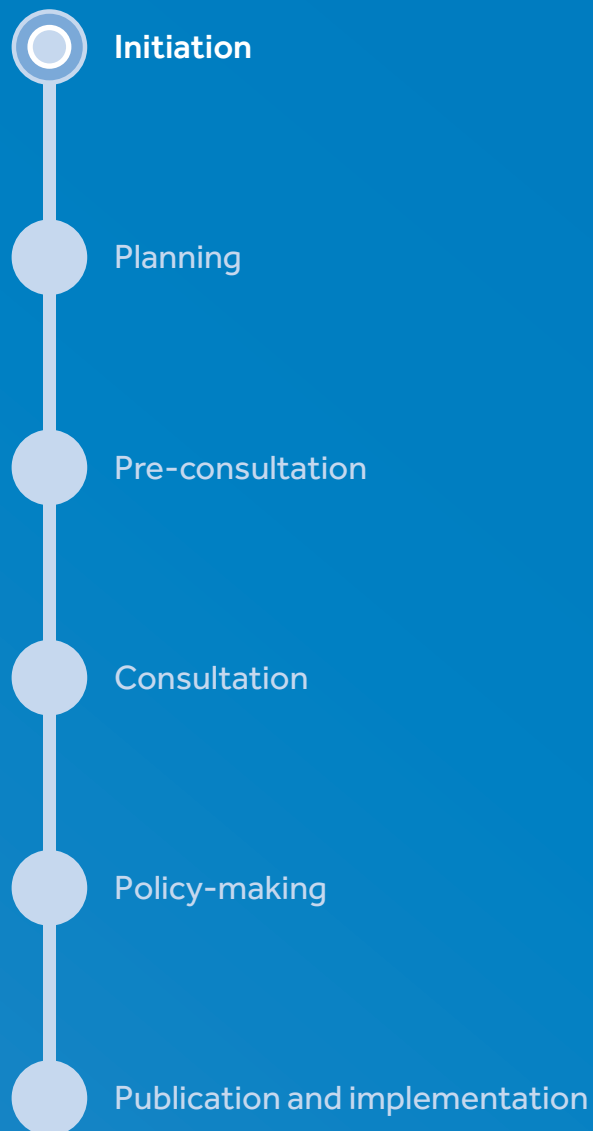


Chapter 3

The Initiation of Law Reform Projects



Chapter 3

The Initiation of Law Reform Projects

Chapter 3 looks at how law reform projects are initiated. The starting point is the mandate – statutory or otherwise – of the agency, which is usually very broad. It then looks at how an agency can select types of project, and discusses the advantages and disadvantages of each. Under the theme of relations with government, it looks at the ways in which a law reform agency receives or decides upon work, whether in references from government or in programmes of work generated by the agency itself (albeit usually approved by governments). The chapter also looks at the institutionalisation of relations with governments as an integral part of the process. The selection criteria for law reform projects are then considered. Finally, the chapter looks at how law reform fits the contemporary context, as well as some of the current challenges to law reform.

This chapter deals with how law reform agencies initiate or select individual law reform projects. It does so by considering five related elements: the scope of the agency's mandate, its relationship with other agencies, the process it uses for selecting projects and the criteria used, as well as the contemporary context within which selection is made.

Most law reform agency mandates are extremely wide in scope, and this presents the first selection challenge: how to use limited resources to best effect. This challenge can be greatly assisted where the agency has good working relationships with other law reform agencies and comparable bodies, both domestically and internationally. Selection outcomes are also strengthened where the process for selection is well structured and consultative, involving assistance from other law reform partners such as government ministries, legal professionals and non-governmental organisations. The selection criteria should

allow the agency to identify which projects best match its core skills and resources.

The context within which projects are selected is significant: at different times, specific areas of law may require examination, or the general financial or political setting may suggest the need for prioritising certain areas for review. Contemporary topics include the regulation of information and communications technology.

3.1 The scope of the law reform agency's mandate

Most law reform agency mandates are wide. Selection and prioritisation of projects are inevitable. Often, it will be advisable for a law reform agency's programme to include a mixture of narrow-focus, short-duration projects and wider focus, longer term, more expansive projects.

The wide scope of most law reform agencies' mandates significantly influences the actual content of a work programme. As discussed in Chapter 2, generally, law reform agencies are given a very wide-ranging mandate: to keep the *entire law* of their jurisdiction under review and to make proposals for reform of that law. Statutes also frequently task agencies with codifying and consolidating all of that law.

At first sight, this may suggest that the agency is required to reform *all of the law* of its jurisdiction, and perhaps to codify, or consolidate, all of it. This may have been the founders' original intention, but it can never have been understood to preclude prioritisation. The reality is that selection is inevitable and is conditioned by the context in which the agency finds itself.

Most law reform agencies are public bodies, and are either entirely state funded, sometimes with contributions from donor agencies, or funded through an institution such as a university. The result is that most law reform agencies have relatively modest resources. This may be especially the case for an agency in a small state or territory.

The budget, like that of most public bodies, will also be subject to regular, usually annual, oversight, in keeping with national and international public service governance obligations or 'value for money' requirements. A law reform agency will usually find it necessary to justify its budget with regard to its outputs. For many, this will involve an expectation of measurable outputs in each year.

Law reform agencies usually develop their programmes by selecting a variety of projects from the spectrum available, from narrowly focused law reform projects that aim to solve small-scale and clearly identified problems, to large-scale projects,

or series of projects, that aim to reform or codify major areas of the substantive or adjectival law of the jurisdiction. Such programmes must also take into account other functions such as consolidation and revision and the repeal of obsolete statutes.

Often, it will be advisable for a law reform agency, in establishing its programme, to include a mixture of narrow-focus, short-duration projects, and wider focus, longer term, more expansive, substantive law reform projects.

3.1.1 Selecting narrow-focus projects

Where clear difficulties have been identified in the application of the law by government, by an inquiry looking into wider issues, or by stakeholders and academics, it may be possible for a law reform agency to undertake a relatively short, substantive law reform project to quickly identify solutions.

Narrow-focus projects on missing persons in Scotland and Ireland; Criminal justice in South Africa

Two projects on the civil law relating to missing persons:

- The Scottish Law Commission's *Report on Presumption of Death*¹ recommended legislation that would permit both the registration of death and the issuing of a death certificate in respect of a missing person who may be presumed dead. Previously, Scottish law had allowed for a presumption of death in only limited circumstances. The Commission's report was implemented in the Presumption of Death (Scotland) Act 1977.
- The Law Reform Commission of Ireland's *Report: Civil Law Aspects of Missing Persons*² examined the civil law issues that arose when a person goes missing, such as the need to manage their property on an interim basis, whether it should be presumed that the missing person is alive or has died, and the civil status of the missing person and of those left behind (notably, their married or civil partnership status).

Two projects in South Africa on criminal justice:

- The South African Law Reform Commission's report on the expungement of certain criminal records reviewed the different systems used for the keeping of criminal records and their expungement in South Africa, at the request of the Minister of Justice and Constitutional Development. The Commission focused on compliance with constitutional imperatives, the prescribed process and the qualifying criteria for expungements.³
- The South African Law Reform Commission considered reform of the system of trapping – known as entrapment in other jurisdictions – in light of the impact of human rights norms and trends in other parts of the world. The Commission's recommendations that there should be greater judicial control over trapping, with the courts being given a broader discretion, led to the adoption of Criminal Procedure Second Amendment Act 85 of 1996.⁴

In addition, where an agency has responsibility for consolidation or statute revision, a small consolidation or revision bill could be prepared.

3.1.2 Selecting wide-ranging projects

The wide scope of most mandates inevitably, and correctly, leads to an expectation that the law reform agency should select and complete not only narrow-focus projects, but also wide-ranging projects to codify large areas of law. Sometimes, such projects will be expected as a contribution by the law reform agency to broader institutional or political projects.

East African Community: Commercial law co-ordination

The East African Community Partner States are Burundi, Kenya, Rwanda, Tanzania and Uganda. Article 126 of the East African Community Treaty provides that partner states shall, through their appropriate national institutions, take all necessary steps to harmonise all their national laws that relate to the East African Community. The East African Community established a sub-committee on the approximation of national laws, headed by the law reform agencies of the East African Community Partner States, to monitor the implementation of this objective. Among the areas being monitored by the sub-committee are contract law, immigration, insolvency, intellectual property, labour and employment, and the sale of goods.

More commonly, a law reform agency will perceive, or be convinced of, the need for wide-ranging change in both the form and the substance of a large area of law, often through codification.

While the Australian Law Reform Commission report (see ‘Large-scale codification projects’, opposite page) has been implemented, efforts to codify the criminal law in England and Wales and in Scotland have not, to date, succeeded in legislative reform.

Large-scale codification projects should not be taken on without careful consideration, given the significant resources required and the degree of complexity involved.

One possible conclusion from this is that caution should be exercised in selecting large-scale projects, in light of the significant resources required and the degree of complexity involved. For this reason, some law reform agencies have, at different times in their history, avoided such large projects on the grounds that it may not be efficient to spend limited resources on a project that can take a number of years to complete, and whose implementation may only be decided many years from the start date.

Nonetheless, there are a number of reasons why, in spite of the challenges identified, agencies sometimes continue to select large codification projects:

- There may be external reasons why large codification projects must be undertaken, including the requirements of membership of regional organisations.
- Codification may be particularly useful in developing countries that are undertaking transformational processes such as implementing a new constitutional or governance framework (see the example box below ‘Constitutional development and implementation: Kenya’).
- Codification may come back into favour in a state or territory where codification projects had, in the past, not been implemented; for example, in 2015 the

Large-scale codification projects

South Africa is one of the few countries worldwide that makes specific provision in its constitution for the protection of the rights of children. One of the major considerations in the South African Law Reform Commission’s project reviewing the Child Care Act⁵ was the meaningful expansion and support of this provision of the Bill of Rights. The investigation culminated in the comprehensive and ground-breaking Children’s Act 38 of 2005, which consolidates and reforms the law on matters related to children, effectively creating a legislative code. It deals with topics including the age of majority, paternity, custody, child support, guardianship, parenting plans, children’s courts, circumcision, day care, child protection, foster care, group homes, adoption, surrogacy, child abduction and the trafficking of children.

In two reports on insurance contracts, published in 1980 and 1982, the Australian Law Reform Commission recommended wholesale reform of the law relating to insurance contracts in Australia, which had become seriously outdated. The reports dealt with the law relating to insurance intermediaries – brokers and agents – and their relationship with insurers and the broader adequacy and appropriateness of the law of insurance contracts. At the time, the law in this area was a mixture of common law and Imperial, federal, and state statutes.⁶ The reports continue to influence consideration by law reform agencies of reform of insurance contract law in other jurisdictions, including the United Kingdom and Ireland.

The work of the Law Commission for England and Wales (in the 1970s and 1980s) on codifying criminal law culminated in the report *A Criminal Code for England and Wales* in 1989,⁷ which included a draft Criminal Code Bill. The bill, produced largely by a working group of academics attached to the Commission, sought to codify both the general part of the criminal law of England and Wales (conduct and mental elements, parties to offences, intoxication, etc.) and the main substantive offences. The Scottish Law Commission similarly published a draft Criminal Code for Scotland in 2003.⁸

Law Commission for England and Wales returned to codification in the criminal law area with a project that involves complete codification of procedural sentencing law.⁹

- It will be expected, because of the wide mandate of law reform agencies, that large codification projects should form part of the standard make-up of their work programme; that is, involving a balance of smaller and larger projects. This is notably the case in states and territories where codification has never been out of favour, and may be expected in those (relatively few) states where a law reform agency has been established in a jurisdiction with a civil law tradition (such as Rwanda).

If a large-scale project is undertaken, no doubt following especially careful consideration of the risks involved, it would merit particularly thorough planning.

Furthermore, while law reform agencies should pay attention to the extent to which their recommendations are implemented, this cannot, as discussed in Chapter 8, be the sole measure of success. Therefore, a completed codification project on an important area of law, such as criminal law, can serve as an authoritative, and thus invaluable, statement of the law. This may

A strategy for large-scale projects

In handling large-scale projects, the British Columbia Law Institute has found the following strategy beneficial:

- Start with a scoping research project (Phase 1). Use Phase 1 to determine the issues to be addressed and set out a plan for the larger project, perhaps narrowing the issues to keep the project manageable.
- When tackling the larger project, consider whether topics are discrete enough to be appropriate for interim reports on the topic or can be handled independently of the whole. It is not always appropriate to do this, but if it is possible, it ensures successes along the way, which is a positive outcome for staff, volunteers and stakeholders. The Institute has adopted this with their Strata Property Law project, which went into year 5, during which two reports were issued, the first of which has already been implemented during the course of the overall project.¹⁰
- Alternatively, the project can be broken up into a number of sub-projects (as with the Institute's project on wills, estates and succession) so that the reports can be worked on simultaneously.

be a significant consideration for a law reform agency operating in a small jurisdiction, where there may not be a commercial market for law publishers to support textbooks on the law of that jurisdiction.

3.1.3 Consolidation, revision and repeal

When developing a programme, a law reform agency will look to include projects expressing all of its active functions. Many law reform agencies have ongoing mandates in connection with the legislative stock of a state or territory, involving the maintenance and state of the statute book. This can include:

- preparing consolidation bills;
- preparing bills repealing obsolete legislation;
- preparing selections of revised Acts, which are administrative consolidations (Acts-as-amended) that may not necessarily require parliamentary enactment, but may nonetheless have semi-official status; and
- preparing and maintaining the entire legislative stock, sometimes referred to as preparing and maintaining ‘the Laws of’ the state or territory.

Some law reform agencies have an explicit mandate to maintain the statute book, including by preparing consolidation bills and repealing obsolete legislation.

As noted above, this type of mandate may require a law reform agency to select either specific areas of law to consolidate as part of its ongoing work programme or to engage in a complete compilation, or update of a previous compilation, of the statute law of the state or territory.

The selection of projects will therefore be affected by the extent to which a law reform agency’s mandate includes such explicit responsibilities to maintain the statute book, as well as the importance attached to this aspect of its work. Such work is more likely to play an important role in a small state or territory where the agency may be the only realistic source of authoritative information on current legislation.

3.1.4 Wider mandates still

Even if a law reform agency’s mandate includes a review of the entire law of the jurisdiction, as it typically will, there are some implied limits to the scope of its work. As discussed in Chapter 2, no law reform agency is likely to take on projects of an overtly partisan political nature.

A few law reform agencies have mandates to carry out other activities, such as undertaking educational programmes on relevant law.

Nonetheless, a small number of law reform agencies have been given a wider remit that includes an explicit obligation to engage in activities that might be regarded as closer to those carried out by a ministry as part of policy formation or by a body such as an economic or social research agency.

The Malawi Law Commission, for example, is expressly required by its foundation legislation to carry out civic education of the general public in connection with its law reform mandate. As a result of this, in a project aimed at determining whether or not the law on the use of contraceptives should be amended in order to address HIV/AIDS, that commission investigated the extent to which possible reforms would be consistent with, or conflict with, existing social practices, through engagement in community-based workshops.

Among its other functions, the Kenya Law Reform Commission is statutorily required to undertake public education on matters relating to law reform. The Victorian Law Reform Commission undertakes educational programmes on law reform relevant to their work.

Constitutional development and implementation: Kenya

The role of the Kenya Law Reform Commission in implementing Kenya's 2010 constitution is recognised in the text of this constitution. Working with the relevant government department, the Commission developed model laws (launched in November 2016) to operationalise the constitution's devolution of functions to newly created county governments.¹¹

Even without such an explicit statutory provision, however, many law reform agencies have engaged in comparable qualitative, and sometimes empirical, exercises as part of law reform projects.

The Australian Law Reform Commission's research on aboriginal law involved a large number of community-based meetings with tribal elders to explore the position in practice in Australia in advance of making recommendations for reform.¹²

Another example, related to a more traditional law reform project, reform of the jury system, is the New Zealand Law Commission's empirical research on jury comprehension, in conjunction with university-based partners, which assisted the Commission's recommendations on how to improve juror comprehension.¹³

Similarly, the Law Reform Commission of Ireland, as part of a project on harmful digital communications, engaged the relevant Ministry for Children and Youth Affairs to facilitate workshops with young people in Ireland on the subject matter of that project in order to conduct a representative and qualitative assessment of their views on the legal regulation of harmful digital communications.¹⁴

3.2 Relations with other law reform agencies

Many law reform agencies are either required by their founding legislation, or may in any event choose, to engage in joint projects with other bodies, including other law reform agencies. This necessarily involves close liaison with law reform agencies and other bodies to ensure that the selection of the subject matter for such a joint project is suitable for each body involved. The impetus for such a joint project can arise from a number of factors.

One is the need for the harmonisation of laws within federal or legislatively devolved states.

There may also be a need for harmonisation in the context of a regional economic union, such as the major project on the harmonisation of commercial law in the East African Community (see example box above ‘East African Community: commercial law co-ordination’).

In addition, law reform agencies have developed formal and informal international links to facilitate the exchange of ideas, which may be useful in connection with the initiation of projects, as they will be for other aspects of agencies’ work. The two formal associations are the Commonwealth Association

Law reform agencies share experiences and ideas in order to learn from each other and occasionally to harmonise laws. The Commonwealth Association of Law Reform Agencies (CALRAs) is one of the formal associations of law reform agencies.

Australia and the United Kingdom

In Australia, federal, state and territory law reform agencies sometimes engage, or liaise with each other, in projects with a view to producing a ‘Uniform Act’, in effect a harmonisation statute that can be enacted in each state or territory.

In the United Kingdom, the two Commissions, in England and Wales and Scotland, have a long tradition of undertaking joint projects. During the period in which the Northern Ireland Law Commission was active,¹⁵ the Commissions also undertook two tripartite projects. Each of the Commissions is under a statutory duty to consult with the others.

Law reform agencies maintain linkages with other bodies involved in reform, such as human rights commissions.

of Law Reform Agencies and the Association of Law Reform Agencies of Eastern and Southern Africa (see Appendix 2). Links between the Australian, New Zealand and Pacific agencies benefit from the conferences organised from time to time under the banner of the Australasian Law Reform Agencies Conference. Similarly, there are annual meetings of the five law commissions of England and Wales, Scotland, Northern Ireland (when active), Jersey and the Republic of Ireland.

Bilateral links between law reform agencies have sometimes developed because of historic associations between two countries, rather than because of regional associations. An example is the link between the Malawi Law Commission and the Scottish Law Commission for co-operation and capacity-building for law reform. This was agreed as part of a wider project called Capacity Building for Justice, which began in 2010 and lasted for a period of three years. The project arose out of the Scotland–Malawi Governmental Agreement in 2005 for mutual co-operation and assistance, and so attracted government development funding for capacity-building activities. Such associations provide the potential for mutual co-operation and learning, including in the context of the selection of projects.

3.3 Relations with bodies with different remits

In many states and territories, bodies other than the law reform agency may have specific law reform mandates in particular legal areas. This can have the effect that law reform agencies may hesitate to conduct projects within those areas, even where that agency has a wide, ‘all of the law’ remit.

For example, a statutory regulatory body, such as an agency with responsibility for environmental protection or occupational safety and health, may be given responsibility for carrying out regular post-legislative statutory reviews of the legislation in question. Such post-legislative scrutiny may require the agency to prepare a report for the relevant government ministry as to whether or not the legislation is working effectively and whether or not some reforms are required. It is highly likely that a law reform agency will not select a project that would overlap with the specialist review role given to an agency in a specialised area of the law.

Similarly, in some jurisdictions, legislation may provide for a statutory post-legislative review of the legislation by a ministry. Again, such specific review requirements are likely to preclude a review by a law reform agency of these areas, although it may not preclude a ministry from ‘contracting out’ such a review to a law reform agency. Such reviews may indeed be shared between a ministry and a law reform agency (such as the review of New Zealand’s Search and Surveillance Act 2012¹⁶ where the statute itself provided for a joint review).

A state may be required, as part of its international obligations, to establish a national human rights agency, with responsibility to monitor the extent to which the state has implemented its international human rights obligations. This may include, for instance, advising as to whether proposed legislation is compatible with the relevant human rights norms.

While such a function can be conferred on a law reform agency, it is more common for a separate human rights agency to be established. In that case, those functions would in practice fall outside the scope of projects that the law reform agency will consider.

Nonetheless, a law reform agency is likely to engage in an examination of whether an area of current law should be reformed in order to comply with human rights standards, whether national or international. To that extent, a law reform agency may be involved in selecting a project that necessarily has a human rights dimension.

For example, a commonly selected criminal law project for a law reform agency is reform of the law on self-defence. This involves an examination of the extent to which lethal force may be used in self-defence, engaging the application of the right to life and issues such as the state’s positive obligation to protect the right to life and the use of fatal force by agents of the state.

In any event, where both a law reform agency and a separate human rights agency have been established in a state, it is likely that both bodies will wish to establish close links having regard to their overlapping functions.

In summary, law reform projects often clearly involve a consideration of wide policy matters. An important issue for a law reform agency in selecting a project is therefore whether or not it has the capacity, alone or with another agency, to analyse

and understand the wider policy context within which the legal reform issues must be assessed.

3.4 The selection process: programmes, references and other functions

Law reform agencies tend to undertake projects that are in a set programme containing a list of projects or are referred to them by government.

A key aspect in the selection process is whether a law reform agency operates through a programme, which contains a defined list of projects to be completed over a defined timescale, or on the basis of commissioned references from, for example, a justice minister or attorney-general. Although this appears, at first sight, to present a binary ‘either/or’ question, in practice the distinction between programme-based and commissioned references is often subtler. Many law reform agencies will initiate projects from both sources.

3.4.1 Programmes

Many law reform agencies are mandated, whether by their founding legislation or by non-statutory terms of reference, to prepare programmes of law reform. These programmes contain a defined list of projects to be completed over a specific time frame. It is also common that such a programme must be approved by a ministry or by the entire government/Cabinet.

While it is possible that a law reform agency might choose to select the projects for a programme of law reform on the basis of a purely internal selection process, dependent on decision-making by the commissioners or board members, this is unlikely to be the case in practice. Many law reform agencies will, either by legislative requirement or because of good governance practices, engage in a detailed consultative process in order to develop a draft list of projects for inclusion in a programme. This consultation will usually involve engagement with government ministries, other state agencies, legal professionals, other professions, non-governmental organisations and the public generally.

In recent years, online consultation and the use of social media has become an important feature of such consultative processes. Direct live meetings with interested parties also remain, however, an important component of consultation.

When a law reform agency engages with government ministries as part of the selection process, it is likely that this will provide a clear view of the priorities within key ministries, such as the justice ministry. This has the benefit of an appreciation of whether or not particular projects under consideration by the agency would be at least consistent with the ministry's general objectives at that time. In turn, this has the advantage that, if the agency selects such a project, it may therefore (when the project is completed) be considered favourably by the ministry when it puts forward its priorities in what is often a contest in a state or territory for limited parliamentary time.

In any event, as noted above, a law reform agency's foundation legislation or terms of reference will often provide that the law reform agency's draft programme of selected projects will require formal approval by either a specific minister or the entire government/Cabinet. Therefore, a well-conducted consultative process, which has included consideration of the views of ministries as well as the general public, is also more likely to be successful in obtaining such formal approval.

Programme construction: England and Wales

The statute establishing the Law Commission for England and Wales requires it 'to prepare and submit to the Minister [the Lord Chancellor] from time to time programmes for the examination of different branches of the law with a view to reform'. Currently, programmes typically last for three years and include projects proposed by a variety of actors. In the tenth programme (2008), for instance, a project on the law relating to social services support for adults was proposed by the parents of two adult disabled children, the Law Society and a mental health charity. The Commission's subsequent recommendations (2011) were enacted as the Care Act 2014 and the Social Services and Well-Being (Wales) Act 2014.

Government departments and public bodies other than the Ministry of Justice now routinely 'bid' for projects in the Law Commission's programme. The 11th programme (2011) included projects on data sharing among public bodies (proposed by the Cabinet Office), electronic communications (Department for Culture, Media and Sport), electoral law (the Electoral Commission, for a joint project with the other UK commissions), taxi and private hire vehicle regulation (Department for Transport), the tort of unjustified threats in relation to trade marks (the Intellectual Property Office) and wildlife law (Department for the Environment, Food and Rural Affairs). The departments involved made financial contributions to the Commission in relation to the projects they proposed.

3.4.2 References

Some law reform agencies operate either entirely, or else in part, on the basis of commissioned work from a minister or attorney-general. These might be referred to as ‘references,’ ‘referrals’ or ‘requests’.

For example, the (federal) Australian Law Reform Commission operates entirely on the basis of a rolling programme of work consisting of a series of commissioned projects from federal ministers.

Many other law reform agencies operate on the basis of a combination of programmes and occasional commissioned references. The balance between programme projects and references may vary over time and between agencies.

Such references, whether they are the only source of law reform projects or are combined with programmes, may be mandatory in the sense that the law reform agency must deal with a commissioned project: it has no choice to decline the project. However, it is common practice that, before the relevant minister or attorney-general makes a formal reference to the law reform agency, there will be informal discussion as to the precise form of the reference and the capacity of the agency to deal with it. In many jurisdictions, the statute may not clearly require a law reform agency to accept a reference. In the United Kingdom, the Law Commissions will, following initial discussions, decline a reference that is thought to be unsuitable. The statutory protocol between the United Kingdom Government and the Law Commission for England and Wales recognises the freedom of the Commission to decline a reference, and sets out the criteria for such a decision.

As the example above indicates, projects included in a programme may well nonetheless be proposed by government departments or other public bodies. In such circumstances, such projects are treated in the same way as projects proposed by others, and subject to the same process of consideration and selection. However, clearly one step that does not have to be taken in relation to such projects is determining the attitude of the relevant government agency to the proposal.

On the other hand, in some cases, the distinction between a programme item and a reference may not be very significant. For instance, in relation to the Law Commission for England and Wales’s 11th Programme of Law Reform (see example box

above, ‘Programme construction: England and Wales’), a project on the regulation of healthcare professionals was proposed by the Department of Health as part of the consultation process, but accepted by the Commission as a reference before the programme was finalised.

3.4.3 Official inquiries

A further source of work for law reform agencies may be recommendations from independent commissions or other bodies set up to investigate particular issues. In most jurisdictions, such recommendations must still be either referred to the law reform agency by a minister or included in a programme.

Double jeopardy: An inquiry-initiated project

The racist murder of a young black man, Stephen Lawrence, in London in 1993 led in 1999 to a wide-ranging public inquiry chaired by Sir William Macpherson, a retired judge. One of its recommendations was that the Law Commission should consider the law on double jeopardy in England and Wales, the main suspects in the murder having been formally acquitted following a failed private prosecution. The Home Secretary immediately referred the question to the Law Commission, which reported in 2001, proposing a narrow exception to the rule. The government legislated a wider version of the proposals, which eventually led to the acquittal of one of the suspects being quashed in 2011. He was retried, with another defendant. Both were convicted and sentenced to life imprisonment.

3.4.4 Numbers and time frames

Whether a law reform agency operates primarily on the basis of a formal programme or primarily on the basis of commissioned projects, all law reform agencies will be engaged in a rolling programme of work.

Two connected questions arise concerning programmes:

- How many projects should be included in a law reform agency work programme (whether a formal programme of law reform or references or both)?
- What is the ideal time frame for a law reform agency work programme?

There is no simple answer to these questions. Both depend on the resources of the agency, the inherent size and complexity of

Sources for projects in selected law reform agencies

Law reform agency	Project sources		
	Programmes	References	Other
Alberta Law Reform Institute		X	X
Australian Law Reform Commission		X	
British Columbia Law Institute		X	X
Cayman Islands Law Reform Commission		X	X
Hong Kong, Law Reform Commission of		X	
Jersey Law Commission			X
Kenya Law Reform Commission	X	X	X
Law Commission for England and Wales	X	X	
Law Commission of India		X	X
Law Reform Commission of Nova Scotia		X	X
Law Commission of Ontario		X	X
Law Reform Commission of Ireland	X	X	
Law Reform Commission of Western Australia		X	
New South Wales Law Reform Commission		X	
New Zealand Law Commission	X	X	X
Northern Territory Law Reform Committee		X	
Queensland Law Reform Commission		X	
Scottish Law Commission	X	X	
South African Law Reform Commission	X	X	
South Australian Law Reform Institute		X	X
Tasmania Law Reform Institute		X	X
Victorian Law Reform Commission		X	X

the project, and outside pressures on timing from government or elsewhere.

In general, however, those law reform agencies that work on the basis of programmes of law reform generally operate on the basis of a life cycle of between three and five years. In some instances, the length of a programme may coincide with the term of office of a majority of the appointed commissioners or board members.

The longer the life cycle of a programme, the greater the number of specific projects that will be included in the programme. However, if the mixture between narrow-focus and wider projects favours more narrow-focus projects, then this will also affect the total number of projects included in a programme.

In any event, it has become common practice of many law reform agencies for projects from a previous programme to be carried over into, or overlap with, projects in a new programme. The annual reports of a commission-based law reform agency, such as the Australian Law Reform Commission, and a programme-based law reform agency, such as the Law Commission for England and Wales or the Scottish Law Commission, will therefore broadly resemble each other: they will both contain an analysis of projects under consideration, projects just begun, projects well under way, projects completed and projects implemented.

3.5 Selection criteria

Selection criteria are the general, high-level criteria or principles that many law reform agencies have developed in order to determine what type of law reform projects they should carry out. While there is a shared core to these criteria, the diverse form of law reform agencies means that there is no single transferable set of criteria.

The core selection criteria for many law reform agencies, in the terms set out by the Law Commission for England and Wales, are:

- **importance:** the extent to which the law is unsatisfactory, and the potential benefits from reform;
- **suitability:** whether the independent non-political Commission is the most suitable body to conduct the review; and
- **resources:** the experience of commissioners and staff, the funding available, and whether the project meets the requirements of the programme.¹⁷

The Scottish Law Commission broadly follows the same approach to setting selection criteria; but sets out the national context, namely having regard to the Scottish Government's overall purpose for Scotland, the National Performance Framework and the national outcomes for Scotland. In addition, the Scottish Law Commission states that in selecting projects they bear in mind whether or not a bill on a project would be suitable for the special parliamentary processes, in particular for certain commission bills in the Scottish Parliament.¹⁸

Projects are selected according to the criteria of importance, suitability, and resource availability.

Other approaches to selection: Victoria and South Africa

Victoria

The Victorian Law Reform Commission adopts a rather different approach to selection. It draws a distinction between references it receives from the Attorney-General of Victoria, on the one hand, and 'community law reform projects', on the other.

Community law reform projects address legal issues that are of general community concern, but are small enough to have relatively straightforward solutions. In addition, community law reform projects must not require significant resources.

In deciding whether to undertake a community law reform project, the Commission considers the following:¹⁹

- **The area in which the law applies:** the Commission can only make recommendations about state laws.
- **The scope of the community law reform project:** this includes the complexity of the legal issues raised, the amount of research required and the amount of legal change that may be needed. The Commission can only take on community law reform projects that deal with relatively small changes to the law.
- **The amount of community consultation that will be needed to fully consider the issue:** complex and controversial subjects or areas of law that do not have strong community consensus will generally not fit within community law reform projects. These types of issues require significant consultation and public debate to resolve. This is better suited to a government-initiated reference or inquiry.
- **The law reform proposal's likely public benefit:** the Commission is interested in projects that will fix problems with the law that affect a significant proportion of the population or address problems faced by significantly disadvantaged members of the community.
- **Community involvement:** if a community group is interested in putting forward a law reform idea, the Commission seeks to know how the group have consulted with people to check that the proposal meets their needs. The Commission also likes to know how the group proposing the idea will keep people informed and involved if the law reform idea is accepted as a community law reform project by the Commission.
- **The prospects of success for the reform proposal:** community law reform projects must provide a simple, effective solution to an anomaly, inequity or gap in the law.
- **The resources and time needed to undertake the community law reform project:** the legislation governing the Commission requires that community law reform projects must not require significant resources. The Commission prefers community law reform projects that can be completed within 12 months, using existing resources.
- **Avoiding duplication:** if the law has recently been considered by parliament or is currently being reviewed, or likely to be reviewed by government, the Commission will not undertake the project. If the law reform idea better suits consideration by another law reform organisation, the Commission will inform the person or organisation of who to approach.

Other approaches to selection: Victoria and South Africa (cont.)

South Africa

All requests received by the South African Law Reform Commission are assessed with reference to the Commission's selection criteria.²⁰ The criteria provide for a two-phased process to determine whether an investigation should be recommended for inclusion in the Commission's research programme. The first phase is an initial screening process to determine whether a proposal or request falls within the mandate of the Commission. The following aspects are addressed during this process:

- whether the issues concerned are predominantly legal;
- whether the legal problem can be addressed in a way that does not require a change of the law;
- whether there is another institution or government department better placed to deal with the request; and
- whether there are any pending legal developments that could influence the relevance of the investigation.

If all the above criteria are met, the request proceeds past the first phase and a preliminary investigation is undertaken during the second phase. Phase 2 is aimed at the evaluation of the request in greater depth to assist the Commission with advising the Minister of Justice and Constitutional Development on whether an investigation should be included in the Commission's research programme. Such a preliminary investigation must be concluded within a specified period and must be communicated to the requester. The criteria used in Phase 2 are the following:

- the extent to which the law may require reform;
- the scale of the problem in terms of the proportion of the community affected;
- the potential benefits likely to accrue from undertaking reform or repeal of the law;
- the extent to which the investigation contributes to the implementation of a broader government policy;
- enhanced constitutionality;
- whether the issues would be of interest to the private sector from which the broader community would also derive a benefit;
- whether the investigation would require substantial, long-term commitment and fundamental review;
- whether extensive public or professional consultation would be necessary;
- whether circumstances indicate that the investigation needs to be conducted in an impartial manner where vested interests are present or where there are significant differences in views or objectives among various relevant entities;
- whether an investigation would promote informed public debate on future policy direction; and
- the extent to which the investigation would benefit poor and previously disadvantaged communities.

Although all the above criteria are considered, a request need not meet all the secondary criteria to be included in the programme. Any proposal approved by the South African Law Reform Commission for investigation is submitted to the Minister of Justice and Constitutional Development and is included in the Commission's research programme after approval by this minister.

Some law reform agencies take a somewhat different approach to ‘importance’. In the criteria published by the Australian Law Reform Commission and the Law Reform Commission of Tanzania, importance is explicitly linked to community concerns or the needs of the community. In South Australia, importance is linked to the administration of justice in the state, and in New Zealand the minister responsible for the Law Commission may require the Commission to accord priority to a project that fits within the government’s priorities. The South Australian Law Reform Institute also gives independent weight to the priorities of the state’s attorney-general.²¹

Many agencies also refer to the general needs of the programme, either as part of the ‘resources’ heading (for example, the Scottish Law Commission) or as a freestanding criterion (such as the Alberta Law Reform Institute).²² Other criteria may also be added to this standard core. The Australian Law Reform Commission, for instance, refers to the need to update the law as a result of scientific or technological developments. The Tanzanian Commission makes express reference to time frame, requiring projects to be completed within two years.

3.6 Relations with government

Government support for the project is very important, and essential if legislation is required to implement the outcome.

For most standard model law reform agencies, governments are closely involved with the initiation of projects. References, where this mechanism is used, by definition involve an issue of concern to government. Even in respect of programmes, the statute establishing the law reform agency will generally require the programme to be at least approved by the government or a specified minister or law officer. More so, in-government law reform units can be expected to follow government priorities.

The position is different for institute model law reform agencies. However, most law reform institutes will include the attorney-general as an *ex officio* board member, or their nominees, who may express a government view during the process of drawing up a programme.

Whatever the formal position, the purpose of law reform is to change the law, not merely the academic purpose of setting out what a better law might be. So in all cases, it is unlikely to be a good use of law reform resources to start a law reform

New Zealand: Guiding executive referrals

The New Zealand Cabinet has set criteria for ministers to consider before proposing projects for the Law Commission's work programme. The criteria are contained in the Cabinet Office Circular (which is a binding directive on ministers and officials). Projects proposed for the Law Commission should meet one or more of the following criteria:

- involve issues that span the interests of a number of government agencies and professional groups;
- require substantial, long-term commitment or fundamental review;
- involve extensive public or professional consultation;
- need to be done independently of central government agencies because of the existence of vested interests, or a significant difference of views;
- require independent consideration in order to promote informed public debate on future policy direction;
- involve technical law reform of what is often called 'lawyer's law' that would be likely otherwise to escape attention.

project that the government opposes, or indeed to which the government is merely indifferent. Government buy-in to a project is always essential where the objective of the project is, as is usually the case, the implementation of reform by means of legislation.

It is therefore important, when considering initiating a law reform project, that the law reform agency discusses the proposed project with the relevant government ministry or ministries, and ensures that the government's view is considered as a factor in the decision-making process. Clear opposition from government will frequently be a deciding factor. However, such discussions are not all one way. If there is a strong case for a project, evidenced, for instance, by the concerns of civil society stakeholders, then the programme-making process can provide an opportunity for a law reform agency to put the case for a project to the government.

Steps can be taken to set out more formally the relations between a law reform agency and government in relation to the initiation of projects. In New Zealand, this has been accomplished through authoritative administrative guidance.

As discussed previously, the process of engagement with government generally has been taken a stage further in England and Wales, through the recent innovation of statutory protocols between the Law Commission for England and Wales and the

England and Wales: Initiation and the protocols

The statutory protocols between the two governments and the Law Commission seek to ensure that the relevant policy department is committed to the project from the outset.

The United Kingdom minister who approves the Law Commission's programme is the Lord Chancellor and Secretary of State for Justice. The protocol with the United Kingdom Government specifies that:

'Where the Commission is considering including a project in a Commission programme, the Commission will notify the Minister with relevant policy responsibility. In deciding how to respond to the Commission, the Minister will bear in mind that, before approving the inclusion of the project in the overall programme, the Lord Chancellor will expect the Minister (with the support of the Permanent Secretary):

1. to agree that the department will provide sufficient staff to liaise with the Commission during the currency of the project (normally, a policy lead, a lawyer and an economist); and
2. to give an undertaking that there is a serious intention to take forward law reform in this area.'

The protocol with the Welsh Government makes equivalent provision, taking into account that the Welsh Government does not approve the programme, unlike the Lord Chancellor.

United Kingdom Government (in respect of England) and the Welsh Government.

The reform that introduced the protocol was at the request of the Law Commission, and arose out of a concern with implementation rates of law reform projects. It illustrates the fact that approval by the Lord Chancellor had, in respect of England, not proved a sufficient guarantee that government was committed to the project at the outset.

The social, economic, cultural and technological issues facing a jurisdiction will impact the selection of law reform projects. Some challenges are global, such as the impact of technology on the law.

3.7 The contemporary context

All projects are selected in a context provided by the particular social, economic, cultural and technological issues facing each jurisdiction. The general political setting at any given time may therefore suggest the need for prioritising certain areas for review. A change of government can present a new series of reform priorities, some of which may become the basis for projects in a law reform agency work programme, or provide opportunities for implementation.

Ireland and austerity

Following the economic and financial crisis that emerged in the Republic of Ireland in 2008, the International Monetary Fund/European Union Financial Assistance Agreement for Ireland (2010) imposed a number of reform conditions as a standard feature of such assistance programmes. These included reform of the law concerning personal insolvency and on alternative dispute resolution. The Law Reform Commission of Ireland had, however, completed reviews in these areas, avoiding the need for external solutions.

The contemporary economic or financial position of a state or territory may also be significant. In recent decades, many jurisdictions have experienced economic shocks, which can in turn lead to externally mandated reform programmes, often linked to external financial assistance programmes. Externally mandated reform programmes, however, may not always be designed in the context of the affected state, and can be difficult to implement. By contrast, there are benefits in an indigenous

Democracy and development in South Africa

In preparation for the onset of South Africa's democracy in 1994, the South African Law Reform Commission was requested to investigate the protection of human rights and different constitutional models. The Commission conducted research into group and human rights and constitutional models as part of Project 58 (Group and Human Rights) and Project 77 (Constitutional Models). This research was considered in drafting the Constitution of the Republic of South Africa Act 200 of 1993, which in turn informed the drafting of the Constitution of the Republic of South Africa Act, 1996. Since then, the Commission has conducted a number of investigations that flowed from the requirements of the constitution. The latter includes an investigation into the harmonisation of the common law and indigenous law (Project 90: Customary Law), which resulted in the adoption of two statutes (the Recognition of Customary Marriages Act 120 of 1998 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009); a review of the administrative law (Project 115: Review of Administrative Law), which resulted in the adoption of the Promotion of Administrative Justice Act 3 of 2000; and an investigation focusing on the rights to equality and human dignity in the context of domestic partnerships (Project 118: Domestic Partnerships), some of the recommendations of which were incorporated into the Civil Unions Act 17 of 2006.

The involvement of the Law Reform Commission in South Africa's development continues. South Africa has committed itself to achieving the goals set in its National Development Plan by the year 2030.²³ It seeks to address the triple scourge of poverty, inequality and unemployment. Areas in need of review, which speak to the aims of the National Development Plan, are given priority when considering the inclusion of projects in the Commission's law reform programme.

law reform agency putting forward proposals for reform that are consistent with the content of such external reform programmes.

Equally, the context in which law reform agencies work can include historic transformational change, to which the agency may contribute. Few changes in recent history were as significant as the process that led to the introduction of democracy in South Africa from 1990.

Challenges and opportunities of these sorts will vary from region to region and from jurisdiction to jurisdiction. However, some issues may be global. One such issue is the evolving impact of information technology and artificial intelligence on law and lawyers.

Law reform agencies may wish to consider to what extent they might include, within their work programmes, how legal frameworks may be affected by, and seek to regulate, such areas. Agencies may need to take account, for example, of a number of developments that may emerge over the coming years, including:²⁴

- exponential growth in information communication technologies and connected devices;
- increasingly capable machines, with many tasks that currently require human beings being performed by machines, including professional services such as legal services, through a combination of:
 - big data analytics: already being used, for example, in e-discovery in civil and criminal trials, and for searching online legislation databases;
 - artificial intelligence and machine learning;
 - the integration of computing in everyday objects, such as driverless cars, and associated issues of liability for road traffic-related personal liability claims and criminal liability; and
 - affective computing systems that can detect and express emotions;
- distributed computing based on ‘blockchain’ systems, and their use in banking, payment and financial services, including the growth of virtual currencies such as Bitcoin.

These developments will likely give rise to many issues for law reform agencies. Among them are the following:

- online courts and the e-filing of documents;
- the use of information technology by judges in analysing questions of law;
- data analytics ('big data') and the civil and criminal justice system, including e-discovery;
- the application of existing data protection concepts in distributed data processing systems;
- freedom of speech, defamation and social media;
- cybercrime and cybersecurity regulation; and
- the regulation of artificial intelligence systems and machine learning tools.

Traditional law reform and statutory consolidation projects will remain a key element of law reform agency programmes into the foreseeable future. However, the impact of information communication technologies and artificial intelligence on substantive law and legal processes will likely become increasingly significant in many future-oriented law reform agency work programmes.

Notes

- 1 <https://www.scotlawcom.gov.uk/files/9712/8014/6403/Report%20on%20presumption%20of%20death%20Report%2034.pdf>
- 2 <http://www.lawreform.ie/news/report-on-civil-law-of-missing-persons-388.html>
- 3 South African Law Reform Commission, Project 137, Report on the review of the expungement of certain criminal records, 2017.
- 4 South African Law Reform Commission Project 84, Report on application of the trapping system, 1994.
- 5 http://salawreform.justice.gov.za/reports/r_pr110_01_2002dec.pdf
- 6 <http://www.alrc.gov.au/report-16> and <http://www.alrc.gov.au/report-20>
- 7 <https://www.gov.uk/government/publications/the-law-commission-report-on-criminal-code-for-england-and-wales-april-1989>
- 8 https://www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf
- 9 <https://www.lawcom.gov.uk/project/sentencing-code/>
- 10 <https://www.bcli.org/project/strata-property-law-phase-one> and <http://www.bcli.org/project/strata-property-law-phase-two>. Strata property is a statutory form of property holding in which individuals own an interest in their own home and are members of a strata corporation which owns common parts, and has obligations in relation to maintenance, etc.
- 11 <http://www.klrc.go.ke/index.php/bills/505-model-laws-developed-by-klrc>

- 12 <http://www.alrc.gov.au/publications/report-31>
- 13 <http://www.lawcom.govt.nz/our-projects/juries>
- 14 Appendix B of a report of the Law Reform Commission of Ireland (2016) contains consultations with young people on harmful internet communications including cyber bullying.
- 15 The Northern Ireland Law Commission, while still formally in existence, has effectively been de-funded by the Northern Ireland Executive.
- 16 <https://consultations.justice.govt.nz/independent/search-and-surveillance-act/>
- 17 <http://www.lawcom.gov.uk/about/how-we-work/>
- 18 http://www.scotlawcom.gov.uk/files/6414/2321/6887/Ninth_Programme_of_Law_Reform_Scot_Law_Com_No_242.pdf
- 19 Victorian Law Reform Commission Act 2000, section 5; <http://www.lawreform.vic.gov.au/all-projects/about-community-law-reform/criteria-for-project>
- 20 South African Law Reform Commission Thirty-Sixth Annual Report 2008/2009 11-12 (http://salawreform.justice.gov.za/anr/2008-09_anr.pdf)
- 21 <http://www.alrc.gov.au/law-reform-process> (Australia); the 2012–2013 annual report of the Law Reform Commission of Tanzania; <https://law.adelaide.edu.au/research/law-reform-institute/> (South Australia); <http://www.lawcom.govt.nz/sites/default/files/corporatePaperAttachments/NZLC%20Statement%20of%20Intent%202013-2016.pdf> (New Zealand).
- 22 http://www.scotlawcom.gov.uk/files/6414/2321/6887/Ninth_Programme_of_Law_Reform_Scot_Law_Com_No_242.pdf (Scotland); <https://www.alri.ualberta.ca/index.php/about-alri/our-process/project-selection> (Alberta).
- 23 www.gov.za/issues/national-development-plan-2030
- 24 See for instance Susskind and Susskind 2015.