Reforming Law Reform

Perspectives from Hong Kong and Beyond

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Chapter 1
Law Reform Today

Michael Tilbury, Simon N M Young and Ludwig Ng

Law Reform: The International Context

This book is about law reform, specifically the process of law reform. Its principal focus is the question whether the institutions of law reform in Hong Kong are appropriate to deliver effective law reform, by which we mean timely and on-going reform that produces laws that are clear, accessible and just, and that respond to the present-day, often shifting, needs of Hong Kong's society and economy. This is an important question for Hong Kong. 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 in the region of the world in which it finds itself. That advantage is diminished by the extent to which the legal system consists of laws that do not adequately address contemporary problems.

The necessity for continual law reform is not unique to Hong Kong. It is experienced in all countries whose economies and societies are in a state of constant flux. The need is felt particularly in common law jurisdictions, like Hong Kong, where the legislature and the courts — the institutions that hold sway over the development of the two principal sources of law, legislation and case law respectively — are not always the most suitable vehicles for reform of the law. This is obvious in relation to case law. Judicial reform of the common law is always piecemeal and slow, dependent, as it is, on the chance of the right case presenting itself for decision. Moreover, even when the right case does come along, judges can only reform the common law within the bounds of their constitutional function, and, in particular, within the constraints of the doctrine of precedent. To the extent to which they are perceived to be acting beyond the limits of that doctrine, they will, invariably, expose

themselves to a "charge" of judicial activism, implying that they have acted beyond their proper function. In practice, this means that judicial reform of the law is often dependent on further happenstance: that the case in question ends up in a court of final appeal, where the doctrine of precedent does not apply with the same force.[1]

This may be thought to leave reform of the law where it properly belongs: with the legislature. In the Westminster system, however, legislatures are usually under the control of the executive government whose legislative programme may have no space for law reform that is not on the political agenda; or that is not perceived to have community support; or that is opposed by powerful interest groups. Indeed, even where a government is prepared to entertain the possibility of reform of a particular area of law, it may not be apparent which government department should be responsible for the reform; and, even where it is, the department in question may lack the expertise in legal policy that is necessary to undertake the process of reform effectively. In Hong Kong, effective law reform through legislation is further compromised by the existence of a dysfunctional legislature, which is, at least partly, attributable to the fact that it is not yet a fully democratic body.[2] And, in politically sensitive areas, reform can be stalled by public perceptions that the Chinese central authorities are directing the change, in defiance of the high degree of autonomy promised to Hong Kong under the Basic Law.[3]

Responding to the need for professional law reform on a continual basis, the government of the United Kingdom created the Law Commission of England and Wales and the Scottish Law Commission in 1965.[4] Their purpose is to promote law reform,[5] and, to this end, to "take and keep under review all the law 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".[6]

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[1] For Hong Kong, see *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, [18]–[19] (Li CJ).

[2] Consider the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art 68.

[3] For examples, see n 30.

[4] Law Commissions Act 1965 (UK).

[5] Ibid s 1(1).

[6] Ibid s 3(1).

To accomplish these objectives, the Law Commissions are established as permanent bodies, comprising full-time commissioners supported by research and administrative staff, including parliamentary drafters. Following the example of the United Kingdom, law reform commissions were established in many common law jurisdictions, though their functions and structure were, and are, not always the same as those in the United Kingdom.[7]

By the early 1980s, almost two decades after the establishment of the Law Commissions in the United Kingdom, it could be said, as a broad generalization, that law reform was "in full flower" in the Commonwealth.[8] The flower was not, however, to bloom for long. By the late 1980s and the early 1990s, many governments had lost an appreciation of the need for full-time law reform commissions and had begun to reappraise the need for them, one reason being that they were regarded as expensive luxuries.[9] The result, particularly in Australia and in Canada, was that law reform agencies were downsized, abolished or simply allowed to wither away.[10] The downsized agencies represented a retreat to a view that had prevailed in the era before full-time law reform commissions were created: that professional law reform could be accomplished through agencies whose members are part-time, though they may be supported by some full-time research and/or administrative staff. Alternatively, the total abolition of law reform bodies could be justified by assigning their work to government departments, particularly to units devoted to legal policy reform within such departments.[11]

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[7] For the creation and spread of law reform commissions in select parts of the Commonwealth, consider W Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, 1986); G Powles, "The Challenge of Law Reform in Pacific Island States" in B Opeskin and D Weisbrot, *The Promise of Law Reform* (Federation Press, 2005) ch 28; M Kamuwanga, "The Challenge of Law Reform in Southern Africa" in ibid, ch 29.

[8] M Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (OUP, 1983) 30.

[9] For example, Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 6 November 1992, 550–552 (Hon Jan Wade, Attorney-General, justifying the abolition of the Law Reform Commission of Victoria on grounds of expense [among others]).

[10] See P Handford, "The Changing Face of Law Reform" (1999) 73 *Australian Law Journal* 503.

[11] Consider the extensive remit of the Programs Branch of the Department of Justice Canada, aimed at achieving the strategic outcome of developing and maintaining a

Of course, law reform commissions that mirror at least the objectives of the UK Law Commissions continue to exist throughout the Commonwealth, at least on paper. Lack of political independence and lack of funding have, however, meant that many of these agencies have made little progress in achieving their objectives.[12] This exposes them to questions about the need for their existence and to the continual threat of abolition or defunding. These questions and this threat are not confined to such agencies. In 2010, the Law Commission of England and Wales, arguably the most successful law reform commission in the common law world, was faced with the threat not only of a substantial cut in its funding, but also to its independence, if not its very existence.[13] While the Commission weathered the storm, by the end of 2011, its Chairman, Lord Justice Munby, was still concerned that the Commission was under threat.[14]

Unsurprisingly, the turmoil affecting law reform agencies over the last two decades or so has led those concerned with the need for on-going professional law reform to devise other ways in which law reform can be accomplished within their jurisdictions. The most promising development has been the emergence of partnerships between universities, governments and other interested parties. Under this arrangement each party to the agreement contributes to the funding of law reform activity, which takes place either within the law faculty of a university or in close connection with a university faculty or faculties of law. This model, which can be traced back to the Alberta Law Reform Institute (which was established by agreement between the government, the University of Alberta and the Law Society of Alberta as long ago as 1967),[15] may prove particularly suitable for smaller jurisdictions, as it has done in Alberta[16] and

"fair, relevant and accessible justice system": see <www.justice.gc.ca/eng/pi/pb-dpg.index.html> accessed 31 January 2013.

[12] See Kamuwanga (n 7) 431–432 (law reform agencies in Eastern and Southern Africa).

[13] See Lord Justice Munby, "Shaping the Law — The Law Commission at the Crossroads" (the Denning Lecture for 2011) 5–6 <www.lawcom.gov.uk/publications/lectures.htm> accessed 31 January 2013.

[14] Ibid 3.

[15] See Hurlburt (n 7) 215–223. The Institute was originally styled "The Institute of Law Research and Reform".

[16] By June 2010, the Institute had issued 97 reports with a good implementation rate: see Alberta Law Reform Institute, *Annual Report July 2009–June 2010*, 35–46, available at <www.law.ualberta.ca/alri> accessed 31 January 2013.

as it appears to be doing in Ontario[17] and Tasmania.[18] Whatever the future of this specific model of law reform, the co-operation arrangements that it promotes between governments and universities are capable of wider application in the achievement of effective law reform. An example of such co-operation occurred in the recent project of the Law Reform Commission of Hong Kong (HKLRC) on reforming offence exceptions to suspended sentences of imprisonment. The Law Society of Hong Kong commissioned the University of Hong Kong's Centre for Comparative and Public Law (CCPL) to prepare a report on the subject, which then served as the main impetus for the HKLRC's project. Agreeing with the recommendations contained in the CCPL report, the HKLRC was able to move swiftly to publishing a consultation paper in June 2013 without the need to form a sub-committee to study the matter.[19]

It is important that the work of professional full-time law reform commissions be put in context in evaluating the overall law reform record of any jurisdiction. Law reform commissions do not have a monopoly on law reform. As Professor David Weisbrot, a former President of the Australian Law Reform Commission, has pointed out, law reform exists in a "crowded field".[20] Successful law reform initiatives may result from the work of other sources, including committees of parliaments; departments of government; specialist tribunals (such as anti-discrimination tribunals); specialist bodies (such as environmental protection agencies); Royal Commissions; and even private consultants and advocates.[21] Moreover, many of these bodies may produce consultation documents, engage in public consultation and, generally, adopt techniques that have been pioneered by law reform commissions.

Law Reform: The Hong Kong Context

A crowded field of law reform also exists in Hong Kong. In addition to the Administration, the Legislative Council (LegCo) and the Courts, the HKLRC possesses a general law reform mandate, which, because it is expressly

[17] See Chapter 6 (Hughes).

[18] See Chapter 7 (Warner).

[19] The consultation paper can be accessed on the HKLRC website: <http://www.hkreform.gov.hk/en/docs/exceptedoff_e.pdf> accessed 1 August 2013.

[20] See D Weisbrot, "The Future of Institutional Law Reform" in Opeskin and Weisbrot (n 7) 18, 20–22.

[21] Consider Chapter 10 (Petersen and Loper).

articulated, places the commission at the centre of any evaluation of the state of law reform in Hong Kong. Specialist bodies nevertheless continue to pursue law reform agenda in particular contexts. It is, therefore, necessary to consider the contribution that can be made to law reform through these various sources, and in particular to evaluate how that contribution measures up in comparison to the work of the HKLRC.

Law making and law enforcement, and hence law reform, lie at the very heart of the constitutional functions of the Executive[22] and of LegCo.[23] However, the limited accountability of the Executive to LegCo,[24] combined with the fact that LegCo is not a fully democratic body,[25] mean that neither the Executive nor the Legislature is fully accountable politically to the people of Hong Kong. This generates great difficulty in achieving effective law reform through the Executive and LegCo in the face of the slightest opposition to reform from vested interests. We acknowledge, of course, that it is nevertheless possible for successful law reform to originate in government departments or bureaux.[26] Indeed, government bureaux are the main agents of law reform in Hong Kong, with particular roles in three areas: ensuring that the law of Hong Kong is compliant with Hong Kong's international obligations, especially major human rights instruments; ensuring that the law of Hong Kong is otherwise in line with major and developing international standards in such areas as financial law and regulation; and developing laws that are necessary to accommodate the increasing interaction with Mainland China.[27] If bureaux are to be judged as primarily responsible for keeping the law up to date in these areas, their record of achievement is, at best, patchy.[28]

The role of bureaux in law reform in no way diminishes the need for, or the role of, the HKLRC. A very important principle is at stake here, which is the independence from government of the body making recommendations

[22] See J Chan and C Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell, 2011) [9.008]–[9.011].

[23] Ibid [7.133]–[7.134].

[24] See Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art 64.

[25] See n 2.

[26] For examples, see Chapter 3 (Wong).

[27] See Chapter 3 (Wong).

[28] See Chapters 10 (human rights law) (Petersen and Loper); 9 (labour law) (Glofcheski); 8 (insolvency law) (Ng).

for the reform of the law. A government bureau or agency of any sort is part of the government. Recommendations that come from such a body run the risk of being perceived as no more than the views of a perhaps unpopular or distrusted administration, even where those recommendations have been arrived at after consultation with relevant stakeholders. Such stakeholders may, in any event, decide not to engage with a government agency in whose independence they have no confidence, thereby diminishing the value of reform proposals that come from that agency. The problem intensifies in politically sensitive areas over which the Chinese central authorities maintain a strong interest. We have seen many instances in which policies and proposals,[29] originating from the bureaux, were met with strong public objections, typically in the form of large-scale street protests, followed by the government's retreat, which ultimately results in little if any reform. Absent in these initiatives is the use of a credible and independent reform body to study and formulate options for public consultation. Such a strategy would also help to alleviate the public's concerns over Mainland Chinese intervention in matters reserved for Hong Kong's high degree of autonomy.[30]

The HKLRC is independent of government and regards this independence as one of its strengths, enabling it to present its recommendations "after an objective examination of the facts and the law".[31] Indeed, it is this independence that can be regarded as underpinning its mission "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."[32]

Moving beyond principle, practical reasons often favour law reform through the HKLRC rather than through a government bureau or department.

[29] For example, national security proposals to implement Article 23 of the Basic Law (2003); constitutional reform of the systems for electing the 2012 Chief Executive and LegCo members (2010); arrangements for filling LegCo vacancies (2011); moral and national education school curriculum (2012); arrangements on the inspection of directors' personal information on the Companies Register (2013).

[30] For the case for such a body in respect of security laws, see Simon N M Young, "Security laws for Hong Kong" in V Ramraj, M Hor, K Roach and G Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd ed, CUP, 2012) 357.

[31] *The Law Reform Commission of Hong Kong, 2011* (Government Logistics Department, HKSAR Government, 2011) 4.

[32] Ibid 1.

The Hong Kong government itself realizes that the Commission plays a "particularly valuable" role in law reform in a number of circumstances.[33] First is "where the subject does not fall readily under the responsibility of one particular bureau of Government", an example being reform of the law of privacy.[34] Secondly, in situations that call for technical legal expertise that the government cannot provide, either because the subject matter is outside the government's day-to-day activities, or because that expertise cannot be provided on a full-time basis. An example of the former is the reform of the law of domicile; of the latter, reform of insolvency law.

Turning to the courts, we have already pointed out the general limitations that apply to piecemeal judicial reform of the law. There is, however, another important factor that ought not to be overlooked and that arises as a result of the way in which law reform commissions operate. In detecting any need for reform of the law, commissions place an emphasis on consultation with groups or people who know how the law operates in practice or who are affected by the operation of the law; and on research (including interdisciplinary research) that reveals how the law operates, or ought to operate, in practice. This distinguishes the task of law reform commissions from that of the courts, and makes them a more powerful locus for reform in appropriate cases. In the words of Sir Anthony Mason:[35]

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry

[33] Ibid 5.

[34] See further Chapters 11 (Chiang), 12 (Bacon-Shone) and 13 (Tilbury).

[35] *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 633 (Mason J).

> out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.

The courts, however, have been a great motivator for law reform in Hong Kong. Many decisions from the Court of Final Appeal (CFA), especially ones concerning unconstitutionality, have prompted comprehensive law reform from the Executive and LegCo.[36] The CFA's invention of the power of courts to suspend temporarily a declaration of unconstitutionality to allow government time to enact corrective legislation has been highly effective in bringing about reform that is both timely and progressive.[37] There have been instances where a court's judgment, sometimes with an explicit recommendation for reform or study, has led to the matter being referred to the HKLRC.[38] This ability of the courts to influence policy and legislative changes, where

[36] For example, *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459, leading to legislation on village representation elections in Village Representative Election Ordinance (Cap 576), which entered into force on 21 February 2003; *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, leading to legislation on Convention Against Torture *non-refoulement* screening in Immigration (Amendment) Ordinance 2012, Ord No 23 of 2012, which entered into force on 3 December 2012. But compare the discussions over a new offence of persistent child sexual abuse following the criticisms of specimen counts in *Chim Hon Man v HKSAR* (1999) 2 HKCFAR 145; see further, Amanda Whitfort, "The Proposed Offence of Persistent Sexual Abuse of a Child" (2002) 32 *Hong Kong Law Journal* 13.

[37] For example, *Koo Sze Yiu v Chief Executive* (2006) 9 HKCFAR 441, leading to the Interception of Communications and Surveillance Ordinance (Cap 589), which entered into force in August 2006; *Chan Kin Sum Simon v Secretary for Justice*, unreported, HCAL79A/2008, 11 March 2009, CFI, leading to removal of all restrictions on the right of prisoners to vote, see Voting by Imprisoned Persons Ordinance, Ord No 7 of 2009, which entered into force in July and October 2009.

[38] See *Wong Wai Man v HKSAR* (2000) 3 HKCFAR 322 (criminal hearsay); but the Court of Final Appeal's suggestion to the HKLRC to study the common law offence of champerty and maintenance in *Winnie Lo v HKSAR* [2012] 1 HKC 537 (CFA) has yet to be taken up.

ordinary reform processes have been impaired, partly explains why there has been an influx of judicial review cases since 1997.[39]

Specialist law reform bodies, such as the Standing Committee on Company Law Reform or the Office of the Privacy Commissioner for Personal Data, may not only use the research and consultation techniques that have been pioneered by law reform commissions, but also generate successful law reform.[40] Generally, however, there is no evidence that specialist law reform bodies are more successful in generating reform than generalist law reform commissions. On the contrary, and compared to law reform commissions, such agencies have three weaknesses. First, their specialization may mean that they lack the perception of independence that attaches to a generalist law reform body. They are associated with a particular area of law and may be perceived to have a particular position when it comes to reforming the law in the area concerned; alternatively, they may be perceived to be captives of particular interest groups. Could a privacy commissioner, for example, be perceived to be other than in favour of laws that would give individuals greater privacy, perhaps at the expense of freedom of speech? Secondly, a specialist agency will almost certainly have among its members groups or individuals who have conflicting views about how the law should develop in the area of specialization. Those views will often be strongly held, leading to internal conflict that diminishes the ability of the agency to act as an effective agent of law reform, as has happened in the case of the Labour Advisory Board in Hong Kong.[41] Thirdly, at least to the extent to which they are ad hoc, specialist agencies are transient. In contrast, a permanent law reform commission should possess an institutional memory that is able to recall past debates to inform present ones. Only thus can a constant reinvention of the wheel be avoided. As Professor David Weisbrot has written:[42]

> An obvious disadvantage of the various ad hoc law reform arrangements is their transience. Unlike permanent law reform agencies, they lack established processes, quality control mechanisms, tried and true staff,

[39] See S N M Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (CUP, 2013) chs 10 and 16.

[40] For example, the Personal Data (Privacy) (Amendment) Ordinance 2012, which resulted primarily from the work of the Office of Privacy Commissioner for Personal Data: see Chapter 11 (Chiang).

[41] See Chapter 9 (Glofcheski).

[42] Weisbrot (n 20) 22.

> established links or databases to facilitate effective consultation, and a track record of excellence. Ad hoc bodies are also unable to contribute to the reform process at a later date — in a field with long lead times — through the maintenance of documents and websites, submissions to parliamentary or other inquiries, and so on.

The considerations just discussed highlight the necessity for a permanent body with a generalist law reform brief, such as the HKLRC, to which we now turn.

The Law Reform Commission of Hong Kong

The HKLRC's establishment in 1980 is located in the general historical movement of law reform in common law countries from part-time to full-time bodies. The Commission replaced a small Law Reform Committee that had operated between 1956 and 1964 and that had issued five reports.[43] Its generalist brief was "[t]o consider such reforms of the laws of Hong Kong as may be referred to it by the Chief Justice and the Attorney General and to report to the Chief Justice and the Attorney General".[44] The Commission now describes its primary mission as being "[t]o present proposals for reform which make the law in Hong Kong more effective, more accessible, and more in tune with the community's needs".[45]

Two aspects of the Commission's objectives and structure stand out.[46] First, the HKLRC has never had a law revision function — a function that can variously be described as the identification for repeal of obsolete and spent statutes; the consolidation of statutes; and the simplification and modernization of statutes (for example, updating or clarifying the language of statutes). Most law reform commissions established after 1965 were expressly invested with this function, although, with the exception of the Law Commission of England and Wales,[47] few law reform commissions have, in practice, devoted

[43] See S Stoker, *A Comparative Study of Law Reform Implementation* (University of Hong Kong, M Soc Sc thesis, 1987) 7 <http://hdl.handle.net/10722/55706> accessed 31 January 2013.

[44] Ibid.

[45] *The Law Reform Commission of Hong Kong, 2011* (n 31) 1.

[46] For details of the structure of the HKLRC, see Chapters 3 (Wong) and 4 (Stoker).

[47] See Sir David Lloyd Jones, "The Law Commission and the Implementation of Law Reform" (Sir William Dale Annual Lecture, 22 November 2012) 5–10 <www.lawcom.gov.uk/publications/lectures.htm> accessed 31 January 2013.

resources to it.[48] It is, arguably, unfortunate that the HKLRC was not given this function in view of the real need for the modernization of Hong Kong's statute book.[49] Secondly, the HKLRC has never had full-time commissioners who are able to devote their time to pushing forward a law reform agenda in the territory, though there are full-time lawyers working within the Commission's secretariat. The full-time staff members are responsible, among other matters, for organizing consultations in which the Commission and its sub-committees engage.

In the absence of full-time commissioners, and in view of its limited resources, the HKLRC relies heavily on the work of expert sub-committees set up to examine almost all of the projects that the Commission undertakes. The members of the sub-committees volunteer their expertise and are not paid. The Commission regards this arrangement as one of its strengths, since "its members come from a range of backgrounds, enabling it to consider reform of the law from the point of view of the community as a whole, rather than solely from that of the legal profession".[50] Of course, the Commission is right to be proud of the contribution that these volunteers have made to the development of the law in Hong Kong.

As at the end of 2012, the HKLRC had produced 61 reports, of which some 32 had resulted in the enactment of legislation, or the introduction of administrative measures, that gave effect, wholly or partly, to their recommendations.[51] This represents an overall implementation rate of approximately 52 per cent. This is in contrast to the overall implementation rate of the Law Commission of England and Wales, which is about 69 per cent.[52] The figure for the HKLRC can hardly be regarded as satisfactory. At the same time, there is no suggestion that the HKLRC has failed to achieve its vision of attaining and maintaining a reputation for excellence in law reform, both internationally and in Hong Kong.[53] That vision is achieved by law reform work of the highest

[48] See generally E Caldwell, "A Vision of Tidiness: Codes, Consolidations and Statute Law Revision", in Opeskin and Weisbrot (n 7) ch 3.

[49] For examples, see L Ng, "Reforming Law Reform", *Hong Kong Lawyer* (December 2010) 18, 21–23.

[50] *The Law Reform Commission of Hong Kong, 2011* (n 31) 5.

[51] The figures in this paragraph are taken from the website of the HKLRC: see <www.hkreform.gov.hk/en/publications/chronological.htm> accessed 31 January 2013.

[52] Sir David Lloyd Jones (n 47) 10.

[53] *The Law Reform Commission of Hong Kong, 2011* (n 31) 1.

quality. The Administration itself attests to the excellence of the Commission's work.[54] So the reason(s) for non-implementation must be sought elsewhere. A significant factor that the overall implementation rate hides is that the level of implementation fell dramatically following the resumption of Chinese sovereignty over Hong Kong in 1997. Of the 33 reports published before the handover, 26 resulted in some implementation, a rate of 78 per cent. In contrast, of the 28 reports issued since August 1997, only 6 have provoked any implementation activity — a rate of 21 per cent. Of course, it is foolish to attribute the poor implementation rate after 1997 simply to the change in sovereignty. The period since 1997 also corresponds roughly with the period in which professional law reform has been in decline in many common law jurisdictions.[55]

Whatever the cause, it became apparent in the first decade of this century that the state of law reform in Hong Kong required investigation. In an article published in the December 2010 issue of the *Hong Kong Lawyer*, one of us urged that a review of the process of law reform in Hong Kong was essential if Hong Kong were to continue to claim its legal system as a competitive advantage.[56] The article pointed out that the failure to bring the law into line with modern conditions extended over many areas of law — among others, legal aid, patents, corporate rescue, child custody and access, consumer protection, regulation of the sale of residential property, product liability, surveillance, and privacy. The article drew attention to the long periods of time that it sometimes took the HKLRC, with no full-time commissioners, to bring reports to finality. It also pointed out that, once the Commission had reported, the Administration frequently failed to take timely action to implement, or even to respond to, the recommendations in a report. The article called for a commitment by the Administration to invest adequate resources in law reform. These concerns were echoed in a number of articles appearing in the *South China Morning Post* at around the same period.[57] Responding to these concerns, a Conference on Reforming Law Reform, organized by the Centre for

[54] See Chapter 3 (Wong).

[55] See text to nn 8–10 above. The implementation rate of the Law Commission of England and Wales fell to about 55 per cent in the first decade of this century: see Sir David Lloyd Jones (n 47) 10.

[56] L Ng, "Reforming Law Reform" (n 49) 18. See also L Ng, "Law for the Times", *South China Morning Post* (29 September 2010).

[57] See 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

Public and Comparative Law at the University of Hong Kong and co-sponsored by ONC Lawyers and others, was held at the University of Hong Kong in November 2011. This book is the result of papers that were delivered at that conference.

The dominant issues emerging from these critiques and from the conference were, first, the length of time that it takes the HKLRC to bring reports to conclusion; and secondly, the failure of the Administration to respond, either at all or in a timely fashion, to such reports with a view to their implementation. These are, in fact, two timeless themes in the literature of law reform commissions.[58] Critics of law reform commissions have seized upon them, while law reform commissions themselves have worried about them incessantly — law reform commissions being notoriously self-critical institutions (as even a cursory glance at the literature on law reform will confirm). The issues then resolve themselves into how these two problems should be addressed in Hong Kong in the second decade of the twenty-first century.

Timeliness

The most obvious response to the perceived excessive length of time that it takes the HKLRC to complete its reports is to appoint commissioners who are engaged full-time in overseeing law reform projects and in driving the overall mission of the Commission. This expansion of the role of the Commission in Hong Kong would, however, run counter to the experience in Canada and Australia where the more recent trend has been to revert to downsized or part-time law reform commissions.[59] The expansion would, however, mirror the model of law reform represented by the Law Commission of England and

Dust", ibid (20 December 2010); J Man, "Failure to Invest in Updating Flawed Laws 'Hurting Hong Kong'", ibid (21 December 2010); A Wong, "Lack of Liability Law Actions Puts Consumers at Risk", ibid (21 December 2010); Editorial, "The Key to Finding a Level Legal Playing Field", ibid (27 December 2010); M Ng, "Government Always Finds 'Good' Reasons to Delay Law Reforms", ibid (10 January 2011).

[58] For timeliness, consider A Rees, "Strategic and Project Planning" in Opeskin and Weisbrot (n 7) ch 8; B Opeskin, "Measuring Success" in ibid 202, 211–12. For implementation, consider Hurlburt (n 7) ch 7; Opeskin, "Measuring Success" in Opeskin and Weisbrot (n 7) ch 14; M Kirby, "Are We There Yet?" in ibid 433, 437–441.

[59] See Chapters 6 (Hughes) and 7 (Warner).

Wales,[60] which, as we have already pointed out, is arguably the most successful, and certainly the most stable, law reform commission of the modern era.

Whatever the reasons behind the reversion to part-time commissions in Australia and Canada, they are not, we suggest, of relevance to Hong Kong. First, there are no economic reasons to suggest that the Hong Kong government, with its healthy surpluses, cannot afford properly to resource a full-time commission. Secondly, at this crucial juncture in its history, Hong Kong cries out for appropriate investment in its principal law reform agency. As pointed out above, a legal system of obsolete laws is always worthless. This is particularly so in today's Hong Kong. At a time at which the legal system in China is being modernized — at least ostensibly — the HKLRC should be examining the compatibility of the Hong Kong legal system with that modernized system with a view to maintaining Hong Kong's competitive advantage within the region.

In the end, we cannot, of course, guarantee that the appointment of full-time commissioners will improve the timelines within which reports are published, since criticisms about overdue reports have plagued all modern law reform commissions (including those with full-time commissioners).[61] We also appreciate that modern part-time law reform agencies have made real contributions to the development of the law within their respective jurisdictions.[62] We do not, however, believe that the future lies in maintaining, or returning to, part-time law reform committees.[63] Our instinct is that it is more likely than not that a properly funded law reform commission, with an appropriate number of full-time commissioners, is likely to be much more efficient, and to deliver more timely law reform proposals, than a commission comprising already over-worked volunteers who come to the task of law reform at the "fag end of the day".[64] The Administration could, indeed, secure the benefit of adequately funding the Law Reform Commission by requiring the Commission to complete its projects within specified time periods.

A well-resourced commission, with full-time commissioners, would have the additional benefit of being able to take advantage of its increased

[60] See Chapter 5 (Partington).

[61] See Lord Justice Munby (n 13) 9–11.

[62] See Chapters 6 (Hughes) and 7 (Warner).

[63] See Chapters 2 (Kirby) and 14 (Kirby).

[64] See K Sutton, *The Pattern of Law Reform in Australia* (University of Queensland Press, 1970) 15.

capacity by raising the profile of the commission in the community, indirectly by attracting the interest of the media in issues of law reform, and directly by engaging the community in the business of law reform through intense and effective consultation processes. This, in itself, would contribute to the democratic development of Hong Kong. Full-time commissioners, having had a more direct role in developing reform proposals, are more likely to champion them long after they have been published, and this serves as an important catalyst to timely implementation.

Implementation

Crucial to a law reform commission's successful and efficient discharge of its functions is the commitment of other actors in the political process to its work. Governments' lack of response to law reform commissions' reports is an indication of the lack of such commitment, perhaps even of hostility. Two strategies have been suggested for overcoming this problem. First, it is argued that there must be some mechanism by which the executive government responds to recommendations of a law reform commission. Without such a response, the work of the law reform commission is marginalized, and can even be seen to be worthless. Secondly, there must also be some process for requiring the easy implementation through the legislature of the recommendations of a law reform commission — recommendations that have been already been subjected by the law reform commission to extensive public scrutiny and discussion, as well as subsequent review by relevant government departments or bureaux.

These two factors undoubtedly present a real challenge for law reform in Hong Kong at this stage of its constitutional development. First, there is the lack of real democratic accountability of the Administration, making it easy for the Administration to ignore or stall recommendations of the Law Reform Commission. Secondly, the structure of LegCo itself, particularly its voting configuration, allows powerful constituencies, themselves subject to the pressure of influential lobby groups, to block reforms that do not suit them or those that lobby them, no matter how rational and well thought out the recommendations may be. It may be that meaningful reform of the law reform process will have to await the changes in the structure of LegCo that are promised in the foreseeable future, since any substantial reform of the Law Reform Commission will itself ultimately have to be considered by LegCo.

However, this does not mean that the ground cannot be cleared by now putting in place administrative processes to facilitate a sensible relationship between the HKLRC, the Administration and LegCo.

In this respect, the October 2011 Guidelines issued by the former Secretary for Justice and Chairman of the Law Reform Commission are to be welcomed.[65] These require relevant bureaux to respond publicly, and as soon as practicable, to Law Reform Commission reports, setting out which recommendations they accept, reject or intend to implement in modified form (with an interim response to be provided within six months following the publication of the report).[66] 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.[67] 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.

This leaves the necessity for some procedure that ensures that the legislature will give expeditious consideration to the recommendations of the law reform commission that are put before it. A recent development in this respect occurred in England in 2010 when the House of Lords adopted a new procedure that facilitates consideration of non-controversial recommendations of the Law Commission.[68] Early indications are that the procedure is working well.[69] An analogous procedure should be considered in Hong Kong. There is already a practice of discussing HKLRC consultation and final reports in relevant LegCo panel meetings, but the practice is haphazard and not systematized. Even with controversial issues, the LegCo panel could be a constructive process for hearing diverse views and making progress in reform. For example, a white paper accompanied by draft legislation for the use of public deputations to a LegCo panel would be a useful vehicle for gauging public sentiments at an early stage. This would be followed by the introduction of a (substantially)

[65] See Appendix to Chapter 3 (Wong).

[66] See Chapters 3 (Wong) and 4 (Stoker).

[67] Failure, or inadequacy, of response may be emerging as a problem under a corresponding regime in the UK: see Lord Justice Munby (n 13) 6–8.

[68] See Chapters 2 (Kirby), 5 (Partington) and 14 (Kirby).

[69] Sir David Lloyd Jones (n 47) 21–23.

revised bill for first reading in LegCo. Further public deputations to a bills committee would be possible, though typically only minor amendments to the bill would be entertained at this stage. To help link the LegCo process with that of the HKLRC, it would be worth introducing a stronger legislative drafting component within the work of the Commission and its sub-committees.[70] With draft legislation appended to HKLRC reports, the trip to the LegCo panel for initial public vetting should be shorter, and hopefully faster.

Conclusion

Any improvement in law reform processes and procedures must, necessarily, come from within Hong Kong itself, taking into account Hong Kong's unique constitutional structure, institutions and legal culture, but learning, where relevant, from the experience of law reform in other countries.

The recommendations with which we conclude this chapter are that:

(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,[71] 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.

[70] The Department of Justice's Law Draftsman is already an ex-officio member of the HKLRC.

[71] See chapters 6 (Hughes) and 7 (Warner).

These are modest proposals. They do, however, go some way to realize the enormously positive effect on the development of the common and statutory law that the creation of professional law reform commissions initially held out. That promise has never been fully realized anywhere in the common law world. It is, in our view, time for Hong Kong to take the lead and to exploit the potential inherent in the noble cause of law reform.

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