



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Family Law Project Options

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Family Law Project Options

Launched on September 7, 2007, the Law Commission of Ontario (LCO) is a partnership among the Ministry of the Attorney General, Osgoode Hall Law School, the Law Deans of Ontario's law schools, the Law Foundation of Ontario, and the Law Society of Upper Canada. It operates independently of government.

The LCO has a mandate to recommend law reform measures to increase the legal system's relevance, effectiveness and accessibility; to clarify and simplify the law; consider technology as a means to enhance access to justice; and stimulate critical debate about law and promote scholarly legal research. Its mission is to become a leading voice in law reform. The LCO's core values are independence; integrity; excellence; innovation; relevance; open-mindedness; transparency; diversity; inclusiveness; multi/interdisciplinarity; collaboration; pragmatism; efficiency and accountability.¹ As stated in its strategic plan, "the LCO is premised on a vision of law reform as a creative yet pragmatic endeavour."² Chosen LCO reform projects reflect this vision.

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I. INTRODUCTION

This paper is part of a long term consultation process regarding project possibilities for the LCO, which started two years ago, even before the official launch of the LCO. From the beginning, it became clear that there were serious concerns in the area of family law in Ontario. The area of family law has been subject to much criticism for a number of years.³ On November 30, 2006, individuals interested in law reform held a Creative Symposium to discuss the creation of a new law reform commission for Ontario and to set priorities and identify potential law reform projects. Creative Symposium participants suggested several potential studies in family law including the definition of legal parenthood; previous Ontario Law Reform Commission Reports on property and pensions that have never been acted on; spousal support obligations/guidelines, based on already conducted previous research; child custody and restructuring parenting; domestic contracts; intersection between family law and bankruptcy; family law obligations, what they should/shouldn't encompass; dependency issues in family law, for example parents claiming support from their children; harmonization of federal/provincial law for service delivery.⁴

The LCO also received directly proposals for comprehensive review of family law. The proposals came from a wide variety of sources, including academics, family law, estates and trusts practitioners, the courts and the government. The LCO Board of Governors also asked Professor Lorne Sossin to consult with various organizations and recommend projects and initiatives that the LCO might undertake as its initial research priorities and Professor Sossin received a number of suggested projects in this area. Proposals to Professor Sossin included the division of pensions on marriage breakdown, the legal definition of the family, discrimination against same-sex couples, estates issues, a study of the establishment of a mandatory registry that records the genetic parents of all children born in Ontario, alternatives to self-represented litigants in family law, enforcement of custody and access orders and issues relating to the structure of the courts.⁵

The LCO heard that pension division was of particular urgency and adopted a project in that area at its inception that it has recently completed. Otherwise, the broad range of family law proposals prompted the LCO to continue the consultation process in order to identify the greatest concerns in the area. Accordingly, in September 2008, the LCO organized a Family Law Roundtable. The aim of this paper is to discuss ideas that emerged from the Family Law Roundtable and to lay out two new project possibilities for the LCO in the area of family law. The next LCO family law reform project will respond to concerns expressed during the ongoing LCO consultation process and especially during the Roundtable.

The LCO invites various stakeholders in the area of Ontario family law and the Ontario population in general to respond to this paper, comment on project options and let us know what project they believe the LCO should undertake. This project options consultation process will take place in February and March 2009. Following these discussions, the LCO will develop a family law project proposal to be submitted to its Board of Governors for approval.

II. FAMILY LAW ROUNDTABLE

A. Background

The LCO Family Law Roundtable took place on September 13, 2008. The purpose of the Roundtable was to bring together experts and stakeholders in the area of family law, from across Ontario, to discuss and narrow down family law reform options for the LCO. Thirty-three representatives of various organizations participated in the Roundtable (see Part VII for a list of attendees). Participants included legal clinic workers, community organizations'

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representatives, family lawyers, judges, law professors, legal organization representatives and government representatives. They came from across Ontario. A range of minority and marginalized groups including Aboriginal, racialized, anti-violence against women, disability and low income groups, were also represented. The LCO warmly thanks all participants for their contribution to the family law consultation process.

To prepare Roundtable discussions, the LCO circulated a pre-conference paper entitled "Roundtable on Family Law Reform: Getting Started on the Discussion" among participants. This paper pointed out some of the main themes for discussion at the Roundtable:

- Social trends;
- Procedural issues;
- Substantive issues; and
- Project design.

This paper provided guidelines for discussion to the participants; however, participants were free to conduct the discussion as they wished and to establish what they perceived to be priorities in the area of family law.

During the Roundtable, participants were divided into two groups that included representatives of each type of organization mentioned above. The LCO hired two facilitators and LCO staff acted as an observer in this process. It is worth noting that members of each group raised similar topics.

B. Issues Raised

1. *Process Issues*

Very early in the day, participants expressed the need for reform related to the family law process. Process issues appeared to have a particularly serious impact on participants' working lives. For example, one judge expressed the difficulty of not receiving enough and appropriate information from unrepresented litigants in order to be able to make the best decisions. Process issues also appeared to have, perhaps more importantly, a significant impact on the participants' clientele. For example, a representative of a Family Law Information Centre (FLIC) explained how frustrated users of the family justice system were at not being able to understand the language used by lawyers and other actors in the system and how, as a result, they felt disempowered.

A number of concerns related to delay and particularly to the need to attend to urgent matters expeditiously. A participant explained that if it takes four months to obtain a conference date, some people will have no other choice but to engage the police to respond to the violence they are enduring. Ontarians should not have to wait for conflicts to escalate before the relevant actors of the family justice system become involved. Participants suggested the following efforts (among others) would help address delay:

- a triage system that could identify and distinguish urgent issues, issues related to children and child protection, as well as issues related to violence and child custody for example;

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- unbundling family law issues to facilitate resolution of simple issues without triggering the use of the entire court system;
- a case management system; and
- more frequent use of settlement conferences.

Some mentioned that they would want to see the LCO examine issues related to conflict resolution. These participants believed that research should be geared towards finding out what drives conflict resolution and try to get away from a 'one-size-fits-all' model of conflict resolution. Part of this concern is the tension between public and private dispute resolution. Some of the problems with each of these dispute resolution systems include the following:

- lack of flexibility in the court system;
- lack of precedent in private dispute resolution;
- unclear guidelines as to when it is appropriate to use mediation; and
- mediators' difficulties in terms of identifying unequal power dynamics between parties.

In addition to the issues stated above, participants raised the following process related issues:

- difficulties around disclosure obligations in family law;
- need for popular legal education about the *Family Law Act*, especially for parents; and
- need for better understanding the interaction among the criminal, family, child protection and immigration systems.

2. Substantive Issues

In addition to concerns related to process, participants agreed on a number of important substantive issues requiring reform. In general, participants identified a need for reviewing part I (family property) and II (matrimonial home) of the *Family Law Act* (FLA).⁶ Some raised the issue of common law spouses' property in relation to these two parts of the *FLA* and whether *Nova Scotia (Attorney General) v. Walsh*⁷ should be followed in Ontario. However, others believed that the issue of the definition of the term "spouse" and differences in the legal regime between married and unmarried couples had already been looked at by the previous Ontario Law Reform Commission⁸ and that it would not necessarily be worth pursuing for the LCO. In general, participants wanted to see corrections to errors in the *FLA*.

Participants mentioned the calculation of pension division, an issue that the LCO was already working on at the time of the Roundtable and regarding which the LCO since produced recommendations and a report.⁹

Others mentioned the following topics, which may be the subject of law reform:

- possibility of departing from the equalization scheme;
- definition of an adult child;

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- need for cooperation between federal and provincial governments in re-thinking custody issues;
- need for mobility guidelines in cases where parents relocate post separation;
- recalculation of support; and
- emergency civil protections.

C. Fixing a Broken System

As the range of issues identified above suggests and as Roundtable participants expressed, it appears that the family justice system is “broken”. In other words, the system as a whole needs to be fixed. Various parts of the system need to be reviewed, improved and better coordinated to ensure that the entire system can work properly. As mentioned above, one example of this broken system is the lack of integration between public and private dispute resolution mechanisms. Because of the state of the system, it is crucial that the LCO respond to a real, identified need among the Ontario population.

In the face of a “broken system”, one must ask whether doing anything other than studying all the pieces of this system and bringing them together makes sense. One must also ask whether it is useful to study only pieces of such a system. Roundtable participants debated whether a “quick fixes” approach was better than a systemic one. Whichever approach it takes, the LCO, as any other actors in the system, must remain aware of the work of others who are attempting to fix other parts of the system. If the LCO identifies a specific aspect of the family law system to study, it must consider how the larger impact of work on specific issues affects the overall (dis)functioning of the system. This is not a simple task and there is a danger that working on only one part of the system may reinforce already existing problems related to the coordination of the various parts of a broken system. On the other hand, a systemic approach may be too broad for the LCO to adopt on its own. The LCO must take these challenges into account in its choice of a family law project.

D. Conclusion

The Family Law Roundtable discussions helped flesh out reform project possibilities for the LCO. During that process, the insights of participants from various Ontario regions who perform different roles in the family justice system were particularly helpful. At the end of the Roundtable day, the Executive Director announced that the LCO would narrow down project option possibilities and prepare this options paper for circulation paper among participants as well as the larger community in order to obtain their feedback and develop a family law project proposal to be submitted to its Board of Governors for approval.

III. CONSIDERATIONS IN DESIGNING A FAMILY LAW PROJECT

Before describing two family law project possibilities for the LCO in the next section, this section will explain three significant considerations that need to be taken into account when designing a law reform project for the LCO, all raised during the Roundtable. The first consideration is the necessity to adopt an intersectional analytical framework. The second one is the pragmatic concern with available resources, efficiency and effectiveness. Finally, the last consideration is the role of the LCO in the community.

E. Intersectional Analytical Framework

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In addition to proposing reform project possibilities for the LCO, Roundtable participants provided insight into analytical approaches that should be part of any LCO project. Key considerations came out of these discussions. These considerations are particularly important for the LCO in terms of fulfilling its mandate of increasing access to justice. They are also related to the LCO core values of diversity and inclusiveness mentioned at the beginning of this paper. This section explores some of the elements of an intersectional analytical framework that the LCO should adopt in any of its projects, with reference to specific family law examples provided during the Roundtable.

1. Cultural Competency

Roundtable participants expressed concern about cultural competency within the family justice system. Lack of cultural competency disproportionately impacts Aboriginal communities and members of various racialized groups, especially non white and non English speaking groups. For example, a Roundtable participant pointed out that an Aboriginal person who is involved in a family dispute might not disclose certain types of information due to cultural norms or previous experience with the legal system. Actors in the family justice system should be trained to ask appropriate questions with respect to such norms and the necessity of developing a relationship of trust.

2. Gender Competency

Participants also noted a lack of gender competency within the family justice system and expressed dissatisfaction with the processing of domestic violence cases, which problems disproportionately affect women. Participants identified the issue of children's contact with parents whose violent behaviour is a major issue. They also mentioned that issues related to violence were often not addressed properly because female parties were not appropriately represented. These concerns have already been the object of numerous studies. However, according to participants, in practice, much effort remains to be done in order to improve service across gender lines within the family justice system.

3. Linguistic Competency

Related to cultural competency is linguistic competency. Roundtable participants had different linguistic backgrounds or were connected to various linguistic groups including English, French, Aboriginal and other languages. Language is especially important in the context of family justice. As much as English may be the main language of business, it is not necessarily the language of the family. Increased sensitivity to the issues of linguistic competency and access to justice is therefore appropriate in this area.

French is the second largest linguistic groups in Ontario after English and represents 4.8% of the Ontario population according to the 2006 Statistics Canada census.¹⁰ The Ontario francophone population is also the largest in Canada, outside of Quebec.¹¹ Although many francophones live in Toronto and Ottawa, many live in other locations in Ontario. For example, a francophone from Sudbury participated in the Roundtable. Despite this large francophone presence across Ontario and the fact that Ontario francophones have specific legal rights in Ontario,¹² French language services in the area of family justice are lacking in Ontario. In the Greater Toronto Area and in Sudbury, there are no shelters for female victims of domestic violence with staff who can deliver services in French, and in Ottawa, there are only two.¹³ Linguistic competency in Ontario would therefore require specific attention to French language.

Although the Roundtable was held in English, the LCO has a commitment to publishing its main documents in both French and English and the present consultation process will be conducted in both languages.

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In addition to the historical presence of the French language, the province of Ontario has an even longer history of disappearing Aboriginal languages due to colonialism. Cree and Inuktituk are currently the most spoken Aboriginal languages in the province.¹⁴ The lack of supports to revive Aboriginal languages through intergenerational connections is a barrier to developing both cultural and linguistic competency in the delivery of family law services to Aboriginal peoples, another area to which the LCO should pay attention.

In addition to this linguistic diversity, Ontario has a long history of immigration, which resulted in Toronto being one of the cities where the highest number of languages is spoken around the world.¹⁵ Many NGOs and community organizations respond to the Ontario population in their first language. Especially when it comes to family issues, access to justice for family members who speak other languages than English and who do not all have the same level of English language skills is crucial. Ontarians must not let linguistic barriers perpetuate damaging family dynamics such as family violence.

People who are more comfortable in other languages than English and who live in smaller centres than Toronto have great difficulty obtaining family justice services. The Family Law Education for Women project is an example of an initiative that helps disseminate plain language family law information in different languages.¹⁶ The Linguistic and Rural Access to Justice Project of the Law Foundation of Ontario is another example of a project that aims at improving access to legal information and services to people who speak another language than English and French, as well as to people living in rural and remote areas of Ontario.¹⁷ These projects provide the LCO with models on how to take linguistic considerations into account.

Although the LCO does not have the capacity to offer multi-lingual consultation processes, it can nevertheless take the linguistic reality described in this subsection into account in thinking about family justice processes and help develop linguistic competency in Ontario.

4. Class

In addition to linguistic, race and gender analysis, discussions within the diverse group that was present around the table made clear that the family justice system does not currently respond properly and equitably to all users across class divides. Some users of the family justice system are fighting over property division, whereas others who do not own any significant assets are fighting to have a foot in the door of the family justice system to solve issues related to child custody, for example. Among disadvantaged groups, Aboriginal peoples as well as people who live in remote areas of Ontario have a difficult time, if any opportunity at all, moving through the system. In addition, advantaged groups have the luxury of buying private family justice services when they are not satisfied with the public system. A participant also raised the unfairness of forcing low income people into mandatory dispute resolution mechanisms. As a result of these inequalities, problems with the family justice system impact advantaged and disadvantaged groups differently.

The Family Roundtable was helpful in terms of bringing together representatives of a range of more or less economically advantaged groups, although not of differently economically placed system users. Discussions revealed that more effort is needed within the family justice system in order to have meaningful exchanges across profound class differences. For example, participants mentioned that the LCO should examine the following topics:

- links between custody, child protection and the social assistance regime;
- inappropriately low support orders made in favour of women on social assistance;
- custody issues for low income parents; and,

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- revisiting the Family Responsibility Office¹⁸ system to avoid results such as removing a parent's main source of income, a trucker's license for example.

Through on-going consultation, the LCO hopes to continue building bridges between these different groups in order to attempt to respond to their concerns and reduce class barriers to the justice system.

At the very least, the Roundtable discussions around class issues made clear that, in any of its projects, the LCO would need to start with the assumption that *the Ontario population has unequal access to and power within the family justice system*. This inequality results from many factors but very importantly from economic power differences. The LCO project will focus on finding better ways to enhance access to justice in a practical way, pragmatism being an important LCO value.¹⁹

5. Aboriginal Communities

It is interesting to note that many aspects of the intersectional analysis described in this paper relate to Aboriginal peoples, including cultural, gender, linguistic competency; class and the situation of people living in rural and remote areas. It is therefore important to respond to the specific needs of Aboriginal peoples.

Roundtable participants pointed out that both Aboriginal women and men were disproportionately involved in the family and criminal justice systems. Participants pointed out that not enough has been done in terms of developing dispute resolution mechanisms that are acceptable amongst Aboriginal communities. Some discussed the possibility of developing a specific and distinct dispute resolution system for these communities. The example of tribal courts in the United States was mentioned. Others explained that people on reserve were so busy with child protection issues that they did not want to apply to Legal Aid Ontario. Council or band representatives, people with the appropriate cultural background, and people, who may not be Aboriginal but understand the issues, should be more available and accessible to help solve family disputes.

6. Lesbian, Gay, Bisexual, Transgendered, Queer and Intersexed Communities

Roundtable participants raised issues related to lesbian, gay, bisexual, transgendered, queer and intersexed (LGBTQI) communities. These issues revolved mainly around LGBTQI persons' rights as parents and the use of reproductive technology. However, in any chosen project, the LCO would need to take into account the various family law models that are present within LGBTQI communities, as well as the difficulties that LGBTQI communities face within the family justice system.

7. Disability

Disability issues were also raised during the Roundtable. Some of these issues related to child protection. For example, a participant explained that the "best interest of child" test often resulted in disabled women losing their children. It was also mentioned that people living with a disability are not all aware of their rights and of ways to represent their needs. The family justice system is not adapted to various levels of ability. One important question that was raised by a representative of a group working on disability issues was that LCO projects should constantly ask who is not around the table and whose needs have been forgotten. The LCO is currently working on a project related to challenges posed by the system to persons with disabilities; however, this does not mean that other projects should not take into account disability issues, as appropriate in developing a framework and in specific contexts addressed by the project.²⁰

8. Rural and Remote Areas

Ontarians living in rural or remote communities face unique challenges in relation to family justice. These challenges are multiple and specific, due to differences in rural/urban as well as northern/southern environments. For example, a representative from an Aboriginal group described the situation of lawyers and judges who fly to remote northern communities to hear cases. This participant mentioned that these professionals all fly in the same plane, which jeopardises their impartiality. In addition, because they fly to these communities every three or six months, they are disconnected from the reality of the communities they are supposed to serve. In addition, due to time constraints, it is not always possible to present motions and do case conferences. Time limitations mean that steps in the family justice process are sometimes missed. In the face of such a scenario, it is understandable that rural and remote communities question the legitimacy of the family justice system.

Roundtable participants mentioned that it is difficult for system users who have complex needs related to more than one area of the law, family and immigration law for example, to obtain legal services outside large urban centers. Initiatives such as the Linguistic and Rural Access to Justice Project of the Law Foundation of Ontario, described in the linguistic competency section above, help enhance access to justice for these people. This is a good example that the LCO can follow.

9. Conclusion

The various considerations mentioned in this paper are only a few of the criteria that must be part of any LCO project. They represent the considerations that were most present during Roundtable discussions. However, other considerations such as literacy, education and age, for example, are significant in the area of family law. It will not be possible to explore all relevant factors in this paper but it is worth noting that the LCO is currently conducting research related to older adults and, as mentioned above, disability issues. There may be crossovers between these various LCO projects.

A. Available Resources, Efficiency and Effectiveness

Among themes that kept coming back in the discussion, Roundtable participants pointed out that the family justice system lacks resources and that existing resources are not used in the most efficient and effective way, which does not help problem-solving. For example, participants noted a significant increase in unrepresented litigants, which is partly due to the insufficient Legal Aid²¹ resources in the area of family law and which increases court expenses. The large majority of participants were not optimistic about the likelihood of increased resources and wanted the LCO to take on a doable project in the circumstances, which is consistent with the LCO value of pragmatism.

Participants also mentioned efficiency and effectiveness problems were barriers to the improvement of the system. Such problems create delays, system fragmentation and role confusion. The impact of these problems is not only felt by those who work within this system but also by those this system is supposed to serve.

Another significant consideration in this area is the resources available to the LCO in undertaking projects. The LCO has a limited number of staff, contract researchers and financial resources. It has the capacity to produce official documents in English and French, and may consider occasionally publishing documents in other languages. It is situated in Toronto and cannot ensure a regular in-person presence across Ontario. Currently, the LCO has the capacity to take on a multi-year project in the area of family law. It has the resources to conduct research and explore problems that, although urgent to solve, may require further research. It is therefore important to consider these limits in thinking about a choice of family

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law project for the LCO. Roundtable participants agreed that the LCO should not take on a project that is beyond its capacity.

The LCO will not be able to resolve funding, efficiency and effectiveness problems within the family justice system on its own. However, as participants stated, some simple measures, such as better use of technology and communication tools, may be possible to implement and make a difference. Better use of communication technology may benefit groups such as people living with a mobility related disability for example. The LCO can take this consideration into account in its research, recommendations and especially in its consultation process.

B. The LCO's Role

As mentioned at the beginning of this paper, thinking about project options for the LCO requires keeping in mind the LCO's mandate and role in the community. The Family Law Roundtable was an opportunity to further clarify the role of the LCO.

As an independent body, the LCO has a complementary role to other social actors. In considering projects, the LCO takes into account what other social actors are currently focussing on in terms of family law reform in order to avoid duplication and make the best use of its resources. As expressed in the LCO mandate, the LCO is committed to selecting areas for study that are underserved by other research.²² This section describes other family law initiatives that are taking place in Ontario today as well as considerations related to research and consultation methodology that were pointed out by Roundtable participants.

1. A Second Family Law Project for the LCO

The LCO has already undertaken a project in the area of family law, which examined the division of pensions upon marital breakdown.²³ Some of the LCO recommendations in this area have been adopted as part of a newly introduced Ontario bill, *Bill 133 An Act to amend various Acts in relation to certain family law matters and to repeal the Domestic Violence Protection Act, 2000*.²⁴ This particular project focused on a highly technical substantive family property law issue and applied primarily to married persons. The next LCO family law project could take the LCO in a different direction, focussing as much on common law and married couples, as on single parents and children.

2. Supplementing Current Family Law Initiatives in Ontario

Currently in Ontario, a number of initiatives in the area of family law are worth noting. As mentioned above, the Ontario government introduced *Bill 133* on November 24, 2008. In addition to pension law reform, this bill proposes changes regarding the possibility of a child's name change as a result of declarations of maternity or paternity, the relationship between child custody and access orders and restraining orders, restraining orders, child custody applications by non parents, the exclusion of debts related to the acquisition or significant improvement of a matrimonial home from the definition of "net family property", the recalculation of child support amounts to reflect updated income information as well as orders regarding conduct of parties, and in particular contact and communication between parties, in family law proceedings related to Parts I, II, III of the *Family Law Act*.²⁵

The LCO also participates as an observer to the Ontario Bar Association Family Law Working Group, which seeks to propose practical ways to apply findings from the Mamo report²⁶ to the unified family court system. Other reports have been recently produced in the area of Ontario family law, including the Osborne Report, the sixth section of which focuses on unrepresented litigants.²⁷ The Law Commission of Canada report "Beyond Conjuality"²⁸ focused on the implications of the notion of conjuality in various areas of the law including

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family law and contributed to a reflection on the definition of the family. The CLEO report²⁹ from its Think Tank on the effective use of self-help family law materials by low income and marginalized communities, the results of which the LCO distributed during its Family Law Roundtable, is another example. In brief, many initiatives have been taken recently in the area of family law. In this context, the LCO seeks to propose projects that are different and complementary to existing ones.

As a family law bill has recently been introduced in Ontario and concrete law reform proposals have already been made in the area of family law, such as those found in the research reports named in the previous paragraph, it is important that the LCO does not duplicate research and focus on areas where more research is needed. Based on its research, the LCO will be in a position to support already existing recommendations where appropriate and formulate additional ones.

3. Comparative Research

In terms of the scope of the chosen project, Family Roundtable participants made clear that the LCO should not reinvent the wheel. Roundtable participants pointed out that other jurisdictions' family justice models should be closely examined as part of any LCO project. The LCO regularly conducts comparative research and agrees with participants that it should inquire into already existing and well-functioning family justice models nationally and internationally. The LCO should build on this knowledge, push it further and perhaps help find new ways to put it into practice.

4. Province-Wide Consultation and Regional Analysis

The LCO can make a contribution to Ontario family law reform through province-wide consultation and possible media interaction. Because of its mandate to act at the level of the province, it can focus on bringing different voices of the Ontario justice system together. This was the goal of the Roundtable. When the new family law project has been chosen, the LCO will make particular efforts at using technology for its province-wide consultation process. The LCO hopes that such process will also help create an interest and willingness to change things in practice amongst people who already work within the family justice system.

The LCO is committed to reflect the concerns of all Ontarians and is committed to performing a regional analysis in its different projects. This type of analysis has been present in the LCO cheque cashing project³⁰ and is relevant to this family law project.

IV. PROJECT OPTIONS

The LCO has identified one overarching process oriented project and one specific substantive law oriented project as options for a family law project. The following subsections describe these projects and sets out a series of questions to consider for each of them. The LCO invites your comments and responses to these questions.

A. Overarching Process Focused Project

“A systematic and comprehensive review looking at the delivery of Family Law Justice in Ontario is necessary.”³¹
Recommendation from the Mamo Report

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1. Defining the Roles of Ontario Family Justice System Actors

This process oriented project would attempt to re-think what the role of actors in a model family justice system should be. Starting with the current Ontario system, the LCO would examine who are the actors in the family justice system and what their roles are. The project would then explore whether actors fulfil their roles in practice or whether role confusion is frequent, and whether their roles should change in order to improve the effectiveness of the system. Where necessary, the project would propose role clarifications or changes. This project would focus on the simple question: “who should do what?”

This project would compare the roles of Ontario actors to that of other family justice systems in Canada and abroad. In particular, the LCO would study family justice models in the United States and Australia, but would consider other jurisdictions as appropriate. This comparative analysis would help identify what other jurisdictions perceive to be the necessary roles in a family justice system.

This project would not only look at the roles of each actor individually but would emphasize relationships between actors. One significant focus of this project would be to examine the tension between actors involved in public and private dispute resolution. The LCO would focus on the complementarity of their roles. It would seek to define what each dispute resolution actor’s role should be and avoid overlap between them.

Another important focus of this project would be to explore differences in impact on the family justice system when roles are played by people with different individual and group identity characteristics. The family justice system’s problems cannot be said to affect only minorities and marginalized groups. Most, if not all, users experience many of them. However, these problems may have a different impact on different people depending on their identity characteristics, an issue that this project will examine closely, in light of considerations described in the second part of this paper.

As the family justice system is under financial pressure, all actors are trying to cope within its limits. This pressure contributes to role confusion. Role confusion is also caused by the addition of new actors in the system over time, legislative changes, fragmented processes and the rise of unrepresented litigants. This role confusion or borrowing does not always benefit system users. It is therefore important to discuss and re-define these roles within the current limits of the family justice system, but also to start thinking about how re-defining these roles can help transition towards a better system.

Examples of actors whose role the LCO would examine include the following:

| <u>System Users</u> | |
|--|---|
| Children | Unrepresented litigants |
| Parents | People who have had a violent behaviour in a family context |
| Grand-parents | Victims of family violence |
| Common law or married, same or different sex couples | Neighbours and friends of families experiencing conflict and violence |
| Parties to cohabitation agreements or marriage contracts | Extended family members |

Family Law Project Options

| | |
|---|--|
| Public and private dispute resolution users | People simultaneously involved in the family and criminal and/or immigration systems |
| Frequent users of the court system | Legal Aid users |

| <u>System Workers</u> | |
|--------------------------|---------------------------------------|
| Child protection workers | Social workers |
| Legal Aid workers | Psychologists |
| Lawyers | Police officers |
| Law clerks | Immigration officers |
| Mediators | Women's shelters staff |
| Arbitrators | Family Law Information Centres' staff |
| Parenting coordinators | Legal clinics' staff |
| Judges | Government representatives |

The LCO would develop short, medium and long term recommendations to re-define the roles of actors in the Ontario family justice system and improve its overall functioning.

2. Questions to Consider

- Should new roles be created within the system? Have some roles become unnecessary?
- Should this project focus on the role of only one or two actors within the family justice system?
- Many believe that courts are used beyond their capacity. Are court actors' roles appropriately defined? Are courts doing things that other bodies should do? Are roles properly defined between public and private dispute resolution? What should be the role of ADR and family supports in the family justice system?
- Does this project properly address the needs of Ontarians who contract out of Ontario family law? Who can support them in their decision-making? Who can respond to their needs?
- How can a model family justice system's activities be best coordinated? Is a coordination role necessary? Who should perform this role?

B. Specific Substantive Project

1. *The Matrimonial Home's Legislative Framework in Ontario*

The Ontario government recently introduced a bill clarifying that debts related to the purchase or significant improvement of a matrimonial home should be deducted from the net family property under the *Family Law Act*.³² This is an example of a positive step in terms of clarifying the law as it relates to the matrimonial home in Ontario. However, other legal issues remain in this area, which this project would seek to address.

This project would examine the legislative framework around the matrimonial home in Ontario. It would look into legal issues mentioned by Roundtable participants. For example, following the work of the former Ontario Law Reform Commission on family law property,³³ the LCO would examine the issue of the non-deductibility of the matrimonial home at the date of marriage and, especially, its impact on women.³⁴ It would look into the impact of the *Family Law Act* matrimonial home provisions on common law spouses and cohabitants. It would also explore issues related to matrimonial homes situated on reserves.

In addition to legal analysis, the LCO could use social science tools, including gender-based data, to better understand the impact of the current legal framework on Ontario families. A social science approach may also be helpful in terms of identifying why, for example, the matrimonial home is not always split 50/50 at relationship breakdown. It would help understand why the matrimonial home still has a special status as opposed to other assets in Ontario law. This aspect of the project would help the LCO propose law reform that reflects today's context.

2. *Questions to Consider*

- As research has already been done in the area of the non-deductibility of the matrimonial home, is it useful for the LCO to focus on this issue? Is there already consensus around the idea that the matrimonial home be deducted and if so, should it be the role of government to introduce legislation in this area without need for further research?
- Is it useful to study the matrimonial home in isolation or would it be better to study all family property?
- Is there a way to study the matrimonial home without excluding those who do not own homes? Is access to matrimonial homes a significant issue in Ontario (both in terms of access to ownership and access to a home owned by an ex-spouse)?
- Are there other specific legal issues that should be addressed around the matrimonial home?

V. MOVING FORWARD

This paper has summarized the process leading to developing family law project options for the LCO. It has described the family law consultation process and considerations in designing a family law project, as well as the project options themselves. At this stage, the LCO would like to continue exchanging ideas with those who already made submissions to the LCO or participated in the Roundtable, as well as more broadly with members of the Ontario population who have not yet had a chance to intervene yet in this process. Based on responses to the Consultation Paper and its own research, the Law Commission will develop a family law project proposal to be submitted to its Board of Governors for approval.

VI. GENERAL CONSULTATION QUESTIONS

The LCO invites your comments on the issues raised by this Paper. In particular, the LCO would like to hear from you on the following questions:

General Consultation Questions

- Between the options described above (the overarching or the specific project), which project do you believe the LCO should undertake in 2009?
- What do you see as the advantages and disadvantages of the two project options described above?
- Do you have additional comments in response to each project option's "Questions to consider" section?
- Do you believe that the project options respond to the majority of family justice system users? If you do, how would you describe this majority? Does the majority in society correspond to the majority of family justice system users?
- Do the proposed project options as described respect the specific impact that family law problems have on different groups?
- Would it be preferable to focus on a more specific group of family justice system users? For example, should the LCO focus on the possibility of creating specific dispute resolution mechanisms amongst Aboriginal communities in Ontario?
- Are there any considerations missing from this paper that would be important to take into account in choosing a project?
- What consultation tools would you like to see the LCO using for the family law consultation process? How can the LCO better reach you?
- How do you think the LCO can improve access to the consultation process across Ontario?

VII. LIST OF ROUNDTABLE PARTICIPANTS

Academics

Martha Bailey, Queen's University Faculty of Law
Nicholas Bala, Queen's University, Faculty of Law
Berend Hovius, University of Western Ontario, Faculty of Law
Lesley Jacobs, York Institute for Public Policy and Law

Clinics

Louise Huneault, Family Law Information Centre, Sudbury
Mary Marrone, Income Security Advocacy Clinic
Margaret Parsons, African Canadian Legal Clinic
Connie Renshaw, Family Law Information Centre, St. Catharine's

Community Organizations

Carol Barkwell, Luke's Place
Zahra Dhanani, Metro Action Committee on Violence Against Women and Children
Jack Falkins, Ontario Federation of Indian Friendship Centres
Claudia LeGarde, Ontario Native Women's Association
Fran Odette, DAWN Canada

Government Representatives

Miranda Gass-Donnelly, Ministry of the Attorney General
Lise Lafrenière-Henrie, Department of Justice
Elissa Leiff, Department of Justice
Ida Bianchi, Legal Aid Ontario
Elizabeth McCarty, Office of the Children's Lawyer
Dena Moyal, Office of the Children's Lawyer
Anne Marie Predko, Ministry of the Attorney General

Judiciary

Patti Cross, Ontario Court of Justice
Madame Justice Mary Jane Hatton, Superior Court of Justice
Madame Justice Geraldine Waldman, Ontario Court of Justice

Legal Organizations

Tom Dart, Ontario Bar Association
Seema Jain, Ontario Association for Family Mediation
Susan McGrath, Law Society of Upper Canada
Judith Nicoll, The Advocates' Society
Laurie Pawlitzka, Law Society of Upper Canada

Practitioners: Private Firms

Family Law Project Options

Philip Epstein, Epstein Cole LLP
Kelly Jordan, Jordan Battista LLP
Alfred Mamo, Mamo & Associates
Nicole Tellier, Sole Practitioner
Lorne Wolfson, Torkin Manes

VIII. HOW TO PARTICIPATE

The LCO invites your comments on the issues raised in this Consultation Paper. Your comments will be considered when the LCO makes a final choice of a family law project to submit to its Board of Governors for approval. You may develop extensive submissions or make shorter comments.

Submissions and comments must be received by **March 13, 2009**.

You can mail, fax, e-mail your submissions or comments **or use the LCO website comments form:**

**Law Commission of Ontario
“Family Law Project Options Consultation”
Physical Resources Building
Suite 1093, 4700 Keele St.,
Toronto, ON
M3J 1P3**

Fax: (416) 650-8418

E-mail: LawCommission@lco-cdo.org

Website Family Law Project Link and Comments Form: (ADD HERE).

If you have questions regarding this consultation, please contact us at (416) 650-8406.

ENDNOTES

- ¹ Law Commission of Ontario, Strategic Plan 2008-2012, p. 1-2, available online: <http://www.lco-cdo.org/en/documents/HighlightsLCOstrategicplan-final-april08.pdf> [LCO Strategic Plan].
- ² Same as above.
- ³ Chief Justice of Ontario, the Honourable Warren K. Winkler, publicly stated that family law is in need of significant reform, particularly with regards to the delivery of family law across the province to better serve the public (Warren K. Winkler, "Access to Justice" (Remarks at the Law Society of Upper Canada's Six Minute Family Law Lawyer Conference, December 5, 2007 [unpublished]). In 1993, the former Ontario Law Reform Commission made recommendations for family law reform on a wide range of issues, including the application of common law remedies in matrimonial property disputes, equalization at death, problems with valuation and the treatment of the matrimonial home (Ontario Law Reform Commission, *Report on Family Property Law* (Toronto: 1993).
- ⁴ Report of Creative Symposium, Toronto, November 30, 2006 [unpublished].
- ⁵ Lorne Sossin, *Research Priorities Report: Submitted to the Board of Governors of the Law Commission of Ontario*, April 27, 2007, available online in English only: <http://www.lco-cdo.org/en/documents/SossinResearchReport.pdf>.
- ⁶ *Family Law Act*, R.S.O. 1990, c. F-3.
- ⁷ *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325.
- ⁸ Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* (Toronto: 1993).
- ⁹ See the LCO website: <http://www.lco-cdo.org/en/documents/Currentprojects/pensions.html>.
- ¹⁰ See 2006 Statistics Canada Census, available online: <http://www40.statcan.gc.ca/l01/cst01/demo11b-eng.htm>.
- ¹¹ Same as above. For more information about francophones in Ontario, see the website of the Office of Francophone Affairs of the Ontario government (<http://www.ofa.gov.on.ca/en/franco.html>).
- ¹² See for example the *French Language Services Act*, R.S.O. 1990, c. F-32.
- ¹³ See the Etablissement.Org website: http://etablissement.org/sys/faqs_detail.asp?faq_id=4000774.
- ¹⁴ See 2006 Statistics Canada Census, above at note 10.
- ¹⁵ See the City of Toronto website for more details: http://www.toronto.ca/toronto_facts/diversity.htm.
- ¹⁶ Family Law Education for Women (FLEW) is a project funded by the Government of Ontario, which provides plain language legal information on women's rights under Ontario family law. This information is available in 11 languages: English, French, Arabic, Chinese (traditional), Chinese (simplified), Farsi, Punjabi, Somali, Spanish, Tamil and Urdu (see <http://onefamilylaw.ca/en/home>).
- ¹⁷ See the Law Foundation of Ontario website: http://www.lawfoundation.on.ca/linguistic_rural_access.php.
- ¹⁸ *Family Responsibility Office (the "FRO")* is Ontario's maintenance enforcement program (MEP) that administers and enforces child support payments and spousal support payments in the province.
- ¹⁹ See the LCO Strategic Plan, above note 1 at p. 1-2.
- ²⁰ See the LCO website at <http://www.lco-cdo.org/en/disabilities.html>.
- ²¹ For more information about Legal Aid Ontario family law services, see <http://www.legalaid.on.ca/en/getting/Family.asp>.
- ²² See the LCO Strategic Plan, above note 1 at p. 1.
- ²³ For more information on the Division of Pensions Upon Marriage Breakdown project and to read the LCO final recommendations, see <http://www.lco-cdo.org/en/documents/Currentprojects/pensions.html>.
- ²⁴ Bill 133, *An Act to amend various Acts in relation to certain family law matters and to repeal the Domestic Violence Protection Act, 2000*, 1st Sess., 39th Leg., Ontario, 2008.
- ²⁵ Same as above.
- ²⁶ Alfred A. Mamo, Peter G. Jaffe, and Debbie G. Chiodo, *Recapturing and Renewing the Vision of the Family Court*, April 27, 2007 [Mamo Report].
- ²⁷ Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings and Recommendations*, November 2007, available online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp>.
- ²⁸ Law Commission of Canada, *Beyond Conjugal: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: 2001).
- ²⁹ Community Legal Education Ontario (CLEO), *Tapping the Community Voice: Looking at Family Law Self-Help through an Access to Justice Lens: Themes and Recommended Next Steps*, September 5, 2008 [unpublished].

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³⁰ For more information on the Fees for Cashing Government Cheques project and to consult the report, see <http://www.lco-cdo.org/en/CCFreportsbackgrounder.html>.

³¹ Mamo Report, see above note 26, p. 9.

³² Bill 133, above note 24.

³³ Ontario Law Reform Commission, *Report on Family Property Law* (Toronto: 1993).

³⁴ See definition of « net family property » under s. 4(1) of the *Family Law Act*, see above note 6.