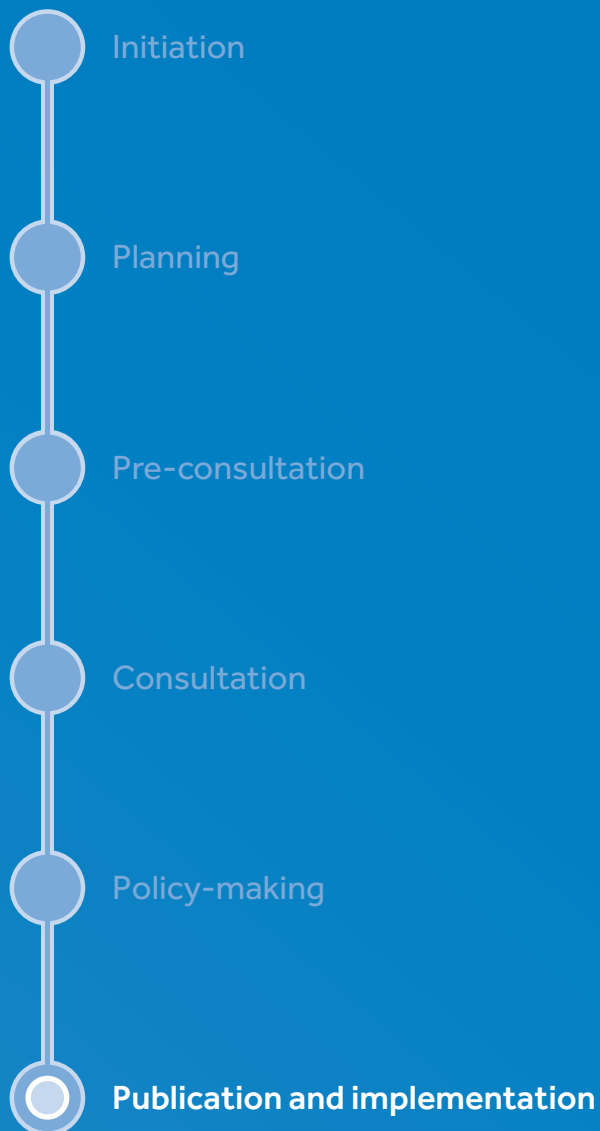


# Chapter 8

## Publication, Implementation and Following Up a Report





## Chapter 8

# Publication, Implementation and Following Up a Report

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Chapter 8 covers the last stage in a law reform project – publication, implementation and following up a report. The chapter starts by considering the very real challenge of implementation to law reform agencies. It looks at the process of publication and the government’s response. The chapter goes on to discuss how law reform agencies can support governments in implementing recommendations after they have been reported. This involves the consideration of possible avenues of influence, such as various forms of engagement with government and the role of supportive interest groups. Finally, the chapter considers the development in a small number of jurisdictions of a special parliamentary process for law reform agency bills, and discusses whether the model could be more widely used.

### 8.1 The challenge of implementation

Implementation is a key challenge for all law reform agencies. Law reform is not complete until implemented and, for the most part, implementation is in the hands of the government.

Law reform agency reports on completion are submitted to government for implementation. While the paradigm for the implementation of law reform agency reports is legislative action, it may also take other forms. These include the issuing of soft law codes of practice or guidance, changes in government policy or administration, or the development of case law by judges.

Nonetheless, most law reform recommendations are recommendations for legislation. Clearly, it follows that the objective of those law reform projects is implementation by legislation.

However, whether implementation should be regarded as the only way to measure the success of a law reform agency is a quite different question.

***Law reform is not complete until it is implemented. This generally means legislative action, but not always.***

### Assessing the performance of a law reform agency: Implementation, but not just implementation

The primary aim of a law reform project that recommends legislative change is to see that change enacted. However, this does not mean that implementation alone is the only *measure of the performance* of a law reform agency.

The Australian Law Reform Commission has developed a sophisticated set of metrics to measure its overall performance. This includes the implementation rate, but also five other indicators. These are citation, to demonstrate the relevance of its work to litigation; the number of responses received, which shows the breadth of its evidence base; the numbers of visitors to the website and mentions in the media as indicators of community engagement; and its commitment to public debate on its work, shown by the number of presentations and speaking engagements. The Commission sets out its performance against targets in each category in its annual report. Its performance in 2015/2016 is shown below:

KPI MEASURE	2015–16 TARGET	2015–16 ACTUAL
Implementation of reports	85%	86%
Citations or references	50	56
Submissions received	150	75
Visitors to website	>250,000	1,143,519
Presentations and speaking engagements	25	29
Media mentions	250	243

The implementation rates of law reform agencies across the Commonwealth are generally commendable. One assessment demonstrates that the average implementation rate across 12 agencies, based on a study of annual reports available on the internet, was 68.3 per cent.<sup>1</sup>

However, a lack of, or slow, implementation of reports is a constant concern to law reform agencies. The implementation rates of some agencies are lower than others, and all go through periods of lower implementation rates. Where implementation rates are lower, this can stem from a number of factors. These include a lack of political will on the part of government, the busy schedules of parliaments, lengthy parliamentary procedures and the costs of implementing reports.

These are objective difficulties faced by all law reform agencies. It is therefore natural that agencies and individual commissioners, board members or lawyers, who have sometimes spent years developing good-quality proposals, should be anxious to see

**Among the reasons for slow implementation or a lack of implementation may be a lack of political will, parliamentary procedures or implementation costs.**

them put into practice. But there is much that agencies can do to overcome these difficulties. That they have done, and continue to do so is attested by the value that they are accorded in most jurisdictions in which they operate.

## 8.2 Implementation other than by legislation

Implementation is very largely a matter of legislation, but there are exceptions.

Law reform agency reports are frequently *used* by the courts. However, occasionally, the courts may *implement* proposals.

In other projects, law reform agencies may on occasion seek to change court rules, practice directions, codes of practice or other soft law instruments, or change practice in other ways. On occasions, this may include recommending change to organisations or individuals who are not part of the state.

However, these are contexts in which, as a matter of rational legal policy, it is more sensible to seek a non-legislative route to implementation. Law reform agencies do not, and should not,

### Implementation by the Courts: England and Wales

In its 1999 consultation paper on double jeopardy,<sup>2</sup> the Law Commission for England and Wales provisionally proposed that ‘the rule in *Sambasivam*<sup>3</sup> – that an acquittal could not subsequently be challenged in other proceedings against the same defendant by adducing evidence that they had been guilty – should be abolished, as part of the introduction of a new statutory scheme of protection against double jeopardy. The Commission provisionally concluded that insofar as the rule was a true double jeopardy protection, it was unnecessary, given the other rules, and insofar as it prevented the prosecution contradicting a previous acquittal in other circumstances, it was undesirable. In the period between the publication of the consultation paper and the report, the House of Lords considered the rule in *R v Z*,<sup>4</sup> and, relying expressly on the Law Commission’s reasoning, abolished it in England and Wales.

The Law Commission recommended, as part of a multi-project programme of work on damages, that the courts should increase the level of general damages (for pain, suffering and loss of amenity) awarded in personal injury cases by significant percentages. Only if the courts did not act did the Commission recommend that this should be accomplished by legislation. In 2000, a specially constituted five-member Court of Appeal was convened expressly to consider the issue in a judgment on a number of appeals (*Heil v Rankin*<sup>5</sup>). The court accepted the Commission’s broad approach, and partly implemented its recommendation for a general uplift in these damages.

### Recommendations directed at other agencies

The Law Commission for England and Wales's report *Housing: Proportionate Dispute Resolution*, in addition to proposing legislative change to court and tribunal jurisdictions, proposed that advice agencies should adopt a particular approach to housing advice known as 'triage plus'.<sup>6</sup>

promote second-best non-legislative routes to implementation because securing legislation is difficult. So, for most agencies, most of the time, legislation is necessary for implementation.

### 8.3 Publication

*Law reform agency reports are published and generate debate in the public domain. They are authoritative documents that can also generate specialist debate.*

Law reform agencies' law reform reports are published. Publication provides the opportunity to publicise the report in the media. It provides full transparency to the agency's deliberations. When law reform agency reports are published they become available in the public domain. Consequently, they generate debate among the interested public, and provide an occasion for interested groups to make their views known.

Nearly all law reform agencies maintain a website, and will always publish their reports in electronic form. For example, most study reports finalised by the Uganda Law Reform Commission are available on the website. Similarly, over 61 reports of the Hong Kong Law Reform Commission are available online. Other law reform agencies, such as the Law Commission for England and Wales and the Australian Law Reform Commission, publish their consultation papers and reports on their websites. Most will also publish in hard copy form. In some jurisdictions, the paper publication will be available to buy through the official government publications system. Some law reform agencies, such as the Scottish Law Commission, now generally publish online only.

When published, reports become authoritative; they come to the attention of academics and are peer reviewed, a process that can generate further specialist debate. Courts and academics frequently cite law reform reports, and legal practitioners make use of the research and conclusions in the reports.

Reports should be written with their most important readerships firmly in mind. The typical readers will probably be very busy, with matters that may seem to them more important

or more urgent. Those readers may very well be unfamiliar with the subject matter. It is therefore very helpful if the main importance and purpose of the report are set out near the beginning. The reader may need to be convinced from the start that the report deals with important issues and needs attention.

An executive summary may be quite as useful for many readers as the report itself. Examples, whether real or imaginary, can be helpful to readers. It may be helpful to use visual means where possible to explain and to relieve solid text, such as photographs, tables and graphs. Some detailed or optional material may be best kept in an appendix. Overly legal language should generally be avoided as far as possible.

A clearly written, readily understood report stands a greater chance of appealing to the public and to legislators who must take the matter forward.

Of all the many potential readers of a report, the single most important are decision-makers in government. It is important to recognise that it will be unusual for a minister to read all of a 200-page law reform report. Rather, this may be done by a member of the civil service or a ministerial adviser with direct policy responsibility, but by no means always a lawyer. It is not impossible that no one in government will find the time to read the whole report thoroughly before the response is agreed.

Accordingly, it is important for law reformers to ensure, first, that in the continuing process of engagement with officials during the life of the project, the officials have a sound understanding of the proposals, including the detail of the recommendations and the reasons for them. Secondly, there should be sufficient explanatory material in summary form to explain the project to those higher up the chain within government.

The publication of reports and recommendations by law reform agencies plays a critical role in ensuring that they are implemented either by legislation or otherwise. In many jurisdictions, the law reform agency relies for the publication of its reports on government authority being given or upon government printers. In some developing countries, long delays have been experienced between the submission of the report by the law reform agency and printing, and therefore publication. It is hoped that the current emphasis on rule of law issues, and the contribution that law reform agencies make to them, will

*Law reform agency reports should be written clearly, with the most important readings in mind. An executive summary will assist accessibility.*

make this a thing of the past. The fact that online publication is so much quicker and easier than printing may also play a part in overcoming this problem.

#### 8.4 The government response

*Reports are addressed to the government. The government may provide a written response in return. The government may need to consult, or carry out other processes, before it can respond affirmatively.*

In many jurisdictions, reports of the law reform agency are laid before the legislature. However, implementing legislative law reform proposals is overwhelmingly the task of the government, and it is to the government that the report is always addressed.

The government response to submitted reports differs from country to country. If the report is accepted by the government, the response can generally be straightforward about that acceptance. In some countries, governments will respond by providing written reasons where there is a rejection of the proposals. In others, however, the governments may not take action on proposals without any reasons being given.

Some law reform agencies have agreements or understandings with the government about the timing of the response, intended to secure reasonably timely responses. The process has recently gone a significant stage further in England and Wales (as discussed above in the example box ‘Implementation by the courts: England and Wales’).

As a result of amendments made in 2009, the Law Commission’s founding statute now makes provision for a protocol to be agreed between the Law Commission and the Lord Chancellor. Further amendments in 2014 added similar provision for a protocol with the Welsh Government.<sup>7</sup>

#### **New Zealand: Rejection requires a statement of reasons to Parliament**

Since 2009, there has been a binding administrative directive in place that requires the New Zealand Government, if it rejects the Law Commission’s recommendations, to respond formally stating this. The minister must present the government’s response to parliament within 120 working days of the presentation of a Law Commission report to parliament. When the government accepts a Commission report it does not need to table a response, but instead begins the process of implementation, normally by having a bill drafted.

**Rejection and implementation: The case of renting homes**

In 2006, the Law Commission for England and Wales published a report recommending a radical overhaul of the law relating to short-term renting. It applied to the jurisdiction of England and Wales as a whole.<sup>8</sup> It was rejected in respect of England by the United Kingdom Government in 2008. But it was accepted by the Welsh Government, which is responsible for housing, and the Renting Homes (Wales) Act 2016 will come into force in Wales in 2017.

Both protocols make similar provision for the government to provide an interim response as soon as possible after the publication of the report, and in any event within six months; and to provide the final response as soon as possible thereafter and in any event within a year.

It is too early to know if this precedent will be picked up in other jurisdictions in the Commonwealth. It may perhaps provide at least a stimulus to governments and law reform agencies to seek to conclude non-statutory agreements along similar lines. The Scottish Law Commission and the Scottish Government have been discussing an agreement along these lines.

Governments may have a general commitment to consult before making major policy changes, including legislating. If the government seeks to consult on a law reform agency's proposals, then further delay to the government's response to the law reform agency is inevitable. If this appears to be a possibility, as part of its ongoing engagement with the government department during the project, the law reform agency may try to persuade the department that this consultation requirement has been effectively discharged by the law reform agency's consultation.

It may be that the government response, when it is made, is negative. If that is the case, then for immediate purposes the project goes into the table of projects not implemented. However, even in such cases, the project may be taken up by another government and eventually implemented.

## 8.5 Assisting implementation

The first stage in assisting implementation of a law reform project is for the government to accept the recommendations in the report. The second is seeing that acceptance translated into legislation.

***After the government accepts a report, it needs to be translated into legislation. The law reform agency may have little formal role after the government has given its response, but can be expected to take an active interest in seeing the report implemented.***

Most legislation establishing law reform agencies does not require them to do more than submit reports to government. However, law reform agencies have long expected, and been expected, to take a positive interest in the future progress of their reports. The ways in which (and the extent to which) they carry that interest forward varies considerably. In this, there are certain factors that most law reform agencies will take into consideration.

On the one hand, they will wish to retain – and be seen to retain – their objectivity, independence, professionalism and reputation for solid and comprehensive recommendations and reports. Any advice they offer will continue to be non-partisan, and will avoid jeopardising their reputation. They will seek to avoid giving an impression of entering the arena and politicising the topic.

On the other hand, they will wish to ensure – and rely upon – the high quality of their reports, including the professional manner in which they are presented, reflected by both the reports themselves and the publicity they provide. They will seek to brief the government on the report and help them to understand the problem being addressed, the views received on consultation and their recommended solution. They will also wish to encourage government to give serious consideration, within a reasonable timescale, to the report.

At some times and in some law reform agencies, there has been a view that the role of the law reform agency is exhausted once the report is delivered to government. Nonetheless, there is a spectrum of attitudes as to how far a law reform agency should go in seeking to follow up a finalised report. The great majority of law reform agencies would wish at minimum to respond to enquiries and requests for information from government.

Beyond that, it is legitimate for law reform agencies to take different views on how far they should go in respect of implementation. A great deal will depend on conditions in the jurisdiction concerned, including the formal structural relationship between the agency and government, and the agency's informal standing with the government. Some law reform agencies will take the view that any steps that could be said to go beyond clarification or briefing would risk endangering their reputation and should be avoided. Others will take the view that it is legitimate, or indeed, that it is their duty,

to be more proactive in seeking to persuade government of the desirability of implementing law reform recommendations.

Practice varies markedly in this respect among Commonwealth law reform agencies. What is appropriate and advisable will not be the same in every jurisdiction, and law reform agencies will recognise and respect the fact that other agencies will, in their own national or sub-state context, make different choices.

Further, that choice may change over time. For example, a new law reform agency may be especially careful until it has acquired the reliable reputation it needs – which may take several years. Once it is more mature, and once government is more confident about its capability in producing high-quality reports in important areas of law, they may be able to work more closely together.

What is, however, critical is that each law reform agency should address the issue and develop and agree its own policy as to how far to go with regard to following up a report.

It has to be remembered that governments may not hurry to implement a law reform agency's report for many different reasons, ranging from having other priorities at that time to taking political or financial considerations into account in a way that a law reform agency might not.

The discussion in this section gives some indication of what steps a law reform agency might take. How far a particular agency wishes to go is a matter for it. This chapter is largely concerned with how agencies can successfully assist governments, over and above initial briefings.

Many law reform agencies monitor major developments on the issues that were recommended in the reports. This is done to ensure that recommendations made in the reports are fully implemented and not ignored by those to whom the recommendations are directed.

When law reform agencies submit reports to government ministries, the reports undergo a transmission process until they are enacted into law or alternative action taken. Often the transmission system may be rigid or delayed. There are therefore opportunities for the law reform agency to follow up on the reports submitted to government to assist implementation. Indeed, it has been observed that a 'law reform agency is not merely a think tank, but a body that is meant to give advice to government.'<sup>9</sup>

Across the Commonwealth, the transmission processes are similar. When a law reform agency finalises its report, it is forwarded to the relevant ministry. The presentation to government is intended to seek approval from the Cabinet or other responsible policy-makers.

When the Cabinet or another responsible policy-maker has approved the recommendations, where the report from the law reform agency does not attach a draft bill, drafting instructions are issued to legislative drafters to draft bills to be submitted to the legislature for consideration. Sometimes the Cabinet agenda may delay implementation of law reform reports and recommendations.

In most Commonwealth jurisdictions, bills for legislation arising from law reform proposals are introduced in national parliament or assembly for debate and enactment. Sometimes the legislative procedures in the national parliament or assembly are long. They involve committee debates and consideration of bills, consultations and plenary debates for enactment.

What follows are some indications of how a law reform agency can aid the path towards final implementation of legislative recommendations. This chapter closes with the consideration of significant new departures in two jurisdictions, which may point the way towards improved implementation rates for other law reform agencies.

### 8.5.1 Engagement with government

*Close engagement with the relevant government department throughout the process is a key factor in successful implementation of law reform.*

Perhaps the single most important element in assisting implementation is appropriate and close engagement with the relevant government department throughout the course of a law reform project.

Given that the role of a law reform agency is advisory, there must inevitably be close co-operation between the agency and the relevant departments of government. Close engagement with policy departments brings many benefits throughout the law reform process, and is of particular importance in terms of implementation. Such co-operation does not threaten the operational independence of law reform agencies, provided that the roles of both sides are understood and respected.

Establishing liaisons/partnerships with relevant government institutions is vital to ensure that law reform recommendations

### **Government involvement with law reform: Uganda and South Africa**

In some jurisdictions, government departments are more integrated into the reform process than in others. The Uganda Law Reform Commission often appoints a taskforce or working group comprising representatives from relevant government ministries and the private sector to offer insights on the matter under consideration for reform. This helps to generate support and ownership from government departments.

The South African Law Reform Commission frequently appoints representatives of government departments as members of advisory committees where the nature of an investigation requires close co-operation with a relevant department. Such officials usually have expert or insider knowledge of the subject under investigation and are appointed at the start of an investigation, or at a later stage as the need for close co-operation and/or expert knowledge arises.

are fully considered. The Cabinet relies on the advice given by government departments. If law reform proposals are to be successful, they are likely to require championing within government, both at the departmental and Cabinet levels. And it is much more likely that the relevant policy officials will champion the proposals if they fully understand and appreciate them. It has been argued that law reform agencies' independence cannot become a recipe for isolation or non-engagement with relevant departments of the state.<sup>10</sup>

Law reform agencies must always work with government to develop legislative plans, where the internal mechanisms of government allow that. The publication of legislative plans would increase the involvement and accountability of all the participants in the planning for legislative processes.

The protocols between the Law Commission for England and Wales and the United Kingdom and Welsh governments make express provision for these governments to make available officials – usually a policy lead, an economist and a lawyer – with which a programme of regular communication is to be agreed. The obligations of the officials include to ‘communicate promptly and openly about wider policy developments and changes in priority which may affect implementation’.

The Law Commission for England and Wales in its eighth law reform programme noted that, while it is important to preserve the independence of the Commission, the Commission has

*Liaison or lines of communication should be established with relevant departments and institutions, while being sure to maintain the independence of the law reform agency.*

*Law reform agencies are often required to report formally to parliament or government once a year. But informal engagement can be just as important as formal reporting requirements.*

developed closer links with the main government departments responsible for the legislation covered by the Commission's projects, both before and after publication of final reports. There are regular meetings with the departments, at ministerial and/or official level. Proposed projects are discussed with the department in advance, to ensure that the department is fully committed to the project and to assist the department and the Ministerial Committee on Law Reform. The Commission also keeps the department informed of progress during the project. This enables, for example, the Commission to be kept informed of relevant work planned by government and of relevant research or other studies in which government is involved.<sup>11</sup>

In some jurisdictions, law reform agencies are required to report to parliament annually about the progress of projects and activities undertaken. This helps the agency to bring to the attention of government and parliament any reports that are pending implementation.

Similarly, many other law reform agencies in the Commonwealth are required to report annually to either ministers or parliament on their work. This will include information about the agency's progress with its current projects. It will normally also report on the status of implementation of law reform programmes. For example, the Uganda Law Reform Commission is required by

### Reports to the legislature

As a result of amendments made in 2009 and 2014, respectively, both the United Kingdom Government, in the form of the Lord Chancellor, and the Welsh Government are now statutorily obliged to report to Parliament/National Assembly for Wales on the implementation of Law Commission proposals. The statute requires the Lord Chancellor to:

'prepare a report on

- a. the Law Commission proposals implemented (in whole or in part) during the year;
- b. the Law Commission proposals that have not been implemented (in whole or in part) as at the end of the year, including—
  - i. plans for dealing with any of those proposals;
  - ii. any decision not to implement any of those proposals (in whole or in part) taken during the year and the reasons for the decision.'

Similar provision is made for Wales.<sup>12</sup>

the constitution to submit to parliament annual reports of the activities undertaken.<sup>13</sup> Under the South African Law Reform Commission's founding statute, the Commission must within five months of the end of a financial year submit to the Minister of the Department of Justice and Constitutional Development a similar report. It must be tabled in parliament.

The New Zealand Law Commission prepares and submits an annual programme of potential projects to the minister responsible for the Law Commission.<sup>14</sup> An annual report is tabled in the United Kingdom, New Zealand and many other parliaments, detailing the law reform agency's activities from the previous year.

Reporting requirements are intended to ensure that a public body created by parliament is accountable. Reporting obligations aim to foster transparency and good working relationships with the government and parliament. Through reporting, law reform agencies are held accountable to government and the people. This process, in turn, may improve parliament's understanding of the law reform agency's activities and help to increase the potential for implementation of reform recommendations. The reporting function can also lead to greater public appreciation of the law reform agency's activities.<sup>15</sup>

Too much stress, however, should not be laid on these formal arrangements. Hundreds or thousands of reports from various sources are 'laid before Parliament' every year, and although it has a formal function, doing so has, in practice, limited impact in many countries. The strongest of these arrangements are the new requirement to report on implementation in England and Wales. In respect of those arrangements, the Law Commission has criticised the brevity and formulaic nature of the reasons given for the non-implementation of reports.

Much more important are the real but informal ties that working together on a project foster between a project team in a law reform agency and the corresponding officials in the government department. It is their commitment to the implementation of a project on which they have both worked for the public good that is key to assisting implementation at the end of the project.

*In most jurisdictions, bill drafting is done by a drafting office. Some law reform agencies attach draft bills to reports to encourage the adoption of the reforms.*

### 8.5.2 Accompanying reports with draft bills

The technical issues relating to the drawing up of draft legislation by law reform agencies have been dealt with in the preceding chapter.

In most jurisdictions, law reform agencies are not formally mandated to draft legislation for government. Bill drafting is confined to a legislative drafting office that is part of government and only drafts government-approved bills. When proposals for legislation are approved, drafting instructions are issued to the government drafters to prepare the bills. Most legislation establishing law reform agencies in Commonwealth jurisdictions does not require them to prepare draft bills to accompany reports, although in some cases, such as in Uganda, South Africa and Kenya, the legislation does require this.

Nonetheless, as is discussed in Chapter 7, a number of law reform agencies draft bills. This is intended to encourage speedy adoption of the proposed reforms by government and parliament.

When law reform agency reports are accompanied by a proposed bill, the report is able to offer the added convenience and efficiency of providing ready-made legislation to those responsible for legislative initiatives.

Further, accompanying reports with bills for proposed legislation provides an additional way of ensuring that the policy behind the recommendations is fully worked through.

Those law reform agencies that have adopted this approach regard the practice as helpful in terms of implementation. The Uganda Law Reform Commission, for example, achieved enactment of 21 of the 27 study reports submitted under its commercial law reform programme in 2010.

Where a law reform agency report is not accompanied by a proposed draft bill, it may be possible for the law reform agency to assist the in-house government drafters in the process of drafting the bill. They can assist by providing further research materials and information to the government. This can help to ensure that the government bill reflects the policy behind the recommendations and expedites implementation.

Even if a report is accompanied by a draft bill, in most jurisdictions the government department responsible will in any

event instruct its own legislative drafters to reconsider the bill. It is often the case that, even if it accepts the main thrust of a law reform agency report, the government will still wish to change some details. It will also wish to obtain its own independent advice on the drafting. In addition, legislative counsel's services will be necessary during the bill's parliamentary passage to deal with amendments.

### 8.5.3 Media and communication

The media can play a lead role in promoting law reform and ensuring that the recommendations submitted to government are implemented. The media can shape and influence public opinion and values, generate public interest on particular issues and provide a platform for interest groups to support reforms. The media may be willing to carry stories on the reform proposals. They can provide public scrutiny and information about how the law operates in practice. It can therefore draw attention to laws that are outdated, are ineffective or contain loopholes and require reforms.

If there is a public debate in the media, the government may experience pressure to act by implementing the law reform reports. The media explains the justification of the reforms further and exhibits the need for action.

Media exposure may also affect parliamentarians through its influence on public opinion. The media can influence public opinion in supporting the need for reforms. The media can also make it easier to keep stakeholders informed about the work of law reform agencies, increase access to publications and increase the visibility of law reform agencies to the general public. Many law reform agencies have adopted the use of media briefings, press conferences and interviews to promote and create awareness about reports submitted to governments.

However, it is difficult for law reform agencies, even if they have a communications official on their staff, to handle the press when relations become difficult. There is a danger that the story will become a negative one for the law reform agency, which may damage the prospects of implementation. The lesson is that law reform agencies should modulate their engagement with the press and media according to what risks can be perceived in advance.

*The media can shape public opinion, generate public interest on particular issues and encourage action by government and parliament.*

*Media exposure has an important role, but there are risks for law reform agencies: the media narrative could turn negative.*

Nonetheless, the media can be an important tool for drawing attention to the need for law reform, serving as a conduit of information and communication between politicians and officials, parliament, interest groups and the general public.

Law reform agencies have adopted the use of other communication strategies to follow up on reports submitted to government. The development of information communication technology has widened and opened new avenues of communication that law reform agencies can adopt or use to follow up recommendations submitted to government. For example, social media today offers avenues for engagement with the public and government. Some law reform agencies have adopted the use of websites, e-newsletters, blogs, social networks, public discussion boards, Facebook, Twitter, WhatsApp and podcasts to raise the profile of reports and carry out consultations.

#### 8.5.4 Assisting governments and politicians

*Views differ on the appropriate role for a law reform agency after delivering a report to government.*

It was noted above that some law reform agencies are hesitant about the extent of post-report assistance that they should undertake. This sometimes expresses itself in an assertion that law reform agencies should not ‘lobby’ government or parliament. ‘Lobbying’ is an unfortunate term. To many it conveys an implication of improper and underhand methods, which no law reform agency engages in. However, many law reform agencies regard post-report engagement with government and politicians as both legitimate and desirable. As noted above, it is for each agency to make its own decision as to what is appropriate in the light of the conditions in its own jurisdiction.

Assisting the civil service and encouraging ministers and politicians to accept innovative ideas of law reform and to obtain the necessary legislative time for reform bills may be appropriate, but are frequently unseen processes, without which the work of law reform agencies are of far less value. Progress in law reform cannot be achieved without active co-operation from those who prepare, promote and advise on legislative proposals, and so informing them of the advantages of a law reform agency’s proposals may be effective.

A law reform body can establish the support of the relevant department by demonstrating the value of the proposed reform

### **Engaging with government: Uganda and South Africa**

The Uganda Law Reform Commission often conducts seminars and workshops for Members of Parliament and government officials on reports submitted, as a way of facilitating the quick passage of the proposals.

Research staff of the South African Law Reform Commission, when requested, render assistance to the Department of Justice and Constitutional Development and other ministries in promoting legislation that results from recommendations by the Commission. Such assistance may include the drafting of Cabinet memoranda, the attendance at and participation in Cabinet meetings, the attendance at and participation in Parliamentary Portfolio Committee and Select Committee meetings, the development of amendments to bills as they progress through the parliamentary phases, the development of second reading debate speeches for ministers, and the translation of the bill into other languages.

in terms of that department's own priorities. The machinery of government must be relied upon to effectively promote those changes that a law reform agency considers desirable. To assist, law reform commissioners may brief politicians and stimulate the interests of potential champions, particularly those who have had experience in legal practice.

Positive engagement with government ministers and lawmakers can provide them with valuable knowledge about the agency's recommendations and the problems that they seek to address. This helps ministers to understand the problems and offers the necessary support to ensure government and legislative action. One form of engagement is in the form of seminars and workshops for ministers and parliamentarians. This helps to draw the informed attention of parliamentarians and government officials to law reform recommendations.

Officials in the relevant government departments play a major role in ensuring that law reform agency proposals are accepted by governments. Government officials advise ministers on the necessity of the reforms being promoted. Ministers are often willing to take on the advice given by the relevant government departments and move the proposals to the next stage.

The initiative for legislation is very largely in the hands of government. But influencing parliamentarians can still be helpful to a law reform agency. Backbench Members of Parliament may influence ministers of the same party. As such, educating Members of Parliament can be helpful in ensuring

the smooth parliamentary passage of a reform bill when it is put before parliament.

In some jurisdictions, commissioners and lawyers in the law reform agency are invited to give evidence to official parliamentary committees that are engaged on inquiries into particular matters, which may relate to law reform agency projects. A particularly clear example of this is where a parliamentary committee is charged with undertaking pre-legislative scrutiny of a draft bill published by the government to implement law reform agency proposals. For law reform agencies to deploy their expertise in this way before official parliamentary committees is likely to be wholly uncontroversial.

It is sometimes seen as more controversial for law reform agencies to engage with parliamentarians from opposition parties. It is often the case that civil servants are not permitted to engage with opposition parties and, in many standard model law reform commissions, the legal staff are seconded government lawyers. Whether such a prohibition extends to staff of a law commission will depend on the particular rules obtaining in that jurisdiction. However, in many jurisdictions, appropriate engagement by law commissioners and the provision of support for them by legal staff are acceptable.

Some law reform agencies regard this form of engagement as acceptable before a report is published, but not afterwards. Others take the view that post-report engagement is both effective and acceptable.

### **Engaging with parliamentarians: United Kingdom**

In the United Kingdom Parliament, backbenchers can set up all-party groups covering a theme, activity or cause, which can then be registered and have a semi-official role. As the title denotes, they involve politicians from all parties. The secretariat for these groups is usually provided by an outside interest or lobby group.

The Law Commission for England and Wales frequently makes presentations to meetings of all-party groups on current or completed law reform projects. For example, during the course of its project on wildlife law, commissioners and staff from the Commission made presentations to all-party groups on shooting and conservation (for which the secretariat is the British Association for Shooting and Conservation), animal welfare (secretariat: the Royal Society for the Protection of Animals), and game and wildlife conservation (secretariat: the Game and Wildlife Conservation Trust).<sup>16</sup>

### 8.5.5 Interested parties

Very often, those with whom the law reform agency consults on its law reform projects will also operate as interest groups on behalf of their constituency. Most law reform agencies would regard it as inappropriate to seek to corral such groups into an organised campaign in favour of reform proposals. But if an organisation supports the proposals, many agencies would regard it as appropriate not only to point that out to government, but also to inform the organisation itself to do so. It may be worth noting that organisations that oppose a law reform agency's proposals may very well make their views known. In respect of the Law Commission for England and Wales's project on the law relating to taxis and private hire vehicles, for instance, trade unions representing some taxi drivers held mass lobbies of parliament to oppose the proposals.

### 8.5.6 Private members' bills

In most Commonwealth countries, a bill may be introduced in parliament as a private members' bill. When introduced as a private members' bill, a reform proposal does not compete with the government's own legislation for a place in the legislative timetable, as private members' bills have allocated parliamentary time of their own.

However, in many, if not most, legislatures, slots for private members' bills are allocated by a ballot. It is only members who are drawn at or near the top of the ballot whose bills will have a reasonable chance of becoming law.

It may be possible for a law reform agency to use this opportunity, but in most jurisdictions, a law reform agency's report could only be appropriately passed into legislation with the support of the government. In the United Kingdom, for example, at least some of the Law Commission for England and Wales's and the Scottish Law Commission's reports that have been implemented by private members' bills have been 'hand-down bills'; that is, bills suggested to private members scoring high ballot results by the government, and, in the Scottish Parliament, members' bills. This is not always the case. The Sale and Supply of Goods Act 1994, for example, based on a Law Commission report, was a private members' bill promoted by an opposition Member of Parliament.

*In some jurisdictions, it may be possible for a law reform agency to seek implementation through a private member's bill. Care must be taken to ensure that in doing so a law reform agency does not damage its relationship with government.*

Whether it is seen as appropriate or acceptable for a law reform agency to seek implementation through a private members' bill, or to assist a private member who chooses to promote such a bill in its passage through parliament, will depend on the jurisdiction in question. Care must clearly be taken to ensure that, in doing so, a law reform agency does not damage its relationship with government.

It should also be noted that a law reform agency hoping for a high-scoring ballot bill will be competing with groups proposing other good causes to these members. Nonetheless, a small number of law reform proposals have proceeded in this way.

## 8.6 Special parliamentary procedures

A fundamental difficulty with the implementation of law reform proposals is securing parliamentary time. For recommendations that require primary legislation, normally the only route to the statute book is through a government bill to be introduced in the legislature and pass through the usual parliamentary stages.

Consideration, however, has been given in a number of countries over the years as to whether or not law reform body recommendations should be enacted by a special procedure, in recognition of the wide consultation process already undertaken by the law reform body, and the careful analysis given by the body to the issues and to framing the recommendations.

Some law reform bodies, and others, have called for special legislative procedures for law reform body recommendations, or at least for certain types of law reform bills, such as technical or non-controversial bills. Some of the calls have been for implementation of such recommendations by means of a ministerial order or other such instrument, albeit that the changes to be made would be to primary legislation. Alternatively, the question of having expedited legislative processes for law reform body bills has been raised frequently.

In response, governments have generally favoured implementation by the usual legislative routes. This has recognised the need to ensure proper accountability of ministers for the exercise of their powers, and to allow proper scrutiny by the legislature of law reform proposals, in keeping with the principles of the rule of law and of democracy.

*Special parliamentary procedures ease the passage of reform proposals through busy parliaments.*

Nevertheless, it may be possible to consider devising special legislative procedures for particular law reform bills that provide for the usual full parliamentary scrutiny of the bill. Special procedures may be aimed at improving the rate of consideration and implementation of law reform bills by the legislature by enhancing the capacity within the legislature in some way so as to deal with more law reform measures.

Where the legislature has a heavy workload, preoccupied with government legislative priorities and parliamentary issues, there

### **The United Kingdom Parliament**

There is a special procedure in the United Kingdom Parliament for Law Commission bills, in both Houses of Parliament, the elected House of Commons and the appointed House of Lords.

The House of Lords procedure was introduced in order to address concerns that the rate of implementation of Commission bills had been dropping because of the pressure of government legislative business in parliament. The procedure is intended to reduce the time that a bill spends on the floor of the House, by providing for certain stages to be carried out in committee. This allows bills to be considered and scrutinised despite pressures on parliamentary time.

The House of Lords procedure was introduced on a trial basis in 2008. Two bills passed through this procedure in the 2008 to 2009 period. There was then a review and the process was formally adopted in 2010 in the form of amendments to standing orders. It has been used successfully since then on a regular basis to address and enact Commission bills.

The procedure is available for bills from both the Law Commission for England and Wales and the Scottish Law Commission.

The procedure was devised to apply to non-controversial Commission bills. What is 'non-controversial' is not defined. Any such bill is introduced in the House of Lords. There is a motion to refer the bill to a second reading committee. The second reading debate is off the floor of the House. The motion for second reading is then taken formally in the chamber. In the House of Lords, the committee stage for a normal government bill takes place in a committee of the whole House – that is, the whole of the House constitutes the committee and the sittings take place in the chamber. Under the special procedure, the committee stage is conducted by means of a special public committee. The report and third reading is in the chamber, as with other bills. The bill then passes through the usual parliamentary stages in the House of Commons, but on the understanding that it need be allocated only limited parliamentary time.

The procedure takes advantage of the fact that, at certain times in the United Kingdom Parliament's year, the House of Lords has a less heavy legislative schedule than the House of Commons.

Although they are formally United Kingdom Government bills, the government looks to the Law Commission project team to undertake much of the work of supporting the passage of the legislation, a role usually allotted to departmental civil servants. This has an impact on the Law Commission's workload.

There are also dangers with this process. The time allotted to the bills in the House of Commons is short, with the result that there is a danger that any significant opposition could prevent the bill from passing. This has not happened so far, but the danger has been real on some occasions.

may nevertheless be ways of channelling law reform business in the legislature so as to take advantage of some capacity in the system to address law reform measures. This route may be best explored by a law reform body working together with the government and the legislature.

There are examples of special legislative procedures for Law Commission bills in the United Kingdom Parliament and now also in the Scottish Parliament.

### 8.6.1 Scotland: a model?

A special legislative process has now been introduced in Scotland. It is worth setting out the process in a little more detail, as it may provide a model for how other law reform agencies might, in co-operation with the government and the legislature's authorities, seek to introduce a similar procedure.

*Scotland has established a special legislative process to pass Scottish Law Commission bills.*

The special legislative process, for a certain type of Scottish Law Commission bill, was introduced in the Scottish Parliament in 2013. A committee of the Scottish Parliament was established with a specific remit on law reform: the Delegated Powers and Law Reform Committee. This process was specially designed to increase capacity within the Scottish Parliament for addressing law reform, and thereby improve the rate of implementation of Scottish Law Commission reports.

This development opened a new era for the implementation of law reform in Scotland, with the first Commission bill going through the process and being enacted in the Commission's 50th anniversary year, in 2015.

The Scottish Parliament was established by an Act of the United Kingdom Parliament, the Scotland Act 1998, with devolved powers to legislate for Scotland on a wide range of matters.

It is a single-chamber parliament with no upper house or second chamber, a factor that has had some influence on how the model has been structured. The committees of the parliament therefore play an important role. Each committee is chaired by a convener, and most committees have between five and nine members. These are selected based on the balance of the various political parties and groupings in the parliament.

A committee can invite any person to attend a meeting as a witness. Witnesses give evidence or provide documents related

to the business of the committee. The parliament has a number of mandatory committees, and sets up subject committees to look at areas of policy such as justice.

There are usually three stages of a bill:

- Stage 1: the parliamentary committee or committees take evidence on the bill and produce a report on its general principles. If the parliament agrees, the bill goes on to Stage 2. If it does not agree, the bill falls.
- Stage 2: the bill is considered in detail by a committee, or occasionally by a committee of the whole parliament. Amendments to the bill can be made at this stage.
- Stage 3: the bill is again considered at a meeting of the parliament. Further amendments can be made and the parliament then debates and decides whether or not to pass the bill in its final form.

Once the bill has been passed, there is a four-week period during which it may be challenged if it is believed to be outside the legislative competence of the Scottish Parliament. If the bill is not challenged by a United Kingdom or Scottish law officer by reference to the United Kingdom Supreme Court, it is then submitted by the Presiding Officer (a role equivalent to the Speaker) to The Queen for Royal Assent. On receiving the Royal Assent, the bill becomes an Act of the Scottish Parliament.

The Scottish Parliament decided in 2013 to make changes to its standing orders, to provide for the Delegated Powers and Law Reform Committee; and to confer a remit on the committee that includes law reform. An existing committee of the parliament, the Subordinate Legislation Committee, was renamed the Delegated Powers and Law Reform Committee; and the remit of the committee was extended to include scrutiny of certain types of Commission bills.

The Parliamentary Bureau, responsible for organising the business of the parliament, were given the power, after the introduction of a bill meeting criteria set by the Presiding Officer, to refer the Commission bill to the Delegated Powers and Law Reform Committee. This committee would then be the lead committee in scrutinising the bill.

The Delegated Powers and Law Reform Committee is given the power to refer such a bill back to the Parliamentary Bureau if

it becomes clear that the bill does not in fact meet the criteria for such a bill. The parliament can then designate another committee as the new lead committee, which can take into account any evidence gathered and any views submitted to it by the Delegated Powers and Law Reform Committee.

### 8.6.2 The criteria for bills

The Presiding Officer of the Parliament made a determination in 2013 setting out the criteria for Commission bills for this process:

‘As well as implementing all or part of a report of the Scottish Law Commission... The Presiding Officer has determined under Rule 9.17A.1 (b) that a Scottish Law Commission Bill is a Bill within the legislative competence of the Scottish Parliament—

- (a) where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;
- (b) which does not relate directly to criminal law reform;
- (c) which does not have significant financial implications;
- (d) which does not have significant European Convention on Human Rights (ECHR) implications; and
- (e) where the Scottish Government is not planning wider work in that particular subject area.’

The criteria reflect concerns raised in parliament that the remit of a new committee is not extended so as to in effect encroach on the territory of the existing Justice Committee, or to create in effect a second Justice Committee, given a previous poor experience of having two Justice Committees in place in one session. The focus of the parliament was on finding a way to address law reform bills of a certain type: ones that reform the law to reflect changes in society or develop the common law, rather than bills that are, for example, contentious or have a political profile.

### 8.6.3 Commission bills

Many Commission bills, emanating from useful law reform projects designed to address a variety of technical legal issues,

will qualify for the process. This is subject to the proviso that, on consultation, consultees generally agree that the reform is needed and agree on the approach to reform put forward.

This process is therefore not a route for implementation of Commission bills that seek to reform the law but require decisions by the parliament on sensitive issues on which there may be a range of views within the country and across political parties.

The first Commission bill to be put into the new parliament was enacted in 2015 as the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015. The second Commission bill was enacted as the Succession (Scotland) Act 2016. A further such bill, the Contracts (Third Party Rights) Bill, was passed in September 2017.

#### 8.6.4 Assessment

There may be questions in practice as to which bills qualify for the process. It has been noted that the criteria require an element of interpretation; and also that criteria in a determination can more easily be adjusted in light of experience than can standing orders.

As the process has bedded in, and confidence in it has grown in light of experience, the criteria have been interpreted broadly.

The benefits of the process include:

- More parliamentary time/capacity is available to deal with commission reports.
- This should increase implementation of Commission reports.
- An enhanced responsibility is provided for a committee that had the expertise, and some capacity, to take on a new area of work.
- Improvements can be made to Scots law, to make it more efficient and up to date.

The establishment of the process in the Scottish Parliament has had an effect on the Scottish Law Commission:

- The profile of the Commission and of law reform has increased, within the parliament and beyond.

- The implementation of Commission bills should increase, with a dedicated process available for certain types of bills.
- There is an obligation on the Commission to identify law reform projects that will result in a bill suitable for the process. The Commission has adapted its methodology for this purpose by, for example, specifically consulting on suggestions for projects that would result in a bill for the process and being aware of the need to identify potential candidate bills from within current law reform projects.
- With regard to resources, the Commission has to provide more post-implementation support than usual to the government bill team and the committee for any Commission bill going through the process.

It took some years of steady work to increase the capacity of the Scottish Parliament to address Commission bills, by providing for the new process. This involved raising the issue of implementation and the need to increase implementation, and, for this purpose, engaging with ministers, government and the parliament by a series of meetings and events. This led to the establishment of working groups of officials from the government, the parliament and the Commission to consider the issues and find a way forward. These working groups identified a way of increasing capacity within the parliament, while respecting the sensitivities of existing committees. Finally, parliament decided to accept the recommendations for establishing this process.

The result reflects a common understanding, reached between ministers, government officials, parliamentarians and the Commission, that it is important to find opportunities for parliament to consider bills implementing Commission recommendations. The process recognises the valuable role of the Scottish Law Commission in making recommendations to improve, simplify and update the law of Scotland.

It is recognised, however, that the process is a partial answer to the issue of finding parliamentary time to implement Commission recommendations. As such, work on implementation generally, on Commission recommendations that do not qualify for the process, continues in Scotland.

## Notes

- 1 Sir Grant Hammond, 'The Legislative Implementation of Law Reform Proposals' in *Fifty Years of the Law Commissions* (2016) ed Dyson, Lee and Stark.
- 2 <https://www.lawcom.gov.uk/project/double-jeopardy-and-prosecution-appeals/>
- 3 Derived from *Sambasivam v Public Prosecutor, Federation of Malaysia* [1950] AC 458.
- 4 [2000] 2 AC 483.
- 5 [2001] QB 272. See Law Commission 1999 for full report.
- 6 <https://www.lawcom.gov.uk/project/housing-proportionate-dispute-resolution/>
- 7 Law Commissions Act 1965, sections 3B and 3D.
- 8 <https://www.lawcom.gov.uk/project/renting-homes/>
- 9 Michael Tilbury, Simon N.M Young and Ludwig N G; *Reforming Law Reform: Perspectives from Hong Kong and Beyond* 2012.
- 10 'The role of institutional law reform in an open government model', presented by Maria Lavelle at Australian Law Reform Agencies Conference, September 9, 2010, Brisbane, Australia.
- 11 <https://www.lawcom.gov.uk/document/programmes-of-law-reform/>, page 51.
- 12 Law Commissions Act 1965, sections 3A and 3C.
- 13 Article 248(2) of the Constitution of the Republic of Uganda
- 14 Law Commission Act 1985 (New Zealand), section 7(1) requires the Commission to prepare and submit to the responsible minister, at least once a year, programmes for the review of appropriate aspects of the law of New Zealand with a view to their reform or development.
- 15 <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/lr-rd/lr-rd.pdf>
- 16 [http://www.lawcom.gov.uk/wp-content/uploads/2015/11/lc362\\_wildlife\\_vol-1.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/11/lc362_wildlife_vol-1.pdf), page 6; and <http://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/registers-of-interests/register-of-all-party-party-parliamentary-groups/> Law reform is not complete until it is implemented. This generally means legislative action, but not always.

