



**LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO**

I.

LCO STRATEGIC PLAN

2008 – 2012

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EXECUTIVE SUMMARY

II. INTRODUCTION

The LCO, launched on September 7, 2007, was established by an Agreement among the Ministry of the Attorney General, the Law Foundation of Ontario, the Law Society of Upper Canada, Osgoode Hall Law School and the other Ontario law school deans, for a period of five years.

III. GOALS TO BE ACHIEVED BY 2012

The LCO's goals for its first mandate are to complete or substantially implement eight to ten major projects and eight to ten focused projects, organize (in collaboration) three conferences, achieve recognition for the high quality of its work, achieve recognition for its consultative process and achieve widespread acceptance of its value.

IV. THE LCO'S MANDATE AND UNDERLYING VALUES

The LCO's mandate is to make recommendations to improve the legal system's relevance, effectiveness and accessibility; to clarify and simplify the law; and to consider how technology might make the legal system more accessible. It is also mandated to create critical debate about law reform and promote scholarly research. The LCO's mission is to become a leading voice in law reform. Its values are independence; integrity; excellence; innovation; relevance; open-mindedness; transparency; diversity; inclusiveness; multi/interdisciplinarity; collaboration; pragmatism; efficiency and accountability.

V. THE LCO'S APPROACH TO LAW REFORM

The evolution of law reform indicates that over time commissions have changes in nature. While law reform began in limited form in the fifteenth century, its modern manifestation did not occur until 1925 in the United States and 1934 in Britain. Ontario created the first law reform commission in Canada, the Ontario Law Reform Commission, in 1964, followed by other provincial commissions and a federal commission. The current LCO differs from the OLRC in not being established by government and in having complete autonomy over its research agenda. The LCO is premised on a vision of law reform as a creative yet pragmatic endeavour.

The LCO will undertake both narrowly focused and complex, socially oriented projects, engage in multi/interdisciplinary research and analysis and make holistic recommendations. It will collaborate with other bodies and consult with affected groups and the public generally. It will be responsive to the need to see its recommendations translated into law, but will also engage in projects that will not become part of the government's agenda, but that may have a longer term impact in a different forum.

VI. THE LCO'S PROJECTS

The LCO is open to project proposals from the public, community groups, academics and legal organizations and from individuals and groups. It will accept proposals at any time, but will also issue a "call" for proposals at times when it is clear that resources will become available.

The Board of Governors approves projects, after receiving recommendations and advice from the Research Advisory Board and the Executive Director. The LCO applies a wide ranging set of criteria in determining whether it is appropriate to undertake a particular

project: relevance of the proposed project to the LCO's mandate and objectives; its impact on the law and communities; and using resources efficiently.

The LCO's current projects are fees for cashing government cheques; division of pensions on marital breakdown; and the development of a coherent approach to law as it affects older persons. In addition, the LCO will carry out a pre-study for a project relating to persons with disabilities.

The staff lawyer and Executive Director will develop a plan for each project, including timelines, resources required, methods of consultation and list of interested groups, taking into account previous work in the area. The knowledge required for each project and consideration of the relevance of technology for each project will be factors in determining the nature of the research required. Narrowly focused projects will usually result only in a draft report distributed for feedback, while complex projects will also involve discussion papers, also distributed for feedback. Complex projects will begin with a pre-study to determine their parameters and will involve multi/interdisciplinary analysis and holistic recommendations.

VII. THE LCO AS A RESPONSIVE ORGANIZATION

The Board of Governors is required to submit a budget and projected expenditures to the partners. The LCO is required to report annually to the partners, but the Executive Director will also develop communication plans that include formal and informal means of communication, including in person communication. The release of the Annual Report will provide an opportunity to bring together the funding partners, the Board of Governors and the Research Advisory Board.

The LCO is committed to public consultation and communication in person, through its website, via a newsletter and through its discussion papers and draft and final reports.

VIII. MEASURING SUCCESS

Measures of success include translation of recommendations into legislation; reference to research, analysis and recommendations by courts, academics and other bodies interested in law reform; quality of work produced; adoption of recommendations or frameworks by other jurisdictions; contribution to or leading dialogue on law reform; collaboration with others; number of proposals submitted to the LCO; extent the LCO is known; and extent to which it meets its own values and satisfies its own identified processes. The LCO will be externally evaluated beginning early in 2010.

IX. OBJECTIVES AND ACTIVITIES FOR 2008

The LCO will complete its appointment of personnel, complete the two narrowly focused projects and complete the pre-study for and begin research on the older persons project, organize, likely in collaboration with a law school partner, a conference on law reform, prepare communication plans and implement its website and newsletter.

THE LAW COMMISSION OF ONTARIO: STRATEGIC PLAN, 2008-2012

I. INTRODUCTION

The Law Commission of Ontario (“the LCO”) was launched on September 7, 2007, as a partnership among the Ontario Ministry of the Attorney General, the Dean of Osgoode Hall Law School, the law deans of Ontario, the Law Foundation of Ontario and the Law Society of Upper Canada. Officially located at Osgoode Hall Law School, the LCO is temporarily housed elsewhere at York University until Osgoode completes extensive renovations that will include space allocated to the LCO.

The LCO’s mandate as articulated by the Foundation Agreement is to recommend law reform measures to increase access to and the relevance and effectiveness of the legal system, to clarify and simplify the law and to consider technology as a means of increasing access to justice. The LCO is also to stimulate debate about law and promote scholarly legal research.

The LCO’s mission is to become a leading voice in law reform. Leadership includes helping to identify the parameters of law reform; encouraging debate about law reform and law reform initiatives; producing scholarly research that identifies areas of law in need of reform and providing high level analysis of the areas identified; and making holistic and multidisciplinary recommendations directed at making the law forward-looking, responsive to the needs of affected communities and comprehensive in approach.

The LCO is premised on a vision of law reform as a creative yet pragmatic endeavour. It has made a commitment to widespread consultation in selecting law reform projects and in making its recommendations. It is also committed to collaboration with other law reform bodies and other organizations engaged in law reform activities. This Strategic Plan not only describes the organization of the LCO and its objectives, but also relates it to the various perspectives on law reform that have informed law reform activities in Canada and elsewhere.

The LCO has the following goals for its first mandate: the completion or substantial completion of eight to ten major projects and eight to ten narrowly-focused projects; the organization (in collaboration) of three conferences; achieve recognition for the high quality of its work; be recognized as a leader in law reform; be recognized for its consultative process; and achieve widespread recognition of its positive contribution to the legal landscape not only in Ontario, but also nationally.

The remainder of the Strategic Plan explains the approach of the LCO to law reform and to the selection and study of projects; it identifies the values that govern the LCO’s work; it suggests measures by which its performance can be measured; and it sets out the LCO’s objectives for 2008.

II. GOALS TO BE ACHIEVED BY 2012

- Completion or substantial implementation of eight to ten major projects and eight to ten more narrowly focused projects: this number recognizes that it will not be until 2009 that the LCO is likely to produce any substantial work on the initial large projects and it also recognizes that, while it continues to select narrowly focused projects, the majority of its work is likely to be in relation to large projects;
- Organization of three conferences or symposia: these are likely to be organized in conjunction with Ontario law faculties and other partners;
- Achieve recognition for the high quality of its discussion papers and reports: this includes the quality of the analysis and the feasibility of the recommendations;
- Acknowledgement as a leader in law reform: this means that its partners, other law commissions, the legal community and the community more generally view the LCO as playing a major role in law reform in Ontario and in Canada generally;
- Achieve recognition for its consultative processes: this refers to consultation in relation to project selection and throughout the project implementation process with affected groups and the public generally, as appropriate for the project; and
- Develop widespread acceptance of the value of the LCO to the Ontario legal system: this will include the view among identified constituencies, such as legal and community organizations, the government and the partners that the mandate of the LCO be extended.

III. THE LCO'S MANDATE AND UNDERLYING VALUES

As set out in section 2(1) of the Foundation Agreement, the LCO's purpose is

to recommend law reform measures to:

- (a) Enhance the legal system's relevance, effectiveness and accessibility;
- (b) Improve the administration of justice through the clarification and simplification of the law; and
- (c) Consider the effectiveness and use of technology as a means to enhance access to justice.

In addition, the Foundation Agreement states that the LCO shall

- (a) Stimulate critical debate about law and promote scholarly legal research; and
- (b) Develop priority areas for study which are underserved by other research, determine ways to disseminate the information to those who need it and foster links with communities, groups and agencies.

The LCO is independent of both government and interest groups. It does not receive its agenda from the government, nor is it obliged to review matters at the request of the government. Furthermore, the government is only one of the LCO's five funders. Nevertheless, the LCO recognizes that at least one measure of success is the extent to which its recommendations are "taken up" by the government of the day. Therefore, government's interest in a proposed project is a factor in selecting among potential projects. This process is facilitated by the inclusion of the Deputy Attorney General on the Board of Governors and the inclusion of an appointee of the Ministry of the Attorney General on the Research Advisory Board. Nevertheless, the LCO may conclude that it

has other reasons to implement a project, even if the government does not evidence interest in it, since it will be difficult to identify the government's future interest in the results of complex project and consistent with the injunction to "stimulate critical debate about law and promote scholarly legal research."

The LCO will be guided by the following values in all its work:

1. *independence*: the LCO is an independent body, the recommendations of which will be determined by the results of research, including consultations with the public and experts in the area;
2. *integrity*: the LCO is committed to ethical practice and will select projects, carry out research and develop recommendations based on merit and not on the basis of pressure from any quarter;
3. *excellence*: the LCO is committed to high quality research carried out for a project, analysis, solutions and production of discussion papers and reports and in its employment and administrative practices;
4. *innovation*: the LCO will approach law reform with a commitment to innovation in law and the reconceptualization of legal frameworks;
5. *relevance*: the LCO will select projects and make recommendations that are relevant to Ontario society today and in the future;
6. *open-mindedness*: the LCO will be open to views from different constituencies at all stages of its projects and will be responsive to suggestions for improvement in all aspects of its operations;
7. *transparency*: the LCO will have an open process for project proposals, will explain its process for selection and will disseminate its work widely;
8. *diversity*: the LCO is committed to diversity in its selection of projects, its approach to analysis and recommendations and in its interaction with community organizations and groups;
9. *inclusiveness*: the LCO will encourage participation by interested groups and individuals, legal and non-legal, in its project selection and project implementation processes and will make every effort to seek out the views of marginalized communities when appropriate to its projects;
10. *multidisciplinarity*: the LCO's research and recommendations will be based on a multi/interdisciplinary and holistic approach;
11. *collaboration*: the LCO will collaborate with other law reform commissions and with other organizations involved in (law) reform as appropriate;
12. *pragmatism*: the LCO will advance recommendations that can be realistically implemented;
13. *efficiency*: the LCO will use its resources efficiently without endangering the high quality of its work and its approach to employees and will not duplicate work done by others or more appropriately done by others; and

14. *accountability*: the LCO will be accountable to its partners and to the public for the quality of its work and its adherence to its values.

IV. THE LCO'S APPROACH TO LAW REFORM

A. Placing the LCO in Context

Law reform as a limited activity goes back to the fifteenth century, but the modern notion of deliberative law reform began in the United States with the 1925 Law Revision Commission and in Britain with the establishment of the Law Revision Committee in 1934 which, with a break for World War II, was reestablished as the Law Reform Committee in 1952.¹ The Ontario attorney general established a Law Revision Committee in 1941 and an Advisory Committee on the Administration of Justice in 1956. The former apparently did no work, but the latter, according to Murphy, "produced a significant body of work, mostly on technical issues" and it was successful in having many of its recommendations adopted by the government.

Ontario established the first "modern" law reform commission in Canada, in 1964. The Ontario Law Reform Commission ("OLRC") was created by statute and was required to look into any issue requested by the Attorney General, but it also had the freedom to study and make recommendations about any area it considered appropriate. Its personnel included one senior and four legal research officers and it otherwise relied on contract researchers drawn from the Ontario law schools. An advisory board, comprised of legal and non-legal members, was also established. The Ontario Law Reform Commission was abolished in 1996 after releasing a significant number of reports, a good number of which, as Hurlburt explains, influenced the development of law in Ontario and elsewhere.²

A little over a decade after the abolition of the OLRC, the Law Commission of Ontario was established on June 25, 2007. In November 2006, a group of individuals, including law school deans, members of the bar, members of the already appointed Board of Governors and the Research Advisory Board of the LCO and members of the Ministry of the Attorney General met in a "Creative Symposium" to discuss issues related to establishing a law reform commission in Ontario.

The LCO is a partnership among the Ministry of the Attorney General of Ontario, the Dean of Osgoode Hall Law School, the Law Deans of Ontario, the Law Foundation of Ontario and the Law Society of Upper Canada, with funding and in-kind contributions from MAG, the LFO, the LSUC and Osgoode Hall Law School for five years, beginning January 1, 2007. The LCO is a not-for-profit unincorporated institution that finds its authority in the Foundation Agreement among the founding partners and not in statute. The Law Commission of Ontario was officially launched in a public ceremony at Osgoode Hall Law School on September 7, 2007. The LCO's Executive Director was appointed effective September 15, 2007. Its staff complement includes a full-time staff lawyer, a part-time research lawyer, the MAG LCO Counsel in Residence (seconded by the Ministry of the Attorney General), the Osgoode Hall Law School LCO Scholar in Residence (seconded by Osgoode) and the Executive Assistant.

The new Law Commission of Ontario joins sister provincial commissions in Nova Scotia, Manitoba, Saskatchewan, Alberta and British Columbia. These commissions vary in

their origins, organizations and resources. The Law Reform Commission of Nova Scotia, the Manitoba Law Reform Commission and The Law Reform Commission of Saskatchewan were all created by specific provincial statute. The British Columbia Law Reform Institute was incorporated under the *Provincial Society Act* in 1997 and was a successor to the Law Reform Commission of British Columbia, established in 1969, from which the Ministry of the Attorney General had withdrawn funding. The Institute of Law Research and Reform was created by the Province of Alberta, the University of Alberta and the Law Society of Alberta in November 1967; it was renamed the Alberta Law Reform Institute in 1989. The Nova Scotia, Manitoba and Saskatchewan Commissions all receive funding from their provincial departments of justice and law foundations. The Alberta Institute is funded by the Department of Justice and the Alberta Law Foundation and it also receives in-kind contributions from the University of Alberta (the University of Calgary provides office space for two ALRI counsel) and the British Columbia Institute by the British Columbia Law Foundation and more recently, by the Notary and the Real Estate Foundations.

The Law Reform Commission of Canada was established by statute in 1971. It was closely tied with government and was given a legislative mandate heavily directed at maintaining currency in law, but it also was given responsibility for developing new approaches to law, a part of its mandate it took very seriously. Although slow to have recommendations acted upon by government (this did not occur until 1983 with respect to a relatively narrow question, the abolition of the immunity of federal employees' salaries from garnishment), the commission saw more recommendations translated into law during the next decade. It was abolished in 1993; revived in 1996, its funding was withdrawn again in 2006.

Internationally, law reform as a deliberate activity has been recognized in countries around the world. Commissions in England and Wales, Scotland, Ireland, Australia (federal and state), New Zealand, South Africa, various states of the United States, Hong Kong, Fiji and Tanzania are among those whose discussion papers and reports are available on the web.

B. The LCO's Approach

From an emphasis on the initial narrow, focused and often technical questions that were the concern of the first law commissions or specialized law reform bodies, law commissions evolved into bodies concerned with large social questions requiring multi/interdisciplinary and empirical research and non-legal expertise. Today law reform commissions are generally responsible for both kinds of "reform." The Report from the Creative Symposium observed that the spectrum of approaches to law reform runs from "philosophy (informative, contemplative and foundational) and politics (immediately relevant and responsive)." The LCO intends to take a creative and visionary, yet pragmatic, approach to law reform, combining qualities of both approaches.

The LCO also recognizes that law reform is not the sole purview of law reform commissions. Law is changed or "reformed" in a variety of ways. Law becomes outmoded and atrophied, not observed or enforced even though not repealed. Governments introduce and legislatures enact new laws, often explicitly replacing existing law in the process, but sometimes legislating in heretofore uncharted areas. Courts make law even as they interpret it. Law reform arises in response to many stimuli: spectacular incidents that dramatically reveal the need to develop or amend

laws; scholarly articles that analyse the problems with existing law; lobbying by groups with particular interests; and societal or technological developments that warrant regulation, among others. It may be planned or responsive to immediate and unanticipated need.

Although law reform commissions constitute only one means by which law is reformed and even transformed, they do have a distinctive capacity to contribute to the process of law reform. They are able to engage in thorough analyses of difficult legal problems and propose innovative solutions that encompass recommendations in areas other than law, in addition to law. They are able to identify the advantages and disadvantages of different options, weighing them in the balance. They have more time for research than does either the government's legislative or even policy development branches or the courts. While academics have the capacity to engage in major research, they do not often have the association with government and the explicit mandate to engage in law reform that characterizes law reform commissions.

While they do not by themselves have the political or legal authority of either government/legislature or the courts, law reform commissions with reputations for excellence and pragmatism may have a "moral" authority that transcends their legal status. Law reform bodies must acknowledge practical and political realities and must couple their high quality scholarship and philosophical contribution with pragmatism in their recommendations: their recommendations must be feasible, even if not popular with a particular government. To be most effective and obtain the trust of the public, law reform commissions must be independent and non-political and must be prepared to accept challenges and deal with difficult and controversial questions.

To achieve legitimacy and maintain it, law reform commissions must take a principled approach to law reform and as a result, commissions that determine their own research agendas may undertake projects that do not necessarily accord with the agenda of the government of the day, knowing that in this instance, at least, its study and recommendations may not have an impact until some time in the future. As suggested below, realization in legislation or even adoption by the government of its recommendations is not the only measure of success for a law commission: it also has a role in contributing to dialogue and education about reform and particular social issues.

Furthermore, a law reform body must be independent not only of government, but also of any particular interest group. Its legitimacy is grounded in the recognition that its work is independent, based on expertise and a culture that understands the process and implications of recommendations resulting from objective study of a particular problem. As the former Chairperson and the Executive Director of the New South Wales Law Reform Commission observe, "Policy analysis and development is something that law reform commissions do very well."³

In short, as Murphy suggests,

A law reform commission must operate on a different level than legislators and judges, since it has to evaluate the repercussions of reforms objectively and without undue regard to short term political considerations. The benefits of a law commission include independence, expertise, focus and continuity.⁴

The contemporary model of law reform commissions has also been described by Adams and Hennessey of the NSW Commission as “uniquely placed to undertake detailed, principled research into areas of law...They are permanent, independent organizations, able to coordinate large research projects, engage in community consultation, and write detailed, reasoned arguments for their recommendations to government.”⁵

One informed commentator, a former Chair of the Australian State of Victoria Law Reform Commission, goes so far as to suggest that underlying “[t]he creation of standing law reform bodies was that the whole idea of law reform was reconceptualised.”⁶ The first Law Reform Commission of Canada, particularly in its early days, considered its mandate to be addressing broad social questions and changing attitudes, not developing “technical” recommendations. Many of its reports were, to use William Hulburt’s phrase, “heavily philosophical.”⁷ The later Law Commission of Canada jettisoned the usual categories of law, “categorizing” law instead as law relating to personal relationships, social relationships, economic relationships and governance relationships.

The LCO’s philosophy of law reform is to undertake both focused questions when there is a particular reason for doing so and the large social issues for which law commissions are particularly suited. It will, indeed, offer in appropriate cases, the “reconceptualization of law” which Neave considered signalled the purpose of a separate law reform body. It recognizes that while law may be the primary discipline as far as law reform is concerned, it must be viewed in the context of other disciplines and expertise, such as sociology, economics and psychology and the natural sciences, for example. It will employ the most modern research tools and both qualitative and quantitative analysis, as appropriate. Its researchers will consult both academic experts and those who have had real life experiences in order to form a picture of the topic at hand from a variety of perspectives. Law commissions today are “of the world,” legal and non-legal, and must, therefore, develop extensive consultation, collaboration and communication processes. A contemporary law reform commission must be concerned not only with the subjects it chooses to research, but also with its research, consultative and communicative processes.

V. THE LCO’S PROJECTS

A. Selecting the LCO’s Projects

This section describes the process of the selection and approval of research projects. The research and communication processes are described in the next section.

1. Sources of Projects

The Creative Symposium held in November 2006 produced a lengthy list of possible law reform projects in “administrative justice,” “civil justice,” commercial law, criminal law/provincial offences, family law, guardianship and trustee law, torts and insurance law and miscellaneous topics. There was no discussion of these topics, merely a listing; however, they do represent a useful “brainstorming” of potential law reform topics of which the Research Advisory Board was aware in considering the first potential LCO projects. The Board of Governors subsequently asked Professor Lorne Sossin of the Faculty of Law at the University of Toronto to prepare a “Research Priorities” document; Professor Sossin identified seven projects from 60 proposals for law reform from

academics, community groups, government and legal organizations in a report released April 27, 2007. The Sossin Report assisted in the identification of the initial LCO projects and will continue to be helpful in the determination of future projects. Other project proposals were subsequently submitted to the LCO by individuals and groups.

In the future, the LCO will invite proposals for law reform projects, using its website and other communication vehicles to reach as many groups as possible with an interest in law reform. Members of the Board of Governors and the Research Advisory Board may also hear about possible projects. Although the LCO will issue “formal” calls for proposals, it encourages the submission of proposals at any time. Ideally, the LCO will have list of projects approved by the Board of Governors from which it can select based on availability of resources.

2. Selection of Projects

The Board of Governors approves the projects to be undertaken by the LCO, on the advice of the Research Advisory Board and the Executive Director.

The LCO’s projects will potentially encompass all areas of law within provincial jurisdiction, including those overlapping with federal jurisdiction. They will affect a wide range of communities, including those defined geographically, linguistically, socially and demographically. The projects will address socially relevant justice issues and narrower questions of law, always with the objective of making the legal system more relevant, effective and accessible. In the usual course, the LCO will have on-going at least two or three narrowly focused projects and at least two complex projects. In all its work, including the selection of projects, the LCO will conform to the values articulated above in Part III.

In selecting projects, the LCO takes into account wide-ranging factors, not all of which are applicable or applicable in the same way to all potential projects. A project must conform to the LCO’s mandate. Preferably, it will contribute to the LCO’s broader objective of producing holistic or multidisciplinary recommendations, but some projects will not lend themselves to this kind of analysis. Many projects will address the exclusion of particular communities from effective access to the law; however, this will not be true of all projects. The LCO has committed to using its resources effectively and to this end, will not duplicate work being done elsewhere. Where appropriate, however, it will collaborate with others working on the same or similar project. At any given time, the LCO will balance a mix of small, focused projects and large projects that will address major social questions about the law and its relationship to other disciplines, as well as a variety of areas of law.

1. Relevance to the LCO’s Mandate and Objectives

- a) Is the project consistent with the LCO’s mandate to make recommendations to increase the relevance, effectiveness and accessibility of the legal system, to clarify and simplify the law, to consider the use of technology to enhance access to justice and to contribute to law reform scholarship?
- b) How well might this project contribute to the LCO’s goal to be holistic, innovative, socially conscious and pragmatic in its selection of projects, research and recommendations?
- c) Is the project likely to result in feasible recommendations or to influence in a constructive fashion the dialogue on law reform in the area?

2. Impact on the Law and Communities

- a) Who is likely to benefit from this project?
- b) How many people will this project benefit?
- c) Will this project likely have a significant impact on improving access to the law?

3. Efficient Use of Resources

- a) Is this issue already being addressed by government or another institution or does it more properly fall within another institution's mandate? The LCO does not want to duplicate work being done by others or overstep the mandate of another organization.
- b) Would this project provide the opportunity for collaboration with other law reform bodies or other organizations?
- c) Will this project be understood by the public as a good use of the LCO's resources?
- d) Will the LCO be able to complete this project within the relevant timelines and resources available?

4. Other Factors

- a) Is the subject matter of this project being litigated? The LCO will not select as a project an issue that is explicitly the subject of litigation.
- b) How does this project fit into the LCO's on-going mix of narrowly focused and complex projects and areas of law that are already being researched?

3. Available Resources

The LCO has an in-house research capacity of a full-time staff lawyer, who also has administrative responsibilities, and a part-time research lawyer, in addition to the Executive Director (the CEO and Chief Spokesperson for the LCO) and the Executive Assistant. It also benefits from secondments from Osgoode Hall Law School (the OHLS LCO Scholar in Residence) and the Ministry of the Attorney General (the MAG LCO Counsel in Residence). It will also rely on contract researchers and students. Osgoode Hall Law School provides administrative and IT assistance to the LCO. The LCO researchers have access to the Osgoode and York libraries and electronic databases. The funding partners having committed to providing \$1.2 million in funding and in-kind contributions annually for five years.

B. Researching a Project: The LCO's Participatory Processes and Approaches

Once a project has been approved by the Board of Governors, the Executive Director will determine when work on it should proceed, given available resources. For narrowly focused projects (expected to take less than a year to complete), the Executive Director and the Staff Lawyer will determine whether the research should be accomplished in-house or by a contract researcher, possibly with the assistance of a student. For complex projects, a member of staff will be designated "head of project." For each project, the Staff Lawyer or head of project, as appropriate, in consultation with the Executive Director, will develop a plan, including timelines, required resources, methods of consultation and a list of interested groups (this list is likely to evolve as the project proceeds). Consideration of the expertise required for each project will take into account the nature of the knowledge required and the need to consider the place of technology in

its analysis and recommendations. For both focused and complex projects, this preliminary stage will include at least a brief look at the work done by other law reform bodies in Canada and elsewhere, as well as by other relevant bodies. Where appropriate, the LCO will collaborate with other organizations in completing the research. The LCO will not knowingly duplicate the work of others, nor carry out projects that can be better implemented by others.

Narrowly focused projects are more likely to be primarily legal issues, but may involve other areas of expertise. In most cases, the LCO will not issue a discussion paper separate from any draft report released on these projects, although it will engage in consultation. Longer, more complex, projects will almost always attract the multi/interdisciplinary, holistic approach to which the LCO is committed. These projects are likely to take two to three years to complete. For complex projects, the Staff Lawyer or head of project will carry out a pre-study to determine the scope of the project. The pre-study will involve public consultation and consultation with experts in the area, legal and otherwise, as appropriate for the project. These longer projects will almost inevitably require expertise in disciplines other than law and this will be taken into account in designing the research team of in-house lawyers, contract researchers and students. These projects will likely make use of the multidisciplinary teams created by the Research Advisory Board, as contemplated by the Foundation Agreement. The LCO will release discussion papers for most longer projects, inviting public input and input specifically from groups evidencing an interest and/or experiential expertise in the area. After consultation, the next stage will be the release of the draft report.

C. Reporting Recommendations

For both focused and complex projects, the Board of Governors will consider draft or interim reports, possibly with recommendations or optional recommendations, prior to their release for public consultation. (From time to time, a focused project will involve consultation and a draft final, but not interim, report.) Interim reports will be posted on the LCO website and sent to groups likely to be interested in the particular issue. After consideration of the input, the draft report will be finalized or revised, usually with specific recommendations. Once approved by the Board of Governors, it will be distributed through the website and in hard copy to government and again, to those particularly interested in the subject matter. Final reports will be available to the public.

The release of reports and of discussion papers will provide an opportunity to publicize the LCO's work, whether through press conferences, collaborative events with affected groups, the tabling of reports by the Attorney General in the Legislature or through other means. The LCO will take these opportunities to publicize, as well, its processes and approach to law reform, as appropriate.

With all reports, the Executive Director or head of project will follow up with the appropriate government body to determine the fate of the report.

1. Current Projects

The LCO began the following projects in 2008.

- **Charging fees for cashing government cheques:** individuals who rely on government cheques are often among the most vulnerable members of our society and they are among those least likely to have bank accounts. This raises the question of whether it is appropriate to permit institutions/commercial enterprises to charge fees or to charge unregulated fees to cash these cheques. Other jurisdictions have addressed this question (for example, Manitoba imposed maximum fees effective October 1, 2007). It is anticipated that this project can be completed by an in-house lawyer with the assistance of a student by the end of 2008. A consultation paper has been released on this project.
- **The preferable approach to the valuation and division of pensions on marriage breakdown:** there is disagreement about whether the pension should be valued as if employment were terminated at the time of marital breakdown or whether it should be valued at the time it is paid out. There are advantages and disadvantages of both approaches for the parties involved. The LCO's objective is to bring clarity to this area of law. This project will require expertise in pensions and accounting, as well as family law. The LCO may collaborate with the Ontario Expert Commissions on Pensions on this project. It is expected that building on the work done in other jurisdictions and in Ontario, this project can be completed by the end of 2008.
- **The development of a coherent approach to law affecting older persons and those who interact with them:** the scope of this study will be determined by an initial consultation with those knowledgeable in the area, but it is expected to cover a wide range of subjects of particular relevance to older adults or as they affect older adults, including powers of attorney, treatment in long term care facilities, employment issues, obligations of children for aging parents and restrictions on driving, among others. The LCO will collaborate with others on this project, including the Canadian Centre for Elder Law Studies, associated with the British Columbia Law Institute. The challenge of this project is not merely to develop an analysis and recommendations with respect to discrete topics, but to develop a coherent approach or framework that can apply to the law as it affects older persons and those who interact with them. The analysis for this project will have to consider the extent to which women and men are affected differently by aging, as well as the cultural experience of older persons. The LCO will issue discussion papers, as well as other materials in relation to this project which is expected to take between two and three years to complete. It will require the LCO to retain contract researchers and students to complement the work carried out by the in-house staff and will involve multi/interdisciplinary analysis and holistic recommendations.

In addition, the Board of Governors has approved a fourth project in principle, **the development of a coherent approach to law affecting persons with disabilities and those who interact with them.** A pre-study will determine its scope. Although the LCO will not begin this project immediately, it will be necessary to note the overlap in issues between the older adults project and this project (in relation to care in long-term facilities and powers of attorney, for example).

VI. THE LCO AS A RESPONSIVE ORGANIZATION

A. Accountability to Our Partners

Section 18(1) of the Founding Agreement requires that the Board of Governors prepare a budget for submission to the Attorney General, Osgoode Hall Law School, the LSUC and the LFO, as well as projected expenditures for the second and third years. The Board of Governors is to obtain the approval of the partners of the budget and the projected expenditures.

Pursuant to section 19 of the Agreement, the LCO will prepare an Annual Report for its partners. The release of the Annual Report will provide an opportunity to engage our founding partners in the on-going activities of the LCO and with each other. In addition, the LCO will develop communication plans for each partner that ensure that each partner receives the information it requires in a timely way, using both formal and informal means of communication. See the Language and Translation Policy at www.lco-cdo.org.

The Executive Director will also meet annually and in appropriate cases, more often, with the law deans and students and faculty at the Ontario law schools and with the other partners to the Foundation Agreement.

B. Reaching Out: Public Participation

The LCO is committed to involving interested groups and individuals, legal and non-legal, and the public generally in the law reform process, from the project proposal to feedback on discussion papers and draft reports.

The Annual Report will be distributed to the public.

The LCO's website will provide a significant vehicle to inform the public about the progress of the LCO's projects, including the posting of consultation papers and interim and draft reports and pre-studies. It will also allow the announcement of projects, on-line discussion about projects and feedback and announcements about research opportunities at the LCO.

The website, consultation papers, interim and final reports, the Strategic Plan and annual reports will be available in English and French, to the extent resources allow.

Members of the LCO will also engage in in-person contact with a wide range of organizations and groups in Ontario, legally-related and community-based, as well as the partners to the Foundation Agreement, both to explain the LCO's mandate and progress and to garner suggestions for law reform projects or to receive feedback on consultation papers and interim reports. Consultations will usually be in English and from time to time in French; consultations in other languages will be subject to the LCO's resources. The LCO will make every effort to provide interpretation and alternate formats for the hearing and sight impaired.

Other constituencies with which the LCO will maintain regular contact include the courts, relevant government ministries, opposition justice (and other) critics and with other

organizations particularly involved in law reform, such as other Canadian law reform commissions.

The LCO will publish a thrice-yearly newsletter to be posted on the website and to be sent to partners, other law commissions and interested organizations and groups.

The LCO, with assistance from experts, will develop a communications strategy to gain the fullest realization of our commitment to interact broadly with the public, including those who might not ordinarily come into contact with a legal body.

VII. MEASURING SUCCESS

As a former President of the Law Reform Commission of Nova Scotia admitted, while evaluation of an entity's performance usually is based on the entity's mandate, "[t]he mandate or purpose of most Law Reform Commissions...is usually set out so broadly that evaluation of the performance of the Commission in any reasonably precise or specific way is very difficult..." He conceded, however, that "a general assessment is perhaps possible."⁸ However difficult, it is important to assess the performance of a law reform body, but it is equally important to recognize the range of ways in which success might be measured. The impact of the OLRC also indicates that tracking the impact of a law commission's influence requires openness: some of the OLRC's reports influenced the development of law in provinces other than Ontario, the development of proposed legislation by the Uniform Law Conference of Canada and the approach taken by courts in certain matters.⁹ Ways of measuring the performance of a law commission include the following:

- Translation of recommendations or frameworks into legislation: It must be remembered, however, that legislative responses to law reform recommendations do not always occur in the short-term. As Hurlburt points out, it was ten years before any of the first Law Commission of Canada's recommendations were reflected in legislation.¹⁰ Indeed, it has been suggested that no jurisdiction has "effectively tackled" the issue of "how to secure governmental legislative and official attention once law reform reports are produced."¹¹
- Acknowledged impact by the judiciary on their decision-making of discussion papers, reports and/or recommendations;
- Use by academics and others of the work carried out by the LCO; in some cases, the result may be to extend the LCO's analysis in a particular area to take into account new developments, while in other cases, academics might base their own analysis on that carried out by the LCO;
- Quality of the work produced by the LCO, as indicated in articles on law reform, for example;
- Adoption by other jurisdictions of LCO analysis or recommendations;
- Contribution to the dialogue on law reform or on substantive areas of law through LCO participation in conferences or conferences organized at least in part by the LCO;
- Collaboration with other law commissions or other bodies and groups in advancing law reform;
- The number of proposals made to the LCO;¹²

- Extent to which the LCO is known in the legal and non-legal communities and its reputation in those communities; and
- The extent to which the LCO meets its own self-professed values and satisfies its identified processes, as articulated in this Strategic Plan.

The LCO will be externally evaluated at the beginning of its third full year of operation (2010). It did not begin operations until the fall of 2007 and will require at least 18 additional months to evidence its capacity to meet its mandate and its preferred method of operation. The beginning of 2010 is an appropriate time for an external evaluation, both because it will allow the LCO to establish itself and will provide sufficient time for the evaluation prior to the time partners will be making decisions about extending funding. The review will have to take into account that realistically, many of the measures identified above will not have had time to ripen; even so, it should be possible for an external reviewer to comment at least on the quality of work produced and the LCO's adherence to its values and processes.

VIII. OBJECTIVES/ACTIVITIES FOR 2008

The LCO was launched on September 7, 2007 and the Executive Director was appointed on September 15, 2007, followed shortly by the Executive Assistant. As it neared the end of 2007, the Board of Governors had approved the LCO's initial three projects and the Executive Director had completed the process of hiring a staff lawyer, begun the on-going dialogue with the LCO partners and made contact with some community groups and legal organizations, as well as the Chief Justice of Ontario. By early 2008, the part-time Research Lawyer had been appointed; the first OHLS LCO Scholars and MAG LCO Counsel in Residence had been selected; a brochure had been developed and a new website launched; the Executive Director had been in personal contact with all the partners, at least once and had visited the Chief Justices of the Superior Court of Justice and the Ontario Court of Justice and the Associate Chief Justice of the Superior Court of Justice, as well as a number of community clinics and legal organizations; this Strategic Plan and performance measures for the Executive Director had been developed; and the Board of Governors had approved a Copyright and Attribution Policy, a Translation and Language Policy and principles of good governance in relation to its own performance. The LCO released its first consultation paper, on fees for cashing government cheques, in March 2008.

The LCO's objectives for the rest of 2008 are as follows:

Projects

- Completion of the research and consultation for the first two narrowly focused projects (fees for government cheque cashing and the valuation of pensions on marital breakdown), under the supervision of the Staff Lawyer and the MAG LCO Counsel in Residence, respectively. These two projects will use the resources of the part-time research lawyer and student researchers and it is expected that recommendations will be released by the end of 2008 or early 2009;
- Preparation of a pre-study by the Staff Lawyer and beginning of research for the project on the law and older adults. The LCO will hire contract researchers and students to work on this project after the pre-study, including consultation with affected groups, has defined the parameters of the study. In carrying out this

- project, the LCO will be cognizant of the overlap with its fourth project, developing a coherent approach to the law affecting persons with disabilities, although the pre-study for that project will not begin until Fall 2008; and
- Approval by the Board of Governors, following discussion by the Research Advisory Board of proposal options, of at least two new projects by the fall of 2008 and of an “approved” list of projects for a longer period.
 - The LCO will also hold a roundtable about family law in the first half of 2008, in order to identify the most urgent and/or useful areas for the LCO to investigate in family law and closely related areas.

Communication and Consultation

- Preparation of a communication plan by May 2008 for the LCO to ensure maximum visibility and public awareness, with the assistance of the Communications Manager of Osgoode Hall Law School and the Director of Communications at the Ministry of the Attorney General;
- Visit by the Executive Director and Chair of the Board of Governors to the Attorney General;
- Scheduling of visits (primarily by the Executive Director, but also by the Staff Lawyer and the Research Lawyer) to interested groups, legal and non-legal, across Ontario;
- Preparation of a newsletter for distribution to other law commissions, partners and interested groups in May, September and December 2008 (to be posted on the website); and
- Consultation with relevant groups on the first three projects, depending on the nature of the project and the stage of implementation.

Accountability

- Preparation of the Annual Report by October 2008;
- Preparation and implementation of individual communication plans for the LCO’s partners by the Executive Director, to be developed by April/May 2008;
- Subsequent visits to the CEO of the Law Foundation, the CEO of the Law Society of Upper Canada and the Attorney General of Ontario;
- Second visits to the law schools beginning in the Fall of 2008; and
- Assessment of initial and projected costs of operating the LCO.

Stimulating Critical Debate about Law Reform

- Organization of a conference or symposium on law reform to be held in early 2009, most likely in collaboration with one or more of the LCO’s law faculty partners, in furtherance of the LCO’s objective to become a leader in law reform; and
- Presentation by the Executive Director at the Osgoode Professional Development 11th Annual Analysis of the 2007 Constitutional Cases of the Supreme Court of Canada in April 2008 and co-editorship of and submission of an article on law reform by the Executive Director to a special volume of the Osgoode Hall Law Journal dedicated to access to justice in summer 2008.

ENDNOTES

¹ Gavin Murphy, *Law Reform Agencies* (Department of Justice Canada, 2004): http://www.canadajustice.ca/en/ps/inter/law_reform/index.html [accessed December 21.07]. The history of law reform in Canada is derived primarily from this paper. For a thorough account, see William H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, 1986).

² See note 1.

³ Justice Michael Adams and Peter Hennessy, "Law Reform Commissions: Is there a place for the principled study of criminal law issues?" The International Society for the Reform of Criminal Law 15th International Conference: Politics and Criminal Justice (Canberra, Australia, August 2001): <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ph01> [accessed December 31.07].

⁴ See note 1.

⁵ See note 3.

⁶ Marcia Neave, "Law Reform in the 21st Century – Some Challenges for the Future" [c.2000]: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches/LAWREFORM+-+Law+Reform+in+the+21st+Century+speech> [accessed May 15.07].

⁷ See note 1.

⁸ William Charles, "Measuring Success in Law Reform," Commonwealth Law Conference (August 1996): <http://www.bcli.org/pages/links/clc/wcharles.htm> [accessed December 31.07].

⁹ See Hurlburt, note 1.

¹⁰ See note 1.

¹¹ Rt. Hon. Sir Geoffrey Palmer, President, Law Commission of New Zealand, "Law Reform and the Law Commission in New Zealand after 20 Years – we need to try a little harder," para. 4 (March 30, 2006): <http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/d0c9b674-5a55-405d-9b3c-2cfd467a0d5d//Law%20Reform%20and%20the%20Law%20Commission%20in%20NZ%20after%2020%20years.pdf> [accessed January 23.08].

¹² William Charles noted that a measure of public approval for the Nova Scotia Commission is the number of enquiries the Commission receives from individuals and groups who want the Commission to embark of particular law reform projects, indicating that they see the Commission "as an important instrument of change." See note 8.