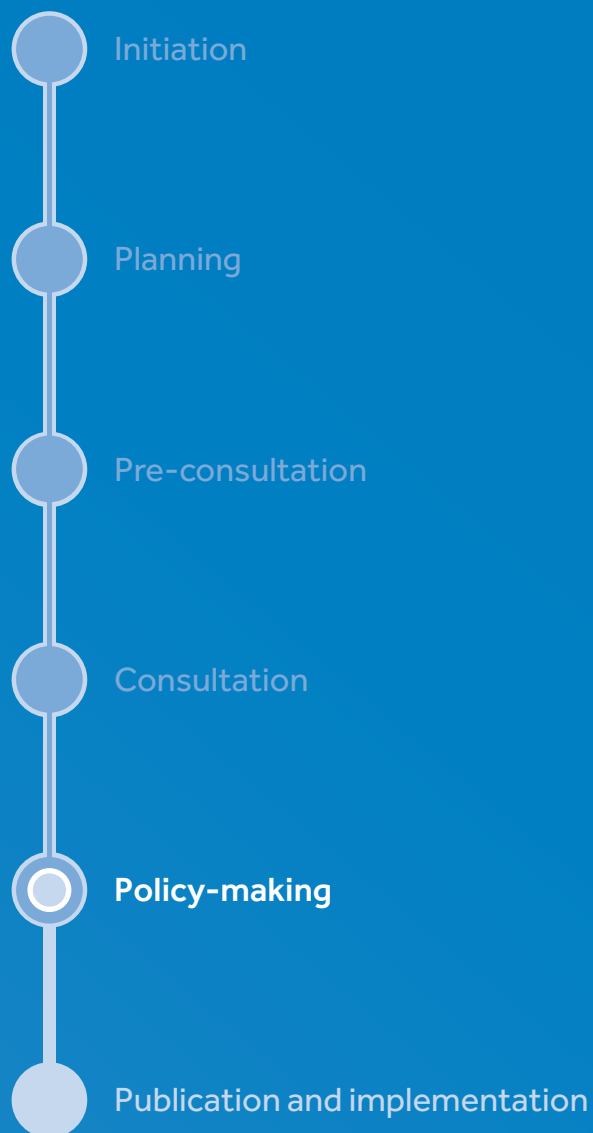


# Chapter 7

## Policy-making





## Chapter 7

# Policy-making

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Chapter 7 turns to policy-making after consultation. It considers how the fruits of consultation are analysed, understood and fed into the policy-making process, leading law reform agencies to come to conclusions. The chapter looks at the development of documents by which law reform project teams come to recommendations for final decisions, and how those are approved within a law reform agency. The chapter then turns to the advantages and disadvantages of cost-benefit analysis as a tool for law reformers, and considers other forms of (usually) government-inspired assessments that a law reform agency may or may not itself wish to perform. Finally, the chapter looks at how those law reform agencies that produce draft bills with their reports go about doing so.

Once the consultation process is complete, the law reform agency must come to final conclusions about what it will recommend.

### 7.1 Responses to consultation

The key bridge between the consultation process and decision-making is the mechanism used by the law reform agency to encapsulate and understand the responses to the consultation. Practice varies among law reform agencies. Sometimes no additional work will be necessary. In other circumstances, a fuller analysis of responses, and the results of active consultation, will be desirable.

In relation to some projects, the main fruit of the consultation period is confined to a small number of written responses. This may be the case in a narrowly focused, technical subject. In such a case, there may be no need for a further document or analysis. The responses themselves may be circulated both within the project team and more widely within the agency, as necessary, for decision.

*The response to consultation is the link between the consultation process and the law reform agency's decision-making. The response may result in a written analysis.*

### **Analysis of responses: Australia and England and Wales**

The Australian Law Reform Commission prepares summaries of both written responses and consultation meetings, which are maintained on a database and organised according to the question or proposal of the relevant paper (or, for some more general responses, by chapter). When a team member accesses the database for a particular question or proposal, they receive a brief summary of each response to that question or proposal. Assuming it was received in electronic form, the summary will be linked by a hyperlink to the full response. A project team member can, for instance, print a summary document for a whole chapter to assist with the writing up of the report on that issue.

The database summaries are not separately published. While available to other commissioners, the database is seen primarily as a tool for the project team in the drafting of the final report.

The Law Commission for England and Wales produces a separate document called an 'analysis of responses' or a 'consultation analysis'. This document goes through the consultation paper chapter by chapter and proposal by proposal, both setting out quantitative information – how many consultees were for or against a proposal – and reciting the arguments deployed. These documents often include substantial quotation from responses. The purpose is to inform both the project team and, critically, the commissioners who make the final decisions (see example box 'Decision-making: commissions and institutes' at section 7.2).

For many years, the analysis of responses was a private document. More recently, the Law Commission has adopted the general United Kingdom Government approach, which requires the analysis document to be published at or before the publication of the final report. Whether publication is before or at the same time as final report publication varies.

The Commission's recent project Mental Capacity and Deprivation of Liberty dealt with the law relating to the system for the approval of steps that deprive people who lack mental capacity (in some respect) of liberty in a care context. The consultation paper received 583 written responses. The consultation analysis was published at the same time as the final report in March 2017. It deals with 95 provisional proposals and questions and runs to 297 pages. In addition, it includes a chapter on other issues brought up by respondents, which includes a section relating personal experiences of the system.<sup>1</sup>

The Law Commission's analysis of responses/consultation analysis primarily focuses on written responses.

It may now be good practice for a law reform agency to publish on their website a summary of consultation responses or the individual responses.

However, in most cases, it will usually be advisable for there to be some intermediate stage of assessment or analysis. This applies to both written responses and information from active consultation events.

At one end of the scale, a single, comprehensive new document analysing the responses may be prepared. This may be written from scratch or it may be the product of a computer database.

The form that an analysis or similar document takes will be substantially influenced by the decision-making process used by the law reform agency.

In some law reform agencies, a general analysis document will do no more than count the number of consultees who supported or opposed a particular option. For a more detailed understanding of the response, the team relies on each team member reading consultation responses, or at least those relevant to their own areas, in their entirety. Where this is the case, it will generally imply that the central decision-maker, such as the commission sitting as a body, will be likely to take a more high-level approach to approval.

In those law reform agencies where consultation meetings and field work by the project team will be comparatively more important, there may be a written account of these meetings or field work, but not a further distillation or analysis of the written responses.

### **Tanzania: The Safari Report**

The Law Reform Commission of Tanzania uses the two-stage consultation approach, with an initial position paper and a more developed discussion paper. The principal focus of wide *public* consultation is the position paper. It is at this stage that the Commission undertakes field work in various parts of the country to gauge public and professional opinion. The Commission captures the information in a safari report, which informs the drafting of the background paper. The background paper is then subjected to further scrutiny at a stakeholder workshop. There is no necessity for a separate document relating to the consultation on the background paper. The safari report is not published.

## **7.2 Coming to conclusions: documents and approvals**

In all law reform agencies, a final decision on policy must be made. The decision is characteristically made by means of the approval of a document. The nature of the decision-maker, and the practices of the law reform agency in publication terms, will determine the nature of that document.

The initial decision-making will be carried out within the project team. By whom and how decisions are made will vary with each team, and even with the personalities involved.

*The law reform agency must make a final decision to recommend a policy, which will often be contained in a document. This will often form the draft of the final report.*

***The final decision on policy will be made by the commission sitting as a body.***

However, for the most part, the locus of decision-making is the drafting of the decisive document. That is, the document on the basis of which the formal decision of the law reform agency will be based. Where a decision on some broad matter is necessary, it may be taken in advance of detailed drafting. But in most law reform projects, a series of distinct decisions must be made as each of the provisional proposals and questions are worked through, and that is usually done as a product of the process of drafting.

### **Decision-making: Commissions and Institutes**

In all standard model law reform commissions, the final authoritative decision is taken by the commission sitting, and deciding, as a body. In standard model law reform agencies, such as the Law Commission for England and Wales and the Scottish Law Commission, the decision-making process is conceived of as including the *peer review* of the principal documents produced during the law reform process. At the Law Commission for England and Wales, while each commissioner is responsible for the work of a single-subject-matter team (see the example box 'Project teams: three law reform agencies' in Chapter 4 above), commissioners are expected to spend about a quarter of their time on the review of the work of other teams in this way. This requires a strict protocol before the meeting of the Commission at which the paper is presented. The draft paper must be circulated to the commissioners, as well as to the chief executive and senior legislative drafter, three weeks before the meeting. The commissioners must then submit written memoranda with their comments to the team within two weeks. The commissioner responsible must then circulate the project team's written response one clear day before the commissioners' meeting. The project team will be present at the commissioners' meeting, to assist with dealing with points that arise.

At the commissioners' meeting, the paper is discussed, the issues in contention having been refined by the previous exchange of memoranda, and the key issues are decided on. There is virtually never a formal vote. Sometimes issues are subject to further discussion between the project team and individual commissioners after the meeting. Provision can be made for a second commissioners' meeting, but this is not usually necessary.

At the Law Commission for England and Wales, there are two stages to the final decision-making process. The first paper after consultation to come before commissioners for approval is the policy paper. This internal document sets out the key decisions to be taken. Its approval clears the way for the team to instruct the legislative drafters to draft a bill (see below). After the bill is finalised, both the bill and the report that accompanies it are approved using the same process.

This procedure also applies to the draft consultation paper.

The Law Reform Commission of Tanzania utilises a larger meeting to scrutinise each paper that it produces. The professional meeting comprises the chair of the Commission, the full-time commissioners, the secretary (chief executive), section heads and legal officers. Once the paper has been corrected following the

In many cases, the decisive document will be the draft of the final report. Some law reform agencies however generate a distinct, internal document in advance of the drafting of the final report. Where the agency drafts a bill, this document (often a 'policy paper') will seek final decisions before drafting begins. The difference is determined by the mechanism used by the law reform agency to come to its authoritative decision. In virtually all cases, the project team will provide a recommendation.

### **Decision-making: Commissions and Institutes (cont.)**

professional meeting, it goes to a commission meeting, consisting of the chair, full-time and part-time commissioners, and the secretary, for formal approval.

The South African Law Reform Commission appoints a project leader for each investigation, usually a member of the Commission. Research papers and final reports are developed by the Commission's research staff under the guidance of and in conjunction with the project leader and an advisory committee. All draft papers and reports are submitted to the project leader and advisory committee for initial approval before formal submission to the full Commission for final approval. The Commission retains the prerogative to comment on and refer the draft paper, or report, back to the researcher and advisory committee for amendment should this be necessary, pending final formal approval.

In the British Columbia Law Institute, each project utilises from the outset a project committee, comprising volunteer experts in the area (see example box 'Project teams: three law reform agencies' in Chapter 4 above). It is this committee that approves the draft report in the first instance. The draft report is then forwarded to the board for approval. The board, as is usually the case in the institute model, is fairly large, and comprises representatives of the key legal stakeholders whose agreement constituted the Institute, plus various *ex officio* members.

The Institute has adopted a policy that sets out the grounds on which the board may not accept the committee's recommendations. The factors include:

- the expertise and experience of the committee (the committee can be expected to be made up of those with a high level of expertise, experience and judgement in relation to the issue under consideration);
- whether a recommendation is significantly inconsistent with a previous recommendation made by the Institute;
- whether a recommendation is in opposition to an important public policy; and
- the obligation of the board to act in good faith and in the best interests of the Institute.

If the board feels that it cannot approve a recommendation, in the light of the policy, it can ask the committee to reconsider. If consensus is impossible, then the board's view is determinate. Such conflict is rare. The system requires the staff and management of the Institute to ensure that all those involved understand their roles and the expectations of them, and to monitor possibly difficult issues in order to address them before the draft report goes to the board.

***Cost–benefit analysis can be a useful tool for informing decision-making by law reform agencies. Such analysis aims to provide the basis for comparing different options.***

### 7.3 Cost–benefit analysis

Cost–benefit analysis can be a useful tool for law reformers in coming to policy decisions. It can provide persuasive arguments for implementation. However, it also has its limits.

Cost–benefit analysis is an analytical tool used to inform decision-making in relation to, for example, public policies, regulations, law reform options and capital investment projects. It can provide a very useful technique for law reformers to assess the relative advantages and disadvantages of alternative options for reform. In addition, it is increasingly the case that governments are requiring new legislative proposals (whether from within government or from a law reform agency or other source) to undergo a cost–benefit analysis. Initially, these requirements were limited to legislative proposals that affected the regulation of business, but they are becoming more general. Where this is the case, there will usually be a specific format to which these analyses must conform.

Cost–benefit analysis weighs up the anticipated costs and benefits to society, to calculate the net benefit; that is, benefits minus costs. Its purpose is two-fold: to determine whether or not a change is justified; and to provide the basis for comparing different options. Although a cost–benefit analysis is most often used when a policy initiative is under consideration, it can also be used during a project’s life cycle to influence decision-making at different junctures.

Costs and benefits must be expressed in financial terms (‘monetised’) whenever possible because cost–benefit analysis results are expressed primarily in monetary terms. In the case of law reform, monetisation can prove challenging. For example, consider a law reform project with the objective of improving the legal procedure for establishing fitness to plead in a criminal case. It may be possible to estimate court time savings from a more efficient court procedure. However, it is not possible to monetise with any accuracy the value of increased legal certainty or increased confidence in the legal system, at least not without spending a great deal on social research.

Inevitably, costs and benefits occur over varying periods. Some will occur immediately, as is often the case with costs of purchasing goods and services to enable the policy intervention, while benefits occur in the future. In order to adjust for costs and benefits occurring at different times, a technique called ‘discounting’ is applied. Discounting enables the transformation of a net benefit

## **Cost–benefit analysis and impact: The United Kingdom and South African experience**

The central government in the United Kingdom operates a unified system of impact assessment, based on, but broader than, a cost–benefit analysis approach, overseen by the Treasury and contained in 'the Green Book'.<sup>2</sup> This provides rules on undertaking a cost–benefit analysis, including detailed practical examples.

The United Kingdom Civil Service has a well-established governance structure to support both cost–benefit procedure and technical content. A regulatory policy committee provides civil service-wide scrutiny of cost–benefit analyses, reviewing the evidence and analyses that support policy proposals, and ensuring accuracy.

The Law Commission for England and Wales has produced cost–benefit analyses, prepared in accordance with this system, in its reports, including joint reports with the Scottish and Northern Irish Law Commissions, for almost 10 years and has a well-established internal procedure in place, overseen by a full-time economist. The Scottish Law Commission prepares impact assessments in accordance with Scottish Government guidance, but does not have an economist in post, or access to an economist's advice.

Some examples of monetised costs and benefits are outlined below:

- Training as a result of a change in the law is a consideration in all projects. In a project on the rules on unjustified threats in intellectual property disputes, one-off judicial training was costed at £131,000. In a project on the regulation of taxis and private hire vehicles, training was estimated at an initial £4.38 million with persisting annual costs of £300,000. There are rarely training costs in criminal projects because of the existing ongoing training provision for criminal case judges.<sup>3</sup>
- Major costs in criminal projects are usually occasioned by increases in prison places. In a project on offences against the person in 2015, the annual increase was estimated at £3.28 million.
- The most significant savings ever generated were related to a project on level crossings. The savings came about as a result of proposals that would make the closure of level crossings easier. Because this counted as capital investment, the savings were calculated on a 60-year basis. It was estimated that the net saving would be £1.4 billion over 60 years. The main source of saving was in driver waiting time, a cost given a standardised value in Treasury rules.
- In respect of some projects, it has been possible to monetise the value of increased clarity and certainty in the law. A 2015 project on wildlife law estimated a saving, based on a reduced need for external consultancy, of £2.55 million annually. In a recent project on the rules relating to the deprivation of liberty in the care of those lacking mental capacity, the Commission estimated improved health outcomes valued at £83 million per year.

In South Africa, the Cabinet, introduced the Socio Economic Impact Assessment System in 2015 in response to concerns about the failure in some areas to understand the full costs of policy initiatives, legislation and regulations. As a result, all Cabinet memoranda seeking approval for draft policies, bills or regulations must include an impact assessment, reflected in a full report that has been signed off by the national Socio Economic Impact Assessment System unit. Senior government officials representing, among others, the Presidency, the Economic Development Department, the National Treasury and state law advisers ensure quality control and capacity support for the Socio Economic Impact Assessment System throughout government.<sup>4</sup> All draft legislation recommended by the South African Law Reform Commission is submitted to the Socio Economic Impact Assessment System process.

into a net present value. The general rule for deciding whether or not to adopt an option is to select the project with the greatest net present value. However, specific resource constraints, such as a capital shortage, might require a more nuanced approach such as the ranking of the benefit to cost ratios for each project. Many agencies do not have the expertise or capacity to undertake proper cost–benefit analyses. Care should be taken not to undertake such analyses unless the appropriate capacity exists.

### 7.3.1 Advantages and disadvantages of cost–benefit analysis

A cost–benefit analysis provides transparency in decision-making by clearly identifying the basis on which decisions are made with reference to the costs and benefits to the main stakeholders. Such an approach conforms to best practice in evidence-based policy-making. It also builds institutional credibility because government officials, the legislature and citizens have access to the evidence supporting proposed policy interventions. Perhaps most importantly, a cost–benefit analysis provides for the cost-effective use of public resources.

However, it is not without its detractors. There are concerns surrounding the theoretical basis of a cost–benefit analysis. Critics question the extent to which it is possible to make a balanced assessment of gains for some against losses for others by simply netting the benefits, which amounts to trading off one person’s benefits for another person’s costs. One solution to such concerns about equity is the use of distributional weights, to prioritise benefits gained to those stakeholder groups identified as having particular significance. For example, participation by under-represented groups in a policy initiative may be highly valued and this might be given a weight that is twice as high as that given to other socio-economic groups that do not have the same characteristic. Such an approach provides a mechanism to adjust the outcome and address equity concerns, in an effort to ensure that the policy is fair. But, ultimately, it simply displaces the issue to the determination of the appropriate weighting.

The most frequently voiced criticisms of cost–benefit analysis surround the practicalities of applying it to the policy-making process. There are problems with monetisation when critical policy benefits lose visibility because they cannot be monetised. A cost–benefit analysis scheme may be wider than just the

*Cost–benefit analysis has the advantages of transparency and providing for cost-effective resource utilisation. Its disadvantages include the problems with netting and weighting different costs, and the monetisation process. Detractors argue that many costs cannot be accurately monetised, or monetised at all.*

cost–benefit calculation itself, and may provide for the statement of non-monetised costs and benefits, but by definition they cannot appear in the calculus. A proposal might be promoted because it allows for more just outcomes, perhaps in distributional terms. But this benefit is very hard to capture in monetary terms. As a result, a cost–benefit analysis may do no more than tell a policy-maker how much the enhancement of justice would cost.

Further, standard monetary values applied to things such as the value of life may also appear arbitrary.

There may also be evidential issues that tend to favour conservatism. It is often relatively easy to ascertain costs, particularly short-term costs, because these can be read off from an understanding of the status quo. Benefits, particularly longer term benefits, may be much harder to evidence, because they inevitably involve a higher degree of speculation. The danger is therefore that a cost–benefit analysis may be skewed to exaggerate short-term costs and underestimate long-term benefits.

Finally, the discount rate is very significant in determining the net present value, and small changes to it can have significant effects. But the discount rate is essentially a conventional measure, and is often based on a cross-government single standard.

### 7.3.2 Use by governments

Efficiency in government is said to have been the driver for techniques such as cost–benefit analysis used to seek to ensure efficient utilisation of public funds in major public investments. Most government agencies in Western industrialised economies have protocols in place that require the completion of a cost–benefit analysis as part of a broader approach to impact assessment. An impact assessment involves the comprehensive assessment of all relevant factors and includes the assessment of economic factors and also non-monetary environmental, social and political issues.

It can be argued that the potential value of a cost–benefit analysis approach in developing countries is greater than in high-income economies, because the scope for efficiency savings in decision-making may be greater. A cost–benefit analysis may also offer some insurance against corruption, in that it serves as a mechanism of transparency, making it harder for a group or an individual to distort a project plan to serve their own interests. Many developing countries now employ some version

of cost–benefit analysis, but may face more challenges as a result of a lack of good data and macro-economic instability.

## 7.4 Other impact assessments

*Human rights and equality assessments are examples of other impact assessments that some governments require.*

Governments increasingly require legislative proposals or other policy initiatives to be subject to various assessments. The purpose of these assessments is to ensure that certain desirable perspectives are incorporated into the policy-making process in a holistic or generalised way. These assessments bring a variety of perspectives to bear. Very common are equality assessments, designed to ensure that policy developments do not discriminate against disadvantaged groups, and human rights assessments. But there are frequently others, reflecting the particular preoccupations and challenges of the country, such as impacts on rural areas or islands.

### **The approach of the Welsh Government**

The devolved Welsh Government requires legislative proposals and other policy developments to undergo a number of impact assessments. Some impact assessments are required by law:

- equality and human rights;
- children and young people;
- the Welsh language; and
- biodiversity.

Others are imposed by Welsh Government policy:

- sustainable development;
- effect on rural areas;
- health;
- the voluntary sector;
- climate change; and
- economic development.

The application of the third category of impact assessment depends on the subject matter. If one of these assessments is not completed, a return must be completed explaining why not:

- privacy;
- justice and the courts;
- habitat regulation;
- the environment and environmental strategy; and
- European Union state aid rules.

Within the Welsh Government, assessments are carried out using prescribed template documents, which require consideration at each stage of the policy process.

### 7.4.1 Who should conduct assessments?

It may not be compulsory for law reform agencies to undertake these assessments, but there are good arguments for them doing so, where it would be advantageous.

Typically, the law reform agency will not be strictly required to undertake such assessments. In respect of an equality and human rights assessment, all law reform agencies would be expected to take account of these considerations as part of their own law reform processes. However, that is not necessarily true of other forms of impact assessment.

The question therefore is how far the law reform agency should go in performing assessments itself, or whether it should leave it to the government department responsible once they have accepted the law reform recommendations.

On the one hand, if the assessments are likely to significantly influence the department in its decision of whether or not to accept the recommendations, there is a strong case for the law reform agency to undertake the assessments itself. It is likely that the agency will do a better job of it than the department. The agency will know much more about the proposals and will have a strong motivation to see them accepted. It was this argument that led the Law Commission for England and Wales to accept the obligation to undertake the United Kingdom Government's impact assessment (which includes both a cost-benefit analysis and individual assessments).

On the other hand, if the contrary is true, then there is little to be gained, particularly if the relevant issues can be expected to be integrated into the agency's practice in any event. If the agency does not undertake assessments, it can nevertheless aim to assist the department that will undertake them with data and arguments, which may impact on consultation questions.

Even if the agency does compile the assessments itself, it will be mindful of the need to not let the process distort its own processes.

## 7.5 Bills

A number of law reform agencies, either as a matter of course or selectively, submit final reports with bills attached.<sup>5</sup> The agencies that take this approach are in the minority, but range from the

larger law commissions to small state or jurisdiction agencies such as the Law Reform Commissions of Trinidad and Tobago and of the Cayman Islands.

### 7.5.1 Why draft bills?

There are significant advantages to a law reform agency preparing a bill to reflect its recommended changes to the law and attaching the bill to its final report.

First, those law reform agencies that provide bills find that the process of preparing a bill to implement recommendations is usually valuable. The interrogation that the proposals are subjected to as a result of the process of instructing legislative drafters assists with the refining of the policy behind the recommendations. It also helps with working out the details of the policy, for example how the proposed new law fits in with the existing common law or statutory framework. This advantage may not be quite so apparent if the bill is drafted by a law reform lawyer rather than by specialist legislative drafters. However, the process of drafting the legislation may still test the policy.

Presenting a bill prepared along with a report can also smooth the path towards implementation of the report. Those in government considering the report will have to hand for consideration not only the report with recommendations and the reasons for them, but also draft legislation that reflects the proposals. This provides a complete and convenient package from the law reform body for the government to pick up and consider, and begin the process of implementation where minded to do so. While, in most jurisdictions, the drafting will be revisited by legislative drafters after acceptance of the recommendations by the government, most of the hard work of drafting will have been done.

While those law reform agencies that provide draft bills are convinced of its benefits, it should be noted that there are costs to doing so. One is monetary – paying seconded drafters can be expensive. Such expenditure may only be warranted if there are good prospects of implementation while the bill as drafted remains current. Further, drafting takes time. In the case of a large and complicated bill, it can add as much as a year or more to the length of a project. This is relevant to implementation, in

*A minority of Commonwealth law reform agencies submit bills with their final reports to government. This can smooth the path of the report's recommendations into law. These bills may be drafted by professional legislative drafters or by law reform agency staff lawyers.*

### **Bill Drafting in New Zealand and South Africa**

In New Zealand, some reports are accompanied by a bill. The Parliamentary Counsel Office has for many years provided drafting assistance to the Law Commission for its reports when it has the resources available. In most cases, however, the Law Commission's reports do not include a draft bill.

Irrespective of whether a bill has been included in a report, the administrative directives governing the government's response to a Law Commission report require, where the government accepts the Commission's recommendations, a bill to be prepared and included in the government's legislative programme. Obviously, this is a more straightforward exercise if there is already a draft bill attached to the report.

The founding statute of the South African Law Reform Commission requires that 'if after investigating any matter the Commission is of the opinion that legislation ought to be enacted with regard to that matter, the Commission shall prepare draft legislation for that purpose'.<sup>6</sup> To comply with this requirement, all final reports of the Commission where legislation is recommended must also contain a draft bill. The government minister responsible for the area of law to which the report pertains, as advised by their department, is at liberty to implement the recommendations contained in the report by introducing the legislation as included in the report into parliament; amend the proposed legislation before introducing it; or reject the recommendations and not introduce the legislation.

that the longer a project lasts, the more likely it is to outlast the initial enthusiasm of the government department responsible.

In the many jurisdictions where the agreed method of carrying out the law reform role is for the law reform agency to make recommendations to government without a bill, the agency may still be involved in the subsequent drafting process. The law reform body may be involved in assisting the government with the preparation of the bill.

#### **7.5.2 The drafting of a bill**

Who drafts the bill, and where they are located organisationally, differs between law reform agencies.

Some law reform agencies have their bills drafted by staff lawyers working on the law reform project in question, who provide a bill to attach to the report. This means that the agency lawyers require the skills to draft legislation, along with ongoing training and development in drafting skills. In South Africa, for instance, the research lawyers who prepare and draft the final report and recommendations also draft the legislation.

*Drafting guidance can be found in the Commonwealth Legislative Drafting Manual.*

**Legislative counsel: Seconded, employed and embedded**

The Law Commission for England and Wales seconded parliamentary counsel (as they are known) from the United Kingdom Government's Office of the Parliamentary Counsel for a period of time in order to draft bills, on the instructions of a project team, for attaching to the Commission's reports. The number of counsel seconded varies over time and in accordance with demand by the Commission and the ability of the Office of the Parliamentary Counsel to make them available.

In Scotland, the Scottish Law Commission currently engages the services of a retired Scottish parliamentary counsel on a part-time basis. He is located at the Commission and drafts Commission bills to be attached to reports. In addition, the Commission also has a working relationship with Scotland's Parliamentary Counsel Office, who draft the Scottish Government's bills. The Commission also instructs counsel in that office to draft certain Commission bills. In drafting legislation, Scotland's Parliamentary Counsel Office say that they are inspired by the Gaelic proverb 'Abair ach beagan is abair gu math e' ('Say little and say it well').

In the Cayman Islands, the staffing of the Law Reform Commission arguably reflects a fusion of the law reform and legislative drafting professions. The technical members of staff of the Commission comprise a director and senior legislative counsel. Both are legislative drafters. The same staff members therefore engage in law reform research, prepare discussion papers and conduct consultations, and then draft the bills for submission. The move from policy to drafting is seamless. Both the director and the legislative counsel also, when required, assist the government's Legislative Drafting Department in the drafting of legislation. The director and legislative counsel execute distinct roles in two substantive departments.

In many jurisdictions, the drafting of primary legislation for introduction to parliament is regarded as a specialist legal job, undertaken primarily by those who are trained in the skills for carrying out this work. There is usually a government office or unit of legislative drafters, or counsel (sometimes known as parliamentary counsel), for this purpose. The legislative drafters accumulate considerable legislative experience and skills in seeking to accurately reflect policy intentions and provide legislation that is clear to those who use it.

In such jurisdictions, some law reform agencies arrange to have legislative counsel seconded from the government office to the agency to draft law reform bills to attach to reports. An alternative arrangement is for the law reform agency to issue instructions to drafters in the government office or unit for the drafting of a law reform bill.

While each jurisdiction in the Commonwealth typically has its own legislative drafting style and possibly national legislative drafting handbooks or manuals, the common law heritage of many Commonwealth countries provides some commonalities in legislative drafting style. Detailed guidance on legislative drafting in the Commonwealth, as well as legislative procedure, preparation of drafting instructions and suggested approaches to drafting, can be found in the *Commonwealth Legislative Drafting Manual*. The handbook can be downloaded from the Commonwealth Secretariat website.<sup>7</sup>

### 7.5.3 Preparing instructions to legislative drafters

The ‘instructing’ of the legislative drafter is a difficult and time-consuming exercise, but one of critical importance.

Preparing instructions to legislative drafters to draft a bill to reflect law reform recommendations is a substantive task, usually carried out by lawyers on the basis of policies that have been carefully worked out and consulted upon.

For this purpose, law reform agency lawyers generally prepare a set of instructions to legislative drafters. These contain the background to and the context of the law reform project, the general policy behind the proposed reform and the detailed policy proposals to be put into draft legislative form. Although the name echoes the ‘instructions to counsel’ that solicitors prepare for barristers in split-profession jurisdictions, in substance instructions to legislative drafters constitute a very different sort of document. They will also be very substantial if the bill is of any great size. It is therefore highly desirable for lawyers embarking on instructions for the first time to secure training and/or to work with a more senior lawyer on a set of instructions before going solo for the first time.

Jurisdiction-specific guidance on drafting instructions is likely to be available. Such guidance will usually be written with the drafting of mainstream government legislation in mind, and may therefore need some adaptation for the law reform agency context. In general, law reform agency instructions should be easier to produce and better than those for mainstream government legislation. Unlike mainstream legislation, the

***When using legislative drafters, law reform agency lawyers will usually prepare a jurisdiction-specific set of instructions for them. This is a difficult and very important task, necessary to translate the findings of the law reform agency into appropriate legislative action.***

### Guidance on instructing legislative counsel

Project lawyers should consult the general advice on drafting instructions for legislative drafters available in their jurisdiction. The example below is an extract from the guidance given by the Australian Government's Office of Parliamentary Counsel. It is part of a checklist of matters to which the instructor should have regard.<sup>8</sup>

#### Checklist for instructions

1.9	Instructors' details	<ol style="list-style-type: none"> <li>1. Nominate at least 2 instructors. They should be people who have sufficient knowledge of the detail of the project to answer the drafters' questions and to check whether drafts meet the instructing agency's requirements and the policy.</li> <li>2. It is helpful if you also state whether the instructors have any planned absences, because the drafters can then plan their work knowing when the instructors will be available. The drafters will also let the instructors know of their own planned absences.</li> </ol>
<b>2. The instructions: core matters</b>		
2.1	What is to be done and why	<ol style="list-style-type: none"> <li>1. This is the core of any set of drafting instructions. Start with an explanation of the key policy objectives that are to be implemented, and why legislation is needed to implement them. If the Bill or instrument is to remedy a problem with the existing state of affairs, mention this and consider including one or more examples of the problem. As mentioned above, attach any relevant legal opinions, and attach other background papers if you think this will be helpful.</li> <li>2. Go on to give a complete and accurate description of how the Bill or instrument is to implement the objectives. It is not sufficient merely to paraphrase the wording of a Cabinet Minute or other policy authority.</li> <li>3. Express this in clear and simple language. Try to:             <ol style="list-style-type: none"> <li>a. avoid specialised terms or technical jargon if possible but, if specialised terms or technical language are necessary (because of the subject matter), include an explanation of their meaning; and</li> <li>b. be consistent: for one concept, use the same word or phrase throughout the instructions; and</li> <li>c. avoid unnecessary detail or complexity (generally, it is not necessary to try to identify and address all conceivable fact situations).</li> </ol> </li> <li>4. Don't attempt to provide the exact words to be used. Instructions proposing exact words don't give the drafters the necessary information and context to help them understand why particular wording was chosen. It can also affect the amount of drafting time required to complete a project because the drafters will need to seek further instructions to understand the policy intention in order to ensure that it is being implemented effectively.</li> </ol>
2.2	Complexity	<ol style="list-style-type: none"> <li>1. Consider whether any aspects of the proposed approach may add complexity, and whether there are any acceptable alternative approaches that would be less complex. The documents on the Clearer Law page of the OPC website may help you with this. In analysing your instructions the drafters will look for areas that add complexity and will work with you to reduce complexity where possible.</li> </ol>

### Guidance on instructing legislative counsel (cont.)

#### Checklist for instructions

##### 3. The instructions: other specific matters

3.1	Commencement	<p>1. Give instructions on when the Bill or instrument should commence. Different measures in the same Bill or instrument can be given different commencements.</p> <p><i>Bills</i></p> <p>2. For Bills, the main options for commencement are:</p> <ul style="list-style-type: none"> <li>a. on the day of Royal Assent, the day after Royal Assent or the 28th day (or some other specified period) after Royal Assent; or</li> <li>b. on some other specified day; or</li> <li>c. on a day to be fixed by Proclamation (generally with a 6-month limit)</li> </ul>
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policy proposals for law reform are generated by lawyers with a close understanding of the legal questions involved.

#### 7.5.4 Preparing a bill: the iterative process

Instructing a drafter is not a one-off process.

Legislative drafters work on the basis of the instructions provided to them. They consider the recommendations to be implemented in the context of the existing law, both statutory law and case law as appropriate. The drafter prepares draft provisions, in the form of a bill, and provides the bill and a note of their comments and questions to the law reform agency for scrutiny and consideration.

This process of preparing a bill is an interactive one, between those who instruct and those who draft the bill, involving a number of exchanges between those instructing the bill and legislative counsel. Counsel will frequently provide a memorandum to the project team containing draft clauses with commentary and questions, and sometimes alternative drafts. It is a considerable advantage to have drafters co-located with the law reform agency, allowing easier and more frequent face-to-face discussion. The process will usually lead to a process of refinement of the policy and the recommendations, on the one hand, and of the draft legislation, on the other.

Once both the law reform body and the drafters are satisfied that a bill would fully implement the recommendations, the bill is

*Legislative drafters prepare a bill on the basis of instructions, but the process of preparing a bill involves ongoing exchanges between instructors and drafters.*

then attached to the law reform agency's report and submitted to ministers or to government.

### 7.5.5 Explanatory notes or memoranda

Law reform agencies often prepare explanatory notes or memoranda on the provisions of a bill. These are notes explaining the purpose and effect of each provision in turn. This document is of assistance to the government in considering the recommendations and the bill. In addition, such a document is often required by the legislature to accompany and explain a bill on introduction.

*Law reform agencies often prepare explanatory notes for a bill, to assist the government in processing the recommendations and passing the bill.*

The form of explanatory notes or memoranda is conditioned by the use to which they are put during the passage of a live bill in the legislature. As a rule, their point is to help, first, legislators and, secondly, members of the public to understand the legislation. They should therefore be written in clear, non-technical language. Notes can also include explanatory material such as graphs and examples that may not feature in the legislation (although it should be noted that, increasingly, examples are used in primary legislation in a number of common law countries, including Australia and the United Kingdom). Notes and memoranda usually specify that they are intended as aids to interpretation and are not themselves authoritative. It is, however, not unknown for courts to consider them in interpreting statutes.

### 7.5.6 Drafting and implementation

Where the government decide to take forward the law reform agency's report and bill, the government may wish to adjust or not accept some of the recommendations. In this situation, the government would normally instruct its 'own' legislative drafter to amend the draft. Although it may be the same drafter undertaking the task, they would be doing so under instructions from the government rather than the law reform agency.

The resulting bill would then be introduced in the legislature by the government. The law reform agency would regard the bill as implementing their recommendations, at least in large part.

## Notes

- 1 <http://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/>
- 2 <https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-government>
- 3 <http://www.lawcom.gov.uk/project/patents-trade-marks-and-designs-unjustified-threats/>; <http://www.lawcom.gov.uk/project/taxi-and-private-hire-services/>
- 4 <http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/default.aspx>
- 5 Bills attached to law reform agency reports are of course draft bills, but it is irksome to repeat 'draft' each time.
- 6 South African Law Reform Commission Act 19 of 1973, section 5(5).
- 7 <http://www.thecommonwealth.org>
- 8 <https://www.opc.gov.au/about/docs/Giving%20written%20drafting%20instructions.pdf>. For other examples, see [https://www.crownpub.bc.ca/Content/documents/3-DraftingInstructions\\_August2013.pdf](https://www.crownpub.bc.ca/Content/documents/3-DraftingInstructions_August2013.pdf); <http://www.pco.parliament.govt.nz/working-with-the-pco#guide2.0>; and <http://www.lawdrafting.co.uk/instructions/index.php>

