

meeting

Memorandum No. 63-19

Subject: Procedure to be used in revising the Penal Code

Senator Regan requested that we prepare a detailed statement of the procedures that the Law Revision Commission would use in revising the Penal Code. This statement would be used, I gather, as the basis for requesting the necessary additional funds to make this study and as a basis for authorizing the Law Revision Commission--rather than some other group--to make the study.

Attached are two copies of a draft of the requested statement prepared by the staff. You can mark your suggested revisions on one copy and can turn it in to the staff at the meeting if the statement is generally satisfactory. After the meeting, I propose to provide Senator Regan and Arthur Alarcon, the Governor's Executive Secretary, with copies of the revised statement.

I understand that Senator Regan and Mr. Alarcon have requested Professor Sherry to provide them with a similar statement. I have asked Professor Sherry to provide us with a copy of his statement so that the Commission can take it into account at the time it considers the attached statement.

Respectfully submitted,

John H. DeMouly
Executive Secretary

SUGGESTED PROCEDURE TO BE FOLLOWED BY CALIFORNIA

LAW REVISION COMMISSION IN REVISING THE PENAL CODE

General Comment.

The California Law Revision Commission consists of seven lawyers appointed by the Governor, a member of the Senate (Senator James A. Cobey), a member of the Assembly (Assemblyman Pearce Young) and the Legislative Counsel. Appointed members are: Herman F. Selvin, Chairman; John R. McDonough, Jr., Vice Chairman; Joseph A. Ball; James R. Edwards; Richard H. Keatinge; Sho Sato; and Thomas E. Stanton, Jr.

The Commission's recommendations are based on comprehensive research studies which examine existing law and various alternative methods of dealing with defects in existing law. The Commission's procedures insure that all interested persons and organizations have an adequate opportunity to express their views before a recommendation is submitted to the Legislature. The Commission's recommendations represent the best judgment of a group of attorneys (including legislators) who represent no particular interest group but who have taken into account the practical problems of persons affected by the recommendations. Thus, the Commission's recommendations are a combination of scholarship and practical common sense.

The Commission meets two or three days each month. Each meeting is a work session devoted to consideration of material previously distributed to the Commission members for study prior to the meeting.

Detailed Procedures.

In general, the Commission would probably use the following procedures in preparing a revision of the Penal Code.

1. Selection of a Research Consultant. When the Commission is authorized to study a particular field of law, it first engages a research consultant to prepare a research study. The research study is prepared pursuant to a contract between the Commission and the consultant. Although the research consultant is paid an honorarium, the research consultant--to a considerable extent--contributes his time and talent as a public service. Past experience of the Commission indicates that law professors who are experienced in the particular field of law being studied usually prepare the most satisfactory research studies--studies that not only are scholarly but take into account the practical experience of persons affected by the study.

The volume of the subject matter embraced within the Penal Code is so great that the Commission does not anticipate that one man could prepare the necessary research study within a reasonable length of time. It is likely that a number of assistant-consultants will have to be retained to work under the general supervision of a Chief Research Consultant, or the Chief Research Consultant will have to be supplied with a staff to perform much of the work involved in preparing the study. The Commission expects that the Chief Research Consultant would be given considerable freedom in determining the methods to be used in preparing the research study.

The first task of the Commission, then, would be to engage a .

Chief Research Consultant. After discussing with him the best method to proceed with the preparation of the study of the Penal Code, the Commission would make contracts with additional consultants or would provide the consultant with sufficient funds to acquire the necessary staff assistance.

2. Preparation of research study by research consultant. The Chief Research Consultant would be responsible for the preparation of a comprehensive study of the existing law in California, the defects in the existing law, and the various alternative solutions to cure the defects. The research study would include an analysis of the Model Penal Code provisions, together with an analysis of the provisions of modern penal codes adopted or proposed in other states. The Model Penal Code incorporates the views of numerous outstanding individuals who have contributed much creative thought to the field of criminal law. Modern penal codes adopted or proposed in other states are another valuable source of creative thought. The various research consultants preparing portions of the study will likewise suggest additional alternative methods of curing defects in existing California law. The consultants will also consider the suggestions of individuals in California who have practical experience in law enforcement so that they can produce a scholarly research study that takes into account the practical problems in California. Such a study will provide the background information that is necessary before a revision of the California Penal Code can be undertaken.

In preparing his study, the consultant would be expected to

consult with the Attorney General, the Department of Justice, district attorneys, chiefs of police, sheriffs, judges, the Youth and Adult Authorities, the Department of Corrections, various other state officers and departments, public defenders, private attorneys and others who have practical experience in the criminal law field. The facts presented by these persons and an analysis of their suggestions would be incorporated in the research study.

The recently published research studies on sovereign immunity and on the Uniform Rules of Evidence are examples of the type of research study contemplated. In the case of the Penal Code, portions of the research study might be published separately in a number of parts. Each portion could then be distributed widely at the time the Commission commences its study of that portion.

The research studies published by the Commission are valuable source materials not only for the Commission but also for the Legislature and for other persons interested in the particular field of law. It is not unusual for a research consultant to disagree with particular recommendations of the Commission. In such cases, the Commission does not require the consultant to revise his study to support the position taken by the Commission; rather, the Commission submits its recommendation to the Legislature and distributes the consultant's study in connection therewith so that the Legislature may have the benefit of the consultant's views as well as those of the Commission.

The Commission would expect the research study to be substantially completed sometime in 1965. Portions of the study should be sufficiently complete by the end of 1964 so that the Commission might begin working

on the Penal Code immediately after completing its work on its legislative program for the 1965 Session.

3. Preparation of tentative recommendations by Law Revision Commission. Portions of the research study would be available in January 1965, and the Commission would then begin its detailed study of the Penal Code.

The first step in this process will be to advise all interested persons and organizations that the Commission will be working on the Penal Code. Interested persons are permitted to attend Commission meetings as observers; but the Commission meetings are work sessions, not public hearings. It is anticipated that the Office of the Attorney General, the District Attorney of Los Angeles County, the Department of Corrections, the Judicial Council, and numerous other groups will wish to have a representative present at each meeting of the Commission. (The Legislative Counsel serves ex officio as a member of the Commission.) These persons obtain valuable background information by attending the meetings and, in addition, provide the Commission with expert sources of information. Moreover, at the time it begins studying a portion of the Penal Code, the Commission probably would call on interested persons to provide any information or views that are not adequately presented in the research study. The Chief Research Consultant, and probably the associate consultant or consultants who worked on the portion of the Penal Code under study, would be present at the meetings of the Commission. In the past, persons who regularly attend Commission meetings have been provided with copies of all materials to be considered by the Commission. These persons review the materials prior to the

meeting so that they are in a position to provide helpful criticism.

Before the Commission considers a new topic, the staff first prepares a memorandum outlining the various major and minor policy questions presented, together with the various alternatives available. This, together with the research study, serves as a starting point for work on the topic. After basic policy is decided, a draft statute is prepared by the staff to carry out the Commission's policy decisions. The Commission then carefully considers every detail of the draft statute to be sure that it is expressive of the Commission's intent. Many times original policy decisions will be changed when the draft statute is considered, and the staff will be directed to revise the statute accordingly. When the Commission is satisfied with the statute, a tentative recommendation explaining the proposed legislation is prepared and, together with the draft statute, is widely distributed to all persons and groups who have indicated an interest in the subject of the Commission's study. In the past, the tentative recommendations and proposed statutes have been sent to legal newspapers which have printed them for the information of the bar.

Interested groups often appoint committees to work with the Commission. In regard to the Penal Code, the Commission would expect to invite the State Bar, the Judicial Council, the district attorneys, the public defenders, the sheriffs, and others to appoint committees to review and comment on the tentative recommendations of the Commission.

The comments from these organizations and persons upon the tentative recommendation and draft statute are summarized and analyzed by the

Commission staff and are presented to the Commission for consideration. In addition, the complete text of all comments received is reproduced and provided to each Commissioner so that he may read the comments in their entirety.

The Commission thoroughly considers all comments on its tentative proposals and frequently modifies the tentative recommendation and draft statute. At times, the comments received have pointed out problems which have compelled the Commission to abandon completely the tentative recommendation distributed and to turn to other statutory methods of dealing with the problems.

When the Commission is satisfied with its recommendation and statutes, they are printed and submitted to the Legislature.

The Commission anticipates that it might not be necessary to use the foregoing procedure for all portions of the Penal Code. Some parts may be in need of recodification but not substantive revision. For such portions of the Penal Code, the Commission might contract with the Legislative Council to prepare a draft recodification for consideration by the Commission. This procedure has been used by the Commission in the past when it has been asked to recodify certain codes or portions of codes without substantive revision--as in the case of the Fish and Game Code and that portion of the Penal Code dealing with grand juries.

Following this procedure, the Commission would expect to complete the major portion of its tentative recommendation on the Penal Code by July 1967.

4. Interim hearings on tentative recommendation. It is anticipated that extensive interim hearings on the tentative draft of the Penal Code would be held by various interim committees during the two-year period prior to the 1969 legislative session. These hearings would familiarize members of the Legislature with the problems involved in Penal Code revision and would provide the Commission with an indication of what would be acceptable to the Legislature.

5. Final recommendation to 1969 legislative session. It is anticipated that the proposed Penal Code (or a revised Penal Code and a Code of Criminal Procedure) would be presented to the 1969 legislative session.

Cost

Until the Commission has retained a Chief Research Consultant and has discussed with him the procedure he will follow, it is not possible to determine accurately what the cost of the research study would be. Nonetheless, certain preliminary estimates may be made. The expenses contemplated for preparation and publication of the research report will have to be in addition to the money otherwise appropriated for the work of the Commission, for during the time that the research is being prepared and published all of the Commission's resources will be devoted to other major studies, such as the Uniform Rules of Evidence,

There is presented below a detailed budget indicating the additional expenses the Commission estimates that it must incur if it undertakes to revise the Penal Code.

DETAILED BUDGET FOR 1963-64 FISCAL YEAR

SALARIES (primarily clerical)	\$ 12,700
OFFICE (supplies, materials and services)	3,000
COMMUNICATIONS (telephone and postage)	1,000
RESEARCH (including travel)	45,000
PRINTING AND BINDING	10,500
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Total	\$ 72,200

ADDITIONAL MONEYS FOR 1964-65 FISCAL YEAR (ANTICIPATED)

SALARIES (clerical services)	\$ 10,000
OFFICE (supplies, materials and services)	3,000
COMMUNICATIONS (telephone and postage)	1,000
PRINTING AND BINDING	unknown at this time

SALARIES

If the Penal Code revision is undertaken, it is suggested that the position of Executive Secretary of the Commission be made a full-time position. Presently, the position is 80 percent State and 20 percent Stanford. In addition, funds sufficient to finance approximately two additional secretarial positions (full time or intermittent) are required to provide sufficient secretarial service to permit the research consultant to complete the research report by September, 1965. It is anticipated that these secretaries would be working with the research consultant, rather than at the Commission's office at Stanford.

To make the position of Executive Secretary a full-time position	\$ 3,700
Secretarial assistance (full time or intermittent)	9,000
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	\$12,700

OFFICE

Additional moneys are needed to provide research consultants with office supplies, materials and services.

\$ 3,000

COMMUNICATIONS

Additional money for telephone and postage for research consultants.

\$ 1,000

RESEARCH

The money requested for research is intended to cover the expense of research to produce research studies for consideration by the Commission. The Commission will, no doubt, wish to have the Chief Research Consultant present at each meeting when the research studies are considered. Another research contract (to be paid for from funds appropriated for research in a subsequent year) will be made to provide compensation for attendance at Commission meetings.

Chief Research Consultant	\$ 10,000
Associate Research Consultant	7,500
Assistant Research Consultants	25,000
Travel by research consultants	2,500
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Total	\$ 45,000

PRINTING AND BINDING

It is suggested that the various portions of the research study be printed before they are considered by the Commission. This will make it possible to distribute copies of the printed research reports to interested persons at the time the Commission begins to study a particular portion of the Penal Code. It is anticipated that some portions of the research study would be ready to print by June 1964, and funds are provided for printing these portions. Additional funds will be required in the budget for the 1964-65 fiscal year to print the balance of the research report.

Portions of Penal Code study

\$ 10,500

Tentative Schedule for Revision of Penal Code

<u>Time</u>	<u>Research consultants</u>	<u>Commission</u>	<u>Legislature</u>
July 1963	All consultants appointed		
May 1964	Portions of study delivered to printer		
September 1964	Additional portions of study to printer		
January 1965		Study commenced	
July 1965	Additional portions of study to printer		
September 1965	Study completed and all copy in hands of printer		
January 1966		First tentative recommendations distributed for comments	
Each month thereafter		Additional tentative recommendations distributed for comments	
July 1967		Revised recommendation covering a substantial portion of Penal Code ready for interim hearings	Interim hearings by appropriate legislative committees
July 1968		Revised recommendation covering entire Penal Code ready for interim hearings	(Interim hearings at regular intervals)
September 1968		Final recommendation approved for printing	
January 1969		Penal Code introduced in Legislature	Penal Code introduced in Legislature