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Speaker's Commission on Digital Democracy

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Dear Commissioners,

Thank you for the opportunity to make a submission in response to the call for submissions on the ***Making laws in a digital age.***

This submission draws on PhD research undertaken in the Research School of Computer Science of the Australian National University on the topic: *Computational Tools for Enhancing the Communication of Law.*

The following briefly summarises conclusions arising from this research which are relevant to the first two issues raised for submission. Enclosed are co-authored publications which are referred to in the discussion below.

ISSUE 1: Could technology improve the access to and usability of both legislation and the law-making process for the citizen, representatives and professionals (such as lawyers), and if so do you have any suggestions?

Yes.

1. A context for this issue is the historical reality that technology has already transformed the way in which law is accessed by citizens. In the nineteenth century, Jeremy Bentham lamented the lack of accessibility of law to the average citizen. He observed that “*the present price of the last edition of the statutes (Statutes of the Realm) exceeds the average annual income of any individual of the labouring classes in England*”¹ This observation provides insight to the significance of the availability of legislation and regulations via the world-wide web for free to all. It also points to the enormous social changes around a legal system that has barely changed in the same period.
2. It is also worth observing that the current free availability of legislation online through public good and public providers, was not an automatic consequence of the availability of the technology. Digital access was the result of a conscious and

¹ Michael Curtotti and Eric McCreath, *Enhancing the Visualization of Law*, presented at Law Via the Internet Conference 2012 (LVI 2012), Cornell University, p 4

sustained effort applying technology to achieve that end, particularly through the work of the Legal Information Institutes in different jurisdictions.² Technological potential is a necessary but insufficient condition for enhancing digital democracy. It requires action by human agents to apply that technology for such a purpose. How we *choose* to develop and apply technology is as important, if not more important, than its mere availability or potential.

3. The particular issues on which I would like to comment are the content of law: how it is written; and the presentation of law: how it is visualized.

Presentation of the Law

4. There does not appear to be a consensus or body of practice around the presentation of law: i.e. how to present the law in a way which is most accessible to citizens.
5. Sites vary considerably in the form in which legislative and regulatory information is presented. Some sites emphasise presentation of the 'official document' – the Act of Parliament which embodies the legal principles. Other sites emphasise accessibility of individual sections and legal rules. The availability of legal data (where made available by governments) has meant that small groups or individuals can also make a significant contribution to the presentation of law – providing enhancements such as use of colour or font and arrangement to improve presentation to make law more accessible. Their innovations demonstrate possibilities that could be pursued in other sites.³
6. The primary issue in this respect is not the availability or deployment of technology to improve the presentation of law. Also there are many good ideas about how the presentation of legal information might be improved. Available technologies are already being utilised to such ends. Rather the primary difficulty is the lack of empirical validation of which approaches best meet the needs of end users of legislation. This is an area where the value of the application of technology could be increased if systematic design evaluations were carried out of the different presentation/visualization options to see what may best meet the needs of users.⁴
7. ***Recommendation:* That systematic ongoing user evaluations of different presentations of the law be carried out to identify improvements that could be applied to current approaches.**

How Law is Written

8. In 2008, a New Zealand Law Commission and New Zealand Office of Parliamentary Counsel inquiry into the presentation of law identified three aspects to 'access to law': availability to the public (such as hard copy or electronic access), 'navigability' - the ability to know of and reach the relevant legal principle, and finally accessibility in the sense of the law 'once found, being understandable to the user'.⁵
9. Considerable progress has been made on the first kind of access. In many cases we can say that the law free availability of to the general public online. This reality has

² *Enhancing the Visualization of Law*, pp 6 et seq.

³ *Enhancing the Visualization of Law*, see generally section 2

⁴ *Enhancing the Visualization of Law*, see generally section 4, particularly 4.3

⁵ Michael Curtotti and Eric McCreath, *A Right to Access Implies A Right to Know: An Open Online Platform for Research on the Readability of Law*, *Journal of Open Access to Law*, Volume 1, No 1 (2013), p 3

significantly extended the readership of the law. It has also however brought the issue of how the law is written (the third kind of access) to the fore. As part of its *Good Law* initiative, the UK Office of Parliamentary Counsel observed:

*“Legislation affects us all. And increasingly, legislation is being searched for, read and used by a broad range of people. It is no longer confined to professional libraries; websites like legislation.gov.uk have made it accessible to everyone. **So the digital age has made it easier for people to find the law of the land; but once they have found it, they may be baffled. The law is regarded by its users as intricate and intimidating.**”* (emphasis added)⁶

10. The available research does support a conclusion that much legislation is difficult, if not incomprehensible, to the average citizen. Numerous studies have reached this kind of conclusion. Interestingly a number of studies have also found that although 'plain language' drafting improves comprehension, the language may still remain inaccessible. For example in one review of Australian tax legislation, even after rewriting, 60% of the legislation remained inaccessible to Australians without a university education. One study (Tanner) examined the degree to which plain language was actually implemented legislation. He reviewed six statutes finding that in practice plain language principles were not being systematically implemented.⁷
11. In our own research we carried out a preliminary comparison of legislative English (popular Australian legislation) against English from graded readers and English from the Brown Corpus (a balanced corpus of English genres including both fiction and non-fiction written American English).
12. The results of this preliminary research indicate that legislative English is very different from other forms of written English. We found that sentences from legislative English are different from other genres of English in respect of readability metrics. i.e. whereas results of readability metrics for sentences for English genres from the Brown Corpus tended to be quite similar, sentences from legislative English had a much broader range of values. Similarly we found that the ratio of parts of speech (e.g. prevalence of nouns, adjectives, verbs etc) and 'chunks' (e.g. noun phrases such as 'the red dog') in legislative sentences, was quite different in legislative English to other English genres.⁸ These results are preliminary but begin an exploration of how the difference of legislative English as compared to other forms of English might be quantified.
13. Corpus studies of this kind, which use computational technologies such as natural language processing and machine learning to process legislation as data can be further employed to characterise and better understand what makes the English in legal rules different to 'normal English' In our further research we plan to more specifically address what makes legislative English easy or difficult to understand.
14. To summarise the conclusions that research findings support:
 - Legislative English is difficult if not incomprehensible to most members of the community.
 - Plain language changes improve understandability but not to an extent sufficient to change the basic inaccessibility of legislative English to many members of the community.

⁶ Cited in *A Right To Access ...*, p 2.

⁷ *A Right to Access ...*, see generally section 3.

⁸ *A Right to Access ...*, see generally section 5.3, pp 30 et seq.

- Preliminary research supports a conclusion that legislative English is a markedly different from other forms of written English.

15. Recommendation: The Commission pursue or encourage further systematic study of how legislative English is written with a view to assessing those characteristics which impact on its accessibility for members of the community. Such studies could inform future drafting of legislation to make it more accessible to the public. While legislative English remains inaccessible to members of the public efforts to increase public involvement in the democratic process will be impeded.

ISSUE 2: Should you need to be a lawyer to understand and use an Act?

No.

16. In 1983 a Parliamentary draftsman, F.A.R. Bennion, observed: “*It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend.*”⁹ The power of this observation arises from the the incompatibility of our notions of what a 'free and democratic society' should be, with the reality that most members of society are unable to access the meaning in texts which set out their rights and responsibilities. Ironically, Bennion himself believed that laws were written for lawyers and legal professionals and nothing could really be done to solve the problem.¹⁰
17. This is not a view that is widely held and there are a number of sound democratic and other reasons why laws should be understandable by all those to whom they are addressed. The following summarise some of the views expressed by government agencies or researchers on such access to law.
- 18. Arguments from Rule of Law:** One line of argument is based on the concept of the rule of law. If laws cannot be understood, it becomes difficult to sustain the rule of law, as the laws themselves are inaccessible.
- 19. Arguments from Equity:** Further it is argued that to expect citizens to obey rules they cannot understand is unfair, and at odds with the rule of law.¹¹
- 20. Arguments from Legislative Effectiveness:** From the viewpoint of the legislator, adopting laws which cannot be understood is a futile, or at best, inefficient exercise. The legislator presumably wishes to communicate in a way which optimally achieves the intent of the legislation.¹²
- 21. Arguments from Economic Efficiency:** From the viewpoint of minimising burden of regulation on the economy, the language used should be such that the regulatory burden is minimised. Efforts at tax law simplification were of this kind. Clearly language written only for lawyers, would not have this characteristic.¹³
- 22. Arguments from Audience:** As noted by the Good Law initiative the *audience* of legal rules has changed. Laws are available on the web and they are read by everyone. To write them only for lawyers both frustrates readers and wastes the potential for effective communication that could be occurring in this online context.

⁹ *Enhancing the Visualization of Law*, p 4

¹⁰ *Enhancing the Visualization of Law*, p 9

¹¹ *A Right to Access ...*, pp 3, 4

¹² *A Right to Access ...*, p 4

¹³ *A Right to Access ...*, p 4, pp 19-20

23. Arguments from Rights: Some authors argue that there is or should be an individual right to access the law.¹⁴ This principle is embodied in the founding documents of the Free Access to Law Movement. The Declaration on Free Access to Law provides:

Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;

Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge¹⁵

24. As noted above a dimension of 'access' is that the legal rules themselves should be understandable. To fully realise a right to access requires that the law be written in a way that members of the community are readily able to understand.

25. Typically those who create the law are well aware of the need for it to be as accessible as possible. The Australian Office of Parliamentary Counsel put it this way in its plain language drafting guidance.

We also have a very important duty to do what we can to make laws easy to understand. If laws are hard to understand, they lead to administrative and legal costs, contempt of the law and criticism of our Office. Users of our laws are becoming increasingly impatient with their complexity. Further, if we put unnecessary difficulties in the way of our readers, we do them a gross discourtesy. Finally, it's hard to take pride in our work if many people can't understand it.

26. There are many reasons why the law should be written for members of the community in general, rather than lawyers in particular. The UK Parliament can give impetus to this by considering the adoption of principles related to access to law. Such plain language principles are for example adopted by the US government.¹⁶

27. Recommendation: That the Commission advance the adoption of principles for access to law including:

- by endorsing the principles of the Declaration on Free Access to Law
- by adopting as a principle that “legislation and regulations should be written so that they are understandable and accessible to the general public”.

Yours faithfully

[Transmitted via email]

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¹⁴ *A Right to Access ...*, p 4

¹⁵ <http://www.worldlii.org/worldlii/declaration/>

¹⁶ <http://www.plainlanguage.gov/pLLaw/>