

Queensland Law Reform Commission

**Protocol for the development of
proposed programs**

October 2014

VERSION HISTORY

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CONTENTS

BACKGROUND	1
PURPOSE AND OBJECTIVES	1
DEVELOPMENT OF A PROPOSED PROGRAM	1
Legislative framework.....	1
Operational context	2
Program timeframe	3
Identification of possible items for the proposed program.....	3
Proposals made or referred to the Commission under section 10(3)(a)	4
Survey of law reform issues	4
Consultation	4
Criteria for selection of items for the proposed program	5
Is there a demonstrated need for reform?.....	5
Is the item one that is suitable to be undertaken by the Commission?.....	5
Are the necessary resources available to carry out the item effectively?	6
Is there a real likelihood of implementation?.....	6
Does the overall program contain an appropriate number and mix of items?	6
COMMUNICATION WITH THE MINISTER AND THE DEPARTMENT	7
REVIEW OF A PROGRAM.....	7
REVIEW OF THE PROTOCOL	7
APPENDIX: STATUTORY FUNCTIONS.....	8

BACKGROUND

[1] Section 10(3) of the *Law Reform Commission Act 1968* (Qld) (the Act) details certain statutory obligations upon the Commission in carrying out its functions. In particular, section 10(3)(c) of the Act provides that the Commission shall 'prepare and submit to the Minister from time to time, or at the request of the Minister at any time, a program for the examination, in order of priority, of different branches of the law for the purposes of reform, consolidation or statute law revision'.¹

[2] This Protocol governs the preparation of a program for submission by the Commission to the Minister (the Attorney-General). It was developed having regard to past practice of the Commission, as well as the processes adopted by law reform commissions in other jurisdictions.²

PURPOSE AND OBJECTIVES

[3] The purpose of this Protocol is to guide the Commission, with the assistance of its Secretariat, in preparing and submitting its proposed program(s) under section 10(3)(c) of the *Law Reform Commission Act 1968* (Qld). Its objectives are to ensure that the proposed program:

- is well-informed;
- contains law reform issues that are both important and suitable to be undertaken by the Commission, taking into account its function, expertise and resources; and
- is capable of being achieved within the timeframe of the program, taking into account the nature of the issues involved and the human and other resources available to the Commission.

[4] The Protocol is not intended to be exhaustive, but provides a framework of the steps to be taken and matters to be considered by the Commission in preparing and submitting a proposed program for the Attorney-General's consideration.

DEVELOPMENT OF A PROPOSED PROGRAM

[5] The Commission's legislative framework and operational context will have an impact upon the development of the Commission's proposed program.

Legislative framework

[6] Section 10 of the *Law Reform Commission Act 1968* (Qld) provides that the Commission's general statutory function is to 'take and keep under review all the law

¹ Section 10 of the *Law Reform Commission Act 1968* (Qld) is set out in full in the Appendix.

² See, eg, Law Commission of England and Wales, *Twelfth Programme of Law Reform*, Law Com No 354 (2014) [1.3]–[1.16]; Scottish Law Commission, *Eighth Programme of Law Reform*, Scot Law Com No 220 (2010) [1.4]–[1.18].

applicable to the State with a view to its systematic development and reform'.³ More particularly, it also provides, among other things that:

- the Commission shall consider any law reform proposal which may be made or referred to it;⁴
- the Commission shall 'prepare and submit to the Minister' from time to time, or at the Minister's request at any time, a program for the examination, in order of priority, of different branches of the law;⁵
- the Minister may vary any program submitted by the Commission or the order of priority on any such program;⁶
- the Commission shall 'undertake, pursuant to approval by the Minister of any program, and in accordance with the approved order of priority', the examination of the particular branches of the law and formulate recommendations for reform;⁷ and
- the Commission shall, if asked by the Minister, examine particular branches of the law and make recommendations for reform, that is, to undertake any specific, individual references given by the Minister.⁸

Operational context

[7] Whilst the Commission is one of several agencies tasked with law reform in Queensland,⁹ the Commission occupies a unique position. It is a permanent, independent statutory body with the function, in wide terms, of keeping under review all the law applicable to Queensland with a view to its systematic development and reform.¹⁰ Its members are appointed for a three-year term, with the possibility of reappointment¹¹ and, together with its Secretariat, represent a broad experience and cross-section of expertise. Its work is based on extensive research and public consultation.

³ *Law Reform Commission Act 1968* (Qld) s 10(1). Section 10 is set out in full in the Appendix.

⁴ *Law Reform Commission Act 1968* (Qld) s 10(3)(a).

⁵ *Law Reform Commission Act 1968* (Qld) s 10(3)(c).

⁶ *Law Reform Commission Act 1968* (Qld) s 10(4). In particular, the Minister may vary the program 'by adding or deleting or making such alteration to any particular branch or branches of law as the Minister thinks fit'.

⁷ *Law Reform Commission Act 1968* (Qld) s 10(3)(d).

⁸ *Law Reform Commission Act 1968* (Qld) s 10(3)(e). See also s 10(3)(b) which provides for the Commission, at the Minister's request, to undertake other examinations of the law to provide assistance to Government departments or instrumentalities.

⁹ Others include the Strategic Policy Division of the Department of Justice and Attorney-General and other departmental policy divisions, Parliamentary Committees, the Rules Committee established under the *Supreme Court of Queensland Act 1991* (Qld) s 89, Commissions of Inquiry issued from time to time, and academic or other experts engaged by Government for specific projects.

¹⁰ *Law Reform Commission Act 1968* (Qld) s 10(1).

¹¹ See *Law Reform Commission Act 1968* (Qld) s 4. Section 4(1)(b) of the Act provides that a member is appointed, in the case of a holder of a judicial office, for the term fixed by the Governor in Council and, in any other case, for a term not exceeding three years fixed by the Governor in Council.

[8] The Commission also operates against the background of a democratic government system. A range of factors will have an impact, or potential impact, on the development of its proposed program(s) under this Protocol, and on the Commission's work more generally, including:

- the size and experience of the Commission Secretariat, and the funding otherwise allocated to the Commission by Government;
- the three-year election cycle for Government and the possibility of changes in Government priorities and of Attorneys-General;
- the existence of policy development units within the Department of Justice and Attorney-General and other departments, which develop law reforms at the relevant Minister's direction;
- the requirement for periodic mandated legislative reviews contained in various statutes; and
- the advocacy of the legal profession on law reform issues, including through the Queensland Law Society and the Bar Association of Queensland, as well as the advocacy of organisations and individuals within the broader community.

Program timeframe

[9] The Commission's proposed program is intended to operate over a defined timeframe of five years, being replaced with a new program at the end of that period.

[10] A degree of flexibility both within and between programs is necessarily required. In particular:¹²

- During the period of operation of a given program, changes may need to be made from time to time to the items that are included or their order of priority; and
- Items on a given program will not necessarily be completed within that program's period of operation, but may be carried over to the next program.

[11] Accordingly, the program will be reviewed regularly, as set out at [30] below.

Identification of possible items for the proposed program

[12] The Commission, with the assistance of its Secretariat, will identify items for possible inclusion on the proposed program from a number of sources. The aim will be to consider suggestions from a wide field of interested individuals and organisations. The Commission may also formulate its own suggestions.

¹²

Law Reform Commission Act 1968 (Qld) s 10(4) specifically provides that any program submitted to the Minister by the Commission may be varied by the Minister by adding to or deleting issues or changing the order of priority. Further, s 10(3)(e) of the Act provides that the Minister may refer additional law reform issues to the Commission.

Proposals made or referred to the Commission under section 10(3)(a)

[13] Consistently with section 10(3)(a) of the *Law Reform Commission Act 1968* (Qld),¹³ the Commission will have regard to any proposals for law reform which may have been made or referred to it from time to time.

[14] The Commission will be assisted in this task by a schedule of such proposals which is to be maintained by its Secretariat on an ongoing basis.

Survey of law reform issues

[15] The Commission may also have regard to law reform issues which have been raised in public fora from time to time, for example, in judicial decisions, coronial recommendations, law journals, conference papers, extra-judicial writings, the work of other law reform commissions, and the mainstream media.

Consultation

[16] The Commission will engage in a targeted consultation process to seek suggestions for possible items for inclusion in the proposed program which, subject to time constraints, may include:¹⁴

- contact with members of the Queensland judiciary, the Bar Association of Queensland, the Queensland Law Society, other representative bodies or organisations within the Queensland legal profession, and the law schools of Queensland universities;
- contact with the Department of Justice and Attorney-General and, depending on the circumstances, other Queensland Government departments;
- a call for suggestions in the Queensland Law Society's monthly publication, *Proctor*, and in the Bar Association of Queensland's electronic journal, *Hearsay*, or in other electronic news bulletins of those organisations;¹⁵
- a call for suggestions on the Commission's website; and

¹³ *Law Reform Commission Act 1968* (Qld) s 10(3)(a) provides that, for the purposes of carrying out its functions, the Commission shall 'receive and consider any proposal for the reform of the law which may be made or referred to it'.

¹⁴ *Law Reform Commission Act 1968* (Qld) s 10(3) provides that, for the purposes of that section, the Commission may 'conduct such inquiries as it thinks fit, and inform itself on any matter in such manner as it thinks fit'. Section 10(5) further provides that, for the purpose of assisting the Commission to formulate a program, the Commission may publish and circulate such papers as it thinks fit.

¹⁵ *Proctor* is published monthly, with submissions due by the 20th of the month six weeks prior to publication (for example, by 20 August for the October edition). The Queensland Law Society additionally distributes a weekly 'newsletter' to its members: see generally, Queensland Law Society, *Newsletters & magazines* (2014) <http://www.qls.com.au/About_QLS/Queensland_Law_Society/Resources_publications/Newsletters_magazines>. *Hearsay* is published intermittently: see The Bar Association of Queensland, *Hearsay: The Journal of the Bar Association of Queensland* <<http://www.hearsay.org.au/>>.

- a call for suggestions on the Queensland Government's 'Get Involved' website.¹⁶

[17] Invitations or calls for suggestions should include a brief explanation of how the Commission intends to select items for its proposed program and a clear statement that its proposed program is not final but will be submitted to the Attorney-General for approval (who may vary any such program). It may also need to include a privacy statement about the collection of respondents' personal information and use of their submissions.¹⁷

[18] Consultation should allow adequate time for people to respond. Follow-up communication will also be appropriate in some instances.

Criteria for selection of items for the proposed program

[19] The Commission, with the assistance of its Secretariat, will have regard to the following criteria in selecting the items for its proposed program and determining their order of priority, if any. Each criterion encompasses a range of considerations, some of which may be more relevant than others, depending on the circumstances. The Commission's consideration of the criteria will also depend on the extent of the information that is available to it. The overall aim will be to ensure careful consideration of all suggestions, identification of appropriate items for inclusion in the proposed program, and a proposed program that is realistically achievable.

Is there a demonstrated need for reform?

[20] Consideration should be given, in particular, to the following:

- The scale of the perceived problem and the strength of the need for law reform in the area, including the extent to which the law is unsatisfactory, for example, by being unfair, unduly complex, inaccessible or out of date;
- The extent to which the area of law affects a wide section of the community, or a significantly disadvantaged or vulnerable section of the community;
- The extent of public interest in the issues; and
- The potential benefits to the community of reform in the area.

Is the item one that is suitable to be undertaken by the Commission?

[21] Consideration should be given, in particular, to the following:

- The extent to which the issues require or would benefit from independent, non-political consideration and/or a fundamental review;
- Whether the area is mainly 'legal' rather than 'political';

¹⁶ See Queensland Government, *Get Involved* (2014) <<https://www.getinvolved.qld.gov.au/>>. The *Get Involved* website is part of the Queensland Government's online consultation toolkit freely available to Queensland Government agencies: see Queensland Government, *ConsultQld online consultation toolkit* (2013) <<https://www.qld.gov.au/web/community-engagement/tools/online-consultation-toolkit.html>>.

¹⁷ See *Information Privacy Act 2009* (Qld) sch 3, item 2.

- The extent to which the issues require or would benefit from extensive consultation, including with members of the public;
- Whether the issues involve 'technical' law reform that might not otherwise receive attention; and
- Whether the issues could more effectively be examined by another agency, and the extent to which the item would duplicate or complement work being done by other agencies.

Are the necessary resources available to carry out the item effectively?

[22] Consideration should be given, in particular, to the following:

- The current and projected financial and human resources available to the Commission;
- The extent to which the members and staff have, or have access to, the relevant expertise and experience;
- Whether the item would make excessive demands on the members and staff, or would require a disproportionate investment of resources;
- Whether the item would require the involvement of the Office of Queensland Parliamentary Counsel in the drafting of legislation to give effect to the Commission's recommendations;
- Whether the item requires or would benefit from the engagement of any external consultant and the extent to which funding is likely to be available for that contingency; and
- The projected duration of the item, and the extent to which it is capable of being completed within a reasonable period of time.

Is there a real likelihood of implementation?

[23] Consideration should be given, in particular, to the following:

- The extent to which the Government or relevant department has indicated support for reform in the area; and
- Whether there is a realistic prospect of implementation for reforms in the area.

Does the overall program contain an appropriate number and mix of items?

[24] Consideration should be given, in particular, to the following:

- The desirability or otherwise of including a balance between shorter-term and longer-term items, having regard to the intended operational duration of the proposed program;
- The desirability or otherwise of including items that will contribute both to 'technical' law reform as well as 'social justice' reforms;

- The need to limit the number of items included on the proposed program to those that are capable of being completed within a reasonable timeframe; and
- Whether the Commission has, or is likely to have, any stand-alone references from the Attorney-General in addition to the items included on its program.

COMMUNICATION WITH THE MINISTER AND THE DEPARTMENT

[25] The Commission will seek to maintain an open dialogue with the Attorney-General and the Department of Justice and Attorney-General (through its Strategic Policy Division) in relation to the development of its program.

[26] The Commission will advise the Attorney-General in writing of its intention to prepare a proposed program for submission to the Attorney-General.

[27] The Commission will submit its proposed program to the Attorney-General, together with an explanation of the way in which it identified and selected the items on the proposed program. The Commission will also advise the likely time that would be required to complete each of the items, and suggest a possible order of priority for those items.

[28] The Commission will follow-up on the Attorney-General's response to the proposed program as appropriate.

[29] In relation to any program that is approved by the Attorney-General, the Commission will keep the Attorney-General informed from time to time about the progress of each item.

REVIEW OF A PROGRAM

[30] A program approved by the Attorney-General should be reviewed by the Commission, with the assistance of its Secretariat:

- from time to time, with a view to assessing the priority and continuing relevance of the items on the program and determining the Commission's capacity, within the timeframe, to complete the items on the program and/or to take on any additional items; and
- before the anticipated end of the existing program, with a view to (and allowing sufficient time for) the preparation of the next proposed program in accordance with this Protocol.

REVIEW OF THE PROTOCOL

[31] This Protocol should be reviewed by the Commission from time to time, including to ensure that its objectives continue to be relevant and that the Protocol meets those objectives.

APPENDIX: STATUTORY FUNCTIONS

The statutory functions of the Commission are set out in section 10 of the *Law Reform Commission Act 1968* (Qld) as follows:

10 Functions and duties of Commission

- (1) The function of the Commission shall be to take and keep under review all the law applicable to the State with a view to its systematic development and reform, including in particular—
 - (a) the codification of such law; and
 - (b) the elimination of anomalies; and
 - (c) the repeal of obsolete and unnecessary enactments; and
 - (d) the reduction of the number of separate enactments; and
 - (e) generally the simplification and modernisation of the law.
- (2) To remove any doubt, it is declared that the law applicable to the State includes both substantive law and procedural law, including, for example, court rules.
- (3) For the purposes of carrying out its functions, the Commission shall—
 - (a) receive and consider any proposal for the reform of the law which may be made or referred to it; and
 - (b) at the request of the Minister, provide assistance to any department or instrumentality of the Government by undertaking the examination of any particular branch of the law and making recommendations for the reform of that branch of the law to bring it into accord with current conditions; and
 - (c) prepare and submit to the Minister from time to time, or at the request of the Minister at any time, a program for the examination, in order of priority, of different branches of the law for the purposes of reform, consolidation or statute law revision; and
 - (d) undertake, pursuant to approval by the Minister of any program, and in accordance with the approved order of priority, the examination of particular branches of the law, and the formulation of recommendations for reform, consolidation or statute law revision; and
 - (e) if asked by the Minister, examine particular branches of the law and make recommendations to the Minister about the reform of the branch of the law, including consolidation of the law or statute law revision;

and may for these purposes hold and conduct such inquiries as it thinks fit, and inform itself on any matter in such manner as it thinks fit.

- (4) The Minister may vary—
 - (a) any program submitted to the Minister by the Commission by adding or deleting or making such alteration to any particular branch or branches of the law as the Minister thinks fit; and
 - (b) the order of priority on any such program.
- (5) For the purpose of assisting the Commission to formulate a program or recommendation the Commission may publish its working and discussion papers and such other papers as it thinks fit and may circulate those papers to such persons as it thinks fit.
- (6) Any programs of and recommendations formulated by the Commission and approved by the Governor in Council shall be laid before Parliament.

