RESEARCH PROGRAM - PROGRAMME DE RECHERCHE 1986

Law Reform Commission of Canada
Commission de réforme du droit du Canada
Law Reform

RESEARCH PROGRAM

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Canada

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As the Accelerated Criminal Law Review nears its conclusion, the time is right for the Law Reform Commission of Canada to submit a new Research Program to the Minister of Justice for his approval and, following that, presentation to Parliament. This research program will outline the work to be done, the time necessary and the resources required to complete the work, pursuant to Section 12 of the Law Reform Act.

A. SOME ACHIEVEMENTS OF THE LAW REFORM COMMISSION OF CANADA

Our Act imposes upon the Commission a mandate that is broad enough to encompass not only minor changes in the law but also the most fundamental kind of law reform. The Commission is instructed by its statute not only to modernize the law and remove anomalies, but also to reflect the distinctive concepts of the common law and civil law, and to develop new approaches to and new concepts of law that are responsive to the changing needs of modern Canadian society and of individual members of that society.

Since its creation, the Commission has studied many subjects including family law, evidence, expropriation, sentencing, Sunday observance, mental disorder and the exigibility of remuneration of crown employees, criminal law and procedure, protection of life and administrative law.

We have produced 30 Reports to Parliament, 52 Working Papers, 70 published study papers, over 150 unpublished study papers, and we have contributed to the private publication of well over 100 books and articles. Over 1,300,000 copies of our publications have been distributed over the past 15 years.

Over the years, the Commission has tried to blend pragmatism with idealism, because we feel that sensible law reform must be both practical and theoretically sound.

We have tried to reflect in our work the aspirations of all Canadians. Therefore, we have endeavoured to involve the public in our work. We feel that the more we can stimulate people, whether professionals or members of the general public, to participate in law reform, the better our proposals will be. The Commission has organized a number of public meetings to hear the views of ordinary people on issues such as physical discipline of children by parents and teachers, wife-battering, vandalism, and violence in sports. The advice received from Canadians on these matters and others has been invaluable.

We have succeeded in influencing some changes in legislation. Although this is certainly not the only measure of our success, we are pleased that 12 out of 27 of our Reports have now been enacted - at least in part - by Parliament. The Criminal Law Amendment Act of 1985 contained material based on seven different items dealt with in our publications, extending back more than a decade, and which included: the abolition of writs of assistance, the introduction of telewarrants, the authorization of pre-trial conferences and motions, the taking of blood samples, changes to the jury system, matters of search and seizure, and issues of jurisdiction. Another recent piece of legislation that has completed its journey through Parliament is the Divorce Reform Bill, which was inspired in part by one of our early reports on Family Law.

One of our proudest achievements is that our publications have been cited by Judges in at least 122 reported decisions, including 17 citations by the Supreme Court of Canada. The help we have furnished to the Courts in their complex and sensitive task of judicial law reform is an indication of the respect for our work shared by the Canadian judiciary and of its practical utility.

In addition to spurring legislative enactments and judicial law reform, a law reform commission can help to improve the legal system without statutory changes. Reform can also take place informally when the actors in the system alter the way they do things. For example, our work on disclosure some years ago resulted in a major shift in the way in which Crown prosecutors deal with defence counsel in relation to the disclosure of evidence prior to trial. Although no law has been passed requiring this, the force of the ideas generated by the Law Reform Commission has brought about a modification of behaviour which has greatly benefitted the legal system. Another example of this type of influence is the impact that our studies have had on provincial legislatures in establishing specialized family courts and in revising their family property legislation. Many of these ideas were advanced by the Commission in its early working papers and reports and they have had a major impact on the thinking of provincial governments, who have responded with worthwhile reforms. More recently, we have encouraged the use of videotaping of confessions. Even though no new laws have been enacted, experimental projects are under way at the present time which are taking advantage of this modern technology. Hopefully, the use of video technology will spread throughout the land, making the legal system more accurate and less expensive.

In the area of administrative law, most of the changes to which our efforts have contributed have been channelled through non-legislative reform. For example, our work with the study

group of administrative agency chairs has produced some major changes in the ways in which agencies deal with the public. We have assisted the Department of Justice's Compliance project, the Neilsen Task Force, the Caplan-Savageau study of broadcasting and others. Many of the suggestions we have made have been accepted and acted on by individual agencies. The chairmen of many of them, including the Unemployment Insurance Commission and the Canada Labour Relations Board, have written to us explaining how our suggestions had been taken into account in wide-ranging adjustments to their procedures. We have also received several requests from agencies, including the Immigration Appeal Board, for assistance in showing them how they can alter their rules of practice so as to reflect the procedural philosophy we outlined in our Working Paper 25 and Report 26 on the subject of Independent Administrative Agencies.

The Law Reform Commission of Canada has also been at the forefront in identifying modern-day social issues and developing new approaches to the problems they raise. For instance, the Protection of Life Project, over the past several years, has been researching the excruciatingly difficult medical-legal and ethical questions that have arisen as a result of the technological revolution in our society. The Commission has studied and made comprehensive, principled recommendations on issues such as the criteria for the determination of death, sterilization, euthanasia, aiding suicide and cessation of treatment, and behaviour alteration. We have also been pioneers in examining the complex legal and ethical questions involved in environmental pollution, searching for the appropriate role of law in protecting life from the harmful effects of our industrial and technological enterprises.

B. THE MISSION OF THE LAW REFORM COMMISSION OF CANADA

The mission of the LRCC is easy to describe - to help Parliament keep our laws up to date - but it is not as easy to accomplish. As social and economic conditions change, the law must respond to those changes. Our task is to keep in touch with the shifts in society and to develop reasoned, legal responses to those changes. In a sense, the LRCC is like the radar of Parliament, transmitting early warnings about the need for action in amending the law.

The Law Reform Commission of Canada serves as a bridge carrying ideas from the Judiciary to Parliament, from the legal profession to Parliament, from scholars to Parliament and from the people to Parliament. Of course, Parliament has other sources of information from these groups and others, but we try to offer these ideas in a more consistent, developed format, ready for the attention of Parliament.

We must take care not to duplicate the work of others. We must also avoid doing research that others can do better than we can. For example, although we have and may continue to be engaged in some fundamental and empirical research, that type of research belongs primarily in universities. Our usual role would be to encourage, nurture and monitor fundamental research in the areas of our concern, rather than conducting it ourselves. This is not to say that that type of research is not vital - it certainly is needed, as is indicated in the SSHRC's report on Law and Learning, but in the normal course, scholars in universities should be doing it, rather than the LRCC.

In short, we are a pragmatic agency whose task is to foster practical and helpful changes, which are based on a solidly-researched foundation. We believe in "change for the better" - not in change for its own sake. If something is not broken, it should not be fixed. We see ourselves, as we have done in the past, focussing on important social issues that must be dealt with, generating research in these areas, developing reform ideas, smoothing and shaping them in consultation with others, advancing them informally to the key actors in the field and, finally, offering these recommendations for consideration by Parliament.

We must be realistic. We cannot change laws overnight. Good law reform requires incremental rather than radical developments. We must educate the legal profession and the people of Canada about the problems facing the legal system and possible solutions to them. Along with having to deal with deeply-ingrained vested interests, the issues to be dealt with

are much too numerous and complex. We know we do not have a monopoly on good ideas. To succeed, the cooperation of all the actors in the system is required.

C. TOWARD A NEW PROGRAM OF RESEARCH

The Commission has engaged in extensive consultations in order to develop a new program of research, which will be both relevant and practical, addressing the key legal concerns of our society today.

We have talked with leading jurists. We have analyzed recent legal writing. We have advertised for suggestions in The National, the Ontario Lawyer's Weely, Barreau 86, and the newsletter Law Reform which is circulated to all the law reform agencies in Canada and the Commonwealth. We have written to Judges, Cabinet Ministers, Members of Parliament including Senators, the Canadian Bar Association, the Canadian Association of Chiefs of Police, the R.C.M.P., the Departments of Justice and Solicitor General, university law deans, and the members of the Canadian Association of Law Teachers. We have also invited suggestions from a broad spectrum of special interest groups, councils and organizations such as the Canadian Advisory Council on the Status of Women, the Canadian Labour Congress, the Canadian Council on Social Development, Canadian Manufacturers Association, the Canadian Medical Association, the Canadian Federation of Agriculture, the Canadian Council on Children and Youth, the Canadian Criminal Justice Association, the Canadian Association of Elizabeth Fry Societies and the John Howard Society. We also solicited ideas from our own staff and colleagues at the Commission. We convened a conference on the Future of Law Reform, held in Ottawa in May of 1986, at which we elicited the views of law reformers, government officials and other key actors in the legal world. We have met with officials in the Department of Justice and other departments of the federal government. We have consulted with provincial government officials.

As a result of all that, we received scores of suggestions about areas of federal law that should be studied. Our Commission met on several occasions to consider our options. As much as we would like to, we cannot do everything that we have been urged to do. Our resources are finite and our expertise is also limited. There are topics that would be better left to other institutions. It would be wise for us, as we move into new areas, to build on our past work, for continuity is important. Some topics, although certainly worthy of study, did not seem to us to be as urgent as others.

Following all this study, consultation and discussion, we have developed six general areas in which we plan to work. All are in need of major reform. All require extensive research, profound analysis and widespread consultation. They all flow naturally out of our earlier work. In our view, none of the areas are being dealt with adequately by other institutions.

THE RESEARCH PROGRAM

It is difficult to describe the research program of an ongoing institution. Some papers are at the press, just about ready to be published. Others are in the process of being approved for publication. Still others are being revised on the basis of advice received during consultations. A few papers are being readied for consultation, while others are still being initially researched. Some research is still at the planning or discussion stage. So it is with an active, energetic, permanent law reform body such as ours. These ebbs and flows are closely monitored and have been described for Parliament in detail each year in Part III of our departmental estimates and in our annual reports. It is now time, even as we are continuing and completing certain work, to shift our course and map our route for the next five years.

It is also hard to forecast with precision the direction of every project and sub-project that will be undertaken over the next five years. Most of the work we have underway is proceeding along the flow chart we have established. Some of the new projects and sub-projects are fully planned and ready to proceed. Others, however, need further consultation and refinement before they are launched. It is also important for us to retain some flexibility to study problems that may arise, within the areas of our general workplan, over the next five years.

Here is our detailed plan for research, under six general headings, with estimates of the time required to accomplish the work. A fuller and more precise breakdown for each project is kept and is available at the Commission offices for those who are interested. Each year we shall continue to give a progress report in our Annual Report and in Part III of our estimates.

1(a) Substantive Criminal Law

In the area of substantive criminal law, the Commission began by studying the aims and purposes of criminal law and produced two Working Papers, The Meaning of Guilt (1974) and Limits of Criminal Law (1975), and a Report to Parliament, Our

Criminal Law (1976). This Report with its recommendations that criminal law be seen as an instrument of last resort, be used with restraint and be concerned with "real" crimes requiring mens rea and involving serious violations of important values in our society, has been officially accepted by the federal government as the starting point for criminal law reform and as the basis of our criminal justice policy (The Criminal Law in Canadian Society (1982)).

Following this fundamental rethinking of the substantive criminal law, the Commission published a number of Working Papers and Reports to Parliament on particular aspects of the law which were consistent with the philosophy developed in the initial studies: sexual offences (1978), theft and fraud (1979), the general part (1982), contempt of court (1982), homicide (1984), vandalism (1984), libel (1984), arson (1984), extraterritorial jurisdiction (1984), assault (1985), bigamy (1985), crimes against the environment (1985), secondary liability (1985), omissions, negligence and endangering (1985), criminal intrusion (1986), hate propaganda (1986) and crimes against the state (1986).

Most of our work was part of the Accelerated Criminal Law Review, a cooperative effort of the Law Reform Commission, the Department of Justice and the Department of the Solicitor General, with the assistance of the provincial governments, between 1981 and 1986. During this period, the initial research work and consultations on the various papers were done by the Law Reform Commission in Phase I. The Departments of Justice and the Solicitor General then engaged in Phase II, doing further study and consultation on the LRC material. Phase III is the legislative enactment and implementation phase, which is the task of Parliament.

It became apparent to us during the course of this work that Canada needed a new Criminal Code. The present Code has served us well for nearly a century, but it is now obsolete. Enacted originally in 1892, revised in 1955 and amended on many occasions over the decades, it shows the wear and tear of many years of heavy use.

The Commission has therefore decided to produce a proposed new Criminal Code for Canada. We recognize that our draft Code is only a first step in a long process which, we hope, will ultimately lead to a new Criminal Code being enacted which is made in Canada, by Canadians, for Canadians and which reflects more accurately our identity as a nation and our common values as a people.

Building on our previous work, and taking into account the criticisms of it communicated to us, the Commission is developing a new Code which aims to be intelligible to all Canadians. It is drafted in a straightforward manner, with a minimum of technical terms, avoiding complex sentence structure and excess detail. It speaks in terms of general principles rather than focusing on needless specifics and ad hoc enumeration. Our new Code is comprehensive, logical, organized, coherent and consistent. It is in harmony with the Charter and responsive to the needs of modern Canada.

The first volume, containing the general part, crimes against the person and crimes against property, was released this fall, in accordance with our undertaking. The second volume, comprising crimes against the natural order, crimes against the social order, crimes against the political order and crimes against the international order should be released early in 1987.

Following that, the substantive criminal law project will be reduced in size and merged with the Criminal Procedure Project, to become a combined Criminal Law Project.

There are still two sub-projects in the revision stage - crimes against animals and corporate criminal liability - which should be completed and published in 1987. After that, over the next four years, the merged criminal law project plans to study some further topics, such as misappropriation of the "new property", white-collar crime, organized crime, entrapment and military law. The project will also cooperate with the Protection of Life Project as it moves toward the completion of its work on the Status of the Fetus, and with the Criminal Procedure Project as it enters the recodification stage of its work.

1(b) Criminal Procedure

The current activities of the Criminal Procedure Project are directed toward the ultimate production of a new Code of Criminal Procedure. This is the complementary process to that undertaken by the Substantive Criminal Law Project. The entire codification undertaking involves the close cooperation and involvement of the Departments of Justice and the Solicitor General and has been part of the Accelerated Criminal Law Review.

The project has published working papers and reports on many subjects: Miscellenaous Amendments (1978), The Jury (1982), Writs of Assistance and Telewarrants (1983), Investigative Tests (1983), Disclosure by the Prosecution (1984), Questioning Suspects (1984), Search and Seizure (1985), Obtaining Forensic Evidence (1985), Arrest (1986), Electronic Surveillance (1986), Disposition of Seized Property (1986), Private Prosecutions (1986). Papers on Classification of Offences and The Charge Document in Criminal Cases have been approved for publication.

Now that these specific studies, mostly on police and investigatory powers have largely been completed, the Criminal Procedure Project has been concentrating its efforts on the trial and appeal process. Included under this general rubric are pretrial procedures, extra-ordinary remedies, and other remedial processes.

Working Papers are now in production on the following sub-projects: Extra-ordinary Remedies; Remedies; Media Coverage of Judicial Proceedings; Jurisdiction of Courts; Criminal Pleadings; Compelling Appearance (Bail); Appeals; Presumption of Innocence; Pleas and Verdicts; Trial Within a Reasonable Time; The Judge and the Conduct of Trial; Powers of the Attorney General; Costs in Criminal Cases; General Principles of Criminal Procedure

Consultations in relation to all of these papers are under way and will be completed soon. Publication of all of them will take place during 1987.

As we are doing with substantive criminal law, we plan to consolidate and recodify the criminal procedure of Canada along the lines of our recommendations. Draft legislation has already been prepared with respect to the completed studies on police and investigatory powers which have culminated in Reports. Initial drafting work is presently being undertaken in relation to several of the Working Papers. These drafting exercises entail the production of a working document which is keyed to existing Criminal Code provisions and to Commission proposals and includes a brief commentary. Once all studies in the police and

investigatory powers area have been surveyed in this manner a consolidated and annotated draft part of the Code will be produced. A similar process will be employed in relation to the other parts of the Code of Criminal Procedure once the initial studies have been completed.

We anticipate the production of the new Code of Criminal Procedure to take place in stages and envision its publication in parts, possibly three, as follows: (1) Police and Investigatory Powers; (2) Pre-trial and Trial Procedures; (3) Appellate and Remedial Processes. Our hope is to have the entire Code completed by the end of 1987.

The completion of the Code of Criminal Procedure should mark the end of the Criminal Procedure Project as presently constituted. It is anticipated that the Substantive Criminal Law Project and the Criminal Procedure Project will thereafter be merged into one single project called the Criminal Law Project. The field of research for this project will remain vast, notwithstanding the production of the Commission's new codes. Among the procedure-type subjects that would be studied by the Criminal Law Project over the next few years would be: The Native Offender and the Criminal Justice System, Police Complaints Procedure, Uniform Court Rules of Criminal Procedure, Included Offences, Juvenile Justice, and Canada's International Obligations and the Criminal Law. All of these are important and merit the attention of the Law Reform Commission of Canada. Naturally, before embarking on any research on these subjects, further consultation will take place with the Criminal Justice community and the officials of the Department of Justice.

2. Administrative Law

Since its creation in 1971, the Commission has always maintained a keen and active interest in administrative law reform. A series of published studies examining the procedures of several major federal administrative agencies formed the basis for a Working Paper and a Report to Parliament on Independent Administrative Agencies. In addition, the Commission has studied aspects of Federal Court operations and advisory and investigatory bodies with a view to their eventual reform: (Judicial Review and the Federal Court; Advisory and Investigatory Commissions.) Following an exploration of policy implementation, including studies of the federal Environmental Protection Service, the CRTC and the Northern Pipeline Agency, the Commission published a Working Paper called Policy Implementation, Compliance and Administrative Law.

The Commission has not limited itself to studies of specific institutions of government and their particular problems; studies which cut across the entire administrative law spectrum have also been undertaken, including the following topics: Status of the Federal Administration; Public Participation in the Administrative Process, Access to Information, Political Control of Independent Administrative Agencies, Parliament and Administrative Agencies and Impartiality in the Administrative Process.

These studies are a solid foundation for further research on matters such as the legal status of the federal administration, tort liability of government and policy implementation. This research will lead to a better understanding of administrative law, its objectives, its limitations and the practical organizational requirements of administration. These studies have exposed major conceptual difficulties which have led us to the view that the traditional approach to administrative law in this country is in need of fundamental reform.

The Administrative Law Project is preparing an Issues Paper for external consultation so that our ideas about reform can be tested. We hope that this process will lead to the production of a Report to Parliament. This Report and future studies should support practical recommendations responding to the needs of modern Canadian society, dealing with matters such as procedure, status, federal court appeals, procurement, delegation and internal organization of government.

The realities of governing in late twentieth century Canada are a far cry from the more basic and less complex organization of earlier times. The main dimensions of modern governing realities are: (1) the evolution of the federal bureaucracy, (2) the multiplication and diversification of administrative institutions, and (3) the growing complexity of administrative action.

In such a context, Administrative Law serves two purposes. **Administrative law is a law of and for the Administration, as well as a law for private persons in their relations with the Administration or the State.** While this statement might seem obvious to some, this represents a fundamental shift in focus for administrative law. The focus should be on how government organizes itself, in addition to how individuals can challenge governmental action.

Like other branches of law, however, administrative law also articulates principles which support public morality, justice and social harmony. An example of such a principle is

the requirement for procedural fairness, which illustrates the dual basis of administrative law principles. Administrative law is functional in nature, in that it regulates and organizes administrative action. It also has a fundamentally liberal character which informs the philosophy behind each principle.

Reflecting its functional and liberal characteristics, administrative law: (1) orders relations between the State and individuals; (2) defines the means, legal (such as a power to decide upon an individual's obligations) or managerial (such as property, finance), provided for administrative action; and (3) defines the legal status of persons and institutions acting for the State.

Administrative law is not immutable; it must be lively and evolving. Federal administrative law has changed little since the original articulation of basic concepts during the Victorian era. This is so in spite of the vastly increased and more complex role of modern government. Compared to most Western countries, the accumulated stagnation in Canadian administrative law is considerable. Fundamental adjustments are needed to meet the challenges of modern Canada.

The Commission wants to reform and Canadianize federal administrative law, taking into account the realities of the modern State, the federal system of government in Canada and current Canadian society and its needs. In working towards these objectives, we must recognize the interventionist tradition of the federal government and the administrative apparatus it has developed to support that interventionism.

A clear comprehensive vision of administrative law is urgently needed. Government and private persons are frustrated by the continuing use of antiquated legal concepts such as "The Crown", complex and overlapping remedies such as mandamus and certiorari, and inadequate legal descriptions of certain government activities such as the benefit-granting function. The Commission plans to suggest reforms in the areas of legal status, government functions, legal means of State action and the relationship between government institutions and private persons.

Administrative law is becoming much less a thing of hoary common law doctrine and much more a creature of statute. The creation of distinctive administrative institutions and the proliferation of special legislative regimes facilitate a growing autonomy of administrative law. Proclamation of the Constitution Act, 1982 (including the Charter), entrenched principles such as legality, proportionality and equality which have direct bearing on administrative action.

At present, administrative law in Canada is shackled by a failure to comprehend both the functioning of the modern state and the distinct nature of administrative phenomena. While the number and types of government decision-makers and governing legal instruments have increased dramatically, our current approach to administrative law recognizes only a handful of traditional responses. New institutions and governing instruments are, therefore, not adequately addressed by traditional administrative law.

This approach fails to fully recognize that government institutions are constantly producing and applying rules. Even though some rules may not be legislation, they nonetheless "govern" the activities of administrators. Within most federal government institutions, a variety of rules seek to guide internal functioning. The labels used to describe these rules may vary among institutions. Examples of such rules are found in circulars, instructions, manuals, guidelines and so on. Although such rules are binding internally, they do not meet the formal requirements of delegated legislation and hence they are not technically binding externally on private persons. However, because these internal rules clearly affect private persons, their production and application should be supervised by administrative law.

In the next five years, the Commission's Administrative Law project will focus on legal questions about state functioning and about relationships between the state and individuals. The Commission proposes four themes under which the reform of administrative law ought to be organized: status, ways and means, organization of government and controls. These themes ought to be pursued to achieve the following objectives: adaptation to social realities; responsiveness to the needs of the modern state; democratization; and autonomous development of administrative law distinct from the traditional private law approaches.

Our approach will be practical, but it will also deal with fundamental concerns. In establishing its priorities, the Commission has identified a number of tasks which it is particularly well-suited to perform. These tasks can be achieved through research, consultation, and by preparing draft legislation. The Commission's research effort will culminate in useful suggestions, statutory and otherwise, to improve matters such as procedure, legal status, Federal Court Appeals, procurement, delegation and internal organization of government.

Much of this work is well under way. In the next year or so, papers should be published dealing with federal inspectorates, the ombudsman, ex gratia payments, administrative

appeals generally, immigration appeals and the Australian Administative Appeal Tribunal.

In the second year, research which has already been started should yield publications on the following subjects: limitation periods; tort liability of the administration; bringing the Crown under the law; procedure and decision-making; the nature of administrative acts; the legal framework for the administration of financial incentives; and a general paper entitled Toward a Modern Canadian Administrative Law.

The project will cooperate with the new better Dispute Resolution Project in research on administrative dispute resolution and the dispute-resolving function of government.

In the third, fourth and fifth years, there will be further research and publications, as resources allow, on several other important and practical topics: regulatory offences; legal status of public enterprises; fiscal and procedural privileges and immunities; transformation of institutions, initiation and reform of Federal Court remedies; an Administrative Procedure Act; environmental mediation; procurement contracts; delegation of government functions and privatization; administrative evidence, internal ordering, authority and legal remedies; and administrative secrecy and information disclosure.

All of these are significant subjects in need of study that are not being dealt with elsewhere and which are within our capacity to accomplish. We hope that our work will generate discussion and consultations which will eventually lead to the reform of our administrative law, making it more rational, more expeditious and more responsive to Canadian needs.

3. Human Rights Law

At this stage, in the infancy of the Charter and in the immediate aftermath of Supreme Court of Canada pronouncements concerning the paramount importance of human rights legislation, policy-makers are confronting a largely unmapped terrain. The potential field of inquiry is vast and the subject matter of pressing importance.

The demands posed by our recently enacted Constitution and by our long-standing commitment to progress in the field of human rights far outstrips the capacities or resources of any one institution. Certainly this Commission does not wish to duplicate the efforts of others in this area, for it would be wasteful to do so. We believe, however, that we have a contribution to make to the development of human rights law. Therefore, a priority concern in the structuring of this project must be coordination and liaison with other responsibility centres within government.

Both the government (through its establishment of the Human Rights Law Section of the Department of Justice and through the responsibilities accorded to the Secretary of State pertaining to Human Rights) and Parliament (through its creation of a Standing Committee on Equality Rights) have recognized that development of initiatives concerning human rights is too important a matter to be left to follow in the wake of court decisions interpreting one human rights provision after another.

Undeniably the courts will play and important and even central role in interpreting and giving effect to the Constitution and other human rights enactments. Unlike the courts, however, which are limited to interpreting statutes and protecting liberty in the context of an attack upon a statute or its application, advisory bodies like the Law Reform Commission of Canada may stimulate the enactment of laws which are fair, clear and coextensive with society's interest in justice.

The very creation of law reform bodies signifies a commitment to a system of laws that is legislation-driven rather than litigation-inspired. The Law Reform approach to the creation of legislation involves an emphasis upon certainty, clarity and deliberation. Comprehensive law reform presents Parliament with the opportunity of undoing - or at least avoiding - past mistakes in the field under review. It is a fact of Canadian history that the vast bulk of our current legislation was forged in an era antedating an entrenched Canadian Charter of Rights and Freedoms. For a variety of reasons, many federal laws contain substantial defects, some of which are profound. Thus, the effort to review comprehensively federal laws from a human

rights perspective is not only a worthwhile but an essential undertaking.

It is our belief that the Law Reform Commission is an appropriate vehicle to help the development and formulation of legislative policies, reflecting in a detailed way our basic constitutional and human rights principles. We have already referred to the value of rational research and analysis. This is a necessary precondition to the development of fundamental principles. It is in this area that one discovers the value of sustained, rational exposition over a litigation-driven process. Comprehensive, coherent law reform could be the leading edge of constitutional evolution and the primary shaper of the process.

Clearly the courts, parliamentary committees and internal departmental policy units will all have significant input in the fashioning of legislative policy and in the interpretation of legislation. However, the labours of an independent advisory body such as the Law Reform Commission of Canada can be a useful complement to these endeavours. The complex process of putting flesh on the bare bones of the Charter will require the cooperative effort of several institutions, including ours, if Canadians are to receive the full benefit of the Charter.

Notwithstanding the centrality of human rights and fundamental freedoms within the Canadian legal system, the issues are sensitive and contentious. It would therefore be unthinkable to proceed with haste into this area. Consultation with specialists in the field would be required at the initial exploratory stages in order to achieve a better understanding of those matters which merit priority consideration.

It is obviously not feasible for us to encompass and review all the laws of Canada; a selection of subjects is necessary. Therefore, as a matter of first importance, the Commission will move to establish an advisory group to assist in determining developmental strategies for the project. Primary among the tasks of this working group will be the identification of subjects worthy of consideration and upon which the Commission can be expected to make a unique contribution. There is no virtue in duplicating or overlapping with similar work either being done or being planned elsewhere within government.

The composition of the Advisory Group has not as yet been determined but should contain representatives from the following centres: the Human Rights Law Section, Department of Justice; Office of the Assistant Undersecretary of State (Multiculturalism); The Human Rights and Social Affairs Division of External Affairs Canada; Canadian Human Rights Commission; Provincial Human Rights Commissions; Status of Women Canada; and the Advisory Committee on the Status of Women.

It would be desirable to have representatives of various independent Human Rights Centres and Civil Liberties Associations and other recognized experts in the field of human rights and civil liberties represented in the working group. Alternatively, they should be consulted independently as to their views concerning which matters deserve priority consideration by the Commission. Additional support should be obtained from those individuals within the Commission possessing experience and expertise in human rights-related endeavours.

As is evident, we envision a modest beginning for this programme. One of the first tasks would be to produce global "think pieces" which would help to determine the scope of the research field under review. Also, one or two specific studies, identified at an early stage by our advisory group, should be undertaken provided that they are of modest proportion and do not place an undue burden on the Commission budget.

Much of the past work undertaken by the Law Reform Commission of Canada has possessed significant human rights dimensions although, admittedly, this has not been the primary focus of our work. The relative infancy of the Charter and significant developments in the field of human rights as a whole have demonstrated a need for new tools, including doctrinal research and writing, as well as fresh legislative approaches.

Certain issues which may be regarded as "Charter-specific" are presently being addressed in the context of the Criminal Code Review. For example, freedom of the press is presently being studied in the context of our consideration of Media Coverage of Judicial Proceedings. The presumption of innocence is the subject of a study bearing the same name. The subject of unreasonable delay will be partially canvassed in our working paper on Trial Within a Reasonable Time: Moving Cases Up to Trial. Nevertheless, there are a wide variety of subjects which will not be directly addressed in the recodification exercise. Other human rights-related work will be the natural outgrowth of the Commission's endeavours in the field of Administrative Law.

As stated, it is the Commission's intention to restrict its endeavours to those areas of the law where it is well-situated to make a unique contribution to evolving law and practice. Since we have not yet completed the process of consultation and liaison with other government responsibility centres, we are unable to state definitively that certain fields are unoccupied. However, we offer the following examples of worthy endeavours which might be undertaken should this prove to be the case:

"The Economic Implications for Federalism of Equality Litigation" is an extremely important subject which has been largely ignored in the literature to date. Such a study would address the contentious issue of how governments might attempt to accommodate findings of unconstitutional discrimination (and remedial orders in relation thereto) at a time when resources are scarce and competing demands for such resources are evident. For example, if a court were to order that the level of services and/or institutions present in one province establish a normative level that should be present in other provinces, what should be the appropriate form of governmental response? For example, can a province constitutionally legislate that the annual rate of expenditures to alleviate unconstitutional discrimination not exceed a specified maximum level? (Certain provincial initiatives in the field of equal pay indicate that governments are at least prepared to attempt to do so.)

"Privacy and Law Enforcement" is a field which has attracted remarkably little attention, at least insofar as computer data base information is concerned.

"Military Justice and the Charter" is an area which has attracted some recent legislative activity in the form of amendments to the National Defence Act, primarily in search and seizure law, but a more global approach to the subject of military law seems to be called for. Military law is a discrete subject which is activated by unique exigencies and concerns. In the past, it has proven to be a fertile ground for constitutional and quasi-constitutional challenge.

"Demonstrating Justification Under Section One of the Charter" is a topic of significant practical importance to the courts. At present, evidentiary and procedural standards to regulate this area do not exist. There has been some haphazard development of the field in the case law to date, but certainty, coherence and uniformity of practice are lacking. It is our belief that the judiciary would welcome the practical guidance that such a study could provide. (Whither the "Brandeis Brief" for Canada?)

The human rights project outlined here is designed with the prospect of future evolution and growth in mind. Once our priorities have been determined and a consensus reached with the other responsibility centres within government we anticipate that it will grow into a major project within the Commission.

4. Law, Technology and the Protection of Life

There is no area in which the Commission's mandate to be bold and innovative is more pressing than that of law and technology. In the past 15 years we have witnessed major, rapid, social and technological changes in our society. Through the use of television, satellite links, computers, lasers and video-phones we are communicating with each other faster and in greater complexity than at any other time in our history. We are discovering things more quickly and exchanging the information more speedily on a world wide basis. It would not be an overstatement to say that technology is now arguably the single greatest agent of change in contemporary society.

In its early years the Commission recognized its responsibility to meet the challenges to law posed by technology. In its first effort to address issues of law and technology, the Commission responded to the urgent and difficult issues that had arisen in the area of medical law. The Protection of Life Project was established to analyze the strengths and weaknesses of existing health-related law and to propose reforms to better respond to both new technological developments and evolving values. Life-saving technology was the challenge responded to in our euthanasia/cessation of treatment papers; the new technologies for determining brain-death led to our papers on the criteria for determining death; the vast and growing array of behaviour alteration techniques and technologies was the subject of one paper; the waste products and environmentally hazardous substances involved in modern manufacturing was the threat faced in various environmental studies done by this Project.

Our work in the health-related area has been positively and enthusiastically accepted, not only by the special interest groups of doctors, nurses, patients and environmentalists, but by the general public at large. All our Working Papers and Reports have been widely distributed, nationally and internationally. They have also been the subject of numerous radio and television programs, newspaper editorials and articles. Our staff have been involved in dozens of meetings, conferences and symposia dealing with these subjects across Canada and elsewhere in the world. The public's strong response to the areas where law and technology intersect has reaffirmed our commitment to the need for further work in this field.

There are, however, three things which characterize and, to some degree, limit the way in which the present Project has responded to technology up to now. First of all, the reforms proposed were for the most part confined to existing legal paradigms. Given the urgent practical problems created by some new technologies being in place and used before the law had

caught up to them, (e.g. life-saving technologies in hospitals), the most one could do on an emergency basis was to clarify existing law and to offer some temporary and limited solutions. There remain, however, some fundamental and long-range questions to be tackled, involving the adequacy of our legal categories and concepts themselves to deal with the challenge of technology. To this point, the law has merely tried to catch up, largely unsuccessfully, because it employs tools designed for a simpler and slower age. In the face of efficient, powerful and fast-evolving technology, developed and managed by professional bodies and multi-national corporations which largely escape easy categorization or regulation, the law appears to many to play only a formalistic, ritualistic and (when effective at all) largely obstructive role.

Some technologies simply do not readily fit into the available legal boxes. For example, biotechnology does not easily fit within either medical law or environmental law; in reality, it is both and more than either of them. Another example is electronic communications, which has been forced into a transportation law box, when in reality it is something quite new and different. Neither technology fits neatly into our current categories and, hence, is not comprehensively nor coherently regulated.

Many technologies are forcing society to face and answer entirely new questions. This is so because of their efficiency, the range of choices they create, their potential intrusiveness, their often non-public nature, and the increasingly shorter period between generations of technologies. If all that is true, then the law, as an expression of societal values and choices, and as one of the instruments of social engineering, can no longer escape the need to address and explicitly articulate its values and choices. Since we can now be and do so many things, it becomes more and more necessary to decide what we want to be, what it means to be human and what elements are a vital part of our humanity, how to protect those qualities and values, and who should be enabled to do what to whom. Technologies can solve some old problems, but they create new ones as well. They can provide us with a wider range of technological options, but that only increases the pressure to determine the kind of society we want and to design laws and social policies to reflect our aspirations.

At the same time a law reform project such as this can help to develop a monitoring and anticipating role for law and law reform agencies. The challenges posed by fast-evolving technologies no longer permit the luxury of responding after the event with various forms of corrective legal surgery. Legal flexibility and innovation are now mandatory, and those

responsible for law reform will need to develop new skills and mechanisms for anticipating what is in store for us in the future. This renders imperative multidisciplinary projects and close observation of changing public values and perceptions.

A second characteristic of the response to technology to date by this Project has been the adoption of a more or less exclusively protective or defensive stance. Our reform proposals have largely focussed on the dimensions of technology which are potentially threatening and intrusive as regards human values and integrity. That focus was appropriate given the problems and technologies dealt with until now - e.g. life-support technologies which are sometimes used to prolong a patient's suffering and dying; sterilization procedures and behaviour alteration techniques which sometimes violate the integrity and best interests of the patient; disposal of hazardous wastes in a manner which seriously endangers the environment and human health. To be sure, a protective viewpoint should remain one of the priorities and concerns of the law inasmuch as most technologies have, in varying degrees, a potentially intrusive and dangerous side.

But without losing sight of its role as a protector of human integrity and values, the law can and should play other roles as well vis-à-vis technologies. The law should enable or facilitate the development and application of socially useful technologies. Undoubtedly, because our paradigm has been largely that of criminal law, we have tended to focus on wrongdoing. We are slowly and ponderously beginning to see the law as a potentially positive force is society. Law can be instrumental as well as interdictory. Research with that perspective in mind may well contribute to the reform or repeal of laws and regulations which obstruct the development and application of useful technologies.

There will always be reason to move in that direction with a degree of caution. One of the most important research goals of any law and technology project must be that of determining with some care the line between facilitating the development and evolution of useful and acceptable technology, on the one hand, and, on the other, proposing an uncritical role for law vis-à-vis technology, which would blindly allow technologies to become "irresistible, irrevocable and irreversible", regardless of threats to human identity, integrity and values.

A third characteristic of the treatment of technology to date by the Protection of Life Project up until now is that the range of technologies has been limited to two areas, health law and environmental law. These are two enormous areas, but they are merely a beginning in the study of technology and law, which

is a vastly greater endeavour.

It would serve little useful purpose to do research into technology and law without focusing on various specific technologies. Though technology has been one of our primary interests from the start, we have felt that to explore "technology and law" at that level of abstraction would produce conclusions too general to be of any practical use. After all, there is, in practice, no such animal as "technology", only "technologies". And individual technologies in different fields are as different as night and day as regards value questions which arise, parties involved and legal implications. Our decision to add the new field of environmental law to the Project enabled us to broaden our experience and knowledge of the area of technology and law and equipped us to confront the larger issue.

But the time has come to expand the law and technology research into other fields which raise new and unanswered questions. As was observed above, the emphasis in many of the earlier Project studies was mainly on the individual, and did not include the institutional and social context. Much of the focus was, therefore, on the individual patient's rights and interests because that was the aspect most in need of attention at that time. Since then, it has become evident that comprehensive policy solutions require that more attention be paid to the institutional context in which moral and legal problems now typically arise, given the multi-party, complex setting in which so much decision-making takes place. That is especially so for health care decisions. Legal or quasi-legal policies which elaborate only the rights and duties of individual patients and physicians, ignoring the dynamics and rules of the larger institution and the increasingly diffused and shared responsibility which results from them, will not be sufficiently comprehensive and effective.

In the next few months we will publish several studies that are now almost completed: Workplace Pollution, Pesticides, Policing Pollution and Consumer Product Pollution.

By the end of the first year, we plan to publish papers on research that is well under way on the following subjects: Experimentation on Human Beings, Biotechnology, Native Rights and the Environment and the Status of the Fetus.

Before broadening the project beyond health issues and environmental law, we must consult more with experts on law and technology to determine where the need for in-depth research exists and where these institutions are not responding to this need. Following that, we will develop several studies which will begin toward the end of the first year and continue into the

fourth and fifth year of the program, subject to our budgetary capacity. Among those studies, based on preliminary consultations, are the following: genetic engineering, experimentation and organ banking; allocation of scarce health technologies; forced feeding in hospitals and prisons; prescription and non-prescription drugs: their testing, approval and marketing; and control of food industries.

It has been suggested that we undertake a study of "informatics" - the different technologies which desseminate information. The issue is urgent and relevant. For example, the Copyright Act, which barely makes reference to communication by radio, cannot adequately protect property and performing rights in works transmitted by satellite or fixed on videotape - forms of technology unknown and undreamt of at the Act's inception. Efforts are underway, however, to bring the Copyright Act up to date. There is need for a fundamental and philosophical examination of the protection of rights in forms of property and expressions of ideas which are not recognized by the present law.

Protection of rights in works fixed in or transmitted by new technological vehicles is a pressing issue. One has only to open a newspaper to find accounts of computer software and pay-TV "piracy". Re-transmission of television signals originating in the U.S. has caused considerable friction south of the border. Concerns have been expressed that unless Canada offers increased protection to innovators, research and development will be stifled. The issues are complex and the repercussions far-reaching. This is definitely an area of law which merits attention.

There are several other issues of law and technology that could be addressed. Among them are electronic banking and fund transfers, cable T.V., privacy protection, computer technology, computer crime, consumer and commercial aspects of technology, transborder data flow, and the use of video, telephone and computers in trial practice and court administration.

A study of these areas will generate many practical and needed suggestions for reform. Most of them demand some fundamental research and analysis on an interdisciplinary, independent and long-term basis. None of them are being adequately addressed by existing institutions.

5. Better Dispute Resolution

One important measure of a civilization is the quality of justice delivered to its citizens. It follows that a society's justice system should reflect its basic values. Canadian society has developed, by and large, through reconciling its diversity peaceably, without revolution or undue civil confrontation. Our justice system, based upon the adversary process, however, does not always reflect this laudable aspect of Canadian society. This has spurred a growing interest in better techniques for resolving disputes which are more in keeping with Canadian culture and values. In short, we must promote more cooperation and compromise in our litigation, and less confrontation and combativeness.

In the United States, where the adversary system can be said to have achieved its "most rigorous purity" this concern has also been strongly felt. Former Chief Justice Warren Burger of the United States Supreme Court warned a meeting of the American Bar Association in February 1984 that the American legal system

> .. must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trial will be the only means, but for many claims, trials by the adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for truly civilized people. To rely on the adversarial process as the principal means of resolving conflicting claims is a mistake that must be corrected.

We agree with this view. Although things are fortunately not as bad in Canada as they are in the United States, the complexities of modern Canadian life are resulting in increased litigation, escalating costs and longer delays. We can and must make our legal system more efficient and less costly. To achieve these goals, we must reduce hostility within the adversary system and shift our focus to cooperation rather than confrontation. We must stress the need for mediation, not litigation; for compromise, not conflict. There is much that can be done to streamline the present litigation process, making it more susceptible to negotiation and settlement than it is now.

This is not to argue that adjudication through the adversary system is <u>always</u> ineffective and inappropriate; it is just that it may <u>not always</u> be the most effective nor appropriate way to deal with human conflict. Too often the cost of traditional litigation, both personal and financial, is too great

for ordinary Canadians to bear. We can do better, and we are already moving in that direction.

The Law Reform Commission of Canada, from the beginning, sought to find ways to encourage settlement, eliminate wasted court time and cut expense. Our suggestions on pre-trial conferences have now been enacted in part in the Criminal Law Amendment Act of 1985. Our ideas about disclosure (Report 22 (1984)) and diversion, although not yet enacted, have found their way into the administrative practices of our judicial system. More recently, Parliament has recognized in legislative form, in the new Divorce Reform Bill, the Commission proposal that mediation should be sought as an alternative to judicial adjudication. (Report on Family Law (1976)).

We plan to continue our work to improve the dispute resolution process in Canada by establishing a new project entitled "Better Dispute Resolution". Almost everyone consulted felt that this should be a research area of high priority for the Commission. This new project will study the current court system in order to offer recommendations for its reform and will also examine alternative methods of dispute resolution. It will be in two phases:

Phase I

The first phase of such a study is to analyze the current trial process in Canada. The judiciary and others in the legal system wish to make it as expeditious and inexpensive as possible. It is truly astounding to realize, however, how little data we have about our trial system and how it functions.

The Canadian Judicial Council wishes to participate in such a study as does the Canadian Bar Association. Officials in the Department of Justice support it, and we expect the provincial governments to participate in it.

We plan, therefore, to conduct a survey of the present trial process in Canada. The main aim of this action research would be to fill in the gaps in available data as much as possible. We would seek to determine the pace and cost of litigation in the various courts across the land. The survey would gather views of key actors in the trial process to determine not only what is wrong with it, but also what works well in it. We would try to find out why certain techniques work and why others do not. Baseline data would be gathered as part of the process. The goal of this phase of the research would not be to make final recommendations, but to set out methods of expediting trials that have improved the situation in various courts and hence show potential for further study and action by other courts across the land In other words, we will describe as

best we can what is going on in the system and offer some possible avenues of reform which have worked in some jurisdictions.

True progress in these areas can only come with judicial leadership and the support of the other key participants. We hope to discover practices and personality factors that contribute to a more efficient trial process. Overcoming resistance to change will be one of the most significant matters to measure. What will emerge is likely to be a "Keynesian" approach to the adversary system, in which modifications, including greater judicial involvement, rather than wholesale replacement, would be suggested.

The publication by the Commission of the findings of this phase of the research should take place within two years. The study paper, as published, would present an overview of the conclusions, containing analysis, interpretation and synthesis. Various provincial courts will be compared with one another. Shorter articles and interim reports might also be published along the way. Following this initial survey over the next two or three years, there will be further work done by the Commission to develop detailed legislative reform proposals or pilot projects.

The fact-finding phase of this study, which would be conducted by Commission personnel, would be under the general supervision of an Advisory Committee composed of representatives from the Canadian Judicial Council, the Canadian Bar Association, the LRCC and provincial representatives. In doing the follow-up work, which would deal with recommendations and action, cooperation with the same groups would be sought, although it is recognized that there may be differing views about what ought to be done.

Phase II

It is not enough merely to improve the way the current system of litigation resolves disputes, although that should be our first priority. We must, at the same time, also study alternative methods of dispute resolution, devise pilot projects, evaluate them and then seek to make them more widely available. Hence, Phase II of the study will also be gradually developed as Phase I proceeds.

The idea of providing alternative mechanisms for resolving disputes is not new. The development of the Court of Equity in 13th and 14th century England was based on a desire to find ways of ameliorating the then-existing structure. In fact, the King's own common law courts were developed as a promise of

better justice than that provided by the manorial courts of early England. Administrative tribunals, which have enjoyed a rapid growth in this century and which are now entrenched within the legal system, were created in many instances to provide an alternative means of resolving conflicts - usually in specialized areas.

In response to the recent concerns expressed about adjudication in an adversarial setting, there has been a resurgence of interest in alternative dispute resolution. Within the last few decades a number of significant developments have taken place. This is especially true in the United States, which now has about 200 alternative dispute resolution programs. Moreover, this number does not include a much greater number of specialized applications in areas such as divorce mediation, consumer arbitration and environmental mediation.

In Canada, the development of alternative dispute resolution programs has been quite modest so far. The Supreme Court of Ontario has had a successful pre-trial conference system in civil cases for years. There have been at least three community-based projects in Halifax, Kitchener-Waterloo and in Windsor - the latter, regrettably, having been closed recently. The Law Reform Commission sponsored an experimental diversion project in East York. There is now a national organization called Mediation Canada. New groups committed to alternatives are developing at York University, the University of Windsor and elsewhere. An important conference on the subject was held recently in Winnipeg. Individuals are offering their services as professional dispute resolvers. Training programs for mediators are now being offered in British Columbia. It is obvious that there is a great need for research and experimentation in this area, as well as better coordination of the effort.

Naturally the Law Reform Commission would concentrate on areas of federal jurisdiction, including divorce, administrative law, taxation, bankruptcy, corporations and matters under the general competence of the Federal Court of Canada. In addition, however, such a program would benefit from co-operative work with the various private organizations which have developed and with the provincial governments or law reform agencies.

The key purpose of such research would be to increase citizen access to and satisfaction from the justice system, both procedurally and substantively, by reducing the costs and delays in the resolution of conflict and by eliminating unwarranted confrontation and bureaucratic or procedural complication. Not only must new channels for dispute resolution be developed, but new attitudes towards disputation must be fostered, so that these efforts will be accepted and not become another added step in an

already complex process.

A first step in any research activity must be the clarification of goals and the values upon which they are predicated. A perusal of the literature on the subject of the amelioration of dispute processing reveals there are generally four separate goals: (1) to relieve court backlogs, undue cost and delay; (2) to increase community involvement in the dispute resolution process; (3) to increase a citizen's access to justice; and (4) to provide more effective, efficient and satisfying dispute resolution, thereby improving the quality of justice and citizen perception of it.

While much has been written on the subject of alternative means of processing disputes, there is, surprisingly enough, a scarcity of rigorous empirical research. Only a limited number of U.S. studies have employed an experimental design, attempting to compare alternative means, using the traditional court process as a control group. Most studies have merely consisted of descriptions of project case-load, referral sources, average time per case, average cost per case and other "performance" data. Moreover the bases for these analyses are far from uniform, thereby rendering it difficult, if not impossible, to compare one analysis with another in any useful or accurate way.

In Canada, this lack of empirical research is even more marked. Canadians, with our different values and culture, have a way of approaching conflict which may be different from Americans. The U.S. studies, therefore, cannot be relied on by us without further work.

The Commission plans a long-term study of alternative dispute resolution. In the early stages, (the first year at least) contact must be established among the groups now working in the field in Canada and abroad. We must carefully identify the areas that need study. If others cannot and will not undertake the research, we should do it ourselves, with the advice and cooperation of other institutions and individuals involved in the field.

The issues in need of study are many. In evaluating the efficiency and effectiveness of various dispute resolution techniques we must take into account not only economic and financial aspects, but also psychological, sociological, cultural and jurisprudential factors, including analysis of theories of human conflict and the role of conflict in Canadian society. We require a systematic analysis of disputes which would try to match a type of dispute with the appropriate resolution process in accordance with dispute processing typologies or taxonomies. Which disputes should be left in the current system? Which

should be removed altogether and decided finally elsewhere? Which can be the subject of experiment within the current system or outside of it? One area for specific study might be medical malpractice disputes.

We must determine whether alternatives merely provide "second-class" justice for low income groups, weakening their rights through lessened access to the courts, and thereby allowing the issue of the high cost of entry into the court system to be deferred, and is this is merely a way for the state to exert more social control? If so, is this desirable? Can the negative consequences of bureaucratization be avoided or minimized? Would alternative programs provide more procedural and substantive justice? To what extent can and should they be integrated into or related to the existing justice system?.

We must determine the extent to which alternative methods require practitioners with skills different from those who practice in the judicial system. For example, should mediators belong to a separate profession, with its own training, certification and regulation? Should mediators be able to claim some sort of legal privilege? What changes, if any, to legal education are required?

The comprehensive approach to dispute resolution that the Commission is recommending will not only require research into substantive law and procedure, but must involve aspects of philosophy, jurisprudence, sociology, anthropology, economics, administration, psychology, statistics, history, political science and social work. Such an interdisciplinary approach would require the assistance of experts in universities.

A project such as this would also need the cooperation of private associations and professional bodies. The Canadian Bar Association has already indicated it would be pleased to work with us in developing our Phase II studies, in shaping our proposals for reform and in seeing that they are adopted. The Canadian Judicial Council has evinced interest in working with us on Phase II. Several existing Canadian dispute resolution groups have also offered their assistance for such an effort. Cooperation and coordination are vital to a project such as this. We must avoid duplication and overlapping. Other groups should be encouraged to do research if possible and we should only do that which cannot be adequately done by others.

This growth of interest in alternatives within the last decade has been extraordinarily rapid. Though these techniques have been shown to be effective, there is an urgent need for continuing objective empirical research in order to temper the over-optimistic and win over the skeptics. Moreover, this

research should be done on a comprehensive level, so that the needs of and impact on the Canadian legal structure and society as whole can be adequately assessed. Only by this means can there be developed a coordinated legal system, which offers the most efficient, effective and just resolution for all the different types of human conflict. In this way, our dispute resolution system will come to reflect more accurately the enduring values of Canadian society.

6. Modernization and Simplification of Federal Statutes

Making recommendations for the improvement, modernization and reform of federal law is the broad mandate of the Commission. In keeping with this mandate the Commission created a project called the "Ongoing Modernization of Statutes". Under this general heading, the Commission, from time to time, has reviewed various federal statutes which were shown to be unfair, obsolete or in need of modernization.

For example, in its Report to Parliament on the Exigibility to Attachment of Remuneration Payable by the Crown in Right of Canada (Report No. 8) the Commission brought to light the unfairness of the law which made federal public servants immune from having their earnings attached. This immunity is based on the concept of the Royal Prerogative which prevented a court from making a binding order against Her Majesty on her funds or property. One of the most unjust effects of this immunity from attachment was shown to occur in the enforcement of maintenance orders. Because of this immunity, unlike other employed persons, the incomes of federal public servants could not be attached to meet their family support obligations. To redress this imbalance the Commission recommended that all existing immunity from garnishment, receivership or other attachment of salary, wages or other remuneration payable by the Crown and by the Government of Canada be abolished. This recommendation was swiftly adopted by Parliament in its Garnishment, Attachment and Pension Diversion Act, S.C. 1980-81-82-83, c. 100, s. 5. Other examples of recommendations for reform by the Ongoing Modernization of Statutes Project can be found in Report No. 7 on Sunday Observance; and Report No. 11 on The Cheque: Some Modernization.

The Commission in its new program of research would like to retain the capacity to study areas of federal law which are in need of reform, but which do not fall within the parameters of our major projects. In this way, there would be some flexibility to deal with discrete problems that arise from time to time, without the need to submit a new program.

The Commission in its consultations on its new research program has received numerous suggestions for areas of study ranging from modernizing and simplifying federal statutes, such as the Income Tax Act, to pursuing fundamental research on the subject of Indian and Native self-government as it relates to the administration of criminal justice. After extensive consultations and because of the limited financial resources and expert personnel, we have narrowed these subjects down to the following:

the Canada Interest Act; native justice; and other small subjects suggested by provincial law reform agencies or departments of the federal government.

Part of our effort will focus on simplifying federal government documents. It has been pointed out to the Commission that the complexity of government forms forces some people drawing Canadian government pensions to consult lawyers to explain what should really be straightforward information. Plain language in the use of forms would save money. It would save time spent by public servants in having to explain the instructions and information in forms and leaflets. It would cut down the cost of translating, because fewer words would need to be translated from English to French and vice versa.

At the present time, the Commission has one part-time consultant, working on a pilot project, informally reviewing the forms and information leaflets of a number of federal departments. His informal advice has been welcomed by various officials. The Commission envisages a more formal program which would act, both in English and French, as an encourager and adviser to federal form designers in various departments to create forms using plain language. We will cooperate with the Canadian Law Information Council in its efforts along similar lines. Projects like this have been most successful in the United Kingdom and Australia and we believe such work could be profitably undertaken by Canada as well.

Many other possible items could be studied under this heading in the event that it is felt advisable to do so. One significant aspect of this vehicle would be to enable Parliament and the Department to refer matters of current concern to the Commission for study - something we would like to encourage. The Commission feels it should continue its miscellaneous project to maintain flexibility and to be able to respond promptly to needs such as these and to others as they arise from time to time.

E. ALLOCATION OF RESOURCES

It is difficult to identify with precision the allocation of resources for research activity. It is hard to tell in advance whether the researchers to be retained will be senior or junior scholars, whether they will work full time or part time, whether they will be in Ottawa or at their own institution, whether they will require travel and support expenses. External researchers are used more in the early stages of research. The in-house research complement increases in size during the latter stages of research. On the basis of past experience, however, we

can estimate the proportion of our budget required to achieve the research objectives of the individual research projects.

In the past, approximately 65 percent of our non-salary total budgetary allocation has been devoted to research contracts, the balance being spend on Commission and public service salaries, secretarial services, publications, information services, consultations, travel and supplies - in short, the ordinary expenses of an ongoing public institution. We expect that our of funding will continue at approximately the same level as in the past, as set out in the departmental estimates of 1985-86, except for the gradual trimming of person years to which the government is committed. We plan to reduce the proportion of administrative costs vis-à-vis research expenses.

On this basis, over the next five years, we will allocate our research funds to the proposed projects as follows:

PROJECT	Year 1	Year 2	Year 3	Year 4	Year 5
Criminal Law*			20%	20%	20%
a) Substantive	10%	10%			
b) Procedure	30%	20%			
Administrative Law	20%	20%	20%	20%	20%
Human Rights	5%	10%	20%	20%	20%
Technology & Protection of Life	10%	15%	15%	15%	15%
Better Dispute Resolution	20%	20%	20%	20%	20%
Modernization	5%	5%	5%	5%	5%
	100%	100%	100%	100%	100%

* Criminal Law Project merged in years 3,4 and 5.

In explanation, the first year will see the reduction in size of the research for substantive criminal law, which will then merge with criminal procedure to form the criminal law project. This project will be approximately the same size as the other projects - not, as in recent years, much larger. As substantive criminal law reduces, the funds devoted to it will be shifted to dispute resolution. As criminal procedure scales down, the funds released will be gradually shifted to human rights. Technology and protection of life will increase gradually as it moves beyond the health and environment issues. Modernization and simplification will utilize only five per cent of the total research budget. The administrative law project will continue to require approximately 20% of the research budget as it has in the past number of years.

In the future, the Commission will complete the Part III Expenditure Plan in such a manner as to reflect its ongoing activities, including objectives, anticipated results and resource requirements. Significant deviations from the program will be described and explained.

It should be noted that we have accepted the offer of assistance from the Office of the Comptroller General in clarifying objectives and developing better performance indicators with which to measure the effectiveness of the research program. In addition, discussions are being held to determine the most appropriate mechanism for periodic review and reconsideration of the activities of the Commission.