



Teaching Law Reform - Why? How? Where?

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JULY 2026

Analytical framework for law reform

- ▶ The core question in any law reform project: how can the law in a given domain be changed to better achieve relevant policy goals?
- ▶ Law is not magic – it can only work by changing how people behave
 - ▶ changing the law on paper is not the point
- ▶ The study of human behaviour is central to law reform
- ▶ The study of institutions and interfaces is central to law reform
- ▶ In order to reform law effectively we need to understand
 - ▶ how the existing law functions in practice: what do people currently do?
 - ▶ what is the concern about what people currently do?
 - ▶ wider social and economic context and key trends – what will the setting in which the law operates look like in the future?
 - ▶ whether/how the behaviour of each relevant audience is likely to change if the law changes

An example of law reform that failed

- ▶ NZ relationship property 'economic disparity' law reform in 2001
 - ▶ Threshold = "income and living standards of one spouse or partner (**party B**) are likely to be significantly higher than the other spouse or partner (**party A**) because of the effects of the division of functions within the marriage, civil union or de facto relationship while the parties were living together"
 - ▶ If the section applies, the court may award some of party B's share of relationship property to party A "for the purpose of compensating party A"
- ▶ Short and simple on paper – but a failure in practice because of
 - ▶ Lack of guidance on threshold and approach to "compensation"
 - ▶ Problematic approaches on both issues adopted by courts
 - ▶ Complexity, time and cost involved in seeking an award
 - ▶ Modest benefits of success – especially in cases where the unfairness was greatest
 - ▶ Result = pursuing an economic disparity claim in court unrealistic for the vast majority of people
- ▶ In 2019 NZLC recommended a completely different approach – Family Income Sharing Arrangements
 - ▶ Objective criteria to qualify for FISA
 - ▶ Default income sharing entitlements for 5 years with a "serious injustice" safety valve (and an ability to contract out)
 - ▶ Not yet implemented

An example of successful law reform

- ▶ Pre-1991 child support regime = application to court for child maintenance order
 - ▶ Complex, slow, costly – and often ineffective in practice
- ▶ Child Support Act 1991 introduced a new framework
 - ▶ “formula assessment” by tax agency based on specified inputs
 - ▶ Easy for a party to estimate likely entitlement/obligation using online calculator
 - ▶ Easy for a party to apply for child support online
 - ▶ Decision in a matter of days in most cases
 - ▶ Immediate binding payment obligation
 - ▶ Enforceable through tax system
 - ▶ Dissatisfied party can seek review by tax agency official (modest numbers)
 - ▶ Further right of review before Family Court (almost none)
- ▶ NB changes to institutional arrangements and default settings

Core capabilities for effective law reform in a changing world

- ▶ Deep understanding of the relevant legal system
 - ▶ Core architecture
 - ▶ Specific areas of law under review
 - ▶ Institutional arrangements for implementing relevant laws
- ▶ Legal research skills
 - ▶ Including comparative legal research skills
- ▶ Empirical research skills to support evidence-based decision-making
 - ▶ Qualitative social and economic research –
 - ▶ Including objectives and design of consultation processes
 - ▶ Quantitative social and economic research
- ▶ Economic, behavioural and sociological research skills
- ▶ Institutional design skills
 - ▶ Interface design skills
- ▶ Data science and digital technology skills
- ▶ The ability to combine all of these in an informed and creative way!
 - ▶ NB opportunities for re-architecting the law in some fields

Law reform can and should be taught

- ▶ Law reform outputs are of uneven quality, and often fail to engage seriously with reach and practical effectiveness
 - ▶ Evidence-based discussions of time, cost and other barriers for intended beneficiaries of the law are rare
 - ▶ Evidence-based discussions of difficulty/cost of compliance with obligations are also rare
 - ▶ Discussions of likely effectiveness are often superficial and rarely evidence-based
- ▶ This is in part attributable to undeveloped frameworks and capability gaps
 - ▶ Not taught systematically in law schools
 - ▶ Many key capabilities are not developed in practice/academia/judicial roles
 - ▶ Fewer opportunities to learn through apprenticeship models, as the public sector becomes more generalist in many countries
- ▶ Frameworks can be taught
- ▶ Relevant capabilities can be taught
- ▶ Interdisciplinary work methods can be taught

Mainstream law courses do not teach these frameworks and capabilities

- ▶ Focus = legal practice and academic analysis
- ▶ Law reform frameworks/legal design principles
 - ▶ Are not taught at all in most undergraduate law courses
 - ▶ Are very rarely taught in graduate courses
 - ▶ Are not the focus of clinical skills programmes
- ▶ Little or no teaching of empirical research skills
- ▶ Outside North America, very few interdisciplinary courses

How should we teach law reform?

- ▶ Explicit teaching of frameworks and core capabilities
 - ▶ As a stand-alone subject
 - ▶ As a component of other law courses and policy courses
- ▶ More interdisciplinary courses
 - ▶ and projects within/across courses
- ▶ Learning by doing
 - ▶ Internships/placements
 - ▶ Conscious articulation and transmission of methodological skills within agencies

Where should we teach law reform?

- ▶ Graduate courses in law schools and schools of government
- ▶ Short courses for people working in the field
- ▶ Seminars for officials and law reform agency staff – upskilling on the job
 - ▶ NB opportunities to collaborate to build a library of training materials
- ▶ Incorporate basic concepts into undergraduate law degrees
 - ▶ Component of substantive courses
 - ▶ Clinical placements/internships
 - ▶ Clinics
- ▶ Public lectures and seminars
 - ▶ including by law reform agencies
- ▶ Other options?

MLS: Designing Effective Legislation

- ▶ Intensive LLM course - structure broadly follows *Making Laws That Work*
 - ▶ 5 teaching days
 - ▶ Around 25 students – mostly with relevant work experience
 - ▶ Assessment based on class participation, oral presentation and research paper
- ▶ Topics covered include:
 - ▶ What is legislation for?
 - ▶ How does legislation work?
 - ▶ To whom does legislation speak? How does it speak to them?
 - ▶ How can the effectiveness of legislation be assessed?
 - ▶ The nature and causes of legislative failure
 - ▶ Legislation and the institutions that apply it
 - ▶ Interfaces for users of legislation
 - ▶ The importance of default rules and default outcomes
 - ▶ Designing legislation for an uncertain and changing world: adaptive legislation
 - ▶ Digital technology – challenges and opportunities for legal designers
 - ▶ Complex legislation: causes of complexity and design options for reducing complexity
 - ▶ The law-making process – can it be improved?



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