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(I) Challenges of Law Reform in Small States

Despite their heterogeneity, small States share the constraint of “smallness” - that is, a small population, limited human capital, lack of economies of scale, a constrained domestic market, and increasing exposure to climate change and market shocks. Small states often have small land areas, and their population is generally under 1.5 million.¹

Many of the challenges which are faced by law reform agencies are very similar, whether the institution serves a large or small country. Limited financial and human resources, with lack of required local expertise in all sectors to enable specialized and effective law reform in all arenas, are some of the major challenges for law reform in small states.² In order to undertake the many obligations imposed on a law reform agency, high quality personnel are required. It may be difficult for an agency to attract and retain suitable persons, and to commit resources for the continuous capacity building of the institution.³

¹ World Bank Group, *Engagement with Small States: Taking Stock* [Operations Policy and Country Services September 8, 2016], at p. 1. *Vide* also Report of the Commonwealth Secretariat/World Bank Joint Task Force on Small States, *Small States: Meeting Challenges in the Global Economy* [April 2000].

² *Vide* A.I. Kalsakau, “The establishment of Vanuatu’s Law Reform Commission” [CALRAs Conference, 2004]. Also, J. Permanand, “Law Reform Challenges & Opportunities for Smaller Law Reform Agencies” [2005] 31(3) CLB 29; J.L. Banda, “Smaller Law Reform Agencies: Prospects and Challenges” [2006] 32(4) CLB 595.

It is apposite to quote what G. Powles, “Challenge of Law Reform in Pacific Island States”, in B. Opeskin & D. Weisbrodt (eds.), *The Promise of Law Reform* [Federation Press, Sydney, 2005], says at p. 414:

“There appears to be a lack of appreciation on the part of finance ministers and treasury officials that law reform requires more than a lawyer and a computer ... in the absence of adequate funding and personnel, it is difficult for full consideration to be given to law reform techniques and processes”.

³ In the Commonwealth Secretariat Paper on “Small States and Law Reform” [LMSCJ (07)11], presented at Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions [Marlborough House, London, 4-5 October 2007], these challenges were highlighted at para. 34 to 37:

“34. First and foremost, in order to undertake the many obligations imposed on an LRA, high quality personnel are required, both commissioners and staff. Even the very small numbers needed for small LRAs may not be available. Senior, trained staff too often leave the LRA, perhaps for more lucrative appointment elsewhere. LRAs tend to find it difficult to attract more staff with the expertise required, due to the inadequate pay it can offer.

35. In order to pursue its functions with the kind of professionalism required for law reform, an LRA must have available to it the resource materials required, access to electronic data, and occasional attendance at relevant international conferences. There should also be continuous training for its staff and attendance at training programmes.

36. It is understandable that, without outside funding, the establishment and support of even a very small LRA can impose a difficult financial burden on a government. In terms of governmental priorities, an LRA is probably ranked at the lower end of the scale.

37. Smaller LRAs often rely heavily on donor funding, commitment and support since they are perceived as vehicles for democratic change. If an LRA is seen as independent and competent, and commands the respect of civil society, donors may be willing to fund its activities. However, this may be a short-term arrangement and an LRA may therefore be faced with the challenge of devising ways of sustaining the current levels of funding in the event of donor fatigue.”

Law reform agencies in small States also face the challenge of developing appropriate and effective law reform processes to ensure maximum input from stakeholders, thereby ensuring its responsiveness to the developing needs of society.⁴

Another major challenge for a law reform agency in a small State is to foster trust and confidence among all its stakeholders in its usefulness and the necessity of its existence as an independent and politically neutral agency. There is need to cultivate political will in support of its activities,⁵ the more so given the “particularism” of relationships in small jurisdictions.⁶

There is also the challenge of living up to expectations. This requires keeping up with demand by avoiding to take on too many projects for their limited capacity. There is also the additional challenge of the time frames for law reform programmes. Criticisms are often levelled against LRAs’ time frames which are seen to be unduly long. The LRAs can be faced with the challenge of convincing government, stakeholders and donors that adequate time frames are necessary to allow for proper research and consultations and that these processes are indispensable in law reform.⁷

⁴ *Ibid.*, at para. 38.

This aspect was also highlighted by M.C. Leung Wai, Attorney-General of Samoa, in his presentation at the ALRAC Conference in 2008 about “Samoa’s Experience with the Establishment of a Law Reform Commission”, at para. 21:

“21. The process of law reform that the Law Reform Commission would adopt involved the Commission attracting ideas from the community and Government agencies. Where the Commission considered that law change was needed and that law change could be readily developed by another Government agency, then it would inform the responsible Minister of its view. The Commission would also assist a Government agency in developing law change ideas by:

(a) providing a forum for discussion of those ideas; and
(b) if necessary, providing research assistance.”

A.I. Kalsakau, in his Paper on “The establishment of Vanuatu’s Law Reform Commission” [CALRAs Conference, 2004], also emphasized that the Steering Committee, set up to look at appropriate support structures for the functioning of the Commission, discussed the need for wide community consultation to ensure the melding of legal tradition with cultural norms and to this end recommended close involvement by Vanuatu Council of Chiefs, including through membership of the Commission.

⁵ In the Commonwealth Secretariat Paper on “Small States and Law Reform” [LMSCJ (07)11], presented at Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions [Marlborough House, London, 4-5 October 2007], it is recognized at para. 39 that “A major challenge for smaller LRAs is to cultivate political will. On occasion a government may suspect that an LRA is inclined to advance either a donor agenda or the opposition agenda, due to the LRA’s independence from mainstream government and its unusual funding arrangements. On the other hand, others may on occasion suspect that a government uses its LRA mainly as an indication of its democratic credibility and as a means of securing donor aid rather than recognising the LRA for what it is.”

⁶ As pointed out by B. Benedict on “Social Aspects of Smallness” [in B. Benedict (ed.), *Problems of Smaller Territories*, 1967, Athlone Press, University of London], at pp. 45 seq., society in a small jurisdiction is characterized by particularistic role-relationships: “The same individuals are brought into contact over and over again in various activities ... In small-scale societies, where alternatives are few and personal relationships are multiplex and highly charged affectively, people often blame failure on the evil intention of others.”

⁷ Commonwealth Secretariat Paper on “Small States and Law Reform” [LMSCJ (07)11], presented at Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions [Marlborough House, London, 4-5 October 2007], at para. 40.

(II) Addressing the Challenges in Small States – Designing the Appropriate Structure for Law Reform Agencies and Providing them with Sufficient Resources

The effectiveness and usefulness of a law reform agency is very much dependent on the manner in which it is designed to carry out its mission, and the resources and support facilities put at its disposal.

(a) Membership of Law Commissions

In a small State, it is crucial to ensure that the various stakeholders in the legal field are represented through membership of the law commission.

A common feature of law commissions is to have a representative of the Judiciary as Member:⁸ a person holding, or having held, judicial office.⁹ In some instances, provision is made for the Chairperson to be a person qualified to hold or holding or having held high judicial office.¹⁰ When the Law Reform Commission of Mauritius was restructured in 2005, the view was taken that there should be a representative of the Judiciary as Member.¹¹

⁸ Some statutes establishing law reform agencies do not specifically require that membership includes a representative of the Judiciary: Section 3 of the Lesotho Law Reform Commission Act 1993; section 4 of Tonga Law Commission Act 2007; section 3 of Vanuatu Law Commission Act 1980.

⁹ Section 3(3) Dominica Law Reform Commission Act 1992; section 3(2) Trinidad and Tobago Law Reform Act 1969 (as amended in 2000); section 3(2) of the Bahamas Law Reform and Revision Act 1975.

Section 7(1)(b) of the Mauritius Law Reform Commission Act 2005 provides that a member of the Commission shall be a representative of the Judiciary appointed by the Chief Justice.

According to section 14(1) of the Samoa Law Reform Commission Act 2008, a judicial officer may, with the approval of the Chief Justice, be appointed as a Commissioner for any law reform project undertaken by the Commission. Section 14(2) is to the effect that, in the event that a judicial officer is appointed as a Commissioner, that appointment shall not affect the Judge's tenure of the judicial office or the Judge's rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as a Judge (including those in relation to superannuation) and, for all purposes, the Judge's services as Commissioner shall be taken to be service as a Judge.

¹⁰ Section 3(1)(a) of the Namibia Law Reform and Development Commission Act 1991 is to the effect that a judge of the Supreme Court or the High Court of Namibia shall be appointed by the President as chairperson.

Section 8(2)(b) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004 provides that a retired judge of the National and Supreme Courts or a person who is eligible for appointment as a Judge of the National and Supreme Courts may be appointed as Chairperson.

Section of the Fiji Law Reform Commission Act 1979 (as amended in 1985) provides that the Chairman of the Commission shall be a person qualified to be appointed as a Judge of the Supreme Court.

¹¹ The Report of the then Law Reform Commission on the "Reform of the law Reform Commission" had this to say:

"The Commission notes that it is a common feature of law reform commissions abroad that at least one of its members is from the judiciary. Often this member is the chairman. There is a feeling that the Commission may be missing on an important dimension with the absence of a judge among its midst. The Commission feels that this anomaly should be corrected. The other members of the Commission would be appointed by the Attorney-General. Given security of tenure with regard to a judicial appointment, the Commission, however, feels that this method of appointment may not be appropriate in this case. The Commission, consequently, recommends that one of its members be a representative of the judiciary appointed by the Chief-Justice."

Some Commissions also provide for a law officer to be member.¹² Experience and expertise developed as a judicial officer or a law officer, with a reflection on the law “as it is”, certainly helps appreciate shortcomings in the law and the soundness of reform proposals to address aspects where the law may have become inadequate or may be incomplete.

Another feature of Law Commissions is for membership to include legal professionals¹³ and law academics.¹⁴ Years of involvement in legal practice and/or legal education and research provide the ability to identify problematic aspects of the law and the type of changes that could be contemplated.

In many jurisdictions provision is also made for lay persons to be Members.¹⁵ This is premised on the understanding that lawyers do not have all the answers when it comes to legal reform and that, in some cases, non-legal responses may be just as effective in handling certain contemporary problems. Inclusion of lay persons without a legal background helps bring balance to the reform process.¹⁶

¹² Section 7(1) of the Mauritius Law Reform Commission Act 2005 provides that the following office holders shall be members of the Commission: The Solicitor-General or his representative and the Director of Public Prosecutions or his representative.

Section 4 (1) (a) of the Lesotho Law Reform Commission Act 1993, as well as section 3 (1) (a) of the Namibia Law Reform and Development Commission Act 1991, makes provision for the Attorney-General to be a member of the Commission.

¹³ Section 3(2) Trinidad and Tobago Law Reform Act 1969 (as amended in 2000) is to the effect that a suitable person for appointment as Commissioner shall be a person with experience as Attorney-at-Law. Section 3(3) of the Vanuatu Law Commission Act 1980 provides that one member shall be a person entitled to practise as a legal practitioner. Also Section 3(3) Dominica Law Reform Commission Act 1992 and section 3(2) of the Bahamas Law Reform and Revision Act 1975.

Section 7(1) of the Mauritius Law Reform Commission Act 2005 makes provision for a barrister-at-law, an attorney and notary to be appointed as Members by the Attorney-General after consultations with the relevant professional body. Section 3(1) (d) and (e) of the Namibia Law Reform and Development Commission Act 1991 also provide that membership includes one practising advocate appointed by the President after consultation with the Council of the Bar of Namibia, and one practising attorney appointed by the President after consultation with the Law Society of Namibia.

¹⁴ Membership of the Mauritius Law Reform Commission includes a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius [Section 7 (1) (g) of the Law Reform Commission Act 2005].

Section 3(3) Dominica Law Reform Commission Act 1992, as well as section 3(2) of the Bahamas Law Reform and Revision Act 1975 and section 3(2) Trinidad and Tobago Law Reform Act 1969 (as amended in 2000), makes provision for a Teacher of law in a University or other Institution of Higher Learning to be appointed as Member.

Section 3 (3) (e) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004 is to the effect that the Dean of the Faculty of Law of the University of Papua New Guinea shall be an *ex officio* member.

¹⁵ Section 7 (1) (h) of the Mauritius Law Reform Commission Act 2005 provides for the appointment of two members of civil society as members.

Section 3(3) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004 provides for the appointment as members of a person having qualifications and experience in anthropology, sociology or political science; and one person nominated by the Papua New Guinea Council of Churches to represent the Churches.

Section 3 (3) of the Solomon Law Reform Commission Act 1994 provides for the appointment as Members of persons having knowledge and interest in the following—

(a) social welfare and religious affairs;
(b) criminal administration; or
(c) sociology, anthropology or Solomon Islands culture.

¹⁶ *Vide* G. Murphy, *Law Reform Agencies* [Canada Ministry of Justice, 2004], at p. 35.

(b) Staffing

The viability and performance of a Law Commission is heavily dependent upon it having the core personnel, committed to comparative legal research and abled to engage meaningfully with stakeholders. It is important therefore that the Act establishing a Law Commission deals with staff matters and confers power to recruit personnel.

In some small Commonwealth States, the Act establishing a Law Commission does not even deal with staff matters.¹⁷ This is a serious impediment to a Law Commission realizing its mission. It is difficult for the Chairperson, or any other member, of a Commission to wear two hats, being the Chairman/member and a research officer as well.¹⁸

In other small Commonwealth States, provision is made in the Act for the Commission to be assisted by officers and employees in the public service made available to it.¹⁹ This arrangement may be helpful but may turn out on occasion not to be satisfactory. Thus in Mauritius the Law Reform Commission, which was first established in 1992 and operated until 2006 when it was abolished and a new Commission set up, could not operate effectively because of unavailability of staff:

“The Commission at present does not have any staff. The Act envisaged that the Attorney-General’s office would provide “officers to assist the Commission in the discharge of its functions”. This has never materialised. The Commission understands that the Attorney-General’s office is under heavy pressure as far as staffing is concerned and understands that it may not be in a position to delegate any officer to the Commission to assist it.

Yet not a single law reform commission abroad operates without a full team of professional staff of its own

...

¹⁷ There are no provisions in the Dominica Law Reform Commission Act 1992 regarding staff matters. It’s same regarding the Trinidad and Tobago Law Reform Act 1969 (as amended in 2000), as well as the Fiji Law Reform Commission Act 1979 (as amended in 1985)

¹⁸ *Vide* F. Kabui & A. Guthleben, “The Establishment of a Commission in Solomon Islands” [ALRAC Conference, 2004], where they had this to say in their Presentation at pp. 3 and 4:

“It became apparent at home that the Chairman had to wear two hats, being the Chairman and the research officer as well. The Chairman began to think about what terms of reference there should be for the Law Reform Commission, thus creating work for the Law Reform Commission. The belief was that law reform was to be a long term program and its foundation had to be laid firmly at its inception bearing that in mind. The Chairman drew up ten references and put them up to the Minister for his approval. The Minister approved them and returned them to the Chairman ...

Of the ten references referred to above, there were a few short references, namely; the review of the timber rights acquisition procedure for the harvesting of timber on customary land; land below high water mark and the law of treason. Work on these references had not progressed to the final report stage. Some very preliminary work had been done on the review of the law of marriage. The other references remained untouched.”

¹⁹ Section 11 (2) of the Namibia Law Reform and Development Commission Act 1991 thus provides that, in the exercise of its powers and the performance of its duties and functions under this Act, the Commission and its secretary shall be assisted by officers and employees in the public service made available for such purpose by the Permanent Secretary for Justice.

Section 6 (4) of the Mauritius Law Reform Commission Act 1992 [repealed by the 2005 Act] also provided that the Attorney-General may designate a public officer to act as Secretary to the Commission and such other officers to assist the Commission in the discharge of its functions.

The lack of staff seems to have been the major stumbling block to the proper operation of the Commission. Researching a theme, debating on it and writing up a report are all time consuming. It was not very realistic to have expected part-time members and a part-time Chairman to undertake the work in the absence of officers delegated by the Attorney-General's Office."²⁰

In a number of small Commonwealth States, although the staff are public servants recruited by a Public Service Commission or other equivalent body, provision is also made for the recruitment of personnel by the Law Commission.²¹ It is crucial for a Commission to be entrusted the power to recruit personnel on such terms and conditions as it may think fit (having regard to pay grading in the public service and the need to recruit and retain competent personnel).²² In order to enable a Commission to evolve into a strong institution, it is essential that it should have high level core personnel which can develop expertise in law reform and keep the impetus over time. Members, who more often than not are part-timers and will all, most likely, be at the Commission for a definite period of time, are unlikely to be able to provide that sort of momentum.²³

Staff must be managed, supervised and given a sense of direction. It is therefore not uncommon for Acts establishing Law Commissions to make provision for the appointment of a Chief Executive Officer or Executive Director or Secretary,²⁴ who is a high ranking officer on whose

²⁰ Report of the then Mauritius Law Reform Commission on "The Reform of the Law Reform Commission" [2004] at pp. 18-19.

²¹ According to section 14 of the Lesotho Law Reform Commission Act 1993, the staff of the Commission shall be persons appointed or employed under the Public Service Order 1970 or employed under terms and conditions determined by the Minister.

Section 21 of the Papua New Guinea Constitutional and Law Reform Commission Act 2004 is to the effect that the staff of the Commission shall be officers or employees of the Public Service, but this does not prevent any person from being employed by the Commission, on contract or otherwise, for the purposes of the Commission.

Section 8 of the Solomon Law Reform Commission Act 1994 also provides that staff required for the purposes of the Act shall be officers or employees of the Public Service, but that does not prevent any person from being employed on contract or otherwise, under any other law to perform functions in relation to the Commission.

²² Section 13 (3) of the Mauritius Law Reform Commission Act 2005 confers on the Commission the power to appoint, on such terms and conditions as it may determine, such persons as it thinks necessary for the efficient carrying out of its functions under the Act.

²³ Report of the then Mauritius Law Reform Commission on "The Reform of the Law Reform Commission" [2004] at pp. 20-21.

²⁴ Section 14 (1) of the Namibia Law Reform and Development Commission Act 1991, as well as section 17 (1) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004, section 7 (1) of the Solomon Law Reform Commission Act 1994 and section 5 (1) of the Vanuatu Law Commission Act, provides for the post of Secretary to the Commission to oversee the work of staff.

Section 6 (1) (a) of the Tonga Law Commission Act 2007 provides for the post of Director of the Commission, who shall be legally qualified.

Section 10 of the Samoa Law Reform Commission Act makes provision for the post of Executive Director, who is the administrative head of the Commission and has responsibility to supervise and direct the work of the Commission. The Executive Director shall be a person who holds a recognized law degree, has at least five years' experience as a barrister and/or solicitor, or in other legal work (including suitable academic positions).

Section 11 of the Mauritius Law Reform Commission Act 2005 provides that there shall be a Chief Executive Officer, a legally qualified person who has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

shoulder the proper functioning of the Commission will rest, to ensure the work of the Commission is effectively carried out. There is also the need for staff to be trained properly and continuously.²⁵

(c) Recourse to Consultants and other Persons with Specialized Knowledge

A Law Reform Agency in a small State may be called upon to review aspects of the law requiring specialized knowledge, and in respect of which members and staff may not have the required expertise. Most of the Law Commissions in small Commonwealth States have been conferred the power to recruit Consultants for any of their projects.²⁶

²⁵ F. Kabui & A. Guthleben, in their Presentation on “The Establishment of a Commission in Solomon Islands” [ALRAC Conference, 2004], at pp. 3 and 4, made pertinent remarks about the training needs of research staff:

“In terms of the policy skills that LRC lawyers should possess, we recognised that it was essential, in terms of sustainability and maximising the benefit to the lawyers and the country, that the recruitment, induction and education of our lawyers be as broad and inclusive as possible. Ideally over an extended period of time our lawyers will develop their essential skills in research, writing and legal policy formulation to a very high standard. In addition, they will need to be skilled in providing drafting instructions and working with parliamentary drafters to develop legislation. They will have to work closely with other Ministries and the judiciary as an integral part of the reform process to understand the capacity and limitations of the relevant agencies. The full range of legal policy skills will be developed and exercised to turn their research and intellectual work into practical, effective legislation.”

²⁶ According to section 15 (1) of the Lesotho Law Reform Commission Act 1993, the chairperson may, with the approval of the Minister, engage persons having suitable qualifications and experience as advisers or consultants to the Commission. Section 7 (6) of the Namibia Law Reform and Development Commission Act is to the effect that the Commission may, with the approval of the Minister in consultation with the Minister of Finance, on a temporary basis or for a particular matter which is being examined by it, employ any person with special knowledge of any matter relating to the work of the Commission, or obtain the co-operation of any body, to advise or assist the Commission in the exercise of its powers and the performance of its duties and functions under the Act.

Section 5 (1) (a) of the Trinidad and Tobago Law Reform Act 1969 (as amended in 2000) provides that the Commission may, in the performance of its functions consult any person who has specialised knowledge in any branch of the law or technical expertise in any particular field.

Section 13 of the Tonga Law Commission Act 2007 is to the effect that the Commission may, for the purpose of any aspect of its functions or for the examination by the Commission of any particular law, engage specialists on a temporary basis to advise the Commission or consider any matter which should, in the opinion of the Commission, be referred to such person and to report thereon to the Commission. Section 13(1) of the Samoa Law Reform Commission Act 2008, as well as section 3 (6) of the Fiji Law Reform Commission Act 1979 (as amended in 1985), makes provision for the appointment of consultants.

According to section 14 of the Mauritius Law Reform Commission Act 2005, the Commission may engage, on such terms and conditions as it may determine, persons with suitable qualifications and experience as consultants to the Commission. Pursuant to section 14 of the Act, Robert Louis Garron, *Professeur Honoraire* at the Faculty of Law of the University of Aix-Marseille, has been working for the Commission as Law Reform Consultant for the reform of the Code Civil Mauricien, the Code de Commerce and the Code de Procédure Civile. Professor Romain Ollard, Vice-Doyen of the Faculty of Law of the University of Réunion, is currently providing assistance on an *ad hoc* basis as Consultant for the reform of the Criminal Code.

Law Commissions have also been conferred the power to establish an advisory committee or panel, for advising and assisting it in any particular project, which may consist of persons having specialised knowledge in, or particularly affected by, the matter to be studied.²⁷

(d) Funding & Operational Capability

The operating expenses of Law Commissions in Small States are invariably met from grants provided by their Parliament, with provision being made for them to be able to benefit from donor assistance.²⁸ Funding is a critical issue for any Law Reform Agency; it demonstrates the political willingness to commit funds to the process.²⁹ Funding must be sufficient to enable it effectively discharge its mission with competent and motivated staff operating in a conducive environment (adequate office space with the required logistics).³⁰

²⁷ Section 5 (1) of the Trinidad and Tobago Law Reform Act 1969 (as amended) makes provision for the appointment of committees by the Commission to provide advice and information and to consider and report on any matter under consideration; appointment of persons as members of a committee is not restricted to members of the legal profession. Section 4 (3) of the Dominica Law Reform Commission Act 1992 also provides that the Commission may set up temporary or standing Committees to examine particular branches of the law with a view to making recommendations as to reform, either in the form of proposals, reports or Draft Bills.

Under section 3 (6) of the Fiji Law Reform Commission Act 1979 (as amended in 1985), for the purposes of the examination by the Commission of any particular branch of the law, the Attorney-General may appoint on a temporary basis a committee to advise the Commission and to consider any matter which should, in the opinion of the Commission, be referred to such committee and to report thereon to the Commission.

Under section 10 (1) (b) (ii) of the Namibia Law Reform and Development Commission Act 1991, the Commission may, if it deems it necessary for the effective performance of its duties or functions, establish a committee, which shall consist of such members of the Commission as the Commission may designate and the other persons appointed by the Minister for the period determined by the Minister.

According to section 8 (1) of the Mauritius Law Reform Commission Act 2005, for the purposes of advising and assisting the Commission in any particular project, the Commission may establish an advisory panel presided over by a member and consisting of persons having specialised knowledge in, or particularly affected by, the matter to be studied and such other members as the Commission may deem appropriate. Currently, there are three Advisory Panels, dealing respectively with "Family Law and Law of Persons", "Financial Services Law", and the "Jury System".

²⁸ *Vide*, for instance, section 16 of the Lesotho Law Reform Commission Act 1993, section 15 (1) of the Mauritius Law Reform Commission Act 2005, section 9 of the Solomon Law Reform Commission Act 1994.

²⁹ What is said in the 2011 Annual Report of the Vanuatu Law Commission is indicative of the type of constraints a Law Reform Agency may face in a small State:

"While the Law Commission Act [Cap 115] (the Act) has been in place since 1980, steps to formally establish the VLC were not taken until 2009. In August 2011, the first Secretary of the VLC, Mrs Bertha Pakoasongi, was appointed."

³⁰ It is quite apposite to refer to what was said by F. Kabui & A. Guthleben, in their Presentation on "The Establishment of a Commission in Solomon Islands" [ALRAC Conference, 2004], at pp. 4-5:

"In 2005, the then Minister responsible for law and justice appointed the former Chairman of the then defunct Law Reform Commission, a sitting High Court judge, the acting Chairman of the Law Reform Commission. The Minister also appointed the four other part-time members of the Commission. These appointments were rather symbolic in nature in that there was no budget for the Law Reform Commission for the financial year 2005 ... There was however a budget for the Law Reform Commission for the financial year 2006.

In April, 2006, the acting Chairman of the Law Reform Commission retired from the bench and was immediately appointed the full-time Chairman of the Law Reform Commission. Although there was a budget, the Law Reform Commission (again) had no staff, office, stationary, furniture and equipment. The new Chairman had to operate from his High Court Chambers with the permission of the Chief Justice as a temporary measure until the Commission found a home. Immediate recruitment of staff was not possible due to lack of office space. The task of finding a suitable office space took longer than expected ... In late

(III) Living Up to the Challenges in Small States – Functions & Powers of Law Reform Agencies and their Working Methodology

(a) Functions & Powers of Law Commissions

Law Commissions in Small Commonwealth States are invariably mandated to review laws and make recommendations for reform.³¹ Their functions may include the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments, the simplification of the law, the development of new approaches to and new concepts of the law in keeping with the changing needs of society, the adoption of new or more effective and economical methods for the administration of the law and the dispensation of justice,³² as well as the codification of the law.³³

In some States, Law Commissions are tasked to review customary law.³⁴

October, 2006, an office was located and rented by AusAID for the Commission plus the purchase of furniture, computers, stationary, telephone service etc. The Chairman, a typist and a clerk immediately moved into the new premises.”

³¹ For instance, section 4 (1) of the Mauritius Law Reform Commission Act 2005 is to the effect that the functions of the Commission shall be to keep under review in a systematic way the law of Mauritius; to make recommendations for the reform and development of the law of Mauritius; and to advise the Attorney-General on ways in which the law of Mauritius can be made as understandable and accessible as is practicable.

Section 6 (b) of the Samoa Law Reform Commission Act 2008 provides that the functions of the Commission are to research and analyse areas of law considered to be in need of reform and report its recommendations for reform.

³² For instance, section 4 (1) of the Trinidad and Tobago Law Reform Act 1969 (as amended in 2000) is to the effect that it shall be the duty of the Commission to keep under review all the law applicable to Trinidad and Tobago with a view to its systematic development and reform, including in particular the modification of any branch of the law as far as that is practicable, 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.

Section 7 (1) (a) of the Lesotho Law Reform Commission Act 1993 provides that the functions of the Commission are to review the laws of Lesotho with a view to the systematic development and reform of law, including in particular

- (i) the modernization of the law by bringing it into accord with current conditions; and
- (ii) the elimination of defects in the law; and
- (iii) the simplification of the law; and
- (iv) the adoption of new or more effective methods for the administration of the law.

Vide also section 6 of the Namibia Law Reform and Development Commission Act 1991, section 4 of the Bahamas Law Reform and Revision Act 1975, section 4 (1) of the Dominica Law Reform Commission Act 1992, section 5 (1) of the Fiji Law Reform Commission Act 1979 (as amended in 1985), section 12 (2) of the Papua New Guinea Constitutional and Law Reform Commission Act of 2004, section 5 (1) of the Solomon Law Reform Commission Act 1994, section 29 (1) of the Tonga Law Commission Act 2007, section 7 of the Vanuatu Law Commission Act 1980, as well as section of the Cayman Law Reform Commission Law 6 of 2005.

³³ Such as Section 4 of the Bahamas Law Reform and Revision Act 1975; section 6 (b) of the Namibia Law Reform and Development Commission Act 1991; section 5 (1) (a) Fiji Law Reform Commission Act 1979 (as amended in 1985); section 29 (1) (a) of the Tonga Law Commission Act 2007.

³⁴ Section 6 (c) of the Namibia Law Reform and Development Commission Act 1991 provides that one of the objects of the Commission shall be the integration or harmonization of the customary law with the common and statutory law. Section 12 (2) (d) of the Papua New Guinea Constitutional and Law Reform Commission Act of 2004, as well as section 5 (1) (d) of the Solomon Law Reform Commission Act 1994, requires of the Commission that it makes recommendations in relation to the restatement, codification, amendment or reform of customary laws. is also to the same effect.

A Law Commission may also exceptionally be required to review the workings of the Constitution³⁵ and submit comments on any Bill.³⁶

The aspects of the law to be reviewed are generally referred to the Law Commission by the Law Minister,³⁷ who may also request the Commission to provide advice and information to Ministries and departments of the Government and other authorities or persons concerned with proposals for the amendment or reform of any branch of the law.³⁸ There is also the opportunity given to the

According to section 7 (b) of the Vanuatu Law Commission Act 1980, one of the functions of the Commission is the reflection in the law of the distinctive concepts of custom, the common and civil law legal systems and the reconciliation where appropriate of differences in those concepts.

Section 4 of the Samoa Law Reform Commission Act lays down that the purpose of the Act is to facilitate the review, reform and development of the laws of Samoa in order to:

- (a) promote Samoan custom and traditions;
- (b) enhance the social, cultural, economic and commercial development of Samoa; and
- (c) ensure that the laws of Samoa are kept in a modern state which meets the needs of Government and the community.

³⁵ Section 12 (1) of the Papua New Guinea Constitutional and Law Reform Commission Act of 2004 requires of the Constitutional and Law Reform Commission provides that the Commission shall inquire into and review the workings of the Constitution and the Organic Laws, and inquire into such other matters of a constitutional nature as directed by the Head of State.

As to the constitutional dimensions of law reform in the Pacific, vide G. Powles, "Challenge of Law Reform in Pacific Island States", in B. Opeskin & D. Weisbrodt (eds.), *The Promise of Law Reform* [Federation Press, Sydney, 2005], says at pp. 416-419.

³⁶ According to section 9 of the Vanuatu Law Commission Act 1980

- (1) When a Government bill is published the Commission may submit comments and recommendations on the bill by notice in writing to the Speaker before any debate on the bill is commenced;
- (2) When the Speaker receives a private member's bill he shall furnish the Commission with a copy so that it may, if it considers fit, give the Speaker notice of its comments and recommendations as provided in subsection (1) for Government bills;
- (3) The Speaker shall provide each member of Parliament with a copy of any notice of the Commission received in accordance with subsection (1) or (2) as soon as practicable after he has received it.

³⁷ Section 6 (1) of the Mauritius Law Reform Commission Act 2005 thus provides that the Attorney-General may, at any time, request the Commission to examine any aspect of the law of Mauritius, and the Commission shall review that aspect of the law accordingly and report to the Attorney-General thereon with its recommendations.

Under section 6 (b) of the Samoa Law Reform Commission Act 2008, the functions of the Commission are, inter alia, in accordance with references made to it by the Prime Minister, Cabinet or the Attorney General (whether at the Commission's suggestion or otherwise), to research and analyse areas of law considered to be in need of reform and report its recommendations for reform to the Prime Minister and the Attorney General. Section 9 (3) further provides that the Prime Minister, Cabinet and the Attorney General may at any time require the Commission to examine any aspect of the laws of Samoa and the Commission shall review the law accordingly and report to the Prime Minister with its recommendations.

Vide also, for instance, section 7 (1) (b) to (e) of the Lesotho Law Reform Commission Act 1993; section 4 (2) (a) of the Dominica Law Reform Commission Act 1992; section 5 (2) (a) of the Fiji Law Reform Commission Act 1979 (as amended in 1985); section 12 (2) of the Papua New Guinea Constitutional and Law Reform Commission Act of 2004; Section 5 (1) of the Solomon Law Reform Commission Act 1994; section 29 (2) (c) of the Tonga Law Commission Act 2007; and section 8 (a) of the Vanuatu Law Commission Act 1980.

³⁸ Section 4 (d) of the Bahamas Law Reform and Revision Act 1975; section 4 (2) (d) of the Dominica Law Reform Commission Act 1992; section 4 (1) (f) of the Trinidad and Tobago Law Reform Act 1969 (as amended in 2000); section 29 (2) (c) of the Tonga Law Commission Act 2007.

In some instances, such function can be performed without the need for request from the Law Minister. Section 6 (c) of the Samoa Law Reform Commission Act 2008 thus provides as one of the functions of the Commission that it shall advise Government Ministries and agencies on the manner or content of reviews of the law conducted by those

Law Commission to consider proposals from stakeholders³⁹ and to embark on projects on its own initiative,⁴⁰ with the approval of the Law Minister.⁴¹ The rationale is that:

Ministries and agencies. According to section 11 (b) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004, the Commission shall provide advice and information to any government department or governmental institution, authority, organisation, instrumentality or body concerned with proposals for the reform or amendment of a law.

³⁹ Section 7 (2) of the Namibia Law Reform and Development Commission Act 1991 provides that the Commission may invite and receive any suggestions relating to its objects from any person or body and may include such suggestions in its work program. According to section 4 (1) (a) and (b) of the Trinidad and Tobago Law Reform Act 1969 (as amended in 2000), the Commission may receive and consider suggestions for the reform of the law which may be forwarded to it (either on the invitation of the Commission or otherwise) by Judges, public officials, lawyers and members of the public generally; receive and consider proposals for changes in the law recommended by any Law Reform Committee, Association of Lawyers or other learned bodies. Section 4 (2) (a) of the Dominica Law Reform Commission Act 1992 is also to the effect that the Commission may, in the exercise of its functions, receive and consider proposals for changes in the law recommended by any Law Reform Committee, Association of Lawyers or other learned body. *Vide* also section 5 (2) (b) of the Fiji Law Reform Commission Act 1979 (as amended in 1985), section 29 (2) (b) of the Tonga Law Commission Act 2007 and section 8 (a) of the Vanuatu Law Commission Act 1980.

According to section 5 (2) (a) of the Mauritius Law Reform Commission Act 2005, the Commission may consider any proposal made to it by any person; the Commission has indicated, in its 2008 Annual Program of Review, Reform and Development of the Law, at p. 2, the criteria used for the selection of Projects:

- (1) Importance of the issues: there is a major problem in that area of law; the law is unsatisfactory (it is unfair, unduly complex, unclear, inaccessible or outdated); and the potential benefits likely to accrue from undertaking reform are significant (it affects many people and there is a real demand for reform);
- (2) Suitability of the issues to be dealt with: the problem is predominantly legal and there is likely to be a solution; changes and improvements in the law can appropriately be put forward after legal (including socio-legal) research and consultation, and there is a fair chance that the proposed solution is likely to be implemented. This would tend to exclude subjects where the considerations are shaped primarily by political judgments;
- (3) Availability of resources in terms of both expertise and funding: legal expertise and funding are likely to be available; there is a real prospect for the project to be completed to a very high standard and in a reasonable period.

⁴⁰ Section 8 (b) of the Vanuatu law Commission Act 1980 is to the effect that the Commission may on its own initiative carry out such studies and research of a legal nature as it may consider necessary for carrying out its functions including research relating to other legal systems. *Vide* also section 5 (2) (a) of the Mauritius Law Reform Commission Act 2005.

⁴¹ It is typically provided in the legislation establishing a Law Commission that it is required to submit to the Law Minister, for his approval, a programme for the review of specified aspects of the law. Section 4 (1) (c) of the Trinidad and Tobago law Reform Act 1969 (as amended in 2000) provides that the Commission shall prepare and submit to the Minister from time to time specific programmes for the examination of different branches of the law with a view to reform including recommendations as to whether such examination should be carried out by the Commission or some other body. Section 4 (b) of the Bahamas Law Reform and Revision Act 1975, as well as section 4 (3) Mauritius law Reform Commission Act 2005, is to the same effect.

Subsections (1) and (3) of section 7 of the Namibia Law Reform and Development Commission Act 1991 are to the effect that, in order to achieve its objects, the Commission shall from time to time prepare and submit to the Minister for approval, programmes in which the various matters which in its opinion require consideration are included in order of priority, and that the Commission shall, as far as possible in order of priority, examine the matters appearing on any programme as approved or amended by the Minister. Similarly, section 6 of the Fiji Law reform commission Act 1979 (as amended in 1985) provides that the Commission shall, before setting a work programme for any year, seek the approval of such programme by the Cabinet through the Attorney-General, and the implementation of such programme is subject to that approval and the degree of priority (if any) decided on by the Cabinet and notified by the Attorney-General to the Commission. Section 9 (1) (a) and 9 (4) of the Samoa Law Reform Commission Act 2008, as well as section 30 of the Tonga Law Commission Act 2007, are to the same effect.

“Having a Law Reform Commission that has a law reform agenda completely different from Government could mean that its recommendations would probably only fall on deaf ears. Whilst it is important that Law Reform Commission be allowed to look into areas of law not required by Government, its resources should not all be directed into such areas.”⁴²

In some instances, Law Commissions are also requested, when making recommendations for reform, to prepare draft legislation.⁴³ This helps tap the benefits that a legislative drafter may bring to the law reform process,⁴⁴ thereby ensuring that “if Government wants to take the law reform to the next level, it can easily refer the draft law to the Attorney General’s Office to be finalised for referral to Cabinet before reaching Parliament.”⁴⁵

To perform their functions, Law Commissions are empowered to request information from any Government department, any organization or person in relation to the review, reform or development of any aspect of the law;⁴⁶ obtain such information in regard to the laws and legal systems of other countries as is likely to facilitate the performance of any of its functions;⁴⁷ initiate, sponsor and carry out such studies and research;⁴⁸ publicize its work, conduct public hearings, seek comments from the public on its proposals, consult any person or class of persons;⁴⁹ hold seminars and conferences on appropriate legal issues.⁵⁰

⁴² M.C. Leung Wai, Attorney-General of Samoa, in his presentation at the ALRAC Conference in 2008 about “Samoa’s Experience with the Establishment of a Law Reform Commission”, at para. 35.

⁴³ According to section 4 (2) of the Mauritius Law Reform Commission Act 2005, the Commission shall, when making its recommendations, where applicable and as far as practicable, attach a draft bill to the recommendations. Section 7 (4) of the Namibia Law Reform and Development Commission Act 1991 is to the effect that, if after examining any matter the Commission is of the opinion that legislation ought to be enacted with regard to that matter, the Commission shall prepare draft legislation for that purpose. Vide also section 4 (c) of the of the Bahamas Law Reform and Revision Act 1975; section 4 (2) (b) of the Dominica Law Reform Commission Act 1992; section 4 (1) (d) of the Trinidad and Tobago Law Reform Act 1969 (as amended in 2000); section 29 (2) (d) of the Tonga Law Commission Act 2007.

⁴⁴ *Vide* P.P. Biribonwoha, “The Role of Legislative Drafting in the Law Reform Process” [2006] 32(4) CLB 601-608.

⁴⁵ M.C. Leung Wai, Attorney-General of Samoa, in his presentation at the ALRAC Conference in 2008 about “Samoa’s Experience with the Establishment of a Law Reform Commission”, at para. 35.

⁴⁶ Section 11 (a) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004; section 5 (2) (d) of the Mauritius Law Reform Commission Act 2005; section 7 (2) (b) of the Samoa Law Reform Commission Act 2008; section 6 (a) of the Solomon Law Reform Commission Act 1994.

⁴⁷ Section 4 (e) of the Bahamas Law Reform and Revision Act 1975; section 4 (2) (e) of the Dominica Law Reform Commission Act 1992; section 4 (1) (g) of the Trinidad and Tobago Law Reform Act 1969 (as amended in 2000); section 11 (g) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004; section 6 (g) of the Solomon Law Reform Commission Act 1994.

⁴⁸ Section 5 (2) (b) of the Mauritius Law Reform Commission Act 2005; section 11 (e) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004; section 7 (2) (a) of the Samoa Law Reform Commission Act 2008; section 6 (e) of the Solomon Law Reform Commission Act 1994.

Section 8 (b) of the Vanuatu Law Commission Act 1980 is to the effect that the Commission may, for the performance of its functions, on its own initiative carry out such studies and research of a legal nature as it may consider necessary including research relating to other legal systems.

⁴⁹ Section 5 (2) (c) of the Mauritius Law Reform Commission Act 2005; section 7 (2) (c) of the Samoa Law Reform Commission Act 2008.

⁵⁰ Section 11 (d) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004; section 6 (d) of the Solomon Law Reform Commission Act 1994.

In some instances, a Law Commission may be empowered to summon witnesses and call for the production of document, with the same powers as a High Court or a Commission established under the Commission of Inquiry Act.⁵¹

In order to render a Law Commission accountable to the Legislature, and make the latter aware of its work (and its recommendations for changes to the law), the Commission is statutorily required to submit periodic reports (generally annually) on its activities to the Law Minister for tabling in Parliament.⁵² In Papua New Guinea, provision is made for the reports and recommendations of the Constitutional and Law Reform Commission to be brought to the attention of Parliament.⁵³

⁵¹ Section 7 (5) of the Namibia Law Reform and Development Commission Act 1991 entrusts to the Commission the following powers:

- (a)
 - (i) For the purpose of ascertaining any matter relating to a subject being examined by it, the Commission shall have the powers which the High Court of Namibia has, to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects.
 - (ii) A summons for the attendance of a witness or for the production of any book, document or object before the Commission shall be signed and issued by the secretary of the Commission in a form prescribed by the chairperson of the Commission, and shall be served in the same manner as a summons for the attendance of a witness at a criminal trial in the High Court of Namibia.
 - (iii) If required to do so by the chairperson of the Commission a witness shall, before giving evidence, take an oath or make an affirmation, which oath or affirmation shall be administered by the chairperson or such official of the Commission as the chairperson may designate.
 - (iv) Any person who has been summoned to attend any sitting of the Commission as a witness or who has given evidence before the Commission shall be entitled to the same witness fees, as if he or she had been summoned to attend or had given evidence at a criminal trial in the High Court of Namibia held at the place of such sitting, and in connection with the giving of any evidence or the production of any book or document before the Commission, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book or document in that court, shall apply.
- (b) Where the Commission has summoned any person in accordance with this subsection, the evidence and addresses of such a person shall be heard by the Commission in public, but the chairperson of the Commission may, in his or her discretion, exclude from the place where such evidence is to be given or such address is to be delivered any person whose presence at the hearing of such evidence or address is, in his or her opinion, not necessary or desirable.

According to section 12 (5) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004, the members of the Commission shall have, for the purposes of any inquiry, all the powers, authorities, protections and immunities conferred on a Commission under the Commissions of Inquiry Act 1951.

⁵² According to subsections (2) and (3) of section 9 of the Namibia Law Reform and Development Commission Act 1991, the Commission shall annually not later than the first day of March submit to the Minister a report on all its activities during the previous year, and the report submitted to the Minister shall be laid upon the Table of the National Assembly by the Minister within one month after receipt thereof if the National Assembly is then in ordinary session, or, if the National Assembly is not then in ordinary session, within one month after the commencement of its next ensuing ordinary session. Section 7 of the Trinidad and Tobago Law Reform Act provides that the Commission shall submit an annual Report of its activities to the Minister who shall cause the report to be laid in Parliament. *Vide* also section 5 of the Bahamas Law Reform and Revision Act 1975, as well as section 17 of the Mauritius Law Reform Commission Act 2005, section 5(3) of the Fiji Law Reform Commission Act 1979 (as amended in 1985), section 9 of the Samoa Law Reform Commission Act 2008, and section 10 of the Solomon Law Reform Commission Act 1994, which provide for annual submissions of report of Commission on its activities to the Legislature.

⁵³ Section 15 (5) of the Papua New Guinea Constitutional and Law Reform Commission Act 2004 is to the effect that reports and recommendations of the Commission, on the workings of the Constitution and its Organic Laws, shall be forwarded to the Minister through the office of the Attorney-General for presentation to Parliament. Section 12 (2) (f) of the Act provides that the Commission, in reviewing other laws, shall liaise with the National Government and any other implementing Parliament about its recommendations. Section 16 of the Act further provides that, if the

(b) Working Methodology of Law Commissions

Although a Law Commission in a small State would be committed to comparative legal research in order to evaluate the merits and demerits of its law in the light of the experience of other jurisdictions (laws should reflect best international practices),⁵⁴ legal transplants must be made to adapt to the local context: laws must reflect and advance a country's social and economic interests. A Law Commission would have to be mindful to avoid importing "models" and transplanting laws that are inconsistent with national legal, customary and socio-economic norms.⁵⁵

Consultations with all the relevant stakeholders should be regarded as crucial for the performance of a Law Commission's functions and must invariably be resorted to in order to develop greater awareness of legal issues and contribute to capacity building for those called upon to apply the law.⁵⁶ The main reasons for consultation are: to establish how other people view the problems; find out what they think of the Commissions proposed solutions; alert the Commission on how the law works in practice; refine the proposals of the Commission; reinforce democratic values and give people a chance to be heard; and build a consensus in favour of reform.⁵⁷

Without consultation, without engagement with the law reform process, there can be no sense by the community of the relevance of the laws to their way of life and the importance of the rule of law in their day-to-day business. A sense of ownership is derived from consultation and

Parliament or a Committee of the Parliament requires the Commission to furnish to any information concerning the performance of the functions or the exercise of the powers of the Commission, the Commission shall comply with the requirement.

⁵⁴ The Mauritius Law Reform Commission in a Brief on its Work in September 2016, had this to say at para. 25:

"The Commission considers that its primary function is of ensuring our laws are in conformity with constitutional and human rights standards, as well as with our international obligations.

With the integration of Mauritius in the international economy, there is mounting pressure to adopt new laws to reflect international standards. Policies can no longer be devised in ignorance of international norms and practices, hence the need for adequate research so that policy makers are made fully aware of the integration of proposed legislative changes.

Our laws, in the opinion of the Commission, should reflect best international practices. The Commission is thus committed to comparative legal research in order to evaluate the merits and demerits of our law in the light of the experience of other jurisdictions. The Commission also holds the view that, where possible, any proposed solution must be tested against empirical evidence.

The Commission's vision is that of just, fair and efficient laws. Laws must reflect and advance the Nation's social and economic interests, in the light of the exigencies of globalization."

⁵⁵ In his presentation at ALRAC 2008 Conference on "The Birth and Rebirth of law Reform Agencies: The Establishment of the Vanuatu Law Commission", A.I. Kalsakau, Attorney-General of Vanuatu, laid emphasis on this aspect. This is what he had to say:

"New laws in all jurisdictions are often inspired by foreign experiences ... in developing countries "legal transplants" or imported laws are common practice. Whilst well intentioned, donors and law reformers need to avoid the trap of drafting new laws to effect change and overcome loop holes or deficiencies with current systems without fully appreciating and understanding the role of custom traditions and the way institutions and enforcement agencies functions and are resourced. New laws do not solve problems simply by virtue of the fact they exist and laws and regulations that are overly complex or fail to take local context into account will not be effective and can in fact create more problems than they solve."

⁵⁶ *Vide*, for instance, Mauritius Law Reform Commission's Brief on its Work, September 2016, at para. 26.

⁵⁷ Namibia Law Reform and Development Commission, "Operating Manual for Law Reform", at p. 13.

Vide also R. Atkinson, 'Law Reform and Accessibility' (2004) *The Commonwealth Lawyer* 13(2) 29, where the author notes that public consultations and meetings serve two important purposes: to provide members of the public with an opportunity to raise concerns and express their views and to enable the Commission to perform an educational role.

participation in the process. Without this engagement, there is always the potential for conflict.⁵⁸ A Law Commission contributes to the strengthening of good governance and legitimacy by engaging communities in public debate over important social, legal, economic and political concerns and by recommending to legislatures areas of law that impede good governance and/or which are inequitable, discriminatory or otherwise in need of reform.⁵⁹

Following the necessary research, discussion and consultation on any project, a Law Commission normally produces one of the following publications:

- (a) Issue Paper: this is a paper identifying issues on which interested parties are invited to make submissions;
- (b) Research Paper or Review Paper: this contains the findings of research (analytical or empirical) done on specific topics;
- (c) Consultation Paper: a paper highlighting matters regarded as problematic and outlining reform options;
- (d) Discussion Paper or Working Paper or Position Paper: a thorough paper on an area of the law regarded as unsatisfactory with proposals for reform;
- (e) Report: This sets out the results of the Commission's research and consultation and usually makes a number of recommendations for law reform to Government (including the inclusion of a draft Bill).⁶⁰

(IV) Contribution of Law Reform Agencies in Small States to the Development of the Law

In a small State, a Law Commission does not have to be large or expensive to make a worthwhile contribution to the development of the laws of its country.⁶¹ It suffices that it has adequate resources put at its disposal and that it operates in an environment conducive to law reform.

⁵⁸ *Vide* G. Powles, "Challenge of Law Reform in Pacific Island States", in B. Opeskin & D. Weisbrodt (eds.), *The Promise of Law Reform* [Federation Press, Sydney, 2005], quoting Mr. M. Qetaki, Chairman of Fiji Law Reform Commission, in his 'Commentary on "Law Reform in the Pacific Area" [Paper presented at 2004 ALRAC Conference].

⁵⁹ P. Macfarlane & C. Lakshman, "Law Reform in the South Pacific", *Journal of South Pacific Law* (2005) Vol 9 issue 1.

⁶⁰ The Namibia Law Reform and Development Commission, in its "Operating Manual for Law Reform", indicates that in a relation to a project the following stages must be followed sequentially:

*Drafting of the Project Initiation Document;

*Development of the Issue Paper;

*Stakeholder consultation on the Issue Paper;

*Development of the Working Paper (Discussion Paper);

*Workshop on the Working Paper;

*Drafting of the relevant Bill;

*Consultation on the draft Bill;

*Drafting Final Report with attendant Bill;

*Consideration of Report by full Commission;

*Submission in terms of Section 9(1).

⁶¹ Commonwealth Secretariat Paper on "Small States and Law Reform" [LMSCJ (07)11] presented at Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions [Marlborough House, London, 4-5 October 2007], at para. 33.

ANNEX: LRC Mauritius as an illustration of the contribution a law reform agency, in a Small State, can make when sufficiently funded

Contribution to Legal Policy Development

The Mauritius Law Reform Commission has since 2006, after the redesign it had undergone, embarked on a comprehensive review of Mauritian law and has submitted to the Attorney-General a significant amount of Reports and Papers on various aspects of law reviewed, with recommendations for change (where appropriate). The recommendations are aimed at:

- (A) Strengthening the rule of law, consolidating good governance and democracy, and reinforcing the human rights protection system;⁶²
- (B) Improving the judicial system, the operation of the legal profession and the provision of legal services;⁶³
- (C) Modernizing the civil justice system;⁶⁴
- (D) Modernizing the criminal justice system:
 - (1) Criminal investigation procedures;⁶⁵
 - (2) Law on bail;⁶⁶
 - (3) Rules as to disclosure;⁶⁷
 - (4) Rules as to costs;⁶⁸
 - (5) Criminal evidential rules;⁶⁹
 - (6) Effective Handling of Criminal Cases;⁷⁰ and
 - (7) Mechanism for review of miscarriages of justice and for the correction of errors;⁷¹

⁶² Report on “Access to Justice and Limitations of Actions against Public Officers and the State” [May 2008]; Discussion Paper on “Judicial Review” [November 2009]; Report on “Local Government Reform” [June 2009]; Report on “Law relating to NGOs” [November 2008]; Issue Paper on “Social Partnership Framework” [November 2009]; Opinion Paper “Aspects of Electoral Reform” [May 2014]. Issue Paper on “Constitutional Protection of Human Rights” [October 2010]; Issue Paper on “Equality/Anti-Discrimination Legislative Framework (Re Equal Opportunities Bill No. XXXVI of 2008)” [November 2008].

⁶³ Report on “Opening Mauritius to International Law Firms and Formation of Law Firms/Corporations” [May 2007]; Opinion Paper on “Establishment of Court of Appeal and Composition of JLSC (Judicial and Legal Service Commission)” [August 2011]; Issue Paper on “Establishment of Family Court and Conduct of Family Proceedings” [November 2011]; Opinion Paper on “Liberalization of Usher Services” [January 2011]; Opinion Paper on “Legal Aid Reform” [February 2011].

⁶⁴ Discussion Paper on “The New Code de Procédure Civile” [May 2012] and Report on “Code de Procédure Civile” [May 2012]; Issue Paper on “Law as to Publicity for Appointment and Revocation of Agent and Proxy” [November 2010]; Report on “Prevention of Vexatious Litigation” [October 2010]; Opinion Paper on “Appeal by Vexatious Litigant” [April 2011]; Issue Paper “Party and Witness Anonymity in Civil Proceedings” [August 2012]; Opinion Paper on «Attorney’s Commission» [April 2011].

⁶⁵ Discussion Paper on “Law and Practice relating to Criminal Investigation, Arrest and Bail” [April 2008]; Discussion Paper on “Forensic Use of DNA” [April 2009]; Issue Paper on “Criminal Investigation: Reform of Police Procedures and Practices” [July 2010]; Opinion Paper on “Draft PACE Bill” [March 2012].

⁶⁶ Report on “Bail and other Related issues” [August 2009].

⁶⁷ Issue Paper on “Disclosure in Criminal Proceedings” [December 2007] and Report on “Disclosure in Criminal Proceedings” [December 2008]; Opinion Paper on “Draft PACE Bill” [March 2012].

⁶⁸ Opinion Paper on “Costs in Criminal Cases” [April 2011].

⁶⁹ Issue Paper on “Evidence of Reluctant/Intimidated Witness in Criminal Proceedings: Proposal for Reform of the Law” [May 2010].

⁷⁰ Opinion Paper on “Effective Handling of Criminal Cases” [February 2014].

⁷¹ Review Paper on “The Criminal Justice System and The Rights of an Accused Person” [September 2008];

- (E) Renovating the criminal law in accordance with human rights norms and best international practices;⁷²
- (F) Modernizing the Code Civil Mauricien:
- (1) Law on persons and “Droit extra-patrimonial de la famille”;⁷³
 - (2) Law on succession and matrimonial regimes (« Droit patrimonial de la famille »);⁷⁴
 - (3) Law on obligations and specific contracts;⁷⁵
 - (4) Property Law (including Law on “co-propriété”);⁷⁶
 - (5) Law on “sûretés” and credit transactions⁷⁷; and
 - (6) Law on prescription;⁷⁸ and
 - (7) Aspects of Private International Law;⁷⁹
- (G) Improving the legal infrastructure for business:
- (1) Reform of the Code de Commerce;⁸⁰
 - (2) Reform of Regulatory Framework for the activities of Real estate agents;⁸¹

Report on “Mechanisms for Review of Alleged Wrongful Convictions or Acquittals” [Nov 2012].

⁷² For instance, Interim Report on «Reform of Criminal Code» [May 2016]; Review Paper on «Criminal Protection of Children’s Rights» [May 2016]; Review Paper «Law on Fraud» [May 2016]; Review Paper on “Criminal Code (Supplementary) Act” [March 2017]; Working Paper about “Reform of Law on Forgery in the Criminal Code” [March 2017]; Discussion Paper about “Reform of Law on Embezzlement in the Criminal Code” [March 2017]; Discussion Paper about “Reform of Law on Swindling in the Criminal Code” [May 2017]; Discussion Paper about “Reform of Law on Larceny & Aggravated Larceny in the Criminal Code” [May 2017]; Discussion Paper about “Reform of Law on Destruction, Degradation and Deterioration of Property in the Criminal Code” [June 2017].

⁷³ For instance, Report on “Relationship of Children with Grand Parents and Other persons under the Code Civil Mauricien” [June 2007]; Report on “Law on Divorce” [December 2008]; Interim Report «Reform of Code Civil Mauricien (Droit extrapatrimonial de la famille)» [April 2016].

⁷⁴ For instance, Interim Report «Reform of Code Civil Mauricien (Droit patrimonial de la famille)» [April 2016].

⁷⁵ Paper on “Changes to Sources and Regime of Law Obligations in Code Civil Mauricien” [June 2017]; Discussion Paper about “Reform of Law of Contract & Regime and Proof of Obligations in Code Civil Mauricien” [June 2017]; Issue Paper on “Indemnisation des victimes d’accidents de la circulation & Réforme du Droit des Assurances” [June 2017]; Discussion Paper about “Reform of Law on Responsabilité Civile in the Code Civil Mauricien” [May 2017]; Issue Paper on «Law of Contracts and Obligations under Code Civil Mauricien» [March 2013]; Report on “Crédit-Bail (Leasing) & Location Financière” [November 2011], Discussion Paper on “Crédit-Bail (Leasing) & Location Financière” [November 2011], and Issue Paper “Crédit-Bail (Leasing)” [December 2011]; Issue Paper on «Specific Contracts» [February 2014]; Issue Paper on “Bail d’habitation” [December 2014]; Paper on Changes to Provisions in Code Civil Mauricien about «Louage des choses, bail à loyer et bail d’habitation» [March 2015].

⁷⁶ Issue Paper “Droit des biens” [June 2015]; Report on «Copropriétés des immeubles sociaux» [August 2012] and Report on “New Regime for Copropriété” [November 2012].

⁷⁷ Report on «Droit des Sûretés» [August 2012] and Issue Paper on «Secured Transactions Reform» [October 2013]; Report on “Encadrement des Opérations de Crédit” [December 2014].

⁷⁸ Issue Paper on «Law of Prescription under Code Civil Mauricien» [March 2013].

⁷⁹ Issue Paper on «Incorporation in the Code Civil Mauricien of Provisions relating to Aspects of Private International Law» [April 2016]; Review Paper on «Hague Conventions on Private International Law and Mauritian Law» [May 2016]; Review Paper on “Comparative Approaches to Aspects of Private International Law” [March 2017].

⁸⁰ Issue Paper on “Timeshare (Droits de Séjour à Temps Partagé)” [July 2011]; Report on «Code de Commerce (Livre Premier) [fonds de commerce, garanties autonomes, crédit documentaire, franchise, concession exclusive & timeshare]» [May 2012]; Report on «Bail commercial» [March 2015]; Report on “Intermédiaires du commerce” [December 2014]; Report on “Incorporation of Provisions relating to Effets de Commerce (Lettre de Change & Billet à Ordre) in the Livre Premier of Code de Commerce” [Nov 2012]; Report on “Miscellaneous Aspects of Code de Commerce” [May 2015]; Report on «Code de Commerce (Livre Deuxième) [navigation & commerce maritimes]» [June 2012]; Report «Code de Commerce (Livre Troisième) [navigation & commerce aériens]» [June 2012]; Interim Report «Reform of Code de Commerce» [May 2016].

⁸¹ Review Paper on «Regulation of the Activities of Real Estate Agents» [February 2016] and Paper on «Legislative

- (3) Reform of the consumer protection regime;⁸² and
- (4) Mediation and conciliation as mechanisms for settlement of disputes in commercial matters.⁸³

Implementation of Recommendations

A significant proportion of the Final Recommendations of the Mauritius Law Reform Commission have been implemented:

- (a) Recommendations contained in Report on “Opening Mauritius to International law Firms and Formation of Law Firms” [May 2007];⁸⁴
- (b) The recommendation contained in the Report on “Relationship of Children with Grandparents and other Persons under the Code Civil Mauricien” [June 2007];⁸⁵
- (c) The recommendations in the Report on “Law on Divorce” [December 2008];⁸⁶
- (d) Recommendations of the Report on “Bail and Related Issues” [Aug 2009];⁸⁷
- (e) Recommendations and Observations of the Commission in the Report on “Prevention of Vexatious Litigation” [October 2010] and in the Opinion Paper on “Appeal by Vexatious Litigant” [April 2011];⁸⁸
- (f) The recommendations contained in the Report on “Crédit-Bail & Location Financière” [November 2011];⁸⁹
- (g) The recommendations contained in the Report on “Mechanisms for Review of Alleged Wrongful Convictions or Acquittals” [Nov 2012] were partly approved and have been implemented.⁹⁰

Observations contained in Reports/Papers submitted by the Commission have also been taken into account by the legislature.⁹¹

Framework for the Regulation of the Activities of Real Estate Agents » [February 2016].

⁸² Report on “Review of Aspects of Consumer Protection Law and Proposals for Reform” [October 2010].

⁸³ Report on “Mediation and Conciliation in Commercial Matters” [November 2010].

⁸⁴ The Law Practitioners (Amendment) Act No. 8 of 2008. The Act came into force on 15 Dec 2008 [P 21/08].

⁸⁵ The Code Civil Mauricien (Amendment) Act No. 24 of 2007.

⁸⁶ The Divorce and Judicial Separation (Miscellaneous Provisions) Act No. 2 of 2011. The provisions of the Act came into operation on 15 May 2011 [P 2/11].

⁸⁷ Some of the provisions of the Bail Amendment Act No. 34 of 2011 [Sections 1 to 7, 8 in so far as it relates to Section (1), (2), (3), (5) and (6) of the Bail Act and Sections 9 to 14] have come into operation on 1 January 2012 [P 24/11].

⁸⁸ The Courts (Amendment) Act No. 6 of 2011.

⁸⁹ The Economic & Financial Measures (Miscellaneous Provisions) (No. 2) Act.

⁹⁰ The Criminal Appeal (Amendment) Act of 2013.

⁹¹ These include, *inter alia*:

- (a) Observations in Discussion Paper on “Forensic Use of DNA” [April 2009], about appropriate legislative framework, was taken into account when DNA Identification Bill was debated in 2009 in the National Assembly;
- (b) Views expressed in Opinion Paper on “Liberalization of Usher Services” [January 2011] taken into account when the Court Ushers (Amendment) Bill 2011 was passed;
- (c) Observations in Opinion Paper on “Legal Aid Reform” [February 2011] were retained when the Legal Aid (Amendment) Bill No. VII of 2012 was passed;
- (d) Observations in Opinion Paper “Offences against Persons [Re Draft Criminal Code (Amendment) Bill]” [April 2012] retained when the Criminal Code (Amendment) Bill No VIII of 2012, which provided for termination of pregnancy in specified circumstances, was passed; the provisions of the Criminal Code (Amendment) Act No. 11 of 2012 are now in force.