly through CSOs:

> *... with people who are homeless or people who have experienced domestic violence ... It's largely done through service providers in terms of how good you pull that together.* (Non-legal CSO)

Because participation needs differ among individuals and groups, and particularly among disadvantaged people and groups, one-size-fits-all approaches in law reform consultation are unlikely to meet diverse needs. Rather they will disproportionately exclude some people and groups. Informants suggest that approaches tailored to individual needs may be necessary to include diverse people:

> *You have to be able to go and see clients where they feel comfortable. You have to provide materials and help them through the process.* (Legal CSO)

While there are instances of tailored consultation targeting specific groups,[96] particularly where law reform is expected to impact directly on particular sub-groups, they are less commonly used for law reform issues that have a broad relevance for the general public:

> *... the law reform that we're [people with disability] interested in is not just about disability services ... people with disability are family members and community members and neighbours and mothers and fathers and daughters and sons ... we are as interested in mortgage rates as we are in whether or not a wheelchair accessible bus is available. Now we're interested in both, but the law reform process and agencies involved in it, may run the risk I think of pigeon-holing people with disability and their families as being only interested in law reform that's about disability services, and of course we're not ...* (Member of government advisory body)

Many informants suggested that law reform consultation tends to insufficiently consider the particular needs of disadvantaged individuals:

[96] Such as the previously described review of *DSA 1993*.

> *... disadvantaged groups are further disadvantaged on a number of levels I think. I mean firstly I don't think government has worked out a way where they can effectively consult with disadvantaged communities. I'm speaking in very general terms. They can certainly maybe consult with various groups which might represent their interests ... But ... there's no kind of direct communication at all.* (Legal CSO)

Unless particular and diverse participation needs are considered, disadvantaged individuals are likely to be excluded from direct participation in law reform, and may be dependent upon representation by or through CSOs with whom they have contact.

6.6 Law reform capability

Our data suggests that few members of the public have the full set of knowledge, skills, time, resources and connections that enables law reform capability. Irrespective of the opportunities available for participating in law reform, individuals do not come to law reform equally. As suggested by an informant:

> *... 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)

While law reform capability may vary across individuals, the bar for effective participation in law reform is set high for most people. That is, many individuals in the general population are likely to struggle to participate. Different forms of disadvantage will add to what is already a difficult undertaking.

Our case studies suggest that individuals draw on a range of information, knowledge and skills to effectively participate in law reform, including functional literacy and law reform literacy, as well as motivation, time and resources.

Our data suggested that the law and its reform, as well as consultation about changes to the law, rely heavily on written forms of communication and involve a sophisticated level of functional literacy that is beyond that of many in the community. The significant gap in general levels of functional literacy among the Australian population and the sophisticated levels involved in participating in law reform suggests that functional literacy alone in law reform excludes

most individuals, and disproportionately excludes disadvantaged individuals from direct participation.

People are only likely to be interested in and have an opinion about a reform that they understand and identify as being meaningful to them. We found that without assistance people struggled to understand what a law reform proposal or legislation says, what it means, and how to go about participating. The gap in community literacy and the functional literacy required for law reform also explains observations that people who do participate tend to come from a narrow set of 'usual suspects' of people who are relatively well educated, resourced, and connected to a range of information and institutional networks.

While functional literacy is foundational, law reform capability also involves a range of other information, knowledge and skills. We found at least six information and knowledge domains, which we collectively refer to as 'law reform literacy', that inform law reform capability:

- how law reform processes generally operate
- when a particular law reform will occur
- what a law reform proposal says — the substance or intended outcomes of the proposal, and the procedure by which the intent shall be carried out
- what significance the wider legal context has for the law reform proposal
- the policy context of the issues and their
- political context.

These knowledge domains are each fundamental to understanding 'how' law reform operates and how people may participate, 'what' the issues are, and 'why' an idea may or may not work. Advocacy skills associated with knowledge of the political context enable individuals not only to assess and determine whether a given participation opportunity is worth the time, resources and effort, they are also applied in a goal-orientated way by determining 'how' to best present one's position in the process in order to pursue one's interests.

Law reform capability is therefore a culmination of functional law reform literacy, using problem solving, critical thinking, planning, and strategising drawn from functional literacy as well as multiple law reform literacy domains in order to achieve a particular law reform outcome. Importantly, this capability may be constrained or prevented by a lack of functional ability in any of these law reform literacy dimensions.

We found that law reform consultations generally occurred in one-size-fits-all ways that did not take into account the different law reform capabilities of individuals potentially affected by a reform. Our informants suggested that some affected people and groups require additional time and/or resources in order to participate. Indeed, many viewed having sufficient time and resources as being critical for any real opportunity to participate effectively. Importantly, the amount of time and resources needed varies with the individual, their particular circumstances, resources, access to information, and the complexity of the issues involved.

Law reform, however, rarely waits for individuals. In order to participate people are often expected to get up to speed within specified time constraints, and many members of the general public, as well as disadvantaged people, find the knowledge, skills, time and resource demands of law reform too onerous. In the absence of active support, most individuals are likely to be excluded from direct participation.

Lack of transparency and uncertainty of outcomes in law reform consultation also deter participation. We found that while individuals do not generally participate, those who did tended to have negative experiences of law reform that discouraged them from participating in the future. Informants reported that many participants in a law reform consultation thought that consultation would provide opportunities for their views and voices to be heard, that they would be kept informed about what was happening, and that they would receive explanations for decisions and outcomes. When these expectations are not met, or misconceptions not managed, there is a risk that people will become disillusioned, question the worth of participating, and lose confidence in law reform decisions.

We found that some individuals who have participated and continue to be involved in law reform are not doing so because they are particularly confident in the process, but because they are tenacious and passionate about particular issues. Our data suggested that the more experienced and hardened advocates are also those who had greater understanding of the wider political imperatives of law reform decision-making, and that they also had more realistic expectations about what was practical and achievable in law reform. Experience also made them more resilient and persistent, notwithstanding negative experiences and outcomes.

Acquiring advocacy skills involves repeated practical exposure to law reform — something likely to be beyond the time and resources available to most individuals. The multi-dimensional nature of functional law reform literacy is also a key reason why individuals often participate in law reform through organisations.

Finally and importantly our data suggested that while people are generally excluded, disadvantaged people are disproportionately excluded from law reform.

Disadvantaged people are more likely than the general population to have lower functional literacy levels and law reform literacy. Limitations associated with not having the required degree of literacy and communication skills present formidable hurdles for understanding and responding to law reform, making the task of working one's way through law reform extremely difficult. In addition, consultation processes designed to capture views of the general public and which adopt a one-size-fits-all approach will exclude disadvantaged communities having diverse communication and comprehension needs. Consultation processes tailored to different participation needs of people affected by reforms, however, are likely to be costly and time-consuming.

The personal circumstances of many disadvantaged people also mean that they not only lack the motivation, time and resources for law reform activities, they are also alienated from law reform. People and groups who have been historically marginalised and excluded from social and political processes are more likely to be fearful and wary of authority and are less inclined to participate in activities such as law reform. Further, immediate primary needs such as health, shelter and survival, especially for people who are disadvantaged and who have multiple and complex needs, consume a greater proportion of their available energy and resources. As an informant suggested:

> *... there needs to be, somewhere in the process, recognition of the fact that people are marginalised from these processes. Know nothing about them, cannot participate and are in living situations and circumstances where ... not only would they never hear about it but they just don't have that capacity or resources.* (Non-legal CSO)

For many disadvantaged people, law reform is so remote in the scheme of their personal difficulties that it barely registers. Indeed the additional constraints associated with social and economic disadvantage may mean that the choice of participating in law reform is simply not open to a disproportionate number

of disadvantaged people, notwithstanding that participation opportunities exist and are formally and equally open to all:

> *... I've got to live in a lawful manner and laws affect me ... But my ability to choose is much greater than others ... we've got the real disparity in people's ability to choose.* (Non-legal CSO)

Critically, some people have a far greater ability to choose what they do and do not do in their political, social and economic lives. Law reform, and especially one-size-fits-all consultation about law reform, reproduces and compounds this social inequality.

For many, the capability to participate in law reform — other than through organisations such as CSOs — is limited. In the following chapter we see how individuals, and especially disadvantaged individuals, depend on CSOs to represent them in law reform because of their greater ability to overcome the formidable time, resource and law reform literacy constraints.

7 Civil society organisations in law reform

The range of knowledge and skills, as well as time and resources, required to participate in law reform means that individuals and governments often rely on civil society organisations (CSOs) to facilitate public and stakeholder participation. CSOs, including consumer groups, interest and advocacy organisations, professional associations, industry groups and peak bodies, play important bridging and linking roles in law reform.

CSOs come to law reform with different interests, resources, connections and expertise. For the purpose of this report we draw a distinction between industry CSOs and human services CSOs. Industry CSOs — that is, business, trade and employer associations — are often key stakeholders and regular participants in law reform. CSOs in the human services sector include consumer, interest and advocacy organisations, professional associations, service providers, charities, not-for-profit and non-government organisations, and peak bodies. We focus on CSOs in this sector due to their particular relationships with their disadvantaged constituents.

Among CSOs in the human services sector we distinguish between legal and non-legal CSOs, and consumer interest and advocacy groups from other organisations. Legal CSOs include community legal centres (CLCs), professional associations such as the Bar Association of NSW and the NSW Law Society, and other professional groups such as the Australian Lawyers Alliance. Although non-legal CSOs may have some legal officers on staff, or legal practitioners on their board of governance, they generally do not have express legal expertise nor do they provide legal services to individuals.

Consumer interest and advocacy groups are distinguished by being formed and led by people who often share particular attributes or the interests of their

members or constituents. These groups often have direct connections with constituents or members and may have strong claims to legitimately representing their views in law reform. They are often formed and led by groups of socially or economically disadvantaged people and as such have a particularly important role in representing and facilitating their participation in law reform.[97]

Peak bodies are umbrella organisations whose members are CSOs of allied interest. For example, NCOSS is the peak body for the social and community services in New South Wales and its members include a diverse range of community based service providers, consumer organisations, support and advocacy groups, as well as individuals of disadvantaged communities. Peak CSOs are often funded by government, in part, for the purpose of helping to organise the interests within a particular policy sector, and often act as information 'clearinghouses' that disseminate information about issues within a particular sector. With peak CSOs tending to have closer links to government, and their member CSOs having closer links to constituents and communities, CSOs are a key bridge between constituents and government.

In this chapter we explore the factors affecting the ability of CSOs to represent, coordinate and facilitate participation in law reform. In particular we examine the role of CSOs in law reform, their law reform capability and its implications for their ability to represent constituents and participate in law reform.

7.1 Role of CSOs in law reform

Our data suggests that government often ascribes CSOs a 'representative' role in law reform (government officer):

> *... we would always use advocacy groups or representative groups ... if we're seeking particular advice about some particular group, that's what we would do ... it's rare that you're actually consulting the individuals. It's usually through their representative groups or stakeholder groups.* (Government officer)

Where government wants the views of the public or stakeholders on particular issues, CSOs may be identified and harnessed for their standing and expertise (government officer), or for their reach into particular groups of people or members of the public, and are thereby a means to access particular communities.

[97] Examples of such organisations include People with Disabilities NSW Inc. (PWD) and Multicultural Disability Advocacy Association of NSW (MDAA). For constitutions of organisations like PWD and MDAA, see <http://www.pwd.org.au/publications/constitution.pdf> and <http://www.mdaa.org.au/archive/06/mdaa-constitution.doc> respectively.

Whether or not an organisation can legitimately speak for a group of people can be contentious, particularly in the context of overtly political activities such as law reform. CSOs demonstrating a sizeable membership or constituency base and internal democratic practices tend to be seen as being able to legitimately represent and speak for that membership or constituency, although just how sizable and how democratic they need to be is contested and value-based (Dalton and Lyons, 2005).

Organisations were identified by informants as having more political clout than individuals and accordingly, their contributions tend to carry more weight:

> *... if you send in a submission as people do, as Jo Smith or something, I don't think it carries a lot of weight. Whereas if a thing comes from some well-known organisation it's bound to carry more weight ...* (Non-legal CSO)

That said, individuals can and do make representations or submissions directly to government and parliament which can lead to legislative change:

> *I mean it's not unheard of that individuals making representations directly ... a number of legislative projects come to my mind because of the actions of single people or small groups of people rather than large monolithic organisations. It does happen ...* (Government officer)

Many informants identified CSOs as performing the following overlapping roles in law reform which we examine in turn:

- as experts or key stakeholders
- as bridges connecting constituents to law-makers, and as links connecting constituents and CSO to other CSOs and
- as capacity builders.

Through these different roles, CSOs represent the interests and enhance the participation of people, particularly disadvantaged people, in law reform.

CSOs as experts or key stakeholders

The profile and status of a CSO depends upon how they are perceived, which may be affected by its size, the way it operates, what it does, and who its constituents are (non-legal CSO). CSOs with well-established reputations and demonstrated expertise are likely to be more readily identified by law-makers as being key stakeholders:

> *... once you are established as a credible organisation ... then they start to take notice of you. If they don't know about you ... then you don't get the same level of access to senior policy-makers ...* (Non-legal CSO)

Law-making institutions often identify CSOs as experts, key stakeholders, or informants in particular law reform issues because of their perceived expertise or knowledge in the particular issues, the needs of certain affected people, particularly those who are more hard-to-reach such as groups of marginalised or disadvantaged people, or the potential impact of the proposed legal change on affected stakeholder groups.

CSOs' first-hand work with particular groups and communities enables them to acquire knowledge and insight about the difficulties of, and the practical impacts of law on, these communities (legal CSO):

> *If you're running a housing program and you find that you've got a lot of Aboriginal clients, and the landlords won't rent to them because they're Aboriginal, then the issue of discrimination becomes very apparent to you. I think it's just in the day to day work. And I think that's something that welfare groups ... generally speaking ... you know, that's the great asset they bring to the community ...* (Non-legal CSO)

Such knowledge about their clients and constituents enables CSOs to bring a unique and practical perspective to law reform issues:

> *... they [law-makers] are able to get a clear idea and think, 'I would never have thought of that and I would never have thought of that because I don't work with, say disabled clients and so it would never have crossed my mind.' ... so in that sense I think it can be quite helpful.* (Legal CSO)

CSOs providing services may also identify some of the problems that commonly affect their clients as being systemic (non-legal CSO), potentially caused and/or resolved by law reform (non-legal CSO). The on-the-ground knowledge and information that CSOs have through working with their clients and constituents may not be apparent to other people, as noted by an informant in the *Boarders and Lodgers Case Study*:

> *It's an invisible problem and the only people that see the problem are those that are providing the services to that client group.* (Legal CSO)

The perceived expertise and profile of CSOs are central to why more extensive law reform participation opportunities are available to them. CSOs are, for example, regularly invited to participate in a range of advisory councils,

commissions, committees, working groups and task forces, not necessarily as representatives or advocates to 'speak for' the interests in question, but as experts or holders of practical knowledge so as to 'speak about' people affected by certain issues (member of government advisory body).

Some CSOs — particularly legal CSOs — may be approached by government or other law-making institutions for their legal expertise. Our government informants reported that one of the reasons they routinely and 'normally' approach professional or legal associations such as the Law Society, Bar Association, or Aboriginal Legal Service or specialist community legal centres, rather than other organisations, is because a lot of law reform 'is terribly technical' and presumes legal expertise (government officer).

Because of their reputation, some CSOs are regularly invited to participate at preliminary stages of law reform, or to contribute to consultations that are not open to the public (legal CSO):

> *... they approached us as a major stakeholder saying 'well look, we're putting together an issues paper, have you got any preliminary observations to make?'. So that's an example of us, although we're involved in the review at the back end of the process if you like, but being consulted from the very very early stage ...* (Legal CSO)

In their role as experts or as members of advisory groups, CSOs can sometimes have a privileged status as insiders, affording them more direct access to law reform. While inside access may not extend to a decision-making function, membership of working groups or task forces may involve extensive contribution to legislative schemes. For example in our *Civil Procedure Act Case Study*, membership of the Working Party amounted to a quasi-legislative role given that the formulated scheme was subsequently accepted by government and parliament without amendment.

When stakeholder views are required within a short timeframe, government will often approach those CSOs with higher profiles or expertise (government officer). These CSOs also tend to receive invitations to consultation processes from a diverse range of law-making institutions. Some informants suggested, however, that it was unlikely any particular part of government was aware of the volume of requests they receive:

> *... it's interesting because when stuff comes out of those big departments ... I don't know if anybody's actually checking what's getting churned out ... So*

> *there'll be a huge Bill or a huge change, or the 20 Year Plan … or something. And then there'll be this other little strategy thing. But the Department expects you to do an equal response to both of them … So sometimes the left hand and the right hand, even within the bureaucracy, they don't know that they're issuing all at the same time.* (Non-legal CSO)

Indeed we found some CSOs who receive invitations to participate in law reform feel obliged to participate, at least in part, so as to maintain the organisation's profile and reputation:

> *I think when you have a reputation … it's hard to say no. Not because it's hard to say no to them, but because you don't want to be then excluded from processes in future. So it's about sort of maintaining your relevance …*
> (Legal CSO)

CSO participation in law reform is critical, particularly where their clients or constituents are disadvantaged, have little capacity or resources, and are unable to participate:

> *… somebody who's truly disadvantaged, you're really more interested in how you're going to get the next meal on the table and a roof over your head. And I think that's where you really need good intermediate groups … You rely on people like that who really can take the time to actually articulate the interests … they're the ones at the coal face knowing what … the issues of concern are … there's a key role for interest groups and their ability to be able to articulate the concerns of disadvantaged people.*
> (Government officer)

> *… with people who are homeless or people who have experienced domestic violence, you know, there's some consumer movement around that stuff. [But] it's largely done through service providers …* (Non-legal CSO)

In the *Boarders and Lodgers Case Study* we found that it was the legal expertise of legal CSOs, coupled with their knowledge of the needs of disadvantaged communities and the impact of the law on these groups, which enabled them to demonstrate the practical consequences of lack of legislative protection for boarders and lodgers (legal CSO):

> *… the two [providing services and law reform work] go hand in hand. It's very hard to not get involved in law reform when you're working as a tenant's advocate … definitely the two go hand in hand … When you're talking to clients and you're constantly saying to clients, 'Yes, I know that's crap but that's the way the legislation is … '* (Legal CSO)

The particular circumstances and living arrangements of boarders and lodgers also meant that, in practice, it would be very difficult for these individuals to be involved in law reform other than through the advocacy of CSOs, as they themselves are often marginalised and unwilling to rock the boat:

> *... the majority of our clients do have quite serious mental health issues. So they don't have the capacity a lot of the time to do their own lobbying or advocating, they're disenfranchised as it is for various reasons ... there's no legislation protecting you ... they'd ring us up for advice and we said, 'Do you want us to contact the landlord?' and they'd say, 'No. I don't want to do this bit. I don't want to rock the boat ... I can't afford to get kicked out. I've got nowhere to go.'* (Legal CSO)

Information about some disadvantaged individuals or groups, and particularly those groups with complex needs, may be unknown to law-makers unless the CSOs that work with them and have knowledge about their issues are capable of participating in law reform.

CSOs as bridges and links

The nature of CSOs' relationships with law-making institutions, as well as within and among themselves, was described as being 'like a tree' branching out to networks and broader alliances (non-legal CSO). CSOs make connections within and across policy sectors: upwards to law-makers, downwards to constituents or clients, and also across sectors. These connections enhance CSOs' capacity to participate and represent constituents in law reform, as they bridge constituents and clients to law-makers as well as link constituents and clients with other CSOs and their constituents. Here we focus on how CSOs bridge between constituents or clients and law-makers, and later discuss their linking role in *Section 7.3*.

Our data suggests the bridging role that CSOs perform for their constituents involves two key aspects: CSOs 'speak to' and inform law-makers of the views and perspectives of their constituents relating to law reform issues, as well as 'reach' their constituents to inform and engage them about law reform.

Speaking to law-makers

A cross-section of informants identified CSOs as being a primary avenue through which individuals can participate in law reform (government officer; non-legal CSO), and that unless individuals are particularly resourced or well connected they have 'virtually no chance of … doing anything to change a law' on their own (non-legal CSO).

Individual and group interests seek to elevate their law reform priorities onto the government agenda by working through CSOs, for example by approaching them to pursue law reform issues with government:

> *... it regularly happens where we get members ringing us up or writing us letters just bringing things to our attention.* (Legal CSO)

Many informants reported CSOs draw on their greater connections to law-making institutions and provide constituents with additional opportunities to raise law reform issues. They facilitate direct contact between their constituents and a variety of law-making bodies, including law reform commissions, parliamentary committees, ministers, government departments, parliamentarians and advisory bodies (non-legal CSO; member of government advisory body).

When law-making is reactive, occurs with little notification, or when government has formulated legislative proposals without public or stakeholder consultation, CSOs were identified as being more capable of quickly mobilising and making representations on behalf of their constituents (member of government advisory body).

Importantly, CSOs can 'speak' to law-makers where individuals or particular groups lack the capacity:

> *We're the ones that are in contact from the ground up. And so we have to be some kind of bridge. If we have the ability to speak up then we're a bridge ... It's very difficult for anyone to speak to power. But maybe we have more ability ... I guess community organisations are in touch with the client base in a way that the Government isn't. And the decision-makers aren't. So it is our responsibility to talk to power in that way.* (Non-legal CSO)

Reaching constituents

All our government informants reported that it was preferable that CSOs sought to reach into their constituencies and facilitate their involvement in the organisation's law reform activities, although they also noted this is not always possible (government officer). The ability of CSOs to legitimately represent and speak for constituents is dependent on their ability to engage with their constituencies:

> *... the more representative or participatory the local NGO is or the regional NGO is, or the issue group NGO is, the better off we are in terms of getting the facts about what's going on and what it really means for real people.* (Non-legal CSO)

CSOs able to demonstrate that they are empowered to 'speak for' a constituency may be considered to be more 'legitimate' and accordingly be invited to participate in more law reform consultation (non-legal CSO). Not surprisingly therefore part of the role law-making institutions perform in analysing law reform submissions involves considering whether CSOs can legitimately represent the interests they claim to speak for (government officer).

A number of informants drew a distinction between 'speaking for' and 'speaking about' groups of people, and noted that this is an important source of tension among CSOs and some participants:

> *... if you talk to some individuals there's also this issue from time to time, a statement, 'Well, that's what that group says. That doesn't necessarily represent ... '* (Government officer)

The legitimacy — both among constituents as well as with law-making institutions — a CSO has is an ongoing issue where CSOs claim to represent a particular constituency:

> *... sometimes there's a question about, you know, there's always a question about illegitimacy that sort of seems to be residing under the surface.*
> (Non-legal CSO)

Some informants observed that consumer organisations may have more reach into their constituents because they are run, managed and led by them (non-legal CSO), and that through such organisations disadvantaged constituents may be afforded a voice and an opportunity to have a say in law reform:

> *Just the fact that you've got a voice I think, and be given the opportunity of having a say. Through this organisation, we do have a say ...*
> (Non-legal CSO)

Similarly, providing evidence of internal democratic or constituent engagement processes may add weight to both a CSO's law reform claims and its perceived reach into communities:

> *... when you just say you've held twenty consultations that's important, and it has a degree of weighting to it [but] when you say 'we had twenty consultations attended by two thousand people' it's got a greater weight.*
> (Non-legal CSO)

Due to the circumstances of their disadvantage, some individuals and groups are harder to reach and engage for the purposes of law reform. Boarders

and lodgers in the *Boarders and Lodgers Case Study* were noted by CSO informants as being 'a transient group' (legal CSO) who are challenging to engage:

> *... we had no long term connection with them because most often they'd be living in one boarding house for two or three weeks, moving on. Or they'd be suffering from a really severe mental illness ... or they'd be long standing boarders and they would be homeless because the boarding house would close and we couldn't locate them.* (Legal CSO)

Particularly marginalised individuals and groups may have to rely on CSOs to 'speak about' their experiences and difficulties with the law, if these groups are not to be excluded from law reform.

CSO informants described an important aspect of engaging their constituents for law reform is to act as an 'information conduit' and enable communication between law-making institutions and constituents:

> *... [CSOs are] in the middle and try to translate this world to that ... From one extreme to the other ... [law reform] is like speaking a foreign language ... that's what we do, we're a sort of communication conduit, or translator, a broker.* (Non-legal CSO)

CSOs interpret and translate the bureaucratic and legalistic language of law reform and its consultation documents into a language and form more meaningful for constituents:

> *... what we can do is reinterpret ... reinterpret that into plain English and get it out to people ...* (Non-legal CSO)

Many CSO informants reported that when they communicate with law-making institutions they usually reinterpret and translate the views of constituents back into a form of 'policy speak', which distils people's experiences into a 'submission form' (non-legal CSO; legal CSO).

Translating and interpreting involves identifying and analysing the policy and legal implications of law reform issues for constituents (non-legal CSO), drawing on knowledge of the law, of constituents, and how they may be affected by proposed reform. In our *Mental Health Act Case Study* for example, a cross-section of informants reported that the peak bodies MHCC and NCOSS significantly assisted member CSOs' knowledge and understanding of the issues in the review of mental health legislation (non-legal CSO).

Our data suggests that unless government can engage directly with disadvantaged people or unless those CSOs able to legitimately represent disadvantaged constituents are able to overcome time, resource and other constraints, disadvantaged people will often be effectively excluded from participation or representation in law reform.

CSOs as capacity builders

CSOs may also increase the law reform capability of their constituents by building their capacity to advocate. Some CSOs for example provide education and training programs designed to inform their constituents about the law, law reform processes, and system of government through (non-legal CSO; non-legal CSO):

> *... lots of forums to teach about the way things are set up and about how the system works, a little bit all about different groups and different rights. So we're always trying to educate beyond the initial issue that someone comes to see us about ...* (Non-legal CSO)

A number of CSOs with disadvantaged constituents in particular, conduct training programs for the purpose of 'skilling up' their constituents' ability to do advocacy:

> *... they [constituents] get training in how to speak out and tell their story about their past and so on, and then they will go to a whole bunch of places including Department of Ageing, Disability, and Home Care and ... Attorney General's Department and Police ... And what they're telling about is their experience of having a disability or being a carer of someone with a disability ... that's one of the things we try and do here ... to build up their own skills in doing that themselves.* (Non-legal CSO)

Some CSOs build the capacity of their constituents by producing information brochures or providing training programs on how to conduct systemic advocacy. Examples include the Carers NSW's *Action Pack for Carers*, a self help kit which provides guidelines on how their constituents can influence government policy and law reform,[98] PIAC's *Working the System: A guide for citizens, consumers and communities* (2003) and its training program *Effective Advocacy Skills and Strategies*, designed to assist individuals and communities to participate and influence government decision-making.

[98] For example, see the online *Having Your Say: Action Pack for Carers*, prepared by Carers NSW, see <http://www.nscchealth.nsw.gov.au/carersupport/resources/otherpublication/5003748200.pdf>.

A number of informants argued that capacity building of particular communities involves taking a 'community development educative process' (legal CSO) or:

> *... a kind of community development approach if you like to law processes that say to people who might be aware of an issue or a problem, or may be affected by the way law works against their interests, but who've never thought of it in terms of 'well how do we reform law to make it fit with our interests'.* (Member of government advisory body)

Such an approach involves translating aspects of the law reform process, as well as working with people to give them the confidence to articulate views (member of government advisory body) — something which some CSOs, particularly consumer and advocacy groups, do.

CSOs therefore perform a key role in law reform where they bridge government and community members, articulate the views and needs of disadvantaged people in particular, identify the impact of the law and proposed change on constituents, and assist people to voice their views and concerns to law-makers.

7.2 CSO law reform capability

A CSO's law reform capability depends on its ability to participate in law reform and represent a constituency. Each CSO varies in its ability to do these things. For instance, some CSOs have more law reform expertise than others, while others have greater reach into their membership, constituents or clients. Others again, particularly peak bodies, may have closer relationships with government.

Here we describe those factors, identified by our informants, which affect the ability of CSOs to participate and/or represent the interests of constituents in law reform. These factors in turn are time and resources, and law reform expertise.

It should be noted these factors are interrelated. For example the law reform expertise of a CSO enables it to respond quickly, while a CSO lacking in law reform expertise may in part be assisted by having sufficient time and access to resources.

Time and resources

Time and resources affect whether a CSO is able to seek additional information or knowledge, apply its own expertise, consult with constituents, develop a

response, and undertake other law reform activities in order to participate and represent constituents in law reform.

Our non-government informants overwhelmingly reported the importance of both time and resources to CSOs' law reform capability. However they often referred to these factors simultaneously and tended to speak about them in ways that suggested the effects of time on CSOs' law reform capability are bound up with the effects of resources. In this section we first describe the interconnected factors of time and resources, before turning to other effects that lack of time and resources may separately have on CSOs' law reform capability.

CSO law reform capability depends on both the time and resources available when a participation opportunity arises. Many CSO informants frequently spoke about the issue of resources while also referring to time pressures:

> *... a lot of this is resource based ... when you're responding to, for example to the Disability Discrimination Act, or the Mental Health Act, you know an inquiry into large pieces of legislation ... looking at the entire Act, six weeks might not be enough to do justice.* (Non-legal CSO)

CSO informants regarded available time and resources as often being the difference between doing 'good' or 'quality' law reform work or producing 'fairly poor' or 'very amateurish' work. Doing 'good' law reform or producing 'effective' submissions was repeatedly and consistently reported by informants as being both time and resource intensive:

> *... sometimes some of our submissions from our end are very amateurish. Because they are amateurish they don't have the impact that they should have ... [Its] Not so much the size of the organisation. It's the lack of the resources, the lack of training ... I mean to make a good submission takes bloody hours.* (Non-legal CSO)

> *... to be totally pragmatic ... it's about time and who's there ... we've had really good submissions and fairly poor submissions, hasn't been, and has had nothing else but the fact that we haven't had much time ...* (Non-legal CSO)

Limited time or resources may prevent CSOs from taking up participation opportunities when they arise (non-legal CSO). The interconnected effects of both factors on law reform capability, however, mean that access to one may, in part, ameliorate or offset some of the limitations arising from lack of the other.

For example we found those CSOs busy with other activities when participation opportunities arise will often have to make time and resource tradeoffs. Some informants noted that participating in a law reform consultation will usually involve making a decision between competing organisational priorities:

> *... the parliamentary stuff ... they'll say, 'we'd like you to come and make representation, and can you answer these questions'. Some of them are in your sort of immediate grasp and some of them you'll have to go away and collect data and do various things for. So they usually take a bit of time and then you've got to negotiate usually whether you can give up what appointment in order to attend ...* (Non-legal CSO)

The timing and timeframe of law reform often determine a CSO's capacity to make use of its available resources. If law reform is reactive, comes on suddenly, or has a short period for consultation, CSOs may simply not have enough time to participate or may not have the sufficient resources to overcome time constraints:

> *... I would say that the timeframe inevitably means that a lot of organisations ... can't put as much of their time into it because they're limited by their resources.* (Legal CSO)

Similarly those CSOs able to draw upon financial, human and technological resources have a higher capacity to overcome short timeframes in law reform. Some CSO informants reported that being able to mobilise available expertise and employ information technology to consult with constituents significantly increased their ability to quickly develop law reform submissions:

> *... we've got specialist staff here that have the expertise to turn that stuff around into submission speak quickly. And then we get that back out. And we use our website a lot for that and we use our email lists a lot for that.*
> (Non-legal CSO)

Where CSOs lack both the time and resources, they are likely to experience great difficulty with, if not be precluded from, participating in law reform.

CSOs with fewer available resources, and disadvantaged constituents in particular, are likely to be at a significant disadvantage. Engaging with disadvantaged constituents in order to represent their interests will often require more time and resources because of their constituents' lower functional literacy and therefore greater law reform literacy needs, particularly where they are unable to rely on standard information technology tools to

communicate with their constituents. Where CSOs have a membership or constituency that is diffuse or hard to reach, consulting with them may present additional difficulties (non-legal CSO). Some constituents may require 'greater interpretation' than others (non-legal CSO), and where constituents have lower levels of functional literacy or experience additional language and/or cognitive difficulties, communicating about law reform issues may be particularly difficult (non-legal CSO).

While lack of both time and resources affects CSOs in general, some CSO informants suggest they particularly exclude CSOs with fewer available resources or for whom constituent engagement is more resource or time consuming — a characteristic of many CSOs that represent disadvantaged members and constituents:

> *... from our point of view the major constraint has been having enough time and capacity to tap into the consumer networks and particularly through our members. And so to get a strong consumer voice in the process ... it's very difficult for consumer groups and advocacy organisations to kind of pull that all together without the resources ...* (Non-legal CSO)

A cross-section of our CSO informants suggested that CSO ability to reach constituencies in order to represent their interests, particularly the interests of marginalised groups and disadvantaged people, requires dedicated or additional support and resourcing (non-legal CSO; legal CSO; member of government advisory body).

Without sufficient time or resources for direct constituent engagement, CSOs often rely on their experience and understanding of constituents, or previous engagement with them in law reform (non-legal CSO; government officer).

CSOs cope with time and resource constraints by being selective in the law reform work they do:

> *... you have to work strategically as to where you engage in the process and what your resources can allow at that particular time. That's how you have to do it ...* (Non-legal CSO)

Other CSOs reported that law reform can be so time and resource consuming that their organisation has instituted organisational policies limiting their law reform work:

> *We have a general in-house policy of only doing one or two submissions a year ...* (Legal CSO)

We turn now to the separate effects that time and resources have on CSOs' law reform capability.

Time

CSO informants often referred to the unpredictable and disruptive nature of the time demands associated with law reform. Timing and timeframes in law reform are overwhelmingly reported as a constraint on CSOs' ability to participate, given that opportunities usually arise in an ad hoc fashion, often with short notice (legal CSO), and swelling at particular points in time:

> *... we find it sometimes very difficult to meet deadlines ... Sometimes they send the Bill the day previously and say 'can we have your comments by the day after tomorrow'. But if it's an important Bill then we work late at night ... But most often they give us at least two weeks to deal with it, and, but that's really not enough because one would need at least a month to look at it properly ...* (Legal CSO)

> *... it comes in waves too. Sometimes we're really running to catch up given that we've got so many, and then there'll be a gap of two months where we don't have much. So it's sporadic throughout the year.* (Non-legal CSO)

Unpredictable timing and short timeframes make it hard to ration law reform work, particularly where important law reform issues arise after a CSO has already exceeded its resource capacity. Each invitation to participate in law reform consultation is likely to be additional and ad hoc work which needs to be fitted in among the CSO's other activities.

CSOs with less experience or less access to law reform expertise often find the timing and timeframe a key constraint to participation:

> *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)

Where legal expertise is lacking, CSOs unable to access the legal advice they feel they need may be prevented from participating:

> *... often the timeframe is so tight that finding a law firm, getting them up to speed on what the issues are, and then ... allowing ... for the organisation to think 'okay, now we understand what this legislation does, what's our view on it?' ... And often the time is just not available to do that.* (Legal CSO)

Timing and timeframe pressures also have important consequences for CSOs' ability to consult their constituents and make accountable law reform decisions.

Our CSO informants contended that while constituent consultation is key to doing 'good' law reform work, developing an 'informed response' from constituents takes time, especially where the issues are divisive or constituents have particular communication or comprehension needs (non-legal CSO; non-legal CSO). Importantly, this is a factor that will differ from CSO to CSO depending on the nature of their constituents and the law reform issue.

Short or inadequate timeframes were reported to limit the depth of constituent consultation and the quality of the representation, particularly where the issues or consultation documents are complex (member of government advisory body):

> *... we're not going to do a poor quality response ... it has to be meaningful and also because the way in which we try and work is to be as consultative as we can with our membership ... It actually takes time to put those processes in place and at least try to do that vaguely properly. And the timeframes often work against us on some of that stuff. When we get a reasonable timeframe we can do a really good process as well as a good product. But sometimes it's a bit hard.* (Non-legal CSO)

> *Very rarely do you get enough time and you sort of say to them 'no that's not good enough, we've got to have an extension on that because we have to be able to take it to our members'.* (Non-legal CSO)

Conversely longer timeframes enable CSOs to do the necessary interpretation and translation required for meaningful constituent consultation:

> *I think in total it was something like a nine month timeframe and we did all the consultations in the first four to five months. So then we had a period where we could get it right, make sure we could do some background research as well, see what was happening in other parts of the world and make it a nice strong proposal.* (Non-legal CSO)

Short timeframes are a particular constraint for those CSOs with internal governance requirements, such as requiring approval or signoff from the executive, board or organisational leadership before undertaking law reform work. CSOs usually have board meetings no more than monthly, and we found submissions for the *Mental Health Act Case Study* took months for some CSOs because:

> *... we held very specific board meetings to work through our position ... because being an incorporated body, the board is the one that sets policy, and this was asking us to take very specific positions on a range of areas. So we had board meetings to look at the data that came in from ... the field people, and from in-house, our own policy people.* (Non-legal CSO)

Organisational procedures to ensure accountability take time, and unless they are taken into account by law-makers, short consultation timeframes may limit the ability of those CSOs with internal accountability procedures to participate in law reform:

> *I think that three months, probably ... the representative bodies with their councils; they all tend to meet monthly. And it becomes a bit tight in two months. One month is just not acceptable ... And I guess the system's so diverse ... we have to get corro [correspondence] out to them which they have to then manage and get back to us. And that's not going to happen overnight either.* (Government officer)

In short, time pressures limit CSO capacity to:

- examine and understand the issues and implications of the proposed reform for constituents (legal CSO; non-legal CSO)
- muster and utilise the law reform knowledge, skills and expertise within the CSO (non-legal CSO)
- seek legal assistance from outside the CSO (non-legal CSO)
- communicate with networks and people outside the CSO (legal CSO)
- conduct meaningful consultation with constituents or other organisations (non-legal CSO; legal CSO)
- conduct research or find evidence to support law reform submissions (non-legal CSO)
- coordinate the development of a submission (legal CSO)
- get approval to make a law reform submission from the CSO's leadership (government officer)
- produce quality law reform work (non-legal CSO).

We found that some CSOs had implemented strategies to overcome sudden or ad hoc participation opportunities. A number of CSO informants reported that their organisation had pre-approved policy positions on identified priority law reform issues, ready to use when opportunities arise:

> *... the best we could do ... we actually wrote an alternative policy ... [and we still] use it ... you know, 'this is what we've been saying for five years' ...* (Non-legal CSO)

One CSO strategy for dealing with short timeframes is to seek extensions of time. In the *Mental Health Act Case Study* informants reported that NSW Health had been flexible and accommodating of their time needs by accepting submissions after the formal deadline had passed. However, other informants cited examples where extensions of time were refused:

> *... I rang them and asked for an extension ... 'We'll give you one day,' ... instead of Friday morning it would be Friday evening. I said 'Oh, forget it.'* (Non-legal CSO)

An informant who reported experiencing difficulty negotiating extensions of time was sometimes left with the impression that their contribution was not really valued or important to the body conducting the consultation, and that the timing and timeframe of law reform principally served the interests and needs of law-makers rather than those of participants or their constituents (non-legal CSO).

Resourcing and funding

Many informants spoke of how the role and funding of CSOs have significantly changed during the last 15 to 20 years (legal CSO; non-legal CSO). Increasingly CSOs are providing services on behalf of government, and reforms associated with outsourcing, competitive tendering, service agreements and recurrent funding cycles have reshaped how some CSOs are funded.

Informants also noted how over the same period, government has increasingly become more consultative with the public and stakeholders in the course of their law-making activities (government officer; government officer). While these changes have afforded more opportunity for CSOs to interact with government and contribute to law reform, they also have resource implications.

For example, most of the burgeoning law reform work has involved CSOs being invited to respond to 'top-down' requests for views or information. A number of informants reported that the time and resources CSOs spend on responding to top-down invitations have reduced their capacity for their own grassroots or 'bottom-up' law reform work:

> *... for the policy team, most of us would say that about 75–80% of our work is reactive. Because there's so much ... We spend huge amounts of time in*

> *meetings, on committees and responding to government initiatives. And much less than we would like in actually developing our own …* (Non-legal CSO)

CSOs vary greatly in the resources they have available, or can raise, for law reform. Some CSOs with disadvantaged constituents operate with little or no financial resources, and access to basic resources such as paper and printing, which many organisations take for granted, can make a difference to them in making a submission:

> *I hand wrote them and … got someone to type them up for me. We have no infrastructure, we have no money, we have no anything, it's all voluntary, and the government doesn't have any idea how little we have.* (Non-legal CSO)

For these CSOs, part of their law reform work may include raising funds:

> *… if I need to do some training, people will pass the hat around. If I need a new keyboard for the computer or need a box of paper or a new toner cartridge for the laser printer, people make it happen.* (Non-legal CSO)

Some informants suggested it is more difficult to raise funds for some types of law reform issues, including many which primarily affect disadvantaged people. For example, an informant in our *Boarders and Lodgers Case Study* reported that raising funds was difficult because:

> *It's not a sexy issue, it's not something people want to listen to. Raising funds for it was difficult.* (Legal CSO)

As we shall see below, increased service delivery obligations for some organisations, coupled with limited funding for advocacy and law reform work, have significantly reduced CSO capability for law reform.

Funding and funding obligations

Both the amount and source of funding affect CSOs' law reform capability. Here we examine government and non-government sources of funding and their effects.

(i) Government funding

Many CSOs in the human services sector, and particularly those that work with or represent disadvantaged people, are reported as being dependent upon government funding for most or part of their operations:

> *… generally in health and welfare … intellectual disability, physical disability … they are all getting, substantially, government funding.* (Non-legal CSO)

Human services CSOs, nevertheless, were characterised by a cross-section of informants as generally being under-funded:

> *... you've got several different types of problems. A lot of the NGO groups are significantly under-funded, in their resources ... they're always under-resourced in terms of personnel, in terms of facilities, in terms of money. We know that.* (Parliamentarian)

> *... we're still under-resourced, of course. I mean as government shifts more and more of its work onto the NGOs, it's not aligning that with sufficient resources to do the work.* (Non-legal CSO)

Limited funding makes it difficult to recruit and retain staff with law reform skills because the salaries human service CSOs can afford are lower:

> *... the lack of funding presents problems. Not the least of which is that salaries over time become uncompetitive and that affects the ability to retain quality staff ...* (Non-legal CSO)

A number of informants reported that CLCs in particular experienced difficulties in funding and retaining staff skilled in law reform work due to competition from both private legal practice and government agencies (legal CSO; non-legal CSO):

> *... there's more competition outside of the sector for the kinds of work too ... there's so much more available in other, bigger statutory authorities, or even in the private sector, to do public interest type work ...* (Legal CSO)

Additional government funding may not improve CSO law reform capability, however, unless CSOs receive funding specifically to support their law reform work. Increased funding may just increase service demands:

> *... money is always an issue ... with more funding ... you start to find that you're getting additional sort of requests for involvement at committees, networks, projects that you're asked to undertake. And before too long ... you'll just be in much the same ... You'll be bigger but in the same sort of, you'll feel like you're still chasing your tail. And you haven't quite got ahead of the beast.* (Non-legal CSO)

Government funding agreements usually prescribe what the funding can be used for, and may quarantine the funding from certain activities such as law reform (non-legal CSO). Some funding agreements specify whether or how much law reform an organisation may do (legal CSO; non-legal CSO):

> *... we're fairly strict about the amount of time and the amount of money that we fund for policy development as opposed to service delivery, but ... we do provide some money for policy development ... we just try to be fairly upfront in the funding agreement about what percentage of time should be spent on one and what percentage of time should be spent on the other. So if they ... can get funding from someone else ... they can just devote [it] to their policy work ... we give them the money for the service delivery which is the main thing that we're interested in.* (Government officer)

This informant noted the potential tensions where CSOs want to advocate for reform:

> *... I'm sure there are groups that do have a problem between how much time they spend with, especially if they're delivering services on behalf of government, and how much time they spend lobbying. Especially if they're lobbying against the government. Could pose some interesting problems ...* (Government officer)

Indeed a common theme in interviews with CSOs that receive recurrent government funding under service delivery agreements was that meeting performance targets and securing ongoing funding are prioritised ahead of other activities such as law reform. As the following informant observed, there is often tension between the organisational resources allocated to client services and law reform:

> *... there is the ongoing tension within organisations on the ground about the balance between if you like direct service delivery and the non-direct stuff around community development, and community education, and participation in law and policy-making. I think that it is really hard for organisations to strike that balance when they've got contracts they've got to meet. Outputs they've got to deliver on.* (Non-legal CSO)

Tensions between service work and law reform work are particularly prominent for CLCs. As not-for-profit organisations are predominately dependent on recurrent funding from the Commonwealth and New South Wales governments, as well as on fundraising and smaller grants from a wide range of other bodies (legal CSO), funding for CLCs' law reform work is an ongoing challenge.

A cross-section of our informants reported that CLC funding is primarily focused on providing specified client services (legal CSO; non-legal CSO; government officer). As such, some informants contended that the capacity of

CLCs to engage in law reform is limited (legal CSO; non-legal CSO). Among some of our CLC informants there appeared to be a disconnect between the law reform aspirations of the organisation and the funding it receives:

> *... although our mission statement was to provide law reform and policy, really we were dissuaded, not explicitly, but implicitly, by the funders ...* (Legal CSO)

While the law reform approach taken varies from CLC to CLC (in part because management committees and principal solicitors have different views and attitudes to law reform work), staff often have little time for activities other than client services:

> *... to do legal education and or law reform ... it's extraordinarily difficult, and if you've only got funding for ten hours a week or something in a certain project from a certain government department then, and you're expected to do casework, then the amount of time you've got left over [for law reform] ... is really really minimal. So it's very very difficult to try and make time to do that ...* (Legal CSO)

Many CLC informants opined that CLC staff, already fatigued with the volume of casework, often face a practical dilemma. A disproportionate focus on individual client services means they feel less able to address the underlying cause of problems commonly experienced by a particular group of people (legal CSO):

> *... most of our advocates are just absolutely smashed with casework ... it's very hard when people are knocking on your door and getting very upset, in extreme forms of distress. But if you don't do the law reform then you have no chance of changing the playing field for everyone else out there with that same problem. And so that's the difficulty of trying to do law reform ...* (Legal CSO)

> *... [by] doing individual casework, we're just sort of a band-aid on the problem. But the greater issue is the actual law reform ... you can't just get bogged down in the casework because that's going to get you nowhere ... it's only with actual law reform that you're going to have the greater victory.* (Legal CSO)

On some issues, and particularly those seen as being systemic, law reform was argued by some CLC informants as one way to stem the flow of clients into CLCs and assist potential 'future' clients, and in turn free up resources for other clients and activities (legal CSO; legal CSO).

Many CLC informants reported however that 'most CLCs are working beyond their capacity in terms of the case work' (legal CSO; legal CSO; legal CSO). For CLC staff, fronting up at work means you are available for client services, and it is 'almost impossible to delineate' and quarantine the time to work on law reform (legal CSO).

Particular CSOs appear to receive a high volume of requests to contribute to law reform (non-legal CSO; non-legal CSO). For some, invitations to participate in a consultation process can create further tensions as CSOs may feel obliged to respond to invitations from government, even where they are not specifically funded to do this type of work:

> *... there is an expectation that because they fund you, you will respond ...* (Non-legal CSO)

> *... a lot of the work they ask us to do, we want to do it because it supports our members, but we're not actually really funded to do a lot of it ...* (Non-legal CSO)

CSOs with limited resources, of course, have to prioritise and make decisions about their activities as participation opportunities arise, in light of the competing demands for their limited resources and operating budget:

> *... we prioritise and, yes, it's all budget related but whether we have enough money in our policy and research budget to do bits of work ... We can't do everything. We certainly prioritise.* (Non-legal CSO)

One CSO informant stated that law-making institutions are, in effect, competing for the limited law reform resources of CSOs:

> *... I think they're competing for your expertise. You know, that's really what they're doing and that's perfectly reasonable. And it's up to us to decide which ones we'll take up and not take up.* (Non-legal CSO)

Insufficient funding for law reform is a primary constraint on CSOs and consequently their capacity to participate and represent constituents is often contingent upon their ability to make available resources 'stretch' to include law reform activities as and when opportunities arise (parliamentarian). For example, a cross-section of informants noted CSOs' law reform work — including that of CLCs — was often performed by staff working in their own time on a voluntary basis, or done with the assistance of volunteers (legal CSO):

> *... in most cases you're not funded to do law reform and policy. You're not. And you only do law reform and policy after you've been able to find time and to job share different tasks ...* (Legal CSO)

> *... we're on a limited amount of funding and by the time you pay your rent and all your overheads, it doesn't leave you a great deal of money left ... So that's why we use volunteers because the more volunteers we use the less money it costs us.* (Non-legal CSO)

Among CSOs staffed on a voluntary basis or whose law reform work is not funded, law reform work usually falls upon the organisation's leadership or a few individuals who are able and willing to fit this work around and above their own employment responsibilities (non-legal CSO):

> *... you do take work home. All my best submissions are written at home ... Which shouldn't be necessary.* (Legal CSO)

> *... it just means that people just do stuff in their own time because they're passionate about it, they're interested in it, it's important to them. And we know how it's affecting our clients.* (Legal CSO)

An alternative consequence is that CSOs make tradeoffs and relegate law reform work to the backburner (legal CSO; legal CSO; legal CSO).

Resource constraints and increased focus on direct service delivery mean that for some organisations, law reform is 'non-core activity' (legal CSO):

> *I think that over time that shift towards the contract culture and that heavy focus on direct service delivery will necessarily de-skill our workforce around law and policy.* (Non-legal CSO)

> *... it's probably not core work, I suppose, is the best way, core and non-core, to describe it. And if it's not a core part of how your organisation does its business and how it relates to its community and sells itself to the community about the range of things that it does, then eventually you'll run out of, people just won't be able to do it because they haven't done it for such a long time.* (Non-legal CSO)

A number of informants in both legal and non-legal CSOs reported that there was a perception or fear among some organisations that law reform work may jeopardise their government funding:

> *The one that criticises doesn't get funded. Or the funding is reduced ... It does happen.* (Non-legal CSO)

Bottom-up law reform, particularly advocacy associated with starting or building a law reform campaign, was reported as being at times:

> *... quite a risk for us to sort of be involved ... it didn't take too much to work out where the information had come from. But ... we didn't have our funding body come back to us at all ... I was expecting ... you know, 'that's not actually in your funding agreement' ...* (Non-legal CSO)

Importantly, government funding arrangements may cause CSOs to self-censor or give up on law reform work for a fear of 'biting the hand that feeds it' and losing funding (legal CSO; non-legal CSO):

> *... the problem is ... if groups are funded by the government they're less willing to criticise the government because they're afraid of losing their funding ... I think sometimes you are limited by funding. There are some groups who are not at all willing to criticise the government because they don't want to lose their funding.* (Non-legal CSO)

In contrast, CSO informants reported that where they had been invited to contribute to a top-down consultation process, they did not have to be as concerned about funding repercussions because responding to invitations is different to advocating, lobbying or campaigning for law reform (legal CSO; non-legal CSO). Indeed, as discussed earlier, some felt compelled to respond. Therefore, when they are able to make their resources stretch, CSOs may be more inclined to do top-down law reform and respond to government rather than do bottom-up work.

(ii) Non-government funding

While finding resources for law reform can be 'extremely difficult' (non-legal CSO), some informants reported that CSOs not dependent on government funding had significantly more independence and freedom to pursue law reform activities because they enjoyed freedom from 'the threat of de-funding' (non-legal CSO):

> *We raise sixty-six percent of our operational money and, it doesn't matter who it is, whether it's Labor or Coalition, they get cranky with us and say 'well we're not going to give you that', but I mean, we're here and we're angry ...* (Non-legal CSO)

CSOs with independent funding may receive information to be used in law reform from those with less law reform capability (non-legal CSO):

> *The good thing is because [the organisation] is so independent, we often get information from … [sources] who cannot do anything officially themselves but who can tell us and then we can act.* (Non-legal CSO)

A cross-section of informants spoke in generalised terms about how industry or professional associations have superior funding and resources available for law reform. Unlike human services CSOs, these types of CSOs are suggested as being able to raise funds from members, such as membership fees (government officer; legal CSO; non-legal CSO).

A cross-spectrum of our informants drew a common distinction between the law reform capability of industry and human services sector CSOs:

> *… it's a real struggle I think for almost any organisation to effectively represent a constituency unless they're an industry based organisation.* (Legal CSO)

> *I refer to it as lobbying and communication skills, but in the private sector they call it … government relations … the private sector peaks have these … in part it comes out of the PR profession … they have identified that these are the skills you need to build relationships at high level … And I think our sector often doesn't have those skills or those high level relationships that are sustainable.* (Non-legal CSO)

Due to their independent source, and generally higher levels, of funding available for law reform, industry CSOs were reported to have more capacity than human service CSOs to make submissions or provide representatives to be a part of law reform committees or working groups:

> *I think that the consumer movement generally would say that they are constrained by things like not having enough funding to maintain the kind of level of research and sort of being able to employ people for the lobbying and whatever. They … might be invited onto steering committees or working groups or whatever, they've got a limited range of people with the relevant expertise. So the same people might be expected to be on a lot of committees so they're stretched very thin. Those kinds of problems are always there I think for the groups on the consumer side. The industry side don't seem to have those problems, [they are] more well resourced and if you're calling for submissions they can always get a submission.* (Government officer)

CSOs in the human services sector, however, were reported to have also learned to cope with limited resources. For example, a government informant observed that these CSOs have learnt to 'share their resources and their expertise and to feed off each other', and that they are able to produce

'very, very good submissions' despite 'the resource difficulties they have' (government officer). We explore how CSOs work together in order to meet resource and particularly law reform literacy needs in *Section 7.3* below.

Law reform literacy

In Chapter 6 we identified the range of knowledge and skills required for individual participation in law reform. A lack of knowledge about the law reform system, a particular law reform event, the specific legal issues or their wider legal, policy or political context, may prevent a CSO from feeling it is able to participate in law reform. However because of their roles as experts and stakeholders, and their ability to bridge and link constituents to law-makers as well as other CSOs, they can be expected to have more sophisticated levels of law reform capability.

A cross-section of informants reported that participating in law reform appears to require 'an increasing level of sophistication' (non-legal CSO):

> *... most organisations like ours have become a bit more professional ... it's just not good enough for me to say, 'Well this is what I think the government ought to do.' It has to be backed up by some arguments and information or evidence.* (Non-legal CSO)

The skills CSOs have for law reform is in part affected by their access to resources (non-legal CSO):

> *... the sort of intellectual capacity or mindset that you need to do that sort of thing. You need somebody who's not just smart but strategic. And articulate ... funding is a major problem.* (Non-legal CSO)

Finding and retaining staff with law reform skills is difficult for many human services sector CSOs:

> *... it's harder to find skilled people, people that have some experience around how do you deal with government ... law reform for us ... [is] not just doing research and writing submissions, it's a whole lot of other activities as well.* (Legal CSO)

We found the following aspects of law reform literacy affect human service CSOs' ability to represent or facilitate the participation of disadvantaged people in law reform:

- legal analysis skills
- policy analysis or research skills
- advocacy skills.

We discuss these in turn.

Legal analysis skills

Chapter 6 examined how understanding the legal issues involved in law reform includes knowledge of what the law is, how it operates, and the meaning of any proposed changes. Perceiving an issue or a problem as having a legal cause or law reform solution also involves knowledge about the wider context and its implications. CSOs have a practical perspective of the operation of law or legislative proposals on many issues affecting the public or disadvantaged people (legal CSO), and may be able to identify problems or the implications of its change:

> *... sometimes you identify a systemic problem and so then it might get kicked up and we'll start advocating with government ...* (Non-legal CSO)

> *... we'll see ten people come through the door saying they've got the same problem. This will ring an alarm bell ... 'ooh, that's interesting, let's do a bit of research on that. What's the current law, what do they do in other states, do they do it the same way? ... have a consultation with a whole lot of consumers and see whether they're having the same sorts of problems or whether they've got any ideas ... ' ... we will then escalate that consumer's problem or that group of consumers' problems and write a letter or submission ... and say 'we think we need to change it'.* (Non-legal CSO)

CSOs' frontline experience with a range of different consumers and/or clients gives them a unique perspective from which to identify systemic issues and solutions.

We found however that some CSOs are far better equipped to deal with the 'legalistic' nature of law reform than others. While we found the legal expertise in legal CSOs facilitates their participation, it would be incorrect to assume that all legal CSOs or lawyers have law reform literacy or expertise — as lawyers are not necessarily skilled in policy analysis and research, law reform advocacy, or in networking with other organisations (legal CSO).

A key distinction between legal and non-legal CSOs is their knowledge and understanding of the law-making process and their legal literacy. Our case

studies revealed a lack of legal expertise that limited the law reform capability of non-legal CSOs. A number of legal CSO informants in our *Boarders and Lodgers Case Study* observed that non-legal participants had difficulty coming to grips with the 'legal vacuum' and at times complex legal distinctions between a 'boarder', 'lodger' and 'tenant', and the implications of possible reform (legal CSO; legal CSO).

While non-legal CSOs tend to be very knowledgeable about their constituents and about the operation of particular aspects of the law in which they have direct experience, they often lack a broader perspective concerning the wider legal and policy implications of law reform issues:

> *... there are a lot of very knowledgeable people in the NGO sector and they'll tend to know something about something that's very specific to their particular interests or whatever. But it's really difficult to find people who've got a really good broad perspective on it.* (Non-legal CSO)

Legal expertise enables CSOs to engage in 'more technical arguments' (legal CSO), or articulate why some proposals will need to be modified to minimise unintended consequences on particular people. We found that CSOs with legal expertise for example, reported that they were 'reasonably successful' in articulating arguments to 'temper' the worst aspects of legislative proposals:

> *... where it's clear the government's not going to change its mind on the actual policy direction ... we take a fairly pragmatic view, that we've got at least a certain amount of legal expertise in the organisation and we can at least make suggestions about either technical issues or, more importantly, amendments which might take the worst, or may temper the worst elements of the legislation.* (Legal CSO)

Legal CSOs are often well positioned to be able to provide a practical and informative perspective on the wider legal context and the consequences of legislative proposals (legal CSO). For example in the *Acceptable Behaviour Agreements Case Study* the Tenants' Union's legal expertise enabled it to identify and articulate reasons why the proposed legislation may have 'unjust' effects, which led to government developing policy concerning how the legislative powers would be used. Similarly, in the *Bail Amendment Act Case Study* we found relatively few CSOs made representations concerning the proposed amendments to the *Bail Act 1978*, and those which did so tended to be a small number of legal CSOs such as the Law Society, Bar Association, and some community legal services providers, as well as a few religious organisations.

Law reform consultation documents written in dense legal language are sometimes daunting and difficult for CSOs to interpret and:

> *... you know, we don't always get it right ... we have come a cropper a couple of times.* (Non-legal CSO)

Non-legal CSO informants suggested their capacity to participate in law reform could be improved with greater access to legal expertise or assistance:

> *... it would be so much better if we had that legal service. Because ... none of us here are lawyers.* (Non-legal CSO)

A complicating issue however, is that CSOs with lower levels of legal literacy are also likely to have a reduced capacity to identify which aspects of law reform they do not understand, or know where or how to get legal assistance. In contrast legal CSOs, particularly CLCs, are more likely to recognise when and how to get more specialised legal expertise:

> *... [for] some of the more technical arguments obviously, we rely heavily sometimes on the ... they have certain areas they're very strong on. And sometimes you do need to go out, and the question is, when do you go out and get a pro bono counsel's advice on something, because it's actually really really complex ...* (Legal CSO)

Our non-legal CSO informants reported seeking legal assistance from a wide range of sources, including legal CSOs such as the Public Interest Advocacy Centre, the Tenants' Union of NSW and other community legal centres. These informants also described how they often ring around their contacts and acquaintances for help or suggestions as to whom they may contact to seek further help relating to legal information or questions (non-legal CSO; non-legal CSO).

Some non-legal CSOs reported that their organisation had recognised their need for legal expertise and had sought to establish 'friendships' with people or organisations for the purpose of providing them with greater access to legal skills and expertise (non-legal CSO; non-legal CSO). Another informant reported that their organisation tried to ensure there was legal expertise within their board of governance that could either directly help or provide contacts to assist with legal interpretation and analysis (non-legal CSO).

In the absence of access to legal expertise however, non-legal CSOs may depend on staff or members with limited law reform expertise and experience. Consequently those in the organisation with some expertise or experience are

likely to shoulder the greater burden of the CSO's law reform work (non-legal CSO).

Policy analysis / research skills

As described in Chapter 6, policy analysis involves specialised skills (legal CSO; non-legal CSO). It includes researching and gathering information to identify problems, issues and causes, consulting with constituents, considering how competing interests are affected, and assessing whether proposed solutions are likely to work.

Demonstrating the significance of a problem or issue, and the impact of law on constituents is important if advocacy is to go beyond 'opinion' or 'conjecture', to views likely to 'hold currency' within the legislative process (government officer):

> *... if you can put an argument and you can back it up with some decent facts, figures, statistics, it's very helpful.* (Government officer)

> *... whatever we do is based on what our consumers and members tell us. We don't just manufacture an opinion ... [we come] from that basis of a really solid informed comment.* (Non-legal CSO)

Having sophisticated policy and research skills among its staff significantly enhances a CSO's law reform capability (non-legal CSO). However it is usually only peak bodies and advocacy CSOs that tend to have dedicated policy officers available to perform these tasks:

> *... a lot of the local non-government organisations don't have a policy worker.* (Non-legal CSO)

CSO informants contended that a lack of policy and research skills within an organisation and across the human services CSO sector is a key constraint on their law reform capability:

> *If we were actually resourced to have that capacity, in house, or shared across, even just a pool of researchers that you could share ... would make a huge difference to the quality of our work.* (Non-legal CSO)

> *... the lack of research capacity is an issue right across the sector.* (Non-legal CSO)

> *... we're not necessarily skilled in economics or research and development in that epidemiological sort of sense. So creating business cases and creating evidence-based arguments are very difficult. And they're also very resource*

> *intensive. If you want to access [or] buy the expertise, that economic expertise for example, that's a huge investment in research and development.* (Non-legal CSO)

Human services CSOs reported that obtaining funding to conduct research for the purposes of law reform is difficult (non-legal CSO), and that those CSOs with research capacity tend to be the bigger charities with greater fundraising abilities (non-legal CSO). Charities reported that they have policy and research staff who assist with the conduct of their law reform work, and that research consultants will sometimes be used for certain law reform projects (non-legal CSO).

Where CSOs need additional policy or research support for their law reform work they may have to raise funding for it on an ad hoc basis or draw on their connections and relationships with other organisations:

> *... we try where possible to form alliances ... we don't have a researcher on staff. We don't have access to ABS statistics, we can't afford to buy them ... when we put stuff out into the public domain and we do projects, and we try and do research ... [but] we are doing that without ... access to stats or without a researcher, or without an economist ...* (Non-legal CSO)

The trend towards evidence-based approaches in policy and law reform is challenging for organisations with less policy or research capacity. Government informants noted that many human services CSOs struggle to go beyond anecdotal evidence in their law reform work because of a lack of policy skills and a lack of time and resources to conduct policy analysis or research (government officer; government officer). Although anecdotal evidence may not in itself be as persuasive when weighed against other evidence, our government informants reported it can support law reform by flagging particular issues for government or advisory bodies to investigate further with their greater policy and research resources (government officer).

Lack of information technology and management also limits the extent to which CSOs can undertake policy analysis (legal CSO) and stay current with research and thinking on issues affecting constituents:

> *... we have no funding to develop a really snazzy database and so we keep making our own up and then going to collect all the data and going 'Gosh it doesn't work'. So we're struggling ... ultimately we need to ... establish really good data collection ... So a lot of bed time reading is international what works literature ... so you can come in and give a snapshot to your staff and say 'right we need to work out how to do this'.* (Non-legal CSO)

There is a danger that if CSOs do not have established or effective record keeping or administrative practices, they will also have reduced capacity to use their information and knowledge when law reform opportunities arise (legal CSO).

Less access to economic analysis and research skills also means that some CSOs are less able to critically analyse the economic arguments of competing stakeholders. For example a number of informants reported lack of economic expertise as being one of the reasons BLAG was not able to achieve legislative reform in the *Boarders and Lodgers Case Study*, as their principle-based advocacy was apparently trumped by the economic-based assertions of industry bodies and a fear of the boarding house industry collapsing (legal CSO):

> *... the boarding house reform was always tied up to property development and economic arguments that we as a community sector ... never fully came to terms with ...* (Legal CSO)

A lack of ability to engage with the policy facets of law reform may thus limit CSOs to making rhetorical arguments:

> *... it is very difficult and sometimes you find yourself making rhetorical arguments on matters of principle. And you know, we're talking really fundamental principles ... which law fundamentally is ... And being met with responses that are about economics.* (Non-legal CSO)

In comparison, private sector organisations and industry CSOs were reported by a cross-section of informants to generally have greater policy and research capacity, including an ability to identify possible economic consequences of legislative change (non-legal CSO).

Importantly, a lack of policy analysis or research capacity may limit CSOs' law reform advocacy to the types of broad philosophical or principled statements identified previously as tending to carry less weight with decision-makers.

Advocacy skills

Advocacy skills are a functional aspect of law reform literacy — they enable CSOs to 'do' law reform. They are skills which allow CSOs to determine the best strategy for representing constituents' claims, and to know when and how to 'pitch' or frame arguments in a way likely to persuade decision-makers and benefit constituents' law reform interests (non-legal CSO).

Law reform advocacy skills draw on a wide range of knowledge, information and tools in order to try to influence political and policy debates and law

reform decision-making. Many informants contended that CSOs' law reform advocacy is enhanced by being able to draw upon different skills and expertise when needed:

> *... it's very important to have people with varying interests and specialties ... by themselves they have their own specialty and they have their own knowledge and experience, but I think that all of them combined ... it just makes it easier to put something together that's more well-rounded ...*
> (Legal CSO)

> *... we tend to use what we're best at ... So if somebody is a writer, well she writes and somebody has got the contacts so she gets the contacts ...*
> (Non-legal CSO)

Relatively few people have advocacy skills and law reform expertise across a range of issues, although CSOs can generally draw on the skills and expertise of more people (non-legal CSO).

Advocacy skills help CSOs determine whether and how they participate in particular law reform, including whether they use any media strategies (non-legal CSO; legal CSO) or 'work through the system' by leveraging relationships with government to keep them informed of constituents' views (non-legal CSO). Knowing how and when to adopt a particular strategy is an advocacy skill requiring political nous and experience (legal CSO).

CSOs' ability to draw on different skills in advocacy is affected by staff departure. Staff turnover was reported to be debilitating, eroding accumulated law reform expertise and disrupting established relationships and networks with law-making institutions and other CSOs (legal CSO; legal CSO).

Many CSO informants contended legal and policy perspectives were important and contributed to effective law reform advocacy, although as noted previously, there is a distinction between legal analysis and policy/research skills. Legal analysis skills help to determine how the law concerning an issue operates or what the practical implications of a law reform proposal are, whereas policy skills help to demonstrate the implications or consequences of how particular people or constituents may be affected:

> *... I think the risk is ... I can't emphasise it enough, that people take the legal advice as the policy position they should take. And it's like, no, they're completely different things.* (Legal CSO)

Importantly, an informant also cautioned that legal advice or analysis is not a substitute for the 'voice' and views of constituents:

> *I guess I find it interesting, we quite often get asked what we're going to say on something by consumer organisations, they want to put their name to our submission. It's like, 'well actually your perspective is probably more important than ours is going to be, [and] we'd really like to work together on it rather than driving it from a legal perspective'. Because often what is then missed is the consumer voice in the process.* (Legal CSO)

It was suggested that CSOs with lower levels of legal expertise should first consider what they think is:

> *... wrong with the system, what are the issues that come to you now? Instead of sort of going off and getting somebody to do a legal analysis of the system for you.* (Legal CSO)

CSOs also need to determine whether law reform will be good or bad for constituents, and in developing a policy analysis to underpin law reform advocacy:

> *... you have to understand that ... the [legal] advice will be how this will operate or is likely to operate, [then] you have to decide on your policy position.* (Legal CSO)

In the Vignette below on the *Fines Amendment Act 2004* we see that law reform issues can successfully emerge where legal and policy expertise are brought together to illustrate and demonstrate the impacts of legislation on particular disadvantaged people.

PIAC's submission on the *Fines Amendment Act 2004*

The administration and enforcement of fines in New South Wales has been subject to a number of reforms and debate over the past 10 years. The *Fines Act 1996 (NSW)* was first introduced in 1996 to consolidate the fines system in New South Wales, reduce the incidence of fines defaulting, and ensure prompt payment. Following the 2004 reforms associated with the *Fines Amendment Act 2004* (NSW), problems with enforcing penalty notices continued to be identified by stakeholders. In April 2006 the Public Interest Advocacy Centre (PIAC) and the Homeless Persons' Legal Service (HPLS) made a submission to the NSW Attorney General's Department and other relevant New South Wales government agencies, outlining problems and issues with the fines system, and made 18 recommendations for reforming the fines system (Galtos and Golledge, 2006).

This submission was the culmination of law reform work undertaken by PIAC, prepared in consultation with a range of community-based and other organisations with an interest in the fines system in New South Wales and drew on casework evidence held by of a number of different CSOs (legal CSO; see Galtos and Golledge, 2006). PIAC undertook the law reform work as 'there wasn't any other organisations that had the capacity to do the work' (legal CSO):

> *… [PIAC] contacted different types of agencies — so people with young people, migrant resource centres, regional and rural areas and became the collection point for all those case studies … [PIAC] identified a core group of marginalised and disadvantaged people and went … [to them] to say 'look we think that if its affecting homeless people we think it's also going to be affecting your clients, can you tell us and provide us with examples' …* (Legal CSO)

In the submission PIAC identified a number of issues with the legislation and its implementation, including problems with communication and processes involved in collecting fines and managing defaulters, lack of easily accessible information about how the system works, and perceived bias in the way fines are issued, particularly fines associated with public transport. The submission used case study examples of how people were affected by the administration of the fines system and how ongoing fine enforcement contributed to difficulties for some people with moving on with their lives, further exacerbating the disadvantage experienced by those people who were already socio-economically marginalised (Galtos and Golledge, 2006). Cited examples included how the impact of penalties such as suspension of their driver's licence and vehicle registration can compound problems and social exclusion for individuals who live in rural and regional areas and those who need a licence to be able to work to help pay the fine and support themselves. Our informants identified PIAC's submission as having been positively received because it combined legal analysis with policy evidence to demonstrate the impacts of the fines system on disadvantaged people and groups, it collated evidence from a number of organisations which helped to identify aspects of the fines system which were having a detrimental impact, and it also suggested how the system may be reformed (legal CSO).

Following the submission, a working/reference group comprised of relevant government agencies and CSOs was established and which subsequently led to legislative reform (legal CSO).

Some CLCs were opined to have a strength in law reform because of their greater ability to combine legal expertise with policy analysis, which they share with other CSOs (legal CSO):

> *... we have access to the client base to then pick up law reform issues because we have solicitors ... the value of having someone that can ... actually focus on picking up the themes and the issues and running with them and forming alliances with other organisations to highlight particular issues is I think ... a great value. We're very lucky in that respect that we have that dual function ... I think that's probably the biggest strength of a community legal centre ...* (Legal CSO)

CLCs' on-the-ground contact with disadvantaged people and communities means that they sometimes act as 'proxies' or experts by drawing on their

experience and expertise concerning the legal problems of their disadvantaged clients in their law reform work (legal CSO). Staff in CLCs reported having assisted or collaborated on law reform with non-legal CSOs such as interest and advocacy groups, as well as providing information to professional associations (legal CSO; legal CSO) and sharing their expertise through peak bodies and networks. When called on as experts, CLCs often provide information about the experiences of their disadvantaged clients which may not be well known or documented by any other organisation:

> *... the great strength is the client casework examples ... if you've got several casework examples to highlight the issue, and normally as a legal centre you'll be writing on something that, you've seen some sort of systemic pattern ...* (Legal CSO)

Submission writing is a key advocacy skill, as much CSO contribution to law reform is through this medium. A cross-section of informants suggested that submission writing skills have to be primarily acquired on the job, and that effective submission writing is a skill that relatively few people in an organisation may have:

> *... very few of our organisation's personnel have got experience in submission writing ... because I did a lot of that within the Government ... I've learnt which ones are persuasive ... consequently I can apply those skills to doing some of our ones.* (Non-legal CSO)

> *It's interesting. In terms of actual submission writing it's a very different skill ... [You] learn by example, [you] go out and do it and think 'ooh, that could have been done a bit better, I'll make sure I do that next time'.* (Legal CSO)

We found some CSO informants who assumed that they were expected to make 'legalistic' law reform submissions written in a similar form to consultation documents (non-legal CSO; non-legal CSO). However while interpreting and analysing the 'legalistic' aspect of a law reform proposal is important, other informants cautioned that government is rarely interested in 'legal critique':

> *... it's very tempting, I think, to simply submit a sort of a legal critique, which, government's not in the least bit interested in ... they've got people inside who are going to give that ...* (Legal CSO)

We noted in Chapter 5 that some of the worst law reform submissions were described by government informants as being overly legalistic and philosophical (government officer). It was suggested that a technical legal

or 'rights based' legal argument may not, in itself, be enough to influence government, and is likely to be trumped by other types of evidence and arguments (legal CSO).

Rather than trying to demonstrate that CSOs are experts in the law, a cross-section of informants posited that more effective law reform submissions focus on evidencing constituents' views (legal CSO; government officer; government officer) and demonstrating how the law, or a reform proposal, affects constituents, as shown by case study examples and other supporting materials and evidence (government officer). Government informants suggested that CSOs should realise that government consults them because of their practical on-the-ground knowledge and expertise concerning how certain groups of people are affected by the operation of law (government officer).

These observations suggest a significant gap may exist between the expectations of government officers and the understanding of some CSO participants concerning the purpose of law reform consultation and the type of information sought. Our research suggests that non-legal CSOs, as well as those with less experience or expertise in law reform, are more likely to assume law reform submission writing requires making a 'legal' critique of the law. Misunderstanding about expectations may therefore undermine the effectiveness of CSO law reform submissions.

Generally the more law reform expertise a CSO has, the higher its capacity for law reform advocacy. In our interviews we found that CSOs have significantly different law reform experience and expertise, and that among those non-legal CSOs with limited law reform experience and expertise the task of representing and advocating on behalf of their constituents was an extremely challenging and overwhelming activity.

7.3 Factors facilitating CSO law reform capability

CSOs in the human services sector differ in their ability to overcome time, resource and law reform literacy constraints to participation in law reform. We found that some CSOs can participate effectively in law reform because they have a greater ability to meet their law reform participation needs by liaising, collaborating and sharing information with other organisations. Here we note some factors which appear to enhance CSOs' law reform capability.

Networking and collaboration

A cross-section of CSO informants reported that they often do their law reform work in collaboration with others, and that it was their relationships and networks with other organisations which enhanced their ability to participate in law reform (non-legal CSO; non-legal CSO).

Networks and ongoing relationships with other organisations facilitate the sharing of information, skills and expertise, as well as the workload, for example through producing joint submissions (legal CSO; legal CSO). Cooperating is one way CSOs help each other to manage and overcome law reform literacy constraints, including sharing the legal and policy analysis (legal CSO):

> *... we've discussed their submission with them ... [it has] been a collaborative arrangement ... they have a different submission ... but we have used their ideas or their analysis to inform our analysis and vice versa ...*
> (Non-legal CSO)

Being able to share perspectives and discuss ideas with other CSOs was suggested by some CSO informants in the *Mental Health Act Case Study* as being very important for facilitating their law reform work:

> *... even if we don't agree with what they have to say. You've got to have somebody to bounce it off ... especially ... [because] the consumer organisations are going to have a different perspective to a carer's organisation, and the legal organisations are going to have different [perspective] ... I think it's critical.*
> (Non-legal CSO)

By meeting and communicating, CSOs are able to share information which can help identify common problems or other systemic issues:

> *... [the meeting] was a chance to get together ... it's useful as a sounding board for ideas and for checking in that your consumers are experiencing the same problems as other people's ...* (Non-legal CSO)

> *... sometimes you think what might just be a one off case that you see once a year, you may not realise it's actually quite a systemic problem ... That's the importance of having these discussions, and saying 'oh, I've had this case' ... 'oh, I had twenty of those'.* (Legal CSO)

Relationships with other CSOs also increase access to information about law reform participation opportunities (non-legal CSO):

> *... [somebody] rings me or emails me and says 'oh, do you know about this?' Because they've got contacts in a government department or someone has said 'look, this is coming up' ...* (Legal CSO)

Sharing information and expertise, particularly legal, policy, research and advocacy skills, enables CSOs to increase their law reform capability. In our case studies we found that CSOs with strong constituent connections but less access to government provided information to other CSOs who had closer relationships with government:

> *... we've given ... information to somebody else [to] go away and talk, with our information if you like ... we're informing peaks who have got a greater presence with spokespeople and governments and people that can influence legislation and we're giving that information to them.* (Non-legal CSO)

We found networks among CSOs were often based on informal personal relations developed by people and organisations over time (legal CSO; non-legal CSO). CSOs may also form networks or coalitions around particular law reform issues of common interest, as exemplified by BLAG in the *Boarders and Lodgers Case Study*. Such networks can rise and fall with time, and different CSOs may take a leading role concerning different law reform issues:

> *... sometimes we initiate and other times other organisations initiate networks around certain issues.* (Non-legal CSO)

Peak bodies

Peak bodies in particular were reported by many of our informants as performing a key role of bringing CSOs together to share information which significantly enhanced their law reform capability. Peak bodies monitor government policy and law reform activity, and they analyse, translate, interpret and disseminate law reform information which helps members identify important issues and participation opportunities (non-legal CSO; legal CSO). The translation and interpretation performed by peak bodies may involve providing plain language briefing materials that help CSOs to consider the legal and policy issues:

> *... what I do is I normally do an issues paper which just breaks down the Bill into its sections ... Which kind of explains what some of the implications might be. We would normally put that on a website, let everyone who might have an interest know that it's there. That they can start thinking about what their response might be ... you always have to do the translating.*
> (Non-legal CSO)

Peak bodies also act as an information resource for CSO members, linking them with other CSOs or expertise that help to meet their law reform literacy needs, especially with respect to the legal context and broader policy analysis:

> *... we go out looking for expertise. We don't expect it to be held within this organisation. 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)

For example where a CSO has a reputation for expertise in a particular area of policy or law, a peak body may help to share this expertise with other organisations:

> *... NCOSS for instance would speak to us ... they come to us saying that they would like to form a partnership because they would like us to share our knowledge.* (Non-legal CSO)

By promoting partnerships, networks, alliances or coalitions among CSOs, peak bodies increase the ability of CSOs, and that of their consitutuents, to participate or be represented in law reform. In our *Mental Health Act Case Study* we found that the MHCC and NCOSS had a critical role in facilitating the participation of consumer, carer and service provider organisations in the review of mental health legislation. A number of our informants highlighted how these peak bodies held consultation forums and convened working groups where participants were able to share and discuss information about the law reform issues and process (non-legal CSO; non-legal CSO).

The sector-wide perspective of peak bodies also helps identify gaps in law reform participation and can focus attention on facilitating the representation and participation of more marginalised groups and communities:

> *... we really go out there and say, 'How can we get more people involved from indigenous NGOs?' or whatever it is. You know, certain organisations that it's quite difficult to engage with. So we try really hard to do that where there are gaps.* (Non-legal CSO)

In this way peak bodies can not only increase their reach into groups of marginalised and disadvantaged people, they can also facilitate their participation or representation in law reform by:

> *... working with and building the capacity of organisations that can give them that information and actually facilitate ... representation.* (Non-legal CSO)

We found CSOs tend to be members of multiple peak bodies, and that an important reason CSOs join them is because of the greater access to information and networking opportunities provided through peak organisations.

Peak body informants also reported that an important part of their law reform work involved membership of and participation in various advisory bodies such as working groups or task forces, as well as other formal relationships with government, such as regular meetings with senior bureaucrats and ministers. Through such activities peak bodies bridge member organisations to government and law-making institutions, foster law reform collaboration among CSOs by promoting links across the sector, enhance law reform communication among members, and represent member organisations and their constituents in law reform where they would otherwise be unable to participate directly themselves.

Community legal centres

Some informants reported that a lack of access to legal expertise by some non-legal CSOs in the human services sector is at times filled by CLCs. CLCs are of particular interest as they have both legal expertise and on-the-ground contact with disadvantaged people and communities who access their services. They provide a range of legal services, advice and information to disadvantaged clients and traditionally have been active in both law reform and community legal education.

CLCs were specifically identified by a cross-section of informants as having information about how their clients are affected by law, as well as legal expertise which may help other CSOs to meet their law reform literacy needs.

A number of informants characterised some CLCs as being well positioned to have a particular knowledge of the legal problems and experiences of disadvantaged people who are their clients because they are located in communities (legal CSO). Experience providing legal services can also provide case study examples of the operation and impact of the law (legal CSO). CLCs also bring a particular legal perspective to reform issues and are connected to broader networks of other community legal centres, legal service providers and professional associations (legal CSO; legal CSO).

CLC staff with legal expertise may be involved in law reform work in collaboration with non-legal CSOs or through other legal CSOs such as a professional association (legal CSO). Where they are able to network and

collaborate with other organisations, CLCs may help to provide important law reform expertise which enables non-legal CSOs, and their constituents, to overcome participation constraints and contribute to law reform (legal CSO; legal CSO). In this respect, people from CLCs may wear multiple hats and share their particular expertise through other organisations and forums.

However, as discussed previously, many informants reported that CLCs face similar funding and resource constraints to other CSOs, which significantly limit their law reform capability. We previously noted the effects that funding constraints, increased focus on service delivery, and high staff turnover have on CSOs' law reform capability. The combined effects of these factors have been argued to reduce the level of law reform expertise within CLCs (legal CSO):

> *... in the CLC movement there used, in community legal centres, there used to be dedicated policy law reform workers. There's very few of those left now.* (Non-legal CSO)

A number of CSO informants contended that these factors may contribute to law reform being regarded as non-core activity and that without the resources, training, mentoring and experience, CLC staff may not develop law reform expertise (legal CSO; non-legal CSO).

CLCs are therefore in theory well positioned to cooperate and help provide law reform expertise to help meet the law reform literacy needs of non-legal CSOs and their disadvantaged constituencies, and also to act as proxies for particular disadvantaged groups. Their ability to perform this work, however, is significantly limited by resource and funding constraints (legal CSO).

Pro bono legal assistance

CSO informants suggested relationships with pro bono legal advisers as another way to help meet law reform literacy needs and enhance CSO law reform capability. The access that some of the larger charities have to pro bono advice was highlighted, and it was opined that such access helped them to be 'very sophisticated lobbyists' (legal CSO). In particular, access to large law firms which have significantly greater resources and expertise, and employees with generalist and specialist legal skills, is reported by some informants as being especially useful (legal CSO; non-legal CSO).

It was further suggested that pro bono assistance is more likely to be useful for law reform when an organisation has an established and ongoing 'solicitor-client' relationship (legal CSO):

> *... where ... it's a good relationship ... the organisation may well be more open to the idea of saying 'oh, maybe we should ask the lawyers about this' ...* (Legal CSO)

An informant also reported that accessing pro bono legal assistance may be impractical when timeframes in law reform are short or opportunities arise in an ad hoc manner (non-legal CSO). Time constraints may preclude CSOs from sourcing a pro bono adviser unless they have a strong pre-existing pro bono relationship.

For example, an informant contrasted the relationship between non-legal and legal CSOs in the environmental sector with that in the human services sector. In the environmental sector the Environmental Defender's Office was observed to have a close working relationship with environmental non-legal CSOs:

> *... one of the things the Environment Defender's Office does is it works very closely with the environmental movement, which is quite sophisticated, and what it does is it provides legal expertise to that movement, in lots of ways.* (Legal CSO)

As a consequence the Environmental Defender's Office:

> *... doesn't have to get into the politics or the philosophy of it, what it does is analyse legislation and other subordinate regulations, all that sort of stuff, and gives advice to the sector about how that might work.* (Legal CSO)

Such a relationship has at least two key consequences for environmental non-legal organisations. First, they do not have to engage in legal analysis because they know where and how to meet their legal expertise needs, and secondly, they are able to concentrate on their policy analysis and advocacy:

> *... the sector knows it doesn't need to be an expert [in the law]. It can talk about the importance of the environment from a whole lot of other perspectives.* (Legal CSO)

The benefit of non-legal CSOs having solicitor-client type pro bono relationships is that they are able to get advice and consider the effects of proposals on their constituents.

7.4 Implications for CSO participation in law reform

In the above sections we outlined time, resource and law reform literacy constraints which limit CSOs' law reform capability, and noted some factors that enhance this capability. Here we note the implications of these factors for CSO law reform participation.

An important finding from our case studies is that the ability of non-legal CSOs to participate in law reform is enhanced where they are able to successfully link with legal CSOs to meet their law reform literacy needs. In our *Acceptable Behaviour Agreements Case Study* for instance, we found that the legal and policy analysis of the Tenants' Union (TU) and NCOSS substantially enhanced the ability of non-legal CSOs to consider the impacts the legislative reform may have for their constituents and then to make representations on their behalf to government and parliament.

Given differences in law reform literacy, resources and the ability to legitimately represent constituents, one-size-fits-all law reform consultation processes will have disproportionate impacts on those CSOs with less access to law reform or legal expertise. Those non-legal CSOs which represent disadvantaged people are likely to use disproportionate time and resources meeting their law reform participation needs because they may have to network with others before they are able to participate (non-legal CSO).

Many of our informants also reported they thought law reform was becoming increasingly sophisticated and required a wider array of capabilities. The rise of evidence-based policy-making in particular may have increased the need for constituent engagement, legal and policy analysis/research, and advocacy skills. A concomitant increase in consultation by governments further increases opportunities and demands for CSO participation in law reform. The time and resources spent responding to government may have the additional impact of reducing opportunities for bottom-up law reform work — work initiated by CSOs relating to issues that detrimentally affect constituents. This has a number of important implications for CSOs' ability to participate and represent their constituents in law reform.

The perceived need for more sophisticated legal and policy analysis and advocacy skills in law reform, it was argued, may see more of this work left to peak bodies (non-legal CSO), which might further distance constituents from

direct involvement in law reform as their voice will have to be filtered through peaks before reaching law-makers (non-legal CSO).

Government informants reported that finding CSOs with sufficient law reform expertise and interest in the issue who are also able to legitimately represent the public or certain stakeholder groups is sometimes very difficult (government officer). Where a law reform issue has general relevance (such as consumer issues) government may be limited to seeking information from CSOs or experts able to 'speak about' a particular group.

CSOs such as peak bodies, professional associations or service providers such as CLCs, may therefore be sought as proxies for particular groups of people who may otherwise not be able contribute to a particular law reform consultation, who are considered to be too hard to reach, or for whom the time, resource, functional literacy and law reform literacy constraints are too formidable. For instance in our *Bail Amendment Act Case Study*, participation was principally limited to CSOs acting as proxies for the general public and disadvantaged people. Similarly in the *Civil Procedure Act Case Study* informants noted that stakeholder representatives on the Working Party all had to wear 'two hats' and consider not only the interests of the agencies and organisations they were representing, but also the broader public interest and users of the civil courts.

Although proxies may have particular expertise or knowledge, government informants reported that they filter the submissions of proxies and experts to consider their vested interests (government officer).

Critically, government informants also reported that often law reform consultation processes lack participation by CSOs able to legitimately represent disadvantaged constituents. On such occasions it falls to government officers to consider the public interest as well as the interests of affected groups such as marginalised and disadvantaged groups not otherwise represented, and weigh them against the submissions received from other stakeholders as part of their normal law-making practices (government officer).

Government may have to actively foster links with some disadvantaged and marginalised groups to facilitate their participation in a law reform:

> *... I think [this is] the major problem. I mean we have a voice with government, business groups have got a voice with government. Other professional organisations do, community organisations do. But the best that people from*

> *particular disadvantaged groups ... [are] going to get is either community organisations sticking up for what they perceive to be ... the problems, [or] us sticking up for what we perceive to be ... their legal problems ... And I think perhaps the best way for governments to solve that is to set up better links with ... those communities themselves.* (Legal CSO)

Without commitment by governments to provide the time and resources to establish consultation processes capable of including hard-to-reach groups of disadvantaged people, and CSOs able to legitimately represent them, participation in law reform may be limited to a narrow set of 'usual suspects' or rather participants limited to speaking 'about' disadvantaged people (government officer).

Further, the sophisticated knowledge and skills involved in law reform advocacy means that time and resources are critical factors affecting CSOs' law reform capability. A key implication of a lack of policy, research and analysis skills is that CSOs may be restricted to responding to top-down law reform with whatever material they are able to marshal in the time available:

> *... you base it [submissions] on other people's research rather than your own. And in terms of trying to be proactive and be creative, and come up with new solutions and new ideas, you don't get a chance to ...* (Non-legal CSO)

CSOs with less access to research resources, constituent engagement, and legal and policy analysis, including many CSOs that represent disadvantaged people, will often be limited to using anecdotal evidence that is consequently afforded less weight.

CSOs who legitimately represent disadvantaged constituencies are highly likely to have additional participation needs. Harder to reach communities, and especially individuals with complex needs, are likely to require significantly more time, resources and innovative engagement in order to be effectively included.

Many of these CSOs are non-legal CSOs, and they are likely to require more time to consider and analyse the legal implications of law reform issues or proposals, to seek legal expertise before taking the issue to constituents to consider the likely impacts, and determine how to respond (legal CSO). Short consultation timeframes in law reform were reported as being particularly limiting for non-legal CSOs, because it is difficult to cope with the legal dimensions of law reform proposals:

> *... the gap there is there's no-one who has time to distil the proposed legislation and to give something back to the community to be able to empower the community [to participate].* (Legal CSO)

CSOs with less resources and access to law reform expertise, or for whom constituent engagement is more time and resource intensive, are likely to be disproportionately excluded from law reform.

Indeed, where law reform timeframes are short, information needs are likely to be difficult to meet on a 'just-in-time' basis — that is, as and when needed. Lack of, or partial, law reform literacy may mean that non-legal CSOs may fail to recognise what aspects of law reform they do not understand, or know where or how to seek assistance with the legal dimensions of law reform. Fostering relationships with other CSOs able to provide law reform expertise will often require some investment of time and resources. Unless non-legal CSOs have foundational law reform literacy which enables them to recognise the legal dimensions of the issues they need help with and make use of their networks to overcome their time and resource constraints, their constituents may be effectively excluded from law reform processes. In these circumstances it may only be those CSOs with sufficient resources or law reform expertise, including peak CSOs, who are able to participate.

Our data suggests that CSOs' law reform work is significantly affected by concerns about funding and resource constraints. CSOs who see law reform as being non-core or risky activity are less likely to participate in law reform. This may not only limit the involvement of their constituents in law reform, but may lead to loss of law reform capability within the sector. For many CSOs with disadvantaged constituencies, law reform work is additional ad hoc work for which they may have little or no surplus resources. This means that to participate in law reform, CSO resources have to be found and stretched to meet participation opportunities as they arise.

The multi-dimensional nature of law reform literacy also means that time and resource constraints are likely to affect different CSOs in different ways, as CSOs are likely to have diverse law reform participation needs.

A number of informants suggested that additional resources to help foster links among CSOs to better enable them to share information and expertise could enhance their law reform capability. In particular, resources to foster and establish relationships between non-legal CSOs and legal CSOs, such

as through CLCs, could enhance non-legal CSOs' ability to meet their law reform needs and participate in law reform (legal CSO).

In the following chapter we discuss the implications of these findings and suggest strategies to enhance law reform participation, particularly for those CSOs able to legitimately represent marginalised and disadvantaged communities.

8 Discussion

The focus of this study on the ability of the general public, disadvantaged people, and the CSOs which often represent them, to participate in law reform, is important for a number of reasons. Access to justice requires more than just access to law or legal institutions such as courts or lawyers. Access to justice extends to access to law-making, because it is through law-making that conditions for perceiving and doing justice are established (see MacDonald, 2005). Democratic practices which provide opportunities for robust participation in political processes are touchstones of a truly civil society (Cox, 1995).

While these ideals are a key rationale, there are also additional reasons why public and stakeholder participation in law-making is important, such as that they are features of best practice law-making (see OECD, 2001). Consultation provides a way to test the clarity, comprehension and likely effectiveness of proposed legislation. Consultation may also help to better target 'wicked social problems' — characteristic of many social policy areas involving social and economic disadvantage — and maximise the quality and effectiveness of legislation. When the diverse range of affected interests and groups is included, especially disadvantaged and marginalised people, law-making decisions are more likely to be based on more complete information about the law, its impacts, operation and consequences.

Legislation based upon incomplete information will often need to be subsequently rectified. This not only incurs additional government and parliamentary time and resources, but also collateral costs associated with unintended or unforeseen impacts or injustice. Such costs may be substantial and significant, but they are difficult to calculate and are not likely to be

compensated. They may also undermine trust and confidence in the law, legal system and government.

We found most people, and many groups, face formidable individual and systemic constraints which limit their capability to participate in law reform. Although many opportunities for public or stakeholder participation exist, law reform advocacy involves daunting time and resource costs as well as high levels of functional literacy and law reform literacy.

Our findings in fact indicate that there is an important distinction to be made between a law reform 'participation opportunity' and an '*effective* participation opportunity'. Effective participation is premised on having an opportunity to participate, as well as the functional literacy, law reform literacy and advocacy skills, and the time and resources needed to make use of that opportunity. Such a distinction allows us to differentiate stakeholders who face constraints to participation, from those who choose to opt out. It is the participation needs of the former with which this report is concerned.

For the purposes of this study we focused on law-making in New South Wales, although given that the participation constraints are likely to be similar our findings and their implications may also extend to Commonwealth law-making. In this chapter we identify systemic features of the law reform system which constrain participation in law reform, and note some of their important implications. We then suggest some strategies to improve the effectiveness of law reform participation opportunities for the public, disadvantaged people, and the CSOs which tend to represent them.

8.1 Systemic features of law reform

On the one hand law-making is the ordinary and routine business of government, yet on the other, its processes and outcomes are tenuous and bound to particular contexts and circumstances. We found that the following systemic features shape the nature of participation opportunities and together often make public or stakeholder participation a challenge, particularly for disadvantaged or marginalised people:

- variability of law reform processes and the law reform cycle
- dominance of executive government in determining issues, processes, timing and participation opportunities

- political context
- high volume of law reform activity.

We discuss these features in turn and examine their implications with respect to public and stakeholder participation.

Variability of law reform processes and the law reform cycle

Chapter 2 outlined the different institutions, including the range of advisory bodies, that may undertake law reform activities. While they have different areas of expertise and relationships with the public and stakeholders, these bodies regularly adopt the consultation process first pioneered by law reform commissions, although how any law reform consultation occurs depends upon the terms of reference received and the time and resources available.

Expansion in the number and type of regulatory and advisory bodies in the last 30 years, including standing commissions overseeing particular legislative or policy areas, has increased the number of institutional bodies with a role and responsibility for investigating and advising on public, consumer or stakeholder interest, and in some cases about specific legislation.[99] The range of different regulatory and advisory bodies complicates the institutional framework of law-making, and combined with multiple levels of government, can make the task of identifying the correct institutional body with responsibility for a law or issue relatively complex. The complex institutional framework is a constraint on participation as it makes knowledge and understanding of the law reform system, as well as law reform communication, more challenging.

Chapter 2 also described the law reform cycle and identified where opportunities for public and stakeholder participation arise across this cycle. These opportunities were further examined through our case studies in Chapter 4. Whether or how a particular law reform issue progresses through the cycle depends on executive decisions made in its particular context. While opportunities for public or stakeholder participation exist across the cycle, the nature and extent of these opportunities varies from case to case. Chapters 4 and 5 reported the ways in which reform processes are affected by a number of features, such as the nature of the legal issues and stakeholders,

[99] For example, the Australian Human Rights Commission (formerly HREOC), an independent statutory organisation, has statutory responsibilities which include education and public awareness, and policy and legislative development, in addition to its dispute resolution and human rights compliance role (see the *Australian Human Rights Commission Act 1986* (Cwlth)). It often provides submissions and advice to parliaments and governments in Australia concerning human rights and discrimination issues.

the institutions involved, and the level of political and public interest. How participation opportunities manifest across the law reform cycle is affected by a combination of these features.

Participation opportunities depend significantly on the particular law reform issues and stage of the law reform cycle. Issues may emerge and be formulated relatively rapidly, effectively precluding public or stakeholder participation other than through political representatives during parliamentary debates, or during implementation and review of the legislation. On the other hand, unless there is sufficient political pressure or government recognition to make an issue a law reform priority, stakeholder involvement may be primarily restricted to 'bottom-up' participation where the onus falls on participants to justify why and how the law should be reformed. This can be extraordinarily difficult, as seen in the *Boarders and Lodgers Case Study*.

The nature of the participation opportunities which may arise can vary at each stage of the law reform cycle. Opportunities during formulation or review tend to be qualitatively different from those arising during implementation. Generally, the earlier that participation opportunities arise in the law reform cycle — particularly during formulation — the more likely it is that participants will be able to engage with both 'what' as well as 'how' questions of reform, including the objectives to be achieved and the methods for achieving them.

Executive dominance of law reform

A key feature of law reform is the dominance of the executive government across all stages of the law reform cycle. Executive government determines what issues emerge, how law reform may occur, and the nature of any public or stakeholder consultation opportunities during formulation, implementation and review. This has several implications for participation in law reform.

Although in many instances parliament is often the forum through which people first learn that an issue is potentially subject to reform, usually by the time legislation is tabled in parliament it has already been the subject of internal advice and cabinet decisions, and government may be loath to make amendments unless they are necessary to secure passage through parliament. Executive government's dominance over law reform extends to parliamentary processes, at least in the Lower House. We found that approximately 99 per cent of legislation made by the New South Wales Parliament stems from government-sponsored Bills.

Each law reform issue arises in a wider context shaped by concurrent government activities and priorities, as well as evolving political, economic and social circumstances. Law reform issues therefore compete for limited government attention, time and resources. Law reform can stall or otherwise fail to move, as executive government decides not to act for a variety of reasons, including significant intervening developments in the wider context. We discuss how the political context of law reform affects participation opportunities further below.

Importantly, executive dominance shapes participation opportunities in two significant ways. Executive government can undertake law-making proactively or reactively, and also determine whether or not any public or stakeholder participation opportunities are afforded.

Proactive and reactive modes of law-making

Our informants identified participation opportunities as being significantly affected by whether executive government is operating proactively or reactively, because this significantly affects both the timing and timeframe of law reform. Proactive law-making tends to occur over longer timeframes and often involves government seeking information from the public or stakeholders for the purpose of informing law reform decisions. Reactive law-making, particularly where legislation is rapidly formulated in response to emergent events or circumstances, often limits or precludes opportunities for public or stakeholder participation.

Participation at government discretion

Other than through periodic election of members of parliament, representative systems of government mandate little other public participation opportunities. While Chapter 2 discussed some of the government policy and statutory requirements to consult while law-making, in practice executive government retains wide discretion concerning law reform consultation opportunities.

Executive dominance means that most public and stakeholder participation is predominantly top-down, primarily serving the information needs of government and law-makers. In short, opportunities for public or stakeholder participation arising across the law reform cycle generally fall into one of three categories:

- no opportunity for consultation outside government
- participation is limited to particular stakeholders
- participation is open to the public.

Where no participation opportunities are provided by government, it falls to people or groups with understanding of the law reform and political system and an interest in particular reform issues, to make representations and to advocate directly to government and/or members of parliament.

Government often consults confidentially with a limited range of stakeholders, including during early stages of formulation, and also again once proposals take legislative form. Government may also extend opportunities to stakeholders by inviting them to be representatives on standing or ad hoc committees, working groups, task forces and the like and to advise on the formulation, implementation or review of laws. Membership of these bodies may provide important additional participation opportunities that are not open to others.

Finally, government can decide to extend participation opportunities to the general public and to particular groups of people, including the most disadvantaged and marginalised people. It may do so by making use of specialist agencies, such as law reform commissions, which have expertise in conducting public and stakeholder consultation concerning complex law reform issues, or by using other advisory bodies with specialist expertise or reach into particular communities or issues. Our *Mental Health Act Case Study* illustrates the extensive public consultation that can be afforded by government in the reform of legislation, while the vignette of the *NSW LRC's* review of the *DSA 1993* (see Chapter 6, p 188) provides an illustration of government's ability to consult with the most disadvantaged and marginalised people.

Providing effective participation opportunities for the public, and particularly for hard-to-reach people and stakeholder groups, is time and cost prohibitive, and will often entail considerable human and financial costs. Law reform consultation has opportunity costs which could be expended on other law reform issues, or on a range of other government activities or services. Government however has the discretion and ability to deploy its limited public resources for the purpose of providing effective public or stakeholder participation opportunities, including extending participation opportunities to hard-to-reach and marginalised people and groups, although the reality of the legislative and political process is that government is constrained by circumstance and wider political considerations.

Embedded in a political context

Law-making involves realigning rights and responsibilities, often among competing interests, and raises conflicting views or debate about what the law ought to be, or how it should be reformed. As Ross (1982) noted, law reform *is* politics and is subject to a wider political, economic and social context which make both its processes and outcomes difficult to predict.

Stakeholder consultation in law-making is therefore an inherently political act. As well as being a means of gathering information, consultation processes may be a way of managing competing demands, claims and the influence of different stakeholder groups. Consultation processes may be used to help manage certain circumstances or an avenue to channel competing stakeholder interests or groups. Public or stakeholder consultation may also buffer government from lobbying or public pressure. Referring an issue to an advisory body can serve to manage an emergent policy issue in order to take the heat out of the politics or impetus for reform. Consultation processes can also provide executive government with reasons to postpone reform pending their conclusion, at which time it can decline to act upon the advice and recommendations received.

Government invariably assesses the political implications of legislating. Where stakeholder opposition to a law reform proposal is strong, or outcomes considered politically damaging, issues may be withheld from the legislative agenda. Controversial issues, or those where passage through parliament is fraught, may not be brought forward unless considered to be of political advantage to the government. Accordingly, issues with lower political priority may struggle to win a place on government's legislative agenda or be trumped by more pressing emergent issues.

Therefore, although law-making is a patterned activity, the wider political context means that its outcomes are a result of a confluence of multiple events, processes, decisions, and authors, and not within the control of any single body or actor. The connection between process and outcomes is not necessarily linear, causal, or clear, as the law reform process itself is an expression of purpose and political constraints.

In Chapter 5 we reported informants' observations that law reform outcomes often depend on 'trigger events' combining with an 'aligning of the stars' among a wider set of circumstances and factors: a right idea at the right time, and in the right set of circumstances. Just what is the 'right' idea and time is

contingent on the wider political context, and is likely to differ according to the particular perspective and interests of participants. This is another systemic aspect of the law reform system with important implications for participation.

Law reform outcomes are difficult to predict. Informants reported, for example, how it is far easier to account for and explain outcomes in hindsight, usually in terms of identifying the influence of particular stakeholders, bureaucrats, politicians or circumstances. Political vagaries also make law reform a complex and mutable process. Processes may suspend, repeat, or appear fragmented for reasons often difficult to glean from outside of government. Chapter 5 noted how participants are often required to be informed and self-directed.

The 'aligning of the stars' feature of law reform favours particular stakeholders and participants in law reform. For example, stakeholders with greater knowledge and understanding of the vagaries of law reform and the wider political context will generally have greater capacity to act strategically to influence law-makers, including making use of any additional or informal opportunities. They are also likely to have more realistic expectations about how law reform operates, as well as what type of information is more likely to be persuasive and influential. Importantly, they are likely to be more resilient when participation does not result in preferred outcomes, and/or be more prepared to undertake advocacy efforts over a sustained period of time.

Wider political circumstances shape not only the law reform process, but also the interpretations of stakeholders. In Chapter 7 we noted how short law reform consultation deadlines led some informants to question the genuineness of consultation opportunities, and how a lack of explanation for government decisions leads to speculation about the 'real' reasons for decisions and outcomes. A consequence of lack of transparency in law reform processes is that the confidence of participants in the credibility of the processes is eroded, and participants who question the worth of contributing are disinclined to participate in the future.

Another consequence of the systemic 'aligning of the stars' feature of law reform is that it makes evaluating the impact of stakeholder participation problematic (assuming, of course, that law-makers are capable of being influenced by participant contributions).

Volume of law reform activity — time and resources

Social change and developments in areas such as science and technology create new legal issues, problems and proposed solutions. Regulation of more and more aspects of society increases the stock of legislation and often either creates new independent or regulatory bodies or increases the areas which are the responsibility of government. The volume of law-making increases further as this stock goes through the ongoing cycle of implementation, review and formulation.

The volume of law reform is an important systemic feature of the law reform system which we found compounds time and resource constraints on participants. Chapters 2 and 4 identified an increase in the volume of primary legislation and legislative change as a component of rising legal complexity, while Chapter 5 noted informant observations of an associated increase in the volume of law reform consultation and participation opportunities.

At a practical level, the volume of legislative change has important and significant implications in terms of the provision of community legal information and education, as legislative change requires additional resources to keep legal information up to date. The volume of legislative change, and its impact on rights or responsibilities, highlights the importance of functional information literacy skills such as knowing how and where to access legal information as well as information about the law reform process, proposals for legislative change, and participation opportunities that may be relevant or of interest.

The time and resources available for participating in any one law reform event are affected by the total volume of law-making. Higher volumes of law reform activity limit the time and resources available within executive government, parliament and the community to focus on particular reforms, and all participants — including non-government participants — have to select and prioritise issues. The volume of law reform activity may make the task of identifying which issues are of interest, and/or what participation opportunities there may be at a particular stage, overwhelming for anyone other than professional participants.

However the volume of law reform activity affects participants differently, depending on the time and resources available in the circumstances. We found that the timeframe and timing of law reform compounds constraints because participation opportunities emerge in ad hoc ways that are difficult to predict, and have to be assessed vis-à-vis the priority of other activities, particularly for

those CSOs with limited law reform resource capacity. A further consequence of an increasing focus by government on stakeholder consultation for law reform is consultation fatigue. Some CSOs, particularly those with high status, profiles, expertise or an ability to reach into or legitimately represent particular affected constituencies, are invited to participate in significantly more law reform consultation than they have the time or resources to do.

From our research it appeared that in many instances there is a disparity in the law reform capacity of different CSOs, and that those with the ability to legitimately represent certain groups of disadvantaged people tend to have considerably less resources for law reform. Time and resource constraints affect the law reform capability of different types of CSOs in disproportionate ways as each participation opportunity — where taken up — consumes a greater proportion of the resources of those with less capability. We found CSOs' ability to participate in law reform often depends on an ability to stretch available resources, through staff working in their own time, through volunteers and by pooling or sharing limited resources with other CSOs. Those CSOs whose constituencies are more difficult to communicate with, or who are impacted by a broader scope of legislation, are also disproportionately affected by time and resource pressures.

While repeated policy efforts concerned with cutting red tape and reducing the regulatory burden on business and industry have contributed to the volume of legislative reform appearing to return to levels comparable to those seen in the 1970s, a further decrease in the volume of law reform consultation appears unlikely. Legislation is a key instrument by which governments govern, and law reform consultation is a barometer of social change and political debate. The trend towards increasingly participative forms of governance suggests the volume of law reform consultation will continue to be an important systemic feature of the law reform system which constrains the time and resources available within government, parliament and the community for any particular instance of law reform.

8.2 Implications for participating in law reform

For non-government stakeholders, the systemic features of law reform make participation complex and demanding. We found interest and motivation to participate is affected by the perceived relevance and impact of the issue on an individual, a CSO or its constituents, and subjective assessment of the

value of participating compared with other priorities competing for limited time and resources.

People's experiences of legal problems tend to be patterned and clustered around particular stages of their lifecycle, some of which pass or resolve after a period of time, or are solved through non-legal actions or mechanisms. As such, many law reform issues are likely to be considered to be minor, transient, or irrelevant, and may not be sufficient to motivate people to participate.

However experience of problems that are ongoing or permanent, particularly where they are significant to quality of life, are more likely to move people to participate in law reform. For example, people with disability have an ongoing personal interest in having a legal system capable of appropriately responding to their needs should they be unlawfully discriminated against on the basis of their disability. As such they have a higher interest in the substance of anti-discrimination law, as well as in having access to dispute resolution processes capable of providing quick, accessible and effective justice.

While motivation is vital to participate in law reform, it is only one component. Our study also found that identifying what and how to participate in law reform is difficult and daunting for many individuals. Chapter 6 identified how participating in law reform consultation involves functional literacy skills which are above the ability of an overwhelming majority of the population. Understanding what a law reform proposal 'says' or interpreting what it 'means' underpins individual law reform capability. People lacking in time, resources or functional law reform literacy are unlikely to have an effective opportunity to make a decision about participating in law reform. Importantly, we found that even where individuals wish to participate, most struggle to do so.

In practice, the skills, knowledge and resources involved in law reform exclude most people, and disproportionately exclude those individuals experiencing one or more forms of disadvantage. We identify and discuss the implications of the systemic features of law reform for participation below.

Law reform literacy demands

The variability of law reform and its multiple institutions and facets — including legal, policy and political — are fundamental systemic constraints on participation. Multiple law-making institutions involved at different stages of the cycle fragment both the process as well as information about law reform.

We found participation in law reform requires sophisticated communication and literacy skills to find, interpret and apply legal information, to develop legal and/or policy analysis, and to communicate effectively with law-makers. In particular, we found the following knowledge and information needs may exclude individuals and stakeholders unless their needs are able to be met within the available timeframe of a participation opportunity:

- law reform system — the roles and relationships between different law-making institutions, different levels of government, and how law reform processes generally occur
- the specific law reform participation opportunity — what public or stakeholder participation opportunities there are at any stage of the law reform cycle
- specific legal issue — what the law is and how its operation may be affected by its reform
- legal context of the issue — what wider legal consequences the reform may have and how significant they are likely to be.

Without the following knowledge and skills people may not feel that they are able or competent to participate, or that their doing so would be worth the effort:

- policy analysis — how to find, use and apply information to develop, analyse or argue about changes to the law and its impact on the interests of particular people or groups
- advocacy skills — how to present one's law reform positions so as to be influential and useful to law-makers.

Few individuals have knowledge and skills across each of these dimensions. We found that a lack of functional literacy or skills in one or more of these dimensions is likely to preclude or significantly limit the ability of individuals or organisations to participate effectively unless they have either the time or resources to meet their needs. Generally, it appears that the more complex the law reform issues or consultation process, the greater the time, resources and law reform literacy skills required of participants.

Importantly, different stakeholders come to law reform with different information, knowledge and skills. These different starting points have salient implications. Our study suggests that most law reform participation

opportunities require individuals and stakeholders to present their views in a written submission, clearly, concisely and preferably with supporting evidence. Unless special provisions are made, consultation in law reform generally takes a one-size-fits-all approach that often ignores different starting positions in relation to individual literacy, law reform knowledge and skills, as well as available time and resources. Failure to take these differences into account means that a one-size-fits-all approach is likely to reproduce any substantive inequality and disproportionately impacts upon some types of interest or groups, such as those with lower law reform capability, and risks obtaining information unduly skewed by those participants who are more knowledgeable, skilled and resourced.

Without access to resources, stakeholders may struggle to cope with the skills and knowledge required to effectively take part in law reform as and when participation opportunities arise. Law reform appears to be significantly challenging for those CSOs with less law reform literacy or access to law reform expertise and who are not specifically funded to undertake law reform work. We found that among those CSOs with the ability to legitimately represent constituents, but who were lacking knowledge or skills in one or more aspects of law reform literacy, having time and resources available to share information and expertise with other CSOs was critical to overcoming constraints to their ability to participate.

A cross-section of informants reported that industry CSOs are often able to engage in cost-benefit or other economic analyses in support of their claims while those from within the human services sector, and who have a key role representing or facilitating the participation of disadvantaged people, generally have less resources and capacity to undertake such analyses within the given time constraints.

In an age of evidence-based policy making, arguments based on conceptions of legal principles, rights and responsibilities are increasingly likely to be pitched against arguments based on cost-benefit analyses of 'what works'. As Kirby (2008) recently observed, policy choices underpinning law reform now, more than ever before, are made in light of an economic price tag. In contrast, we found participants with less access to policy analysis and research skills have significantly less capacity to engage with or present alternative evidence about what works, and thus may be restricted to making less quantifiable claims based on ideals or principles.

The multi-dimensional nature and sophisticated functional literacy skills inherent in law reform means that overcoming time, resource and law reform literacy constraints will often be problematic and cost-prohibitive. The political and real-world context of law reform also suggests that time will continue to be a critical factor affecting participation. Law reform rarely waits for non-government stakeholders. As such, a primary and enduring constraint on participation in law reform is meeting law reform literacy needs within the available time.

Furthermore individuals' experiences of legal issues are unlikely to coincide with law reform timeframes. People usually want legal problems addressed immediately, which will usually be inconsistent with the uncertain and longer term nature of law reform. Equally, people may not identify law reform as being a possible or worthwhile solution. The episodic nature of law-related problems and how people relate to and think about the law and law reform suggests that they are only likely to be interested and motivated to participate when they perceive issues as being relevant, and when they are confident they will be able to participate effectively.

For these reasons the capacity to successfully meet law reform participation needs on a just-in-time basis (as and when needed) is a particularly salient issue as law reform participation opportunities generally arise in an ad hoc fashion and with certain timing and timeframe constraints.

Just-in-time participation needs will often be specific to the law reform problem or issue, such as the particular law, reform proposal, or possible consequences for a certain interest group, and will vary depending on the levels of functional literacy and law reform capability of individuals.

Just-in-time participation needs in law reform may however be difficult and challenging to meet on a reform-by-reform basis. Lack of, or partial, functional literacy or law reform literacy means potentially affected people or organisations may fail to perceive participation opportunities, recognise what aspects of law reform they do not understand, or know where or how to seek assistance with the legal or policy dimensions of law reform. Our study suggests that being able to meet the particularities of law reform just-in-time requires certain foundational capabilities:

- 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 may in turn enable participants to seek, interpret and consider information about law reform. Inherent is knowledge that public participation opportunities exist and awareness of the form those opportunities generally take, as well as the role and stage of public or stakeholder consultation within the legislative process. Meeting participation needs on a just-in-time basis may also require awareness about where information about the law and the law reform process may be available. Unless individuals or organisations — especially the non-legal CSOs who represent or facilitate the participation of disadvantaged constituents — can recognise the legal or law reform dimensions of the issues they need help with, and where to get that help, they are unlikely to have a substantive opportunity to participate. Some of the strategies outlined in *Section 8.3* below concerning an online law reform portal for information and resources about law reform activities suggest ways of addressing these foundational capabilities.

Functional literacy

The importance and foundational role of functional literacy for law reform capability cannot be overstated. The law, and consultation about its reform, primarily manifests in a written medium that often operates at and demands very high functional literacy. Given the sophisticated information and analysis skills associated with law reform, and drawing on the ABS research reporting the levels of functional literacy among the Australian population (see Chapter 6), we suggest that an overwhelming majority of the Australian adult population is likely to have functional literacy levels which are likely to preclude participating in law reform or make the task of meeting their law reform literacy needs problematic.

In Chapter 6 we identified how the lower functional literacy and resource capacity which is characteristic of many groups of disadvantaged people significantly restricts their access to law reform. Disadvantaged people with lower levels of functional literacy face enormous barriers to participating in many areas of public life, and reliance on written forms of communication in law reform consultation disproportionately excludes disadvantaged individuals and groups. Indeed, functional literacy is not only fundamental to acquiring law reform literacy knowledge and skills, but also key to addressing wider social and economic disadvantage, particularly in an era increasingly dominated by reliance on information communication technology.

Importantly and more specifically, as a disproportionate number of disadvantaged people have lower levels of functional literacy, they are also likely to be less capable of meeting law literacy needs just-in-time, as relevant law reform participation opportunities and issues arise. Without sufficient time and resources to meet their particular law reform participation needs, or to enable CSOs to reach into disadvantaged communities, participation may be limited to those people and organisations with higher law reform capability and those who are able to speak 'about' affected people and interests.

Disadvantaged people face significant additional constraints to participating in law reform, including a disproportionate use of their time and resources meeting immediate primary needs (food, safety, shelter). Social stigmatisation and the often hidden nature of disadvantage and social exclusion further marginalises disadvantaged people from law reform processes and institutions, and makes reaching them to meet their law reform literacy needs time and cost prohibitive.

In other words, if disadvantaged people with complex needs often put off dealing with unmet legal problems because other essential life needs have a higher priority, law reform will simply not be on their radar.

Therefore disadvantaged people will be absent or grossly under-represented in law reform unless they are either connected to CSOs or law-making bodies who are able to successfully reach out and include them. CSOs are particularly important to the ability of disadvantaged people to participate or be represented in law reform. That said, we also found that CSOs with less access to resources and law reform expertise have lower law reform capability and are less likely to feel that they are capable of influencing law-making decisions, preferring to spend their limited time and resources on other activities perceived as having more tangible and direct outcomes for constituents.

Resilience and law reform experience

Our findings indicate that for many participants, making law reform submissions is often a thankless undertaking and a test of patience. In the face of complex and uncertain processes, participants may have to be prepared to make repeated contributions, and maintain optimism and resilience through delays, setbacks and unfavourable outcomes.

Although there is an 'aligning of stars' aspect to law reform outcomes which is beyond individual control, our study suggests that a combination of tenacity

(assisted by available resources) and strategy (informed by law reform literacy and advocacy skills) increases both resilience and law reform capability.

A key finding of this study is that law reform literacy is primarily acquired through experience participating in law reform. Informants highlighted the 'on the job' and 'trial and error' nature of acquiring law reform expertise, particularly in how to write effective law reform submissions, and how this experience and expertise in turn sustains participation through the often repetitious and iterative nature of law reform.

Significantly, negative prior experience participating in law reform potentially clouds views about the utility of law reform and on taking up participation opportunities. For example, many of our CSO informants spoke at great length of their negative experiences and of seemingly 'wasted' efforts in trying to do 'good work'. Frustration particularly arises from contributions to consultations which seemingly disappear into the 'ether', achieve nothing, or have outcomes which are unexplained or unfavourable.

We found that those participants with lower law reform literacy or less experience were generally far less likely to appreciate the vagaries of the law reform system, and the wider factors which influence its process and outcomes, and were less likely to understand the dominant role of executive government in setting and controlling the legislative agenda. Those with less law reform experience are particularly vulnerable to having unrealistic expectations of the outcomes of consultation and of how to influence law-makers. As such, they are significantly more vulnerable to becoming disillusioned with law reform consultation and learning or feeling that they are incapable of participating in a worthwhile and effective way. We encountered informants who reported they thought law reform participation was just not worth the effort. Participants who do not build resilience may not be able to sustain participation in law reform over time.

Critically, we found that participants and stakeholders with greater law reform experience had more realistic expectations of participation opportunities, and a greater appreciation of the wider context and factors that influence law reform outcomes. Greater law reform experience not only appears to build law reform literacy and capability, it also increases resilience. As such, it may be important that participants have realistic expectations of how law reform occurs and the role of public or stakeholder consultation.

A useful way of characterising how different stakeholders come to law reform is using the nomenclature of 'repeat players' and 'one-shotters', applied elsewhere in the context of court users (see Galanter, 1974). Repeat players are those who regularly participate in law reform — those participants often described by our informants as being the 'the usual suspects', and who tend to be well-established organisations with developed resources, reputations and status among government and other law-making bodies. These include peak bodies, professional associations, charities and advocacy groups.

Repeat players are more likely to be identified as being key stakeholders and enjoy closer or privileged relationships with law-makers, and participate in law reform on a more equal footing with government. They are more likely to be invited to participate in confidential or limited stakeholder consultations with government and advisory bodies, and to become members of committees, working groups or task forces asked to provide advice and recommendations about law reform issues.

Repeat players are generally better equipped to navigate the law reform system and make effective use of participation opportunities. They also have a greater ability to influence law-making through both formal and informal relationships and channels of communication with legislative decision-makers before, during and after any public consultation opportunities. Repeat players also have a greater interest in learning how to make best use of participation opportunities across the law reform cycle and in keeping up to date with emergent issues and trends in policy-making. They can be expected to have greater law reform advocacy skills and expertise, as well as more realistic expectations of participation opportunities and how to influence law-makers.

The law reform system systemically advantages participants who are repeat players because law reform literacy and expertise is principally acquired through experience. Without sufficient resources however, we found that repeat players are also at risk of consultation burnout and fatigue.

In contrast, one-shotters are those people or groups participating in law reform for the first (or a sporadic) time, such as a new organisation formed for the purpose of pursuing a particular legislative reform. One-shotters face significantly greater barriers to accessing and participating in law reform, as they are likely to need substantially more time and resources to negotiate law reform and meet participation needs relating to one or more of the dimensions of law reform literacy. Where repeat players and one-shotters are presented

with the same one-size-fits-all participation opportunities, one-shotters face significant additional threshold information and knowledge constraints which consume a disproportionate amount of their available time and resources.

The participation capacity of people and organisations with less experience of law reform, including one-shotters, will be enhanced by recognising their additional time, resource, law reform literacy and often functional literacy needs. If law-making bodies are to reach out beyond the usual suspects of repeat players and resourced interests, they will need to acknowledge the time and resource constraints that impact disproportionately on those people and organisations having lower levels of functional literacy and law reform literacy, and less access to resources. This includes many human services sector CSOs who have a critical role in facilitating the participation or representation of the general public and disadvantaged people in law reform consultation.

Dependency on CSOs

Law-making institutions and practices have evolved within representative systems of government to communicate with and through representative groups rather than individuals. In Chapter 7 we reported how CSOs perform important translating and interpreting roles which can bridge constituents and law-makers. An ability to draw on the greater resources and a wider range of law reform skills within organisations and among their networks, gives CSOs a far greater law reform capability. CSOs are therefore important lynchpins between individuals and institutions of governance.

Government and constituents of CSOs are therefore 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, and the general level of functional literacy and law reform literacy increases. Increasing functional literacy and direct communication is a challenging whole-of-government and whole-of-community task, and in a practical sense is a matter for longer-term public policy. In the short term, CSOs are therefore likely to remain critical to public participation in law reform, particularly for disadvantaged people.

We found that CSOs differ in their capacity for law reform work, their ability to manage the time and resource demands associated with law reform, and their ability to legitimately represent and speak for particular constituencies. In particular, we found that those CSOs most able to speak for disadvantaged and marginalised individuals generally tend to struggle with the law reform

literacy demands of law reform and that non-legal CSOs in particular have difficulty coping with the legal dimensions of particular issues and their wider legal context. While CSOs are likely to have particular expertise about certain issues or how constituents are affected, they are also likely to have other areas of need which, unless met, will limit their law reform capability.

An overriding constraint for CSOs in the human services sector, identified by many of our informants, is their general under-resourcing for law reform. Consequently their law reform capability may necessitate stretching resources to extend to participation in law reform on an ad hoc basis as and when opportunities arise. However, a number of CSO informants also reported that within their organisation, participating in law reform had become so problematic that it was now a non-core activity with lower priority. Another important feature of human services sector CSOs is staff turnover, which means that even where an organisation may have participated in law reform, the people within those organisations may have little or fragmented law reform experience or expertise. A consequence of these observations is that the capacity of the CSO sector to undertake and participate in law reform may be eroded and lost, especially if participation in law reform comes to be regarded as being a luxury activity only undertaken after core activities.

A downside of dependency upon CSOs in law reform is that it leaves both constituents and law-makers dependent upon CSOs' law reform capability — in particular their ability to consult and perform bridging and linking functions, and their ability to translate and interpret information — and also upon how the organisation operates and sets its own priorities. This also leaves law-making particularly vulnerable to non-communication or miscommunication as it is filtered through organisational channels.

Furthermore many individuals, and particularly disadvantaged people who are not well connected to, or able to participate in, CSOs, may be effectively excluded from participating or being represented in law reform unless government is willing to commit time and resources to law reform consultation processes capable of including hard-to-reach groups of disadvantaged people. The participation of many disadvantaged people will therefore often be limited to articulation through CSOs, some of whom may be proxy organisations with some relevant information or expertise, but who are not necessarily legitimate representatives able to speak for a particular group, or who may also have their own interests.

Bolstering the law reform capability of CSOs and promoting direct communication with affected people however, need not suggest an either/or approach. Indeed, the individual and systemic constraints on participation in law reform experienced by most people and CSOs, and particularly disadvantaged people, suggest that both approaches will be necessary over both the shorter and longer term, and that in the short term harnessing the work and roles of CSOs may be a cost-effective strategy for enhancing the ability of socially and economically disadvantaged people to participate in law reform. We look at these approaches in more detail below.

8.3 Strategies for promoting participation in law reform

Diverse people and stakeholders come to law reform with different abilities and inclinations to participate and with different understandings and views about the operation and effects of law. Different starting points mean one-size-fits-all processes can rarely provide equal participation opportunities. While not everyone will want to contribute, law reform processes would ideally benefit from people having an effective opportunity to decide whether or not to participate. Having the ability to do so can be enhanced and promoted by considering the participation needs of different groups of affected people and stakeholders.

This is not to suggest that public consultation is required at each stage of each and every law reform. Public and stakeholder consultation has to be proportionate to the scale, scope and impact of the policy choices inherent in the particular law reform issue. However, some measures to help ensure that law reform is evidenced and rigorous, and that it is appropriately based on the best available information, may require that affected people and stakeholders have effective participation opportunities. What will be appropriate will change with circumstance and is inherently the responsibility and decision of executive government and members of parliament.

Our key findings indicate that most people face formidable individual and systemic constraints which prevent them from being able to make use of participation opportunities that are formally available. Transparent law reform practices may help participants better understand both how law reform occurs and how they may influence outcomes, and may also help to increase public confidence in the legislative process.

Addressing constraints to participation in law reform may therefore require measures to:

- enhance the effectiveness of law reform participation opportunities, as well as
- reform law-making institutions and/or practices.

Each of these approaches requires different strategies, discussed in more detail below. We base these strategies on suggestions made by our informants, as well as the implications stemming from the individual and systemic constraints on participation identified in our analysis and findings. They also incorporate and build on the government's recent reforms establishing the Better Regulation Office (BRO) and its *Guide to Better Regulation* which outlines seven 'better regulation principles' to guide government law-making. These principles include that consultation with stakeholders should inform formulation of the law reform proposal.[100] Some strategies may have more immediate benefits or may be easier to implement than others, although they also necessarily overlap and may have synergies.

Enhance the effectiveness of law reform participation opportunities

Promoting effective law reform participation opportunities involves recognising and addressing the factors that limit and constrain the ability of people and organisations to participate. This requires strategies that enhance and improve access to information and skills across multiple dimensions of law reform literacy, including foundational knowledge about the law reform system, laws, their impacts, and law reform participation opportunities. Addressing only one aspect of functional law reform literacy is unlikely to be sufficient to successfully enhance public or stakeholder participation, and in practice may be of little or no substantiative benefit with respect to people lacking functional literacy.

Strategies will also need to consider how consultation practices can be better tailored to be more sensitive and responsive to the different resource and law reform capabilities of diverse stakeholders. Ensuring participation opportunities are more effective will involve considering and assessing the different time, resource and law reform literacy needs of stakeholders. In

[100] See Principle 5 of the *Guide to Better Regulation*, which states 'Consultation with business and the community should inform regulatory development' (BRO, 2008: 22).

particular, additional time and/or resources may be needed in order to expand participation in law reform beyond the set of 'usual suspects'.

The strategies outlined in Table 8.1 below are intended to especially recognise and support the critical role that CSOs perform in law reform, in particular those CSOs within the human services sector which are pivotal to the participation and representation of disadvantaged people and communities. This table however needs to be read in light of two fundamental features of law reform participation, first functional literacy, and secondly, cost.

Enhancing functional literacy is a challenge that also goes beyond this project, notwithstanding that individual capacity is essential for participation in law reform. As such, enhancing the effectiveness of opportunities to participate in law reform is complex, and is an issue that extends well beyond legal institutions and the legal sector. Functional literacy is a whole-of-community issue that underpins not only participation in law reform, but also many aspects of wider economic and public life. In itself, enhancing functional literacy is an important public policy issue with significant cost implications.

The role ascribed to public and stakeholder consultation in law reform, as noted above, has inherent time and financial costs, and as such any strategy to improve the effectiveness of law reform participation opportunities will also have cost implications. The payoff however may be strengthened democracy, more inclusive democracy and efficacious law.

Table 8.1: 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 formulate law reform submissions. Law reform consultation providing insufficient time for participants risks being perceived as being 'sham' or 'non-genuine', potentially eroding confidence in government and 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 formulation, 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 CSOs that represent them, to participate in law reform.	◆ information should, at minimum, set out in accessible language an overview and orientation to the particular law reform process, the legal issues, and implications (including practical implications) of proposed change. Links and references to further and more detailed information should be provided for those who are interested ◆ where circumstances necessitate, it may be appropriate to produce multiple consultation documents which better meet the needs of diverse stakeholders: a detailed version which extensively canvasses the legal and policy issues; a plain language version; and versions tailored and accessible to particular publics ◆ recognise that producing law reform documents in plain and accessible language is a sophisticated communication task, for which government standards need to be developed. Promote expertise and specialist skills within government in producing accessible law reform consultation documents

Possible broad approach	*Rationale*	*Strategies*
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 participating in law reform. The volume of law reform activity, fragmented across different government departments and agencies, makes it difficult for stakeholders to monitor particular issues. Centralising information about law reform activities, including consultation, will reduce the burden of staying current with developments. Investing in accessible information and resources about the law reform system would not only assist people to work through disparate law-making institutions, it also offers potential benefits in terms of social inclusion and capacity to engage across levels of government.	• develop and maintain an up-to-date centralised website which 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. We note the BRO has a website showing consultations currently undertaken by all government agencies. Co-locating this portal with additional information resources about the law reform system, the role of different institutions, and how the public is able to participate would make it easier for interested people to navigate both to and through law reform. An advantage of a centralised online resource is that periodic updates can be made, particularly useful given the myriad — at times rapid — changes which may occur in law reform. Such a portal would also facilitate communication with stakeholders through a registration process. Interested stakeholders who register can opt in to receive information updates about particular law reform issues • develop community information resources about how to find legal information, including how to access legislation, Bills of Parliament, as well as support the community education work that some CSOs, particularly legal CSOs such as CLCs, undertake with respect to plain language legal resources concerning substantive areas of law and law reform • fund community education, information programs, and plain language resources to promote general understanding of our political and legal system, 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 particular needs of disadvantaged communities (such as Indigenous communities, people from non-English speaking backgrounds, people with disabilities, young people, older people and other socio-economically disadvantaged communities)

Possible broad approach	*Rationale*	*Strategies*
4. Enhance the capacity of CSOs to participate and represent their constituencies, particularly disadvantaged communities, in law reform	Participating in law reform consumes significant resources. Unless assisted, individuals and stakeholders with relatively less capacity to participate will be unable to effectively utilise participation opportunities. Disadvantaged people and groups may be unable to participate where doing so prevents them from meeting their daily needs such as health, housing, and/or in the case of CSOs, service obligations. 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 of particular constituencies to a law reform process. The law reform work of many CSOs can be strengthened by considering how best to support them to 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 in their organisations, particularly among those CSOs who represent marginalised and disadvantaged people and groups • fund CSO law reform work where appropriate, particularly where it enhances the ability of socially and economically disadvantaged people to participate and may provide information that will not otherwise be available to government • support the important information, networking, communication, translation and interpretation roles peak CSOs perform for their member organisations which often underpin their ability to participate in law reform. Support and promote opportunities for communication and collaboration between legal and non-legal CSOs for the purposes of law reform work • support capacity building programs which aim to increase the ability of individuals and the CSO sector to undertake systemic law reform advocacy • support and strengthen pro bono relationships which facilitate CSO access to legal assistance or advice on the legislative consequences of proposals for particular interests and communities. 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 • appropriately fund legal CSOs, including CLCs, to act as a legal resource and meet the law reform literacy needs of individuals in the community and other CSOs in the sector • promote and provide incentives for policy or research partnerships between human services sector CSOs and tertiary institutions. Encourage and promote links between stakeholders and CSOs undertaking law reform to any pro bono policy, research and/or constituent engagement expertise that may be available • value the ability of CSOs, particularly advocacy and consumer CSOs, to reach their constituents and marginalised communities — particularly those that are hard to reach. Where appropriate, harness CSOs' on-the-ground information and knowledge of the operation of legislation by supporting their involvement during implementation and review of legislation, particularly where they represent or have knowledge of hard-to-reach disadvantaged or marginalised communities

Possible broad approach	*Rationale*	*Strategies*
5. Ensure the scope and aims of law reform consultation processes are clear for participants, and that processes match the participation needs of affected stakeholders. Where appropriate, tailor these processes to specific needs 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 different level of functional literacy, law reform literacy and resource capacity of the diverse people and groups potentially affected by reform proposals. Meeting different participation needs through the consultation process will increase the likelihood of more complete information being collected and will help inform executive decision-making, especially information about hard-to-reach communities which may otherwise not be known within government. 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 has yet to happen before legislation can be enacted. Such information should seek to clarify expectations concerning the scope of the consultation and 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 ◆ improve identification of and communication with relevant stakeholders when designing public or stakeholder consultation for a particular law reform issue ◆ harness the expertise, knowledge and relationships of individuals from specific communities, public servants and/or CSOs with existing links to specific constituencies in the design and implementation of consultation with particular groups. CSOs with knowledge and reach into disadvantaged and marginalised communities have specialist expertise and knowledge which can be critical to designing effective consultation strategies with and for those groups. While the most appropriate format or method of consultation will vary, where possible, consultation with key stakeholders is more likely to lead to more appropriate community engagement and consultation processes ◆ where law reform affects diverse interests, it may be appropriate to employ multiple consultation methods, using different modalities (phone, internet, face-to-face, or other). While communicative technology can facilitate wider reach to members of the public, this may not be so with respect to marginalised and disadvantaged people and communities

Underpinning the approaches outlined in Table 8.1 are the ideas of best practice law reform consultation noted in Chapter 1. While it may not always be possible, realistic, or indeed desirable to undertake consultation for law reform, it is in government's interest — and in the wider public interest — to strive to do best practice whenever undertaking public consultation in law reform, and also when seeking to include hard-to-reach disadvantaged groups or communities.

Law reform consultation is an information exchange process, seeking to collect information not otherwise known within government. Better practice law reform consultation potentially enables more complete information about the law and its operation on diverse stakeholders and interests to be collected and to inform the formulation of legislative proposals. Information about aspects such as the experience, operation and impact of law, as well as how it is understood and applied, may not be known by decision-makers without consultation. Better practice law reform consultation may therefore enhance the quality and effectiveness of legislation.

Striving to regularly undertake best practice consultation, either with general members of the public or with specific targeted communities, may also build social capacity and resilience for law reform participation.

Lessons from best practice consultations, where applied, have potential benefits for all law reform stakeholders, including government, participants and citizens. Innovative best practice stakeholder consultation, and in particular consultation with certain hard-to-reach communities, provides opportunities to develop and build on stakeholder participation skills both within government agencies, CSOs, and those communities. Innovation and rigorous evaluation will also help to build better knowledge and understanding of what works in law reform consultation, and why.

Investing in consultation that strives to be best practice may also have ancillary returns in terms of building public knowledge and understanding of institutions, active citizenship, and engendering trust and confidence in governance institutions, particularly among those marginalised and disadvantaged communities who are more likely to be mistrustful and cynical about governance institutions and agencies.

A number of strategies may be adopted to encourage and resource best practice law reform consultation.

A central government agency, ideally located in the DPC (Department of Premier and Cabinet), might be tasked with responsibilities for promoting and coordinating consultation practices and capacity within and across the whole of government.

Such a centralised government body could integrate consultation practices across government and help manage consultation fatigue. It could develop public participation and community consultation resources, guidelines and/or standards, and maintain information and resources about innovative public consultation techniques and best practice in consultation with hard-to-reach communities.[101] Collecting and evaluating information about consultation may also help to build consultation capacity in terms of the practical and operational lessons learnt. Such a body could also help to manage and oversee other information resources concerning law reform activities, for example coordinating a single portal point of entry to online information about law reform and public participation opportunities across the whole of government, as outlined in Table 8.1.

Another strategy consistent with promoting best practice is to better harness the existing skills and expertise of specialist advisory bodies, such as law reform commissions, in developing law reform consultation practices across government that are better attuned to the participation needs of marginalised and disadvantaged people.

Finally but not least, institutions — government, advisory as well as CSOs — might be funded for the purpose of extending their consultation processes beyond the familiar one-size-fits all written consultation paper approach so as to be able to undertake more diverse and innovative engagement methods where the law reform issues may substantially affect marginalised and disadvantaged people and communities. While deliberative practices such as citizen juries or panels, community conferences or community auditing have been applied, they have yet to be consistently evaluated. Establishing a funding resource for the purpose of extending law reform consultation, contingent on some established criteria, including the publication or sharing of 'lessons learnt about the consultation process' would significantly add to the body of knowledge and practice relating to law reform consultation.

[101] For example, the International Association for Public Participation, see <http://www.iap2.org/associations/4748/files/toolbox.pdf>.

Institutional reforms

Our informants suggested a number of other ways to promote participation in law reform which would require fundamental and widespread reform of law-making institutions and practices of government.

More minimal institutional reform of existing law-making practices, particularly those of executive government and parliament, may provide for increased transparency, accountability and scrutiny of executive government decisions concerning law reform, such as providing for scrutiny and evaluation of the adequacy and sufficiency of public and stakeholder consultation. Institutional reform to better integrate legislative impact analysis may also support sound and rigorous law-making practices.

Radical changes to better provide for public participation would require more fundamental changes to political and law-making institutions, which are notoriously difficult to achieve.

Strategies which are premised on limits stemming from the current institutional framework and representative practices of government may, however, be implemented given sufficient political will or public demand as it should be noted that public policy and administration, like other institutional process, evolve and adapt over time.

Improve transparency, accountability and rigour of law-making practices

Transparent practices with enhanced reasons or explanations for decisions may help promote trust and confidence in the law reform process. For example, many of our informants with lower levels of law reform literacy and less experience of law reform reported being confused and frustrated by a lack of explanation of outcomes following consultation processes, particularly where they had gone to significant effort to participate.

Lack of transparency in law reform decision-making can undermine stakeholder confidence in governance and in their ability to meaningfully participate in law reform. It compounds consultation fatigue and leads participants to question the value of participating, particularly where substantial time and resources have been expended. Some feedback and explanation of law reform decisions will help promote greater participant understanding of what information was influential, and also what factors were determinative in the decision-making, and better provide for 360-degree communication. Currently this tends to fall

between the institutional cracks among the bureaucracy, executive government and parliament.

Participants are more likely to be resilient and have trust and confidence in the process, as well as in their ability to effectively contribute, when they feel that they have had an equal opportunity to participate, and that their contributions have been taken seriously and considered, even where subsequent decisions and outcomes are unfavourable to them.

Providing feedback need not be onerous. For example, a feedback document outlining the broad areas or issues raised by participants, and how information has or is being considered, and reasons for any divergence between submissions and outcomes, could be produced. We note that in the Better Regulation Office's guidelines relating to the formulation of legislation, government bodies are generally encouraged to provide stakeholders with feedback about the decision-making process, and account for discrepancies in submissions and law reform outcomes (BRO, 2008: 32). Such feedback is especially important with respect to those participants with less experience of law reform.

Ongoing information about the progress of particular law reform proposals or legislative activity would also help people and stakeholders interested in specific issues to understand and monitor any ongoing law-making activities and developments. This could be achieved by providing basic information about the progress and status of law reform issues, for example that:

- participant contributions are being analysed or investigated
- advice is still being considered by Cabinet
- government has declined to introduce legislation at this time
- a legislative proposal has been tabled in parliament and is being considered
- a legislative proposal is being examined by a parliamentary committee
- legislation has been enacted.

Regular updates could also be provided about the progress and expected timeline of implementation, as well as scheduled or expected dates for statutory review.

While reforms establishing the Better Regulation Office and the production of a whole-of-government *Guide to Better Regulation* may help promote

opportunities for public and stakeholder participation, their impacts on law-making practices should also be monitored and evaluated. The Better Regulation Office reforms are intended to reduce regulatory burdens on business by preferring non-regulatory policy solutions where appropriate.[102]

A feature of red tape reform intended to serve the public interest is that law-making should not impose unnecessary administrative burdens and compliance costs. However this may conflict with the public interest in having effective legislative protection for particular rights, or regulatory schemes to provide safeguards or minimum levels of protection to alleviate disproportionate or detrimental impacts on particular groups of people. Regulatory detail often refines the impact of otherwise blunt legislative instruments, and helps avoid unintended consequences. If the law reform system puts the evidentiary onus of justifying the need for legislative or regulatory protections on affected non-government stakeholders, this may be an onus too great to bear for some, especially given that regulatory safeguards are often intended to provide greater protections to certain identified groups of disadvantaged people. For many issues involving substantial disparity between competing interests, government will have to collect and rigorously analyse information and evidence through processes such as law reform consultation.

A number of our informants identified that reform of practices associated with regulatory impact statements (RISs) might help to enhance the transparency of law reform decision-making.[103]

The RIS process, particularly under the Better Regulation Office, might help to provide increased opportunity for stakeholder consultation, but only if it is not simply a routine add-on activity, but is a meaningful and integral part of the law-making process. Where consultation is undertaken in a token way, or merely for the purposes of complying with policy guidelines, it risks further compounding consultation fatigue and cynicism among law reform participants.

The rigour of the Better Regulation Office's certification process of RIS could be strengthened by requiring an assessment and statement as to why

[102] See Principle 3 of the *Guide to Better Regulation* (BRO, 2008:13).

[103] RISs are required for all significant new and amending Bills, Regulations and Statutory Instruments, under reforms relating to the Better Regulation Office (BRO, 2008: 7) and for all principal subordinate regulation (as required by the *Subordinate Legislation Act 1989*).

the consultation strategy employed should be considered adequate.[104] This would enable cabinet scrutiny of the adequacy of the consultation undertaken at a pre-parliamentary stage, such as whether or not adequate information about potentially affected people and interests, as well as likely or possible consequences, has been collected and considered. Similarly the capacity of public officials to effectively undertake an RIS, and particularly to undertake adequate consultation, should be supported through appropriate information and training programs.

The *Guide to Better Regulation* also recognises that some legislative impacts may be intangible, but public officials are nevertheless encouraged to quantify impacts and use cost-benefit methods of analysis in order to enable comparison of costs and benefits across a range of policy options (BRO, 2008: 14).

Such a focus may skew attention to particular types of information that is overly narrow in focus (Wilkinson, 2003). We note that cost-benefit analysis can bias assessment and decision-making towards those factors and stakeholders whose interests can be more easily costed, to the potential detriment of other less quantifiable social impacts. This heightens the risk that some social impacts are being inappropriately considered and assessed in decision-making.

RIS requirements may therefore need to be reviewed to ensure they provide for an appropriate balance between considerations about impacts on business and industry, as well as impacts on the public and specific disadvantaged groups such as Indigenous communities, people from non-English speaking backgrounds, people with disabilities, young people, elder people and socio-economically disadvantaged groups (see BRO, 2008). Further, options for developing additional criteria to ensure impacts on disadvantaged, marginalised and vulnerable people are appropriately considered and rigorously demonstrated may need to be investigated and developed, particularly given that such groups have less capacity to participate in consultation about law reform issues affecting them.

Broader institutional reforms

Some of our informants suggested that another way of ensuring that opportunities for public or stakeholder participation in law reform are

[104] As noted in Chapter 2, all proposals for primary legislation that are considered significant by the responsible minister require a Better Regulation Statement (BRS) for cabinet consideration. The BRS is a regulatory impact statement which justifies legislation as the preferred policy solution for an identified issue, and outlines how the legislative development process has followed best practice principles, including consultation of affected stakeholders.

effective would be to provide additional time between the tabling and debate of government Bills to provide for greater opportunity for scrutiny. This might be most useful where government Bills have been formulated without public or stakeholder consultation.

Further, and similar to the model already used with respect to regulatory and other impact analysis, an 'adequacy of consultation statement' might help to formalise and integrate consideration of public and stakeholder consultation into the legislative process, although its rigour would depend on executive government and parliamentary support.

For example, provision could be made requiring that ministers proposing new legislation make a statement as part of the Agreement-in-Principle Speech[105] detailing why the government believes the formulation of the legislation has been adequate and appropriate in the circumstances. Such a statement might also formally and publicly document the following:

- the issue or problem that gave rise to the need for legislation
- the intended and desired objectives of the legislative proposal
- the impacts the legislation is expected to have and how those impacts were identified
- what, if any, advisory bodies or non-government bodies were consulted
- what, if any, opportunities there were for public or stakeholder consultation and to what, if any, extent stakeholder views were inconsistent
- reasons why the consultation process and proposed legislation is considered to be adequate in the circumstances, such as how the consultation process was commensurate with the magnitude of the issues and likely impacts of the proposal
- what, if any, public or stakeholder consultation opportunities are anticipated during implementation and review of the legislation.

Such requirements would reflect a number of aspects of best practice law-making. Where legislation is brought forth following an election, government might simply demonstrate that adequate and appropriate consultation has occurred though the election process. Governments already do this when they claim a mandate to enact their campaign policies.

[105] Previously known as the Second Reading Speech.

At the other end of the legislative spectrum, in times of state emergency or public crisis for example, government could satisfy any requirement by stating that the perceived risks to the community, or the benefits intended by the legislation, outweigh the competing public interest of conducting adequate consultation, particularly where the legislation includes a sunset clause or provides for public consultation as part of statutory review within a relatively short timeframe (for example, one or two years).

For the substantial proportion of legislation likely to lie between, it may be sufficient for a minister to articulate why a particular consultation process is considered to be adequate given the scope of the proposal, the identified affected stakeholders, and any participation opportunities provided.

The purpose of scrutinising the adequacy of the consultation process would be to help satisfy parliament that the legislative proposal has been informed by the best available information, and has adequately considered and tested the potential impacts and consequences, with the aim of making effective, efficient and just legislation.

Where parliamentary scrutiny finds a particular consultation process to have been inadequate given the circumstances, it would be open to refer the Bill to a parliamentary inquiry in order to better satisfy parliament that the Bill has been adequately informed, and where considered appropriate or necessary, to undertake public or stakeholder consultation for that purpose. Of course, the effectiveness of such scrutiny would depend upon the political make-up of each House of parliament, however it would have the benefit of being a matter of public record and of public scrutiny.

Knowledge that the adequacy of public or stakeholder consultation will be subject to parliamentary and public scrutiny may focus executive government attention on its practices during pre-parliamentary formulation.

As suggested by organisations such as the OECD, the primary benefit of impact analysis is that it promotes the consideration of real-world impacts, assumptions and implications at an early stage of the policy or law reform process, that is, during formulation (OECD 2002: 46–47). Scrutiny of the adequacy of public or stakeholder consultation may therefore integrate and formalise consideration of the various impacts legislative proposals may have on certain groups of people during both the pre-parliamentary and parliamentary stage of formulation.

More widespread reforms raised by our informants included suggestions that a right to participate in public life and governance be enshrined, similar to the rights that exist in those Australian jurisdictions that have adopted a Charter of Rights.[106] Such a right might require consideration of the particular participation needs of certain affected people and may lead to public or stakeholder consultation during pre-parliamentary formulation.[107]

While the suggested institutional reforms have the capacity to improve public and stakeholder participation opportunities in law reform, they are likely to be marginal in the absence of commitment from government to providing effective public and stakeholder participation opportunities, and to meeting more foundational needs such as functional literacy, law reform literacy and support for CSO law reform work.

8.4 Conclusion

The strongest argument for why public participation in law reform is important for enhancing access to justice is because it furthers the ideals and aspiration of building democratic governance and a justice system more capable of 'doing' justice, and does so in a 'just' manner. Public and stakeholder participation in law reform extends access to justice to the very processes that set the conditions for justice.

Law reform is an inherently political process, however if law reform consultation stems from the premise that it is essentially an exercise in information collection and exchange with the aim of making better laws, its value rests on being able to reach into and make connections with the full and diverse set of affected stakeholders and communities. Indeed, one of the promises of public and stakeholder participation in law reform is its potential to produce more effective, responsive and just laws. Consultation can enhance the likelihood that legislation will work as intended and minimise unintended consequences.

Conversely lack of, or poorly conducted, consultation is not only more likely to have negative consequences for particular groups of people, public, and/

[106] For example, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 18 provides that every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

[107] For example, one consequence of the *Human Rights Act 2004* (ACT) is that the ACT Human Rights Commissioner is given access to draft cabinet submissions. This may lead to recommendations that legislation be released as an exposure draft for community consultation (Watchirs 2005).

or the government, and waste limited public, stakeholder, government and parliamentary time and resources, it also erodes public confidence and trust in law-making institutions, the law reform system, and government.

Law reform consultation provides an opportunity for government to reach out and include marginalised and disadvantaged people and communities. Effective law reform participation opportunities require government to be mindful of and responsive to the functional and law reform literacy needs of diverse people and groups, as well as the likely and unequal effects of time and resource constraints.

Participation opportunities that manifest in a one-size-fits-all form are unlikely to adequately capture information about the impact and operation of law on a diverse range of people or interests. In fact, one-size-fits-all law reform consultation is likely to disproportionately exclude marginalised and disadvantaged people. Unless law reform adequately provides for the consideration of impacts on marginalised and socially or economically disadvantaged groups — including the consideration of their particular participation needs — there is a significant risk that legislative reform may cause or reproduce disadvantage.

The strategies we suggest seek to address the factors that facilitate and constrain participation in law reform, as identified through our case study analyses. Although these strategies are focused on New South Wales, their relevance — and especially findings on the constraints stemming from a lack of functional and law reform literacy — is likely to extend to other levels of government. Indeed, a consequence of Australia's federal system of government is that as institutional responsibilities and consultation practices are fragmented, the challenges posed by law reform literacy is exacerbated.

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Appendices

Appendix 1.1: Typology of participation in policy-making

Table A1.1: Typology of participation in policy-making[1]

Participation Type	*Objective*	*Key Instruments*	*Limitations*
Consultation	◆ gauge community reaction to a proposal and invite feedback ◆ consultation is only participation when information gathered can influence subsequent policy choices	◆ key contacts ◆ surveys ◆ interest group meetings ◆ public meetings ◆ discussion papers ◆ public hearings	◆ delay between consultation and any outcome ◆ communities feel betrayed if they do not like the decision ◆ expensive and time consuming for complex decisions
Partnership	◆ involve citizens and interest groups in aspects of government decision making	◆ advisory boards ◆ citizens advisory committees ◆ policy community forum ◆ public inquiries	◆ issue of who can speak for a community ◆ bias toward established interest groups ◆ legitimacy issues with those excluded from the process
Standing	◆ allow third parties to become involved in the review process	◆ review courts and tribunals ◆ open and third party standing ◆ statutory processes for social and environmental impact assessment	◆ only relevant for those issues which come to court ◆ expensive and time consuming ◆ bias toward well-funded interests ◆ legal approach may be inappropriate for some issues
Delegation	◆ hand investigation and control of issue to an independent body / process	◆ independent inquiry or bodies (i.e. Ombudsman)	◆ discretion to adopt recommendations of body reserved by government ◆ may be expensive and time consuming
Consumer Choice	◆ allow customer preferences to shape a service through choices of products and providers	◆ surveys, focus groups ◆ purchaser / provider splits ◆ competition between suppliers ◆ vouchers ◆ case management	◆ relevant only for service delivery issues
Control	◆ hand control of an issue to the electorate or random sample of electorate	◆ referendum ◆ 'community parliaments' ◆ electronic voting	◆ costly, time consuming and often divisive ◆ are issue votes the best way to encourage deliberation?

[1] Bishop and Davis (2002: 27).

Appendix 3.1: Generic interview schedules

[Specific questions about events and experiences of relevant case studies were asked as they arose through these major questions]

Can you tell me about your role in the organisation, and how the organisation is involved in law reform activities?

- Are there some activities the organisation does more than others?

In your experience, what has been the ways in which laws are made or changed?

Opportunities

What opportunities generally exist for involvement in law-making?

What opportunities for individuals in public?

Do opportunities differ depending on:

- stage of law
- process used to change the law (advisory group, parliamentary inquiry, government review of legislation, impact statements)
- area of law
- mode of law-making (proactive / reactive).

Constraints

What would you say are the major factors which make it difficult for the organisation or other interested organisation to be involved in law-making or law reform?

[Where relevant prompt issues relating to:

a. knowledge / information

b. resources or funding (for sector)

c. time

d. skills

e. relationships with other bodies (other CSOs and government)

f. media

g. technology

h. use of volunteers
   - pro bono relationships
   - working conditions – staff retention
   - volume of legislation
   - charities

i. others we haven't talked about?]

Disadvantage

One thing that different forms of disadvantaged communities seem to share is that generally speaking, they do not have the same ability to participate in society. What in your experience does this mean for the ability of disadvantaged people to be involved in law-making activities?

- How involved?
- Represented and/or through organisations? If so, whom does this tend to be by?
- What are the major factors which affect the involvement of disadvantaged people?
- How different to involvement by the wider public?

Areas for improvement?

- Is there anything you would like to see in relation to how laws are made or changed?
- Are there any changes you think could be easily made which would assist people's involvement in law-making?
- Are there other changes that would be more difficult to make?
- Would these changes also assist those who are disadvantaged?
- Are there any particular processes or specific examples that you think worked particularly well?
  - If so, what were the key factors?

Appendix 3.2: Consent form

Participation in Law Reform Processes

Participant Information

The Law and Justice Foundation of NSW is doing research looking at the access to justice needs of people in New South Wales. This project looks at how laws are made or changed in New South Wales, and how people — particularly disadvantaged people — are involved in such processes.

The Foundation has selected for more detailed study a handful of cases where a particular law was introduced or changed. You have been approached to participate in this project because of your general knowledge of law reform, or because of your specific knowledge of one or more of the following cases:

- *Residential Tenancies Amendment (Public Housing) Act 2004* (NSW)
- Reforms sought by the NSW Boarders and Lodgers Action Group
- *Bail Amendment (Repeat Offenders) Act 2002* (NSW)
- Review of the *Mental Health Act 1990* (NSW)
- *Civil Procedure Act 2005* (NSW).

We will be asking your experiences generally on processes for changing laws in New South Wales. In relation to the case(s) you are involved with, we will be asking your views about the processes that occurred, and the kinds of opportunities and constraints there were for the public and particularly disadvantaged groups to participate in proposals for, and/or implementation of, change. Where available and/or appropriate, we may also ask for supporting documents or materials.

We are doing this so that law and policy-makers, groups representing the interests of disadvantaged people, and concerned individuals, may understand the extent to which people, particularly disadvantaged people, are involved in processes that make or change laws. Your experience and what you tell us will also provide valuable insights into how disadvantaged groups may better participate in such processes.

What will my participation involve?

The interview may take 60 to 90 minutes. Participation is voluntary. You may choose not to answer some or all of our questions. If you want to stop the interview please just say so. You are free to withdraw at any time.

We undertake not to identify you or your organisation by name. We will not put your or your organisation's name on any copy of your interview, and will not report any information that shows it was you or your organisation who spoke with us. We will also de-identify any documentation or materials you choose to provide to us that are not publicly available. For example, if we quote someone in our report, we will not use their name or any detail that allows others to identify them. We will only attribute quoted comments to the class of stakeholder you or your organisation belong to. For example we may identify you as an individual, member, officer or senior officer of a:

Government agency	Interest / advocacy group
Government advisory group	Interest / advocacy group (interests of disadvantaged people)
Peak body	Parliament

All information provided will be stored securely and in the strictest confidence within the law, and otherwise will only be disclosed with your written permission. Only members of the project team will have access to this information.

We undertake to gather and store material as confidential. While we do not report individuals or organisations in the report, we acknowledge that for some informants the circumstances of the particular case may be such that it is not possible to protect the informant's or organisation's identity. For example, a particular case may have involved only one peak body or government agency. In such a case the above classification will not protect the identity of that peak body or government agency.

If you agree, we will also tape record the interview. This is only so we are not writing things down while we are talking. This recording will be wiped as soon as the interview has been written up. If you want the tape recorder turned off at any stage please tell us, and if you decide that you do not want us to use anything you have said in our report please tell us and we will not use it.

Participation in Law Reform Processes

Consent to Participate

I, _____(please print name) agree to participate in the study called 'Participation in Law Reform Processes' being conducted by the Law and Justice Foundation of NSW (the Foundation).

I have read, or had explained to me, information about the study and I have a copy of the participation information sheet. Any questions that I have asked have been answered to my satisfaction.

I agree to talk with the researcher for this study and I understand that I am free to stop the interview at any time. I understand that all information identifying me or my organisation is confidential, and will be disclosed only with my written permission, or except as required by law.

I also understand that while the Foundation undertakes to de-identify the information I provide, confidentiality cannot be guaranteed.

I am aware that my participation is voluntary and that I can stop and/or withdraw my participation at any time without penalty. I understand that I may be contacted further, but only for the purposes of clarifying or adding detail to my original response.

If I have any concerns about the research, or how the information I supply will be used, I can contact Natalina Nheu (Project Leader) or Christine Coumarelos (Foundation Research Manager) on (02) 8227 3200.

Signature (participant): _____ Date: _____

Signature (researcher): _____ Date: _____

Consent to the interview being recorded

I consent to the interview being tape recorded. I understand that this recording will be erased as soon as the interview has been written up.

Signature (participant): _____ Date: _____

Signature (researcher): _____ Date: _____

Appendix 4.1: Chronology of consultation in mental health reform

Table A4.1: Chronology of public and stakeholder consultation for mental health law reform in New South Wales 1990–2008 (… 2013)

Year	*Consultation Opportunity*
Pre-1990 (Formulation of MHA 1990)	Steering Committee on Mental Health. Extensive consultation with consumers, carers and health professional and the broader community.
June 1990	*Mental Health Act 1990*. Assented 1 June1990. Commenced 3 September 1990.
1990 to 1992 (Implementation of MHA 1990)	Mental Health Act Implementation Monitoring Committee. Public consultation forums held through the State. 124 written submissions received. Report August 1992.
May 1994	*Mental Health (Amendment) Act 1994*. Assented 30 May 1994. Commenced 14 October 1994 (except Schedule 1 (3), (5), (14) and (15) commenced 19 September 1997). NSW Health discussion paper and committee to monitor the utilisation and effectiveness of MHA and receive submissions on the discussion paper.
May 1996	NSW Health discussion paper, *Caring for Health: Proposals for Reform – Mental Health Act 1990*, concerning amendments proposed by the Mental Health Implementation and Monitoring Committee and other issues released with attached exposure draft *Mental Health Legislation Amendment Bill 1996*. Three-month consultation period. Close to 100 submissions received after a three-month consultation period.
June 1997	*Mental Health Legislation Amendment Act 1997*. Assented 25 June1997. Commenced 19 September 1997. The Act amended or removed a number of proposals contained in the exposure draft legislation in response to the submissions received for the 1996 discussion paper and exposure draft Bill.
December 2001	Legislative Council Select Committee on Mental Health was established to inquire into mental health services in New South Wales. Submissions invited from the public and stakeholders, public hearing held. 303 submissions received.
December 2002	Legislative Council Select Committee on Mental Health, *Mental Health Services in New South Wales Inquiry Final Report*. 120 Recommendations.
October 2003 (MHA Review commenced)	Key stakeholders consulted by NSW Health in preparation for drafting discussion papers for the review of the *Mental Health Act 1990*.
February 2004	Review of the *Mental Health Act 1990.* *Discussion Paper 1: Carers and Information Sharing* Released February 2004 with comments sought by 30 April 2004.
July 2004	Review of the *Mental Health Act 1990.* *Discussion Paper 2: The Mental Health Act 1990* Released July 2004 with comments sought by 31 October 2004. More than 300 submissions received in response to Discussion Papers 1 and 2.

Year	*Consultation Opportunity*
During 2005	The Hon. Ms Cherie Burton MP, Parliamentary Secretary to Minister for Health, visits mental health facilities and holds public forums throughout New South Wales.
August 2006	*Review of the Mental Health Act 1990 Report* and *Exposure Draft Mental Health Bill 2006* released. Comments sought by 3 November 2006. More than 50 submissions received. Two further reviews also announced: – Review of the Administration of the Mental Health Review Tribunal – Review of the forensic provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedures) Act 1990*. Task force convened to examine options for reform and consult stakeholders and the public on those options.
November 2006	*Mental Health Bill 2006* introduced into parliament on 22 November 2006. Bill lapsed on prorogation of parliament at the Second Reading Stage in the Legislative Assembly.
May 2007	*Mental Health Bill 2007* introduced into parliament on 9 May 2007. Bill includes minor changes from the 2006 lapsed Bill. Passed without amendment by parliament on 6 June 2007. Assented on 15 June 2007. Commenced 16 November 2007.
December 2006	Consultation Paper - *Review of the forensic provisions of the Mental Health Act 1990 and the Mental Health (Criminal Procedures) Act 1990*. Comments sought by 31 March 2007. 50 formal submissions received.
August 2007	*Review of the New South Wales Forensic Mental Health Legislation Report* released. 34 Recommendations.
June 2008 (MHA Review completed)	*Mental Health Legislation Amendment (Forensic Provisions) Bill 2008* introduced in parliament 27 June 2008. Passed without amendment by parliament 28 October 2008. Assented 5 November 2008. Commenced 1 March 2009.
June 2012	Section 201 of the *Mental Health Act 2007* provides for the Act to be reviewed by the minister as soon as possible five years after its assent.
June 2013	A report of the outcome of the statutory review of the *Mental Health Act 2007* due to be tabled in Parliament.

Appendix 5.1: Source and type of Bills introduced in 2002–2006

Table A5.1: Distribution of primary legislation (Bills) introduced in New South Wales Parliament during 2002–2006 inclusive, according to the source of Bill and whether Bill is new or amending

Source of Bill (sponsorship)	***Amending Bill*** *Number (and % of total Bills introduced by sponsor)*	***New Bill*** *Number (and % of total Bills introduced by sponsor)*	***Total (N=724)*** *Number (and % of total Bills introduced)*
Private Member	70 (65%)	37 (35%)	107 (15%)
Government	466 (75%)	151 (24%)	617 (85%)
Total	536	188	724

Appendix 5.2: Logistic regression predicting outcome of Bill

Table A5.2: Standard binary logistic regression predicting outcome of Bill (assent or not) introduced in New South Wales Parliament during 2002–2006 inclusive

	B	**SE**	**WALD**	**P**	***Odds Ratio***	***95% CI for Odds Ratio***	
						Lower	*Upper*
Source of Bill (government = 1; private member = 0)	5.693	.461	152.571	**.000**	296.805	120.268	732.476
Type of Bill (amending = 0; new =1)	-.307	.391	.617	.432	.736	.342	1.582
House of origin (Upper = 1; Lower = 0)	.210	.532	.156	.693	1.234	.435	3.500
Election cycle (period 12 mths before election = 1; other periods = 0)	-.855	.367	5.431	**.020**	.425	.207	.873
Constant	-2.267	.598	14.352	.000	.104		

Notes: N=724 Bills. P values for significant predictors are presented in bold. For election cycle, a dummy variable was created, where if the date of introduction of the Bill was in the period 12 months before the election of March 2003 or March 2007, it was coded '1', and otherwise coded '0'.

Logistic regression model summary: Cox and Snell R^2 = .418, $\chi^2(5)=392.240$, p=.000.

Appendix 5.3: Multiple regression predicting times for parliamentary formulation

Given the highly skewed and non-normal nature of parliamentary formulation times, we used the natural log transformation of the elapsed time from the date the Bill was introduced to parliament, to the date on which it resolved.

We began with source of Bills (government or private members), type of Bill (amending or new), House of origin, and election cycle[2] as preliminary predictors of parliamentary formulation times. As a result we found that both source of Bill and parliamentary House of origin each significantly contributed to variations in parliamentary formulation times, and together accounted for 31 per cent of the total variation in parliamentary formulation times.

Table A5.3: Multiple regression predicting times for parliamentary formulation of Bills introduced in New South Wales Parliament during 2002–2006 inclusive

	B	SE	Beta	P	*t*
Source of Bill (government=1; private member=0)	-1.779	.100	-.576	**.000**	-17.702
House of origin (Upper =1; Lower = 0)	-.327	.108	-.099	**.003**	-3.028
Constant	5.323	.097		.000	55.008

Note: Regression model summary: $R^2 = .307$, $F(2, 720) = 159.684$, $p=.000$.

[2] A dummy variable was created, where if the date of introduction of the Bill was in the period 12 months before the election of March 2003 and March 2007, it was coded '1', and otherwise coded '0'.