

Chapter 6

Consultation



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Consultation

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 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.

Since the inception of modern law reform agencies, consultation has been central to law reform. The other work of law reform agencies may sometimes be performed without consultation, such as some consolidations or reviews of statutes. Occasionally, law reform agencies may perform other functions, such as providing advice to ministers, that do not require consultation. However, law reform agencies' core function of law reform, as it has developed, sees consultation as close to definitional.

6.1 Why consult?

Law reform agencies consult for three principal reasons. First, consultation is good in its own right. Secondly, consultation helps the law reform agency in a practical way to conduct a law reform project. Finally, consultation helps the law reform agency achieve its aims by conferring legitimacy and enhancing its reputation. The account in this chapter focuses primarily on the second of these reasons.

Consultation is an essential part of law reform. Law reform agencies must consult because consultation is necessary to produce good reforms, people have a right to be consulted, and consultation supports the integrity and reputation of the law reform agency.

6.1.1 Consultation is a civil right

People have a right to be consulted. The rule of law itself includes recognition of the importance of participation in decision-making:

*...a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, **participation in decision-making**, legal certainty, avoidance of arbitrariness and **procedural and legal transparency**.¹*

It is therefore part of the proper law-making procedure in a democracy to provide an opportunity to the people who will be subject to the laws to have a reasonable degree of participation in the making of those laws, over and above their role as electors. As Sachs J said in the South African Constitutional Court:²

All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.

This quotation highlights the link between the normative and the practical, or instrumental, reasons for consultation.

6.1.2 Consultation is essential for the project

At a practical level, good-quality consultation is essential for good-quality law reform. It provides new information and new insights, and brings important strategic benefits.

Consultation provides law reformers with new information. Law reform concerns not just the law in the abstract, but how the law works in the real world. However good the pre-consultation

preparation has been, consultation always provides more hard information on how the law works in practice in the relevant field.

Consultation also brings new insights. These may arise because they are informed by practical knowledge of the field. Law reformers, however well informed and skilled, do not have a monopoly on insight. As such, the gleaning of new information and new insights is a key advantage of consultation on a law reform project.

Consultation also brings strategic advantages. By consulting, the law reform agency will become better acquainted with the position of those who support and those who oppose the proposals. The probing of the position of opponents, in particular, will help the law reform agency to understand where some compromise at a later stage will enhance the prospect of implementation. The agency can then make a judgement as to whether, for instance, a compromise on a subsidiary matter is worthwhile for the greater benefit of the implementation of a whole scheme. At the extreme, consultation can effectively become a means of negotiating a compromise or consensus approach that players who are otherwise in conflict can sign up to.

Law reform agencies should never allow themselves to become mere policy fixers. The great benefit of law reform through law reform agencies is that it provides a politically neutral and rational form of legal policy-making. But on the other hand they should seek to understand the dynamics of influence within the field and to accommodate them in an appropriate way.

6.1.3 Consultation is essential for the success of the law reform agency

Good-quality consultation enhances the reputation of the law reform agency and makes it more likely to be effective.

A justified claim to extensive and impartial consultation strengthens the legitimacy of the law reform process. Policy officials, ministers and parliamentarians are more likely to trust the outcome of a law reform process if they can be assured that it is in part the result of such engagement. The relevant policy officials may take a close interest in the agency's consultation process in a specific project. But more generally, the law reform agency will also be judged on the general reputation it has earned for its approach to consultation. Guarding and enhancing this reputation is therefore of high importance.

Most often, law reform recommendations are broadly consistent with the results of the consultation process.

6.1.4 Limits to consultation

Consultation should not determine the final view of the law reform agency. Sometimes, consultation can be negative.

Consultation is not an election. Even if everyone who responds to a consultation process is of one mind about a proposal, it is still incumbent on the law reform agency to consider the proposal on its merits. First, it is a mistake to assume that the results are, necessarily, a true reflection of public opinion on a matter. The sample is, broadly, self-selecting and never weighted to reflect the population. But, secondly, even if it were, consultation, as conducted by law reform agencies, is a public *engagement* process, not a public *determination* process. Law reform agencies consult in order to better perform their public function, not to evade responsibility for it.

Not all consultation is constructive. In extreme cases, the reaction of consultees, or one particularly important consultee, can be so negative that it threatens the whole project. In this, very unusual, situation, a law reform agency may feel the best course is to save future expenditure and effort by terminating the project.

England and Wales: Withdrawing a project on the basis of consultation outcome

In 2008, the Law Commission for England and Wales consulted on a project on the remedies available against public bodies, including the central government. It included proposals to reform both public and private law, in particular proposing a new schema for the liability of public bodies in negligence. The responses on the latter were almost universally negative. The government's response was wholly and implacably opposed. In response, the Commission decided to do no more work on these proposals, and this was announced in a subsequent annual report.

A written consultation may be based on a single, thorough document or on multiple documents at different stages of the consultation.

6.2 Consultation processes

While consultation is always a component of a law reform project, consultation, both written and face to face, can be organised in different ways. Two main patterns have emerged for law reform consultation *documents*. One relies on a single, well worked-through document. The second uses an initial, more open document followed by consultation on a more

British Columbia Law Institute consultations

The British Columbia Law Institute generally identifies key stakeholders representing the various interests affected by the law under study at the beginning of a project. A project committee is established, composed largely of stakeholder representatives. Members of staff carry out research and writing. The committee on the Institute's project on strata property law also includes a representative of the ministry responsible in the provincial government.³ The committee members assist with identifying the issues that need to be addressed and a work plan is established. The committees usually meet for two hours every month, at least nine or ten times a year. Between meetings, committee members may consult with their stakeholder organisations or clients. Once tentative recommendations are finalised, a consultation process occurs on the standard pattern, based on a consultation paper. The consultation period may last three months, or sometimes longer. Responses are then reviewed by the committee, refined and a final report is prepared.

The committee is seen as critical to ensuring many voices and perspectives are heard. It means that the Institute internalises stakeholder input from the start of the project, as well as seeking external input from a wider group of consultees subsequently.

worked out scheme. Law reform agencies also use consultative techniques such as advisory groups to involve stakeholders early.

The first, and most commonly used, is the straightforward method of publishing a single consultation document and inviting comments during an open consultation period on the basis of that document.

However, law reform agencies have developed other methods. Many law reform agencies consult twice. The Australian Law Reform Commission method – an issues paper followed by a discussion paper, both of which are subject to consultation – is illustrated, in the context of drafting the papers, in the previous chapter. Given the Australian Law Reform Commission's tight timetabling of projects, this approach imposes relatively short consultation periods – less than six weeks, for instance, for the 259-page discussion paper in its Inquiry on Equality, Capacity and Disability in Commonwealth Laws.

This approach, however, has the potential advantage of allowing a deeper engagement with stakeholders. In addition to reacting to a worked-through scheme of reform, as in most one-shot consultation processes, stakeholders are able to engage at an early stage with the shaping of the worked-through scheme.

Consultation should be public.

Another way of bringing stakeholders in earlier is to use working groups or advisory groups to help shape the project. They may become part of the drafting process of a single consultation paper. Such groups will meet a number of times, and may be asked to comment on early research memoranda and chapters of the consultation document as they are drafted.

This use of advisory or working groups and committees for substantive input before public consultation is to be contrasted with the use of advisory groups as a preparation for public consultation, as discussed in the previous chapter. In the former, the group is an inherent part of the consultation process. In the latter, it is, largely, a part of the process of preparation for consultation.

6.3 Audiences

Consultation requires careful consideration of the audience that it seeks to reach and involve. This involves a balance between tailoring a consultation process to a pre-selected audience and allowing for general public engagement.

As regards the first, it would defeat the purpose of consultation if the audience is exclusively selected. Consultation, except in extreme circumstances, should be public, in that any member of the public should be able to take part, should they so choose. It is often helpful to emphasise that responses are welcome from any source, not only those approached by the law reformers. Too many potential consultees suppose that a response from them would not be welcome if they have not been approached by law reformers. In addition, it may be helpful to emphasise that responses to some or any question are welcome; it is not necessary to respond to every question asked.

However, in practice, a law reform agency will look primarily at those most closely involved in the field under consideration. The purpose of consultation is to ensure that the law is relevant for its intended objective, and so those most closely affected will be more likely to produce the key consultation responses. The law reform agency should therefore consider who the primary targets of consultation are and ensure that the process works to address them.

Key potential consultees should be selected carefully.

The audience for a technical, 'lawyers' law' project will be very different from that for a wide-ranging regulatory project

or a project on criminal law. The difference in audience will determine what documents are produced and the style in which they are written.

It is important not to draw the line too narrowly however. Understanding the full range of stakeholders who may be concerned with the law covered by a project requires imagination and care. This question may have already been addressed by the start of the consultation period if a committee such as the type used by the British Columbia Law Institute or an advisory group, as discussed in the previous chapter, has been set up. If not, it will certainly arise when a list or lists of recipients for documents is drawn up at the commencement of the consultation process.

Drawing up such lists is a key part of targeting consultation. It will often be helpful to ask the policy official responsible in the relevant government department for their list of stakeholders or contacts. General legal stakeholders, with whom the law reform agency will have an ongoing relationship, such as bar associations and law societies, may help. They will often have lists not only of legal stakeholders, but also of ‘client’ organisations in particular fields. It is also important to ask those who the project team do know are involved: they may be able to suggest who else the team should contact. It is advisable therefore to think laterally. For example, if the agency is looking at a housing or landlord and tenant question, the army, which houses soldiers, may be interested; or it may be worth consulting hoteliers, who provide services that may have to be distinguished from the legal regime that is the subject matter of the project. Even if an agency’s work on social services deliberately excludes healthcare, it will need to talk to healthcare professionals about the border between the two and how changes in social services might affect the delivery of healthcare. That some relevant stakeholders will be left off the list is almost inevitable, and can be handled with an apology and belated inclusion.

The nature of the audience will affect the type and style of documents produced.

6.4 Publication: getting the word out

Most law reform agencies publish lengthy consultation documents to commence the public consultation period or periods. Increasingly, supporting documents are also used. These may include summaries and papers or leaflets aimed at particular constituencies of consultees.

Consultation documents should be shared with stakeholders and the public at large. Publication in print or on the web, in the press or on social media, or via professional networks will be appropriate for different issues and different stakeholders.

6.4.1 Print and web publication

Should law reform agencies publish online only, or also in print?

Nearly all law reform agencies maintain a web presence and use their website to publish documents online. Producing only a print version is hardly an option these days. It is possible for a consultation document to appear only online. Nonetheless, most law reform agencies still print at least a relatively small number of hard copies for distribution to stakeholders.

Experience suggests that, contrary to what might be expected given the ubiquity of the internet, most consultees, including those in large and professional organisations, still use hard copies when composing their responses. Providing a document only, or mainly, on the internet is very much cheaper for the law reform agency. If the agency does not print documents, a well-resourced organisation will print its own from the online files. However, smaller organisations, charities and individuals may not be able to print documents, and the lack of a hard copy may disadvantage them. It is for each law reform agency, in relation to each project, to find the appropriate balance.

The law reform agency's database of stakeholders will therefore receive either a hard copy, with a letter inviting a response, or an email with a link to the document on the agency's website, or a mixture of the two.

6.4.2 Press and social media

At the point of publication, press interest is particularly welcome to promote the existence of the project to potential consultees.

Some larger law reform agencies may employ communications professionals, but most will not, in which case the task of press relations will fall to the project team or to the chief executive of the agency.

As with other major stages, the law reform agency will prepare and distribute to journalists a press/media release. This guide is not the place to provide wide-ranging advice on press relations in general, or the preparation of press/media releases in particular. General training and advisory materials on press relations will be useful to law reform agencies.

It may be helpful, however, to mention two related aspects of press relations relating to law reform.

The first is that lawyers and law reformers can risk overestimating general public interest in the topic of law reform. At least in larger countries, where there is more competition, it is very difficult to get the main popular newspapers or television and radio news programmes to take an item that involves any degree of legal complexity. While some law reform subjects, such as many criminal issues, certainly do interest mainstream news outlets, other subjects will struggle to get coverage, and it is often much better to target specialist outlets. Those may be specialist legal outlets. Just as important, if not more so, are specialist outlets aimed at the professional audience or audiences in the relevant field. In smaller jurisdictions, it may be easier to secure broader media interest.

The second and related point is that even the specialist press will want a simple story. Reality is rarely simple enough, and lawyers tend to focus on details and accuracy. When interesting a news outlet in a story, the lawyer has to let go of qualifications and nuance, while retaining a broadly accurate account.

Whether it is useful to hold a press conference to launch a publication will depend on the likely interest in the project, the press expertise of the agency and the receptiveness of the press in that jurisdiction. However, it will rarely be the case that it will be advisable for an agency to adopt a general practice of holding a press conference.

Some law reform agencies have a presence on social media such as Twitter and Facebook. These allow the agency to disseminate information directly to the public. The Law Commission for England and Wales has more than 12,000 followers on Twitter, for instance. It is also possible for a law reform agency to establish a Twitter feed and Facebook page dedicated to a particular project. These avenues may prove a useful way of keeping stakeholders and consultees in touch with a project as it develops. As yet, they have not been used as a conduit for responses.

6.4.3 Networks

Media publicity does not exhaust the ways in which stakeholders can be reached. A particularly important resource is stakeholders' own networks.

The agency will have undertaken pre-consultation preparatory engagement with stakeholders or used small working/advisory groups at an earlier stage. This is the opportunity to discuss with stakeholders how best to engage their own networks.

Nearly all of the organisations with which law reform agencies engage will be located within networks. Some will be membership bodies with local branches. Charities and voluntary organisations will be members of national and often regional or global umbrella bodies. Companies will be members of trade associations, and professionals will have both professional and subject matter-related representative bodies. Such networks usually have methods of regular communication with their members, and could be approached to include information about a relevant consultation in a newsletter or regular email. It is often more effective for that explanation to come from a trusted, known network, rather than from a law reform agency of which the recipient may have only limited knowledge.

Law reform agencies actively seek engagement with stakeholders. For example, this can be done through advisory/working groups.

6.5 Active consultation

There may once have been a time when law reform agencies published consultation documents and then passively waited for responses to arrive. That is generally no longer the case. Formal written responses from organisations and individuals remain central to law reform agency consultation. But the consultation period or periods are also used much more now as an opportunity to actively engage with stakeholder communities in a dialogue on the law reform agency's proposals and alternatives to them. This section considers some of the methods that may be used.

6.5.1 Advisory/working groups

There are a number of distinct roles that advisory groups/working groups/committees can play during consultation.

The use of advisory groups in the pre-consultation process was discussed above (see Chapter 5). At that point, their function is primarily to prepare the stakeholder community for consultation. As consultation proceeds, their function will adapt. They can be used as forums for discussion on the substance of the issues. This can both act as a direct input into the law reform agency's thinking, and help to inform the

Taxis in England and Wales: A technical legal issue within a regulatory project

The Law Commission for England and Wales's 2011 to 2014 project on the law relating to taxis and private hire vehicles was a broad regulatory law project covering all aspects of the regulation of this market. A key element of the existing regulatory regime is the undefined legal concept, introduced in nineteenth century legislation, of 'plying for hire'. The concept was originally conceived for one purpose (the licensing of taxis and the making of 'plying for hire' a criminal offence for others), but now also forms the essential legal border between what taxis and (pre-booked) private hire cars could do. The case law relating to what 'plying for hire' means is considerable, complicated and difficult to understand. The Law Commission convened, during the course of the consultation period, an 'expert panel on plying for hire' to consider the issue. It consisted of lawyers, some nominated by interested groups such as enforcement officers and trade unions representing taxi drivers, other senior barristers and solicitors in private practice. It crafted a new approach to the legal definition of both taxi and private hire operations that does not rely on the concept of 'plying for hire'.

individual stakeholder members' own subsequent written responses. In addition, such group meetings can be useful if held towards the end of the consultation period, in order to feed back some of the messages that the law reform agency has heard in other ways.

Where a stakeholder working group has been used as a way of integrating stakeholder concerns at an early stage, as for instance in the British Columbia examples set out above, it will continue to perform that function during and after the consultation period. However, it is inevitable that the focus shifts somewhat from internalised consultation structures to the public exercise.

In addition to the uses of working groups or committees already discussed, there may be a role within a broader public consultation for a small, specialist working group to consider a particular, distinct issue.

6.6 Meetings, events and observational consultation

6.6.1 The format of meetings and events

Meetings and events are central to consultation as active dialogue. The format of meetings and events can range in size and formality. There is often tension between the giving

Active dialogue requires meetings. These can vary in size, formality, the balance between giving and receiving information, openness and hosting arrangements.

and receiving of information, which should be considered in determining the right format or formats for particular meetings and events.

In all cases, the law reform agency is concerned with both providing and receiving information and understandings from stakeholders. In the first instance, the agency must explain both what it is provisionally asking or proposing and why. At one level, there is value in simply getting such information out to stakeholders. It will inform stakeholders' own internal conversations, the result of which will be a better response at a later point.

However, there is also considerable benefit to be gained from engaging in a dialogue with stakeholders, a process that puts at least as much emphasis on the law reform agency receiving information and understandings from stakeholders.

The balance between these two features will be different depending on the nature of the event. A formal presentation at a large conference will be very useful in disseminating information to a wide range of individuals, but it will provide very limited opportunity for genuine dialogue. Such opportunities can be enhanced if the conference programme includes workshop or breakout sessions with small groups of attendees, in sessions led by a member of the project team or the advisory/working group. However, doing so where a number of such sessions must be held at the same time naturally poses a challenge to the resources of the project team.

A seminar provides a more balanced environment, allowing for both information dissemination and dialogue. Such events, modelled on academic, pedagogic or research seminars, are usually confined to fewer than 20 or 25 participants. Ideally, participants sit around the same table, rather than facing the presenter in theatre style.

Seminars not only allow the law reform agency to give a full presentation of the consultation proposals and questions, but also allow plenty of time for discussion. Sometimes, discussion can be enhanced by having an individual outside the law reform agency taking on the role of discussant. The idea is that the discussant gives an immediate reaction to the agency's presentation as a way of encouraging participation. This

approach is more likely to work if the discussant is critical of some aspects of the agency's approach.

The word 'seminar' is associated with universities and high levels of expertise. As such, it may be off-putting for some stakeholders. Much the same format can be labelled a 'workshop' or 'forum'.

At the other end of the scale from a large conference is a meeting of members of the project team with representatives of a single stakeholder organisation or a small number of stakeholders. This format is the opposite of a conference. As regards disseminating information from the agency, it is very limited in scope. On the other hand, it may provide a great deal of scope for dialogue. It is also much easier to organise than the other types of event.

6.6.2 How public is the meeting or event?

Whatever its format, it is important for there to be a clear understanding as to the extent to which what is said at an event is to be considered public. It should always be made clear at the outset by a clear statement from the chair what the status of the meeting or event is.

There are three main approaches: the meeting or event may be public, it may be held under the Chatham House Rule or it may be confidential. Most conferences will be public and some may be streamed on the internet or recorded for later dissemination. Other events will vary. Some will be fully public. Some will be held under the Chatham House Rule. This rule provides that the results of the event can be made public, but individual contributions should not be attributed to identified speakers. Finally, some may be confidential.

People may be more willing to speak frankly if a meeting or event is confidential or held under the Chatham House Rule, and that can be valuable. However, these contributions will be of less use to the law reform agency than a response that can be quoted and attributed to a named participant. Secrecy can also give rise to unjustified suspicions among those who were not involved, particularly if the issue is one occasioning a high degree of controversy and/or there is limited trust in the project among some stakeholders.

6.6.3 Whose event?

It can be easier, cheaper and more effective for law reform agencies to use other organisations to set up events and meetings. It is, however, critical that the basis upon which the law reform agency is taking part is made clear to avoid any suggestion that the agency is thereby associating itself with the views of the organisation that is responsible for the event.

Events of any size, such as seminars and conferences, take significant resources to organise. Doing so can be a challenge in terms of both budget and staff time. Accordingly, law reform agencies may wish to consider approaching other organisations that may hold events and be willing to extend an invitation to the agency to speak at such an event. This may be an event that is already planned, to which the organisation would like to add the subject matter of the agency's project. Alternatively, if the issue is important to the organisation, they may wish to hold a specific event.

The way in which such events are presented to the public is important. If it is badged as a law reform agency event, but is paid for by a stakeholder organisation, there may be a danger that the law reform agency could be seen to be prejudiced by the relationship.

Sometimes law reform agencies have accepted sponsorship for an official event such as the launch of a project. This may be uncontroversial if the sponsor is a government department, an aid agency or a legal publisher. But if the sponsor is a stakeholder that is likely to take a particular line in relation to the subject matter of the project, or a law firm that preponderantly represents one interest, then questions as to propriety and conflict of interest may arise.

The position is quite different when the event is clearly owned by the stakeholder group, and the law reform agency is appearing as an invited guest to secure the views of that stakeholder or those who attend the event. But for such an approach to escape criticism, the law reform agency must also make it clear that it is open to similar invitations from other groups. The agency will also have to ensure that it does what it can to reach groups that are not organised in a way that allows them to extend such invitations to the agency (see section 6.8 'Difficult-to-reach consultees').

The advantage of a law reform agency organising its own events is that the agency controls the form of the event (conference, seminar, etc.), the content of the event and who is invited. In this way, it can ensure the appropriate balance between interests and, where relevant, an appropriate geographical spread. The law reform agency can also be sure to schedule the events for the timetabled consultation period. In addition, there may be no guarantee that invitations from other organisations, at least in any number, will be forthcoming. So organising its own events can be safer for the agency.

There are countervailing advantages of a consultation strategy that relies on accepting invitations. Because the stakeholder body is organising and paying for the event, it is possible for the project team to reach many more stakeholders. There may also be advantages in going out to meet stakeholders where they are, in sentiment as well as in physical location, such as at a local branch meeting or an organisation's annual conference, rather than trying to bring the stakeholders to the law reform agency.

The difficulty of scheduling events can be significantly mitigated by appropriate pre-consultation engagement with stakeholders. At an early stage, the law reform agency can discuss what events the stakeholders have already planned in the consultation period, and the stakeholders can consider whether or not they wish to arrange a special event for consultation purposes.

It is also not necessary to be too prescriptive about the timing of events. Sometimes, there may be a genuine reason for a high degree of confidentiality. But, otherwise, it is unlikely to harm the process if, at events held before the official start of consultation, the law reform agency, with appropriate warnings, gives an indication of how its thinking is progressing. Likewise, while events held a significant time after the close of consultation will be useful to only a limited extent, they may still be useful for some time.

The choice is not a binary one, however. Even a law reform agency that relies largely on accepting invitations from stakeholders will, nonetheless, be likely to organise a small number of events to address specific questions that might not otherwise arise or to otherwise plug a gap in the range of invitations.

England and Wales: Tenure reform invitations accepted

In its interim report on the project on the reform of tenure for short-term renting, called Renting Homes, the Law Commission for England and Wales published a list of 72 events attended by members of the project team.⁴ There were two consultation periods on different aspects of the project, from March to July 2002 and from August to November 2002. The first of the listed events was in February 2002 and the last was in September 2003, although most were concentrated in the consultation periods.

As an example, the following is an extract from the list:

Date	Organisation	Event
23 February	TPAS Nottingham	RSL tenants' conference
20 March	Small Landlords Association London	Meeting
22 March	Social Landlords Crime & Nuisance Group Coventry	Committee meeting
26 March	Association of Law Teachers London	Conference presentation
5 April	Socio-Legal Studies Association Aberystwyth	Conference presentation
18 April	Social Landlords Crime and Nuisance Group Birmingham	Annual Conference
25 April	North East Housing Law Practitioners Association Newcastle	Meeting
9 May	Housing Law Practitioners Association London	Executive Committee meeting
15 May	Socio-Legal Studies Association/Society of Public Teachers of Law London	Academic seminar
15 May	Housing Law Practitioners Association London	General meeting
20 May	Welsh Assembly/Welsh National Housing Federation	Conference
22 May	Essex Citizens Advice Bureau Witham	Housing Policy meeting
27 May	Law Society London	Housing Law Committee meeting
28 May	London School of Economics London	MSc Housing Alumni meeting
5 June	Local Government Association London	Executive meeting

England and Wales: Tenure reform invitations accepted (cont.)

Date	Organisation	Event
7 June	Rent Assessment Panel Birmingham	Meeting
12 June	Chartered Institute of Housing Harrogate	Annual Conference
13 June	National Union of Students London	Meeting
13 June	Bolton Council Bolton	Housing special interest group meeting
18 June	Law Centres Federation London	Seminar
18 June	Tenant Participation Advisory Service Birmingham	Anti-social behaviour Conference
19 June	Brighton Council Brighton	Private Sector Forum meeting

6.6.4 Observational consultation and site visits

Some law reform agencies have taken engagement with stakeholders a stage further. In some projects, it is important for the project team to get a ‘feel’ for the field or some particular issue causing concern. It is equally important to keep the significance of what members of staff witness in proportion.

This will not be relevant in the more technical legal fields, where a real understanding of the issues can be readily achieved by reading and understanding the legal texts. However, in projects concerned with regulating activities or markets, for instance, it can be helpful to gain insights from observing events or by going on site visits.

Observational consultation of this type can be very helpful in giving members of the project team an inside understanding of how and at what points both the current law and any proposals for reform may come under pressure. There is a concomitant danger that such experience can be *too* vivid, and can therefore mislead the team as to the significance of what they have seen versus other considerations. In the examples in the box below, the late night economy situation was used as an argument to abolish the distinction between taxi cabs and private hire vehicles (both of which are safe cars driven by drivers with criminal record checks) and concentrate on policing ‘touts’. Although it floated some half-way house proposals, the Commission eventually recommended

Law reform agency staff can benefit from seeing or experiencing issues and places first hand. However, care must be taken to give appropriate weight to what is seen and experienced.

Observational consultation in South Africa and England and Wales

South Africa

During the course of the South African Law Reform Commission's project on sexual offences and adult prostitution, researchers undertook police-guided and facilitated site visits to a safe-house, brothels, and areas of pimping and street prostitution. Engagements facilitated by non-governmental organisations were also conducted at neutral sites in different provinces with adult prostitutes as part of the public participation process following publication of the Commission's discussion paper for this investigation. Because of the sensitive nature of certain investigations and the risk of harm to interviewees, one-on-one confidential or anonymous interviews were conducted with current or existing prostitutes, ex-brothel keepers and victims of stalking for the purposes of the Commission's investigation into stalking.⁵

England and Wales

The Law Commission for England and Wales undertook a project on the regulation of taxi cabs and private hire vehicles. A particularly intense set of regulatory issues related to the 'late night economy' arose. In certain, often quite small parts of British cities late at night at weekends, as pubs and clubs close, taxi cabs and private hire vehicles become the primary way of transporting large numbers of young people home, many of whom are under the influence of alcohol. At such times, the legal distinctions between taxi cabs (which can be hailed on the street) and private hire cars (which must be booked) and completely illegal vehicles ('touts') come under extreme pressure. There are also critical threats to public order. To understand the issues, members of the team accompanied licensing enforcement officers on operations in London and Liverpool, which included accompanying officers undertaking undercover operations to test the legality of the conduct of private hire drivers. They also accompanied police officers on a similar operation against 'touts' in London.⁶

The same Commission's joint project with the Scottish Law Commission on the law relating to railway level crossings encountered serious problems with its proposals in relation to regulating tram level crossings. The relevant association invited the commissioner and team manager to inspect the layout of the tram system in Sheffield, which they did from a private tram that was able to stop and allow the team to inspect particular features of the system. The team members were also asked to drive the tram on a training track to show the vehicle's capability to undertake an emergency stop. In the same project, team members also conducted a number of site visits to dangerous level crossings with railway officials.⁷

retaining the distinction for other good regulatory reasons. In respect of the tram example, however, the Commission completely changed its proposals to wholly exclude trams.

6.7 Record keeping

Appropriate record keeping of meetings and events is crucial. This applies to meetings of committees and working groups, of

Australian Law Reform Commission: Noting of advisory groups

From the chapter 'Strategic and Project Planning' in *The Promise of Law Reform* by Anne Rees (edited by Opeskin and Weisbrot):

Advisory committee meetings are vital to finalising questions, proposals or recommendations. Although there may be consensus on some matters, others will be more controversial and may be opposed by some of the committee. Noting and understanding this range of views is important to the team and to the process of transparency and it underscores the value of effective minute taking. With meetings that may run for up to three hours, minute taking becomes one of the necessary evils of the inquiry process. Staff usually operate in relay pairs and write up the minutes between them.

whatever nature and stage of the project, and to consultation events. However, what is appropriate may vary.

Full minutes, circulated to members and corrected and accepted at a subsequent meeting, may be essential where the purpose of a committee meeting, or commissioners' or board meeting, is to make formal decisions on behalf of the agency.

It may not be necessary, and indeed may be unhelpful, to try to record what happened at a consultation event. First, creating a full record of this sort is resource intensive. It means that at least two members of staff must be present, one to present and conduct the meeting and the other to take notes. Secondly, writing up effective minutes involves editing and structuring the normal flow of a meeting, and that can take considerable time. To produce good-quality minutes of such a meeting will take some hours back at the office. It is nowadays technically possible to cheaply and easily digitally record a meeting and to store the recording in an accessible way. But there are few purposes efficiently served by listening to the whole of a two-hour meeting, with its repetitions, irrelevancies, silences and interruptions.

An alternative is for the person presenting and conducting the meeting to complete a short form outlining the nature of the event and providing a few bullet points of further information. A middle ground is used by the Victorian Law Reform Commission, which provides more information than the short form. Comprehensive hand-written notes are taken during the consultation. These are then confirmed as accurate by the participants; the notes then stand as the record but are not published.

Some form of record keeping is always needed, but the appropriate type varies. The production of quality minutes for a meeting takes some hours.

Law Commission for England and Wales: Consultation meeting record form

The form below is an example of the meeting and event forms used by some teams at the Law Commission for England and Wales. The form is designed to be completed quickly and easily. It may be filled in as the team member conducting the meeting travels back from the meeting or first thing the following day. The bullet points in most cases will be one or two sentences long.

MEETING RECORD FORM			
[NAME OF PROJECT]			
Subject (if not the project as a whole):			
Date	Meeting organiser	Type of meeting	Number of participants
Nature of participants (professional, user, lawyer, etc):			
Key points (guidance: 4 to 8 bullet points)			
• • • • • • • •			
Team member:			

6.8 Difficult-to-reach consultees

Not all potential consultees have representative organisations to speak for them. It is important, when taking into account the views of organised stakeholder groups, that law reform agencies do not miss the contribution of those without representative organisations.

Law reform agencies are in general largely reliant for responses on organised stakeholder groups, including legal professional groups, and academics.

This works well when all major interests are properly represented by effective, professional stakeholder groups. That is, however, frequently not the case. The result is that, unless compensatory steps are taken, the responses to a consultation may be skewed in favour of the well-resourced stakeholder.

Efforts must be made to reach potential consultees who do not have organised representation. This can require imaginative efforts.

Human genetics information and the Australian Law Reform Commission

In its inquiry on the protection of human genetic information (a joint inquiry with the Australian Health Ethics Committee), the Australian Law Reform Commission recognised that widespread public consultation would be a key feature. The agency organised a series of well-publicised (and generally well-attended) public meetings in 15 major cities and towns all over Australia. This was in addition to 185 separate stakeholder meetings, plus a number of conferences and overseas meetings. The Commission also experimented with the use of 45,000 free postcards, made available in public places, such as cafes, in an attempt to reach people who would not otherwise have been aware of the inquiry.

The inquiry received a total of 316 written submissions as a result (to both the issues paper and the discussion paper) and had to extend the consultation period in light of the interest generated.⁸

In some consultations, the missing consultees are the general public. In many projects, this is not necessarily a significant problem. For example, in a technical project on conveying real property, if both sides of the conveyancing transaction are adequately represented, then it is difficult to see what a distinctive 'public' voice would add.

Reaching rural people in Tanzania and South Africa

Tanzania is a large country with a preponderantly rural population (68 per cent). As it is a relatively low-income developing country, there are comparatively few representative or interest groups speaking for the mass of the rural population on legal issues. The Law Reform Commission is based in Dar es Salaam. In order to gauge opinion in rural areas on appropriate projects, the project team travels into the countryside in a Commission vehicle, carrying all of the relevant consultation materials. The aim is to conduct open public meetings in rural towns and villages in relation to a project. The team may spend several weeks on the road in this way. The result is a 'safari report', the aim of which is to feed the views of rural people into the law reform process.

In its project on *ukuthwala* (the forced marriage or sale of young girls into marriages with adult men), the South African Law Reform Commission presented a number of consultative workshops in rural areas to facilitate public comment on the Commission's discussion paper on this issue.⁹ The discussion paper published for public comment contained a proposed draft bill reflecting the Commission's preliminary recommendations. The draft bill was translated into several different indigenous languages to make the consultation process as accessible as possible. Public workshops, presented countrywide to facilitate responses to the discussion paper, were also presented in the different indigenous languages spoken in the different provinces to ensure a true understanding of the Commission's views by and to encourage the participation of the indigenous population.

However, in many broader, less technical projects, the views of the public in general may well be of great significance to the direction of law reform.

At other times, law reform agencies have used opinion polling in appropriate projects. Polling can be expensive and the response to a simple polling question can be crude, but it may provide an avenue to explore popular feeling where there are no other options available.

However, there may be other, more imaginative ways to reach the people. Going out to the people is an essential component of consultation in many jurisdictions.

In some projects, the project team may be aware that a particular, clearly interested group is not represented.

When seeking the input of specific populations, it is important to facilitate their ability to participate. Considerations range from the physical accessibility of the premises to public transportation, including reimbursement of transport costs, using the connections of local community groups to reach the target community. Prior to commencing a consultation event, it may even be necessary to ensure that food is provided for those who have not eaten. Most importantly, timeline planning may need to accommodate additional time for locating participants and gaining their trust, and ensuring appropriate follow-up so that participants feel that their opinions and ideas have been heard and considered.

Private tenants: The Law Commission for England and Wales

During the Law Commission for England and Wales project Renting Homes, on renting tenure reform, it became apparent to the project team that a particular category of tenants was unrepresented. Tenants of local authorities and housing associations were well represented by a number of bodies, local and national. Private tenants on pre-1989 Rent Act tenancies, who had security of tenure, were also represented, by a number of active local associations. However, most private tenants with more modern tenancies, with little security of tenure, did not identify with each other as an interest group, and their tenancies were often transitory.

The project accordingly engaged an experienced tenant participation consultancy to undertake a series of focus groups with these private tenants. The focus groups were made up of 10 to 12 tenants. The presenter from the consultancy was provided with a brief, which included questions for discussion. Afterwards, the consultancy submitted a report on the results of the focus group exercise.

6.9 Written responses

Written responses, formally submitted usually at the close of the consultation period, remain a key product of consultation. General issues arise in relation to the form of responses, how strictly time limits for reception of responses should be enforced and whether responses should be publicly available.

Written responses are an important product of consultation. They may be electronic or hard copy. Care is needed in deciding about their availability to the public.

6.9.1 The form of responses

Many law reform agencies use online questionnaires for responses, although responses in hard copy are also received. The use of software with online questionnaires can make the analysis of responses quicker and more efficient. Some agencies publish hard copy booklets for responses. Even if separate documents generated by the consultee are used, the law reform agency may ask for them to be submitted in electronic form as well as, or instead of, hard copy, again to assist with the analysis.

6.9.2 The timing of responses

Written responses should be received before the end of the consultation period. As discussed in Chapter 5, advisory groups brought together before consultation starts can be a way of disseminating information about the timetable for the project, including the end of the consultation period. A law reform agency may have a continuing relationship with regular consultees, such as a law society, and can forewarn them of upcoming consultations.

It is nonetheless frequently the case that a significant number of responses to a consultation are received shortly after the deadline for responses. If a response is a week late at the end of a three-month consultation period, the law reform agency is unlikely to be prejudiced and will accept it. But what of significantly late consultation responses? Law reform agencies are frequently asked for extensions of time by stakeholders.

In some cases, a general extension of the time limit may be warranted. This could be because new issues have emerged during the course of the consultation process that require further consideration from stakeholders. Equally, allowing extra time may provide the law reform agency with a way of

Wildlife law: Athletes and fishermen

In 2012, the Law Commission for England and Wales extended the consultation period for a large-scale project on wildlife law, first in response to representations from stakeholders concerned that the Olympic Games, which were held in London that year, would reduce the time available. Secondly, while the consultation paper sought to limit the marine extent of the project to territorial waters, it asked a question about this time issue. The issue of whether the project should extend to the 200-mile 'exclusive economic zone' also became a live one during consultation, and the deadline was further extended to allow the sea fishing industry to make representations.

accommodating critics: doing so may divert criticism and mean that the likelihood of a more consensual outcome is increased.

Law reform agencies will have different attitudes towards requests for late submission of responses from individual stakeholders. If the timetable for the project is very tight, it may be impossible to accommodate an extension. In general, law reform agencies will want to be able to extend time to get the benefit of an additional response. The law reform agency may need to ensure that there is a clear message as to how much extra time it is likely to allow stakeholders from one project to the next.

The Victorian Law Reform Commission encourages submissions before or early in the consultation period. This has the additional benefit of enabling issues raised in submissions to be progressively consulted upon.

6.9.3 The public availability of responses

The law reform agency should make express provision for whether responses should be considered public documents or not.

In some jurisdictions, the extent to which responses should be made public will be influenced by freedom of information legislation. It may be that the law reform agency cannot impose a general confidentiality rule, even if it wanted to, because responses would be subject to freedom of information requests. A law reform agency may also be covered by government policies in relation to publication or inspection on request of responses to consultations.

In general, most law reform agencies would consider that it is good practice for responses to be publicly available, at least on request. Law reform is a form of public policy formulation and will generally benefit from transparency. On the other hand, agencies will also seek to preserve confidentiality or anonymity upon request in appropriate cases.

Whatever the policy, it should be publicly set out in the consultation document to which the response is made.

The analysis of responses is the key step linking the consultation exercise with the final policy-making process, and to that the next chapter turns.

Status of submissions

The South African Law Reform Commission indicates in all its research papers published for public comment that the Commission will assume that unless comments or representations are marked 'confidential', respondents grant the Commission permission to quote from their comments and to refer to respondents by name. Respondents should further be aware that the Commission may, under the terms of the Promotion of Access to Information Act 2 of 2000, be required to release information contained in representations or comments submitted to the Commission.

The New South Wales Law Reform Commission operates a two-stage consultation process, with question papers and consultation papers. The following is the text that appears in the Commission's question and consultation papers, clearly setting out the Commission's policy:

We generally publish submissions on our website and refer to them in our publications.

We will normally publish your submission unless you request confidentiality for all or part of the document (see our Privacy and Information Management Policy for further details). Please let us know if you do not want us to publish your submission, or if you want us to treat all or part of it as confidential.

We will endeavour to respect your request, but the law provides some cases where we are required or authorised to disclose information. In particular we may be required to disclose your information under the Government Information (Public Access) Act 2009 (NSW).

In other words, we will do our best to keep your information confidential, but we cannot promise to do so, and sometimes the law or the public interest says we must disclose your information to someone else.

The Commission's privacy and information management policy is published on its website, and makes clear that the name of the person submitting the response will be made public, but not their personal address, telephone number or other personal information.¹⁰

Notes

- 1 Definition from United Nations Security Council 2006, paragraph 6 (emphasis added).
- 2 *Doctors for Life International v The Speaker of National Assembly* 2006 (12) BCLR 1399 (CC). For a useful commentary, see Czapanskiy and Manjoo 2008.
- 3 <http://www.bcli.org/project/strata-property-law-phase-two>. Strata property is a statutory form of property holding in which individuals own an interest in their own home and are members of a strata corporation that owns common parts and has obligations in relation to maintenance, etc.
- 4 http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc284_Renting_Homes.pdf
- 5 <http://salawreform.justice.gov.za/reports/r-pr107-SXO-AdultProstitution-2017-Sum.pdf>
- 6 <https://www.lawcom.gov.uk/project/taxi-and-private-hire-services/>
- 7 <https://www.lawcom.gov.uk/project/level-crossings/>
- 8 <http://www.alrc.gov.au/publications/1-introduction-inquiry/community-consultation-processes>
- 9 <http://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf>
- 10 <http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Consultation-Papers/CP17.pdf>; http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_policytableddoc/LRC_policydoc/lrc_impp.aspx