

Osgoode–York Working Paper Series in Policy Research



York Centre for Public
Policy & Law (YCPPL)
York Research Tower,
6th Floor
York University
4700 Keele Street
Toronto, Ontario M3J 1P3

EDITOR-IN-CHIEF

Jennifer Dalton

604 York Research Tower
jedalton@yorku.ca

STUDENT EDITORS

Senior Editors

Alysia Lau, JD Cand.
Nidhi Punyarthi, JD Cand.
Rachel Stack, JD Cand.

Junior Editors

Michael Brzezinski, JD Cand.
Katia Diab, JD Cand.
Mark Freake, JD Cand.
Ajay Gajaria, JD Cand.
Safina Lalani, JD Cand.
Saktish Pillai, JD/MBA Cand.
Rebecca Wasserman, JD Cand.
Jody Wong, JD Cand.

WEB PAGE

www.yorku.ca/oysspr/

**“Reflecting on the Law Commission of
Ontario’s Approach and Method:
Multidisciplinarity, Analytical Lenses and
Consultation”**

**Patricia Hughes
Executive Director,
Law Commission of Ontario**

March 2010

Sponsored by the
York Centre for Public Policy & Law



**Reflecting on the Law Commission of Ontario's Approach and Method:
Multidisciplinarity, Analytical Lenses and Consultation**

Patricia Hughes*

* Patricia Hughes, formerly the Dean of Law at the University of Calgary, is the Executive Director of the Law Commission of Ontario.

I. Introduction

How a law commission carries out its work is perhaps as important as the kind of work it undertakes, since the method employed to research a particular subject can affect the substance of the project: how the project is framed and analysed and the recommendations that the law commission makes.

In this paper, I describe the method the Law Commission believes is appropriate for many of its projects, in particular those that can be described as “social justice projects” These are large projects that seek to address the legal circumstances of marginalized groups, or, at least of specifically identified cohorts. Although these projects are about law, they are also about the social determinants that affect how the law operates or whether it is responsive to the circumstances of marginalized groups. To be done well, they require a particular approach which I discuss here. I also point out the challenges that this kind of approach poses, both pragmatic and normative.

II. About the Law Commission of Ontario

Launched in September 2007, the LCO is the result of an Agreement to which the Law Foundation of Ontario, the Ministry of the Attorney General, Osgoode Hall Law School, the Law Society of Upper Canada (all of whom provide funding to the LCO) and the other Ontario law schools are parties. Unlike many law reform commissions, it is not created by statute, does not receive references from the Attorney General and does not submit its reports to the Attorney General. Nor does the Attorney General have any obligation to table the LCO’s reports in the Ontario Legislature or to explain how it will respond to the reports. Rather, the LCO Board of

Governors determines the projects the LCO will undertake and once approved by the Board, the LCO will distribute the reports widely.

III. The LCO's Mandate and Access to Justice¹

The LCO's mandate is to make recommendations to make the law more relevant, effective and accessible, to simplify and clarify the law and to consider whether and how technology can increase access to justice. It also has a mandate to stimulate critical debate about law and to promote scholarly research.

More generally, however, it might be said that the LCO's mandate, similar to that of many commissions, is to make recommendations to enhance access to justice. This phrase is shorthand for law commissions' mandates (at least in a liberal-democratic society), whether a commission focuses on doctrinal questions and reviewing legislation, also addresses changing informal norms, intending their recommendations to "bring about broader social and cultural change" or whether it develops policy options.²

Access to justice may be viewed as synonymous with "access to the legal system" and from that perspective, often includes the removal of barriers to legal access consequent on the high cost of legal representation. The "core aspects" of access to justice have been identified as "reasonable and effective access to courts of law and the opportunity to obtain legal services from qualified professionals".³ One need push the boundaries of this conception only a little to

¹ This working paper develops themes raised in a presentation to the York Centre for Public Policy and Law Seminar Series. It expands on some of the issues explored in and specifically relies for the discussion on the meaning of "access to justice" in Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" [2008] 46 Osgoode Hall Law Journal 773.

² Marcia Neave, "Institutional Law Reform in Australia: The Past and the Future" (2005) 23 Windsor Y.B. Access Just. 343 at 349-350.

³ *Christie v. British Columbia*, [2005] B.C.J. No. 2745, 262 D.L.R. (4th) 51 at para. 30 (B.C.C.A.) (per Newbury J.A., speaking for the majority). Newbury J.A. considered these aspects constitutionally guaranteed, not a position upheld by the Supreme Court of Canada: *British Columbia (Attorney General) v. Christie*, [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873.

include recognition that other factors may also affect access to the legal system and thus to legal justice, such as physical or cultural barriers.

These are important conceptions of access to justice or to the legal system and there is much to do in these areas. There is, however, another conceptualization of access to justice that includes ways in which law may be employed to advance other forms of justice (such as social or economic justice, for example), or to understanding the ways law might impede social or economic justice. This view almost necessarily encompasses how non-legal actors (that is, actors not involved in law) impact the effectiveness of law. It can be argued that a contemporary law commission in a liberal democracy should be concerned with questions related to enhancing access to justice, broadly defined, although this requires more resources than a more modest or focused approach. (It must be said that a project focused on legislative amendment or development may be extensive and take considerable time and may also respond to contemporary social developments; this is, nevertheless, a different approach to developing law from one that incorporates social and other considerations into the project.)

There are many organizations today that engage in law reform to a greater or less degree.⁴ Law commissions are distinctive in structure and mandate, particularly when one considers the sum of their characteristics: law reform commissions are independent, both of government and of interest groups; are meant to have some degree of permanence; are dedicated solely to law reform; usually have their own staff; undertake the study of many different areas of law and policy; tend to perform their work in public through the release of discussion papers and interim reports; and engage with affected communities, professional and otherwise, in the study of an

⁴ Law reform has been described as “crowded field” with a variety of law reform agencies or organizations that engage in law reform (*ad hoc*, permanent, government, expert commissions, commissions of inquiry, community clinics): David Weisbrot (President of the Australia Law Reform Commission), “Comments from the President”, ALRC Annual Report 2004-2005: <http://www.austlii.edu.au/au/other/alrc/publications/reports/101/3.html>, accessed July 25, 2008.

issue and development of recommendations. They do not serve their mandate well by being advocates or lobbyists. Law commissions differ from each other, however, on how they define access to justice.

Law commissions, to the extent resources permit, may establish their own niche by sometimes carrying out work that transcends the “boundaries of legal reality”, as identified by Conklin, that is, move outside the institutions (courts, legislatures, subordinate agencies and government officials) and concepts (doctrines, rules, principles and policies) to enter the “‘ought’ or non-legal realm”, the place where the broadest understanding of justice can be realized.⁵ Yet this can be dangerous territory, since there is also a well-established perception of law commissions as bodies that are expected to provide practical advice to government on issues government may not have time to examine itself or issues government may wish to avoid direct association because they are controversial.

At one time, commissions found their projects in the legal profession (including judges) and they consulted only the legal profession. Their projects were determined “more in response to lawyers’ dissatisfaction with the law and its processes than to the injustices felt by citizens”.⁶ Although as an exclusive approach to law reform by standing law reform commissions this narrow approach has been discarded, some commissions still focus on statutory reform (albeit the projects may be expansive and lengthy), rather than social justice issues.⁷ Some take a broader view that even if they are responding to the government’s agenda, this cannot be at the

⁵ William E. Conklin, “Whither Justice? The Common Problematic of Five Models of ‘Access to Justice’” (2001) 19 Windsor Y.B. Access Just. 297. For a more extended discussion of how Conklin’s thesis applies to law commissions, see Hughes, *supra* note 1 at 781.

⁶ Gavin Murphy, Law Reform Agencies (Department of Justice Canada, 2004): <http://www.justice.gc.ca/eng/pi/icg-gci/lr-rd/index.html>.

⁷ The Alberta Law Reform Institute’s work shows the breadth that statutory reform can take, as well as the impact such projects can have on debate in the area: <http://www.law.ualberta.ca/alri/Publications/index.php>, accessed December 30, 2009. The British Columbia Law Institute also tends to statute reform work, however, it also supports the Canadian Centre for Elder Law: <http://www.bcli.org/ccel>, accessed December 30, 2009.

expense “of *not* taking things for granted; of questioning the conventional wisdom; of *not* accepting that our existing laws, structures and institutions are natural and inevitable – when in fact they are historically contingent”.⁸ A broader understanding of access to justice requires questioning “the existing legal framework” in order to incorporate the worldviews and experiences of previously excluded groups.⁹

Nevertheless, it must be recognized that law commissions are *law* commissions and they cannot ignore that legal reform is their core mandate. If their projects have the potential of destabilizing law, it should be with the intent of transforming law to make it more equitable, more responsive to all citizens and to everyday life. The role of law is much bigger than the legal system, while also being less than the total of people’s lives. For law to have legitimacy it must not only keep pace with changing societal conditions and norms, it must, at times, lead those changes. It must act contemporaneously as a cultural change agent, while reflecting the evolving culture of any society. In a liberal-democratic society, law reform is a deliberate, progressive activity that seeks to ensure that law is accessible and equitable. From this perspective, law reform is a normative activity. Thus at its best, it goes beyond tinkering or ensuring that specific legislative provisions are not out of date (although it is, of necessity, appropriately that); it contemplates in its more ambitious projects, the reconceptualization of legal frameworks and the integration of law with other disciplines.

Realistically, a law commission’s capacity to address the larger access to justice questions will be limited by broader societal and political developments. If it is concerned about being perceived as a rogue organization, it may take the “safer” route of limiting its efforts to statutory

⁸ David Weisbrot, “The Historical Necessity of Law Reform”, The Alex Castles Memorial Lecture in Australian Legal History (August 2006) (“Historical Necessity”): <http://www.alrc.gov.au/events/speeches/DW/20060824.pdf>, accessed July 24, 2009.

⁹ Reg Graycar and Jenny Morgan, “Law Reform: What’s In It for Women?” (2005) 23 Windsor Y.B. Access Just. 393 at 398.

reform (although this may also leave it open to charges of being redundant if in doing so, it seems to be an agency of government). When there is a general commitment to extending rights and viewing “justice” broadly, law commissions may feel more confident in approaching their mandate broadly. In a progressive milieu, not only those groups whose circumstances are addressed by the commission’s recommendations will welcome this approach, but also other actors in the system may nonetheless appreciate its value.

To the extent that the mandate of law commissions is to enhance “access to justice”, explicitly or implicitly, they must decide whether they think of “justice”, unmodified, as not only a legal term, but also as a social concept that has or may require a significant legal component. If law commissions do decide to engage with the broadest terrain of access to justice, to do so with any degree of success, they must adopt particular approaches to and modes of analysis in the work that they do.

IV. Approach and Method

The approach a law commission takes and the methods it uses infuse its work from the commencement of projects through to its recommendations. The LCO approves project proposals from many different sources, engages in consultation with many groups of different kinds as part of its research, does multidisciplinary research and uses different lenses to analyse the issues and determine its recommendations.

David Weisbrot, former President of the Australian Law Reform Commission, listed the “modernist” characteristics of law commissions as permanent, full-time, independent and authoritative. In addition, he suggested that other “post-modernist” characteristics, “essential to the success of a contemporary law reform agency,” are generalist, interdisciplinary, consultative

and implementation-minded.¹⁰ In his view, law commissions need to reflect broad societal changes around law and policy-making, including: the decline of ‘traditional certainties’, authorities and institutions; the increased “complexity of social institutions/problems, and of competing interests”; the diffusion of power which is not “entirely invested in the formal organs of government”; the recognition that not all issues and disputes are ‘legal’; and the “increasing desire for direct participation in civil society and in public policy-making”.¹¹ On the negative side, it has been argued that these post-modern insights undermine trust in law and thus in legal solutions, which is the opposite of the vision underlying the formation of law reform commissions, namely that the law could be made more “accessible, understandable, coherent and administered fairly by institutions that are neutral and behave with integrity”.¹²

Some of the characteristics Weisbrot and others identify are necessary to a law reform commission (it must be independent and impartial, for example). Others may be more appropriate for some projects rather than others; or, perhaps more accurately, essential to some, but not to others. Larger, socially-oriented projects invite multidisciplinary research through a variety of analytical lenses and extensive community consultation. The reality of a law commission’s resources may mean that it will not be able to apply the methods needed to engage in extensive consultation among community groups or multidisciplinary research for all its projects. Even if inclined to the bigger projects, however, a law commission will likely engage in narrow, technical projects that involve recommending amendments to legislation or the abolition or creation of new legislation, as well as broader more socially-oriented projects. It is not that the

¹⁰ David Weisbrot, “Historical Necessity”, *supra* note 8. Also see David Weisbrot, “The ALRC and the Challenges of National Law Reform”, Legal Studies Conference (Sidney, April 3, 2009) 8 (“Challenges”): <http://www.alrc.gov.au/events/speeches/DW/2009/20090403.pdf>.

¹¹ Weisbrot, “Challenges,” *ibid.* at 7.

¹² Rt. Hon. Sir Geoffrey Palmer, “Law Reform and the Law Commission in New Zealand After 20 Years – We Need to Try a Little Harder”, New Zealand Centre for Public Law, Victoria University (Wellington, March 2006) 7-11: <http://www.lawcom.govt.nz/SpeechPaper.aspx>, accessed December 21, 2008.

narrower projects do not have ramifications beyond the legal system, nor that they do not have value in themselves. Rather, a law commission's selection of projects will be determined by the political culture within which it operates, external normative expectations about the appropriate role of a law commissions, as well as what it perceives to be an effective use of resources and the need to complete "products" frequently enough to satisfy funders and others.

The Law Commission of Ontario undertakes both kinds of projects. Its narrower, more legally-focused projects include the division of pensions on marital breakdown,¹³ joint and several liability under the *Ontario Business Corporations Act* and the modernization of the *Provincial Offences Act*.¹⁴ More socially-oriented projects include the charging of fees for cashing government cheques;¹⁵ the development of a coherent approach to the law as it affects older adults; the development of a coherent approach to the law as it affects persons with disabilities; family law process;¹⁶ and protection of vulnerable workers.

The projects in this second category reflect a commitment to a substantive understanding of access to justice or equality. This is true even of the family law project, despite its being about process, because it involves understanding the needs of different communities where family disputes are to be resolved effectively and long-term. These projects require consideration of the social circumstances that affect the impact of the law; in developing recommendations, it is crucial to take into account the way the law affects various communities differently. In other

¹³ The Final Report in this project is available on the LCO's website at <http://www.lco-cdo.org>.

¹⁴ See the LCO's website for the Consultation Paper in the POA project. This is an example of a project on a subject in which the government itself introduced legislation: *Good Government Act, 2009* which made rapid progress through the Legislative Assembly (introduced on October 27, 2009, it received Royal Assent on December 15, 2009). Amendments to the POA constitute only part of the statute which addresses a number of other issues.

¹⁵ The Final Report is available on the LCO's website.

¹⁶ For consultation papers in the projects on older persons, persons with disabilities and family law, see the LCO's website. The LCO's work in these areas will take into account work done by other organizations. For example, The Western Law Reform Agencies have issued a report on Enduring Powers of Attorney: Areas for Reform (<http://prejury.law.ualberta.ca/alri/docs/WCLRA-EPA%20report.pdf>). A number of bodies not necessarily committed full-time to law reform have made proposals for family law reform and the government recently announced some basic reforms to the system:

<http://www.attorneygeneral.jus.gov.on.ca/english/news/2009/20091217-famlaw-nr.asp>.

words, “good law reform work presupposes that regard will be given to the way in which the law operates in practice; that is, how it impacts on people’s lives and on society generally”.¹⁷ The projects in the first category do not ignore these factors, but they play a less central role.

My focus here is on the projects that are defined based on a broader understanding of access to justice. These recognize and incorporate, to the extent feasible, public participation, multiple normative orders and inter/multidisciplinary analysis.

A. Consultation

The notion of “pluralism” reflects the significance of “difference” as part of Canada’s identity. The predominant view is that “enduring ethnic, cultural, national, and other forms of identity [should be] important factors in the ordering of social and political relations”.¹⁸ These are not the only choices that can be made about how a society is governed and the bases upon which policy is developed. Canada began as a “bilingual/bicultural” experiment; it continues as a country that shifts between a “monoculture-based system,” as Taieb describes both the United States and France (but not Canada), one “refusing the competition between the laws enacted by the state and the laws produced by communities and their collective narratives”¹⁹ and one that seeks to incorporate different sources of authority into its rules of governance. This challenge is posed by First Nations law and by certain religious communities. For a law commission, the significance of the existence of multiple normative orders in a pluralist society means that it should engage with a far wider range of communities than has been done ever before if its analysis and recommendations are to take into account how people view the authority of

¹⁷ Michael Tilbury, “Why Law Reform Commissions?: A Deconstruction and Stakeholder Analysis from an Australian Perspective” (2005) 23 Windsor Y.B. Access Just. 313 at 313.

¹⁸ Tim Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver, Toronto: UBC Press, 2003) at 16.

¹⁹ Julien Taieb (2004) “Freedom of Religion: from France to the United States, a National Conflict of Law,” *Global Jurist Advances*, 4:3, Articles 1, 5: <http://www.bepress.com/gj/advances/1vol14/iss3/art1>, accessed January 26, 2005.

government. One of the benefits of consultation is that it might reveal differences in how people view and categorize law and their relationship with it. Incorporation of external bodies of knowledge and methods of analysis, as well as recommendations that recognize law as “in the world” and affecting people in their daily lives, are imperative for a commission to make a contribution to access to justice, with law as part of a larger societal context.

Researchers investigating the use of the legal system by abused women in immigrant communities, for example, found that cultural norms, language barriers and “perceived racism in the criminal justice system and social service agencies” were only some of the “extra-legal” factors that discouraged women from exercising their legal rights.²⁰ One cannot ignore that “cultural norms” may be treated by some people or communities as a form of authority that is considered equal to or even more important than the official authority of government. Any attempt to increase access to justice for these women that limited itself to the cost of access to the legal system, to forms of dispute resolution and specific recommendations, such as increased prison sentences, and did not take these non-legal factors into account, would fail in its objective and perhaps make the situation worse by positing a false statement about what justice would look like. In particular, it is vital to consider whether “imposing” majority views on a community that does not accept them works to the advantage of the abused woman or not. It follows that in making recommendations about how to address this example of inadequate access to justice, it would also be necessary to make recommendations about how to address these other factors. Factors external to law can make even “good” law inaccessible or can make a mockery of law’s

²⁰ Baukje Miedema and Sandra Wachholz, A Complex Web: Access to Justice for Abused Immigrant Women in New Brunswick (March 1998): http://www.swc-cfc.gc.ca/pubs/pubspr/complexweb/complexweb_e.html#summary, accessed January 27, 2008.

efforts to deal with a problem that has been framed as legal, but which is really about power relations or economic disadvantage or some other “law and ... ” issue.²¹

Significantly, community participation and multi-disciplinary analysis informed by different normative orders help to unpack what has become accepted and unquestioned beneath the surface of law, what lies behind and beyond legal institutions, process and language. Thus contemporary law commission inquiries, recognizing the influence of the non-legal world, require consultation with people directly affected by the law who may have very distinctive experiences with law and the legal system than do most technical “lawyers’ law” inquiries (although it should not be assumed that various communities may not have something helpful to say about the way they are affected by more technical areas of law or that lawyers do not have something to say about the broader issues). These consultations are intended to obtain information and the viewpoints of the members of relevant communities affected by the law under study, but it has been suggested that they also perform other pragmatic functions, including the correction of errors;²² the possibility that the affected groups will pressure government to respond to the law commission’s report; and the “public ventilation of issues” to help develop consensus or at least “defuse lingering tensions” around issues.²³ This applies not

²¹ Conklin, *supra* note 5 at 311. By “law and ...”, I mean that the issue involves not only law, but other phenomena, such as cultural norms or areas of people’s lives which are better understood through other disciplines such as sociology or psychology, which, as Conklin says, are “exterior to legal reality”.

²² These errors may take different forms. For example, they may be in researchers’ assumptions about the views held by members of a particular community or the extent of dissent in a community, revealed through the consultation process or in the interim report on which feedback is requested. Errors may also be factual; or a discussion of an issue may not be inaccurate as much as incomplete. These mistakes are usually revealed when people read the interim report and may affect the law commission’s preliminary recommendations.

²³ See, for example, The Hon Justice Michael Kirby, “Law Reform – Ten Attributes for Success”, delivered to The Law Commission of Ireland (Dublin, July 17, 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_17jul07a.pdf, accessed July 24, 2008, David Weisbrot, “What’s the Value of a Full Time Standing Law Reform Commission? (You mean besides independence, quality scholarship, extensive public consultation, corporate memory, cost effectiveness...?)”, Australian Law Reform Agencies Conference (June 2002): <http://www.alrc.gov.au/events/speeches/DW/20020620.pdf>, accessed July 24, 2008. In Canada, see Roderick A. Macdonald, “Jamais Deux Sans Trois ... Once Reform, Twice Commission, Thrice Law” (2007) 22 No. 2 Can. J.L. & Soc’y 117 at 141; Yves Le Bouthillier, “Introduction” (2007) 22 No. 2 Can. J.L. & Soc’y 113 at 114.

only to “community groups”, but also to professionals: thus “[s]ome commissions are also beginning to think about how to change the culture of institutions, such as the courts and the police, to ensure that any legislative amendments work in the way intended”.²⁴

At a minimum, consultation with affected groups permits a better understanding of what people actually experience and of what the law means to them: is it a help or a hindrance? Is law simply an abstract representation of authority or does it address important parts of their lives? Part of the analysis of the subject matter of a project must be to view it as those subject to it see it, and this often requires disassembling the norm. Complicating this analysis is that one person’s “truth” may be omitted from someone else’s “truth” or indeed may be someone else’s “lie”. No one’s account is complete, but no account can be complete without their input. An individual’s views cannot be treated in isolation, but as part of a larger analysis that takes into account the requirements of others affected by the law or responsible for it. In order to obtain the larger picture, however, it is necessary to consult not only with government, lawyers, the judiciary and others directly associated with the legal system, but with members of communities particularly affected by the law under consideration or with the organizations serving them.

The LCO’s project on older adults provides an illustration. It is premised on several principles, including autonomy and independence, diversity, security and participation. Clearly, these factors may be in conflict for some older adults. The ability of a person to be independent may be curtailed by conditions that limit mobility or cognitive capacity. From another perspective, a person’s autonomy to act may have to be restricted in order to ensure the safety of other members of the public. The challenge of this project is reconciling these principles, ensuring that each has its due, without stereotyping on the basis of age. Even treating “older adults” (however defined) as a cohort, even one identified explicitly as heterogeneous, may be

²⁴ Neave, *supra* note 2 at 361.

criticized. On the other hand, without acknowledging that people are treated differently because of age and that in certain ways, many (although not all) people behave differently or have different needs as they age (such as assistance in making decisions), it is not possible to appreciate the part law can play in meeting those needs or in facilitating a life in which these needs do not dominate. The best authority on what life is like for older people is older people; and the best authority on what life is like for poor older women is poor older women. Even so, it is necessary to hear from others involved in the lives of poor older women to obtain a full picture and to recognize that it is impossible to avoid generalizations that are not always accurate for everyone in a particular cohort.

Widespread and more in-depth consultation requires creativity, again within the bounds permitted by resources. In its simplest form, posting on the internet provides the easiest method of dissemination and has the potential to reach the greatest number of people. As in many other areas, the internet is a boon to law commissions, both with respect to cost and the extent to which its consultation papers and reports can be distributed. Not everyone affected by law commission projects has access to the internet or the ability to use it, however. Even those who do may not be inclined to respond if there has not otherwise been a connection with the commission.

Going beyond posting on the internet to being proactive in reaching members of the public or of more defined communities, it is difficult to reach people who are directly affected by the law and often commissions look to community organizations to facilitate these connections. In-person consultations through focus groups, individual interviews and similar formats are commonplace. Web-based discussions with tools that can accommodate disabilities can be helpful in extending the commission's geographical reach. The commission needs to provide easy means of making written submissions or comments, such as through email or comment

boxes on the commission's website. There are other ways "to spread the word"; for example, the Australian Law Reform Commission has been involved in radio talk-in shows. Roundtables of academic and experiential experts may suit some projects.

The Law Commission of Ontario has attempted to develop broad consultation and has hired a Community Outreach Coordinator to improve its consultation processes and extend its reach. It recognizes, however, that many of its efforts in relation to current projects may not bear fruit until later, perhaps in its second mandate if it receives one, if at all.²⁵

B. Multidisciplinary Analysis and Analytical Lenses

Law as an isolated discipline has little capacity to explain or illuminate people's behavior. If we want to know why people behave the way they do, we need to use the research tools and knowledge of other disciplines, including those that operate at societal and individual levels. In the older adults and persons with disabilities projects, for example, questions of competency require understandings gained from medicine, psychology, sociology and others disciplines. We need to understand the role of cultural norms, gendered behavior and other factors that influence how people make decisions, why they rely on others, how people decide to rank the decisions they make and the capacity for societal or individual supports before developing recommendations about competency and supported decision-making.

Similarly, assuming that a cohort is homogeneous, or recognizing difference but assuming it is of little import in the bigger picture means we are likely to miss crucial aspects of people's lives. A uni-dimensional analysis may mean we have glossed over circumstances that reveal the failure of the law as it exists or that will limit the potential of reforms in the future. What does it mean to bring a racialization, gender or class analysis, or one that brings to the fore the effect of

²⁵ The LCO's initial mandate expires on December 31, 2011. It is currently engaged in a renewal process, including an application to its funders for extended funding.

legislation on persons with disabilities or age, and one that recognizes the intersection of identity and/or community membership? It means in part looking beneath the surface. As Kimberlé Crenshaw said a decade and a half ago, when examining a question that seems to be about gender, we should also ask, “where is the racism in this?”²⁶

One of the LCO’s projects is focused on vulnerable workers and precarious work, or work that is temporary and low paid with few benefits. It examines not only the extent to which these workers enjoy statutory protections and enforcement mechanisms under the relevant statutes, but also who the majority of vulnerable workers are, why they disproportionately belong to particular communities and what the impact of engaging in precarious work for most of their working lives may be. One example of precarious work is part-time work. A proper examination of the impact of this work must consider that some workers choose this work, while others take it out of necessity; that for some employers, it is a way to avoid paying benefits or a way to pay lower wages, while for others it is a reasonable way to respond, for example, to seasonal requirements. For some workers, the money they earn is simply “extra”, but for many others it is their living and one part-time job must be combined with one or more other part-time jobs. Some workers experience temporary work as temporary for them before they are able to enter the full-time workforce, while others go from one part-time job to another for their working lives, not out of choice, but out of necessity. There are many differences in the demographic of part-time work even on the surface, but the phenomenon becomes even more complex when one takes into account the identity of part-time workers who are disproportionately women (of different communities) and members of racialized communities. Without using an analytical approach that

²⁶ Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour” in Dan Danielsen and Karen Engle, eds., *After Identity: A Reader in Law and Culture* (New York: Routledge, 1995) at 350, fn.6.

draws on insights from theories about gender, racialization and class, the full appreciation of the phenomenon of precarious work and the identity of vulnerable workers may not be possible.

A variant of looking beneath the surface of law is the acknowledgement that government may not be the only source of authority for some people or circumstances and that it is not the only actor that has an effect on the application or implementation of law; law commissions may make recommendations to actors other than government, whether quasi-public or private actors. In its fees report, for example, the LCO not only recommended relevant legislative provisions, but also made recommendations to banks and other relevant actors who had a role to play in the respectful treatment of recipients of government assistance who received their benefits in the form of cheques. The way a commission develops its recommendations has to address the reality that some of those who require enhanced access to justice may be more influenced by authorities other than the official law or the agencies responsible for enforcing it.

V. Challenges

The biggest practical challenge facing law commissions that want to engage in extensive consultation and multidisciplinary and variant lenses analysis is resources, followed closely by expectations. Consultation also poses normative challenges that a law commission is not always in a position to address.

Undertaking lengthy social justice projects is an expensive proposition. The person responsible for the project will spend considerable time on it. At the LCO, the project head (usually, but not always,²⁷ an in house lawyer) is responsible for research, writing consultation papers, consultation and writing the interim and final reports. The older adults and persons with

²⁷ The LCO's joint and several liability under the OBCA is headed by an Osgoode Hall Law School LCO Scholar in Residence, an in-kind contribution from Osgoode. The pensions project was headed by the then Ministry of the Attorney General LCO Counsel in Residence, an in-kind contribution from the Ministry; the POA project is headed by the current MAG Counsel.

disabilities projects are headed by the same lawyer, who also has other responsibilities, but whose time is primarily spent on the two projects. In addition, the LCO commissioned three background papers for the older adults project and will be commissioning papers for the persons with disabilities project, as well as other projects. Both projects will involve extensive consultation with concomitant costs.

Larger projects require flexibility in funding (that is, lump sum funding) allowing the funding to be used most effectively for each project as required. Project-based funding can limit the kinds of projects that a commission can undertake.

There is an “infrastructure” to consultation which requires resources. Consideration must be given to privacy and its special importance in certain projects. Accommodation of disabilities is also crucial. Sometimes, means of providing translation must be found, as appropriate to the project. Most importantly, real community consultation requires establishing relationships with the communities or conditions that invoke trust that the commission will treat comments and input with respect.

Extensive consultations can require considerable resources and effective consultation requires time to develop relationships of trust. There must be staff to organize the consultations so that they run smoothly and respond adequately to the needs of those who are giving their time and energy to the consultations. Legal staff engaging in the consultations must have time to travel, as well as general time to allocate to the consultations themselves. Alternatively, the commission may pay for participants in the consultations to travel to a central location. Travel and accommodation are expensive. Knowledge resources are crucial; there must be opportunities to hear from members of communities themselves what proper consultation with them requires. The LCO has, for example, had the benefit of an Elder’s knowledge about certain First Nations’

customs provided during the Elder's visit to the LCO offices. It is also using student resources to learn about Aboriginal communities in Ontario. Time is required to acquire information and to implement what is learned. It is important that someone has the time to learn about the various views held by different groups within communities, views that sometimes reach the status of serious disputes.

There are other aspects of consultation that, in some ways, are even more difficult than the factors to which I have already referred, and which may be glossed over in practice because of their difficulty and, in particular, the normative challenges they pose. A fully realized substantive equality conception – for that is what a broad understanding of access to justice involves – requires appreciation of the flexibility and overlapping nature of identity and of the distinction between an externally imposed and an internally derived identity.²⁸ The shaping of social identity is dynamic, in flux and complex: one might think of “the self [as] a text with a multitude of discourses”²⁹. We tend to identify people as belonging to a particular group or community, or at best as experiencing “membership” in two communities. Law commissions are likely to limit their appreciation of someone's identity as it is revealed for the purpose of the project on which they are being consulted. Law commission analysis and recommendations cannot realistically address the complexity of individual identity, but it should be present as a sub-text of the commission's work.

There must be resources to hire excellent staff with a background in relevant research techniques and openness to hearing different viewpoints. Law commission staff must at times put aside their own predispositions on an issue. Preferably staff have a capacity to engage in some

²⁸ See, for example, Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 Queen's L.J. 179.

²⁹ M. M. Slaughter, “The Multicultural Self: Questions of Subjectivity, Questions of Power” in Michel Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy* (Durham: Duke University Press, 1994) 369 at 374.

multidisciplinary research, as well as in analysis through a variety of lenses. Often, however, it will be necessary to hire external researchers. This is not only a monetary cost, but a cost in the ability to address the quality and timing of completion of research.

Law commissions often face conflicting expectations. Different constituencies imprint their own vision of what a law commission should do. As already indicated, some observers believe that a law reform commission should restrict its work to legal matters, narrowly defined, and instead focus on legislation. On this view, the LCO's pension division on marital breakdown may be the "perfect" project: it was limited to recommending amendments to the *Family Law Act* as it currently existed, not questioning any underlying assumptions about the Act. While it dealt with an issue that could easily have been addressed by government itself, it was not yet at that point, although it had been identified as one of the most urgent issues in family law. In fact, government did accept some of the LCO's recommendations which were incorporated into amendments to the *Family Law Act*.

Because law commissions must be pragmatic, their recommendations may also disappoint those who believe that law commissions should always seek to re-conceptualize the law. They believe that projects of the division of pensions type are not a good use of a law commission's time. The most extreme version of this is that a law commission should undertake large, transboundary projects that have as their goal not law *re-form*, but "law *re-substance*".³⁰ There are more who think that a commission's character is best reflected in the somewhat less ambitious, but nevertheless challenging, undertaking of large – and lengthy – social justice projects. On the other hand, these projects, in some quarters, led themselves to the question, "What is the law in this?"

³⁰ Macdonald, *supra* note 23 at 132 (emphasis in original).

A commitment to widespread consultation may result in higher expectations among community groups than can be achieved, especially in the short term. There may be disappointment, too, if the commission's recommendations differ from those the group itself would want to see. In making recommendations, a commission has to take into account many factors from different perspectives.

The issue about types of project is related to expectations about level of productivity. There are expectations about how quickly the work should be completed that may be hard to meet. Short, statute-focused projects about which most consultation is with the legal community can be completed relatively quickly, in less than a year and perhaps in a shorter period. Of course, statute-focused projects can be lengthy, if the goal is to recommend legislation in a whole new area or to update a major statute. Social justice projects with extensive consultation with the legal community and with community-based groups can take anywhere from about 18 months to three years to complete.³¹ Yet a major measure for some people is how many reports the law commission has been able to produce. More unrealistically, one measure usually cited to determine how successful a commission has been is the extent to which government has adopted its recommendations or the extent to which its recommendations have been translated into legislation. Success on either of these measures is less likely with larger social justice projects. Furthermore, the more innovative and forward thinking a commission's recommendations are, the less likely they are to be legislated in the short term, at least, although they may be successful on other measures.³²

³¹ The LCO's fees project, the first project undertaken, was completed in about nine months, in part because the lawyer responsible was able to focus primarily (although not exclusively) on it and because, although it involved consultation, it was more limited than the kind of community-based consultation the LCO carries out today.

³² Such as whether courts have commented on the reports, academics have used them to analyse issues, other jurisdictions have adopted the recommendations or the report has created or significantly contributed to debate on the issue (one aspect of the LCO's mandate is to stimulate critical debate on the law).

When a law commission “promises” to engage in consultation widely, expectations will inevitably be raised among many groups that they will be consulted on any project in which they have an interest. Any group can comment on a consultation paper or interim report, as long as they have some capacity to do so and when doing so is made as accessible as possible. Still, some groups will have minimal resources for participating and may expect the commission to facilitate submissions financially. Most commissions will not have the resources to assist in this way. The commission will likely be proactive in seeking out submissions (written and oral), and this may not sit well with those who are not consulted. The commission has to make choices based on hearing from those (it believes) are most affected by existing legislation or policy and will be most affected by changes. It will have the task of “managing expectations”.

Yet multidimensional analysis, through different lens, requires not only integrating the analyses developed by academics, but also the experiences of people themselves. This view underpins the need for widespread consultation, but it also raises significant normative questions that a law commission usually does not tackle. This challenge is one that likely faces the society in which the commission operates and not only the commission itself.

This rather larger normative challenge arises from recognition of the existence of multiple sources of authority and a commitment to pluralism. To what extent can a political system countenance "multiple normative orders," that is, "take cognizance of, and even give way to, social [or religious] norms that develop independently of officially endorsed rules?"³³ Is it possible to develop reconcile competing claims and interests based on religion or culture that secularists (those who are not predisposed to majority or minority viewpoints), the majority and

³³ Denise G. Réaume, "The Legal Enforcement of Social Norms: Techniques and Principles," in Alan C. Cairns et al, *Citizenship, Diversity and Pluralism: Canadian and Comparative Studies* (Montreal & Kingston: McGill-Queen's University Press, 1999) 177 at 177.

the minority all recognize and acknowledge a type of "joint governance" in which there is a mutual reinforcement of individuals' agency as a member of a culture and a citizen of a state"?³⁴

This challenge raises many issues with respect to consultation. For example, most groups are not, in fact, homogeneous, even if they purport to be; there may be dissenters or members who are disadvantaged by the majority but who nevertheless do not wish to leave their community. Furthermore, groups that most strenuously claim an "independent" or autonomous scope of decision-making (in family matters, for example) may also be groups that profess views that are most incompatible with mainstream views (that is, views that are reflected in the constitutional text and principles), hence the need for autonomy. Liberal principles underlie the view that some recognition should be given to this sphere of autonomous decision-making, often, but not only, on the basis of religious freedom. At the same time, other liberal principles, primarily equality, may run counter to holistic acceptance of the autonomy of these groups. In making recommendations intended to increase access to social justice, including legal justice, law commissions are in effect making recommendations about the civic good; these recommendations must find their reference point, whether articulated or not, in a view of the good society, from which the legal – justice – system cannot be separated.

Depending on the particular project, a law commission will not be able to avoid the debate about the way in which mainstream or dominant values and the values espoused by "minority" groups conflict. This is because the values of minority communities tend to be at least partially premised on normative judgments about the treatment of those who are at odds with the judgments in mainstream society (even if not realized in practice). If one justifies recognition of minority practices, whether explicitly in law or otherwise, on the basis that the

³⁴ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001) 88.

minority should not be oppressed by the majority, how is one able to ignore unequal treatment of “minorities within minorities”?³⁵ A law commission has to consider calls to find a way in which these conflicts can be “talked through” to some sort of mutual accommodation.³⁶ At the same time, the extent to which a law commission will make recommendations that would require the state to be complicit in sanctioning practices that have underpinned Canadian societal values for the past quarter century also should be considered.

VI. Conclusion

This paper is intended to be a contribution to the conversation about the methods and approaches a contemporary law reform commission should employ in how it frames the questions it studies, in its research and analysis and in its recommendations. While recognizing that any law commission will usually undertake focused legal projects, directed at amending legislation or creating a legislative model for matters not yet addressed through statute, and recognizing, too, that some law commissions either choose to work within a statute-focused mandate or are not provided with the resources that permit more broadly framed projects, it explains why the Law Commission of Ontario also undertakes more socially-oriented projects and explores the significance of doing so for the approaches it takes and the methods it employs.

Once a commission entertains the possibility of undertaking projects that are intended to permit recommendations to increase access to justice, broadly defined, it also has to address

³⁵ Melissa S. Williams, “Tolerable Liberalism” in Avigail Eisenberg and Jeff Spinner-Halev, eds. *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: University Press, 2005) 19 at 27: “a concern for equality presents both an argument for and a limit to toleration”, an argument that can be made about autonomy as the basis of recognizing minority group practices. Also see Susan Moller Okin, “Multiculturalism and feminism: no simple question, no simple answers” in Eisenberg and Spinner-Halev, eds., *ibid.* at 67.

³⁶ See, for example, Shachar, *supra* note 34; Alex Fielding, “When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada” (2008) 13 Appeal 28 (supporting the application of Mill’s harm principle and a focus on individual rights, rather than a societal consensus); and Faisal Bhabha, “Between Exclusion and Assimilation: Experimentalizing Multiculturalism” (2009) 54 McGill L.J. 45 (suggesting various ways of working through the conflicts can be tried to find the best way).

whether these projects require a different approach from the legally-focused project. The answer is not simple, since even the project limited to law requires an understanding of how the law affects those subject to it, including groups whose experience of law may be different from that of majority groups. Realistically, however, the LCO is, at least, less likely to undertake a significant pro-active consultation in these projects, especially if the project has not been framed as whether the law has an unfair impact on a particular group or if initial research does not reveal areas of concern in this regard. One of the reasons for taking these projects, although certainly not the only one, is that they require fewer resources and can be completed in a shorter period of time.

It is, on the other hand, difficult to carry out the broader project without extensive consultation, multidisciplinary analysis and employing different analytical lenses, if one assumes that enhancing social justice requires understanding what justice requires for affected groups. It may be argued that the current Canadian notion of social justice infers that dominant forms of justice may at least sometimes constitute injustice for non-majority communities. This requires effective consultation (that is, consultation approaches that are accessible to various groups), as well as academic analysis that permits a re-reading and unpacking of majority norms, as well as the capacity to explore the legal issue using the insights of disciplines other than law. And this, in turn, requires resources: human resources, financial resources and time. This also requires a sensitivity that a commission can acquire only over time, but which also requires developing relationships with a variety of communities.

The *Osgoode–York Working Paper Series in Policy Research* primarily publishes research that has been presented as part of the *Osgoode–York Seminar Series in Policy Research*.

The *Seminar Series* seeks to:

- provide a forum for the dissemination of scholarly research and research-in-progress in areas related to public policy, broadly defined;
- enhance and develop interdisciplinary discourse in policy-related areas; and
- bring together Osgoode and York faculty, graduate students, and advanced undergraduate students in a collegial learning environment.

Proposals for seminar presentations and working papers are being accepted on a rolling basis. Working papers undergo at least two stages in a peer-review process and are posted online as they become available.