

**Memorandum of Understanding between the Law Commission and Lord Chancellor (on behalf of Government):
Law Commission funding model**

September 2020

Aim

1. This Memorandum of Understanding sets out a sustainable funding and operating model for the Law Commission. Any changes to this document must be agreed by the Lord Chancellor and the Chair of the Law Commission. It should be reviewed after 3 years.

Introduction

2. The Law Commission is an independent Arm's Length Body. It has a statutory duty to keep the law of England and Wales under review with the aim of ensuring that the law is fair, modern, simple and cost-effective.

3. The Ministry of Justice's 2019 Tailored Review of the Law Commission recommended that:

With a view to maintaining the independence and capability of the Law Commission, the MoJ ALB Centre of Expertise, Finance Business Partners, Policy Sponsors and the Law Commission should conduct a review of the current funding model and other funding arrangements to ensure that the Law Commission's funding model is sufficiently robust.

4. In interviews with stakeholders during the review, current arrangements were identified as giving rise to a perception that the Commission's independence has been compromised. The review also noted "the perception that the current funding model is incentivising the Law Commission away from pursuing those projects of most importance and towards those which are the most able to pay".

Summary

5. The Law Commission will no longer rely on income generation from Whitehall Departments to supplement its core funding from the Ministry of Justice (MoJ). Instead, the Law Commission will now receive its entire operating budget from the MoJ direct. This budget should be sufficient for all five Statutory Commissioners to be fully utilised.
6. The aim of this new model is to give the Commission financial stability during the year better to prioritise resources on established projects, while also seeking new work.
7. The operation of the new model relies on increased and proactive engagement between the MoJ and the Law Commission during the planning and development of the Commission's Programmes of work and when considering ad hoc Ministerial references.
8. It is expected that, the MoJ will recharge other Government Departments to recover the marginal cost of Law Commission work. These costs will be agreed between the other government department, MoJ and the Law Commission.

Principles

9. Any financial operating model for the Commission must respect certain core principles which largely flow from the Law Commissions Act 1965. The Commission should:
 - a) Remain truly independent
 - b) Maintain objectivity, transparency through consultation and high-quality output
 - c) Adopt a forward-looking approach, proactively assessing future law reform need
 - d) Deliver priorities on behalf of all of Government
 - e) Undertake law reform based on need (***annex A***)
 - f) Maintain the required skill base and promote diversity

Supporting processes and assumptions

Balance of work between MoJ and Other government departments

10. As the main legal department in Government, it is recognised that there will be a higher proportion of MoJ projects included in Programmes of Law Reform and received on an ad-hoc basis by way of reference. Competing priorities (for example between a Programme project or an urgent reference, or between MoJ & other Departments) should be discussed transparently and promptly. Priority should be determined based on the criteria set out in Annex A and an assessment of MoJ and wider Government priorities.
11. At all times Commissioners will have the right, within their statutory powers, to pause or slow work with a view to prioritising new work. If the Law Commission is undertaking work for another Government Department where no financial contribution has been made, that work may be paused or slowed for a higher priority project for the Ministry of Justice to proceed. These decisions will be taken in conjunction with the MoJ and any affected government department.

Approval of Programmes of Law Reform

12. A Programme of Law Reform is agreed between the Commission and the Lord Chancellor following public consultation. Programmes tend to last for between three and five years. The Lord Chancellor will continue to approve all Programmes of Law Reform and retains the right to decline to approve the Commission's proposed Programme if there are concerns about taking any of the individual projects forward. To facilitate that process, the Commission will be required to engage with the MoJ from the beginning of the process and then regularly and at each key stage during the conception, planning and development process of each Programme. The draft final programme plan must be shared with the MoJ sponsorship team for final scrutiny at least one month prior to it being submitted for final approval and publication, in order to build in time for any necessary amendments.
13. The Commission exists to provide law reform capability for all of Government in exercise of its statutory function to keep all the law under review. The MoJ will expect for costs to be recharged from another Government Department. In order to ensure a balanced Programme, there must be provision for projects (as assessed against the criteria at Annex A) to proceed where, despite efforts, they do not attract funding from another Government Department. It is an important principle that a lack of funding should not

preclude law reform work being included in a Programme and going ahead, subject to the Lord Chancellor's approval. If another Government Department is not able to provide funding for a potential Programme project, the MoJ, Commission and other Government Department will enter into a tripartite discussion to conduct a transparent assessment of the project's merits based on the criteria and principles within this agreement. Where a project does not proceed following the tripartite discussions, this decision should be recorded in the published Programme.

14. Approximately one third of Law Commission work is expected to be received by way of ad hoc Ministerial references outside of the formal Programme of Law Reform. Programmes will need to be formulated on the basis that there will be sufficient work to keep the Commission fully utilised, with decisions taken by the Commission as to priority between projects as and when Ministerial references are received during the lifecycle of the Programme. The Commission will engage with the MoJ before such decisions are taken.

Wales

15. It is important that the Law Commission's role in relation to the people of Wales is recognised within the funding model. While the MoJ will seek to recharge the marginal cost of Law Commission work from the Welsh Government wherever possible, each Law Commission Programme should contain at least one Wales-specific project.

Ad hoc Ministerial references

16. Ad hoc references can be requested at any stage by any Minister or Welsh Minister. They sit outside of the formal Programme of Law Reform approved by the Lord Chancellor.
17. The Commission will continue to seek funding when discussing new ad hoc Ministerial references with other Government Departments. The expectation is that other Government Departments will almost always cover the cost of such work. It is recognised, however, that there will be rare circumstances where MoJ will not be able to recharge for individual project costs because an OGD is unable to provide funds for an ad hoc project supported by both the responsible Minister and Commissioners. In such circumstances, as above, the MoJ, Commission and other Government Department will enter into a tripartite discussion to conduct a transparent assessment of the project's merits based on the criteria and principles within this agreement. Where a project does not proceed following the tripartite discussions, this decision should be recorded in the Commission's Annual Report.
18. The Law Commission CEO undertakes to keep the MoJ sponsorship team sighted on all potential ad-hoc projects from an early stage, so the Department can consult with Ministers if they have concerns about whether a project may be suitable in accordance with the criteria.

Strategic use of the Commission

19. The MoJ should support efforts across Government to ensure greater awareness of the Commission's work; and, to encourage strategic use of the Commission when determining law reform priorities.

Transparency

20. The Law Commission should share project planning documentation with the MoJ on a quarterly basis and individual project plans as soon as practicable as they arise. The Commission must agree realistic and transparent resourcing plans for each project and report any significant delays to the MoJ where there is likely to be a financial impact of that delay or a follow-on project will be delayed. For projects within the policy area of another government department, the MoJ and Law Commission will seek to recover any increased costs as a result of the delay.

Budget

21. The Law Commission's budget should be agreed in accordance with the Departmental Allocations processes. Any proposed reduction (whether real-terms or inflationary) must be discussed with the Lord Chancellor and Chair of the Law Commission. The Law Commission's budget for 2021-22 will be £4.4m. The Law Commission future year budgets should carefully consider pay inflation and progression as most of the Law Commission's costs arise from staffing overheads.
22. The Commission will use its best endeavours to seek to recover between 20% and 33% of its overall costs through paid Ministerial references and Programme work. The Commission retains the right to receive income from other Government Departments if the need arises or the Commission has the capacity to undertake further work (for example, funding additional drafting resource for Consolidation work).

Annex A: Balance of work and criteria for assessing suitability of Law Reform work

The Commission aims to maintain a diverse range of work. The following (non-exhaustive) list demonstrates the types of work that might be found in a balanced portfolio:

- projects which address complex matters of legal policy where the law is at present failing individuals, business or the third sector
- cutting-edge projects which look at new or future technological, economic or societal legal challenges
- projects where timescales are likely to be tight, for example because of legislative priorities
- longer-term law reform projects which address a diverse range of issues and deep-rooted complex and technical problems
- projects relating to consolidation, codification and statute law repeals work, aimed at streamlining and simplifying the law thereby increasing legal certainty.

The Commission applies the criteria referred to in the 2010 Protocol to assess which individual project to take on. They have been developed in this document (below) to reflect the way in which they apply to current societal and economic issues.

- i. **Impact:** The extent to which law reform will impact upon the lives of individuals, on business, on the third sector and on the Government. Benefits derived from law reform can include:
 - a. modernisation, for example supporting and facilitating technological and digital development
 - b. economic, for example reducing costs or generating funds
 - c. fairness, for example supporting individual and social justice
 - d. improving the efficiency and/or simplicity of the law, for example ensuring the law is clearly drafted and coherent to those who need to use it.
 - e. supporting the rule of law, for example ensuring that the law is transparent.
 - f. improving access to justice, for example, ensuring procedures do not unnecessarily add to complexity or cost.
- ii. **Suitability:** Whether an independent, non-political, Law Commission is the most suitable body to conduct a proposed project.
- iii. **Opinion:** The extent to which proposed law reform is supported by Ministers/Whitehall, the public, key stakeholders, Parliament and senior judiciary.
- iv. **Urgency:** Whether there are pressing reasons (for example, practical or political) why reform is required. To ensure a manageable programme of work, the Commission seeks a mix of: (a) urgent projects with tight or fixed timeframes and (b) longer-term projects where there is more flexibility over delivery. There has to be a realistic assessment of the time and resource required to undertake the work to the quality expected from the Law Commission.
- v. **Balance:** so far as possible the Commission seeks a portfolio of work which takes account of: (a) the statutory requirement to keep all areas of the law

under review; (b) the balance of work across Government departments (i.e. different departmental law reform priorities); and (c) the balance of legal skills and expertise available to the Commission.