# COMPETING RIGHTS POLICY: THE LAW COMMISSION OF ONTARIO APPROACH

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ABSTRACT

In the development of the policy that underlies its law reform recommendations, the Law Commission of Ontario ascertains the often diverse interests of those who determine or are affected by the law. The author discusses the LCO's outreach and consultation processes, including it several objectives, and the challenges it poses.

## I. INTRODUCTION

Hearing directly from the people affected is crucial to developing effective and responsive ways to resolve tensions between or among rights claims. Those who experience a denial of their rights have a unique perspective on why that is the case and appropriate remedies. Their views alone may not determine the outcome, however, for their claims may turn out to affect the rights – or interests – of others and the remedy they seek may turn out to curtail these latter rights or interests.

Claims may be based not only legally protected rights; normative, ethical or moral claims may also be accorded "validity". Tension between rights occurs because two people or groups each claim a right that does not fit well with the other's claim. There are times that rights might be termed "competing", but they are not always in competition: sometimes they can be reconciled creatively, although there may be instances when one claim must give way (when it is adversarial to broad societal values, or when a claimant is absolute in framing the claim or counterclaim).

This paper is not about how to resolve these various tensions, but rather about the value of including communities in the process, and specifically about the outreach and consultation by the Law Commission of Ontario ("the LCO").

The LCO was launched in September 2007 with a mandate to make recommendations to make the law more effective, relevant and accessible, to simplify and clarify the law and to see how technology might be used to increase access to justice, as well as to stimulate critical debate about law. It was created by an agreement to which the Law Foundation of Ontario, the Ministry of the Attorney General, the Dean of Osgoode Hall Law School, the Law Society of Upper Canada (all of whom provide funding to the LCO) and the other Ontario law deans are parties. The LCO carries out consultation for all its projects and receives formal submissions, emails or web-based comments; it also arranges focus groups, individual and group interviews, in person, over the telephone and web-based. For some projects, the consultation may be primarily with legal and other professional groups. For the socially-oriented projects consultation is broader in scope.

## II. THE LCO'S OUTREACH AND CONSULTATION

The LCO carries out general outreach, not explicitly related to particular projects, that includes various professional organizations, the judiciary, government, legal clinics and community-based advocacy and service

groups. Usually, these are in-person meetings, sometimes with a particular organization and sometimes with a group of representatives from different organizations. For example, a visit to Thunder Bay in October 2009 included a presentation to the Thunder Bay Law Association, a meeting with the Regional Senior Judge of the Superior Court of Justice, discussion with several workers at the Kinne-Awaya Legal Clinic, the Ontario Native Women's Association and area legal aid offices and two meetings with representatives of various groups, including injured workers, disability advocates, a women's centre, the John Howard Society and social workers. Other outreach meetings have been with the African-Canadian Legal Clinic Board of Directors, the Executive Director and workers at the Metro Toronto Chinese and Southeast Asian Legal Clinic, the National Anti-Poverty Organization, Maytree, the Ontario Centre for Engineering and Public Policy, Windsor Women Working for Immigrant Women and the Social Planning Council, among others. Staff may also attend or speak at conferences on subject matter relevant to particular projects.

Broad consultation by law commissions has become an integral part of how they develop the policy underpinnings of analysis and recommendations. The Australian Law Reform Commission is committed to extensive and effective project consultation, as the current President (then Commissioner), Rosalind Coucher (2007), explains

> The ALRC has really taken consultation to heart and widespread community consultation is a genuine commitment. As Professor Weisbrot [then the President] has commented: This commitment to community involvement is part of the ALRC's DNA. We don't do public consultation just to tick that box; we do it because we know it significantly improves the quality, the grass roots applicability, and (not surprisingly), the public acceptability of our recommendations. [Footnote omitted]

Project-related consultations help define the scope of and inform the analysis and recommendations in the project. We try to identify interests and groups that might be affected by any changes to the law or policy and add to our list as we learn about others. The project relating to persons with disability involves an extensive consultation with 14 focus groups (with persons with disabilities and service and advocacy groups) in five different Ontario locations, individual interviews and an on-line survey. It and other projects have project-specific advisory groups that include representatives of community groups, the bar, the judiciary, government and academics. Prior to approval by the Board of Governors of a project in family law, the LCO held a Roundtable which brought together about 35 people from all areas of family law (practitioners, judges, community workers and advocates, academics, government policy-makers and others) to help identify the most important candidates for reform in family law. The pan-Ontario consultation for the resulting project, in person and by telephone, included a wide range of workers in or users of the family law system.

## III. WHY OUTREACH AND CONSULTATION?

Outreach allows initial contact with groups to inform them about the LCO and to learn about their law reform needs. While the purpose is not to discuss the particular projects, inevitably they are raised. These initial meetings may lead to specific project consultation or broader relationship. For example, an initial meeting with ARCH, the legal clinic that addresses the needs of differently-abled persons, has led to partnering with ARCH in the LCO's consultations on its disabilities and the law project. These visits are also a way to communicate through action the LCO's interest in making connections with community outside the realm of existing projects and may also be a source for new projects.

Outreach and consultation have other benefits. They constitute a message about who should be involved in policy development. While the LCO is not responsible for changes in the law, to the extent that it has an impact, specific or otherwise, groups that have contributed to the projects have at least an indirect impact. They and their views become part of the debate around the project issues.

Commentators such as David Weisbrot (2002) have pointed out that consultation in a law commission project might help correct errors; these might be factual errors in a consultation document or errors in understanding a group's point of view, for example. Initial consultation may also reveal that the commission has omitted an issue crucial to understanding the full implications of the matter it is studying. Consultation may build support for a final report and recommendations and may promote use of the report in lobbying efforts by interested groups. The involvement of groups with different views may assist in giving the recommendations widespread legitimacy and acceptance, even if not agreement, and, as Weisbrot (2002) suggests, might promote "public ventilation of issues" to help develop consensus or at least "defuse lingering tensions" around issues.

Others see consultation as not only relevant for the law commission's own work, but also as a process that contributes to the development of civil society, of democracy, because it involves citizens in the law reform process (Neave, 2004). As Neave maintains, consultation

is not just a question of expressing views on a consultation paper; rather, it has a broader goal of involving citizens more broadly in the law reform process and in accepting the *idea* of contributing to law reform and promoting civic engagement.

On-line consultation methods (forums, on-line submissions or surveys) are more or less required today. They permit far less formal expression of opinion than the written submissions that previously constituted a major part of the feedback to a law commission paper. Because commissions post consultation papers (and other documents) on-line, the pool of potential participants is broader than it used to be. More people may be reached more cheaply. These methods may be less likely to create the "bond" or trust that may be developed by in person consultations, however.

Consultation is not without its difficulties and risks. It is important that people realize that their views may not be accepted, in whole or even in part. There may well be opposing views, between and within groups. Sometimes these can be reconciled, but sometimes they will not be. The LCO is not an advocate for any particular groups, although its objective is, roughly speaking, to increase access to justice.

Outreach may involve many groups with whom it is not feasible to do project-related in-person consultation. Groups who do not have an interest in a particular project may not see an immediate value to the commission. It is important to maintain contact (and important not to make assumptions about where people's interests lie) and to provide means by which these groups can continue to be involved, even if not in the most direct consultations. Others have had their fill of participating, of "giving away" their experiences, only to see no tangible change. Yet others feel they are merely treated as subjects of study rather than authors of their own lives. These are difficult hurdles that can be overcome only by perseverance, if at all.

## IV. CONCLUSION

This paper assumes it is a "good thing" to include the views and experiences of affected groups (and this might be widely defined to include not only a variety of identified communities, but the public at large, or societal interests) in the development of policy.

Once that is accepted, other issues have to be addressed, including: how best to involve communities that are differently positioned in the conversation (and whether to include all groups that might have an interest, regardless of how their views accord with widely accepted societal norms around equality, for example) and how to ensure that the reality about the impact of their involvement is clear.

The objectives, processes and challenges around consultation with community groups carried out by the LCO are not unlike those arising out of attempts to resolve "competing" riwghts claims or to develop a protocol for the resolution of "competing" rights claims" in other contexts.

The development of policy, as the development of law commission recommendations, is almost always more complex than responding to one group's concerns. Even if a particular community's interests are the impetus for the policy, there may well be apparently conflicting claims within the community itself, interests of other groups with the right to make claims, and the societal interests "outside" the group that must be taken into account. Without as full an exploration of societal perspectives as possible, it will not be possible to advance policy that reflects these different interests nor to shape the policy in a way that seeks, even if not successfully, to reconcile the different interests at stake.

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