

CREATING A NEW LAW REFORM
COMMISSION OF CANADA

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CREATING A NEW
LAW REFORM COMMISSION
OF CANADA

A CONSULTATION PAPER

CREATING A NEW LAW REFORM COMMISSION OF CANADA

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FOREWORD

In the Speech from the Throne on January 18, 1994, the Government of Canada made a commitment to create a new law reform commission. Before introducing legislation, the Minister of Justice, the Honourable Allan Rock, would like to receive public input into the new commission's mandate and structure.

This consultation paper has been prepared by the Department of Justice to assist it in preparing that legislation, and to make the Minister and the future commission aware of the public's views on how the new law reform process should unfold. The paper is being circulated widely both within and beyond the legal profession in order to obtain a broad range of perspectives on law reform.

In preparation for this step in the consultation process, the Department of Justice carried out individual and group discussions with persons familiar with the former Law Reform Commission of Canada to help identify the main issues to be addressed in creating a new commission. This paper sets out a brief discussion of those issues. In each area, you are asked to consider certain general questions. At the end of the paper, you will find a Questionnaire providing specific questions. Please indicate your answers to those questions on which you have an opinion (you need not answer all of them) and return the Questionnaire to us. Your views will be taken into consideration before the Minister puts forward a proposal for a new law reform commission.

Send the Questionnaire to:

Law Reform Commission Project
Department of Justice Canada
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Ottawa, Ontario
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Chapter 1.

The Challenge of Law Reform in the 1990s

The Government of Canada has made a commitment to create a new federal law reform commission¹. However, before deciding on the mandate and form of such a commission, the Government is taking this opportunity to consider new and more effective ways of doing law reform — ways that better address the challenges that will be faced in the 1990s and beyond.

Much has changed in Canada since 1971, when the previous Law Reform Commission was created. The demographic and cultural composition of the population is now different. There have been major changes in information technology, industrial structures, and economic realities. Canadians are increasingly concerned about such issues as the environment, aboriginal rights, and rights and freedoms in general. And they are demanding more accountability and responsiveness from their public institutions.

One implication of these changes is that law reform requires a more comprehensive or holistic approach, one that recognizes the many changing social and economic conditions of our times and their relevance to the role and the formation of the law. Those designing and operating a new law reform commission need to consider innovative responses in such key areas as mandate, organization, resources, strategic approaches, and support systems.

Mandate

There is growing recognition that the most effective solutions to law reform problems do not always involve changes to the law, changes in penalties, or other "legal" responses. Sometimes it is better to look for ways to prevent those problems arising in the first place or to develop alternative forms of resolving disputes that do arise. Increasing access to the law and legal processes and improving the implementation of laws can also make a difference. A more comprehensive approach to law reform will therefore start with a reconsideration of the mandate and objectives of the new commission and the products and services it will provide.

1. The former Law Reform Commission of Canada operated for 21 years and produced more than 60 working papers and more than 30 reports. In 1992, the previous government abolished the Commission as a cost-saving measure.

Organization

More and more groups within Canadian society now feel strongly that they should have a greater say in decisions involving public policy, including law reform. At the same time, the public sector is becoming aware of the value of active consultation in all steps in the policy formulation and implementation processes.

Clearly, many issues that are likely to be addressed by a new law reform commission are also of concern to other public and private agencies — agencies that have not to date been involved in law reform as much as they might.

After all, the need for law reform stems from the inability of existing laws to deal effectively with problems, and the root causes of those problems often involve the complex interaction of social, economic, health, education, and other factors.

Thus, without rejecting all of the more traditional approaches to law reform, there may be scope for developing new ways to make the process more inclusive of different views, more accountable to different constituencies, and more capable of drawing on the legal and non-legal expertise and experiences of different segments of Canadian society.

A more comprehensive approach should avoid selective or narrow definitions of who does law reform, and instead encourage cooperative strategies that make better use of the expertise, resources, and perspective of a broad range of disciplines from both the public and the private sectors.

Resources, Technology and Support Systems

Any proposals for a new approach to law reform must also recognize the changed fiscal realities facing governments now and in the foreseeable future. The government is considering providing the new commission with an annual budget of up to \$3 million. (The budget of the former Commission was approximately \$5 million.)

On the one hand, this could mean that we will have to scale back expectations, either by setting priorities among issues or by addressing a larger number of areas less intensively. On the other hand, we could adopt a more aggressive (and more integrated) approach by finding ways to combine the resources directly available to the commission with the resources of other public and private groups. Solutions might include cost recovery through products provided or strategic alliances with other groups such as research institutions, the academic community, and provincial law reform commissions. There may be considerable untapped potential in this area.

Another important consideration is the major advances in technology in recent years, especially technology related to information and communications. For instance, the development of local, national and global information databases could revolutionize the way information is collected and disseminated at all stages of a law reform project. The new

technology has implications as well for consulting among stakeholder groups, for communicating among commissioners, staff, and advisory board members, and for joint writing and review of commission papers and reports.

These developments could significantly alter the way in which a new law reform commission conducts its planning, research and implementation efforts, and could have a direct bearing on its organizational structure.

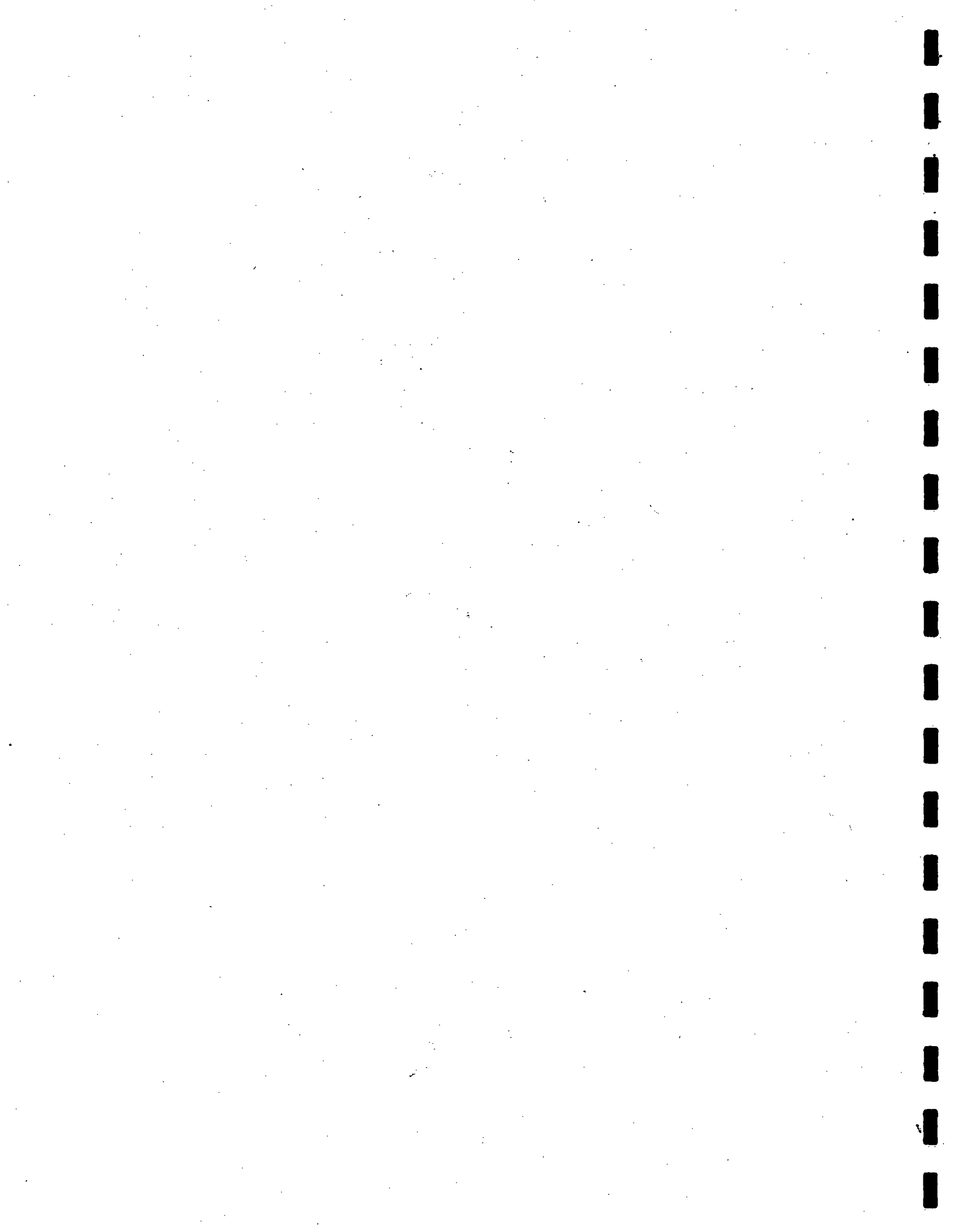
Strategies

In designing a new law reform process we need to address a number of strategic issues related to how the commission should carry out its day-to-day work.

Of particular concern is the need to strike a balance between maintaining the independence of the commission and ensuring that its work remains relevant and responsive to the needs of Canadian society.

Striking this appropriate balance will require strategic choices about defining direction and setting priorities and the role of various stakeholders in the process. A range of other issues, such as the mix of long-term and short-term projects or the role of theoretical as opposed to empirical work, must also be considered.

In summary, a comprehensive approach to law reform and to a new law reform commission will require innovative approaches and choices in a number of key areas. The following chapters address each of these areas in turn and identify questions and issues on which we would appreciate your views.



Chapter 2. Mandate, Purpose and Objectives of a New Law Reform Commission

2.1 Introduction

An effective law reform commission must have a clear sense of its mandate, a statement of what it is trying to achieve overall. Such a statement will be essential in setting priorities internally, and allowing the commission and others to assess how well it is succeeding in meeting its long-term objectives. A clear mandate will also allow other groups involved in the wider Canadian law reform process to define how they can most productively work with the commission.

By "mandate", we mean a statement of the overall aims of the commission, not the priority issue areas the commission may address or the specific projects that the commission may study. The mandate will be set out in the legislation creating the commission, but the priority issue areas and specific projects that the commission will focus on will likely be determined only after the commission is up and running. (Other chapters of this paper address how the commission might go about deciding which areas are in need of study and reform.)

2.2 Historical Context

Traditionally, the role of a law reform commission has been to keep the law constantly under review, to consult widely to find new solutions to law-related problems, and to make proposals for the improvement of the law.

The need for a body of this nature in Canada became clear some decades ago. Members of the legal profession and others realized that government could not do an adequate job of keeping the law up-to-date on its own. When it appeared that particular areas of the law were in need of special attention, Canadian governments typically established Royal Commissions to study them and to provide recommendations for their improvement. This approach was expensive and sporadic. What was needed was a permanent body which could keep the law under constant scrutiny.

The Act establishing the former Law Reform Commission stated that the objects of the Commission were to "study and keep under review on a continuing and systematic basis the ... laws of Canada with a view to making recommendations for their improvement, modernization and reform." In addition, the Commission was to find ways of removing "anachronisms and anomalies in the law" and to work towards "the elimination of obsolete laws." It also had a duty to ensure that the law reflected "the distinctive concepts and institutions of the common law and civil law legal systems in Canada." Finally, the Commission was to seek "new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society."

This was an ambitious mandate. Indeed, as well as establishing the overall objectives of the Commission, in a sense the former Act really provided a definition of law reform. It expressed the idea that law reform should involve modernizing the law, making sure that the law does not lag behind the needs and values of Canadians. It also suggested that, in a bijuridical country like Canada, law reform should involve the comparison and exchange of concepts between common law and civil law systems.

2.3 Options for the New Commission

Major changes have taken place in Canadian society since the establishment of the former Law Reform Commission, and it may be worthwhile to reconsider the overall goals that should be included in the new commissions's mandate. Revised concepts of what constitutes law reform in today's world, and what role a law reform commission and others should play in a broader, coordinated law reform process might also suggest ways in which the mandate of the commission should be refined.

We are asking that you consider what should be retained from the mandate of the old commission, what should be modified or eliminated, and what new goals should be added to reflect the challenges and opportunities the new commission will face during the next few decades.

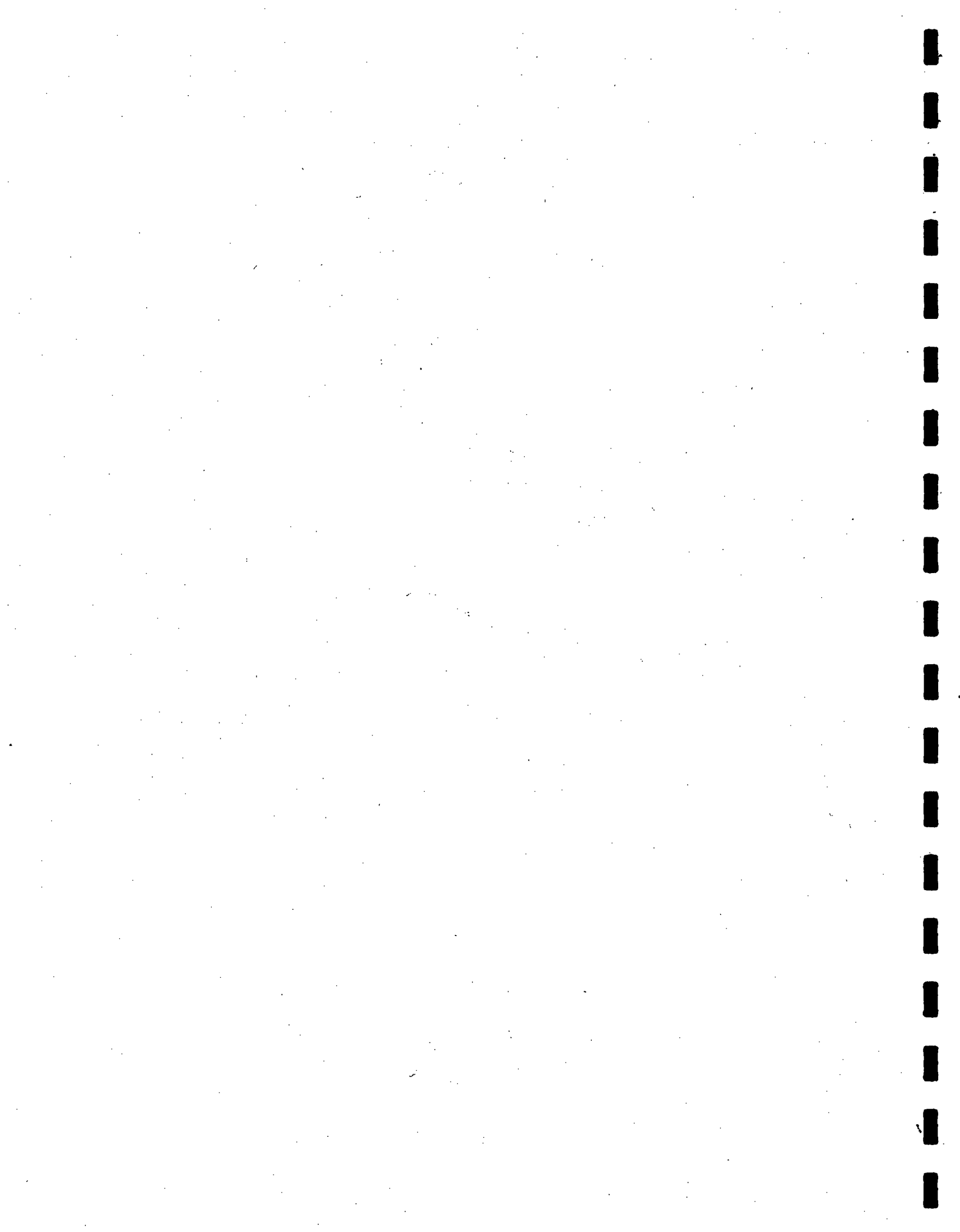
Included below is a list of possibilities that illustrate the range of suggestions made during prior steps in this consultation process. When responding to the questions at the end of this paper, please feel free to use, ignore, or to add to the suggestions in this list.

Mandate: a sample of suggestions received to date

- | | |
|---|--|
| <ul style="list-style-type: none"> ● to identify areas of the law requiring reform; ● to ensure that law reform efforts receive information from different groups with expertise in a range of legal and non-legal areas, and from others interested in or affected by law reform efforts; ● to assume a consultative and coordinating role for law reform, with research programs assigned to the private sector; ● to provide a testing ground for new areas of law; ● to identify areas of law that have been researched (locally, nationally and globally) and to coordinate the dissemination of this information; ● to adopt a more integrated, holistic concept of law reform (i.e. broaden the mandate to include more non-legal responses to problems, rather than simply legislating); ● to take into account the bijuridical and bilingual aspects of the laws of Canada; | <ul style="list-style-type: none"> ● to support community-based initiatives (e.g. through pilot projects which translate theory into practice); ● to develop legislative proposals ("a legislative drafting shop"); ● to establish a cooperative program of reform issues with international partners, using modern communications technology; ● to embrace a broad nature of reform ("social" law reform versus a legislative mandate); ● to provide public education; ● to provide independent advice on law reform to the Minister of Justice; ● to study the impact of the law on various groups and individuals (e.g. eliminating bias in laws, accessibility issues); ● to consider ways of making the law more efficient and economical; ● to support social justice activities. |
|---|--|

What should be included in the new commission's mandate?

From which sources should the law reform commission encourage, receive and consider proposals?



Chapter 3. Organization

3.1 Introduction

An effective and efficient law reform initiative will require appropriate organizational structures, clear allocations of responsibilities and authority, and a strong commitment from all involved.

Those designing the new law reform commission must weigh different options for defining the following:

- responsibilities and structure of the commission executive, commission staff, and others;
- relationships (allocation of responsibilities and authorities) between the new commission and the Minister of Justice, the Department of Justice, Parliament, parliamentary committees, and other federal departments;
- relationships between the new commission and other groups involved in the law reform process (e.g. provincial law reform commissions, academic researchers, private research and consulting organizations, special issue groups, legal and other professional associations, and the general public);
- roles of specific groups in certain types of law reform activities, such as setting direction or agendas, developing and maintaining organizational structures and networks, providing resources, determining and carrying out law reform strategies and tactics, conducting specific projects, and developing and maintaining the supporting infrastructure (notably the roles of legal vis à vis other stakeholder groups); and
- methods for ensuring leadership and commitment on the part of the Department of Justice, commissioners, and other stakeholders in law reform.

3.2 Key Considerations

A number of considerations would be especially relevant in making choices among different options in each of these areas.

More inclusive participation in commission initiatives

First, prior consultations indicate a preference for organizational options that ensure that a larger number of Canadians, with a broader range of legal and non-legal expertise, experience and perspectives, be given an opportunity to participate in the law reform process.

Structures that facilitate partnerships and strategic alliances

Consultations to date — and economic reality — also point to a need for organizational structures that promote a more open and cooperative approach to undertaking law reform through cooperation with a broader range of public, academic and private sector organizations.

The special importance of independence

Further, there is a consensus that special emphasis must be given to the need to preserve the independence of the commission.

It is widely accepted that a law reform commission should be an independent agency that can set its own priorities and develop its own recommendations, whether or not those priorities and recommendations are consistent with government policy.

One of the main reasons for having a law reform commission is to ensure that the law is constantly under review. An independent commission is better able to carry out that kind of review because its mandate is continuous — it lasts longer than the four or five years of a government's mandate. It has the opportunity to look at the law in a broader perspective and over a longer time frame. As such, it can address areas of the law that may not be priority concerns of the government of the day.

Independence is also important to the substance of the commission's work. A commission should be free to make recommendations, whether or not those recommendations are in keeping with existing government policy. It must be permitted to suggest ways of improving the law that may not have occurred to government and to take account of perspectives on the law that the government may not be fully aware of.

A law reform commission's constituents are not just the legal community but include all those who are affected by the law. The notion of independence therefore also implies that a law reform commission not only should have the *right* to present its views, it should also have the *responsibility* to do so when it finds that an area of law is not protecting the needs of different groups within Canadian society.

Reporting relationships and other organizational options must respect and facilitate these types of independence for the new commission.

Balancing independence with accountability

There is a need, however, to ensure that independence does not lead to isolation or complete autonomy. A law reform commission is, after all, a public institution funded by increasingly scarce public resources. There is therefore a strong argument for ensuring a balance between independence on the one hand and accountability on the other.

The new commission's reporting and authority structures must at least ensure that the commission would be aware of government and other priorities when setting its own agenda or making recommendations. It is also important that these mechanisms permit the possibility of the government (and possibly other groups) making use of the commission's expertise in solving difficult legal and social problems.

Efforts to enhance the responsiveness of the new commission should focus on the roles and responsibilities of both the commission and the government. For instance, a common complaint about the former Law Reform Commission was that its reports often were not implemented. However, there is little a law reform commission can do if the government of the day chooses not to consider or implement its recommendations, or does not have the organizational structures and responsibilities to do so.

3.3 Organizational Options for the New Commission

Some of the options for achieving an appropriate balance among the above considerations relate to the commission's mandate (e.g. explicitly setting out in the commission's mandate its duty to keep the law constantly under review). Other options relate to Resources and Strategic Approaches and are discussed in chapters 4 and 5. This section concentrates on options related to organizational structure and responsibilities.

Government reporting structure

Under the *Law Reform Commission Act*, the former Commission reported to Parliament through the Minister of Justice. This arrangement made it clear that the Commission had ultimate responsibility to Parliament, which fostered its independence from the Minister of Justice. At the same time, it was equally clear that the Commission had a special relationship with the Minister of Justice, who had the power to comment on Commission recommendations at the time of their presentation to Parliament.

Other reporting arrangements have been considered, such as having the commission report directly to Parliament. However, the kinds of institutions that currently report directly to Parliament (e.g. the Auditor General and the Official Languages Commissioner) are unlike a law reform commission in that they oversee the actions of the government on behalf of the House of Commons, to which the government is responsible. Arm's-length advisory bodies such as law reform commissions and research councils (e.g. the National Research Council) report to Parliament through their responsible minister. This reporting

relationship, by which responsible ministers table agencies' reports in Parliament, does not seem to reduce the independence of those agencies.

What is the most appropriate reporting relationship for the new commission?

Special reporting requirements

A balance between independence and accountability can also be fostered by specifying the types of matters on which reporting should take place.

For example, the former Commission had a duty to prepare and submit detailed research programs to the Minister of Justice. In turn, the Minister had the power to request the Commission to include in its research plan any study to which, in the Minister's opinion, it was "desirable in the public interest that special priority should be given by the Commission." The previous Commission was bound by such a request.

In effect, then, the Commission had the authority to develop its research program independently of government, but had a duty to inform the Minister of the contents of the program. Through the power to request priority studies, the Minister was also given a role to play in setting the Commission's agenda.

However, these two procedures were only infrequently used. The former Commission produced two research programs in its 21-year history, and only the first was ever approved by the Minister of Justice. While the statute did not make clear that the Minister's approval was required, the Commission operated on the assumption that it should not embark on a new research program without it. Similarly, only twice did the Minister make a special request of the Commission for a priority study; and the commission closed down before the second was completed.

In addition, the previous Commission had a further duty to report the results of its studies to the Minister of Justice. In turn, the Minister had a duty to lay before Parliament a copy of the Commission's report. (The same procedure applied to research programs submitted by the Commission to the Minister and to the Commission's annual report.) Further, when Commission reports contained recommendations, the Minister had an opportunity to include comments.

In addition to these statutory means to ensure closer ties between the former Commission and government, other less formal means were used to foster communication and good working relations. For instance, representatives of the federal and provincial governments were regularly consulted by the former Commission on work-in-progress that affected them. Advance copies of forthcoming reports were often supplied to federal government officials.

These kinds of informal activities also made the commission more responsive without compromising its independence.

Nonetheless, consultations to date indicate that there is scope for establishing a somewhat closer relationship with government, without substantially reducing the commission's independence. For instance, in the past, the absence of a duty to prepare research plans at regular intervals meant that the Commission was under no explicit obligation to keep the Department of Justice informed of its work-in-progress or future undertakings. Given that the Minister was at times unaware of the Commission's activities, the Minister was not well placed to suggest to the Commission areas where its proposals would be particularly welcome.

The following are some of the possible reporting arrangements suggested during our earlier consultations.

Reporting Relationships: a sample of suggestions received to date	
<ul style="list-style-type: none"> ● having the Department of Justice adopt a policy to respond to work submitted by the commission; ● having the Minister of Justice make more use of the Standing Committee on Justice and Legal Affairs to review commission reports and recommendations; ● requiring the commission to submit to the Minister of Justice workplans for future programs of study, perhaps including estimates of costs and timetables; 	<ul style="list-style-type: none"> ● requiring meetings at regular intervals between the commission and officials of the Department of Justice to provide information on commission plans and progress and on government priorities; ● having the government require the Commission to undertake special studies; and ● conducting regular informal meetings between the commission and Department of Justice officials to keep lines of communication open.

Which reporting mechanisms would be most useful in establishing an appropriate balance between commission independence and responsiveness?

Advisory and other consultative committees

Many of those consulted to date have also suggested that various types of advisory, consultative or resource committees would be very useful, not only in ensuring that a wider group of people could participate more directly in the law reform process, but also in keeping the commission aware of different perspectives on law reform issues. Such bodies could also be used to vet commission reports and recommendations.

One such suggestion would be an advisory body, or "Roundtable," to the commission. The Roundtable would be representative of Canada's diverse population. Its members would bring to the commission a range of knowledge and experience. The responsibilities of this body could include advising the commission on setting its priorities and commenting on

publications prior to their release. To facilitate communication between government and the commission, the federal government could also be represented on the Roundtable. The Roundtable could meet quarterly or semi-annually. Its members could be reimbursed for expenses but not paid a salary or honorarium.

The role of a Roundtable would be different from that of the commissioners. The commissioners would be responsible for overseeing the day-to-day operations of the commission. The members of the Roundtable would instead offer advice on general directions and feedback on draft reports and recommendations. The Roundtable would not replace the commission's consultations with other groups on its work-in-progress, however.

It has also been suggested that special project-specific resource groups be established for different priority areas of interest (or even for specific major projects within those areas). Such groups would bring a range of perspectives to bear on issues, but would have the additional responsibility of providing expert advice in matters such as recent research already undertaken in an area; effective research, development and implementation project methodologies; facilitation of projects; and professional expert review of project reports and recommendations.

Should the commission have an advisory committee?

Chapter 4. Resources, Technology and Support Systems

4.1 Introduction

The new commission must have the necessary resources — personnel, equipment, technology, facilities — to implement law reform strategies and to achieve specific objectives. Its effectiveness will be directly related to the quality of the infrastructure of people and systems supporting the commission. These include information and communication systems, consultation systems, financial and budgeting systems, human resource management systems, and management systems in general.

Many issues relating to commission resources and law reform support systems are more operational in nature and will be addressed by commissioners, staff and other stakeholders after the commission has been established. However, several issues in these areas are especially relevant to those planning and designing a new commission. Of particular interest are issues related to resource choices that could affect the following: ensuring an effective balance between independence and accountability; ensuring that the commission encourages an open, inclusive and participative approach to law reform; and ensuring the most cost-effective use of scarce public resources.

This chapter will deal with four of these issues:

- strategies for more effective use of increasingly scarce resources;
- the number and composition of the commissioners;
- the size and composition of the commission staff; and
- the enabling effects of information and communications technology.

4.2 More Effective Use of Increasingly Scarce Resources

As noted in Chapter 1, the new law reform commission will face constraints on resources similar to those felt by most public and private agencies in the 1990s. Although the government is considering providing the new commission with an annual budget of up to \$3 million, this sum is considerably lower than that available to the previous commission.

Accordingly, designers of the new approach to law reform will probably have to respond to these fiscal realities by both

- cutting back on resources and expectations, and
- using existing resources more effectively, as well as increasing the effective resource base of the larger Canadian law reform effort.

One of the more promising approaches that have been suggested is for the new commission to see itself less as the main organization doing law reform in Canada and more as a partner in a network of individuals and organizations working together to accomplish different law reform goals. The role played by the commission would then depend on what is needed given the strengths and weaknesses of other partners within particular alliances.

The *Law Reform Commission Act* stated that the former Commission could enter into joint projects with other law reform commissions. It also had a duty to make use of available resources from other government departments or agencies. These provisions could be strengthened. For example, the new commission could be encouraged to undertake joint projects with provincial law reform commissions or with other kinds of institutions, such as universities, government departments and agencies, and non-governmental and private organizations. Furthermore, the commission could make use of research that had been sponsored by other organizations. It could also be encouraged to seek ways of sharing common resources, such as research databases, communications facilities, physical facilities and libraries, with other institutions or agencies.

Some of the suggestions that were received in our prior consultations are listed in the following table.

Effective Use of Resources: a sample of suggestions received to date	
<ul style="list-style-type: none"> ● make better use of partnerships with other public and private sector agencies in carrying out law reform initiatives; ● use decentralized multi-participant models for undertaking projects; ● build on existing research efforts, and avoid duplicating such efforts; ● make more effective use of new technologies for arranging long-distance discussions among commissioners, staff, advisory boards, consultants, and other stakeholders (e.g. through electronic bulletin boards and information services); 	<ul style="list-style-type: none"> ● where appropriate, share resources with other organizations; ● where appropriate, make sure of cost recovery through products provided (e.g. services or publications); ● take an active role to ensure the least possible duplication of effort among the different groups involved in law reform efforts; ● take a lead role in ensuring a more effective flow and sharing of information on progress and findings among the different law reform efforts.

How can we improve the effectiveness and efficiency of commission operations?

4.3 Size and Composition of the Commission Executive

A question of considerable interest concerns the size and composition of the executive of the new commission. (The previous commission had a Board of five full-time Commissioners.)

Deciding the optimal number of commissioners will involve compromises among a number of objectives. For instance, some would argue that the board should be representative of certain key perspectives or areas of expertise. Another consideration would be the volume of work that will have to be undertaken by the commissioners. The number of commissioners will also depend on whether other organizational bodies have been established to achieve these and similar objectives.

Two of the alternatives most frequently suggested to date are:

- a larger and more representative executive, necessarily composed of a combination of full-time and part-time members, or
- a smaller executive, plus an expanded Advisory Group (or Roundtable) and/or project-specific resource groups.

(It would probably not be cost-effective to create both an expanded commission *and* a Roundtable. Each would achieve overlapping objectives and the costs would be prohibitive.)

Please state your preference regarding the number of commissioners.

The question of the composition of the executive must also be addressed.

The former *Law Reform Commission Act* established strict eligibility requirements for Commissioners. Three of the Commission's five members had to be federally appointed judges or eligible for appointment to the bench. At least two of the five members had to be from the province of Quebec. The Act also required that commissioners serve full-time.

There are different forces influencing the creation of a law reform commission today than when the original Commission was established in 1971. In particular, there was more confidence then that social and legal problems could be solved by marshalling legal talent to them. Now, more people feel that the law does not have all the answers and, in some cases, non-legal responses may be more effective for handling legal problems. Commissioners with expertise and experience in other non-legal disciplines would therefore be required. In addition, we are now more conscious of the need for involvement of persons representative of Canada's diverse population. Finally, a number of those

consulted have emphasized that, given the budget to be administered and the nature of the effort required, at least one commissioner should have a strong grounding in management techniques.

The eligibility requirements contained in the former Act made clear that the Commission was to be run by senior legal practitioners, although it was possible to have as many as two non-lawyers as Commissioners. The problem with such requirements is that they tend to exclude not only non-lawyers, but also women and minorities. There are simply proportionately fewer women and minorities among senior legal practitioners than in the Canadian population as a whole.

If the new commission is to be multidisciplinary and representative of a wider range of perspectives, then the eligibility requirements should be modified accordingly.

What qualifications should be considered in the selection of commissioners?

4.4 Size and Composition of the Commission Staff

Those designing the new commission will also have to consider how many researchers should be on staff. Besides the obvious cost implications, a flexible, more cooperative approach to conducting law reform within a network of alliances with various partners would affect the mix of budget allowed for full-time staff as opposed to contract or project-specific consultants.

On the other hand, many of those consulted stressed the importance of having a core of full-time staff to ensure continuity, coordination, quality, management, and focus of commission efforts. Full-time staff may also be needed to carry out consultations and to forge links with other organizations.

Presumably, the degree to which a new commission will rely on full-time staff or outside contractors should also vary according to their availability and the nature of the studies the commission undertakes. If the benefits of using outside researchers are thought to be substantial, the commission could be required under its legislation to do so where possible. In fact, this was the case under the former *Law Reform Commission Act*. The Commission was permitted to engage "on a temporary basis or for specific projects the services of persons having technical or specialized knowledge of any matter relating to the work of the Commission." This provision obviously supposed that researchers would be hired for short periods for specific projects. In fact, some of the former Commission's researchers worked full-time over a period of many years on a variety of projects. These researchers helped ensure consistency and quality in the Commission's reports. A new statute could include a similar provision but also state that the commission could engage a small full-time research staff.

Which mixes of staff and external consultants would be most appropriate?

It should also be noted that consultations to date have strongly indicated that the analysis of many law reform issues requires both legal expertise and expertise in a range of social sciences, arts and physical sciences. A range of disciplines, experiences and perspectives should therefore be reflected in the complements of both full-time staff and external consultants.

4.5 Enabling Effects of Information and Communications Technology.

Recent advances in technology — in particular, technology related to information and communications — could substantially alter the way information is collected, stored, and communicated at virtually all stages in the law reform process. The new law reform commission will no doubt take advantage of this new technology.

During this early design stage it is important to keep in mind that the new technology could provide significant new options in a number of areas. For instance, in regard to questions raised in this paper, new technology could have the following types of "enabling" effects:

- The ability to link a number of people electronically and relatively inexpensively would mean that accommodation and travel costs, per diems and time conflicts would not limit the size of boards and committees made up of people from disparate geographical areas or the number of times full committee meetings could occur.
- Advances in "groupware" software will provide electronic tools that will make it easier to jointly develop ideas and plans, so larger groups of people could be involved in the earlier conceptual phases of law reform initiatives.
- Electronic information networks would help in developing decentralized models of law reform planning and project management.
- The possibility of distributing documents electronically would allow the new commission to distribute questions, interim findings, and even final reports more widely.
- The possibility of creating "special interest group" conferences spanning networks of computer bulletin boards could enable the commission not only to provide reports on completed research, but to offer access to an ongoing dialogue among experts about key law reform issues.

- World-wide information networks (e.g. INTERNET) will not only provide inexpensive access to information from around the globe to analyze Canadian problems, but may also affect what is defined as a law reform issue of priority interest to Canadians.

In summary, we should bear in mind that many of the geographic and communications constraints faced by the previous Commission will not be relevant for the design of the new commission.

Chapter 5. Strategic Approaches

5.1 Introduction

The most effective and efficient strategic and tactical policies, approaches and procedures must be used to mobilize and manage the scarce public and private resources available for law reform.

Other sections of this paper have discussed a number of strategic approaches related to the setting of mandate, organization and the use of scarce resources and technology. Additional areas in which strategic approaches will have to be developed include:

- determining the appropriate mix of reactive and proactive approaches to deciding direction and choosing specific projects;
- determining the most cost-effective degree of participation of (and/or consultation with) different groups in different stages of projects;
- choosing a mix of projects with long-term and short-term products;
- setting the best mix of theoretical and empirical work;
- deciding whether to focus on a small number of issues or to spread efforts over a wider area; and
- deciding whether to adopt an incrementalist or a radical approach to law reform.

During our consultations to date, a number of specific suggestions have been made about the strategic approach the commission should take in the above areas. A sampling of those suggestions is presented in the following table.

General Strategies: a sample of suggestions received to date

- | | |
|--|--|
| <ul style="list-style-type: none"> ● ensure that the organizational structure for law reform is flexible enough to accommodate the diversity of issues to be addressed; ● provide feedback to those consulted - this is critical to ongoing relationships and the future effectiveness of the commission; ● conduct projects that will achieve tangible, visible and practical results within a relatively short period of time (rather than "bottomless pits" that consume copious resources and should be done as joint ventures if at all); ● undertake practical work and leave theoretical work to outsiders and academics; | <ul style="list-style-type: none"> ● retain the capacity to undertake long-term, fundamental reform (but such projects need a management plan with bite-size products); ● develop a communications policy which reflects the interests and rights of people of both official languages; ● ensure the openness and accessibility of law reform efforts by using plainer language in all phases of law reform; and ● ensure that "reactive" capacity is restricted to a small portion of the workload (e.g. via Minister's reference). |
|--|--|

These and many other suggestions will undoubtedly be considered by the commissioners and other stakeholders involved in the new commission.

How can we improve the effectiveness and efficiency of commission operations?

5.2 Strategy Regarding Consultation

The former *Law Reform Commission Act* imposed a duty on the Commission to "consult with the Minister, associations of members of the judiciary and of the bar, institutions and persons engaged in the teaching of law or research into the law, and other interested bodies and persons, including members of the public." This provision obviously gave heavy emphasis to the role of the legal profession.

A new commission could be instructed to carry out broader consultations in developing reform proposals and perhaps be given a duty to consult outside the legal profession. On the other hand, the commission could be left to develop its own approach to consultation.

There has been a strong consensus evident in our prior consultations that

- many more individuals and groups within different segments of Canadian society, (with different perspectives, experiences and expertise) feel strongly that they should have a greater say in issues likely to be addressed by a new law reform commission; and
- both public and private organizations in a variety of areas are becoming aware of the positive gains that can be made by consulting and involving groups with a wider range of expertise and experience.

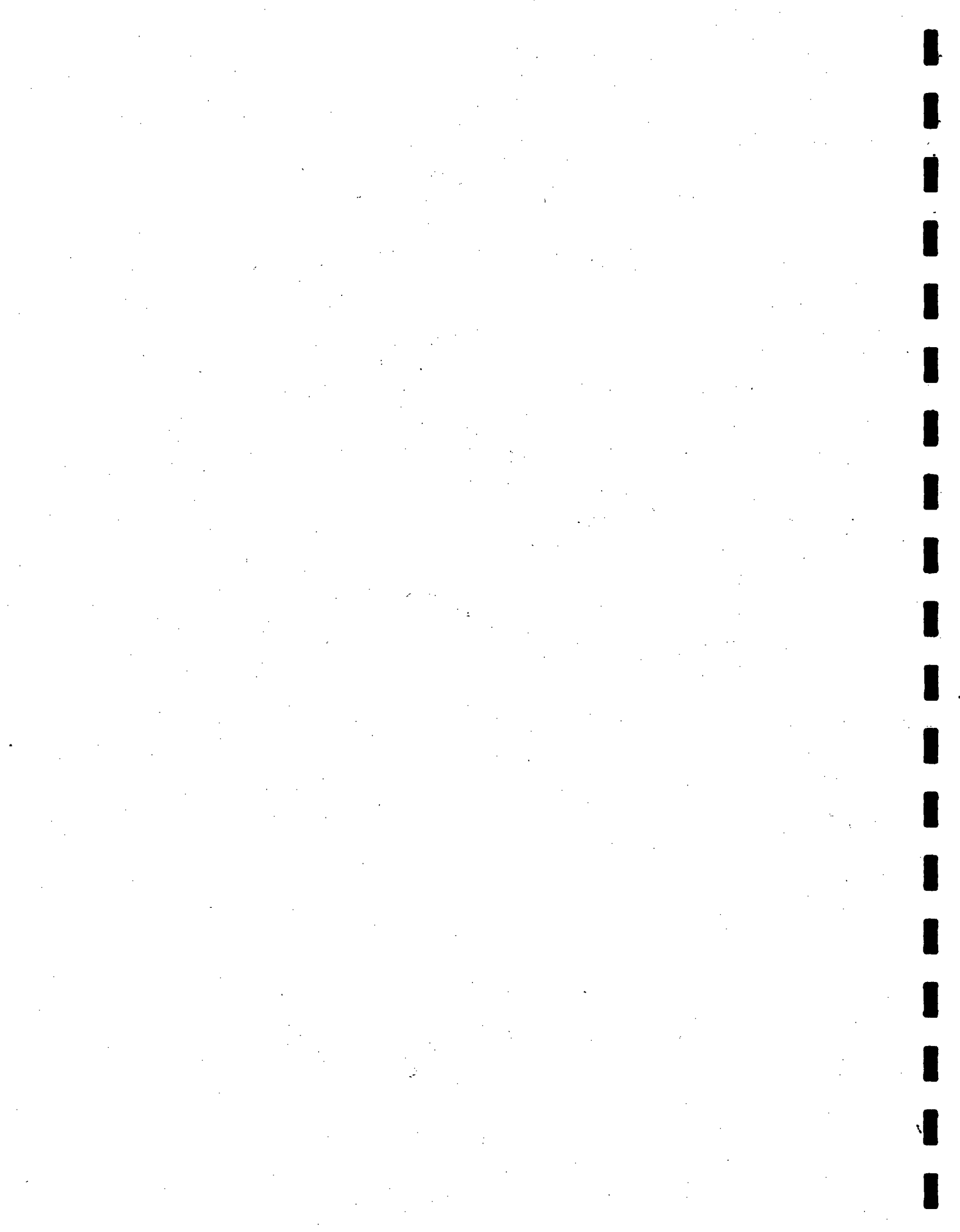
Specific comments typical of those made to date regarding the position that should be taken by the new law reform commission on this strategic set of choices include the following:

Consultation Strategies: a sample of suggestions received to date

- | | |
|--|--|
| <ul style="list-style-type: none"> ● be more open and recognize the significant contribution that can be made by a range of individuals, groups and agencies; ● ensure broad consultation as an important component of most law reform initiatives and for all phases of those initiatives, from setting priorities to assessing effects; ● operate as a network or strategic alliance of individuals and agencies, rather than focusing on the efforts of one group; | <ul style="list-style-type: none"> ● consult with a range of different groups depending upon the issues to be addressed; and ● ensure the commission does not become the preserve of lawyers but stays open, responsive and non-exclusive. |
|--|--|

Clearly, consultation with a wide diversity of individuals and groups should be an integral strategy employed by a new law reform commission. However, there is still some question regarding the types of commission decisions and activities that would benefit most from application of this strategy.

Would the work of the commission be more effective if people with a broader range of legal and non-legal experience were consulted and involved in specific steps in the law reform process?



Conclusion

We now have an opportunity to design a commission that can meet the social and economic realities of the 1990s. While many are anxious to have the commission up and running as soon as possible, we do not want to proceed so quickly that we fail to give careful consideration to the different ways that law reform could be carried out.

Your contribution to this part of this consultation process will help us develop the mandate and structure of the new commission. Once the Minister has reviewed the results, he will be in a position to propose a model for legislation.

We appreciate your having taken the time to read this paper and to respond to the questions that follow.

Questionnaire: Creating a New Law Reform Commission

Please answer as many of the following questions as you feel qualified to answer. (Specific instructions are provided with each question.)

Please also feel free to submit with your questionnaire separate pages containing any further comments regarding the issues raised within any question(s).

Mandate

1. Please indicate whether or not the following items should be included in the overall mandate of the new law reform commission (Please put a ✓ in the "yes" or "no" box to the right of each of the items. Please also feel free to specify additional items that should be part of the new mandate.)

- a) To ensure that law reform efforts are informed by knowledge contributed by different groups
 - with legal expertise yes no 20
- b) To ensure that law reform efforts are informed by knowledge contributed by different groups
 - with expertise and experience in a broad range of non legal areas (e.g. social science, physical and health sciences, the environment, economics) yes no 21
- c) To ensure that law reform efforts are informed by those
 - with an interest in or who will be affected by law reform efforts yes no 22
- d) To determine the potential impact of law reform on different groups and individuals in Canadian society yes no 23
- e) To develop draft proposed legislation yes no 24
- f) To conduct action-oriented projects to support community based initiatives .. yes no 25
- g) To make the law more efficient and economical yes no 26
- h) To provide independent advice on law reform issues to the Minister of Justice yes no 27
- i) To identify areas of the law that require reform yes no 28
- j) To make law reform information more accessible to the public yes no 29
- k) Other (please specify) _____ yes no 30

2. Please indicate whether or not the new law reform commission should encourage, receive and consider proposals for addressing law reform issues from each of the following sources (by putting a ✓ in the "yes" or "no" box to the right of each of the items. Please also feel free to specify additional sources of proposals)

- a) The Minister of Justice yes no 35
- b) Officials of the Department of Justice yes no 36
- c) Officials of other government departments yes no 37

- d) Other levels of government yes no 38
- e) Non-governmental organizations (including universities) yes no 39
- f) Any individual or group of Canadians yes no 40
- g) Other (please specify) _____ yes no 41

Organization: Balancing Independence and Responsiveness

3. Please indicate which one of the following reporting relationships you feel is most appropriate (by putting a ✓ in one (and only one) of the boxes to the right)

- a) The law reform commission should report to the Minister of Justice ...
- b) The law reform commission should report to Parliament through the Minister of Justice 45
- c) Other (please specify) _____

4. Please indicate whether you feel the following reporting arrangements would be useful in establishing an appropriate balance between independence and responsiveness of the new law reform commission (by putting a ✓ in the "yes" or "no" box to the right of each of the items. Please also feel free to specify additional strategies)

- a) Having the Department of Justice adopt a policy to develop a response to work submitted by the commission yes no 50
- b) Having the Minister of Justice make more use of the Standing Committee on Justice and Legal Affairs to facilitate a review of commission reports and recommendations yes no 51
- c) Requiring the commission to submit to the Minister of Justice workplans for future programs of study yes no 52
 - (i) if yes, requiring that those workplans include estimates of the resources required and the timetable for carrying out the work yes no 53
- d) Retaining the power of the Minister of Justice to require that the new commission undertake analyses of specific issues yes no 54
 - (i) if yes, should the commission be provided with a significant part of the additional funds required to undertake such analyses ? yes no 55
- e) Requiring the commission to indicate the costs of implementing (or not implementing) their recommendations yes no 56
- f) Conducting meetings at regular intervals during each year between the commission and officials of the Department of Justice yes no 57
 - (i) if such meetings were required, should there be an onus on the commission to provide a status report of its ongoing work (with emphasis on the issues being considered) ? yes no 58
 - (ii) if such meetings were required, should there be an onus on the Department of Justice to provide a status report regarding law reform related issues of current and upcoming concern to the government ? ... yes no 59
- g) Other (please specify) _____ yes no 60

5. Please consider the suggestion that the commission should have advisory/ roundtable committees and/or other types of committees (by placing a ✓ in the "yes" or "no" box to the right of each of the items please indicate your views on the following questions)

- a) Should an advisory/ roundtable committee be established (to provide advice and a broader perspective on general issues and possible general future directions)? yes no 70
- (i) if such a committee or roundtable were appropriate, should the committee be composed predominantly of persons with legal training? yes no 71
- (ii) if such a committee or roundtable were appropriate, should the committee be composed of persons with a wide range of (legal and non-legal) experiences and/or expertise regarding alternative law reform problems, solutions and impacts? yes no 72
- b) Should resource groups be established for specific commission projects (to provide advice and expertise related to a specific project)? yes no 73
- (i) if such a group were appropriate, should the group be composed predominantly of persons with legal training? yes no 74
- (ii) if such a group were appropriate, should the group be composed of persons with a wide range of (legal and non-legal) experiences and/or expertise regarding alternative law reform problems, solutions and impacts? yes no 75
- c) Other suggestions for such advisory committees or resource groups (please be specific)
- _____ yes no 76
- _____
- _____

Resources, Technology and Support Systems

6. Please indicate whether or not you are in agreement with each of the following suggestions that have been made for ensuring more effective use of scarce resources (Please put a ✓ in the "yes" or "no" box to the right of each of the items. Please also feel free to specify additional suggestions.)

- a) The new commission should make better use of partnerships with other public and private sector agencies in carrying out law reform initiatives yes no 80
- b) The new commission should build on existing research efforts, and avoid duplicating such efforts yes no 81
- c) The new commission should make more effective use of new technologies for facilitating long distance discussions among commissioners, staff, advisory boards, consultants, and all other stakeholders involved in the law reform process (e.g. through electronic bulletin boards and information services) yes no 82
- d) Other (please specify) _____ yes no 83
- _____

7. Please indicate which one of the following alternatives you feel would be most appropriate regarding the number of commissioners (by putting a ✓ in one (and only one) of the boxes to the right)

- a) A more representative larger number of commissioners (i.e. larger than the old Commission) which would include part time members 90
- b) A smaller number of commissioners, plus input from an advisory committee (or roundtable) 90

c) Other (please specify) _____

8. Please indicate whether or not you support each of the following suggestions regarding qualifications of commissioners (Please put a ✓ in the "yes" or "no" box to the right of each of the items. Please also feel free to specify additional suggestions.)

- a) The requirements should be relaxed regarding the length of certain types of legal experience required for commissioners who are lawyers yes no 95
- b) Among the commissioners should be members with formal training and experience in non-legal areas. yes no 96
- c) There is a need for management expertise and experience on the part of at least one of the commissioners yes no 97
- d) Other (please specify) _____ yes no 98

9. Please indicate which one of the following alternatives you feel would be most effective and efficient regarding the mix of commission staff and external consultants (by putting a ✓ in one (and only one) of the boxes to the right)

- a) The project work of the commission would be carried out primarily by full-time commission staff, supplemented to a small extent by a number of contract researchers or consultants hired on a task-specific basis
- b) The project work of the commission would be carried out using roughly equal budget devoted to full-time commission staff, and contract researchers or consultants
- c) The project work of the commission would be carried out using a small number of full-time commission staff (who would undertake research and manage outside consultants) and a larger number of contract researchers or consultants hired on a project- or task-specific basis 102
- d) Other (please specify) _____

Strategies

10. Please indicate whether or not you are in agreement with each of the following strategies that have been suggested for improving the effectiveness and efficiency with which the new law reform commission will conduct its day-to-day operations (Please put a ✓ in the "yes" or "no" box to the right of each of the items. Please also feel free to specify additional suggestions.)

- a) The new commission should ensure a mix of long term projects and shorter projects delivering more immediate and more frequent results yes no 105
- b) The new commission should foster the use of plain language in all its communications. yes no 106
- c) The new commission should focus primarily on a proactive approach to defining its priorities. Resources devoted to "reactive" projects should consume a relatively smaller portion of its resources. yes no 107
- d) The new commission should focus on empirical work and leave theoretical work primarily to academics yes no 108
- e) Other (please specify) _____ yes no 109

11. Please indicate whether or not you feel that the work of the commission would be more effective if people with a broader range of legal and non-legal experience were consulted and involved in each of the following specific steps in the law reform process (Please put a ✓ in the "yes" or "no" box to the right of each of the steps. Please also feel free to specify additional steps.)
- | | | | |
|--|------------------------------|-----------------------------|-----|
| a) <i>Setting the general agenda of the commission</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no | 110 |
| b) <i>Choosing specific law reform projects to undertake</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no | 111 |
| c) <i>Designing and carrying out specific projects</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no | 112 |
| d) <i>Reviewing the results of specific projects</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no | 113 |
| e) <i>Developing recommendations</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no | 114 |
| f) <i>Developing commission and project-specific management and administrative processes</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no | 115 |
| g) <i>Other (please specify)</i> _____ | <input type="checkbox"/> yes | <input type="checkbox"/> no | 116 |

General Questions

12. Please indicate which one of the following types of organizations you worked for longest during the past year (Please put a ✓ in one (and only one) of the boxes to the right.)

- | | | |
|--|--------------------------|-----|
| a) <i>Law Reform Commission</i> | <input type="checkbox"/> | |
| b) <i>Other body whose main focus was law reform</i> | <input type="checkbox"/> | |
| c) <i>Academic institution, legal faculty or institute</i> | <input type="checkbox"/> | |
| d) <i>Academic institution, non-legal faculty or institute</i> | <input type="checkbox"/> | |
| e) <i>Government agency within the justice system</i> | <input type="checkbox"/> | 120 |
| f) <i>Other government agency</i> | <input type="checkbox"/> | |
| g) <i>Private law practice</i> | <input type="checkbox"/> | |
| h) <i>Private sector: other (please specify)</i> _____ | <input type="checkbox"/> | |
| _____ | <input type="checkbox"/> | |
| i) <i>Other (please specify)</i> _____ | <input type="checkbox"/> | |
| _____ | <input type="checkbox"/> | |

13. Although it is not mandatory, to assist us in later steps in this consultation process, it would be helpful if you would provide the following information:

a) Name:	_____	140
b) Organization:	_____	160
c) Telephone #	() - _____	170
d) Facsimile #	() - _____	180

e) Address:	_____	190

f) Province	_____	210
g) Postal Code	_____	215

**Thank you for participating in this part of the
consultation.**

Please return the completed questionnaire to:

The Law Reform Project,
Justice Building,
239 Wellington Street,
Ottawa, Ontario, K1A 0H8

(Fax) 613-957-2491