

Chapter 5

Pre-consultation: Research and Drafting



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Chapter 5 considers the first stage of a law reform project – 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 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.

The first substantive stage of any law reform project is preparation for consultation. This involves initial research on the law, and on the social and economic context, with a view to the drafting of documents to support the consultation process. Occasionally, law reform agencies may undertake work that does not require consultation. However, these are rare, and usually the first stage involves researching and drafting a first stage document for use in consultation.

5.1 First stage documents

The nomenclature of first stage documents varies between law reform agencies globally, and indeed within the same agency over time. The documents are variously referred to as research papers, background papers, working papers, preliminary papers, information papers, consultation papers and issues papers. Although they may vary slightly in content, form and focus, they all serve the purpose of providing background material on the issue under review, descriptive information about the

The first stage of a project is usually the researching and drafting of a first stage document, for use in consultation. These documents provide background material, descriptive information, preliminary analysis or an initial scoping of the law reform task at hand.

The law reformer must take care to ensure that the consultation document is clearly written, well researched, and easily understood by the key audiences.

law as it stands, preliminary analysis and thinking about issues or problems raised, or an initial scoping of the law reform task at issue. Sometimes a single document is used to inform a single consultation stage. At other times, or for other projects, a law reform agency may publish an initial, more open paper or papers followed by a further document including reform proposals.

The type of the initial document produced may depend on factors such as the time frame set for an inquiry, the available resources and the way in which a law reform body is constituted – in particular, whether it can self-refer or act only on terms of reference from government. In situations where time frames are tight, it may not be practical to produce

Three Australasian approaches

The Australian Law Reform Commission works to terms of reference and strict timelines of, on average, 12 months to the final report. The first document that is most commonly produced is an issues paper. This document presents the Australian Law Reform Commission's initial analysis of the terms of reference and provides an outline of the legal issues identified as being problematic and needing reform. It represents the Australian Law Reform Commission's preliminary thinking on the subject and asks open questions about the community's experience of the area under review, seeking advice about any issues that may have been missed, and asking for feedback on the initial scoping and analysis. It opens the conversation with the community and invites their participation in the process. It often suggests or outlines principles that could guide proposals or provide a framework for reform and asks the community for guidance on these. Usually, stakeholders will have around eight weeks to respond to the issues paper during which time the Australian Law Reform Commission will continue its research and analysis and also proactively consult.

In other cases, an agency may, in considering whether to investigate a particular area of law, commission background or research papers to collect data and an evidence base on the need for reform, or to canvass the issues prior to settling specific terms of reference.

The Victorian Law Reform Commission produced four information papers for its inquiry into victims of crime to provide background information about the history of the modern criminal trial and its underlying principles, evidence about who victims are and what they need from the criminal justice system, information about the International Criminal Court as a case study of victim participation and a review of the sources of victims' rights internationally and in Australia. Three months later it then produced a consultation paper that sought public submissions.

The New Zealand Law Commission produces issues papers for consultation on its references. On rare occasions, the Commission has produced a study paper as a way of informing discussion on a reference. For example, in 2007 it produced a study paper that set out some privacy concepts and issues to assist stakeholders in conceptualising law reform issues in this area.

Initial documents

The Law Commission for England and Wales sometimes produces what it refers to as scoping reports. These may be produced when the Commission has agreed to take on a project, but the exact scope of the endeavour requires more precise definition. Scoping papers are generally published for information, rather than inviting consultation. Such exercises may be preliminary to further government commitment to a project, and can involve further decisions. For example, the Law Commission's scoping paper on adult social care required approval by the government, and one element of the scope that the Commission proposed, namely that adjudication of disputes be included, was rejected by the government. A project then proceeds to a further paper on which consultation takes place.

The Singapore Law Reform and Revision Division of the Attorney-General's Chambers produces consultation papers that include questions about whether the law should be reformed and how, and call for the community to make submissions to the inquiries. In some cases, it also publishes information papers providing background and explaining the issues.

In order to actively involve the community at an early stage, the South African Law Reform Commission also publishes issues papers for appropriate investigations as the first step in the consultation process. These papers announce an investigation, describe the aim and extent of the investigation, point to possible options available for solving existing problems, and initiate and stimulate debate on identified issues by way of including specific questions on relevant issues.

background or information papers, and organisations may need instead to go straight to a consultation paper or issues paper.

In many cases, the first document in a law reform project will be the consultation document, with which the law reform agency will seek to engage the relevant community. However, there may also be other documents produced as part of an initial, definitional stage.

As the process for each law reform project may differ slightly according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review and the period of time allotted for the inquiry, the initial documents produced will vary. However, they commonly offer the first point of engagement with the community in the law reform process in question. It is therefore important to ascertain which form of document will best serve these purposes. These documents also serve to manage stakeholder expectations about what the inquiry might achieve, what it might focus on and, importantly, what might be considered outside of the terms of reference and scope. Whatever the decision about first documents, whether

Enhancing accessibility

Since its Disability Inquiry in 2014, the Australian Law Reform Commission makes its issues papers available in 'Easy English' for greater accessibility, and produces summaries in 20 community languages. In line with Welsh Government guidelines, the Law Commission for England and Wales publishes some consultation papers and reports in both Welsh and English.

they are issues papers or scoping papers, consultation papers or discussion papers, the key is to be aware of the audience that the document is written for, and what the purpose of the document is. Consultation lies at the heart of most law reform processes and is important for developing effective recommendations because good law reform and effective implementation depend on involving the people who may be affected by it and taking their views into account.

Care must be taken with the form of consultation papers, to ensure that they are appropriately accessible to the appropriate audiences. For example, it may be necessary to publish a paper in more than one language.

Particular steps may be necessary to ensure that all members of the relevant community have access to papers. This may include ensuring that papers are available in audio or large print forms for people with visual disabilities, or easy read versions to make them accessible to people with learning difficulties. It may also be very helpful to consultees to prepare a summary of the paper.

Extensive community and stakeholder engagement is intrinsic to independent law reform, a topic covered in detail in the next chapter. First documents provide a key starting place in this process of community engagement and it is important that they are well researched, clearly written, accessible and set the right tone for the inquiry going forward in whatever form they take.

5.2 Legal research

Legal research remains the key to law reform consultation and similar documents.

All good law reform depends on high-quality research. The type of research undertaken and resources available will vary

from one law reform agency to another. The scope and depth of any research proposed should be carefully planned in advance, including the timescales, and the research envisaged should be proportionate to the nature and purpose of the law reform project. The method of research and approach will depend on the agency that conducts the research, the time allotted, and the nature and breadth of the subject.

The impetus for the reform may be driven by a variety of goals, such as:

- to increase efficiency and effectiveness;
- to provide a technical fix;
- to reflect changing community views and attitudes;
- to give effect to international obligations;
- to respond to new economic and technological development; or
- to respond to constitutional challenges.

The nature of law reform research is coloured by these goals. It is therefore not primarily or purely an academic exercise. It is, rather, instrumental in nature. There are usually clear objectives and outcomes, which must be kept in mind and which will shape the direction and approach of the research. The idea that should therefore be kept in the forefront of the mind is that legal research for the purposes of law reform is always driven by the mandate of the agency to reform and modernise the law, to find solutions:

[W]hen research is undertaken as part of the process of law reform, it is undertaken as a part of the process, it is undertaken with a definite end, namely making suggestions for improvements in the law on concrete and easily identifiable matters and the formulation of those proposals in precise terms.¹

It is necessary therefore to tailor the methods to be adopted – depending on the type of agency, the resources available, the time allotted and the subject – to the nature and extent of research. Where the law reform agency is a hybrid body or a government department, issues such as the needs of the administration may take precedence in the time allotted to meet objectives. More generally, the exigencies of working within government may provide other challenges for such agencies.

Research is fundamental. The nature of the research will depend on the goals of the reform.

The internet has greatly expanded the scope and variety of legal research opportunities. The Commonwealth Secretariat, through its Office of Civil and Criminal Justice Reform, provides access to the Legal Knowledge Exchange Portal. This includes searchable national legislation from Commonwealth countries in selected legal areas.

5.2.1 The internet

The internet has transformed legal research. Prior to the explosion of information available on the internet, the best that could be hoped for was access to well-stocked libraries and contacts with universities, government departments, lawyers and law reform agencies in other countries in order to obtain books or copies of material. Information could be hard to come by and could take time to locate and obtain in physical form. This posed particular challenges for less well-resourced and smaller law reform agencies in developing countries.

Some key internet resources

Legal information institute websites exist in many parts of the world. Almost all of these institutes collect case law transcripts; many also provide legislation, treaties, law reform reports and other legal materials. Some, such as Austlii, the Australasian Legal Information Institute, also include some journals.

CommonLII, the Commonwealth Legal Information Institute, acts as a portal for eight Commonwealth Legal Information Institutes, covering 60 Commonwealth and other common law jurisdictions (some of which are mentioned in this box): <http://www.commonlii.org/>. Another general portal is the World Legal Information Institute: <http://www.worldlii.org/>.

Some examples of legal information institute websites are given below:

- Asia (<http://www.asianlii.org/>): includes some information on 30 national jurisdictions (not all include case law) and 13 Indian state jurisdictions.
- Australasia (<http://www.austlii.edu.au/>): all Australian jurisdictions and New Zealand. For New Zealand, see also <http://www.nzlii.org/>.
- British and Irish (<http://www.bailii.org/>): all United Kingdom jurisdictions, Ireland, Jersey, the European Union and the European Court of Human Rights. For Ireland, see also <https://www.ucc.ie/law/irlii/index.php>.
- Canada (<https://www.canlii.org/>): all Canadian jurisdictions.
- Hong Kong (<http://www.hklii.org/eng/>).
- Kenya (<http://kenyalaw.org/kl/>).
- Pacific Islands (<http://www.pacii.org/>): 20 Pacific islands, both Commonwealth and non-Commonwealth.
- Southern Africa (<http://www.saflii.org/>): 16 southern African states, including all South African jurisdictions.
- United Kingdom territories and dependencies (<http://www.worldlii.org/catalog/3144.html>): 14 jurisdictions.
- Cornell Law School's Legal Information Institute (<https://www.law.cornell.edu/>): includes information on US and state jurisdictions through links to relevant websites.

Apart from current subscription services such as LexisNexis and Westlaw, the proliferation of official government, parliamentary and court websites alongside those of law reform agencies from around the world, legal information institutes and other free web-based resources now make it possible to access a large volume of material from authoritative sources. This has provided a great opportunity for smaller law reform agencies to access necessary research material. In fact, the internet now poses the opposite challenge, with very large volumes of material published from a wide range of sources, not all of which may be updated or accurate.

Some key internet resources (cont.)

The Commonwealth Secretariat, <http://www.thecommonwealth.org>, through its Office of Civil and Criminal Justice Reform provides access to the Legal Knowledge Exchange Portal for member countries. This includes searchable national legislation from Commonwealth countries in selected legal areas, including constitutional law, criminal law, oceans and natural resource law, commercial law, and health and education law.

The three regional human rights regimes provide case law websites: <http://en.african-court.org/> (African Court of Human and People's Rights); <http://www.corteidh.or.cr/index.php/en> (Inter-American Court of Human Rights); and <http://www.echr.coe.int/Pages/home.aspx?p=home> (European Convention on Human Rights). The Universal Human Rights Index is also useful: <http://www.uhri.ohchr.org>.

Many national and sub-state authorities provide legislative websites, including:

- South African Government website of Federal legislation: <http://www.gov.za/documents/acts>;
- Database of Indian Federal legislation maintained by the Supreme Court Judges' Library: <http://supnet.nic.in/legis/mainpage.html>;
- Legislation by the United Kingdom Parliament and devolved legislatures in Scotland, Wales and Northern Ireland: <http://www.legislation.gov.uk>.²

Other relevant sources are:

- the American Law Institute: <http://www.ali.org>;
- the Asian Business Law Institute: <http://www.abli.asia>;
- the Uniform Law Commission (The National Conference of Commissioners on Uniform State Laws): <http://www.uniformlaws.org>.

The initial task for a law reform researcher is to determine what the law is in their jurisdiction; what problems exist; what can be done to remedy those problems; and what the options for reform are and why.

Understanding what the law is involves researching the history of how and why the law came to be.

5.2.2 Types of research

Once the law reform subject has been assigned or determined and the issues to be addressed identified, the initial task of law reform researchers can be conveniently summarised as determining:

- what the law is in their jurisdiction;
- what problems or deficiencies exist;
- what can be done to remedy those problems; and
- what the options for reform are and why.

The initial issues to be addressed are usually clear from the terms of the reference or assignment, the subject matter and the circumstances that may have prompted the reference. It should be recognised however that research will often reveal other issues, directly relevant or collateral, which may also need to be addressed. The researcher must keep a balance between maintaining a focus on the primary concerns of the project and ensuring that all relevant matters are included.

5.2.3 What is the law of this jurisdiction?

The law reform agency is presented with a law reform issue that needs to be addressed. The issues or task may (or may not) be set out in a relatively clear, comprehensive manner. Determining what the law is in the jurisdiction will involve not only finding out what the law

Legal history and law reform

In 1996, the ancient common law 'year and a day rule' was abolished in England and Wales. The rule provided that a person can only be charged with an offence of homicide if the victim dies within a year and a day of the defendant's act or omission. The abolition of the rule (by section 1 of the Law Reform (Year and a Day Rule) Act 1996) was the result of a recommendation of the Law Commission for England and Wales in its report *Legislating the Criminal Code: The Year and a Day Rule in Homicide*.³ The rule caused real problems with the adequate prosecution of crime. It was felt that it was inappropriate now that life support machines could keep victims alive well after the period had elapsed. Another problem was that in many cases there was no offence with which people could be charged if the injured person survived for more than a year and a day, which would otherwise have been gross negligence manslaughter. But a powerful element in the case for reform was made by considering the history of the rule from its thirteenth century origins, which demonstrated that it arose from obscure medieval procedural concerns, not as a matter of high principle. As such, it could be seen to be merely obsolescent and anachronistic.

is at the present time; that is, the existing state of the law, but also obtaining a picture of how the law came to be in its present state. This will often involve an investigation into the historical development of the law in order to understand the reasons behind the existing law, the course of its evolution and the factors that prompted changes to the law over time. The point is not to simply expound the law but to understand it, its origins, its rationale, its history and its application over time so as to be able to formulate recommendations for reform that will address the relevant issues with a better law.

5.2.4 Legislation

The researcher must find relevant statutes including subsidiary legislation, such as regulations, orders and rules. Care should be taken to ascertain that all the potentially relevant statutes are considered. In the larger jurisdictions in which they are available, internet services providing amended and annotated legislation may be invaluable. However, in many jurisdictions use must still be made of alphabetical lists of statutes, indexes and chronological tables. In most jurisdictions, case law will be relevant to the legislative regime. Again, in large jurisdictions, practitioner texts or academic works may be consulted. Where these are not available in smaller jurisdictions, such works published in larger allied jurisdictions may still be helpful, but must of course be used with caution.

Where statutes have been amended and consolidated over time, care should be taken to ascertain that relevant parts of the statute have not been omitted or changed. Although the commercially available databases in some jurisdictions may be relied on, they may well not be available or reliable in relation to other jurisdictions.

Comprehensive research into the state of the law must include research into legislation, case law and secondary sources.

The dangers of statutory amendment

In Jamaica, the antiquated Prisons Act and Commissioner of Corrections Act were replaced by a modern Corrections Act in 1985. The question then arose in 2015 of the status of Prisons Regulations 1980. The Corrections Act as passed in the Jamaican Parliament contained 87 sections. Section 87 made provision for repeals of previous Acts but also provided that regulations, licences, orders and rules made under the repealed Acts continued to have effect as if made under the new Corrections Act. Later, the Corrections Act was added to the official volumes of the Law of Jamaica and, as part of the law revision process, apparently spent provisions, such as section 87, were omitted. An examination of the Corrections Act would leave the researcher unclear on whether the Prisons Regulations 1980 were still in force, and without more research the conclusion might be drawn that these regulations were no longer in force.

It may therefore be critical that the historical development of the statute, where it has been amended, repealed and replaced, is investigated. Where legislation is available in searchable electronic databases, such as legal information institute and government websites, it may be possible to access point-in-time legislation to make the task easier.

Historical research may be important for three reasons. First, it may indicate why particular provisions were crafted in their present form and will supply some indication of the reasons that justified the particular approach. Secondly, it may reveal that alternatives may have been considered and rejected, and the reasons why they were rejected. Thirdly, this research may show that a provision that was relevant and justified at the time of its making is no longer justified.

The researcher will also need to be aware of other sources of rules and standards such as codes of conduct or practice that are mandated by the statutes that establish self-regulatory regimes for particular subjects or sectors. Examples include professional codes of conduct that apply to lawyers, medical doctors or industry codes of practice under data protection or protected disclosure (whistle-blowing) legislation.

5.2.5 Case law

Cases in which the relevant common law rule or statute has been litigated or prosecuted are a critical source for the researcher. This is particularly so where the judgment or opinion of the court interprets, applies, explains or comments on the issue. Attention must be paid to the hierarchy of courts. Care must be taken to ensure that principles of good case research are adhered to and to determine where cases have been overruled, reversed or distinguished.

It is important to remember that for law reform purposes important perspectives on the subject may be found in *obiter dicta* and dissenting opinions. A case may be important for law reform purposes for what was said by the court, rather than what was decided.

Whether statute or case law, the objective is always to provide a clear and comprehensive picture of the law in order to identify problems and deficiencies where the law reform task is a general review of the area of law, or to more precisely delineate

and define the scope of the problem where the reference is a narrower one.

5.2.6 Other resources

Law reform researchers will also have recourse to standard secondary sources, such as:

- legal encyclopaedias such as *Halsbury's Laws of England/Australia/Canada*, *Laws of Scotland: Stair Memorial Encyclopaedia*, the *Canadian Encyclopaedic Digest* (Western and Ontario) and *Corpus Juris Secundum* (USA);
- legal text books;
- legal periodicals and journals;
- case digests, e.g. *The Digest* (United Kingdom); and
- legal dictionaries.

Consideration of these materials crosses over into the consideration below of comparative research, but their inclusion at this point reflects the reality that many jurisdictions will not have local versions of these works and, where issues relating to the common law are involved, much of this material remains relevant and useful for research of local law. In this regard, it may be that older, superseded volumes of these works may prove useful; even more so than up-to-date volumes.

Legal textbooks provide in-depth commentary and scholarly analysis of areas of law. They also provide footnotes with citations to potentially relevant cases, statutes and secondary authorities. Useful standard features include indexes and tables of cases, statutes and abbreviations.

Larceny v Theft

In England and Wales, the Theft Act 1968 replaced the previous law on larceny, much of which was contained in the Larceny Act 1861, and cases decided on that Act. The current edition of *Halsbury's Laws of England* therefore covers the law since the 1968 Theft Act. However, in a number of Commonwealth jurisdictions, the (in England and Wales) older law still obtains. Therefore, the third edition of *Halsbury's Laws of England*, published between 1952 and 1964, rather than the up-to-date version, is the key reference for the researcher in these jurisdictions.

Legal encyclopaedias are multi-volume sets that provide overviews and a detailed description of the law on a range of legal topics, usually those more often encountered in practice. In addition to reproducing much of the statute law and secondary legislation in a convenient form, their commentary provides references and footnotes to primary sources, including relevant cases and other legislation.

Journal articles tend to focus on narrower legal issues. The authors, usually academics and practitioners in a particular field, provide informed analysis of the law and references to relevant case law and legislation. Journal articles are especially useful for commentary on emerging areas of the law, and areas undergoing change.

Digests contain summaries of court cases. These collections of case digests are usually an attempt to provide the researcher with an exhaustive list of cases for a particular jurisdiction or subject area. Digests are arranged under broad subject headings and sub-headings.

In addition to these legal resources, there are many written resources dealing with the development or implementation of legislation, and the law more widely, which provide helpful explanation, comment and opinion. These include:

- records of parliamentary proceedings (called Hansard in the United Kingdom and some other jurisdictions);
- parliamentary committee reports;
- ministry papers (green papers/white papers);
- law reform agency reports;
- reports of commissions of inquiry;
- reports of advisory bodies, independent authorities and professional associations;
- non-legal academic writing/textbooks and peer-reviewed journals; and
- newspaper reports and articles.

In many Commonwealth jurisdictions, green papers are consultation documents produced by government ministries and departments to inform the public and to give the ministry or department feedback on its policy or legislative

proposals. White papers are policy documents produced by the government that set out firm proposals for future legislation.

The records of proceedings of parliament (Hansard) are frequently useful for ascertaining the intent of the legislation and the policy, and the concerns that were the impetus for its introduction and passage. This is often critical in the analysis of the problems. The reports of committees that have received submissions from the public while examining the problem that the legislation was designed to address, or the legislation itself at a later date, are particularly useful.

5.2.7 Comparative research

Comparative legal research is the examination of the laws of other jurisdictions on the issues under consideration. The aim is to enable a proper evaluation of the approach and experience of other key jurisdictions in addressing the issue. This is particularly useful where other jurisdictions have had their solution in place for a period sufficient for there to be case law and commentary, in the form of judicial pronouncement, parliamentary reviews and reports, law reform agency reports, legal academic research and so forth on its performance, successes and failings. This is valuable in seeking to avoid pitfalls and in tailoring legislative options or solutions that are appropriate for the home jurisdiction of the law reformer. The same process that was used to research the law in the home jurisdiction will be applied to the research in another jurisdiction.

Comparative legal research therefore seeks to investigate how comparable jurisdictions address a common issue in order to identify reform options, and the advantages and disadvantages of each. This involves a critical exercise of judgement, in both the planning of the research and in assessing the results. As regards the planning, it is essential to define the scope of the comparative research, to ensure that only appropriate and useful comparisons for the home jurisdiction are investigated; and that the research results are available within a specified timescale.

It is fundamental to comparative legal research that it should not be approached as simply a way of cutting and pasting a legislative approach used elsewhere without consideration of the local context of both jurisdictions. The aim is not to simply imitate another jurisdiction, but to draw from, and apply as appropriate, experience from elsewhere.

Comparative legal research involves investigating how comparable jurisdictions address a common issue in order to identify reform options. It involves careful consideration of questions of applicability and relevance.

Cybercrime in Jamaica and Nigeria

Consideration of legislation on cybercrime in Jamaica drew on the Council of Europe Convention on Cybercrime. This convention addresses issues such as offences against the confidentiality, integrity and availability of computer data and systems, computer-related offences, content-related offences related to child pornography, and offences related to infringements of copyright and related rights. In the context of Jamaica, however, it was decided that the Cybercrimes Act 2010 would not deal with content-related offences or copyright offences. These were already dealt with in specific legislation addressing these issues; that is, the Child Pornography (Prevention) Act and the Copyright Act. Nigeria's Cybercrimes (Prohibition, Prevention, etc.) Act 2015, by contrast, incorporates these issues into the same legislation.

Legal reforms in other countries, where found useful, must be considered and adapted to suit the local constitutional and legal system, and jurisprudence, as well as the social, cultural and political environments. For example, in several jurisdictions in the USA, sex offenders' registries are open to the public and their contents available online. Serious consideration is required in determining the benefits and challenges of such an approach and whether this would be an appropriate or preferred law reform option for another particular country context.

There is a vast amount of material available online from government ministries, law reform agencies, academia, and the legal and other professional groups, among others, from many jurisdictions.

For many law reformers, particularly in small developing common law states, it may be tempting to seek solutions primarily from jurisdictions such as the United Kingdom, Canada and Australia. However, because of the range of material now available online, it is also possible to research the law in smaller jurisdictions, which may be more appropriate in some cases. Where possible, a search should be made for law reform agency reports from comparable jurisdictions, given the wide networks of law reform agencies and legal information institutes now available.

Naturally, it is often convenient to start by looking at large and developed jurisdictions that have a long history of publications of relevant legal materials, frequently updated by law reform agencies, government departments and parliament. Nonetheless, it is important that law reformers in smaller and medium-sized developing countries do not limit searches because of this. For

Naturally, it is often convenient to start looking at large and developed jurisdictions that have a long history of publications of relevant legal material. However, for developing countries, more suitable ideas may be found in the law reform agencies and jurisprudence of developing states.

developing countries, solutions that may be more culturally and situationally appropriate may be found in the law reform agencies and jurisprudence in developing states.

Although primary reliance may be placed on material from the Commonwealth jurisdictions with predominantly common law jurisprudence, the experience of other jurisdictions can be useful. There may be difficulties accessing the law in civil jurisdictions because of practical considerations such as language differences. Nonetheless, it is important to recognise the mixed common law/civil law heritage of such accessible countries as Scotland and South Africa.

The use of a consultant to carry out relevant comparative research may be of particular value to the law reform agency (see also section 5.4 'Resources for research: consultants and collaboration'). A legal expert, for example from legal academia, could be commissioned to conduct comparative research into a particular issue, and prepare a paper for the agency to consider analysing different approaches from other key jurisdictions and whether or not these would work in the home jurisdiction. The research paper may be published as part of or along with their own consultation document or report.

Certain Commonwealth countries have civil law traditions and systems in addition to the common law, and this must be taken into consideration when conducting comparative research.

5.3 Empirical research and the use of other disciplines

Law does not exist in a vacuum. It is part of the fabric of human and community interaction in society. As a result, the law reform researcher may have to have regard to other academic disciplines, particularly the social sciences and empirical research, that seek to ground observation and analysis on data that can inform legal policy. Where possible, and to a greater or lesser extent depending on the issue being addressed, qualitative and quantitative research can assist in obtaining the best or a better picture of the context in which the law operates, of the difficulties with the current law and of the way ahead for reform.

Empirical studies for these purposes may involve surveys of public opinion on the necessity for new law or reform of the law, or the acquisition and analysis of sociological, demographic or health and medical data. These bring a quantitative element to the examination of the operation and effect of existing law in practice.

Research outside the discipline of law can be illuminating and provide useful qualitative and quantitative information on which to base reform recommendations.

A cost–benefit analysis is an example of non-legal information that is often of value.

Commissioning new empirical work of any complexity can be a challenge for law reform agencies, whatever their size. It is frequently expensive, and will often take a considerable time to commission and conduct, which may not fit with the timetable constraints of the project. However, there is, internationally, a very great deal of social science and other empirical research that has been conducted and reported, and it may often be more appropriate to ensure a proper review is undertaken of existing research, rather than to commission new, bespoke research.

Further, it may be possible to work collaboratively with these institutions and with government statistical data resources to prepare useful material for a law reform project.

A particular form of non-legal information that will often be of considerable benefit to law reform projects is the development of cost–benefit analysis, applied to reform proposals. Cost–benefit analysis is dealt with more fully in Chapter 7. It should be noted, however, that many established procedures for implementing cost–benefit analysis require the process to start at the earliest stages of the project.

Behaviour of public bodies and sentencing: Non-legal research in England and Wales and South Africa

When undertaking a wide-ranging project on the law relating to remedies against public bodies, the Law Commission for England and Wales realised that it required insight on the impact of changes in liability on the behaviour of public bodies: whether legal liability led to excessive risk-aversion ('defensive administration') or improved the quality of service provided to the public. It was not possible to commission new empirical research, so a professor of public policy at Bristol University was commissioned to produce a literature review, at moderate cost. The 70-page review covered socio-legal studies, economic approaches, including behavioural economics, public choice theory, decision theory and psychological approaches, and was distilled into a 20-page appendix to the consultation paper.⁴

An empirical quantitative and qualitative study of the sentencing practices of the South African Criminal Courts, with particular emphasis on the Criminal Law Amendment Act 105 of 1997, formed part of the South African Law Reform Commission's review of the sentencing law. The study was undertaken on behalf of the Commission by experts affiliated to the Institute of Criminology at the University of Cape Town. The aims of the study were to determine what sentences were given for various crimes in various regions; the factors that affected those sentences; the impact of the Act investigated on sentencing practices; and to compare sentencing practice with the requirements of the Act. The study informed the research for the Commission's investigation into sentencing law and was published as part of the Commission's research series.⁵

5.4 Resources for research: consultants and collaboration

A law reform agency may possess all the legal or other expertise that may be required for the research project. Commissioners who are experts in the law are usually appointed to carry out the law reform work; in many law reform agencies, supported by Commission legal and research staff. The depth of legal support will depend on the resources available to a law reform agency. If the law reform agency does not have the necessary expertise, consideration may be given to the engagement of consultants or the formation of an advisory group of external experts to advise the law reform agency, in order to provide relevant legal or non-legal expertise for the project in question.

The question to be considered is whether or not the subject matter of research requires or could benefit from external expertise. This involves questions of cost and the availability of consultants or advisory group members. It may also be possible to access technical assistance through regional or international organisations.

Universities and other research institutions can be a good source of potential consultants or advisory group members with academic and research skills and expertise in particular areas, who could be engaged on a full-time or part-time basis for particular projects. Legal practitioners of particular repute and knowledge, as well as retired judges, may also make good consultants or advisory group members.

Consultants may also be practitioners in the relevant field. Other sources of consultants include professional associations and self-regulatory bodies such as bar associations and medical councils; university teaching and research institutions; other government agencies; non-governmental organisations; and international organisations such as the United Nations Educational, Scientific and Cultural Organisation and the United Nations Office on Drugs and Crime.

International assistance: Drugs in Jamaica

Drugs courts were established in Jamaica as a result of the Drugs Court (Treatment and Rehabilitation of Offenders) Act 1999. The process was aided by technical assistance from the Inter-American Drug Abuse Control Commission, an agency of the Organization of American States, which was a source of comparative laws, statistical data and experience, and examples of good practice from other jurisdictions that had previously established drug treatment courts.

Working with academics: The Scottish experience

An example of collaborative working that obtains access for a law reform agency to resources and expertise for research is the memorandum of understanding that was entered into between the Scottish Law Commission and Scotland's university law schools in 2016. The agreement was made to promote law reform in Scotland, by providing a framework for enhanced joint working between the Commission and the legal academic community. It involves university academic staff, post-graduate students and others contributing research to the Commission's law reform projects. The first placement involved an academic from the University of Glasgow School of Law undertaking a comparative research study into selected jurisdictions in order to contribute information and analysis to the Commission's project on the reform of the law on enforcement of securities over land and buildings.

It may also be useful to consider the possibility of collaborative work to obtain the benefit of consultancy-type expertise and additional resources to reduce costs.

5.5 Pre-consultation engagement with stakeholders

One reason for engaging with stakeholders in the field that is the subject matter of the law reform project is so that they can assist with initial research, as discussed above.

There are, however, other reasons. In particular, early engagement with stakeholders can bring considerable benefits in terms of the management of the consultation process to best effect. Lawyers will usually be aware of the existence of the law reform agency, and may well have used or contributed to its work. The same frequently cannot be said for most non-legal stakeholders in the area being examined.

It is often the case, therefore, that lay stakeholders in the area of the law under review will not understand law reform. They will not know what the law reform agency is. They will not be clear about its relationship with government. If, however, they understand its record of success in achieving legislative change, they will likely be much more ready to get involved. On the other hand, they will not necessarily understand the limits to law reform. They might, for instance, seek to influence it to take an inappropriately political line. Above all, they will not understand the law reform process, and therefore they will not know how and when to feed in their views and expertise.

Engaging with stakeholders can assist with legal research, educate both law reform agencies and stakeholders, and raise stakeholder interest and enthusiasm.

On the other side, law reformers will be capable of researching and understanding the law using their own and allied skills. What they will not necessarily understand is the ‘feel’ of the field. How does the market, or the public service, actually work? How do the different groups of practitioners in the field relate to each other? How do the non-lawyers relate to the lawyers? How do they consume the law? Do they look directly at legislation, or is it filtered through practice and training? What are their pressing day-to-day concerns?

Getting to know the stakeholders early can bring substantial advantages to both sides.

Engaging with stakeholders in advance of public consultation can take many forms. At one end of the spectrum, the law reform agency may feel it is sufficient to write to a relatively small number of stakeholders to convey the necessary information. It is, however, usually worth considering going further than this. In the first instance, it is often desirable for members of the project team to arrange one-to-one meetings with the main organisations in the field. In doing so, law reformers may hear of others that they should also meet.

Even if the project team does not consider that it needs it to generate information, it is often useful to convene a working group or advisory group well before consultation, even if for only a single meeting. It will give the agency the opportunity to explain itself and the process to the stakeholders attending and provide them with a feeling of understanding what will happen and when. This will bring immediate practical benefits in that it allows the stakeholders to plan their contribution to the consultation, which may for instance include organising a conference or seminar during the consultation period or preparing local groups or branches to consider the issue at the right time.

Being a member of an advisory group can confer some status on the individuals concerned, which may also bring benefits to the agency. Even if it was not the motive, bringing together a group of people well versed in the field will always yield some new insight or piece of information. The terms ‘working group’ or ‘advisory group’ suggest a small gathering, and that may be the right approach, depending on the project. However, the Law Commission for England and Wales, when undertaking

projects, frequently has up to 60 or 70 attendees at advisory group meetings.

It may also be appropriate and useful for the project team to take part in activities that give them direct experience of the field under consideration. Such ‘observational consultation’ is considered in detail in the next chapter, but it should be noted that it can be undertaken at this earlier stage as well as during the consultation process proper.

5.6 Legal policy: developing the proposals and options

5.6.1 From analysis to proposals and questions

Having completed the initial research and acquired sufficient material to come to a comprehensive view of the area of law within the jurisdiction and in other jurisdictions that have comparable laws, the next step is the analysis of the material and the development of provisional proposals. Research is an organic process and as the material is collected and analysed various possible approaches will often become clear. The analytical review of the material itself will provide suggestions for reform and approaches that have been taken or avoided in other jurisdictions. It is here that judgement, experience and knowledge by the researcher of the community in which the law reform agency is situated will have to be exercised.

The point of the analysis is to understand the legal and other dynamics that give rise to what is perceived as the problem that requires law reform attention. Whichever approach to questions or proposals is adopted, it must arise directly out of the analysis and be presented within the narrative in a way that explains why those are the conclusions, or the questions, that the law reform agency thinks address that aspect or problem. The reader should be able to understand why the consultation document is asking the question or making the proposal in relation to the issue or problem under discussion. If there are weaknesses in a proposal, or difficulties in the way that a question has to be posed, those should be set out and discussed. The more honest the presentation of the struggle that the agency is engaged with, for what will almost invariably be

The material collected in the research effort must be analysed by reference to the law reform problem.

difficult questions, the more the reader will understand and be able to engage with the issues.

5.6.2 Questions and proposals

The possible range of first stage documents was covered above. Purely information-providing documents, including scoping reports, do not require consideration of the positive reform proposals. As for those documents, of whatever name, that are intended to form the basis of the consultation, the project team must reach a decision about how open or prescriptive the document's presentation of proposals and questions should be.

Some consultation documents, particularly those produced by government ministries early in the policy formation process, ask questions of a very open and general nature, often proceeding from a fairly thin factual and analytical base. Practice among law reform agencies varies but, as a general tendency, where law reformers can include a stronger and more informed analysis, they will. This in turn tends to close off unsuitable avenues for reform, leaving fewer, but more meaningful, issues open.

Most law reform agency consultation documents contain a mixture of determinate provisional proposals, which the consultee is asked to agree or disagree with, and options, which may be presented neutrally and made the subject of a question. Some may include open questions, although these will tend to be on less fundamental issues. But within that mix, very different emphases are possible. Practice varies among law reform agencies and indeed within a law reform agency in respect of different projects.

As a general rule, the Law Commission for England and Wales tends to have the view that the more worked out the provisional proposals are, the more robust and informed the consultation will be. One might see the consultation or working paper as a means of setting up as clear a structure as possible for the purpose of determining whether or not it can withstand consultation. What is left standing at the end is likely to be correct.

The danger with this approach is that it is possible to give the impression that the law reform agency has made up its mind at this stage, which may detract from the quality and vigour of the consultation process.

Law reform agency consultation documents usually contain a mixture of determinate provisional proposals, which the consultee is asked to agree or disagree with; options, which may be presented neutrally; and open questions.

Australian Law Reform Commission: Questions and proposals

In 2013 to 2014, the Commission undertook an inquiry on equality, capacity and disability in Australian law.⁶

This is an extract from the issues paper summary, listing the questions asked in the relevant chapter.

The National Disability Insurance Scheme

Question 12. What changes, if any, should be made to the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules, or disability services, to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

Question 13. What changes, if any, should be made to the nominee or child's representative provisions under the *National Disability Insurance Scheme Act 2013* (Cth) or NDIS Rules to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

Question 14. What changes, if any, should be made to the nominee provisions or appointment processes under the following laws or legal frameworks to ensure they interact effectively:

- a. the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules;
- b. social security legislation; and
- c. state and territory systems for guardians and administrators?

And this is the same section in the discussion paper summary:

5. The National Disability Insurance Scheme

Proposal 5–1. The objects and principles in the *National Disability Insurance Scheme Act 2013* (Cth) should be amended to ensure consistency with the National Decision-Making Principles.

Proposal 5–2. The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include supporter provisions consistent with the Commonwealth decision-making model.

Proposal 5–3. The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include representative provisions consistent with the Commonwealth decision-making model.

Question 5–1. How should the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules be amended to clarify interaction between supporters and representatives appointed in relation to the NDIS, other supporters and representatives, and state and territory appointed decision-makers?

Question 5–2. In what ways should the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules in relation to managing the funding for supports under a participant's plan be amended to:

- a. maximise the opportunity for participants to manage their own funds, or be provided with support to manage their own funds; and
- b. clarify the interaction between a person appointed to manage NDIS funds and a state or territory appointed decision-maker?

The Australian Law Reform Commission frequently publishes first an issues paper and then a discussion paper, both of which are subject to consultation. The issues paper will have a much higher preponderance of questions, although some may be bounded, or ask if the consultee agrees with a statement. The discussion paper still has some questions, but has a greater preponderance of proposals, and the questions and proposals are distinguished typographically, whereas in the issues paper, everything is presented as a question.

In South Africa, the Law Reform Commission has adopted a general policy of first compiling an issues paper as a first step to announcing an investigation, to clarify the aim and extent of the investigation and to suggest the options available for solving existing problems within a particular area of the law. The paper is distributed as widely as possible for general information and comment and, where appropriate, may be supplemented by public and/or focused workshops. Responses to an issues paper, coupled with further intensive research, form the basis of preparing a discussion paper. A discussion paper contains essential information on the investigation and the Commission's tentative proposals for reform. In particular, a discussion paper includes a statement of the existing legal position and its deficiencies, a comparative survey and a range of possible solutions. In most cases, the discussion paper also includes a draft bill. Discussion papers are distributed widely and the Commission's preliminary views are usually also explained at public workshops with the aim of gathering informed public comment. Both the issues paper and the discussion paper usually include specific questions to facilitate the public response.

5.6.3 Proposals and questions: some practical issues

On a practical level, it is important to clearly set out the formal questions or proposals that the law reform agency wants the consultees to address. It is often helpful to consultees to set out, in a summary or appendix, the list of questions and proposals (as in the above examples from the Australian Law Reform Commission).

The proposals and questions should also be clearly labelled or numbered – any ambiguity or uncertainty will make the analysis of responses and subsequent work much harder. Law reform

The formal questions or proposals that the consultee must address should be set out clearly in brief, simple sentences.

agencies frequently publish shorter summary documents along with the full consultation document. Despite the effect it will have on the length of the summary document, the proposals and questions should appear in exactly the same words and according to the same numbering scheme as in the full paper. Some consultees will work from the summary rather than the full document, and any divergence between the two will lead to difficulties during the consultation period and for analysis.

It follows that the questions and proposals should, as far as possible, be drafted so that they are grammatically free-standing and do not rely, for their sense, on a cross-reference. The extent to which this can always be accomplished is of course limited. Questions and proposals will inevitably rely on the discussion and detail provided in the full paper. But they should at least be capable of being read and understood, if not fully, on their own. More generally, consultees will spend a lot of time and energy on the law reform agency's proposals and questions. As such, time spent on being sure that the agency's drafting is clear and unambiguous is well spent.

Writing for the public: Everything should be made as simple as possible, but not simpler

Law reformers face a difficult task: how do you explain complicated law to a wide audience, most of whom are not lawyers? This is central to what law reformers do. However, it puts pressure on staff. People who work for law reform agencies have to be not only excellent lawyers but also superb communicators.

Some writing and communication tips are listed below:

Sentence length: keep them short. Most common law lawyers will have read some Lord Denning judgments. While his judgments took this approach to the extreme, generally good writing uses some short sentences, but also varies sentence length within a paragraph.

Be human: do not cut out the human action. When discussing a case, a lawyer will understand the shortest description ('In *A v B*, an action for breach of contract, the claimant was awarded substantial damages'). But most people will need that density to be unpacked. It is therefore important to tell the human story as well as getting the essential law in. Use the active voice rather than passive: 'The judge awarded damages' not 'damages were awarded'.

Use one word when one will do: English lawyers used to be paid by the word, so tended to use two words for a single concept, for example 'will and testament' and 'aid and abet'. Using one word is preferable. Ask what the second word adds to the sense. If one is covered by the other, use the more general one. Further, avoid long-winded prepositions. Therefore, use 'if x happens' not 'in the event of x occurring'; 'about x', not 'in respect of x'.

Notes

- 1 P M Bakshi, 'Legal Research and Law Reform', (1982) 24 Journal of the Indian Law Institute 391.
- 2 Particular care should be taken to note the reported status of legislation on this website, as amendments made to Acts may take some time to appear in the version presented.
- 3 <https://www.lawcom.gov.uk/project/year-and-a-day-rule-in-homicide/>
- 4 <https://www.lawcom.gov.uk/project/administrative-redress-public-bodies-and-the-citizen/>
- 5 <http://salawreform.justice.gov.za/dpapers/dp91.pdf>
- 6 <http://www.alrc.gov.au/inquiries/legal-barriers-people-disability>

