

**For discussion on
20 December 2017**

**Legislative Council Panel on
Administration of Justice and Legal Services**

**Enhancing the operation model for
the Law Reform Commission in Hong Kong**

PURPOSE

1. This paper briefs Members on the preliminary outcome of the study conducted by the Law Reform Commission of Hong Kong ("the LRC study") to consider various options to enhance the efficiency and operation of the LRC, including examining the experience of law reform agencies in other jurisdictions. Members' views are sought on the options and preliminary conclusions from the study to assist the Department of Justice in considering the way forward.

BACKGROUND

(a) Introduction

2. In the context of administration of justice, the Law Reform Commission of Hong Kong (LRC) plays an important role in the development and promotion of effective law reform. The remit of the LRC, which is a non-statutory advisory body established in 1980, is to consider for reform such aspects of the law as are referred to it by the Secretary for Justice (who is the *ex officio* Chairman) or the Chief Justice (who is also an *ex officio* member of the LRC). The aim of any LRC reference is to consider the law in a specified area and, where appropriate, present well considered proposals to the Government.

3. As the process of law reform has been in operation for quite some time, it is considered desirable to review the process with a view to exploring possible options to enhance the efficiency and operation of the LRC. The purpose of the LRC study is to consider, with reference to the experience of various law reform agencies in other jurisdictions, whether the structure and operations of the LRC should be improved, and if so, to identify possible measures and options for reform.

(b) Law reform generally

4. Effective law reform¹ plays an important role in any modern society which aspires to uphold the rule of law. As our society evolves, our laws must change to meet society's needs. Law reform in common law jurisdictions is generally achieved by various means, including:

- (1) through the legislature – but law reform in this context is often limited to a particular government's political or social priorities rather than systemic law reform;²
- (2) through the process of judicial precedent – which is *"dependent, as it is, on the chance of the right case presenting itself for decision"*;³
- (3) in some jurisdictions, through the process of *"professional law reform"*, by professional, independent law reform bodies specifically established for the purpose;⁴ and
- (4) through the work of others, including specialist tribunals (such as anti-discrimination tribunals), specialist agencies (such as environmental protection agencies), Royal commissions and commissions of inquiry, or *"private consultants and activists."*⁵

5. Within these sources of law reform, almost every major common law jurisdiction has some kind of specialist body devoted to the task of law reform, although their set-up, processes and the resources available to them vary substantially. In some jurisdictions, law reform bodies are creatures of statute, while others may operate within the government's legal department or on an administrative basis. Some law reform bodies have the resources to appoint remunerated full-time

¹ Which has been observed to mean, in the Hong Kong context: *"on-going law reform that produces laws that are clear, accessible and just, and that respond to the present-day, often shifting, needs of Hong Kong society and economy ..."*: see Michael Tilbury, Simon N M Young and Ludwig Ng, "Chapter 1: Law Reform Today" in Michael Tilbury, Simon N M Young and Ludwig Ng (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (2014, HKU Press), at 3.

² Same as above, at 4.

³ Same as above, at 3.

⁴ Same as above, at 4 to 7.

⁵ Same as above, at 7. The writers go on to note that: *"many of these bodies may produce consultation documents, engage in public consultation and, generally, adopt techniques that have been pioneered by law reform commissions"*: same as above.

commissioners while others are made up of part-time volunteer members, while still others may operate through co-operation between governments and local legal professional bodies and law schools, etc.

(c) The position in Hong Kong

6. It has been observed that the issue of whether the institutions of law reform in Hong Kong are appropriate to deliver effective law reform is a particularly important one:

*"[A]s Hong Kong's legal system, with its independent judiciary, is often said to be a cornerstone, if not the cornerstone, of Hong Kong's competitive advantage That advantage is diminished by the extent to which the legal system consists of laws that do not adequately address contemporary problems."*⁶

7. The primary source for law reform initiatives in Hong Kong is actually Government bureaux and departments.⁷ However, the LRC has an important role in law reform where:

- (1) the subject does not fall readily under the responsibility of any particular bureau of Government;
- (2) the subject raises issues which are outside the Government's day-to-day activities; and
- (3) the subject requires the dedication of full-time legal input to conduct a review.

8. In addition to recommending reforms to keep pace with social development, the LRC could also, from time to time, fulfil a leading role in bringing major social change in Hong Kong, such as in the reforms made to the laws on homosexuality, illegitimacy, divorce and (possibly in the not too distant future) child custody.⁸ It could be said that in each case, these

⁶ Same as above, at 3.

⁷ Wong Yan Lung (former Secretary for Justice), "Chapter 3: Sources and Channels of Law Reform in Hong Kong" in Tilbury, Young and Ng (eds) (2014), above, at 44.

⁸ I.e., following the LRC reports on, respectively: *Laws Governing Homosexual Conduct* (June 1983) (implemented by the Crimes (Amendment) Ordinance (90 of 1991); *Illegitimacy* (December 1991) (implemented by the Parent and Child Ordinance (17 of 1993); *Grounds for Divorce and the Time Restriction on Petitions for Divorce within Three Years of Marriage* (November 1992) (implemented by the Matrimonial Causes (Amendment) Ordinance (29 of

LRC reports have promoted significant changes in public-thinking and awareness. Even where no recommendations for legislative change have been made, or recommendations have been rejected by the Government or not implemented or only partially implemented, LRC reports have stimulated public debate on important issues that might not otherwise have been aired, and so could lead to further reform in the future (for example, regarding advance directives and organ donation, stalking and debt-collection practices⁹).

----- 9. An overview of the LRC and its operations is at Annex 1.

(d) Relevant developments in Hong Kong since 2010

(i) Media commentary

10. There have been calls from different quarters in recent years for "*reform of law reform*" (ie, reforming the process of law reform¹⁰) in Hong Kong. The following articles published in late 2010,¹¹ for instance, highlighted two main issues:

(1) *"the long periods of time that it sometimes took the HKLRC, with no full-time commissioners, to bring reports to finality";*¹² and

(2) that once the LRC had reported, *"the Administration frequently failed to take timely action to implement, or even to respond to, the recommendations in a report."*¹³

1995); and *Child Custody and Access* (March 2005) (Labour and Welfare Bureau is working on a draft Children Proceedings (Parental Responsibility) Bill to introduce the shared parental responsibility model in custody proceedings as recommended in the LRC report).

⁹ Ie, see LRC reports on *Substitute Decision-making and Advance Directives in Relation to Medical Treatment* (August 2006), *Stalking* (October 2000) and *The Regulation of Debt Collection Practices* (July 2002).

¹⁰ Michael Tilbury, Simon N M Young and Ludwig Ng, "Chapter 1: Law Reform Today" in Tilbury, Young and Ng (eds) (2014), above, at 3.

¹¹ See, for example (as cited in Tilbury, Young and Ng, above, at footnote 57): L Ng, "Law for the Times", *South China Morning Post* (29 September 2010) and "Reforming Law Reform", *Hong Kong Lawyer* (December 2010); M Ng, "Treatment of Custody Overlooks Child's Rights", *South China Morning Post* (20 December 2010); A Wong, "Series of Law Reform Ideas Left to Gather Dust", *South China Morning Post* (20 December 2010); J Man, "Failure to Invest in Updating Flawed Laws 'Hurting Hong Kong'", *South China Morning Post* (21 December 2010); A Wong, "Lack of Liability Law Actions Puts Consumers at Risk", *South China Morning Post* (21 December 2010); Editorial, "The Key to Finding a Level Legal Playing Field", *South China Morning Post* (27 December 2010); and M Ng, "Government Always Finds 'Good' Reasons to Delay Law Reforms", *South China Morning Post* (10 January 2011).

¹² Michael Tilbury, Simon N M Young and Ludwig Ng, "Chapter 1: Law Reform Today" in Tilbury, Young and Ng (eds) (2014), above, at 15.

¹³ Same as above.

11. Various developments have since taken place.

(ii) Government Guidelines

12. In October of the following year, the Government issued a set of Guidelines to its bureaux and departments to promote expeditious and systematic implementation of LRC recommendations. In gist, the Guidelines require bureaux or departments with policy responsibility for a LRC report to provide a detailed *public* response (setting out which recommendations they accept, reject or intend to implement in modified form) to the Secretary for Justice (as Chairman of the LRC) "*as soon as practicable*", and within 12 months of the report's publication, unless otherwise agreed by the Secretary for Justice. In any event, the bureau or department should provide at least an interim response within six months of publication of the report which sets out a clear timetable for completion of the detailed response and the steps taken so far. (These 2011 Guidelines are discussed more fully in **Annex 1** to this paper.)

(iii) HKU Conference

13. In November 2011, a Conference on Reforming Law Reform took place at the University of Hong Kong, organised by the University's Centre for Public and Comparative Law and co-sponsored by ONC Lawyers and others. In addition to leading local speakers, a number of eminent overseas law reformers delivered papers at the Conference, which, while focusing on the experience in Hong Kong, also reflected experiences of law reform practice, successes and difficulties across the common law world.¹⁴

(iv) Annual reporting mechanism

14. In February 2012, Legco's Panel on Administration of Justice and Legal Services (AJLS Panel) proposed a mechanism for monitoring the progress on implementing LRC recommendations; in particular that the Secretary for Justice is to submit to the Panel for discussion an annual report in respect of the implementation of LRC reports. The mechanism was endorsed by the Legco House Committee in March 2012 and under

¹⁴ Including, for example, Mr Michael Kirby, AC CMG (first Chairman of the Australian Law Reform Commission; former Justice of the High Court of Australia and President of the New South Wales Court of Appeal) and Mr Martin Partington (Emeritus Professor, University of Bristol; former Law Commissioner (2001-2006) and Special Consultant.(to 2008), Law Commission of England and Wales.

this mechanism, the Secretary for Justice has submitted an annual report to the AJLS Panel and also attended specific meetings of the AJLS Panel to provide explanations since June 2013.

(v) Textbook on Reforming Law Reform

15. In 2014, the papers from the HKU Conference were published in the text, *Reforming Law Reform: Perspectives from Hong Kong and Beyond*,¹⁵ which, given its obvious relevancy, has informed to some extent the content of this paper. In particular, the suggested improvement measures to Hong Kong's law reform processes and procedures¹⁶ arising from the Conference, and set out below, have been taken into account.

- "(1) An appropriate number of full-time law reform commissioners should be appointed to the Law Reform Commission of Hong Kong;*
- (2) Where appropriate, the Law Reform Commission of Hong Kong reports should include draft legislation so as to facilitate and expedite the implementation process;*
- (3) The Guidelines that govern the response of bureaux and departments to reports of the Law Reform Commission of Hong Kong should be kept under review to ensure that they are satisfactorily implemented in practice;*
- (4) Consideration should be given to the development of a procedure by which Legco can consider, with the benefit of public deputations, recommendations (including draft legislation) of the Law Reform Commission of Hong Kong with a view to their implementation;*
- (5) Drawing on the experience of jurisdictions such as Ontario and Tasmania, the Law Reform Commission of Hong Kong and the Administration should consider developing closer co-operative and collaborative relationships with law schools and universities on law reform generally and on specific reform projects."*¹⁷

¹⁵ Michael Tilbury, Simon N M Young and Ludwig Ng (eds) (2014, HKU Press).

¹⁶ See Michael Tilbury, Simon N M Young and Ludwig Ng, "Conclusions" in "Chapter 1: Law Reform Today" in Tilbury, Young and Ng (eds) (2014), above, at 20 to 21.

¹⁷ Same as above, at 20.

16. In the course of its study, the LRC considered these and other relevant issues, as set out in the discussion below.

REFORMING THE HONG KONG LAW REFORM MODEL: KEY ISSUES FOR CONSIDERATION

(a) Introduction¹⁸

----- 17. As noted in the previous section (and illustrated in more detail in Annexes 1 and 2), there is considerable variation across law reform agencies in terms of the key rubrics of their constitution, structure, membership and agenda. The discussion below sets out the strengths and weaknesses of Hong Kong's current law reform commission model as well as further issues considered by the LRC in the context of "*reforming law reform*".

(b) Important features of the LRC

(i) A non-statutory administrative body

18. In terms of its constitutional basis, the LRC was created administratively pursuant to an Executive Council decision, rather than statutorily. The advantage is that this provides flexibility in the administration of the LRC, such as making changes in the appointment of members and the decision-making process. The disadvantage is that the LRC "*is vulnerable to dissolution at the whim of the government, though political considerations could be expected to weigh against any such move.*"¹⁹ There is, of course, no intention on the part of the current Government to abolish the LRC. Instead, the intention is to improve its operation.

(ii) Chaired by the Secretary for Justice

19. The fact that the LRC is chaired by the Secretary for Justice can be seen as both an advantage or disadvantage.

20. The fact that the Secretary for Justice is both Chairman of the LRC and a senior member of the Government provides a useful two-way

¹⁸ Some of the content of this section is drawn from Stuart MI Stoker (a former Secretary of the LRC), "Chapter 4: Hong Kong's Law Reform Commission" in Tilbury, Young and Ng (eds) (2014), above, at 53 to 65.

¹⁹ Same as above, at 59.

conduit which, on the one hand, can apprise the LRC of political practicalities on an issue and, on the other, provide a supporting voice for the LRC's proposals within the Government.²⁰

21. However, there is arguably at least a perception of possible conflict in having an independent law reform body chaired by a senior Government official who, as part of a particular administration, will be tasked with promoting and supporting that administration's priorities in the face of other competing claims on government and legislative time and resources. A former Secretary to the LRC, Stuart Stoker, notes however, that in practice, this criticism has rarely been raised, and on the contrary, *"on more than one occasion calls have been made for initiatives pressed by the government to be referred to the HKLRC for an objective and independent view."*²¹ Besides, having the Chief Justice as a standing, *ex officio* member of the LRC, and involved with the Secretary for Justice in referring topics to the LRC for study, is a clear advantage in terms of sustaining the perception of the LRC's independence.

(iii) Part-time volunteer Commission and sub-committee members

22. One of the significant features of the LRC is that it functions through volunteers. On the one hand, this enables the LRC and its sub-committees to tap into different areas of expertise that would not otherwise be available, either because it would be too costly or because the individuals concerned might be unwilling or unable to commit themselves to full-time engagement. The appointment each time a new reference is made of a range of sub-committee members from experts in that field, as well as key stakeholders, allows for both early stakeholder involvement in LRC projects and for focus on the most relevant issues, which in turn enhances the quality, relevancy and credibility of each sub-committee's, and eventually the LRC's, output.²² On the other hand, projects might take a long time to complete, as there are obviously constraints on how much and how quickly volunteers can be asked to do work on the LRC's behalf.

²⁰ See the discussion in Stuart MI Stoker, "Chapter 4: Hong Kong's Law Reform Commission" in Tilbury, Young and Ng (eds) (2014), above, at 60.

²¹ Same as above. One example arose in relation to the proposals in a report on the *Trial of Complex Commercial Crimes* put forward by the Attorney General in the late 1980s. The proposals were strongly opposed by, *inter alia*, the Bar and the Law Society and, even though the proposals were firmly identified with the Attorney General, there were calls from a number of Legislative Council members for the matter to be referred to the LRC.

²² See the discussion in Stuart MI Stoker, "Chapter 4: Hong Kong's Law Reform Commission" in Tilbury, Young and Ng (eds) (2014), above, at 60 to 61.

23. In its study, the LRC observed that, if a new law reform model with full-time commissioners were to be contemplated, careful thought would need to be given as to how to obtain the same wide level of expert input on specific topics, as under the current structure. One possibility considered favourably by the LRC would be to 'brief out' the whole or part of the initial study to outside independent experts including appropriate university academics who are expert in that field.

(iv) Non-lawyer members

24. Unlike many law reform agencies, the LRC includes non-lawyers among its members. The original thinking was that this would import consideration of the wider picture to the LRC's deliberations and avoid the risk of too legalistic or academic an approach. The disadvantage, however, is that the lay members may not be best placed to consider highly technical aspects of the law.²³ If a new law reform model with full-time commissioners were to be taken forward, the role, if any, for non-lawyer members on the LRC has to be carefully considered.

(v) Own agenda and timeframe

25. While the stance of the government on a particular issue is obviously relevant in assessing the chances of implementation of any reform proposals the LRC may make, the final decision on whether or not to refer a matter to the LRC rests with the Secretary for Justice and the Chief Justice. As such, the LRC has the free hand to set its own agenda. The criteria which the Secretary for Justice and the Chief Justice will usually consider in deciding whether to take on a project are set out in Annex 1.

26. Under this head, the LRC study pointed out a number of issues which merit further consideration:

- (1) With no standing "*law revision*" function within its remit,²⁴ and no practice of devising and issuing law reform "*programmes*" setting out the broad areas the LRC will review for the next few years, it could be argued that the LRC's

²³ Same as above, at 61.

²⁴ Same as above, at 62. (A law reform commission with a "*law revision*" function undertakes, in theory, the systematic (rolling) review of all the laws of that jurisdiction to ensure they are kept as up to date as possible. Given the enormous commitment of resources required for this task, few law reform agencies appear to do so. Two examples are the English Law Commission and the Scottish Law Commission; however, even they acknowledge that they do not undertake this function comprehensively: see Annex 2.)

choice of topics is currently rather *ad hoc* and should be rationalised onto more of a 'running theme' basis.

- (2) In determining topics to be taken forward, there is always a delicate balance to be struck between the LRC's independence on the one hand, and pragmatically ensuring on the other that the LRC's resources are devoted to work that will eventually be implemented. Following on from point (1) above, there may be a case for establishing dialogue with Government bureaux and departments at a very early stage of determining a law reform programme, to see to what extent, if at all, the LRC's workplan could accommodate some Government priorities without compromising the LRC's independence.
- (3) In terms of timing and through-put of projects to be handled by the LRC, former Secretary Stuart Stoker has commented: *"while there may be a sound case for wishing to speed up the process of law reform, the limitations of the legislative timetable render questionable the practical benefits of increasing the volume of law reform proposals issued by the HKLRC."*²⁵

(vi) Role and function of the Secretariat

27. The LRC Secretariat comprises full-time lawyers and support staff within the Legal Policy Division of the Department of Justice. The role of the lawyers in the unit is to carry out the legal research and writing required to support the LRC and its sub-committees and thereafter to assist the Government's bureau and departments, as need be, in the process of their implementation of LRC reports.

28. In its study, the LRC considered the following issues under this head:

- (1) The lawyers who join the Secretariat are not usually experts in particular areas of law, but are generalist lawyers who develop expertise in the topics being reviewed by the LRC through their research and writing in support of the LRC and its sub-committees. Potential difficulties can, for example, arise

²⁵ See the discussion in Stuart MI Stoker, "Chapter 4: Hong Kong's Law Reform Commission" in Tilbury, Young and Ng (eds) (2014), above, at 62.

when these officers are on leave for any extended period or transfer out of the Unit to another part of the Department.

- (2) The LRC has also begun trialing a new, team-based approach within the Secretariat (an idea borrowed from the English Law Commission), so that more than one counsel should be involved on each LRC project. Recently, the LRC has also bid successfully for new government counsel resources in the Unit to strengthen the research side (especially given the large extent of international comparative research required on almost all LRC projects).
- (3) Consideration may, if resources permit, also be given in future to 'briefing out' to expert practitioners or academics some parts of the research work and preparation of papers on LRC references, in line with similar initiatives adopted in other jurisdictions in recent years.

(c) Implementation of LRC recommendations

(i) The Government Guideline

29. In relation to the Government's Guideline on implementation of LRC recommendations, the authors of the text on *Reforming Law Reform* (referred to above) have stated:

*"The success of these Guidelines will depend on their effective implementation in practice; and in particular, on the extent to which they generate meaningful responses to Law Reform Commission reports in which the Executive effectively sets out, and justifies, its attitude to the recommendations of the Commission. In early 2013, it appears from the updates to the HKLRC website that these Guidelines are already having an impact and the Administration has been providing timely and detailed responses (and updated responses) to HKLRC reports."*²⁶

30. The LRC noted in its study that the effectiveness of the Guideline is one of the issues that require further consideration, but any

²⁶ Michael Tilbury, Simon N M Young and Ludwig Ng, "Chapter 1: Law Reform Today" in Tilbury, Young and Ng (eds) (2014), above, at 19.

modification will have to be considered against the overall scheme of reform to be implemented.

POSSIBLE OPTIONS ON THE WAY FORWARD REGARDING THE STRUCTURE AND OPERATIONS OF THE LRC

(a) Introduction

31. As indicated in the discussion above, and in the descriptions of a range of overseas law reform agency models in Annex 2, the disparity between them is considerable, in respect of their structure, management model, funding, staffing, budget, etc. There are obviously many different options available for Hong Kong to consider, should reform of the current model be considered appropriate.

(b) Some possible options

(i) Option 1 : Maintaining the status quo

32. One obvious option is to maintain the structure and mode of work of the LRC and the Secretariat as described in Annex 1, ie, to maintain the status quo.

Pros of Option 1

33. Advantages of this approach include:

- (1) The model is already well-established.
- (2) The enormous and varied expert contribution of LRC and sub-committee members (including lawyers and non-lawyers), as volunteers, would continue.
- (3) Given the voluntary involvement of LRC and sub-committee members, the cost of this model is relatively limited since the cost is mainly in the running of the Secretariat, which is already provided for as it is subsumed under the Department of Justice.
- (4) The model is highly flexible, in that the LRC Chairman (after consulting the Chief Justice and other members) would continue to : (a) make recommendations on the appointment

of LRC members²⁷ and appoint sub-committee members; (b) choose, in conjunction with the Chief Justice (and in practice, in consultation with LRC members), topics for referral to the LRC for study; and (c) oversee the LRC's budget, Secretariat resources, etc.

Cons of Option 1

34. Possible disadvantages of this approach include:
- (1) The fact that the LRC is chaired by the Secretary for Justice and the Secretariat is staffed by the Department of Justice counsel risks the perception that the LRC is merely acting as a mouthpiece for the Government.²⁸
 - (2) If the Secretariat remains part of the Department of Justice, decisions on staffing (promotions, recruitment, re-deployment, training, etc) will be out of the control of the LRC and would remain under the management of the Department of Justice (the Legal Policy Division of the Department, in particular).²⁹
 - (3) With part-time, unpaid LRC members and part-time, unpaid expert sub-committee members, it is difficult to request members to complete a project within a certain or specific time-frame, especially when large-scale projects are in progress.

Steps to implement Option 1

35. As Option 1 is to maintain the status quo, no follow up action would be needed.

²⁷ LRC members are appointed by the Chief Executive upon the recommendation of the LRC Chairman.

²⁸ Such criticisms were, for instance, made when the LRC published its proposals on Privacy and Media Intrusion, and on Stalking. See: *Consultation Paper on Privacy and Media Intrusion* (1999) (for example, Recommendation 5: An independent and self-regulating commission should be established by statute to deal with complaints of unjustifiable infringements of privacy perpetrated by the print media); and *Consultation Paper on Stalking* (1998).

²⁹ The LRC has no real control over its budget and resources and must compete with other units in DoJ (and within LPD) to obtain funding.

(ii) Option 2: Maintaining the current Commission and sub-committee structure but enhancing the LRC Secretariat support

36. An enhancement of Option 1 would be for the LRC to maintain its present structure and composition, but enhance its resources by adding more lawyers and supporting staff to the Secretariat.

37. With more lawyers in the Secretariat, dual secretaries could be allocated to each sub-committee, instead of a single secretary as has long been the case. This would enable some kind of division of labour between the two secretaries in serving the sub-committee and would help expedite the consideration of the topic by the sub-committee.

38. To further enhance the Secretariat support, the LRC may explore the feasibility of engaging outside research bodies such as the Centre for Comparative and Public Law of the University of Hong Kong and various other research institutes and centres in the Chinese University of Hong Kong or the City University of Hong Kong, to conduct studies on topical issues. This would be particularly useful when the LRC is to take on smaller-scale projects without a sub-committee.³⁰

39. From a broader perspective, the present set-up whereby the LRC Secretariat falls within the Department of Justice's Legal Policy Division which is headed by the Solicitor General, arose by historical accident. This could also be streamlined (or rationalised), as the Secretariat reports directly to the LRC, its sub-committees and the Secretary for Justice. It may be more appropriate for the Secretariat to be under the Secretary for Justice's Office, reflecting the fact that it is the Secretary for Justice who heads the LRC and would underscore that the work of the Secretariat is separate from that of the Legal Policy Division of the Department of Justice.

40. A concern under the current sub-committee structure is that the chairmen and members are part-timers. The only full-time worker on

³⁰ The Scottish Law Commission has also considered this possibility: *"Partnership or some form of collaborative arrangements between the Commission and the University Law Schools might be one possible option; thus allowing for academic staff to be seconded to the Commission to work on projects in which they have particular expertise and to which they can bring the benefit of their research. I would have thought that the type of intensive analytical work carried out in the course of a law reform project would be recognised as having scholarly merit and practical impact for the purposes of receiving funding and accreditation as acceptable published academic work."* See M Dyson, J Lee & S Stark (eds), *Fifty Years of the Law Commissions - The Dynamics of Law Reform* (Hart Publishing, 2016), at 353.

each sub-committee is its secretary. To streamline a sub-committee's operation, the following measures could be adopted (and have been adopted from time to time for some sub-committees):

Setting time-frames and dates

- (1) A target time-frame can be discussed and agreed with the sub-committee chairman at the outset, so as to set a target date for the publication of the consultation paper (and if possible, the final report as well).
- (2) On the basis of the Secretariat background/discussion paper prepared to initiate the sub-committee's consideration of the LRC reference, a broad framework of sub-topics to be covered can be agreed with the chairman at the outset, and a provisional work-plan prepared on this basis for the ongoing work of the sub-committee.
- (3) The sub-committee secretary can work out a preliminary or tentative schedule of meetings for the coming 12 months (as approved by the chairman or the whole sub-committee) for the sub-committee to adopt as far as possible (eg, the sub-committee may target to meet regularly every 3 to 4 weeks, subject to special circumstances).

Engaging sub-committee members and outside assistance

- (4) In case of need, a core group within a sub-committee can be formed to expedite the matter by being more proactive, such as meeting up more frequently, more focused discussions, drafting of papers, etc.
- (5) A vice-chairman can be appointed at the outset so as to assist the chairman. Alternatively, the chairman can delegate some work to a member of his choice on an *ad hoc* basis. Besides, some sub-committee members can be assigned with specific tasks, such as providing information, leading a discussion on a particular issue, drafting a particular part of a consultation paper or report, etc.
- (6) If and when appropriate, outside experts or consultants (whether lawyers, academics or otherwise) may be engaged to provide assistance on specific issues.

Secretariat to be more proactive

- (7) Once the LRC has decided to take a topic on board, the Secretariat can prepare a much more detailed discussion/background paper at the outset of the project prior to the establishment of the sub-committee. (This could be undertaken by counsel in the Secretariat itself, as now, or 'briefed out' to external practitioners or academics, as under the new initiative discussed above.)
- (8) With additional resources made available to the Secretariat, more than one sub-committee secretary can be appointed to each LRC sub-committee, to help expedite its work.
- (9) The sub-committee secretary(ies) can conduct other research in parallel or in advance, with the aim of expediting matters.
- (10) The sub-committee secretary(ies) may, as far as possible, prepare in parallel the draft consultation paper and a preliminary draft of the final report while the sub-committee is holding regular meetings.

Pros of Option 2

41. Advantages of this approach include:

- (1) This option could be more easily achieved, as the non-statutory basis of the LRC's constitutional framework would continue, and the cost implications would be significantly less than for a fully independent LRC.
- (2) With 'beefed-up' Secretariat support, the LRC would likely have a speedier turnaround of projects.
- (3) With the Secretariat under the Secretary for Justice's Office, decisions on staffing matters (promotion, recruitment, re-deployment, training, etc) could be separated, at least, from the Legal Policy Division of the Department of Justice.

- (4) The LRC Chairman will continue to have a free hand in various matters, including on the recommendations of appointments to the LRC,³¹ the appointment of sub-committee members, the choice of topics to be studied, budget, etc.
- (5) The considerable voluntary contribution of the members of the LRC and its sub-committees (including lawyers and non-lawyers) would continue.
- (6) There would be minimal disruption to the current operation of the LRC.

Cons of Option 2

42. A possible disadvantage of this approach is:

- (1) In contrast to a fully independent, statutory LRC, if the Secretary for Justice continues as the LRC Chairman, and the Secretariat continues to be staffed by Department of Justice counsel, there may still be perception that the LRC lacks independence and is merely acting as a mouthpiece for the Government. Though in practice, as observed earlier, the LRC's neutrality in making proposals has rarely been questioned, even under the current set-up.

Steps to implement Option 2

43. Option 2 would require the expansion of the Secretariat to provide more counsel support. Bids for further staff resources would need to be made and would have to have the support of the Legislative Council.

44. The 'briefing out' of research on specific topics to the research centres of the local law schools, should be explored. Funding for such a briefing out facility would also need to be sought.

45. The Secretariat could follow up more proactively on the list of "streamlining" measures mentioned above in paragraph 40.

³¹ LRC members are appointed by the Chief Executive upon recommendations of the LRC Chairman.

46. The issue of transferring the LRC Secretariat to the Secretary for Justice's Office could be explored.

(iii) Option 3: Fully independent statutory law reform body

47. A fully independent, statutory LRC would be chaired by a senior and highly regarded lawyer or retired judge. This President/Chairman would be supported by a number of full-time (or a combination of full-time and part-time) commissioners. The Secretariat of this new-model LRC could also be suitably enhanced by recruiting more full-time law reform lawyers, research assistants, etc.

Pros of Option 3

48. Advantages of this approach include:

- (1) This would clearly establish the independent status of the LRC, with its mission of producing impartial, objective and balanced proposals for reform.
- (2) With full-time commissioners, the LRC would be in a better position to engage and build a stronger link with the community and the relevant stakeholders in the law reform process (including the Government, the Legislature, the Judiciary, the legal profession and academics). This may in turn enable it to make more thoroughly considered reform proposals.
- (3) A properly funded LRC with more resources consisting of full-time commissioners would presumably enable a speedier consideration of law reform projects. Full-time commissioners would have more time to devote to the law reform projects under their purview, compared with part-time commissioners, who would be busy with their own full-time work. Speed aside, this may also further enhance the quality of the proposals, papers and reports produced.
- (4) An independent LRC can have better control over its resources, budget, recruitment and staff management, without being subjected to the rules of the civil service and the needs of the Department of Justice. This will facilitate the better operation and planning of the LRC.

- (5) Statutory provisions in the legislation to be introduced would set out the LRC's functions, appointment of its commissioners and staff, its powers and responsibilities, etc. To some, this would further enhance LRC's transparency, accountability and credibility.

Cons of Option 3

49. Possible disadvantages of this approach include:

- (1) Depending on the final size and structure of the proposed LRC, the necessary staffing, office and equipment costs would be significant. Apart from the possibility to have to pay rental for the LRC's new office, employing full-time commissioners and secretariat staff (including lawyers and research assistants) requires funding for payment of remuneration, benefits and other expenses.³² Approval from the relevant authorities for funding would be needed. Reference can be made to the costs of some overseas independent law reform agencies that were established by statute: Scotland, New Zealand and England & Wales.³³ The costs of the Scottish Law Commission for the year ended on 31 Dec 2016 were £1,509,346.³⁴ The estimated total expenditure of the New Zealand Law Commission was NZ\$4,049,000 for the year ended on 30 June 2017.³⁵ The budgeted total expenditure of the Law Commission in England is £3,607,000 for 2017/2018.³⁶

³² Under the current setup, all the Commissioners and sub-committees members are volunteers, and the Secretariat is staffed by full-time DoJ employees. As such, the LRC is operated on a "no-cost" basis as all its resources are provided by the DoJ.

³³ Scotland and New Zealand are chosen because both have a similar population size as Hong Kong's, while England is chosen for comparison because of its highly regarded status. Statistics published by the National Records of Scotland show that the estimated population of Scotland was 5,400,000 in mid-2016 (<https://www.nrscotland.gov.uk/news/2017/scotlands-population-is-projected-to-increase-and-to-age>). New Zealand has a population of 4,833,000 as at Nov 2017 (http://www.stats.govt.nz/tools_and_services/population_clock.aspx).

³⁴ The bulk of the costs comprises Commissioners' salaries £633,200; staff costs £664,856 and accommodation £98,690. See *Annual report 2016*, Scottish Law Commission, at 27. (https://www.scotlawcom.gov.uk/files/2414/8827/0829/Scottish_Law_Commission_Annual_Report_2016_Report_No_246.pdf)

³⁵ The bulk of the costs comprises personnel costs NZ\$2,991,000; occupancy NZ\$524,000 and other operating expenditure NZ\$290,000 (the figures are estimates based on management's judgements, estimates and assumptions for the final 2016–2017 outcome). See *Statement of Performance Expectations 2017 to 2018*, New Zealand Law Commission, at 10. (<http://www.lawcom.govt.nz/sites/default/files/corporatePaperAttachments/Law-Commission-Statement-of-Performance-Expectations-2017-2018%20%28Parliamentary%20PDF%29.pdf>)

³⁶ The budgeted expenditure comprises Commissioners' costs £558,000 (excluding salary of the

- (2) The availability of persons with the necessary expertise and standing willing to take on a full-time role with the LRC is uncertain. The concern is whether the LRC would be able to recruit commissioners of the right calibre. The Hong Kong legal circle is much smaller compared to jurisdictions that have fully independent law reform agencies, therefore the pool of talent willing to take on the role of full-time commissioners is considerably smaller. Some of them might be unwilling or unable to commit themselves more fully than on a part-time basis. This may be exacerbated by the practice (as in overseas jurisdictions) that full-time commissioners would serve for a fixed term of a few years. This means that every few years, the LRC will have to search for new commissioners.
- (3) Like some other independent bodies, appointment of the LRC's full-time commissioners may be subject to public scrutiny with the risk of it being politicised.
- (4) The valuable input from a wide spectrum of sub-committee members (lawyers and non-lawyers) may (but not necessarily) be lost.
- (5) The limitations of the legislative timetable and whether (or, at least, how fast) the policy bureaux would implement the LRC's reform proposals, mean that the practical benefits of increasing the volume of law reform proposals issued by full-time commissioners may be questionable.
- (6) The new independent LRC may be caught in the middle of political crossfire. Because of its independent status, the LRC may be regarded as the appropriate forum to take up politically sensitive topics, as it would be perceived to be less likely to be influenced by the Government. The new LRC would have to be robust enough to withstand such possible political wrangling.

Chairman who is paid by HM Courts and Tribunals Service); staff costs £2,816,000 and other costs (eg print, events, travel, stationery, etc) £2,816,000. See *Business Plan 2017/18*, Law Commission of England and Wales, at 11.
(<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/05/Final-Business-plan.pdf>)

- (7) For the LRC to become a statutory body, new legislation would be required, and both the drafting and legislative process can be lengthy and uncertain.

Steps to implement Option 3

50. Under Option 3, it would be necessary to consider and determine key features of the new fully independent statutory LRC, including its structure, staffing and funding, etc.

51. Regarding structure and staffing (including composition and hierarchy), the following matters would have to be carefully considered:

- (1) the number of commissioners (and including whether they would all be full-time or a combination of full-time and part-time, and whether all lawyers or a combination of lawyers and non-lawyers);
- (2) their terms of office and qualifications required; and
- (3) the manpower of the Secretariat (such as lawyers, research assistants and a general manager who is responsible for the general administration of the Secretariat).

52. Funding is crucial if the new LRC were to be an independent statutory body. If funding is to be provided by the Government, early consultation would be advisable with the relevant authority, such as the Financial Services and the Treasury Bureau, to consider the way forward. Further in-depth study of other independent statutory law reform bodies in overseas jurisdictions may be needed if this option is to be pursued.

(c) **Whether the LRC should have a role in the systematic review of the laws of Hong Kong**

53. When LRC Members were considering the options set out in this paper, an issue was raised as to who should be responsible for keeping the laws of Hong Kong up to date, as it was observed that, while the primary source of law reform initiatives is government bureaux and departments, there is no mechanism for *systematic* review of the laws in Hong Kong. It was observed that the Law Commissions in both England and Scotland have as part of their remit the function to systematically review the law in their jurisdictions to ensure that, as far as possible, it is

kept up to date. In its study, the LRC examined the issue of whether the LRC should undertake systematic review of the laws of Hong Kong as part of its functions. The following considerations were identified:

- (1) The current Terms of Reference of the LRC, though broad, do not specifically cover systematic review of the laws and it may be "a stretch" to use them this way. To put it beyond doubt, an amendment of the Terms of Reference, via the Executive Council, would be needed if it is believed that the LRC should be given this responsibility.
- (2) Of the jurisdictions discussed in the LRC study (see also Annex 2), only England and Scotland appear to review legislation in a more systematic way than the general approach adopted by law reform agencies. However, even in the case of England and Scotland, the review seems to be confined to statute law repeals and consolidation which do not involve significant policy changes.
- (3) In England and Scotland, the Commissioner responsible for the consolidation and statute law repeal work is the Chairman. The work also involves the parliamentary counsel and the relevant government department with policy responsibility. The English and Scottish experience is that consolidation work can be exceptionally difficult and that most consolidations are significant undertakings in terms of time and resources.
- (4) Although law reform agencies in other jurisdictions do not conduct such systematic review or updates, quite a number do review a chosen piece of legislation, or relevant legislation within a particular policy area, on a 'needs' basis - instead of doing it as a matter of course - in the same manner as the regular law reform projects undertaken by the LRC.
- (5) Were the LRC or the Department of Justice to take on the systematic law revision function, it must be underscored that both statute law repeals and consolidation are not meant to involve significant policy changes which would undoubtedly call for more time and resources, in particular, a substantial injection of resources into the LRC Secretariat and/or the Department of Justice.

- (6) Systematic review and update of the laws (other than statute law repeals and consolidation) would be likely to involve some degree of material policy change, even just to update an ordinance after the equivalent English Act upon which it may be based has been amended. It would then be up to the relevant bureau to implement the LRC's recommendations on the review/update, as with any other regular law reform project.
- (7) It is, after all, the Government bureaux which have the primary responsibility to keep up to date the ordinances under their purview. It may not be feasible for one organisation to take on the role of keeping all the ordinances of Hong Kong up to date.
- (8) In any event, the Department of Justice will from time to time introduce legislation to amend various ordinances in one single bill. Proposed amendments in the bill are largely minor, technical and non-controversial, but are important for the purpose of updating or improving existing legislation.

(d) Conclusions of the LRC

(i) On the options for reform of the LRC

54. Following its deliberations on the matters raised in the LRC study, the LRC took the following view in relation to the various options put forward for Hong Kong's law reform commission model.

- (1) Option 2: Maintaining the current Commission and sub-committee structure but enhancing the LRC Secretariat support.³⁷ This was the LRC's preferred option, as it would harness all the advantages of the current LRC structure and composition, while significantly improving the support to the LRC and its sub-committees and the timeliness of completing LRC consultation papers and reports.

However, if the current model of the LRC is to continue going forward, its current structure and *de facto* independence must

³⁷

See discussion above at paragraphs 36 to 46.

continue to be jealously guarded by the LRC itself and fully respected and acknowledged by the Government.

- (2) Option 3: Fully independent statutory law reform body.³⁸ While ideal, the LRC proposed that this option should be considered as a longer term goal of the Government for the various reasons set out in paragraph 49 above. The LRC noted in particular that this option would involve significant investment of resources and may be difficult to establish in Hong Kong, given the small pool of suitably qualified lawyers who may be prepared to undertake the role of full-time LRC commissioners.

The LRC study also observed that whilst there were cogent arguments for the establishment of a fully independent law reform body in Hong Kong, in some quarters it was felt that the issues with effective law reform lay not so much with the constitution and operations of the LRC itself, but with the handling of law reform initiatives by the Government,³⁹ which needed to consider how it could more speedily and effectively implement law reform recommendations.

(ii) On systematic law revision

55. With regard to the issue of whether or not the LRC should undertake the task of systematic review of the laws of Hong Kong, the LRC concluded that this role went beyond its current remit. It was, however, observed that the Department of Justice already undertook a more or less biennial exercise of introducing a Statute Law (Miscellaneous Provisions) Bill into LegCo to consolidate necessary amendments to a range of ordinances, including on behalf of other bureaux. If an even more ambitious systematic approach were to be adopted, this would require a very substantial increase in resources to undertake this work.

³⁸ See discussion above at paragraphs 47 to 52.

³⁹ For example, at the ONC Conference on Law Reform (discussed earlier in this paper) former LegCo member Margaret Ng observed that, although she was not against the idea of the establishment of a fully independent law reform body in Hong Kong, it may not solve the problem of more effective law reform, as in her opinion, the hold-up was caused by the Administration, not the LRC. As to whether full-time commissioners would be instrumental in pushing the Administration to implement LRC reports, Ms Ng believed that this may depend on the personality of the commissioners. See also Ms Ng's letter to the editor "Government always finds 'good' reasons to delay law reforms", South China Morning Post (10 Jan 2011).

56. With regard to any role for the LRC under this head, it was noted that, going forward, one possible option is for the LRC to provide advice and training to bureaux on the process of reviewing and updating the range of ordinances under their purview.

ADVICE SOUGHT

57. Members are invited to give their views on the above proposals.

**Department of Justice
December 2017**

THE LAW REFORM COMMISSION OF HONG KONG

Introduction

1. The Law Reform Commission of Hong Kong was established in January 1980. The Commission considers for reform those aspects of the laws of Hong Kong which are referred to it by the Secretary for Justice or the Chief Justice. Members of the Commission are appointed by the Chief Executive, on the advice of the Secretary for Justice, and include academic and practising lawyers, and prominent members of the community.

2. The Commission has published reports covering subjects as diverse as arbitration, interception of communications, privity of contract, divorce and matters of criminal law. The Commission is currently considering references on sexual offences, causing or allowing the death of a child, archives law, access to information and periodical payments for future pecuniary loss in personal injury cases.

Historical background¹

3. Prior to the establishment of the LRC in 1980, there had been a number of formal and informal committees and groups which had considered various aspects of law reform. The first permanent machinery for law reform in Hong Kong may be traced back to the Law Reform Committee, which was established by the then Governor on 16 March 1956. Its terms of reference were restricted, however, to examining legislations enacted in the United Kingdom having regard especially to the reports of the Law Reform Committee appointed by the Lord Chancellor on 16 June 1952. That Committee issued five reports during the period between 1957 and 1964, when it ceased to operate.

¹ Relevant excerpts from Biennial Review LRC 2013.

4. In 1965, a Law Reform Drafting Unit was formed in the then Attorney General's Chambers. It primarily dealt with the drafting of approved law reform measures and to a lesser extent, identifying UK legislative measures that might be suitable for adoption in Hong Kong. The Unit was, however, not in a position to propose wider reform of the law.

5. In the late 1970s, a group of 14 lawyers drawn from Government and the private sector formed an informal law reform committee under the chairmanship of a High Court Judge, the then Mr Justice T L Yang.

6. The arrival of a new Attorney General in Hong Kong in 1979 addressed calls for a more formal mechanism for law reform. In January 1980 the Chief Justice and the Attorney General presented to the Executive Council their joint views as to how law reform should be handled in the future. Their recommendation that the LRC should be established was endorsed by the Executive Council on 15 January 1980, though with three significant amendments. The first was that the Attorney General should chair the LRC, rather than the Chief Justice. The second was that members of the LRC should be appointed by the Governor, not the Chief Justice. The third was that the secretary should be an Assistant Principal Crown Counsel in the Attorney General's Chambers, rather than an Assistant Registrar of the Supreme Court as envisaged in the proposal put to the Executive Council. A further minor adjustment was that references should be made to the LRC jointly by the Chief Justice and the Attorney General, rather than by one or the other.

7. The membership of the LRC was to consist of the Attorney General (as *ex officio* Chairman), the Chief Justice and the Law Draftsman (all as *ex officio* members) and eight other unofficial members drawn from five categories –

- (a) a member of the HK Bar Association;
- (b) a member of the HK Law Society;
- (c) two members of the Faculty of Law of Hong Kong University;
- (d) two unofficial members of the Executive Council or Legislative Council; and
- (e) two or more other members.

8. It was envisaged that the last two categories would allow the appointment of non-lawyers to the LRC, which from the outset was seen as an important element in the LRC's composition. The three *ex officio* members were entitled to have their places occupied by a representative and, in the Chief Justice's case, a member of the High Court was specifically named as representative. The inclusion of the Law Draftsman as a member was intended to provide the LRC with access to law drafting expertise, enabling the inclusion of draft legislation in the LRC's reports.

9. Though not expressly spelt out in the Executive Council paper, it seems that the rationale for the structure and membership proposed for the LRC was that it built on existing expertise and could be established speedily with few resource implications.

10. The LRC today differs in a number of respects from the model established in 1980. Perhaps the most significant change relates to its membership, where a flexible approach has been adopted from the outset. Early in its life, the Chief Justice's representative morphed into a separate permanent seat on the LRC in addition to the Chief Justice, first as a High Court or Court of Appeal judge and later, since 1997, as a judge of the Court of Final Appeal. In contrast, neither the Attorney General/Secretary for Justice nor the Law Draftsman have availed themselves of the opportunity to appoint a representative in their stead, other than occasionally the individuals who have been temporarily acting in their posts. With the establishment of law schools at City University and the Chinese University of Hong Kong, the academic lawyers on the LRC are no longer restricted to those from Hong Kong University. Over time, there has been a view that the inclusion of members of the Executive Council or Legislative Council brings more negatives than positives. In particular, it could be argued that their inclusion runs the risk of a perception of politicisation of the LRC, with the concomitant difficulty of avoiding the appearance of favouring one political party over another. The last occasion on which a serving member of the Executive Council was appointed to the LRC was in 1989 and the most recent appointment of a serving member of the Legislative Council was in 1999.²

² LegCo member Sophie Leung was appointed to the LRC in September 1999 and served until August 2005. Maria Tam, who was then a member of both ExCo and Legco, served on the LRC from June 1989 to June 1992. Anna Wu's appointment to ExCo came after her appointment to the LRC in 2006.

11. On an operational level, the LRC initially operated by having counsel from the Attorney General's Chambers "volunteer" to serve as part-time secretaries to the sub-committees set up to work on each reference. That was found unsatisfactory because of the competing demands on the secretaries' time. Support is now provided by lawyers in the Department of Justice (DoJ) who work full-time in the LRC's Secretariat. At the same time, not every LRC project has been referred to a sub-committee. In a number of instances, the LRC has itself undertaken the reviews without the involvement of a sub-committee, in part as an experiment in attempting to speed up the reform process.³

12. A further minor change has been that references can now be made to the LRC by either the Secretary for Justice or the Chief Justice, rather than requiring joint referrals, but this has had no practical effect as every reference to date has been made by both the Secretary for Justice and the Chief Justice.

The current LRC

Mission

13. The vision, mission and core values statements of the LRC are as follows:

Vision

- To attain and maintain a reputation for excellence in law reform, both internationally and in Hong Kong.

Mission

- To present proposals for reform which make the law in Hong Kong more effective, more accessible, and more in tune with the community's needs.
- To engage the public in the law reform process, and to arouse public interest in that process by the dissemination of law reform material and by effective communication with the community.

³ Examples include two projects reviewing aspects of the law relating to enduring powers of attorney and a report proposing the abolition of the "year and a day" rule in homicide.

Core values

- Objectivity
- Integrity
- Quality research
- Community involvement
- Effective communication.

Role of the LRC

14. The LRC is not the only source of proposals for reform of the law in Hong Kong. For instance, proposals for reform may be generated by Government departments or bureaus, or there may be initiatives from the legislature or the public. However, the Commission's role is particularly valuable:

- where the subject does not fall readily under the responsibility of one particular bureau of Government (for example, reform of the law of privacy)
- where the subject raises issues which are outside the Government's day to day activities (as is the case, for instance, with reforming the rules for determining domicile)
- where the subject requires the dedication of full-time legal input to conduct a review (the review of insolvency law is an example).

15. In such cases, it is unlikely that reform of the law would be achieved without the involvement of the LRC.

16. The strengths of the Commission are that:

- It is independent, and presents its recommendations after an objective examination of the facts and the law.
- Its members come from a range of backgrounds, enabling it to consider law reform from the point of view of the community as a whole, rather than solely from that of the legal profession.

- It involves the public at large in the reform process by consulting as widely as possible before reaching final conclusions on any of its references.
- All the Commission's reports and consultation papers are published and made freely available to the public.

Referral of subjects to the LRC

17. The LRC is chaired by the Secretary for Justice who, together with the Chief Justice, decides which aspects of the law should be referred to the LRC for consideration. These will normally be chosen from suggestions made by members of the Commission itself, the legal profession, the public at large, or the Administration.

18. Since its establishment in 1980, the LRC has considered a wide variety of subjects of varying complexity and breadth. There are no hard and fast rules as to which subjects are suitable for referral to the LRC, but a number of factors will usually be considered by the Secretary for Justice and the Chief Justice:

- Is there a problem or shortcoming in the law of general application? The problem or shortcoming should be identifiable, and should not be one which relates only to a particular individual or case.
- Are the issues raised more ones of policy than law? As a broad rule of thumb, a subject is not likely to be best suited for consideration by the LRC if the issues it raises are essentially ones of Government policy, rather than law or legal policy. While it would be unlikely, for instance, that the LRC would be asked to consider questions of taxation or immigration, as these are both areas where Government policy concerns predominate, that does not mean that the LRC could not be asked to consider the general policy issues raised in respect of a subject such as, say, the legal age of majority.
- Could the subject be more effectively considered elsewhere? Where there is a specialist body with expertise in the particular area of law in question, then the subject is unlikely to be referred to the Commission. So, for instance, the Standing Committee on Company Law Reform, or the

Court Users' Committees, would be better placed than the LRC to consider company law or court procedural matters respectively.

- Is there a realistic prospect of implementation? The purpose of the LRC's work is to improve the law. Its resources are limited, and it would be wasteful of those resources to embark on a project if it was unlikely that any resulting proposals would be implemented. The LRC would therefore be unlikely to consider an area of law where the Government had clearly indicated that it saw no need for change.

19. In addition to these factors, the Secretary for Justice and the Chief Justice need to consider the question of timing, and decide when the LRC is able to take on a new project.

Organisation of the current LRC

The Commission and sub-committees

20. The LRC comprises three *ex officio* members including the Secretary for Justice (as Chairman), the Chief Justice and the Law Draftsman. In addition, the Chief Executive nominates another judge (usually a Judge of the Court of Final Appeal). The remaining members include practising lawyers, law school academics, businessmen, and non-lawyer academics and representatives from various sectors. As at March 2017, there are 13 members in the LRC. (To-date, a total of 78 individuals have served as members of the Commission since its establishment in 1980.)

21. Upon deciding that a subject should be referred to the LRC, Members will then deliberate whether a sub-committee should be set up to examine the subject. Members of a sub-committee are appointed by the Chairman of the LRC with the assistance of the Secretariat.

22. Members of the LRC and the sub-committees serve on a voluntary basis. There is no hard and fast rule on the size and composition of sub-committees. Generally speaking, persons with expertise in the subject under consideration would be considered and appointed. Depending on the subject, sub-committees would also comprise non-lawyer members.

23. Where a sub-committee is formed, a full time lawyer from the Secretariat would be assigned to assist the sub-committee as secretary, providing administrative and legal support.

24. Nonetheless, not every project requires a sub-committee be appointed. In appropriate cases, the LRC may decide to dispense with a sub-committee and to consider the matter itself by way of a fast-track approach on the basis of the Secretariat's research and discussion paper.

The Secretariat and supporting staff

25. The Secretariat is manned by a team of full time government lawyers in the Legal Policy Division (LPD) of the DoJ, providing all administrative and legal support to the Commission and its sub-committees. After the LRC has published a final report, lawyers in the Secretariat would be involved in assisting the relevant policy bureau to implement the LRC's proposals.

26. The current Secretariat consists of the Secretary, Deputy Secretary, four Senior Government Counsel and two Government Counsel, two translation officers, and six other administrative supporting staff.

Process for projects

Sub-committees

27. Subjects referred to the Commission for study are looked at in detail by a sub-committee of experts, sometimes under the chairmanship of a member of the Commission. In view of the need to be in contact with the community at large, Commission sub-committees often have a substantial proportion of non-lawyer members. Since the Commission was established in 1980, more than 499 individuals have served on one or more of the Commission's sub-committees, all on a voluntary basis. Members of sub-committees are appointed by the Secretary for Justice. Where a sub-committee is appointed, one of the qualified lawyers from the Secretariat services the sub-committee as secretary and researcher.

28. Alternatively, the Commission may decide to dispense with a sub-committee and to proceed on the basis of research carried out by the Secretariat. The Secretariat, which consists of the Secretary, a Deputy Secretary and six other lawyers, researches topics and prepares

background papers and assists in the drafting of sub-committee reports and Commission reports.

29. A key part of any Commission project is an examination of the relevant law in other jurisdictions. Problems Hong Kong faces may have been faced and overcome elsewhere, and an important aspect of the Commission's work is keeping abreast of developments in, and maintaining links with, other law reform agencies around the common law world.

Consultation

30. Whether or not a sub-committee is appointed to deal with a particular topic, the Commission always ensures that there is extensive public consultation on any of its projects before it reaches its conclusions. This will normally be by way of a consultation paper which sets out the Commission's or the sub-committee's preliminary conclusions and recommendations. Relevant interest groups and the general public are invited to submit their views to the Commission on the proposed recommendations. The usual consultation period is three months. Members of the relevant sub-committee or the Secretariat will often be asked to provide a briefing on the proposals to district bodies, the relevant panel of the Legislative Council, or to organisations with a particular interest in the subject. The responses to the consultation paper play an important part in assisting the sub-committee to finalise its proposals.

The LRC report

31. Once the sub-committee has reached its final conclusions, it submits its report to the full Commission for consideration. The Commission considers the sub-committee report in detail, assisted by the chairman and members of the sub-committee, before issuing a final LRC report. Reports are generally published simultaneously in English and Chinese. Where the subject is likely to be of general public interest, one or more members of the LRC or its sub-committee will present the report at a press conference to bring the report to the public's attention.

32. The publication of the final LRC report marks the completion of the reference. The report will then be passed to the Administration for consideration. Often, however, lawyers in the Secretariat will take an active part in the implementation of the LRC's recommendations by legislation. This may take the form of providing research material and information to the Government bureau with policy

responsibility for the subject, as well as assisting in the preparation of drafting instructions for legislation to implement the LRC's recommendations and assisting during the legislative drafting process itself.

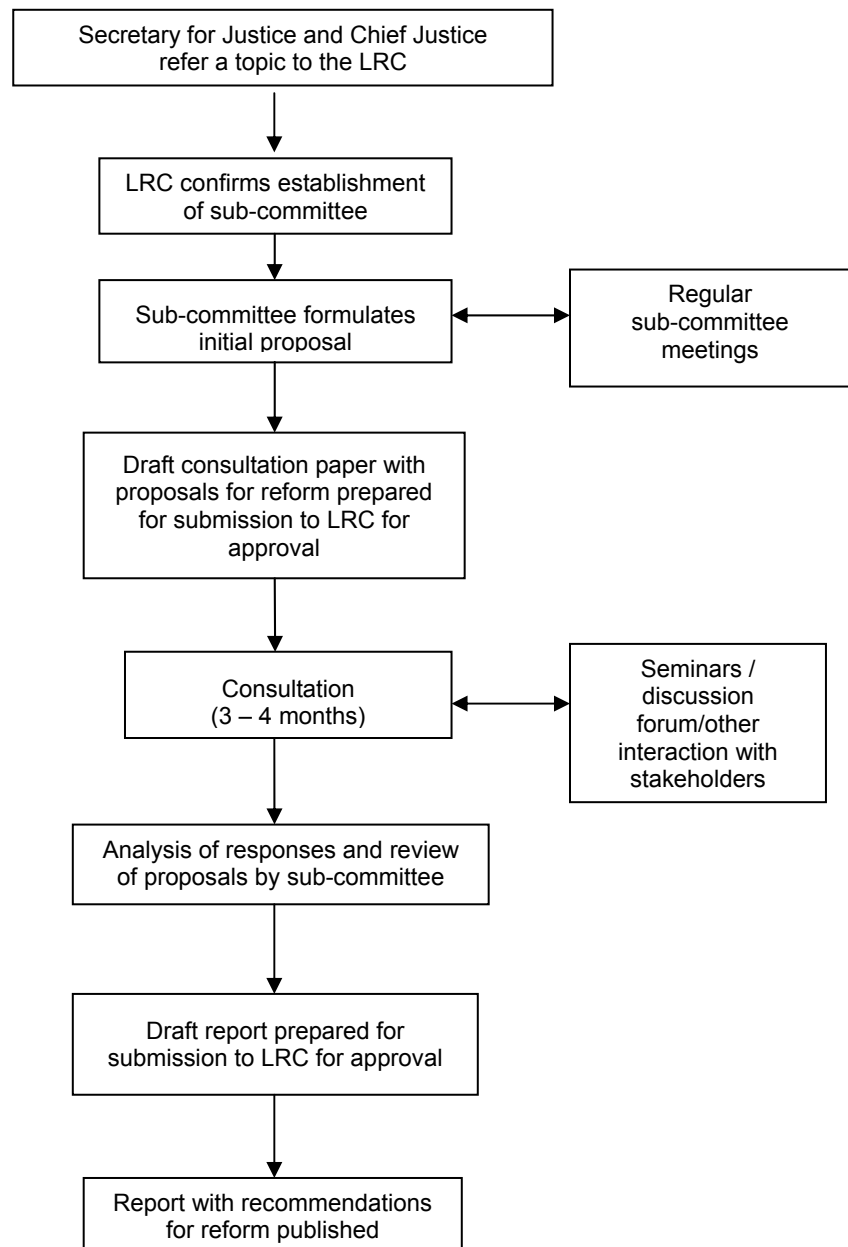
33. To-date, 42 of the 65 reports of the LRC have been implemented either in whole or in part by legislation and/or administrative means. In the case of one report, the Commission recommended no change to the existing law.

Implementation

34. Although the LRC's members are appointed by the Chief Executive of the SAR, the Commission is independent of the Government. The views expressed in LRC reports are those of LRC members, not the Government, and the publication of a LRC report does not mean that the recommendations it contains will automatically be adopted in legislation. In every case, recommendations made by the LRC will be passed to the relevant policy bureau of the Government for consideration. Sometimes, the Government disagrees with the LRC and does not accept its recommendations. Two examples are the LRC's reports on *Contempt of Court* (1987) and *Interest on Debt and Damages* (1990). Often, however, lawyers in the Secretariat will provide assistance in the implementation of the LRC's recommendations by legislation. This may take the form of providing research material and information to the Government bureau with policy responsibility for the subject, as well as assisting in the preparation of drafting instructions for legislation to implement the LRC's recommendations and assisting during the legislative drafting process itself.

Flowchart of a law reform project

35. The flow chart below shows the various stages of a typical law reform project–



Measures to improve implementation

Guidelines for the Administration to respond to LRC reports

36. Since the establishment of the LRC in 1980, a total of 65 reports have been published (with one report recommending no change to the law). In light of the relatively low implementation rate and slow response, the Administration in October 2011 issued a set of guidelines with the purposes of improving the timeliness on responses to published LRC reports. The bureau/departments having policy responsibility over any LRC report are required to provide at least an interim response within 6 months of publication of the report and a detailed public response within 12 months of its publication. In the interim response, the bureau/departments should set out a clear timetable for completion of the detailed response and the steps taken so far. They are also required to provide a detailed public response setting out which recommendations they accept, reject or intend to implement.

37. Other salient points in the guidelines include –

- (a) When a consultation paper is issued by the LRC, the Administration should at that stage decide which bureau/department will take primary responsibility for consideration/ implementation of the report and should so notify the LRC;
- (b) LRC may, without compromising its autonomy, seek and consider preliminary views from relevant bureau/departments when starting a new project. The relevant bureau/departments should provide their views or advice to the LRC where these are sought by the LRC, whether at the initial stage of the project or in response to a consultation paper.
- (c) The Secretary for Justice (both in his capacity as Chairman of the LRC and as head of the DoJ) will in appropriate cases, and subject to the availability of resources, consider including draft legislation in LRC reports.

Mechanism for annual report to LegCo

38. To ensure that LRC's recommendations are given consideration within a reasonable timeframe and would be given timely

implementation, the LegCo's Panel on Administration of Justice and Legal Services (AJLS Panel) in February 2012 proposed for the endorsement of the House Committee the following mechanism for monitoring the Administration's progress in implementing the LRC recommendations –

- (a) Secretary for Justice to submit to the AJLS Panel for discussion an annual report flagging up the progress in respect of the LRC reports which have not yet been implemented, say, after the Policy Address in each year;
- (b) the AJLS Panel to copy the annual report to the relevant Panels to facilitate their follow-up with the bureau/departments having policy responsibility over the respective LRC reports; and
- (c) the relevant Panels to include the Administration's responses to the respective LRC reports in their list of outstanding items for discussion, and to invite members of the AJLS Panel and all other members to join the future discussion.

39. The mechanism was endorsed by the House Committee on 2 March 2012. Pursuant to this mechanism, the Secretary for Justice has submitted an annual report to the AJLS Panel since June 2013.

40. The guidelines and mechanism aim at expediting the Administration's decision-making and implementation process by way of providing checks and balances. This is because the bureaux/departments may face pressure or even criticisms from the public /LegCo if they fail to study and consider the LRC proposals in accordance with the requirements laid down in the guidelines within the prescribed timeframe.

KEY FEATURES OF LAW REFORM BODIES IN OTHER JURISDICTIONS

Introduction

1. As observed earlier in this paper, while almost every major common law jurisdiction has some kind of specialist body devoted to the task of law reform, their setup and resources available to them vary substantially. In some jurisdictions, law reform bodies are creatures of statute, while some may operate within a unit of the government's legal department. Some law reform bodies are made up of part-time commissioners, while others may have the resources to appoint remunerated full-time commissioners. In some jurisdictions, law reform bodies are formed by co-operation among the governments, law schools, etc. The variations from one jurisdiction to another can be considerable.

2. Some might regard the Law Commission in England as the model to aspire to, but there is no single "*one size fits all*" model of law reform agency in the common law world.¹

3. In this annex, we shall review the key features of law reform bodies in Australia, Canada, England and Wales, Ireland, New Zealand, Scotland and Singapore.

Australia (Federal)

4. The Australian Law Reform Commission (ALRC) is a federal agency operating under the Australian Law Reform Commission Act 1996 (ALRC Act), and the Public Governance, Performance and Accountability Act 2013 (PGPA Act).

¹ See discussion on features of various law reform agency models, with an emphasis on Hong Kong, in Stuart MI Stoker (a former Secretary of the LRC), "Chapter 4: Hong Kong's Law Reform Commission" in Tilbury, Young and Ng (eds) (2014), above, at 62.

5. Under section 20 of the ALRC Act, the Attorney-General may refer a matter to the ALRC, either at the ALRC's suggestion or on his or her own initiative. In relation to matters referred to it by the Attorney-General, the ALRC's function is as follows:²

- (a) to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by:
 - (i) bringing the law into line with current conditions and ensuring that it meets current needs;
 - (ii) removing defects in the law;
 - (iii) simplifying the law;
 - (iv) adopting new or more effective methods for administering the law and dispensing justice; and
 - (v) providing improved access to justice;
- (b) to consider proposals for making or consolidating Commonwealth laws about those matters;
- (c) to consider proposals for the repeal of obsolete or unnecessary laws about those matters;
- (d) to consider proposals for uniformity between State and Territory laws about those matters; and
- (e) to consider proposals for complementary Commonwealth, State and Territory laws about those matters.

6. The ALRC conducts inquiries into areas of law at the request of the Attorney-General of Australia. Based on its research and consultations throughout an inquiry, the ALRC makes recommendations to government so that government can make informed decisions about law reform. ALRC recommendations do not automatically become law, however over 85 per cent of ALRC reports have been either substantially or partially implemented - making it one of the most effective and influential agents for legal reform in Australia.

² Section 21 of the Australian Law Reform Commission Act 1996. See also *Annual Report 2016-2017* (ALRC Report 132), at 11
https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_132_whole_with_cover.compessed.pdf

7. The ALRC is part of the Attorney-General's portfolio, however it is independent of government and is able to undertake research, consultations and legal policy development, and to make recommendations to the Parliament, without fear or favour. The ALRC's objective is to make recommendations for law reform that:

- bring the law into line with current conditions and needs
- remove defects in the law
- simplify the law
- adopt new or more effective methods for administering the law and dispensing justice, and
- provide improved access to justice.

8. Pursuant to the ALRC Act, the ALRC consists of a full-time President and up to 6 other members who can be part-time or full-time. The performance of the ALRC's functions and the exercise of its powers are not affected merely because of 1 or more vacancies in its membership. The Attorney-General may, from time to time, appoint such other part-time members of the ALRC as the Attorney-General considers necessary to enable the ALRC to perform its functions.³ Full-time members are appointed by the Governor-General and part-time members are appointed by the Attorney-General. A member holds office for the term (of at least six months but not longer than five years) specified in his appointment, but is eligible for re-appointment.⁴

9. The process for each law reform project may differ according to the scope of inquiry. An Inquiry begins with terms of reference delivered by the Attorney-General identifying an area of law that needs to be reviewed for various reasons including (a) there is community concern about a particular issue that needs to be addressed through the process of law reform; (b) recent events or legal cases have highlighted a deficiency with the law; and (c) scientific or technological developments have made it necessary to update the law or create new laws. The ALRC will then conduct initial research and consultation to prepare an issues paper. After further consultation, the ALRC will publish a discussion paper and call for submissions. Once the final report is ready, it will be submitted to the Attorney-General with specific recommendations for changes to the law or

³ Section 6 of the ALRC Act.

⁴ Section 7 & 8 of the ALRC Act.

legal process. Once the final report is tabled in the Parliament, it is made publicly available.

10. What remains thereafter is for the Australian Government to decide whether to implement the recommendations, in whole or in part. There is no set time frame in which the Government is required to respond, and some reports are implemented several years after they have been completed. Implementation of ALRC recommendations is tracked and recorded each year in the ALRC's Annual Report.

Australia (Tasmania)

11. The Tasmania Law Reform Institute (Institute) is the law reform body in Tasmania. The Institute was established on 23 July 2001 by a signed partnership agreement (the "Founding Agreement") between the Government of Tasmania and the University of Tasmania specifying areas of cooperation to benefit the Tasmania community.⁵ The Institute is located at the campus of the University of Tasmania, under the Faculty of Law.

12. Prior to the establishment of the Institute, the Law Reform Commission in the State of Tasmania first operated within the Crown Law Department and provided advice on law reform without formal reports until 1974. Thereafter, the Government of Tasmania introduced and the Parliament enacted the Law Reform Commission Act, 1974. The Law Reform Commission comprised a Chairman and members from the Law Society, law school and community. The work of the Law Reform Commission was supported by a Director and a small administrative staff.⁶

13. The major functions of the Institute include the review of laws with a view to:

- the modernisation of the law;
- the elimination of defects in the law;

⁵ Tasmania Law Reform Institute Founding Agreement:
http://www.utas.edu.au/__data/assets/pdf_file/0003/302943/FoundingAgreement-1.pdf

⁶ In 1988, the Law Reform Commission was replaced by a single office of the Law Reform Commissioner and the legislation for this office expired in 1997. From 1998, law reform advice was provided as an additional function to the Director of the Legal Aid Commission until in 2000 when the Founding Agreement was signed on 23 July 2001.

- the simplification of the law;
- the consolidation of any laws;
- the repeal of laws that are obsolete or unnecessary; and
- uniformity between laws of other States and the Commonwealth.

14. The Institute may receive proposals for law reform or research projects from a wide range of sources, including the Judiciary, the Attorney-General, the Legal Aid Commission, government departments, the Parliament, the legal profession, members of the community and community groups.

15. The Institute is run by the Board which includes a Director appointed by the Vice-Chancellor of the University of Tasmania, and eight members each appointed by a prominent figure from the legal field or the academic. The Board is assisted by six staff including the Executive Officer and Researchers (as at November 2017). Pursuant to clause 3 of the Founding Agreement of the Institute, the Board of the Institute is established as an advisory body. The role of the Board is to advise the Director on the conduct of business at the Institute, including making recommendations on whether a particular reform project should be undertaken. The Board should meet at least four times each year.

16. Funding for the Institute is set out in clause 6.1 of the Founding Agreement. In a nutshell, the Department of Justice and Industrial Relations of the Government of Tasmania agree to provide AUD50,000 per annum. The University of Tasmania agrees to provide up to AUD80,000 (including in kind contributions, such as office premises suitable for the operation of the Institute) per annum. All funding is accounted for in accordance with the standard procedures for the operation of Research Centre of the University of Tasmania.

17. Other sources of funding are as follows –

- (a) the Law Society will support the Institute's operation by provision of advice on proposals for research projects in relation to the legal profession and by providing funding on a case by case basis (clause 6.2);

- (b) The Law Foundation of Tasmania may provide annual grants, subject to available funds for the operations of the Institute (clause 6.3);
- (c) The Institute would explore other funding avenues, particularly from external research grants and donations.

Canada (Federal)

18. The Law Reform Commission of Canada began operation as a permanent independent body to study and undertake a systematic review of Canadian law in 1971. It was disbanded in 1993 as part of the federal government's attempts to reduce spending and the federal deficit. Nonetheless, the Law Commission of Canada (LCC) was established under the Law Commission of Canada Act, and commenced operation in 1997. The LCC established partnerships with other agencies, developed research programs, engaged in extensive public consultation, and produced reports to Parliament on recommended law reforms. In 2006, the LCC was permanently disbanded.

19. Hence, there has not been a federal law reform agency since 2006. Currently, there are six provincial law reform agencies in Canada,⁷ created in different ways and with varying resources and mode of operation.

Canada (Ontario)⁸

20. The Law Commission of Ontario (LCO) was created by a Foundation Agreement to which the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, the Dean of Osgoode Hall Law School, the Law Deans of Ontario, and the Law Society of Upper Canada are parties (the "Foundation Agreement"). The LCO is an independent organisation that recommends law reform measures to (a) enhance the legal system's relevance, effectiveness and accessibility; (b) improve the administration of justice through the clarification and simplification of the law; and (c) consider the effectiveness and use of technology as a

⁷ Alberta Law Reform Institute, British Columbia Law Institute, Manitoba Law Reform Commission, Law Reform Commission of Nova Scotia, Law Commission of Ontario, and Law Reform Commission of Saskatchewan.

⁸ Law Commission of Ontario, <http://www.lco-cdo.org/>

means to enhance access to justice.⁹

21. According to Article 2 of the Foundation Agreement 2017 of the Law Commission of Ontario,¹⁰ the LCO's purpose is to recommend law reform measures to:

- (a) enhance the legal system's relevance, effectiveness and accessibility;
- (b) improve the administration of justice through the clarification and simplification of the law; and
- (c) consider the effectiveness and use of technology as a means to enhance access to justice.

22. The LCO shall also:

- (a) stimulate critical debate about law and promote scholarly legal research; and
- (b) develop priority areas for study which are underserved by other research, determine ways to disseminate the information to those who need it and foster links with communities, groups and agencies.

23. In furtherance of its mandate, the LCO may:

- (a) undertake, promote, initiate and evaluate studies and research;
- (b) support, publish, sell or otherwise disseminate studies, reports and other documents;
- (c) sponsor or support conferences, seminars and other meetings;
- (d) facilitate and support cooperative efforts among the Law Commission, governments, the academic community, the

⁹ Clause 2 of the Foundation Agreement.

¹⁰ The parties to this agreement are the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, the Dean of Osgoode Hall Law School, the Law Deans of Ontario, and the Law Society of Upper Canada.
<http://www.lco-cdo.org/en/learn-about-us/governance-strategy/lco-foundation-agreement-2017/>

legal profession and other organisations and persons interested in the Commission's work; and

- (e) do all such things as are conducive to the furtherance of its purpose.

24. The LCO is funded by four partners:¹¹

1. Law Foundation of Ontario¹²
2. Ontario Ministry of the Attorney General
3. Dean of Osgoode Hall Law School; and
4. Law Society of Upper Canada.

25. The governing body of the LCO is the Board of Governors which consists of representatives appointed by the founding partners.¹³ These Governors serve without remuneration.¹⁴ They manage and conduct affairs and businesses of the LCO including making decisions regarding the research agenda, research projects and final reports; and overseeing the operational functioning of the LCO. The Governors serve a term of three years.

26. The Executive Director is responsible for the day to day operations of the LCO. Other supporting staff include a Staff Lawyer and two Research Lawyers who carry out research, coordinate major projects, and engage in consultation and supervise student researchers from Ontario law schools. The Ministry of the Attorney General seconds a counsel to the LCO each year and Osgoode Hall Law School seconds a faculty member for six month terms. Two other administrative staff provide support for LCO operations and projects.

27. Since January 2012, LCO has extended its commitment to consult Ontarians by creating a Community Council composed of a variety of individuals who are enthusiastic about law reform and whose

¹¹ LCO also receives support from the Deans of a number of Ontario law schools.

¹² "Established in 1974, the Law Foundation of Ontario (LFO) is a grant-making organisation that promotes and enhances justice for all Ontarians. Formed under an amendment to the Law Society Act (the governing legislation of lawyers and paralegals in Ontario), the LFO receives interest on lawyers' and paralegals' mixed trust accounts to fund worthwhile programs for law-related activities." <http://www.lawfoundation.on.ca/>

¹³ Clause 4 of the Foundation Agreement.

¹⁴ "... but shall be entitled to be paid reasonable travel and living expenses incurred by the member while absent from the member's ordinary place of residence in the course of performing duties under this Agreement" see Clause 6 of the Foundation Agreement.

combined reach extends throughout the province. The Council's mandate is to assist the LCO in its consultations and to provide expertise to the consideration of new and on-going projects. The LCO issued a call for applications to join the Council and has selected 12 individuals as the initial members. The LCO is also assisted by the Law School Research and Liaison Group.

England and Wales

28. In England and Wales, the Law Commission (the Commission) is an independent body set up by Parliament by the Law Commissions Act 1965. The functions of the Law Commission are set out in Law Commissions Act 1965.

29. The cost of the Commission is met substantially from core funding provided by Parliament (section 5 of the Law Commissions Act 1965) and received via the Ministry of Justice. The Commission also receives funding contributions from departments towards the cost of some law reform projects, in accordance with the Protocol between the Government and the Law Commission.¹⁵ The Law Commission's budgeted total expenditure for the fiscal year 2017/2018 is GBP3,607,000 with most money anticipated to be spent on the costs of Commissioner and staff (GBP3,374,000).¹⁶

30. Currently there are five full-time Commissioners (as at December 2016). The Chairman is either a High Court or an Appeal Court judge, appointed to the Commission for up to three years. The other four Commissioners are experienced judges, barristers, solicitors or teachers of law. They are appointed by the Lord Chancellor and Secretary of State for Justice for up to five years, although their appointments may be extended. The Chairman promotes the role and work of the Commission and is its principal public face. He leads the Commissioners and represents their views to Ministers and other stakeholders. The Chairman also leads on particular law reform projects and has special responsibility for overseeing the Commission's consolidation and statute law repeals work. The Right Honourable Lord Justice (Sir David) Bean has been Chairman since August 2015.

31. The Commissioners are supported by a Chief Executive and

¹⁵ Law Commission, *Annual Report 2015-2016* (Law Com No 359), at 86.

¹⁶ Excluding the salary of the Chairman who is paid by HM Courts and Tribunals Service.

about 20 members of the Government Legal Service, two Parliamentary Counsel (who draft the Bills to reform and consolidate the law), and a number of research assistants, who are usually recently qualified law graduates.

32. The core function of the Commission is to review areas of the law that have become unduly complicated, outdated or unfair. It consults widely on its law reform proposals by way of public consultation and presents reform recommendations to the UK Parliament that, if legislated upon, would implement its law reform recommendations.

33. Other than reforming the law, the Commission has a statutory obligation to simplify the law in the following manner:¹⁷

- (a) Codification of the law;
- (b) Consolidation of the statutes;
- (c) Repealing obsolete and unnecessary enactments.

34. More specifically, section 3(1) of the Law Commissions Act 1965 imposes a duty on both the Commission and the Scottish Law Commission to keep the law under review "*with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law*".

35. The Commission and the Scottish Law Commission approach this work as two distinct strands: law reform projects and statute law work (which includes both statute law repeals and consolidation).¹⁸ The "law reform projects" strand is similar to the function carried out by the LRC here in Hong Kong. Statute law repeals and consolidation work is explained further below.¹⁹

36. Consolidation is one of the statutory functions under the Law

¹⁷ Section 3 of the Law Commissions Act 1965.

¹⁸ See Law Commission of England and Wales, *Annual Report 2015-16* (Law Com No 367), at 7, at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/56221-Law-Comm-367_Web.pdf, and for Scotland, see: "What we do" in the Scottish Law Commission's webpage: <https://www.scotlawcom.gov.uk/about-us/>

¹⁹ The paragraphs below discuss the position in England, but the Scottish position is similar. Indeed, the projects on statute law repeals and consolidation are sometimes undertaken jointly by the English and Scottish Commissions.

Commissions Act 1965.²⁰ The aim is to make statute law clearer, shorter and more accessible by way of putting together different enactments on a topic into a single Act. The consolidated Act replaces various Acts (and statutory instruments) passed over a period of years. Over 200 consolidation Acts have been enacted since 1965.

37. The commissioner responsible for the consolidation work is the Chairman. Consolidation work is carried out by an experienced parliamentary counsel working closely with the department with policy responsibility for the law being consolidated. The department's inputs on the consolidation bill are important, and it is often best placed to identify and deal with stakeholders. If significant policy changes to the law are needed, the Commission would not consider the law concerned is suitable for consolidation. Consolidation work can be exceptionally difficult, and technical substantive changes to the law are often required. Significant input of time and resources may be needed. Consolidation projects affecting the law of Scotland are conducted together with the Scottish Law Commission.

38. The statute law repeals work involves repealing statutes that are no longer of practical use.²¹ The purpose is to modernise and simplify the statute concerned so as to reduce its size and thus save the time of users (and ultimately unnecessary costs). It also avoids the situation where obsolete laws would mislead people by way of masquerading as live laws. The commissioner responsible for the repeals work is also the Chairman.²²

39. Implementation of the Commissions' proposals on statute law repeals is by means of some special Statute Law (Repeals) Bills. Nineteen such bills have been enacted since 1965, repealing more than 3,000 whole Acts and achieving partial repeals in thousands of others.

40. Acts chosen for repeal are selected on the basis that they are no longer of practical use - usually because they no longer have any legal effect on technical grounds (because of being spent, unnecessary or obsolete). Some Acts may also be selected because the purposes for

²⁰ <https://www.lawcom.gov.uk/consolidation/>

²¹ <https://www.lawcom.gov.uk/our-work/statute-law-repeals/>

²² Law Commission of England and Wales, *Annual Report 2014-15* (Law Com No 359), at 38.
http://www.lawcom.gov.uk/wp-content/uploads/2015/05/6.792_LC_EL_Annual-Report-accounts-201415_WEB.pdf
Scottish Law Commission, *Annual Report 2016* (Scot Law Com No 246), at 21.
https://www.scotlawcom.gov.uk/files/2414/8827/0829/Scottish_Law_Commission_Annual_Report_2016_Report_No_246.pdf

which they were enacted no longer exist or are being met by some other means, although they strictly speaking still have legal effect. The Commission consults widely before finalising its repeal proposals.

41. It should be noted that the projects on statute law repeals and consolidation undertaken by the Commission and the Scottish Law Commission do not appear to involve significant policy changes.

42. With regard to its wider work, the Commission engages and benefits from the expertise of an in-house economist who provides specialist advice in relation to the assessment of the impact of its law reform proposals. In addition to the three existing legal criteria for project selection: importance, suitability and availability of expertise, the Commission also applies a preliminary cost/benefit analysis of potential reform options. Impact assessments continue to play a critical role in the output produced by the Commission. The economics team works with legal teams in drafting the assessments, which the Commission now routinely produces alongside the consultation paper on each project.²³ There is also an in-house communication professional who provides strategic direction on all communication issues for the Commission and supports its work through managing and developing its website, stakeholder relations and events, and handling its media relations. Sir David Lloyd Jones, Chairman of the Commission (2012-2015), has observed on the advantages of the Commission,

"To my mind, the model of a Law Commission as developed in England and Wales and in Scotland works well as an effective means of delivering law reform. The Law Commission and the Scottish Law Commission both enjoy a number of huge advantages. Within the Commissions, there is great legal expertise in many different fields. We are in a position to consult widely and thoroughly on the state of the existing law, on perceived deficiencies and proposals for reform. Our independence from government and our reputation for independence permit engagement with a wide range of parties who value our objectivity and our impartiality. Our system of peer review, involving rigorous expert scrutiny of reports and draft legislation, is a sound quality assurance system. We have our own in house

²³

In 2011–12 the Commission reduced the number of economists in the team due to budgetary pressures. In 2012–13 the Commission hopes to increase the capability in this area as the need for economic and statistical evidence to support the proposals for reform grows.

*Parliamentary Counsel. We have the advantage of special parliamentary procedures, which are particularly suited to law reform measures."*²⁴

43. The Law Commission Act 2009 requires the Lord Chancellor to prepare an annual report, which must be laid before Parliament, on the implementation of Law Commission proposals. The 2009 Act also provides that the Lord Chancellor and Law Commission may agree a protocol about the Law Commission's work so as to provide a framework for the relationship between the Government and the Law Commission. In March 2010 the Lord Chancellor and the Law Commission agreed a statutory protocol governing how Government departments and the Law Commission should work together on law reform projects. The protocol is key to ensuring a productive working relationship between the Law Commission and Whitehall and is intended to increase the number of Law Commission proposals implemented by Government and to reduce the time in taking reform forward.²⁵

44. The Protocol provides, inter alia, as follows –

"18. The Minister will provide an interim response to the Commission as soon as possible and in any event within six months of publication of the report unless otherwise agreed with the Commission.

19. The Minister will provide a full response to the Commission as soon as possible after delivery of the interim response and in any event within one year of publication of the report unless otherwise agreed with the Commission. The response will set out which recommendations the Minister accepts, rejects or intends to implement in modified form. If applicable, the Minister will also provide the timescale for implementation."

Ireland

45. The Irish Law Reform Commission (ILRC) was established

²⁴ M Dyson, J Lee & S Stark (eds), *Fifty Years of the Law Commissions - The Dynamics of Law Reform* (Hart Publishing, 2016), at 363.

²⁵ Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission,
http://www.lawcom.gov.uk/wp-content/uploads/2015/06/lc321_Protocol_web.pdf

under section 3(1) of the Law Reform Commission Act 1975. It is an independent statutory body which examines areas of the law and proposes reforms or changes. The ILRC's law reform research work arises from two main sources, namely (1) under a Programme of Law Reform prepared by the ILRC and agreed by Government and laid before the Houses of the Oireachtas (National Parliament) under the 1975 Act; and (2) in accordance with a request from the Attorney General under the 1975 Act.

46. The function of the ILRC is to keep the law under review and, in accordance with the provisions of the Law Reform Commission Act, to undertake examinations, conduct research with a view to reforming the law and formulate proposals for law reform.²⁶ The word "reform" in relation to the law or a branch of the law is defined in the 1975 Act to include –

- (a) the development of law
- (b) its codification (including its simplification and modernisation) and
- (c) the revision and consolidation of statute law

47. The ILRC consists of a President, a full time Commissioner and three part-time Commissioners. The Commissioners are appointed by the Government on the request of the Taoiseach (ie the Prime Minister of Ireland), made by him after consultation with the Attorney General for a term of up to five years and their appointment may be renewed. The Government shall appoint to be Commissioners only persons appearing to them to be suitably qualified by the holding of judicial office, by experience as a barrister or solicitor or as a teacher of law or by reason of such other special experience, qualification or training as, in the opinion of the Government, is appropriate having regard to the functions of the Commission.²⁷ The current President of the ILRC is a retired judge of the High Court of Ireland.

48. The Commissioners are supported by a Director of Research, two managers (all are legally trained) as well as nine legal researchers and six administrative staff (as at December 2016).

49. In each financial year, the ILRC receives a grant of such amount, out of money provided by the Oireachtas, as the Minister for Finance, on the recommendation of the Attorney General, may consider

²⁶ Section 4(1) of the Law Reform Commission Act 1975.
²⁷ Section 3(7) of the Law Reform Commission Act 1975.

necessary to enable the ILRC to perform its functions.²⁸

New Zealand

50. The Law Commission (the Commission) is an independent Crown Entity governed by the Law Commission Act 1985 and the Crown Entities Act 2004. The purpose of the Commission is to promote the systematic review, reform and development of the law of New Zealand. Section 5 of the Law Commission Act 1985 sets out the functions of the Commission. Apart from making recommendations for the reform and development of the law, the Commission also advises:

- (a) on the review of any aspect of the law conducted by any Government department²⁹ and on proposals made as a result of the review;
- (b) the Minister of Justice and the responsible Minister on ways in which the law can be made as understandable and accessible as is practicable.

51. The Ministry of Justice is authorised to be the monitoring department in respect of the Commission. The Ministry administers the Output Agreement between the responsible Minister and the Commission, and monitors the Commission's performance for this purpose.

52. The Commissioners are highly experienced and skilled lawyers from the judiciary, the public sector, the private sector, and the universities. The Commission's research and legal staff are also highly qualified experts in their own right. The Law Commission Act 1985 provides for a minimum of three and a maximum of six Commissioners who are remunerated. They lead teams of researchers and collectively determine the content of the Commission's final reports. The nature of the Commission's work requires not only that the Commissioners manage projects but also that they be engaged fully in all the detailed research, presentational, and drafting issues. Currently, there are four Commissioners including the President as head Commissioner who is a retired judge of the New Zealand Court of Appeal.

53. The General Manager manages the operations of the

²⁸ Section 8 of the Law Reform Commission Act 1975.

²⁹ As well as organisation as defined in section 3A of Law Commission Act 1985.

Commission and reports directly to the President. As at November 2017, the Commission has 15 legal and policy advisor staff.³⁰ The Commission also makes use of consultants with expertise in specialist areas for particular projects. As a general guide, the Commission endeavours to maintain the ratio of Commissioners to research/policy staff at 1:3. The Commission's experience has demonstrated that this ratio maximises the efficiency and effectiveness of Commissioners and staff.

54. The Law Commission's estimated revenue for the year ended 30 June 2017 was NZ\$4.115 million.³¹ Its estimated expenditure, however, reached NZ\$4.049 million with core amount spent on personnel remuneration (NZ\$2.991 million).

Scotland

55. The Scottish Law Commission (SLC) is an advisory body established by Parliament of the United Kingdom in 1965 to keep the law of Scotland under review and recommend necessary reforms to improve, simplify and update Scots law. It was established by the Law Commissions Act 1965 at the same time as the English Law Commission.³²

56. The statutory function of the SLC is to keep Scots law under review and to provide independent advice to the Government on reform of the Scots law as needed. Most of the law reform reports are submitted to the Scottish Ministers while some are submitted to UK Ministers where the subject matter involves areas of law reserved to the UK Parliament.

57. (The SLC's role in relation to statutes law repeal and consolidation,³³ which is also imposed on the English Law Commission under the terms of section 3(1) of the Law Commissions Act 1965, is

³⁰ The Commission's current policy is to recruit the best young graduates available, along with people with more experience and developed expertise in law as well as other disciplines within the senior staff.

³¹ Revenue includes revenue from the Crown, interest revenue, publications sales and miscellaneous revenue. See the Commission's *Statement of Performance Expectations 2017 to 2018*, at 10. <http://www.lawcom.govt.nz/sites/default/files/corporatePaperAttachments/Law-Commission-Statement-of-Performance-Expectations-2017-2018%20%28Parliamentary%20PDF%29.pdf>

³² Section 2 of the Law Commissions Act 1965.

³³ See "What we do" in the Scottish Law Commission's webpage: <https://www.scotlawcom.gov.uk/about-us/>

discussed in more detail in the earlier section, above, on the England and Wales.)

58. The SLC consists of five full-time Commissioners appointed by the Scottish Ministers. One of the Commissioners is the chairman who by convention is a Court of Session Judge. The other Commissioners are drawn from those holding judicial office, advocates, solicitors or university law teachers. Commissioners are appointed for a maximum term of five years with the possibility of re-appointment. The Commissioners are supported by the Chief Executive of the SLC and by both legal and non-legal staff. All permanent staff are seconded from the Scottish Government.³⁴ As at November 2017, there are ten legal staff and six non-legal staff.

59. The SLC may initiate a law reform project on its own or jointly with the Law Commission of England and Wales and the Northern Ireland Law Commission. At times, law reform proposals may come from organisations or individuals. Scottish Ministers may also ask the SLC to undertake work on a certain area of the law. SLC's authority to carry out work is contained in ongoing Programmes of Law Reform approved by the Scottish Ministers or on the basis of a reference from the Scottish Ministers.

60. The SLC is funded by the Scottish Government. The SLC's total expenditure for the year ended on 31 December 2016 was £1,509,346 with most money spent on the Commissioners' salaries and staff cost (£633,200 and £664,856 respectively).³⁵

61. There is one significant development in the Scottish Parliament with regard to the implementation of SLC recommendations. The Scottish Parliament decided in May 2013 to make changes to its Standing Orders to provide for a committee of the Parliament with a specific remit on law reform – the Delegated Powers and Law Reform Committee. The SLC considers all Scottish statutory instruments laid before the Parliament and decides whether to draw them to the attention of the Parliament under certain grounds. This development reflects the Parliament's wish to find a way forward for implementing more Commission Bills that update the law to keep in step with changes in society, or to develop the common law.³⁶ The new process recognises

³⁴ <http://www.scotlawcom.gov.uk/about-us#who>

³⁵ Scottish Law Commission, *Annual Report 2015*, at 29.

³⁶ News release:

http://www.scotlawcom.gov.uk/files/5614/0077/2775/News_Release_-_First_law_reform_Bill

SLC's valuable role in recommending reforms to improve, simplify and update the law of Scotland.

62. More recently, the Commission on Parliamentary Reform has recommended that the Scottish Parliament should provide a mechanism for ministers to announce to Parliament (either in committee or in chamber) when they receive SLC reports proposing law reform.³⁷

Singapore

63. The Legislation and Law Reform Division (LLRD) under the Attorney General's Chambers was officially formed on 15 June 2008 upon the merger of the Legislation Division and Law Reform and Revision Division. LLRD had two main directorates – the Legislative Drafting Directorate and Law Reform and Revision Directorate. Its main functions were legislative drafting, law reform and law revision.

64. An annual work plan was prepared to identify projects in law reform. Systematic research, study and consultation with government ministries and agencies, as well as professional bodies and members of the public, were carried out in order to make practical and relevant recommendations for law reform. The LLRD worked closely with the Law Reform Committee of the Singapore Academy of Law (the Academy). In 2014, the LLRD was renamed Legislation Division to reflect its primary focus on drafting legislation. It seems that the role of the renamed Legislation Division on law reform has significantly diminished.

65. The Academy has close to 10,000 members comprising persons called as advocates and solicitors of the Supreme Court or appointed as Legal Service Officers, corporate counsel, faculty members of the local law schools and foreign lawyers in Singapore. The Academy is governed by the Senate which is headed by the Honourable the Chief Justice as President. The Senate also comprises the Attorney-General, Supreme Court Bench and key leaders of the various branches of the legal profession.

66. The Academy considers that legal knowledge is their

³⁷ for a new process in the Scottish Parliament.pdf
See Recommendation 48 in *Report on the Scottish Parliament* (20 June 2017), at 51.
<https://test123582.files.wordpress.com/2016/10/commissiononparliamentaryreformreport-june-20171.pdf>

members' intellectual capital. Therefore, one of the Academy's functions is the development and enhancement of legal knowledge. The Law Reform Committee (the "Committee") of the Academy invites all practitioners to feedback on deficiencies or errors in the law encountered in the course of their work. The Committee will review all feedback received and make recommendations to the Attorney-General's Chambers for amendments in due course. The Committee also studies the contours of the law that requires change, and looks into the reform of discrete areas of law which are not confined to any particular field or doctrinal area. The Committee consults widely for its reform work which results in amendments and updates of existing legislation and enactment of new laws.³⁸ The Committee has achieved a significant breadth of reform initiatives since its inception in 1989, drawing on the input of a small but dedicated team of members who come from the higher echelons of practice and academia.

³⁸ These include the implementation of the corporatisation of law partnerships in the Legal Profession (Amendment) Act 2000, the transfer of proceedings between courts in the Subordinate Courts (Amendment) Act 2005, and the loss of inheritance in the Civil Law (Amendment) Act 2009:
http://www.sal.org.sg/content/LD_law_reform.aspx