Chapter 2

Law Reform and Law Reformers

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Chapter 2 explores the nature of law reform as it has developed over the past 50 years. The chapter goes on to consider how law reform legislation fits into the legislative scheme in general, and then surveys the key features of law reform agencies and their values. In this connection, it considers the nuanced way in which law reform agencies and governments have separate roles. It provides a characterisation of the institutional models that presently exist – the standard model of a statutory law reform agency; the institute model sometimes used at sub-state level in Canada and Australia; and the in-government unit.

2.1 What is law reform?

Law reform as an activity, and law reform agencies as institutions, are conceptually intertwined.

The law is constantly changing. The business of government includes legislating in pursuance of political and policy goals. Very often, and quite properly, government terms its political and policy objectives 'reform'. Legislating for government reform is the very substance of everyday political work in democracies throughout the world. However, the sort of reform that requires changes to the law is not what is meant in this guide by 'law reform'.

Rather, 'law reform' is used to refer to the principal, although not the only, activity of bodies, such as law reform commissions, law institutes, and other law reform agencies and entities that are dedicated to changing the law. While there is no single accepted definition of law reform as an activity, broadly, law reform means improving the substance of the law in significant ways.

This key characteristic of law reform distinguishes it from a number of related processes, some of which may also be undertaken by some law reform agencies.

Law reform is a process that is distinct, for example, from the *revision* or *consolidation* of laws. The term 'law revision' is normally used to refer to statutory amendments that make no change at all to the substance of the law. They make the law more accessible and simpler to understand, but without changing its meaning. *Law reform is about substance, while law revision and consolidation are about form.* Consolidation, in particular, is the bringing together of statute law in a number of different instruments into a single, new, legislative instrument. Consolidation re-packages, but does not substantively change, the law. There may be some scope to change the language of the law, or make the most minor and technical changes to its effect, for instance to avoid absurdity. But the fundamental objective is to have a neutral impact on the substance of the law. 'Consolidation' and 'law revision' are almost synonyms, used in different places to refer to much the same process.

Law reform is about the substance of the law. It means improving the law in significant ways.

In some jurisdictions, 'revision' is reserved for the wholesale consolidation of the laws of the jurisdiction, undertaken as a single exercise. In some Commonwealth jurisdictions, consolidation or revision are functions conferred on law reform agencies. In many, these functions are undertaken by the office responsible for legislative drafting, or a unit dedicated to the task elsewhere within government.

There is another, slightly different sense in which the word 'revision' is used. In a small number of jurisdictions, the law reform agency is charged with publishing as-amended versions of Acts. The Law Revision Department of the Uganda Law Reform Commission publishes from time to time the complete Revised Edition of the Laws of Uganda; that is, the full text of all the primary legislation of Uganda in its amended form.[1] As with pure consolidation, these functions do not change the substance of the law. Similarly, in the Republic of Ireland, the Law Reform Commission of Ireland is responsible for publishing revised Acts; that is, administrative consolidations of Acts in their amended form since 2006 (plus some earlier Acts). These Revised Acts are not enacted by the Parliament of Ireland, and therefore do not have any formal or official status, but they have been cited with approval in the courts.[2]

Some law reform agencies also undertake projects to repeal obsolete legislation. Only statutes that have no possible application are proposed for repeal, so again this activity does

not change the law. A much more ambitious version of this is undertaken in South Africa, where the Law Reform Commission has been engaged for a number of years in a wide-ranging statutory law revision project to review all of South African national legislation in order to determine whether some or all of its provisions are obsolete, spent or otherwise incompatible with the South African Constitution.[3]

Law reform is distinct from the revision or consolidation of the law, which are about the form of the law.

Consolidation, revision and the repeal of obsolete statutes are all functions of some law reform agencies, but they are to be distinguished from law reform proper. The term 'law reform' is sometimes used more broadly to include all of the functions of law reform agencies. However, this guide focuses on the distinct main task of law reform agencies of examining existing laws and where appropriate advocating for or implementing changes in law. Tasks such as law consolidation or revision are touched upon only insofar as a law reform agency will take into account its whole range of functions in setting up its work programme, planning its activities and assessing its use of resources.

This main function, to which the guide largely confines the use of the term 'law reform' (or sometimes 'substantive law reform'), can be distinguished from consolidation/revision and repeal of dead statutes, because its key objective is to change, and thereby improve, the substantive law.

In this regard, *codification* of law is often included within the scope of law reform. Codification has been described, by the Law Commission for England and Wales' founding Chair, Lord Scarman, as:

> *...a species of enacted law which purports so to formulate the law that it becomes within its field the authoritative, comprehensive and exclusive source of that law. It is, however, distinct from consolidation, in that it allows for and indeed generally requires that the brought-together law be at the same time improved. It is a method of law reform proper, rather than a distinct, free-standing objective. Within common law legal systems, codification may involve both the bringing together of provisions in a number of statutes, and the re-framing of common law rules in statutory form.*[4]

Codification was a major preoccupation for the British law commissions in their earlier years. It now takes a less central

place, although codification still exercises a strong pull in the criminal context. The Law Commission for England and Wales[5] is currently engaged in a codification of sentencing procedure.

The founding statute of the Law Commission for England and Wales and the Scottish Law Commission was the Law Commissions Act 1965. Just as those commissions became the model for many law reform agencies, the words of that Act have frequently been used elsewhere. The 'functions' of the Commissions are set out in section 3. Section 3(1) comprises mostly a list of obligations and techniques (such as comparative research), but its opening words are:

> *It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.*

Law reform, then, was originally conceived as including the reviewing of the law; and its general touchstones were seen as 'simplification and modernisation'.

Neither of those on its own functions to distinguish law reform from political legislation, but they do give a flavour of law reform. Generally, law reform at least starts with the state of the law as its subject matter, rather than a social, political or economic problem independently defined. In addition, what it seeks to improve is the law. The impetus to do so may very well be motivated by social or other concerns, but the law remains the central focus of law reform.

All legislative action is fundamentally political, but law reform agencies are non-political in the sense of being outside the competition of ideas between political parties.

One way in which law reform distinguishes itself from that which is done by governments is insisting that it is not political. Indeed, the non-political nature of law reform is universally seen as fundamental by law reform agencies. In a wide social science sense, all policy-making is 'political' in that it involves 'the authoritative allocation of values' or is a decision 'which confirms, allocates, or shifts power'.[6]

However, law reform agencies are non-political in the sense that they do not engage in work that would appear to take sides in the competition of ideas between political parties that exists in functioning democracies.

This does not mean that law reform must be *non-controversial*. Much of law reform occasions public controversy, at least among some parts of the public. It is indeed rare that, for instance, substantive proposals in the criminal sphere do not do so. However, it cannot be directly driven by party political controversy – that is, something supported by one of the main parties in the state and opposed by another.

Furthermore, there are some legal subjects that fall outside the reach of law reform. Taxation is provided for through legislation, but it is generally considered outside the scope of a law reform agency's remit to examine whether the rate of corporate or income tax should be 'reformed' by way of an increase or decrease. In some states, legislation provides for membership of a military alliance, or the constitution requires neutrality. These similarly are not matters for law reform.

Whether or not a topic is suitable for law reform is a key question. Suitable topics tend to be areas or activities undertaken and led by lawyers.

As will be seen in the next chapter, most law reform agencies' criteria for undertaking law reform projects include that it be 'suitable' for law reform. Expanding that criterion, relevant questions include: is the project suitable for a non-political body of lawyers? A key feature of law reform is that it is generally an activity undertaken and led by lawyers.

As such, a general characterisation of law reform is that it is a non-partisanly political form of (legal) policy formation, which is within the professional capacity of lawyers to accomplish.

It will be apparent that law reform agencies as institutions and law reform as an activity are conceptually intertwined. Law reform is what law reform agencies do; and law reform agencies are (mainly) there to do law reform.

During the 50-year history of law reform agencies, different areas of law have come under law reform examination at different times. The following is a flavour of the issues that one or more law reform agencies have considered during that time:

- reform of family law to take account of changing family relationships;
- reform of civil liability law, such as the extent of the duties of occupiers of property;
- reform of aspects of commercial law, including consumer protection law;
- reform of law on ownership of land (real property) and transfer of ownership (conveyancing);

- reform of court processes generally, including mass claims ('class actions');
- use of alternative dispute resolution;
- the right to privacy, including freedom from intrusion by the media and, separately, freedom from surveillance by the state;
- protection of persons whose decision-making capacity may be in question, and other vulnerable persons;
- criminal law, such as conspiracy and homicide law, or procedural issues, such as double jeopardy and corporate criminal liability;
- the regulation of assisted human reproduction;
- the scope of the use of DNA in a forensic setting and (sometimes later) the development and scope of a DNA database; and
- the regulation of harmful digital communications, notably on social media.

Some of these involve the review of matters that may not have attracted political priority and are therefore matters that a law reform agency is well suited to address, while others will have arisen after the establishment of most law reform agencies. It is therefore clear that the scope of projects that a law reform agency may be required to review will alter with the passage of time: the contemporary setting will often identify at least one project that may not have been an issue in previous years.

Throughout this guide, practical examples of specific law reform projects are used to illustrate the procedural process of law reform with reference to particular changes to the law proposed by law reform agencies.

2.2 Who does law reform?

The function of law reform can be carried out in a variety of ways. Each jurisdiction chooses a forum and process for law reform that is appropriate in its own context, taking into account issues such as the availability of resources and expertise.

The starting point for law reform in modern times, however, has been the institutional development over the last 50 years of

a distinct form: the law reform agency. This is the predominant approach within the Commonwealth, and in some other common law countries. A law reform agency comprises a standing and independent body established in order to provide recommendations and advice on law reform. Such bodies have been established in both large and small jurisdictions, in unitary and federal states, and at the sub-state level.

In the Commonwealth, much law reform is undertaken by independent law reform agencies. There are other arrangements in some Commonwealth jurisdictions, such as using one-off committees or working within government.

Over time, two families of models of law reform agencies have developed. The first, and most widespread, is what is now regarded as the 'classic' or standard model: the establishment of an independent law reform body by statute. Secondly, the 'institute' model consists of the setting up of an independent body by agreement between leading legal interests and stakeholders.

Some arrangements, however, do not fit into either of these categories. A small number of jurisdictions have established other methods. For example, especially in a small jurisdiction, a government may arrange for a ministry to take the lead on law reform. This may be the ministry of justice or the office of the attorney-general. Although not independent of government, such law reform agencies tend to broadly adopt the methods and approaches of an independent law reform agency. Such a unit is therefore to be distinguished from, say, the section in a ministry of justice that is responsible for civil law as a policy area, just as another section may be responsible for court administration or judges' pensions.

Jamaica: Law reform within government

Jamaica has a system in place by which law reform functions, both making recommendations and implementing them, are carried out by the Legal Reform Department, being a department of the Jamaica Government's Ministry of Justice.

The Legal Reform Department began in 1973 as a division of the Ministry of Justice, and later was given departmental status.

The mandate of this department is:

> *To keep under review the laws applicable in Jamaica with a view to its systematic reform to meet the changing needs of the Jamaican society, and to assist in the implementation of law reform proposals in accordance with Government policy.*

The Legal Reform Department also undertakes additional duties to support the law reform process.

Alternatively, from time to time, governments may set up a one-off committee or commission, or ask an individual, to consider a particular issue and to provide recommendations for reform of the law to ministers. Where the issues to be addressed are legal in nature, a judge or senior lawyer (such as a Queen's Counsel or equivalent) is often appointed to carry out the review or as the chair of a review team. The reviewer, or committee or commission, makes its report to ministers on the issue and at that point has fulfilled its remit.

Such review mechanisms are not undertaken by standing or established agencies or bodies. Some reviews are however carried out by a process similar to that adopted by a law reform agency for the purposes of a particular law reform project.

In a few jurisdictions, a practice has emerged of law reform being regarded as the responsibility of the main legal interests, such as the law society, the bar and the law schools of the universities. One or several of these interests may form a committee, rather than establish an institute, to consider law reform issues and report from time to time.

2.3 Legislation and law reform

The law reform process results in recommendations that the law be changed, which normally requires legislation.

The product of a law reform process is a recommendation that the law be changed. For law reform to be complete, that recommendation must be implemented, nearly always, by legislation. In most, if not all, common law jurisdictions, the legislative agenda is largely set by the government. So, for law reform recommendations to be enacted, they must be accepted (in whole or in part) by the government. Where a law reform agency is established by statute, the scheme of the Act will usually require the law reform agency's recommendations to be directed to the government.

This will usually mean that, even once they are accepted by the government, the legislative recommendations made by a law reform agency have to compete for time in the legislature with the government's own proposed legislation. One way round this, adopted in a small number of jurisdictions to date, is for the law reform agency's recommendations to be subject to a special legislative procedure. The challenges of implementation are dealt with in Chapter 8.

How does law reform fit into the scheme of government legislation as a whole? A government's legislative policy will derive from

a number of sources including the governing party's manifesto at the last election, policy developed by partisan think-tanks or outside interests aligned with the governing party, the policy priorities of ministries, pressure from back-bench members of the legislature and the need to react to events. From the government's perspective, the law reform agency is just one of those potential sources of legislation.

All governments have systems for delivering a programme of legislation. There is a wide range of these systems, and they vary significantly in time frame, the autonomy they allow to departments and the associated decision-making process. One feature that is largely common, however, is that there are often more potential bills than legislative slots.

In all parliamentary democracies, the amount of legislative time available to the government will be limited. As a result, the government has to prioritise its legislative programme, and its main policy concerns will take priority in the competition for scarce legislative slots. Law reform proposals may have a lower

Making a legislative programme in the United Kingdom Parliament

The creation of the United Kingdom Government's legislative programme, contained in the Queen's Speech on the opening of each parliamentary session, is short term and centrally controlled.

At the centre is a Cabinet committee, currently denominated Parliamentary Business and Legislation (PBL). It is chaired by a member of the Cabinet, usually the Leader of the House. About a year before the Queen's Speech, PBL asks departments to submit legislative bids in order of priority. The policy behind each bid has to be separately approved at Cabinet level. The number of bills to go into parliament varies, but is usually about 25 to 30. PBL usually receives twice that many bids. Bids are assessed on political importance, urgency and practical readiness. A provisional programme is agreed, and PBL monitors the development of the proposed bills by departments. PBL also authorises the use of Parliamentary Counsel to draft the legislation. The decision on the final content of the programme is made by Cabinet about a month before the Queen's Speech.

To reach parliament, a relevant report by the Law Commission for England and Wales or the Scottish Law Commission must first be accepted by the department with lead responsibility and receive Cabinet policy clearance. The department must then decide to include it in its bid to PBL and for it to feature not too far down the department's list. It must then be provisionally accepted by PBL, and receive drafting authorisation, which is needed regardless of whether the report had a draft bill attached. Finally, it must be included in the final list as decided by Cabinet.

priority. Indeed, it will not usually be the law reform agency that is directly involved in promoting the legislation, but rather the government department within whose remit the relevant area of law falls, and which has accepted the recommendations.

As a result, law reform agencies may frequently find it a challenge to ensure that their accepted recommendations are included in the government's legislative agenda. While most law reform agencies succeed some or most of the time in the implementation of their recommendations by government legislation, law reform agency bills commonly represent only a relatively small part of the legislature's workload.

2.4 Law reform agencies: key features and core values

Law reform agencies bring expertise, focus, continuity and independence to the task of law reform.

Law reform agencies offer a number of advantages for generating law reform proposals.

2.4.1 Expertise

Law reform agencies build up expertise, knowledge and specialist contacts in both the law and law reform. This is vital for successful law reform. It increases the likelihood of consistently high-quality work. A law reform agency's reputation and independence is also important in attracting skilled commissioners, staff and consultants.

Apart from its own collective expertise, a law reform agency can obtain additional expertise and advice from a wide range of stakeholders, cultivating dynamic relationships. For example, it can seek to capture the attention of external persons through open, thorough, imaginative and responsive consultations. As a result, opinions can not only be obtained from all quarters but are also taken fully and seriously into account. Consultation is more fully dealt with in Chapter 6. Some agencies also use consultants, who are mainly legal experts who assist with aspects of particular projects. Law reform agencies often also appoint working parties of experts, representatives from non-governmental organisations and other interested parties.

A law reform agency's methods ensure that its recommendations are thoroughly worked through before they reach the government and legislature. Its publications, and especially its final reports, are authoritative documents. They provide

detailed and up-to-date explanations of the current law and of its deficiencies (both in principle and in practice), as well as recommendations for its improvement.

2.4.2 Focus

A law reform agency has the great advantage of having a central focus and purpose: law reform. As Lord Gardiner, the Lord Chancellor of England and Wales, said when introducing the bill to establish the original British law commissions, 'it may be your Lordships' experience that things in life do not get done unless it is somebody's job to do them. It has never been anybody's job in England … to see that our law is in good working order and kept up-to-date.'

As a result, a law reform agency can concentrate its energy and resources on this single purpose and is saved from the need to prioritise other work, as may be the case in other bodies, and most particularly government ministries.

2.4.3 Continuity

Law reform agencies are standing bodies. There are enormous advantages to having law reform undertaken by a body that is in continual existence. Continuity enables an agency to acquire and apply its expertise in the long term, avoiding the need for transient bodies each having to learn the necessary skills and processes. In many jurisdictions, law reform commissioners and staff may tend to stay longer within a law reform agency than government ministers and officials, building up a corporate memory of sound law reform methodology.

Law reform agencies usually undertake work in many areas of law, providing a standing body capable of producing recommendations in a range of legal areas, including substantive, evidential and procedural law. As a standing body, a law reform agency is able to discuss with government, over a number of years if necessary, the reasons for its recommendations, and their strengths and any weaknesses.

As a standing body, a law reform agency is readily available to take on more urgent law reform work, sometimes at short notice.

Another advantage of a standing law reform agency comes from the skills it acquires over time. One way in which they are

accumulated is through the experience it gains from successive law reform projects. When a law reform agency has completed a law reform project, it can assess its performance during the project. The main benefit is to share within the agency what have been the successful, and less successful, methods used. The purpose is to learn from experience and therefore to confirm their processes and to improve them where necessary.

An entirely different type of evaluation can be used to assess the outcome of a completed law reform report that has already been implemented. Such an evaluation can be undertaken by the agency, the government or, probably best, both together. For example, the Ugandan Law Reform Commission has on occasion made post-enactment evaluations of some of 'their' legislation.

2.4.4 Independence

An essential feature, and a key advantage, of a law reform agency is its independence. It is not only independent of government in the conclusions it comes to in undertaking law reform, but also independent of judges, the legal professions and funders. This independence is critical to demonstrating that the views of a law reform agency are the result of rational enquiry based on meticulous research and consultation. The executive and the legislature frequently need and value specialist advice in the planning and formulation of law reform.

New Zealand and Malawi: Embedded independence

The Law Commission Act 1985, which established the New Zealand Law Commission, provides in section 5 that the Law Commission 'must act independently in performing its statutory functions and duties, and exercising its statutory powers'. The Commission also has the power under section 6 of the Act 'to initiate proposals for the review, reform or development of any aspect of the law of New Zealand'.

The Malawi Constitution, in section 136, provides for the independence of the Malawi Law Commission: 'the Law Commission shall exercise its functions and powers independent of the direction or interference of any other person or authority.' The Law Commission Act of Malawi also refers to the 'independence and impartiality of the Commission' in section 14, in a proviso in relation to donations that it may receive. This ensures that contributions of resources whether financial or otherwise do not bring the Commission under the control, direction or authority of the donor or contributor.

England and Wales: A selection criterion

The Law Commission for England and Wales have used law reform project selection criteria in preparing for their Programmes of Law Reform that included the following criterion:

Suitability: whether or not the independent, non-political Commission is the most suitable to conduct the project.

This advice is best provided by an objective, impartial and independent body.

Independence, together with the practice of wide public consultation, enhances the credibility of a law reform agency's work, including with opposition members of the legislature.

Key ways in which governments can promote the independence of law reform agencies include ensuring that appointments of commissioners are non-political and free from conflicts of interest, that the terms of reference for law reform projects are not designed to produce any particular outcome, and that there is no improper governmental or other external pressure upon the agency to produce any particular recommendations.

Often, it will be the government that asks the law reform agency to investigate a particular topic. The government may also exercise a veto over consideration of a topic by the agency. However, what is critical is that the agency is independent in how it comes to its own law reform conclusions. The Kenya Law Reform Commission sums this up well:

> *[Independence] refers to a Commission's intellectual independence – the willingness to make findings and offer non-partisan advice and recommendations to government without fear or favour.*

The establishment of agencies as independent by statute acts is a safeguard against interference by the government or any other body. Few enabling statutes refer specifically to 'independence'. There is the occasional exception, however.

However, as a public agency, a law reform agency must nonetheless remain accountable, for example by complying with public sector requirements on the use of funds and resources. The agency must also operate within boundaries established by its enabling statute. This may include agreeing on programmes of work with government and making annual reports to ministers

to be laid before parliament. These are normal checks and balances applying to public agencies of all types. This does not constrain the law reform agency in exercising their law reform functions independently.

There are significant benefits in establishing a law reform agency with an independent status. If the agency is separate from the political process and political influence, and seen to be separate, it is regarded as objective and impartial. It thereby gains the trust and respect of the government and the legislature, as well as of stakeholders and of civic society generally. This enhances the credibility of the agency's recommendations.

This is valuable not only to the law reform agency, but also to the government and the legislature who need specialist advice in the formulation of law reform.

To safeguard the role of the law reform agency, some agencies take steps to ensure that their programme of work covers areas

Kenya: Key features and core values

The Kenya Law Reform Commission identifies the key features of a law reform agency as:

- independence
- expertise
- a focus on law reform
- continuity.

The Commission identifies the following as its core values:

- professionalism
- integrity
- innovation
- networking
- accountability
- results orientated.

The Commission also identifies the following as distinguishing characteristics:

- permanent
- authoritative
- full-time
- independent
- generalised
- consultative
- implementation-minded.

of policy and law appropriate for such an independent, non-political agency. An agency may apply selection criteria designed to safeguard that role.

Some law reform agencies have taken the step of expressly setting out their key features and core values in published documents.

2.5 The role of government

Regardless of how a law reform agency is constituted, to be effective in its functions the agency will have, or need to develop, channels of communication with the government. The agency will need to find ways of working with the government on matters such as the planning of law reform work, arranging for government consideration of reports and working towards the implementation of recommendations.

The statute or the agreement establishing a law reform agency may set out the working relationship with the government, as well as the agency's structure.

Where the law reform agency is a standard model independent statutory body, the founding legislation will generally make provision on the main aspects of the relationship between the agency and the government. The statute will therefore provide for the appointment of commissioners and the period of their tenure, their qualifications, and their remuneration and pensions. Usually, the Act will also provide for the staffing and funding of the agency.

Provision would also be made for the submission of reports by the agency to government or to ministers, for the agency to make programmes of work, subject to ministerial approval, and for the laying down by ministers before the legislature of agency programmes, reports and annual reports.

Where the law reform agency is an institute, the agreement establishing it may make provision for the submission of reports to the government, for requests from government to carry out a project to review a particular area of the law and for the institute to be able to seek funding for projects from other parties, including the government.

2.5.1 Guidance

The government and the law reform agency may issue guidance on the working relationships and the processes between the law reform agency and the government.

New Zealand: Cabinet Manual and Circular

In New Zealand, the Cabinet Manual, which has been endorsed by successive governments, provides authoritative guidance for ministers and their offices, and all government officials. The manual and Cabinet Office Circular issued in 2009, entitled 'Law Commission: Processes for Setting the Work Programme and Government Response to Reports', cover the processes for setting the Commission's work programme and for handling within the New Zealand Government, including consideration by the Cabinet of all Commission reports and recommendations. The circular provides that when a project is put on the Commission's work programme, government departments should make resources available to work on the project so that officials are kept in touch with the development of the project and can provide advice on it. The provision of legislative drafting assistance may also be appropriate so that a draft bill can be included in the Commission's report.

2.5.2 Protocols

A law reform agency may enter into a protocol or agreement with ministers or the government as to how they should work together in relation to law reform and law reform projects. Protocols may be made on the basis of statutory powers, or be entered into between the parties as an administrative measure.

Where such a protocol is made, it may contain provision on matters such as the following:

- the scope of the arrangement;
- designating formal contact points for the purposes of the protocol, on the part of both the law reform agency and the government;
- any requirements to be fulfilled before the law reform agency commences a project;
- matters on which agreement should be reached before the set-up of a project and during a project, for example the terms of reference;
- review points at which to consider progress;
- the overall timescale and a programme of regular communication about the project;
- the preparation of an impact assessment and government assistance in doing so, and any issues as to the powers of the legislature to legislate on the matter;

- arrangements after the project has been delivered, for example as to an interim response by ministers within a certain timescale, and for a full response, within a specified timescale, setting out ministers' views on accepting, rejecting or partially accepting individual recommendations;
- whether the commission is given the opportunity to discuss any significant recommendations to be either rejected or substantially modified; and
- any support to be given by the law reform agency to the government to assist implementation.

England and Wales: Protocols with two governments

As a result of devolution, England and Wales, while a single legal jurisdiction, has two legislatures, the United Kingdom Parliament and the National Assembly for Wales. At the executive level, the Welsh Government is responsible for devolved matters within Wales.

A protocol between the Lord Chancellor (on behalf of the United Kingdom Government) and the Law Commission for England and Wales was made in 2010, with statutory provision having been made for the protocol in section 3B(4) of the Law Commissions Act 1965 as a result of amendments made by the Law Commission Act 2009. A similar protocol was subsequently entered into between Welsh ministers and the Law Commission for England and Wales in 2015, the 1965 Act having been amended again to make such provision by the Wales Act 2014, in order to take account of Welsh devolution. The protocols cover the matters specified above.

2.6 Funding of law reform agencies

The funding of law reform agencies broadly follows the basis upon which the agency was established. The Act establishing a standard form agency will usually set out how it is to be funded. Funding, accordingly, is usually from the government budget, as approved by the legislature. However, there are a number of law reform agencies that receive a substantial proportion of their funding from donor agencies. This is particularly the case in developing countries and for individual specific projects.

Varieties of funding: Governments and donors

The Law Commission for England and Wales is entirely funded by the United Kingdom Government and other governmental entities. A mixture of core funding is provided by the Commission's sponsor ministry, the Ministry of Justice, as well as additional funds from other government departments, the Welsh Government and other public bodies in respect of specific law reform projects. In recent years, specific project funding has become more important.

The Scottish Law Commission, on the other hand, is wholly funded by the Scottish Government by way of core funding only.

The South African Law Reform Commission is funded by the South African Government. However, this commission has on occasion made use of donor funding for specific investigations. For instance, a German Government development agency (Deutsche Gesellschaft für Technische Zusammenarbeit) provided technical and financial assistance to enable the South African Law Reform Commission to acquire quantitative data and other information in relation to a project on the feasibility of establishing a compensation fund for victims of crime in South Africa.[7]

Where the law reform agency is an institute, funding is usually sought from entities such as ministries of justice, universities, law foundations and law societies.

Where the law reform function lies with a unit or department of government, that function is funded by the responsible ministry, as in Jamaica where the Legal Reform Department is managed centrally by the Ministry of Justice.

Alberta: The institute model

The Alberta Law Reform Institute is funded primarily by the Department of Justice and the Alberta Law Foundation. The University of Alberta provides office premises and other services, plus a small cash grant per annum.

2.7 The structure of law reform agencies

This section sets out the features of the standard model and the institute model for law reform agencies. It should be remembered that there are significant variations within each model, so not all existing law reform agencies will exhibit all of the features of one or other of the models.

2.7.1 The standard model

Most law reform agencies in Commonwealth countries exemplify the standard model. In this model, the key elements are that the agency:

- is a statutory body, having been established by legislation;
- has law reform as its only or main function;
- is a standing, permanent body;
- is independent of government and of other interests, such as the courts and the legal and other professions: their independence lies primarily in their intellectual independence, as regards their consideration of issues and making recommendations for law reform;
- receives all, or most, of its funding from government; some may also receive funding from donor agencies;
- usually has several commissioners, being persons appointed from different parts of the legal profession; occasionally, an agency has a small number of commissioners appointed from outside the legal profession;
- has as the norm a minimum of one full-time commissioner and/or a chief executive or similar post, except for law reform agencies in very small jurisdictions;
- has agreed programmes of work in the form of a programme or programmes of law reform, comprising a number of individual law reform projects on particular legal issues or topics;
- uses a broadly similar law reform methodology, including high-quality legal and other research; widespread consultation, drawing on outside expert assistance, such as from consultants, legal or otherwise, on the areas in question; and undertakes appropriate comparative work to consider the law in other jurisdictions;
- produces at the end of each project a final report, which is submitted to ministers or to government, and which examines the issues, and makes recommendations for reform, with full reasons for the changes proposed; and
- has its final report published – which is often accompanied by draft legislation that would implement the recommendations.

Most Commonwealth law reform agencies are 'classic' or standard model law reform agencies, established by statute. An alternative is the institute model, established by agreement between legal interests and stakeholders. The institute model is found at the state or provincial level in parts of Australia and Canada.

As stated above, there are variations in the model. For example, in some small jurisdictions, a commissioner may also be a member of the government. Many law reform agencies do not have in-house legislative drafting resources. In some standard model law reform commissions, not all commissioners will necessarily be lawyers.

There are also numerous variations in how law reform projects are undertaken, many of which are explored later in this guide.

The United Kingdom Commissions: The original standard model

The standard model was created by legislation establishing the Law Commission for England and Wales and the Scottish Law Commission. Both were established as statutory, independent bodies by the Law Commissions Act 1965.

These Commissions are independent as regards their law reform functions. They are permanent bodies.

Their general purpose is to promote law reform, with specific functions of keeping the law under review with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments, and generally the simplification and modernisation of the law.

Provision is made for the appointment of commissioners. Commissioners in England and Wales (a chair and four other commissioners) are appointed by the Lord Chancellor. Following amendment as a consequence of devolution, commissioners in Scotland (a chair and up to four other commissioners) are appointed by Scottish ministers. Commissioners are usually appointed for a term not exceeding five years, although a limited renewal of appointment may be possible in certain circumstances. Commissioners' salaries are stipulated to be paid out of money provided by the United Kingdom Parliament and by Scottish ministers, respectively.

The statutory criteria for appointment are specified: those appearing to be suitably qualified by the holding of judicial office or by experience as an advocate or barrister or solicitor or equivalent, or as a teacher of law in a university. Those appointed as commissioners are usually experts in a particular area or areas of the law included in the Commission's current programme of law reform projects. A commissioner's role under this model is as a law reformer, leading and carrying out the law reform work, and undertaking peer review of other commissioners' work.

Provision is made for the preparation of programmes for the examination of different branches of the law with a view to reform; for the preparation of programmes of consolidation and statute law revision; for preparing draft bills; for providing advice and information to government and authorities; for the laying before the United Kingdom Parliament and the Scottish Parliament any programmes and proposals for reform; and for the making of an annual report to ministers, to be laid before the United Kingdom Parliament or the Scottish Parliament. Each programme lasts for a specified numbers of years and comprises a number of individual law reform projects of varying size.

New Zealand Law Commission: Commissioners can be drawn from other disciplines

In New Zealand law, the Law Commission Act 1985 does not require that all commissioners are legally qualified. Section 9 requires that the president of the Commission must be either a judge or a retired judge of the Court of Appeal or the High Court, or must be an experienced barrister or solicitor, but the Act is silent on the qualifications of other commissioners. On occasion, commissioners have been appointed who have not been legally qualified because they have had other relevant qualifications and experience.

2.7.2 The institute model

The other main model for an independent law reform agency is that based on an agreement made between leading stakeholders or interests in the legal community, such as the attorney-general, the law society, university law schools and the bar association. There are currently a small number of institute model agencies at state and province level, all in Australia and Canada. They are broadly similar, but there are also several differences between them, for example some of their working practices and their funding sources differ, as well as their legal structures.

The institute model will usually have similar aims to a standard statute-based law reform agency. These may include reviewing the law with a view to modernisation; the elimination of defects; the simplification and consolidation of laws; the repeal of laws that are obsolete or unnecessary; and, in appropriate cases, the achievement of uniformity in the laws of federal sub-state units, and uniformity between those units and the federal level.

An institute may have a board, with members comprising representatives of the founding parties, such as the judiciary, the bar association, the law society, the attorney-general, universities and other members representing the community. The institute model board, unlike the standard model commission, usually comprises representatives or *ex officio* office-holders, rather than commissioners engaged full- or part-time in law reform. Institute boards are usually larger than commissions.

As in the standard model, however, the institute undertakes widespread consultation with key stakeholders and with the community, and the responses received inform the recommendations made in their report.

Similarly, final reports are submitted to government to consider for implementation. Reports, along with research papers and

consultation papers, will usually be published by the institute in paper form and/or on their website. As with the standard model, practice varies as to whether legislative drafting is undertaken.

The first law reform 'institute' was developed by the Canadian province of Alberta in 1967: the Alberta Law Reform Institute was established only two years after the template for the standard model was set by the establishment of the United Kingdom law commissions. The Alberta model has been adapted in Australia and Canada to suit the circumstances in individual states and provinces. These law reform bodies are sometimes described as following the 'institute model', although it should be recognised that there are substantial differences between agencies within this very broad category.

The Alberta Law Reform Institute was created by agreement between the Province of Alberta, the Law Society of Alberta and the University of Alberta. The aim was to establish a full-time independent agency dedicated to maintaining, modernising and monitoring the law of Alberta.

The Alberta Law Reform Institute: Objectives and methodology

The objectives of the Alberta Law Reform Institute are:

1. The consideration of matters of law reform with a view to proposing to the appropriate authority the means by which law of Alberta may be made more useful and effective; and
2. The preparation of proposals for law reform in Alberta, with respect to both the substantive law and the administration of justice.

The Institute's law reform methodology is as follows:

- Suggestions for potential law reform projects come from many sources, including government, the public and the legal profession.
- Following a review process, and a decision to take on a project, legal counsel carry out research and analysis of the issues. They collaborate with the board and with an advisory committee of experts in preparing a consultation document that seeks views on the policy choices for reform.
- Following public consultation, the board and the advisory committee develop final policy recommendations for publication in a final report.
- A key role of a final report is to convince government of the need for law reform so that the recommendations will be implemented by legislation.
- Draft legislation to implement recommendations is attached to the final reports.

British Columbia Law Institute: Purposes

The broad purposes of the Institute, described in Article 2 of its constitution, are to:

- promote the clarification and simplification of the law and its adaptation to modern social needs;
- promote improvement of the administration of justice and respect for the rule of law; and
- promote and carry out scholarly legal research.

The Institute's operational approach is described in Chapters 6 and 7.

The Institute has a governance board of 14 members, representing the founding parties and the broader legal community. The board appoints a director as the head of the organisation, which has a small team of legal and administrative staff. The Institute is funded primarily by the Department of Justice and the Alberta Law Foundation. The University of Alberta provides office premises and other services, plus a small cash grant per annum.

A key feature of the institute model is that it is not, ordinarily, dependent on a government for its establishment. In British Columbia, a standard model commission existed from 1969 to 1997. When it was decided that funding for the commission would be withdrawn, the British Columbia Law Institute was established by its founder members as a society under provincial legislation. The Institute is funded by a combination of operational funding from the Law Foundation of British Columbia and the provincial government, and funding received from government programmes, not-for-profit grants and stakeholders for specific projects.

The institute model has spread successfully within both Canada and Australia, at the provincial and state level. The Tasmania Law Reform Institute was established in 2001 by agreement between the Government, the University and the Law Society of Tasmania, drawing on the model of the Alberta Law Reform Institute.

This model has also been adopted for both the Australian Capital Territory and, most recently, South Australia. That institute is based at Adelaide Law School and arose, in 2010, from an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.

Notes

1 http://www.ulrc.go.ug/content/law-revision-department
2 http://revisedacts.lawreform.ie/revacts/intro
3 http://salawreform.justice.gov.za/anr/2015-2016-anr-salrc.pdf
4 For a discussion of 'common law codification' by the Law Commission for England and Wales, see http://www.lawcom.gov.uk/wp-content/uploads/2015/07/cp223_for_accessibility_wales_with_cover.pdf, pages 142–152.
5 Formally, simply 'the Law Commission'. It is referred to throughout this guide as 'the Law Commission for England and Wales' to avoid misunderstanding.
6 David Easton, 'An Approach to the Analysis of Political Systems' (1956–7) 9 World Politics 383; Robert H Jackson, *The Supreme Court in the American System of Government* (Cambridge Mass, Harvard University Press, 1955).
7 http://salawreform.justice.gov.za/reports/r_prj82-2011-victim-compensation.pdf