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ACCESS TO JUSTICE: RHETORIC OR REALITY

LAW REFORM AND ACCESSIBILITY

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LAW REFORM AND ACCESSIBILITY¹

1. Introduction

The title of this paper is ‘law reform and accessibility’. There are two concepts embedded in this title: first, the reform of the law to increase access to law and justice, and second, public influence on the process of law reform itself. In relation to the law, accessibility means both the ability to know what the law is and to make use of it; in relation to law reform, this means not only knowing what law reform is under consideration, but being involved in that process of law reform itself. In practice, while these two aspects of accessibility are quite different, they are nevertheless complementary – increasing one is likely to increase the other. It is this second meaning of ‘accessibility’ that I want to focus on in this paper.

We live in an information rich age but information does not necessarily translate into engagement or a sense of civic involvement so necessary to deliberative democracy in which people feel able to involve themselves with law, justice or the law reform process. This sense of alienation from the processes of the law is reflected in the popular media with their concentration on sensationalised reporting of little-understood court processes, but it would be wrong to think that this is merely misunderstanding or easy populism at work. The inaccessibility of legal processes has been a staple of both fiction and non-fiction throughout the modern era. A few examples will suffice.

Franz Kafka uses the image of doorways to symbolise the law’s inaccessibility and incomprehensibility to the protagonist in his novel *The Trial*.² There is a doorway to the law – and the law shines out radiantly from behind that doorway. The doorway is always open but there is a guard before the doorway who will not admit the man seeking entrance. The guard does not use force and does not try to stand in the man’s way; he simply tells the man that he cannot grant him admission to the Law. The man

¹ The author acknowledges the extensive assistance rendered by her Associate, Oanh Thi Tran, and Claire Riethmuller of the Queensland Law Reform Commission in the preparation of this paper.

² Kafka, Franz (Scott, Douglas and Waller, Chris Trans) *The Trial* London, Picador Classics: 1977 (reprint) at 239 – 246.

waits his entire lifetime, trying various means to gain admission, but finally dies waiting.

“... before the Law stands a door-keeper. A man from the country comes up to this door-keeper and begs for admission to the Law. But the door-keeper tells him that he cannot grant him admission now. The man ponders this and then asks if he will be allowed to enter later. ‘Possibly,’ the door-keeper says, ‘but not now.’ Since the door leading to the Law is standing open as always and the door-keeper steps aside, the man bends down to look inside through the door. Seeing this, the door-keeper laughs and says: ‘If it attracts you so much, go on and try to get in without my permission. But you must realize that I am powerful. And I’m only the lowest door-keeper. At every hall there is another door-keeper, each one more powerful than the last. Even I cannot bear to look at the third one.’ The man from the country had not expected difficulties like this, for, he thinks, the Law is surely supposed to be accessible to everyone always, but when he looks more closely at the door-keeper in his fur coat, with his great sharp nose and his long, thin black Tartar beard, he decides it is better to wait until he receives permission to enter. The door-keeper gives him a stool and allows him to sit down to one side of the door. There he sits, day after day, and year after year. Many times he tries to get in and wears the door-keeper out with his appeals. At times the door-keeper conducts little cross-examinations, asking him about his home and many other things, but they are impersonal questions, the sort great men ask, and the door-keeper always ends up by saying that he cannot let him in yet. The man from the country, who has equipped himself with many things for his journey, makes use of everything he has, however valuable, to bribe the door-keeper, who, it’s true, accepts it all, saying as he takes each thing: ‘I am only accepting this so that you won’t believe you have left something untried.’

During all these long years, the man watches the door-keeper almost continuously. He forgets the other door-keepers, this first one seems to be the only obstacle between him and admission to the Law. In the first years he curses this piece of ill-luck aloud, and later when he gets old, he only grumbles to himself. He becomes childish and, since he has been scrutinizing the door-keeper so closely for years that he can identify even the fleas in the door-keeper’s fur collar, he begs these fleas to help him to change the door-keeper’s mind. In the end his eyes grow dim and he cannot tell whether it is really getting darker around him or whether it is just his eyes deceiving him. But now he glimpses in the darkness a radiance glowing inextinguishably from the door of the Law. He is not going to live much longer now. Before he dies all his experiences during the whole period of waiting merge in his head into one single question, which he

has not yet asked the door-keeper. As he can no longer raise his stiffening body, he beckons the man over. The door-keeper has to bend down low to him, for the difference in size between them has changed very much to the man's disadvantage.

'What is it you want to know now then?' asks the door-keeper. 'You're insatiable.' 'All men are intent on the Law', says the man, 'but why is it that in all these many years no one other than myself has asked to enter?' The door-keeper realises that the man is nearing his end and his hearing is fading, and in order to make himself heard he bellows at him: 'No one else could gain admission here, because this door was intended only for you. I shall now go and close it.'"

The jurisprudential philosopher, Roscoe Pound, used a different image, that of a queue, to highlight the difficulties relating to accessibility.³ He compared the law to a cinema, in which a new and well-advertised film starring some popular star is showing. There is a queue outside the ticket window, where many more people than the theatre can accommodate are seeking admission. If those seeking admission did not line up in an orderly fashion, it might not be possible for as many to get in, or at least only the strongest could fight their way in. The process would not only be long and difficult but it might also result in injury and affect the ability of the people who do get in to enjoy the show. The law – like the queue – is better than anarchy, but produces its own frustrations and desire for a better way of managing access.

In both these metaphors for access to the law, the goal of ultimate justice is alluring and has the appearance of accessibility but something – guard or queue – restricts access. These metaphors reflect popular views of the inaccessibility of the law and justice and of the courts, but whereas in Kafka's imagined world the quest for access is repeatedly frustrated and ultimately shown to be hopeless, in Pound's trope there is hope for some, but there might be a better way to deliver justice to many more. This, in the end, is the goal of law reform – to progress incrementally from a basically good, if in some respects flawed or inadequate system of justice, to a better one – more just, more transparent, cheaper, faster, and final. It is not that ordinary people despair at the possibility of justice, nor do they necessarily think of legal process as inimical to a just result (or differ radically in their conception of what that just

³ Pound, Roscoe *Social Control Through Law* New Jersey, Transaction Publishers: 1997 (reprint, first published Yale University Press: 1942) at 63.

outcome might be); but, if hundreds of popular narratives, from jokes through films to three-volume novels, can be taken as a guide to popular opinion, they find legal proceedings incomprehensibly slow, over-concerned with due process, ignorant of Occam's razor – that is, never cutting to the chase – and always in danger of collapsing into a self-serving desire to elaborate irrelevancies and maximise fees rather than keep the focus on the ultimate goal.

The futility and self-perpetuating nature of some litigation was viciously satirised by Charles Dickens in *Bleak House*. In referring to a case in the Chancery Division of the Courts in London called *Jarndyce v Jarndyce* (fictional, but possibly not too far from at least one notorious case of the time concerning trusts and estates)⁴, Dickens wrote:⁵

“Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.

Jarndyce and Jarndyce has passed into a joke.”

All institutions that seek to involve members of the public in issues of law and justice must face the public's scepticism and distrust, not of the law itself, but of the kinds of obfuscating processes which authors from Dickens through Kafka to our own times

⁴ The fictional case is reputed to be loosely based on *Re Jennens, Willis v Earl of Howe* (1880) 50 LJ Ch 4: see Hurst, G. (1949) *Lincoln's Inn Essays*, Constable & Co Ltd at p 116-118.

⁵ At p20.

have written. Governments have attempted to deal with this in many ways, and the catchcry is always ‘accessibility’ in both of the meanings with which I began: “make justice easier to access, simpler to comprehend, quicker to deliver, and more certain”; but also, “involve us in the process by which this reform is achieved”. They want to be certain that we understand exactly what their frustrations with current legal processes are, and they also fear that, sitting down to consider how to reduce nine points of the law to five, we will, like the lawyers in *Jarndyce v. Jarndyce*, come up with fifteen. We must accept, I believe, this challenge: to involve citizens both in the reconsideration of areas of concern in law, *and* in the process by which we work towards suggested reforms.

We must begin, I suggest, by acknowledging that few law reform bodies have been at the forefront of the rush to use the technological revolution of the last decade as a tool for engagement, consultation, feedback, and review. It is instructive to compare our reliance on traditional methods of considering changes to the law – reference, research, discussion paper, and orthodox forms of ‘public consultation’ leading to a report to the Attorney-General – with the innovations of the other arms of government, particularly the very parliaments which we rely on to give ultimate effect to our proposals. In Britain, an ‘eDemocracy’ programme has been inspired by the work of Professor Stephen Coleman of the Oxford Internet Institute at Oxford University. A website about its work⁶ highlights the following statement:

“Public cynicism about the House of Commons is a serious problem and we need more effective institutions in a world where power has passed increasingly to those we do not elect and cannot remove. If democracy is to survive and develop we shall have to start again at the grass roots and make those in power listen, for political management is not the same as political representation.”

These ideas have led to the setting up of interactive community consultation websites such as www.communitypeople.net.

In Australia, initiatives have been undertaken by parliaments to increase civic engagement and social capital reflecting the view expressed by Walter Bagehot in the

⁶ www.hansardsociety.org.uk/node/biew/130 visited 31/3/2004.

English Constitution in 1925⁷: “No state can be first rate which is not a government by discussion”. In Queensland, a sophisticated community cabinet process was adopted in 1998 seeking to decrease public distrust in Government and increase ‘social capital’ in the community. The utility of social capital was discussed by Professor Glyn Davis in his thought provoking paper, “*Re-Inventing Government – Queensland Style*”⁸:

“Social capital makes possible ... ‘civic engagement’ – people’s connections with the life of their communities and the politics of their nation. Those with social capital have the networks, the information, the understanding of civic life, and the confidence to engage their world. They develop the skills to work with other people, and a willingness to take responsibility for their own destiny.

...

Social capital encourages commonsense and pragmatism. Its absence feeds “the culture of complaint” – a sense that everything is out of control and other people are to blame.”

Throughout the 1990s, much attention was devoted to the question of access to justice, but the methods used were much the same as might have been employed in Dickens’s day. In 1994, the Federal Access to Justice Advisory Committee headed by Ronald Sackville QC (as his Honour then was) considered the reports of the Australian Senate and the House of Representatives Standing Committees on Legal and Constitutional Affairs and a joint Select Committee; a report of the Administrative Review Council; a Trade Practices Commission report; a report by the Independent Committee of Inquiry into National Competition Policy; publications of the Australian Institute of Judicial Administration; a number of reports of the Australian Law Reform Commission (“ALRC”); a report of the Family Law Court; a report of the committee for the review of the system of a review of migration decisions; several reports of the New South Wales Law Reform Commission and of the New South Wales Attorney-General’s department and of the New South Wales Law Society; and several reports of the Victorian Law Reform Commission. Fortunately, the possibility of all this important work becoming like *Jarndyce v. Jarndyce* was recognised and, I think successfully, short-circuited by the Access to Justice Advisory Committee itself, which reported in a publication called, “Access to Justice: An Action Plan” in an endeavour to draw together the analysis of all of those

⁷ Bagehot, W. *The English Constitution* (2nd edition) London: Kegan Paul, Trench, Trubner, 1925.

⁸ www.blisinst.org.au/papers/davis_glyn_reinventing/print.html visited 31/03/2004.

reports so that practical implementation rather than yet another analysis of the problem could occur.

If I have, in the above, concentrated on what I see as some perceived inadequacies or limitations in how law reform itself engages the wider community, I certainly do not wish to undervalue the efforts that have been made in this regard. Importantly, for our purposes, Law Reform Commissions have long recognised the need to conduct both wide and targeted consultation to maximise participation in law reform by members of the community. This paper will next look at what has been achieved in that area and consider the prospects for greater community participation in the future.

2. Access to the Law Reform Process

It is trite to observe that the law is one of the main institutions of social organisation and has a significant impact on many areas of people's lives. It is necessary to ensure that the law remains relevant and useful to people, hence both the need to develop and refine existing law, and to adapt laws for new social, economic, or cultural circumstances. Hence, the ongoing need for law reform.

Justice Sackville⁹ has defined law reform to be a process of adapting law to meet changing social needs¹⁰ and we must add to this definition that the aspiration of that process should be genuine progress and improvement of the law.¹¹ The term 'reform' does not mean simply change; 'reform' must mean change for the better – to use Justice Kirby's words.¹² This is a very broad, and elusive, definition of law reform. Statutory definitions of law reform are similarly broad.¹³ Law reform is generally defined as the systemic development of the law, with a view to simplifying,

⁹ 1981 – 1984, Chairperson, NSW Law Reform Commission; since 1994, Justice, Federal Court of Australia.

¹⁰ Sackville, Ronald "Law Reform – Limitations and Possibilities" in *Legal Change: Essays in Honour of Julius Stone* Sydney, Butterworths: 1983, 223 – 240 at 224.

¹¹ Ross, Stan *The Politics of Law Reform* Ringwood, Victoria, Penguin Australia Ltd, 1983 at 5.

¹² Kirby, Michael as quoted in Ross, Stan note 11 at 6.

¹³ *Australian Law Reform Commission Act 1996* (Cth) s 1; *Law Reform Commission Act 1968* (Qld) s 10(1); *Law Reform Commission Act 1967* (NSW) s 10(1); *Law Reform Commission Act 1972* (WA) s 11(4).

modernising and consolidating the law and finding more effective methods for the administration of law,¹⁴ so as to improve access to justice.¹⁵

Law reform bodies have often been requested to consider ways of making the law more accessible. The terms of reference given in 1989 by the then Attorney-General, Michael Lavarch MP, for the ALRC reference on the adversarial system of litigation commenced with the words: “having regard to the need for a simpler, cheaper and more accessible legal system.”¹⁶ Similarly, when launching the ALRC’s report on ‘Managing Justice – A Review of the Federal Civil Justice System’, the then Attorney-General Daryl Williams referred to the goal of an “accessible legal system” and the wide-ranging consultation of the Commission “with the broader community and all relevant courts and interest groups.”¹⁷ Law reform bodies themselves often identify increased accessibility as one of the fundamentals goals of their work: the mission statement on the home page of the Law Commission for England and Wales says that, “the role of the Law Commission contributes to the aim of the Department of Constitutional Affairs to build fair, effective and accessible justice services and to modernise the law and constitution”.¹⁸

The further elaboration of this process which is my main subject today: the need to involve the wider public in the debate about law reform itself, is somewhat less frequently referred to. A notable exception is the home page of the Law Commission of Canada, which urges both the desirability of the law being more accessible as well as a hoped-for accessibility of Law Reform Commissions. It states:

“The law affects every member of our society, so we all have an interest in ensuring that it is relevant, responsive, effective, accessible and just. Your participation in the Law Commission’s work, and in the ongoing renewal of our legal system, is essential. Get involved and make a difference!”

¹⁴ *Law Reform Commission Act 1972* (WA) s 11(4).

¹⁵ *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(a)(v).

¹⁶ www.austlii.edu.au/au/other/alrc/publications/reports/89/tor.html visited 31/03/04.

¹⁷ Attorney-General, “Launch of the Australian Law Reform Commission Report” 17 February 2000 <http://www.nationalsecurity.gov.au/www/attorneygeneralHome.nsf/0/EB9C32106FAC36C9CA256B5F00182C76?OpenDocument> visited 31/03/04

¹⁸ www.lawcom.gov.uk visited 31/03/04.

In a paper given by the President of the Law Commission of Canada (“LCC”) in 2002¹⁹, Professor Nathalie Des Rosiers reviewed the work of the Commission. When the LCC started its work in 1997, it defined its mission as “a commitment to engaging Canadians in the renewal of the law to ensure that it is relevant, responsive, effective, equally accessible to all, and just.” In her paper, delivered after the completion of the first five years of this work, Professor Des Rosiers concentrated on why the engagement of citizens was essential to law reform. She identified the need for the LCC to develop better means of allowing members of the community “to exchange with one another and take stock of the research” of the LCC. She stressed the importance of community involvement in identifying topics which might *require* law reform. Like many others referred to in this paper, the LCC found a marked degree of alienation both about law and about the process of law reform. Speaking of the LCC’s consultation with the community about what was wrong with the law, she said:

“The most revealing element of this consultation was a sense of disengagement of Canadians towards law and institutions. It almost seemed that life, real life, was outside the scope of law and certainly, that law was not considered as contributing to the achievement of an improved quality of life, but rather as an impediment to fulfilment.”

Other areas proposed by the LCC for community involvement are in the initial research as to the scope of the problem by looking at the “reality of the law as it is lived”, that is the impact of the law on the lives of people, by engaging members of the community in proposing and implementing changes.

3. How can law reform be made more accessible?

The purpose of accessibility to law reform is two-fold: to gain responses and feedback; and so that the public has a ‘sense of ownership’ over the process of law reform.²⁰ This in turn ensures that a Law Reform Commission’s work is intellectually rigorous and practical: having considered evidence of how the area of law in question operates in practice; gathered information from a variety of sources and perspectives;

¹⁹ “*Engaging Canadians in Law Reform*” www.lcc.gc.ca/em/pc/speeches/20010403.asp visited 31/03/04.

²⁰ North, Peter “Problems of Law Reform” [2002] *New Zealand Law Review* 393 at 396.

and tested proposals with interest groups and affected parties.²¹ All these factors produce a document that political decisions makers can accept as community tested, before implementation of the reform proposals.

Law Reform Commissions use a number of methods to ensure that the public are aware of law reform references and have an opportunity to participate in the decision making process. These include public consultations, the media (television, print and radio) and websites. The extent to which such tools are used varies, depending on the nature of the reference and budget and staff constraints. There will be some references in which particular interest groups may be easily identifiable, or where only certain very specific organisations will be interested and affected. In contrast, there are also references in which the public is extremely interested.

I shall use specific examples from the experience of the Queensland Law Reform Commission (the “QLRC”) to illustrate the various means by which law reform can be made accessible to the public. I do so because it is the Commission of which I am a member and so it is its work I know best. However, I do not do so with any sense of complacency, or make any claim that our procedures are necessarily ‘best practice’. However, it is only by examining what we do that we can suggest how it can be done better.

3.1 Initial Consultation

The QLRC undertakes a two step consultation process. The first step is to publicise references and begin the research process. Occasionally, even at this preliminary stage, the QLRC will make a public call for submissions to assist it in the identification of relevant issues for consideration.²² After the production of a discussion paper, the QLRC again participates in consultation, this time by doing two things: making a public call for submissions and conducting consultation meetings, often with specifically targeted groups or individuals. The procedures are flexible, depending on the nature of the reference.

²¹ Kirby Michael “The ALRC: A Winning Formula” (2003) 82 *Reform* 58 at 60.

²² Queensland Law Reform Commission *The Receipt of Evidence by Queensland Courts: The Evidence of Children* Discussion Paper No. 53 (1998) at 2.

The purpose of the initial consultation is to publicise the reference and identify the relevant issues and the affected parties. At this stage, the use of news media is quite limited, simply publishing a statement that the QLRC is undertaking a particular reference. This information is also published on the website (further use of the media and the website will be discussed below). The QLRC also advises interested parties and relevant organised bodies of the reference. For example, for its current reference on the Disposal of Dead Bodies, the QLRC contacted, among others, the Office of the State Coroner, funeral homes and the Brisbane City Council (which has an interest in several crematoria and cemeteries). Another benefit of this initial consultation process is the further identification – in the form of ‘leads’ – of parties to contact. A mailing list of interested parties to whom discussion papers and call for submissions are later sent can be produced from this initial consultation.

3.2 Actual Consultation

The bulk of substantive consultation in relation to law reform research and recommendations occurs after working papers are produced. Working papers can be issues, discussion or information papers. Such papers outline what have been identified as the key issues in the terms of reference, outline and analyse the relevant law and often put forward a range of options for reform or even preliminary recommendations that the public are invited to comment on.

As stated earlier, the forms of consultation will vary with the reference. Moreover, a combination of different types of consultation may be used during the course of a reference.

3.2.1 Direct Targeting

The direct targeting of individuals or organisations can be an effective means of gathering relevant information and opinions. This is particularly so where Commission is seeking the views of:

- individuals who have direct personal experiences that are relevant to a reference; or
- individuals or organisations who might be expected to have an interest or professional expertise in the particular reference.

For example, in the QLRC's review of the practice of female genital mutilation, the Commission met with groups of women, now living in Australia, who had undergone the procedure before coming to live in Australia. Given the sensitivity of the subject matter, it was important that the Commission was able to create an atmosphere of trust and confidence in which the women concerned could recount their personal experiences and offer their opinions. In this case, the cohesive nature of the groups contributed to the effectiveness of the meetings. It is almost certain that the information and opinions gathered in these meetings would never have been volunteered if the Commission had simply held consultation meetings involving disparate groups of people with a general interest in the reference.

The targeting of individuals with a specific interest in a reference has also proved effective in references of a technical nature, or that relate to a very specific issue. For example, in the QLRC's Review of Damages in Wrongful Death Cases,²³ public consultation forums would probably not have been the most effective way of collecting relevant and useful information. This was also the case in the QLRC's reference on the Role of Justices of the Peace.²⁴

In the first of these references, the Commission directly sought the input of various torts law academics, as well as insurance organisations that might be affected by any proposed changes.

In the second of these references, which concerned the powers exercisable by justices of the peace, the Commission specifically sought the views of justices of the peace about the extent to which particular powers were exercised, if at all, as well as a range of other matters.

²³ Queensland Law Reform Commission *Damages in an Action for Wrongful Death*, Report No. 57 (2003).

²⁴ Queensland Law Reform Commission *The Role of Justice of the Peace in Queensland*, Report No. 54 (1999).

The number of submissions received in response to direct targeting will of course vary widely depending on the nature of the subject matter: four for the Damages for Wrongful Death reference; and 187 for the Justices of the Peace reference.

The apparent wide interest in the latter of these reveals, on closer examination, the interest of a group of people who would be directly affected by change. Out of the total of 187 submissions received for the Justices of the Peace reference 169 submissions were from Justices of the Peace, Commissioners of Declarations and Justices of the Peace organisations. The Justices of the Peace reference was unusual in that one of the major groups of people who would be affected by any proposed changes was easily and readily identifiable; suggesting that direct targeting is a particularly effective form of consultation when the reference relates to specific or technical areas of law.

The number of submissions received is, however, far less important than the nature of the information conveyed through these processes, as borne out by the QLRC's experience with the reference on female genital mutilation.

3.2.2 Consultation Forums

It is with references considered relevant to the general public that community consultation forums provide the most valuable input; for example, in relation to the Health Care of Young People and Guardianship references.²⁵ For both references, the Commission made efforts to ensure public awareness of and involvement in the law reform process. This included press releases and advertisements in the media, notices in Parents' and Citizens' Newsletters and significant and extensive public consultation. In relation to the Health Care reference, meetings were organised, with the assistance of Queensland's Regional Health Authorities, in major regional areas of

²⁵ Queensland Law Reform Commission *Consent to Health Care of Young People* Report No. 51 (1996); Queensland Law Reform Commission *Assisted and Substituted Decisions: Decision-making by and for People with a Decision-making Disability* Report No. 49 (1996).

Queensland such as Longreach, Townsville, Mt Isa, Hervey Bay, Cairns and Mackay.²⁶ A number of areas held more than one meeting.²⁷

In the Guardianship reference, a public forum was held in Brisbane called “Looking After the Affairs of People with a Disability,” attracting over two hundred people. After this forum, issues and discussion papers were produced and further public meetings were held in Brisbane and regional areas. Following the release of a Draft Report, still-further extensive consultation occurred during which public seminars were held in Brisbane and regional areas. Meetings with relevant individuals and organisations were also held to facilitate discussion concerning the reforms proposed by the Commission.

Consultation meetings of this kind serve two important purposes: they provide members of the public with an opportunity to raise their concerns and express their views; they also enable the Commission to perform an educational role, with the result, hopefully, of eliciting submissions that are made from an informed position.

Public consultation can also occur in an indirect manner. Organisations that make a submission to the Commission themselves often hold smaller scale consultations during the preparation of their submission to the Commission. Thus, the Commission has received the views of the members of the public potentially affected by proposed law reform, albeit without holding the public consultation itself. For example, a submission received from the Children’s Commission of Queensland, in relation to the paper on Children’s evidence,²⁸ was compiled following consultations with police officers, defence lawyers, doctors, therapists, counsellors, youth and social workers and children and young people or their parents. This submission was quite valuable because it provided the perspectives of numerous actors involved in the taking and giving of children’s evidence. In particular, the Children Commission’s access to children and young people who had actually given evidence provided information to the Commission on the actual experience of giving evidence. The Children’s

²⁶ Report no. 49 at 9.

²⁷ Two meetings were held at Gold Coast, Longreach, Townsville, Mt Isa, QE II Hospital, Royal Children’s Hospital, Rockhampton and Brisbane. Three meetings were held at Cairns.

²⁸ Queensland Law Reform Commission *The Receipt of Evidence by Queensland Courts: The Evidence of Children* Discussion Paper No. 53 (1998).

Commission held face to face consultations, except with rural indigenous groups, where tele-conferencing was used.

3.2.3 Public Submissions

The most useful submissions generally contain critical analysis of the law or provide evidence of the practical operation of the law that would otherwise be difficult or impossible to obtain. The preparation of submissions of this calibre involves significant effort and resources on the part of those making them. All Commissions face the constant dilemma of how to elicit submissions from persons and organisations who have a genuine interest in a reference and the best of intentions about providing their input, but who ultimately may not be able to find the time to contribute their views. There are no easy answers as to how participation in the law reform process can be made more accessible. On a practical level, the QLRC is always willing to take oral submissions, which can, to a certain extent, reduce the work that would otherwise be involved for a respondent in preparing a written submission.

Occasionally, submissions may be skewed by organisations and interest groups who exhort their members to send pro-forma submissions. The Tasmania Law Reform Institute, in its recent report on Adoption by Same Sex couples, received a total of 1300 submissions: only 195 of which were not duplicates.²⁹ Such an issue will probably have polarised community views, have been well publicised in the media and with interest groups with strong opinions at either end of the debate. Of course, the original submission is considered but its duplicate goes only to assessing the weight of community opinion behind a particular position; it adds very little else.

3.3 Use of Media

The media is an important tool for informing the general public about what references the QLRC is undertaking, as well as communicating the progress of those references

²⁹ Tasmania Law Reform Institute *Media Release* (29 May 2003), at <http://www.law.utas.edu.au/reform/MediaReleaseAdoptionFinRep.pdf>, visited 18/03/2004.

and inviting interested persons to make submissions to those references. However, using the media creates its own difficulties.

The media often has its own criteria for the importance of news and will therefore only publish material that it considers newsworthy. In about mid-September 2003, ABC Radio News had organised an interview with Penny Cooper, Director of the QLRC, regarding the reference on Abrogation of the Privilege against Self-Incrimination. However, a busload of refugees recently released from detention, arrived in Brisbane. This event eclipsed the newsworthiness of the QLRC interview and so it did not proceed. I do not wish to suggest that the arrival of recently released detainees is not important; simply that the prioritising of news items by the media means that one cannot rely on the media to give prominence to a law-reform issue, even if it may have a greater long-term impact on people's lives. The media, as is often noted, also has a tendency to "sensationalise, personalise and trivialise information"³⁰ which does not assist the public to properly understand the work of the QLRC. For example, in the Health Care of Young People reference, the *Courier-Mail*³¹ headline read: "14 year olds' abortions to remain private". The Discussion Paper in question had proposed a scheme to deal with consent to health care generally and had included a preliminary recommendation that health care providers respect a young person's wishes relating to confidentiality; the QLRC had not made any preliminary recommendations specific to abortion.

Nevertheless, successful use of the media does occur. The QLRC produces press releases to inform the media who, at their discretion, may publish it as a news story. Recently, an article about the QLRC's progress on the Self-Incrimination reference,³² written by one of the Commission's members, Peter Applegarth SC, was published in the *Courier-Mail*.

3.4 The Use of Websites

³⁰ Kirby, Michael "Reform: Australian Style" *Reform the Law: Essays on the Renewal of the Australian Legal System* Melbourne, Oxford University Press: 1983, 51 – 70 at 61.

³¹ Queensland's only daily news broadsheet.

³² *Abrogation of the Privilege against Self-Incrimination*

Most Law Reform Commission websites, including the QLRC's, detail the current projects being undertaken, with links to papers published and contact details for further inquiries or comments. Most importantly, websites provide free electronic access to recent publications and a facility to order hard copies of recent publications for free, or earlier publications for a minimal fee. Invitations to make submissions and the facility to do so electronically are also on the QLRC website. Such websites differ in complexity: the QLRC's website is quite simple.³³

The success of a website lies not just in the amount of interest it generates but in the fact that it is an excellent aid to the allocation of limited resources. People visit the website who have already been made aware of references by other means (usually news media). They can access working papers, read the terms of references and the key issues, without – as had been done in the past – contacting the Commission itself to post or fax working papers. The development of the QLRC website has significantly reduced the amount of work that the Commission must do in responding to requests for papers. It is not, however, interactive in the sense that the 'eDemocracy' and other community consultation websites referred to earlier are, and it would require major additional resources to make it so.

3.5 Consultation Initiatives

Victoria and New South Wales have Community Law Reform Programs – an initiative of those Law Reform Commissions in which members of the community and community organisations are invited to make suggestions to the Commissions about laws that create difficulties or need to be simplified or modernised. Such programs have looked at a variety of matters including insurance law, conscientious objection to jury service, liability for injuries caused by dogs, and neighbour disputes. These Commissions undertake a preliminary investigation of any suggestions from the community that have a likely prospect for reform. In NSW, if the preliminary investigation indicates that there is a case for taking a matter further, a background paper is prepared which is sent to the Attorney-General who decides whether a formal

³³ <http://www qlrc.qld.gov.au> visited 29/03/2004.

reference should be made.³⁴ In Victoria, the Commission is able to make recommendations for minor legal changes without a reference from the Attorney-General.³⁵ Where the suggested area is too complex, or requires greater funds and more widespread consultation, the Attorney-General is briefed and terms of references are sought. The Programs do not, however, consider suggestions that are too complex for its resources; that may involve contentious policy issues or may involve areas not properly the field of law reform; or that are otherwise unsuitable, including for being within an area of Commonwealth responsibility. Although the QLRC does not have a formal program for community suggestions for law reform, such suggestions are nevertheless received and the Commission has the power to request a reference from the Attorney-General.

Such community-based suggestions for law reform can be a valuable way to identify areas of injustice. However, there are also some disadvantages to such a system, beginning with the self-evident fact that such a program has the potential to be a drain on resources. As well as the cost of the consultation process itself, the Law Reform Commission may be completely unable – either because of budgetary, resources or jurisdictional concerns – to investigate all suggestions, potentially leading to community feelings that their input has been ignored, that they have wasted their time, or even that the consultative process has been a smokescreen for a *fait accompli*. Secondly, and further, the nature of the power to make suggestions may create an expectation in members of the public that their particular injustice will be addressed and redressed. The law reform process is rarely able to solve an individual grievance; such inquiries are usually referred by the QLRC to relevant government departments or bodies. This points to the third limitation: law reform proposals deal with systemic problems; suggestions from the public may involve very individual circumstances, and these can even be a distraction from rather than an aid to systematic and more generally-useful law reform.

The Law and Justice Foundation of New South Wales has recently given useful consideration to the weaknesses and barriers in existing law reform processes which

³⁴ <http://www.lawlink.nsw.gov.au/nswlrc.nsf/pages/how2> visited 29/03/2004.

³⁵ *Victorian Law Reform Commission Act 2000* (Vic) s 5(1)(b); <http://www.lawreform.vic.gov.au> visited 29/03/2004.

restrict the ability of disadvantaged groups within the community to effectively participate in those processes, mechanisms that have been implemented to address these issues and proposals for further initiatives which may enhance access to those processes particularly for disadvantaged or marginalised groups who may lack access to the courts but whose problems with the law may point to the way in which systemic change can increase the prospects of a fairer legal system.³⁶

The Queensland government has created a website www.getinvolved.qld.gov.au/ where members of the community are invited to take part in consultations in many areas where the government is seeking views from the public. This site has hot-links that link it in turn to other websites relevant to the areas where the views are sought. One of the links is to the QLRC's web site as we have been seeking public submissions on a discussion paper on the abrogation of the privilege against self-incrimination. The areas covered are extremely diverse.

As might perhaps be expected there is an initiative to seek the views of young people called "GENERATE Youth" "designed for people aged 15-25 living in Queensland. It's a gateway that offers an alternative voice for young people to let the government know about issues that matter to them. GENERATE is an opportunity for young people to engage with government, and government to engage with young people. It includes on-line chats, email newsletters and web forums for discussion and debate. Young people can answer a question from government, ask questions about government policies or programs, comment on legislation or send a message directly to government Ministers and Members of Parliament. GENERATE is a component of the government's Youth Participation Strategy." Views are also currently being sought on such matters as rural water pricing policies and road safety.

Views have also been sought on a water quality protection programme for the Great Barrier Reef, new building certifier regulations, a proposed canal development in a regional city, a copper joint venture mining project, a review of the requirements for working with children and even protection of the grey nurse shark.

³⁶ Law and Justice Foundation of New South Wales *Public Consultation Report 5*. Participation in Law Reform <http://www.lawfoundation.net.au/publications/reports/a2jln/1C> viewed 04/04/04

The web site is still at the trial stage. It will be interesting to see not only the quantity but also the quality of responses generated. The QLRC is unaware of any submissions to it on its current reference having been generated by this website but it is perhaps just a matter of time before eConsultation becomes if not the norm, a standard method of seeking views and submissions from members of the public.

4. Conclusion – eLaw Reform?

According to Franz Kafka, Roscoe Pound and Charles Dickens, the law is something to which people want access, but to which they are denied or sense they are denied. It must be the concern of providers of law and of policy makers to ensure that all who want and need access to the law and to law reform are provided it, within the limitations of the system. The Queensland experience shows that seeking relevant public involvement in the law reform process has led to the production of better reports, more useful to parliament and to the general public, and sent to the legislature with stronger community awareness and support. Law Reform Commissions must, however, keep themselves and their processes under the same kind of rigorous review that we apply to our references. We must be prepared to introduce the innovative solutions to our consultation practices that we apply to other areas of law reform: we are living at a time in which radical new means of communication are being introduced in all areas of public life, and we must remain open to any initiatives that can improve access to justice and the process of law reform.

May I suggest that this as a topic for discussion in this session of the conference.