

Chapter 1

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Law is always in need of reform. To be successful, law reform must be of a high standard. This guide is designed to provide practical assistance to users seeking to deliver high-standard law reform outcomes. Using examples and experience from around the Commonwealth and beyond, it guides users through each of the phases of a successful reform. It is the first general guide to conducting law reform in Commonwealth countries.

The need for law reform has been widely recognised for many years. Law reform activity has grown, in a great variety of ways and with varying success. In order to enhance justice and legal efficiency, and contribute to socio-economic development, reform needs to be of a high standard. Across the Commonwealth, there is a need for information and guidance about the different ways in which law reform can be undertaken, learning from the various methods that have proved successful in Commonwealth jurisdictions.

1.1 The purpose of this guide

There are at least 60 law reform agencies in the Commonwealth, and a good number outside the Commonwealth. In addition, in some jurisdictions, law reform is performed through a range of other means.

Law reform has become ever more demanding. Public expectations have increased, and pressures have grown. Law commissioners and the staff of law reform agencies often move on swiftly. In addition, law reform agencies have increased in number and continue to do so: the newer agencies tend to be in small states, and tend themselves to be smaller.

Until now, there has been no general guidance on how to carry out law reform in Commonwealth countries. This guide fills that gap. It is simply a guide and is not prescriptive.

Law reformers themselves will benefit from such guidance, as well as others involved in law reform in other ways.

This guide is for:

- those with experience in law reform within law reform agencies and government ministries;
- those who are new to being closely involved in law reform, such as new law reform agencies, new members of staff and new law commissioners and board members, and others coming for the first time to law reform, such as those conducting one-off reviews of specific subjects;
- the recipients of law reform outputs, particularly in government and in legislatures; and
- governments and others considering the possible establishment of a new law reform agency, to assist them with fully understanding typical models and processes.

The guide is relevant across the Commonwealth, and indeed beyond. It may, however, be of particular relevance to developing Commonwealth countries, as well as small Commonwealth jurisdictions.

The guide is of an entirely practical nature. It aims to assist a law reformer at their desk, with ideas about how to progress a particular law reform project, from start to finish.

Throughout, points are illustrated with examples from around the Commonwealth and beyond. The examples are drawn from a wide range of law reform agencies (and others). Examples from some agencies recur, with the aim of providing a sense of how particular practices build upon each other in the distinct processes used by these law reform agencies. The examples are chosen to illustrate points covered in each chapter. However, they will frequently also provide outlines of the substance of the law reform under consideration by the agency responsible. The aim of this is to give some idea of both what law reform agencies around the world have sought to improve and how they have gone about doing it.

The guide explains a variety of approaches to the elements of the law reform process, discussing their advantages and disadvantages as appropriate. Not all will be relevant or

practical for all law reformers. The guide is intended to be used selectively, and to be capable of adaptation to different contexts.

The guide also provides suggestions and options for law reformers who have few resources, including tailored coverage of agencies in small states and jurisdictions. At the same time, it covers some relatively sophisticated procedures which will be appropriate for better funded or larger law reform agencies.

1.2 The approach of the guide

The guide broadly seeks to follow law reform processes through each stage, from the initiation of projects to their final implementation.

The guide starts with an account of law reform and law reformers. Chapter 2 seeks to explore the nature of law reform as it has developed over the last 50 years. The chapter goes on to consider how law reform legislation fits into the legislative scheme in general, and then surveys the key features of law reform agencies and their values. In this connection, it considers the nuanced way in which law reform agencies relate to governments. It provides a characterisation of the models that presently exist – the standard model of a statutory law reform agency; the institute model at sub-state level in Canada and Australia; and the in-government unit. When the guide uses the term ‘law reform agency’, it refers to all three of these models.

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

Chapter 4 considers the planning and management of projects. It starts by looking at how project teams are formed, and then

considers the basic elements of project management – a timeline and a budget; evaluation of progress; co-ordination of inputs; and risk management. The chapter goes on to discuss key mechanisms for project management. These include task lists, and the identification of responsibilities, dependencies and timelines.

Chapter 5 considers the first stage of a law reform project – the research and drafting in the period before the start of consultation. A variety of first stage documents are examined, including documents that provide background, analysis and initial questions or conclusions for consultation. The chapter considers legal research, as practised in law reform agencies. This means not only research into the law, and its development within the jurisdiction, but also comparative legal research and empirical social science research. The chapter then considers the nature and value of pre-consultation engagement with stakeholders. It provides guidance on the drafting of consultation documents and the development of legal policy in a consultation document, as well as the balance between provisional proposals and questions.

Chapter 6 addresses the role of consultation as a definitive element of law reform. Following a discussion of why consultation is important, the chapter considers different forms of consultation process. It goes on to discuss the identification of the audience for consultation and the publication process. The chapter then looks at active consultation – how law reform agencies reach out to the communities with which they aim to engage through advisory groups, meetings and events, and observational consultation and site visits. It underlines the importance of record keeping. It examines the persistent problem of difficult-to-reach interests – how do law reform agencies reach out to those communities that are not organised in such a way as to be readily accessible to the law reformer? Finally, the chapter considers some of the practical issues in relation to written responses, such as time extensions and confidentiality.

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 be expected to produce, or may or may not wish to perform itself. Finally, the chapter looks at how those law reform agencies that produce draft bills with their reports go about doing so.

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 the implementation of law reform agencies' reports. It looks at the process of publication and a government's response. The chapter goes on to consider and discuss how law reform agencies can support governments in implementing recommendations after they have been finally 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 or not the model could be more widely used.

Chapters 9 and 10 address cross-cutting issues in law reform for Commonwealth countries. Chapter 9 discusses the impact of standards and international obligations on law reform processes, including international human rights law. It also introduces the 2030 Agenda for Sustainable Development and explores the important contribution that law reform can make to the realisation of the Sustainable Development Goals. Chapter 10 turns to the particular challenges of law reform in small Commonwealth states and jurisdictions. Of the 52 members of the Commonwealth, 30 are classified as small states. In addition, law reform agencies exist in a number of non-state jurisdictions such as Jersey and the Cayman Islands. Chapter 10 covers the challenges and advantages of a small population and land area, and the impact that can have on the structure of law reform agencies in small states and jurisdictions, including the particular pressures on staffing. The chapter looks at how small state and jurisdiction agencies adapt the law reform process, and the particular significance of comparative research for them. It goes on to outline how, despite the challenges, small state and

jurisdiction law reform agencies have made very considerable contributions to the law. Finally, the chapter assesses the particular utility of co-operation between law reform agencies, including through regional associations, and small state and jurisdiction agencies.