

The Law Reform Process

The Role of Law Reform Agencies

Lord Steyn considers the role of law reform agencies must be anchored in the principle of constitutionalism.¹ It is neither a rule nor a principle of law. It is a political theory about the type of institutional arrangements that are necessary in order to support the democratic principle. One important application of this principle is that absolute executive power ought to be avoided by a diffusion of authority. This can be achieved by nurturing independent centres of public decision-making. Such autonomous centres introduce checks and balances in a democratic system. And that is how the role of a law commission should be seen and structured.

Although it is inevitable that Parliament will be the major player in the field of law reform, good law reform, in the opinion of Lord Steyn, is facilitated by a co-operative effort between the three organs of the State - the legislature, the executive and the judiciary. It involves the idea of a dynamic interaction between the branches of government. It is a valuable and constructive notion, which need entail no abandonment of the constitutional functions of the judiciary.

The Law Lord further considers an independent, competent and courageous legal profession, practising and academic, dedicated to the view that the law is an honourable calling, which involves more than the pursuit of personal advantage, can contribute greatly to law reform as it too is a centre of independence.

According to Lord Steyn, more is needed for the law reform process as the law is not an end in itself, but is only a means of ordering a civil society, and the law is not and cannot be static but must adapt to the changing needs of society. The Law Lord thus holds the view that in a democracy it cannot be left to branches of government to undertake a systematic study of law reform. He considers that important as their roles are the universities and the practising professions are also not equal to the task. Experience has shown that it is essential to put in place institutional arrangements for tackling Law Reform in the interests of the people. Lord Steyn is thus of the opinion this role can only be fulfilled by a law commission, which forms an integral part of the democratic dialogue in a State.

¹ Keynote Address on ‘The Role of Law Reform Agencies’ at ALRAESA Law Reform Conference [Cape Town, March 2005].

The very first requirement for the existence of an effective law commission, according to Lord Steyn is that it must be, and must be seen to be, independent. It must have public confidence and, self-evidently, deserve to have it. The Law Lord considers a law commission should not be the handmaiden of the party in government in the pursuit of its political agenda, and this is to be reflected by the fixed-term appointments of the chairman and members of the law reform agency. Moreover, Lord Steyn argues that although a law commission is part of a democratic dialogue and must act in a spirit of constructive co-operation it serves not the government but only the people. Where necessary it must stand up for the interests of the people against the government. The people are entitled to expect independent and effective decision-making by a law commission committed to its important role in a democracy.

Lord Steyn also expressed the view that an effective law commission is more likely to flourish in a country in which the rule of law - the overriding democratic principle - is scrupulously observed in letter and in spirit.

Lord Steyn further considers that, given that the role of a law commission is advisory, there must inevitably be close co-operation between the law commission and the departments of government, but there are two further important touchstones of the effectiveness of the agency to be mentioned. First, the executive must allow the agency a considerable freedom in the selection of the particular projects of law reform to be undertaken. Choices have to be made and the agency must be accorded substantial scope in selecting not dry as dust technical projects but subjects, which are truly relevant to the needs of the community. Secondly, once the reports of the agency are published there must be a convention binding on the government to evaluate the merits of the proposals for law reform and, if judged to be sound, to act on them within a reasonable time. Arguing that it does not fit in with the party political agenda of the government, or that the parliamentary timetable is too tight, is not good enough. And the government must be under a public duty, if it decides not to take a project forward, to explain why it has taken that decision.

Regarding the methodology to be adopted, Lord Steyn stresses it is necessary for a law Commission to research and evaluate the experience of other jurisdictions. Comparative law studies have become ever more sophisticated. The aim is not to arrive at some sort of poll of the solutions adopted in a majority of jurisdictions. The real function of comparative law is to throw light on the competing advantages and disadvantages of different feasible solutions adopted in other national systems and in the international arena. It enables a law commission to re-examine the merits and demerits of the law of its own country in a rigorous manner. Such an enquiry must be approached as a matter of principled decision-making. Where possible it must also be tested against empirical evidence.

Last, but not least, Lord Steyn emphasizes that in order to carry out its complex duties a law commission must aim high. It is thus essential that it must be properly funded and staffed. It must have the resources to undertake intensive research and consultation exercises. It must have extensive connections with all relevant sectors of the community including professional bodies and market associations. It must have ready access to experts in the field against whom to test their initial views. A law commission must work not for the passing hour but for an expanding future.

The Operational Template of Law Reform Agencies

Mr. Justice Bruce Robertson - President of the New Zealand Law Commission – in his paper presented at the ALRAESA Conference in Cape Town that since a law reform body has to be flexible, innovative, creative and sensible, there is generally a template, which will be influential:

- a) What is the law in the area?
- b) What are the problems or deficiencies that exist?
- c) What could be done to meet those problems?
- d) What is recommended and why?

Best Practices in Law Reform

Michael Sayers, former Chief Executive of the Law Commission of England and Wales, and the General Secretary of CALRA, presented a paper at the ALRAESA Conference in Cape Town on what he regards as some of the best practices in law reform.

He considers a Law Reform Commission, which is quite new or is particularly trying to carve a niche for itself with a slightly doubtful Government, judiciary, legal profession or public, should undertake the kind of project having as many as possible of the following features:-

- there is a major problem in that area of law;
- it either affects many people badly or affects fewer people very badly;
- there is real demand for reform there;
- there is likely to be a solution, which would have a fair chance of being implemented;
- the project can be completed to a very high standard and in a reasonable period.

Sayers is of the opinion that this would help the Commission convince Government of its usefulness; Non-Governmental Organizations, the judiciary and all the other interests of its usefulness, and convince itself of its own usefulness!

As regards the project work, Sayers considers it needs to be based on thorough and thoughtful legal research and analysis of case law, legislation, academic and other writing, and other relevant sources of information both in the jurisdiction and abroad. The preliminary research must seek to establish the existing legal position at home and, if appropriate, in other comparable jurisdictions. It highlights the current shortcomings, and must consider ways in which other jurisdictions have tried to overcome them and ways in which commentators have suggested overcoming them.

Sayers also emphasizes that it is good practice, and relatively common for law reform agencies [LRAs] to consult widely. The main reasons for doing so are:-

- (1) to find out how other people view the problems;
- (2) to find out what they think of the LRA's proposed solutions;
- (3) to alert the LRA to how the law works in practice;
- (4) to fine tune the LRA's proposals;
- (5) to reinforce democratic values by giving people a chance to be heard; and
- (6) to build a consensus in favour of reform.

It is very useful, and indeed virtually essential, in the opinion of Sayers, to have a policy paper as the next major step after the analysis of responses to consultation. It is placed before members of the Law Reform Commission to seek their approval to the general policy, which they are minded to include in the final report.

According to Sayers, any final report needs to spell out prominently, briefly and compellingly, why there is a need for change. This includes, in non-technical language, the problems with the current law, the nature and extent of the injustice etc caused (could one say anything about how many people etc are – actually or potentially – adversely affected at present and precisely how and with what effect, possibly with examples?), and anything else like expressions of dissatisfaction with the present law by the courts in published judgments or by others. This is the place for a written assessment of the likely impact of the recommendations, if they were implemented.

Sayers holds also the view that, depending on the prevalent culture in the particular jurisdiction, it is often very important for the report to set out near the beginning, in a way which will attract and convince the typical reader, why there is a real need for the recommendations to be implemented; in other words, to “sell” the report, however reluctant the LRA may be to pursue that course, since according to him the natural inclination of most Government officials is simply to consider whether there are strong enough reasons for making changes to the current position.

Some of the points to be covered in a typical report would thus include:--

- (1) Briefly, the method used for the project: for example, the consultations undertaken and broadly about the response from those consulted;
- (2) The need for reform: some very basic but convincing reasons, for example current injustices, the scale of the problem – preferably with relevant statistics – and calls for reform, for example from Parliament, MPs, the courts, academics etc;
- (3) Any guiding principles;
- (4) The position in other relevant jurisdictions;
- (5) Human rights aspects;
- (6) The options considered for reform, with the main arguments for and against each, and with the LRA’s final decision;
- (7) The anticipated impact of the recommendations, if they are implemented.

Sayers also stresses that at a rather higher level than the practicalities of the law reform process, there inevitably lie the values and policies adhered to by each LRA, values such as human rights and the rule of law, gender equality, democracy and good governance, and sustainable economic and social development; its vision of the law.

Project Management

Project planning and management as risk management

In a paper on “Law Reform: Project Planning and Management” at the ALRAESA Law Reform Conference, Cape Town, South Africa, March 15 - 17, 2005, Peter J.M. Lown, Q.C., Director, Alberta Law Reform Institute, stressed that proper planning and management of a project, by a law reform agency, involves risk avoidance [identifying and reducing risks]

- (1) Reducing the risk of non-delivery by developing strategies to manage problems that arise during the project life cycle, such as change in personnel; change in government priorities; change in underlying legal premises;
- (2) Providing a formal project structure against which progress can be evaluated, such as laying out milestones that allows both monitoring and adjustment as the milestones arise. This may also include a decision not to proceed with a project, should the landscape change so significantly it began;
- (3) Providing a mechanism for involving the widest variety of interested parties (stakeholders) in the project: law reform projects are essentially collaborative efforts, led and guided by the law reform agencies; their content and disposition depend entirely on the quality and effectiveness of consultation; the challenge is how to engage audiences on the topics in question;
- (4) Developing a budget and timetable which enables the commitment of resources at appropriate points in the project: Much of this area of decision-making will depend on the stage of the project – research, library science or similar assistance will often be required early in the process. Consultation and materials presentation assistance will normally occur well into the process, whereas skills such as legislative drafting are more likely to be required toward the latter stages of the project;
- (5) Providing consistency throughout the project, as well as addressing through contingency planning, the possibility of changes to the project in the event of significant difficulties.

Management of the various Stages of a Project life cycle

Most law reform agencies define phases through which a project passes. The first phase could be a preliminary assessment to determine whether there is a clear law reform issue that should be dealt with and whether the law reform agency has the resources and expertise to propose a solution that has a reasonable chance of being adopted. This may be followed by a “feasibility study.” In effect, this is where most of the preplanning occurs, the anatomy of the project is established, including internal management committee and external advisory group. Scope, methodology and critical consultations are identified.

At this point, there is a clear description of the critical issues, the methodology of research, consultation, analysis, and the individuals who should be involved in the project. There is a clear plan through to final product, with decision points identified on the way. Roles and responsibilities are clearly described and attributed. Necessary financial and human resources are identified and allocated.

STAGES IN A LAW REFORM PROJECT

(Sayers, "Best Practices in Law Reform", ALRAESA Law Reform Conference: 15 to 17 March 2005)

Key Stages	Key Ingredients	Optional
<p><i>Before the Project</i></p> <ul style="list-style-type: none"> - Consideration of the Project - Preliminary Project Plan - Decision whether to conduct Project 	<ul style="list-style-type: none"> - Importance of issues? - Need for reform? - Suitability? - Staff and finance resources? - Priority over other possible projects? - Scope - Project team - Partnership with others - Timing 	

Key Stages	Key Ingredients	Optional
<p>Up to Report</p> <ul style="list-style-type: none"> - Responses to Consultative Document - Policy - Drafting of legislation - Publication of Report 	<ul style="list-style-type: none"> - Analysis of responses - Consideration - Drafting of Report decisions - Recommendations for Reform - Publicity 	<ul style="list-style-type: none"> - Informal consultation - Working party - Advisory Group - Seminar - Public meetings
<p>After the Report</p> <ul style="list-style-type: none"> - Following up the report 		

NB: For any process of law reform to be effective, capacity building for officers called upon to implement the new law and development of legal awareness of stakeholders and interested parties are crucial.