
Law Commissions and Access to Justice: What Justice Should We Be Talking About?

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Law Commissions and Access to Justice: What Justice Should We Be Talking About?

Abstract

In addition to their explicit mandates, law reform commissions have a generic mandate to make recommendations that are designed to increase access to justice. Moreover, contemporary commissions ought to interpret the concept of access to justice broadly. Even though they undertake topics of 'lawyers' law,' or at times limit their focus to the narrower legal system, commissions should also consider how law can be employed to realize economic or social justice. In order to make pragmatic recommendations to increase access to justice, commissions must study the non-legal realm and incorporate into their work the insights of other disciplines and the experiences of diverse communities. Furthermore, commissions must distinguish themselves from other law reform bodies by addressing the larger, more profound tasks that have the potential to redefine the meaning of access to justice.

Keywords

Law reform; Justice, Administration of

Law Commissions and Access to Justice: What Justice Should We Be Talking About?

PATRICIA HUGHES *

In addition to their explicit mandates, law reform commissions have a generic mandate to make recommendations that are designed to increase access to justice. Moreover, contemporary commissions ought to interpret the concept of access to justice broadly. Even though they undertake topics of 'lawyers' law,' or at times limit their focus to the narrower legal system, commissions should also consider how law can be employed to realize economic or social justice. In order to make pragmatic recommendations to increase access to justice, commissions must study the non-legal realm and incorporate into their work the insights of other disciplines and the experiences of diverse communities. Furthermore, commissions must distinguish themselves from other law reform bodies by addressing the larger, more profound tasks that have the potential to redefine the meaning of access to justice.

En plus de leurs mandats explicites, les commissions de la réforme du droit sont chargées d'un mandat générique: celui de formuler des recommandations étudiées pour augmenter l'accès à la justice. Qui plus est, les commissions contemporaines devraient interpréter le concept d'un accès plus étendu à la justice. Même si elles entreprennent des problèmes de « droit de l'avocat » ou limitent parfois leur champ au système juridique plus restreint, les commissions devraient également se pencher sur la question de savoir comment la loi peut servir à réaliser la justice économique ou sociale. Afin de formuler des recommandations pragmatiques en vue d'augmenter l'accès à la justice, les commissions doivent étudier le domaine non légal et incorporer à leur travail les connaissances venues d'autres disciplines et les expériences de communautés diversifiées. En outre, les commissions doivent se distinguer des autres organismes de réforme de la loi en s'attendant aux tâches plus étendues et plus profondes qui possèdent le potentiel de redéfinir le sens de l'accès à la justice.

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IT IS COMMON TO THE MANDATES of law (reform) commissions¹ that they are to make recommendations to simplify, maintain currency, or fill gaps in the law.² Less commonly, but not infrequently, commissions are enjoined to make recommendations to improve the administration of justice (as is the case with

1. For my purposes, whether "reform" appears in the commission's name is not significant, although some believe the use of "reform" suggests a narrower mandate than does its omission. See *e.g.* Roderick A. Macdonald, "Jamais Deux Sans Trois ... Once Reform, Twice Commission, Thrice Law" (2007) 22 C.J.L.S. 117 at 132 [Macdonald, "Jamais"]; K.J. Keith, "Has professional law reform met expectations?" (Paper presented to the Australian Law Reform Agencies Conference, Wellington, New Zealand, 16 April 2004), online: New Zealand Law Commission (NZLC) <<http://www.lawcom.govt.nz/SpeechPaper.aspx>>. A former NZLC president has described that agency's name as implying that law reform was not to be "the whole" of its mandate; it was to also offer "another view [next to the existing law] where we consider the public interest demands." David Baragwanath, "The Role of the New Zealand Law Commission" (2001) *New Zealand Centre for Public Law Occasional Papers* 2 at 14, online: <[http://www.victoria.ac.nz/nzcp/Files/Occ papers/Baragwanath web paper.pdf](http://www.victoria.ac.nz/nzcp/Files/Occ%20papers/Baragwanath%20paper.pdf)>. On the other hand, it has been suggested that underlying "[t]he creation of standing law reform bodies was that the whole idea of law reform was reconceptualised." Marcia Neave, "Law Reform in the 21st Century—Some Challenges for the Future" (Lecture delivered 11 October 2001) [unpublished], online: Victorian Law Commission <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches/LAWREFORM++Law+Reform+in+the+21st+Century+speech>> [Neave, "21st Century"]. Neave suggests that "reform" means not merely "change," but making the law more responsive to shifting societal needs and using law to improve people's lives. Marcia Neave, "The Ethics of Law Reform" (Lecture delivered at the Centre for Applied Philosophy and Public Ethics, University of Melbourne, 11 August 2004) [unpublished], online: <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches/LAWREFORM++Ethics+of+Law+Reform+speech>> [Neave, "Reform"].
2. These are the purposes identified in the mandate of the Law Reform Commission of Nova Scotia (LRCNS), but they are typical of the mandate of most law commissions. Less typical is the injunction to the LRCNS to make recommendations for the "review of judicial and quasi-judicial procedures." *Law Reform Commission Act*, S.N.S. 1990, c. 17, s. 4.

the Law Reform Commission of Nova Scotia (LRCNS)). Some commissions seem to have a more restricted mandate than others. Compare, for example, the purpose of the New Zealand *Law Commission Act*, which is “to promote the systematic review, reform, and development of the law of New Zealand”³ with that of the LRCNS to develop “new approaches to, and new concepts of, law that serve the changing needs of society and of individual members of society.”⁴

Although few commissions’ mandates actually state as much,⁵ one might say that, in general terms, the mandate of law reform commissions is to make recommendations with the objective of increasing access to justice, whether in the form of making legislation easier to read or making the law more reflective of contemporary social conditions. One might call this a generic mandate, against which specific, often statutory, mandates should be assessed. I argue that it is inherent in the notion of a contemporary law commission in a liberal democracy—part of its generic mandate, one might say—that it be concerned with questions related to enhancing access to justice, broadly defined. Access to justice is a shorthand or catch-all description of the mandate, whether commissions focus on doctrinal questions or “place more emphasis on changing the informal norms, which influence human conduct”; whether their role is “to improve the law as it is written or to bring about broader social and cultural change”; or whether they busy themselves with policy or not.⁶ Whether or not a law commission is enjoined explicitly to make recommendations to increase

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3. *Law Commission Act 1985* (N.Z.), 1985/151, s. 3. The Commission is to engage in a systematic review of the law, to make recommendations for “reform ... and development of the law,” and to advise on ways to make the law “as understandable and accessible as is practicable.” Unusually, it is also to advise on reviews of the law undertaken by government departments or organizations. See s. 5(1). Although the wording of the statute is narrower than that of others, the comments related, *supra* note 2, suggest that the actual wording may be less important than one might think.
 4. *Supra* note 2.
 5. One exception is the Australian Law Reform Commission (ALRC), the mandate of which is to review Commonwealth laws in relation to matters referred to it by the Attorney General in order to reform the law, particularly by “providing improved access to justice,” among other means. See *Australian Law Reform Commission Act 1996* (Cth.), s. 21. See also the ALRC’s website, which states that it “aims [to] improve access to justice,” among other objectives. “About the ALRC,” online: <<http://www.alrc.gov.au/about/index.htm>>.
 6. Marcia Neave, “Institutional Law Reform in Australia: The Past and the Future” (2005) 23 *Windsor Y.B. Access Just.* 343 at 349-50 [Neave, “Australia”]. Neave identifies Canada as the site for this debate about law commissions’ roles.

access to justice, few law commissions today would deny that they should not only recommend legislative reform, but also relate law to societal needs.

Unless the mandate is explicitly restrictive, the injunction to ensure that the law is current or that it responds to changing conditions, however actually phrased, lends itself to narrow or broad interpretation. Thus, the more important point is how commissions understand the phrase "access to justice" in light of other explicit aspects of their mandate or other relevant factors, such as how their purpose is described when they are created. While a commission's explicit mandate is not insignificant in giving content to the phrase, more can be learned by examining how the commission goes about its business. Furthermore, its processes, its reports and other documents, and who its work reaches can reveal much about whether a commission satisfies its own access to justice rhetoric. My purpose here is to explore the relationship between commission processes and various interpretations of access to justice. In particular, I suggest that the broader the concept of "justice" we expect a commission to engage in, the more extensive its consultation processes and the sources it brings to its analysis must necessarily be.

Law reform commissions have great potential to contribute to enhancing access to justice, broadly defined—that is, to "bring about broader social and cultural change," in Neave's words—but it is important that their approach takes account of the views and experiences of those affected by law or, in other words, those for whom access to justice is meant to be enhanced. Similarly, reliance only on legal concepts, structures, and recommendations will fail to extend access to justice beyond the legal system in any significant way. Incorporation of external bodies of knowledge and methods of analysis, as well as recommendations that recognize that law is "in the world," are imperative for a commission if it is to make a contribution to the wider notion of access to justice.

Underlying this exploration is the premise that law reform is not merely about "changing" the law.⁷ Rather, the law reform process connotes increasing

7. William Hurlburt reviews the various ways in which the concept of law reform had been interpreted until the mid-1980s. While some observers limited its application to a narrow range of strictly legal changes, others intended its usage to refer to more extensive changes, sometimes to the extent of viewing all changes as having more than a strictly legal component. William H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton: Juriliber, 1986) at 3-6. Hurlburt concluded that law reform involves change, improvement, and conservation of essential factors (at 7). I am using the term "law reform"

access to justice by providing more people with meaningful access to courts, tribunals, and other dispute resolution processes, and thus to legal process, to the substance of law, or, more broadly, to the rights and benefits generally available to society by the mechanism of law. Fundamental to how well a law reform commission can accomplish this task is the extent to which it involves the public and the insights of disciplines other than law in its work.

After considering in Part I how “access to justice” has been conceptualized, I discuss in Part II why a core function of law commissions should be to advance a broad conception. In Part III, I discuss what it means for law commissions to advance a broader conception of access to justice, and I then consider in Part IV what they must do if their work is to reflect it. I conclude in Part V by placing law commissions in perspective.

I. CONCEPTUALIZING “ACCESS TO JUSTICE”⁸

It has been suggested that “access-to-justice forms an integral part of the rule of law in constitutional democracies,”⁹ although this is perhaps more an aspirational statement than one of fact. Access to justice has, however, become part of mainstream thought about a “fair” legal system.¹⁰ At its most basic level, “access to

loosely to include technical changes (sometimes called “lawyers’ law”) that may be narrow and broad changes that involve the consideration of non-legal contexts in addition to law. In both cases, however, at a minimum, the intent must be to “improve” the law or to extend its benefits to persons previously excluded. Thus, law reform has normative content.

8. Although I do not go so far in the context of law reform commissions, a quick perusal of the table of contents of the Windsor Yearbook of Access to Justice indicates how broadly “justice” might be defined. In its first issue, most of the articles were associated with the legal system, but at least one addressed the difference in theoretical approach between socio-legal studies and the sociology of law—the former being concerned with issues such as access to justice, legal effectiveness, and plea-bargaining, and the latter considering law as a form of social control. See David Nelkin, “The ‘Gap Problem’ in the Sociology of Law: A Theoretical Review” (1981) 1 Windsor Y.B. Access Just. 35. Note that “access to justice” is treated as the equivalent of plea-bargaining, and not a broader category of which plea-bargaining might be a discrete example. Subsequent volumes have been devoted to issues such as reparations (2003) and legal education (1999 and 2001), and there are many individual articles that go far beyond a narrow notion of access to the legal system, whether in Canada or elsewhere.
9. Faisal Bhabha, “Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions” (2007) 33 Queen’s L.J. 139 at 140.
10. For instance, while the specific phrase is not employed, the intent is similar in the Ministry of the Attorney General of Ontario’s “Justice on Target” project. A major focus is on

justice” is synonymous with “access to the legal system,”¹¹ although one might also view the “legal system” instrumentally as simply what the law is and how it is enforced and processed—activities that may have little to do with justice, fairness, or equity.¹² In this respect, access to justice means simply (but not insignificantly) making it easier for people to use the legal system or making the legal system more “accessible” (*e.g.*, through more legal aid or more expeditious proceedings). Indeed, the core aspects of access to justice have been identified as “reasonable and effective access to courts of law and the opportunity to obtain legal services from qualified professionals.”¹³ Put slightly differently, it refers to the removal of barriers to legal access consequent on the high cost of legal representation.¹⁴ Means of increasing access to justice in this context are designed “to make courts and the legal process more accessible” through, for example, the rules of practice, contingency fees, pro bono representation, and costs awards.¹⁵

It has long been widely recognized that economic factors may impede access to justice:¹⁶ hence the emphasis on legal aid, pro bono legal representation, less

reducing delays in the criminal law process. See “Justice on Target” (2007), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/jot/>>.

11. In many cases, this is considered so obvious that the author of an article on access to justice will not specify that he or she means “access to the legal system” when using the phrase “access to justice,” although the context will soon make it clear. In contrast, a discussion of access to justice in South Africa begins, “[i]t is not intended in this paper to debate the different meanings of justice, such as its social, political or moral meaning. . . . This paper is concerned with justice in the legal sense, more particularly, justice in terms of access to the civil and criminal courts.” David McQuoid-Mason, “Access to Justice in South Africa” (1999) 17 Windsor Y.B. Access Just. 230 at 230. McQuoid-Mason refers to issues as diverse as the race and gender composition of the judiciary—a constitutional matter in South Africa—and extension of limitation periods as components of access to justice.
12. Roderick A. Macdonald, “Access to Justice and Law Reform” (1990) 10 Windsor Y.B. Access Just. 287 at 294 [MacDonald, “Access”].
13. *Christie v. British Columbia* (2005), 262 D.L.R. (4th) 51 at para. 30 (B.C. C.A.) (per Newbury J.A., speaking for the majority). Newbury J.A. considered these aspects constitutionally guaranteed, which was not a position upheld by the Supreme Court of Canada. See *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873.
14. Bhabha, *supra* note 9 at 141.
15. *Ibid.*
16. For instance, it has been over fifty years since legal aid was established in Ontario. For the history of the development of the more community-oriented clinics in Ontario from the latter part of the 1960s to 1980, see Frederick H. Zemans, “Community Legal Clinics in

costly ways of determining disputes, and the development of self-help materials. A broader understanding of access to justice, although still confined to the legal system, also recognizes that other factors may affect access to the legal system and, thus, to legal justice.¹⁷ In addition, access to justice today includes physical access and requires the removal of barriers through, for example, translation, sign language interpretation, and accommodation of other physical and mental challenges.¹⁸ There is also increasing recognition of cultural barriers to equitable access to the legal system, including the courts and administrative tribunals, which require a reshaping of institutions and processes.¹⁹ Most contemporary law commissions, at least in countries where these ideas are prevalent, would not consider their job complete if they had recommended a new way of resolving certain kinds of disputes, but had not included either recommendations to ensure equal access to the new forum for everyone or explanations about why they were not making recommendations to this effect.

While these efforts for, and understandings of, access to justice obviously require consideration of the needs and experiences of various communities, they are still focused on the legal system, including legal representation and the courts.

Ontario: 1980 – A Data Survey” (1981) 1 Windsor Y.B. Access Just. 230. Legal aid and community clinics are still an active element in the access to justice debate.

17. For a discussion of objective and subjective barriers, see Macdonald, “Access,” *supra* note 12 at 299-302. Objective barriers are said to include the complexity of law, while subjective barriers may refer to psychological barriers (but these may be the impact of factors such as age and race) and lack of knowledge.
18. In 2005, then chief justice of Ontario Roy McMurtry established the Courts Disabilities Committee in order to bring the courts into conformity with the *Ontarians with Disabilities Act, 2001*, S.O. 2001, c. 32. For a history of this process and the scope of the committee’s work, see Report of the Disability Issues Committee, “Making Ontario’s Courts Fully Accessible to Persons with Disabilities,” online: <<http://www.ontariocourts.on.ca/en/accessiblecourts.htm>>. The committee’s report refers in Part 4 to a 1982 study, by then Family Court Judge Rosalie Abella, of access to the legal system, rather than to the courts. It is worth noting, given the passage of time, the committee’s observation that “many of the recommendations Judge Abella made twenty-three years ago remain valid today and yet have not been implemented.”
19. For a relatively comprehensive account of how to achieve access to justice in courts and tribunals, see Judicial Studies Board, “Fairness in courts and tribunals: A Summary of the Equal Treatment Bench Book” (July 2004), online: <http://www.jsboard.co.uk/downloads/fairness_guide_final.pdf>. The Judicial Studies Board is responsible for training judges and members of administrative tribunals in England and Wales. This guide encompasses appropriate language and practices related to race, religion, children, disability, gender, and sexual orientation.

Access to justice may also be viewed more broadly to include ways in which law may be employed to advance or impede other forms of justice (such as social or economic justice). This view necessarily encompasses the impact of non-legal actors on the effectiveness of law. Primarily because they treat law as an isolated branch of knowledge and practice, some people are challenged by the idea that law commissions are prepared to step outside the comfort of the legal system. At the very least, however, the category's boundaries are porous, encouraging a reciprocal relationship with other categories of knowledge and practice.²⁰

As a result, one can trace the evolution of the meaning of access to justice from "issues about access to courts and lawyers," including an emphasis on legal aid, to consideration of "new institutional [or legal] arrangements," "procedural initiatives," and "community legal education and the prevention of disputes"—all of which share the notion of availability—to considerations of equality and fairness, or "the degree to which the citizen has access to and can participate in the procedures by which substantive law is made."²¹ The development of access to justice has also been summarized as a "trajectory from service-oriented, individualized strategies of access-to-justice, to more multi-dimensional, integrated approaches."²² A worthwhile law commission should engage in reform that facilitates access to justice across the spectrum, and certainly beyond the basic notions of access to the institutions of law, forms of dispute resolution, or even language. In my view, it is part of the core generic mandate of law commissions to study

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20. Those who resist the notion that law can be usefully informed by non-legal factors (or believe that law can act as if that is the case) are usually ready to acknowledge and promote the idea that law affects other areas of life, whether medical, business, sport, or merely neighbourhood fences. Law as colonizer is easier to accept than the loss of law's autonomy.
21. Martin Partington, "The Relationship between Law Reform and Access to Justice: A Case Study – The Renting Homes Project" (2005) 23 Windsor Y.B. Access Just. 375 at 376. Partington describes a project of the Law Commission of England and Wales, suggesting that it departs from most of the Commission's previous work in the broadness of its approach.
22. Bhabha, *supra* note 9 at 153, summarizing the waves of access to justice described by Mauro Cappelletti and Bryant Garth. See Mauro Cappelletti & Bryant Garth, *Access to Justice: A World Survey*, vol. 1 (Milan: Sijthoff and Noordhoff-Alphenaaandnrijn, 1978), E-161. See also Roderick A. Macdonald, "Access-to-justice in Canada Today" in Julia Bass *et al.*, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19; Mauro Cappelletti & Bryant Garth, "Access to Justice as a Focus for Research: Foreword" (1981) 1 Windsor Y.B. Access Just. ix. Cappelletti and Garth's three waves of access to justice are focused on the legal system, but Macdonald's notion of five waves goes much further afield.

how law impedes access to social and economic justice in order to develop recommendations about how law can be employed to advance this access.

II. WHY LAW COMMISSIONS SHOULD ADVANCE A BROAD CONCEPTION OF ACCESS TO JUSTICE

William Conklin has argued that access to legal justice is premised on the separation of “valid legal rules/principles” from the non-law realm where “[j]ustice dwells,”²³ and is thus invisible from the legal perspective. It is not possible to attain full, real, or meaningful justice, or to even know what it is, by limiting one’s focus to the law.²⁴ I agree that law commissions can neither identify justice in its fullest sense, nor, therefore, make recommendations to achieve it, if they do not incorporate frameworks and experiential and academic knowledge from outside the world of law into their work concepts.

Although law commissions will vary in the extent to which they do operate within an expanded concept of access to justice, in order to be effective, their work must at times transcend the “boundaries of legal reality,” as identified by Conklin; that is, they must move outside these institutions (courts, legislatures, subordinate agencies, and government officials) and concepts (doctrines, rules, principles, and policies) in order to enter the non-legal realm, which is the place where justice can be realized. I add a caveat here, however: to be clear, although I argue that law commissions should be informed by, and make recommendations relevant to, a broad meaning of access to justice—one that is defined by social or economic conditions, for instance—I part company with those who contend that this is *all* that law reform commissions should be about, and that they should not engage in the more prosaic law reform in areas that might be described as “lawyers’ law.”²⁵ While one might think that this kind of reform

23. William E. Conklin, “Whither Justice? The Common Problematic of Five Models of ‘Access to Justice’” (2001) 19 Windsor Y.B. Access Just. 297 at 297.

24. *Ibid.*

25. Thus, the Law Commission of Canada (LCC) “did not focus its efforts on ‘moving periods and semi-colons’ so as to change the form of law,” but rather saw that “the point of [its] work was to engage not in law *re-form*, but in law *re-substance*,” unless the “*re-form* brought about substantive change or symbolic reorientation of the law.” Macdonald, “Jamais,” *supra* note 1 at 132 [emphasis in original]. I do appreciate that sometimes a little reform is not a step along the way to a broader justice, but rather may be an impediment; nevertheless, for reasons I refer to below, I also appreciate that a law reform commission is “of this world” and

can be accomplished quite adequately by government legal branches, there are times when an independent review is useful.

Conklin's analysis helps to explain why law commissions must be prepared to unpack the outward legal manifestations of socially determined relationships, entitlements, and other legally relevant categories. Law commissions have not only an "is," but also an "ought" responsibility if they are to play a role in enhancing access to justice (or, more accurately, to make recommendations with the potential to achieve that objective). Conklin argues that while access to justice is meant to flow from the application of the five models that he posits, it in fact does not. This is because "justice," in all cases, is actually external or anterior to the legal manifestation identified by the model.

In Conklin's first model, "law as procedure," access to justice is thought to occur if the procedure is fair; next, the "sources" model assumes that it is sufficient if the relevant decision emanates from an appropriate institution that has acted within its jurisdiction. In both cases, these are models that apply in large measure to administrative review. There is, however, no assessment of whether the substantive outcome is actually "just"; substantive justice is merely inferred from fair procedure or because the appropriate institution made the relevant decision. The other models raise different concerns about justice. The "semiotic" model posits that justice occurs when people are able to use legal language and it is the language (*i.e.*, "the narrative structure") that determines what is legally authoritative or even what exists for legal purposes.²⁶ Yet one is not expected to ask why the language is considered authoritative; that is, the social reality behind the language, or signs representing the social reality, are out of bounds and perhaps unknown. The "unspoken social practices of a community"²⁷ form the core of Conklin's fourth, "social convention" model: they can illuminate how practices deviate from what is expected and, thus, from justice. Unwritten practices that deviate from the "foundational unwritten social conventions"²⁸ undermine justice, yet these conventions are unenforceable legally (here one thinks of constitutional conventions—Conklin refers to these—and, to some extent, of the foundational constitutional principles, although the legal status of the latter

not somehow above or beyond it.

26. Conklin, *supra* note 23 at 306.

27. *Ibid.* at 309.

28. *Ibid.* at 310.

is rather more ambiguous). They become enforceable only when reduced to writing, at which point they become legal rules or legal language alienated from their origins.

The last model links “law and ...,” where the ellipsis is completed by a discipline other than law. Under this model, access to justice is informed by the insights from other disciplines; in this case, the “other” discipline is “exterior to legal reality.”²⁹ This model is particularly relevant to the multidisciplinary research a commission must undertake in order to inquire into questions relating to access to justice in its fullest sense. Even though the “law and ...” model suggests that justice can be ascertained, justice remains somewhere other than law.

Pessimistically, Conklin concludes that in all of the legal models, justice is unknowable by definition and, if we restrict our search for justice to the legal world, unattainable.³⁰ I do not feel as gloomy about whether one can attain some type of justice by using only legal concepts. There is *something* to be gained within the legal sphere, although at the risk that this “something” will be perceived as a full account of what justice means in the particular context. I do find Conklin’s models useful, however, in explaining how justice in the broadest sense cannot be ascertained or achieved only through the legal system itself. Conklin posits his models as abstract, discrete, and bounded categories (they are, after all, models). Under the source model, for example, law is neither concerned with the events that led to the creation of the institution, nor with what concept of “goodness” exists beyond the structure.³¹ This analysis forces one to examine where law begins and ends, but I would argue that the boundaries are in reality less dense than the models portray, and that it is in the interstices between these models that law commissions can make some of their most important contributions. To do so, however, they must accept, as Conklin argues, the legal system as part of a larger confluence of events and disciplines, and bring these to bear on their analyses of what were initially defined as “legal problems.” At best, an analysis based only on the law can result in only partial access to justice.

29. *Ibid.* at 311.

30. Although Conklin states that he cannot provide “a blueprint” that will disclose “the experiential meanings which ... a [legal] structure and its language conceal,” he can “offer the questions.” *Ibid.* at 316.

31. *Ibid.* at 303-04. Both are “oughts,” or political in nature.

Not everyone believes that law commissions have a major role to play in addressing substantive injustice (*i.e.*, with respect to law that might require revising rather than mere amending), since “[g]oals (and the concerns of substantive justice) are relegated to the realm of politics, while means (and the concerns of procedural justice) come to dominate law’s empire.”³² On this view, to the extent that law commissions are intended to address “law” and not “politics,” their mandate is restricted to means, rather than goals—to accepting the system as given in fundamental respects rather than as open to reconceptualization. The distinction has been pithily articulated as speaking of access to justice as “rather less of substantive steps to the creation of [a] ‘just society’ (whatever that may be) and rather more of finding direct and affordable routes to a remedy for presumed wrongs.”³³ It is, furthermore, relatively easy to talk about increasing access to justice through the legal system (although not necessarily easy to do), and much harder to sort out how to advance more complex, multi-faceted access to justice.

A broader understanding of access to justice requires questioning the existing legal framework in order to incorporate the worldviews and experiences of previously excluded groups.³⁴ As Monture-OKanee and Turpel state, it is necessary to engage in “a more fundamental or first-principles discussion of justice.”³⁵ While this fundamental questioning is particularly apposite with respect to First Nations, it is also appropriate to other contexts for the purpose of determining whether the principles behind legal institutions and principles are—or ever were—valid, or whether they have an undue and unnecessarily negative impact on identifiable communities. It *may* also require rejecting legal categories in order to capture the sub-text of an actual experience with law.

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32. Macdonald, “Access,” *supra* note 12 at 293. Macdonald recognizes that procedural changes may have substantive consequences, although they may be unintended and often undesirable, a situation he describes as “less justice” for “more access.”
 33. Roland Penner, “Access to Justice and Law Reform” (1990) 10 Windsor Y.B. Access Just. 338 at 338. Writing nearly twenty years ago, Penner refers to the mandate of law reform commissions as limited to the “so-called technical aspects of the law” (at 339).
 34. Reg Graycar & Jenny Morgan, “Law Reform: What’s In It for Women?” (2005) 23 Windsor Y.B. Access Just. 393 at 398. Lest this now seem obvious, the authors refer to studies by the Law Commission of England and Wales and the New South Wales Law Reform Commission (NSWLRC), which failed to take the broader view; alternatively, Graycar and Morgan cite the Victorian Law Reform Commission as taking an appropriate approach.
 35. P.A. Monture-OKanee & M.E. Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) U.B.C. L. Rev. 239 at 241.

Law has been shown to have feet of clay. Put another way, it has been democratized, made more accessible, and treated as one of a number of disciplines that affect people's lives. Despite attempts to regulate different areas of our lives and to establish borders delineating acceptable and unacceptable behaviour, law finds itself outrun by technological advances. It is recognized, too, that government is only one actor that influences how law is received and implemented.³⁶

Law reform commissions are only one in a "crowded field" of law reform agents that vary considerably in their format and function;³⁷ to earn their keep, they must be qualitatively different from these organizations. Put bluntly, "[s]o much law change is driven by political necessity, perceived electoral advantage and special interest pleading. There are abundant opportunities for reactions to those criteria. For law commissions to justify their existence, they must be in a different league."³⁸ They must be neither too ethereal, nor too pedantic; they must be just right, and "more than ... a de facto academic research body or the

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36. It is beyond the scope of this paper to consider the reasons for the change in law's status. One can look at academic criticism, from the earliest critical legal realism movement through to feminist and critical race theory, which questions either law itself or the fundamentals of the current law; a general dislike of intellectualism and "elitism"; the role of other disciplines in *Charter* jurisprudence (a reflection of the much earlier Brandeis brief in American constitutional cases); the judges' own efforts to emphasize their "human side" and make the institution of the judiciary more "accessible"; infamous miscarriages of justice; and a culture that generally treats claims to expertise as inappropriate and futile, and promotes the democratization of judgment. In many ways, these developments in law reflect those in other disciplines and in society at large. For example, history loses its authority when it is recognized as being "history" as defined by the winners and not by the losers, or when it is expanded to explore the history of "ordinary" people.
37. David Weisbrot, "Annual Report 2004-2005 – Comments from the President," online: ALRC <<http://www.austlii.edu.au/au/other/alc/publications/reports/101/3.html>> [Weisbrot, "Annual Report"]. Weisbrot, President of the ALRC, identifies "government departments, other statutory authorities, parliamentary committees, interdepartmental committees, royal commissions, eminent persons' groups, non-government organizations, university-based law reform institutes, private consultants, and other standing and ad hoc bodies" as each having some kind of mandate to engage in law reform. See also Neave, "Australia," *supra* note 6 at 351-52.
38. Justice Bruce Robertson, "Law Reform: What is knitting? How do we stick to it?" (Address delivered to the Association of Law Reform Agencies of Eastern and Southern Africa Conference, Cape Town, 15-17 March 2005) at 16, online: NZLC <<http://www.lawcom.govt.nz/SpeechPaper.aspx>> [Robertson, "Law Reform"].

clone of law advisers in government departments.”³⁹ Some of the distinctiveness is reflected in structure and mandate: law commissions are meant to have some degree of permanence; they are dedicated solely to law reform; they usually have their own staff; they undertake the study of many different areas of law and policy; they are independent, both of government and of interest groups;⁴⁰ they tend to perform their work in public through the release of discussion papers and interim reports; and they engage with affected communities, professional and otherwise, in the study of an issue and the development of recommendations.⁴¹

It has been suggested that the ideal for law reform commissions is to establish themselves as “an element in the constitutional arrangements for legal renewal ... [as] part of the furniture,”⁴² or, in other words, as a part of the legal landscape of liberal democracies that is accepted as necessary. History, however, suggests that this is far from the case.⁴³ Even if they depend on the attorney

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39. Justice Bruce Robertson, “Tradition and Innovation in a Law Reform Agency” (Address delivered to the New Zealand Centre for Public Law, Victoria University, Wellington, 23 July 2002) at 2, online: <[http://www.victoria.ac.nz/nzcpl/Files/Occ papers/Robertson web paper.pdf](http://www.victoria.ac.nz/nzcpl/Files/Occ%20papers/Robertson%20web%20paper.pdf)> [Robertson, “Tradition”].
40. Put another way, they do not have a “professional constituency”; this was how Macdonald described the LCC. Macdonald, “Jamais,” *supra* note 1 at 138.
41. The nature of most law commissions becomes clearer when contrasted with the Uniform Law Conference of Canada (ULCC), which is also devoted to law reform. The ULCC’s website explains that “[t]he Conference was founded in 1918 to harmonize the laws of the provinces and territories of Canada, and where appropriate the federal laws as well. It also makes recommendations for changes to federal criminal legislation based on identified deficiencies, defects or gaps in the existing law, or based on problems created by judicial interpretation of existing law.” Online: <<http://www.ulcc.ca/en/home/>>. The ULCC, while a permanent law reform body funded by government, nevertheless limits itself primarily to recommending amendments to statutes, because it lacks the resources and, perhaps, the inclination to engage in significant research and public consultation; its members are civil servants whose work is more or less behind the scenes.
42. Justice Michael Kirby, “Law reform and human rights – Scarman’s great legacy” (2006) 26 L.S. 449 at 463 [Kirby, “Law reform”]. Partnerships and collaboration with other actors with a similar mandate, reflecting “recognition of the value of the institution by other leading legal actors,” enables the commission to establish itself as part of the legal landscape. Macdonald, “Jamais,” *supra* note 1 at 119. Of course, sometimes becoming “part of the furniture” is taken for granted, and this is not something that a law commission desires.
43. On the ebb and flow of support for law commissions, see Gavin Murphy, *Law Reform Agencies* (Department of Justice Canada, 2004), 2.1.4, online: <<http://www.justice.gc.ca/eng/pi/icg-gci/lr-rd/index.html>>; Neave, “Australia,” *supra* note 6; and Handford, *infra* note 47.

general to refer subjects for study to them, law commissions are able to address matters that governments have neither the time nor inclination to address. Although one might name characteristics necessary to a successful law commission in addition to those above, two intangible elements are particularly crucial: “process expertise” (*i.e.*, understanding the process of law reform in the broadest sense), and “corporate identity” (*i.e.*, the agency as a distinct entity, composed of members of a community with a clear appreciation of its mandate).⁴⁴ A commission must also understand the legal and political contexts in which it operates,⁴⁵ and form both domestic and international partnerships.⁴⁶ It should be acknowledged that a law commission’s decision to pursue the larger access to justice questions is unlikely to be divorced from what else is going on in its society, and whether it will be perceived as in step with these developments or as a rogue organization. When there is a general commitment to extending rights and viewing justice broadly, law commissions may feel more confident in approaching their mandate broadly,⁴⁷ and they may receive more references from the attorney general with “a strong social policy emphasis.”⁴⁸

I suggest that at least part of the answer to the question of what it means for a law commission to distinguish itself lies in how it perceives access to justice.

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44. The terms “intangible,” “process expertise,” and “corporate identity” are Sandra Petersson’s. See Sandra Petersson, “Law Reform Agencies: The Essential Elements” (Paper presented to the Australasian Law Reform Agencies Conference, Wellington, New Zealand, 13-16 April 2004) at 2-3, online: NZLC <<http://www.lawcom.govt.nz/SpeechPaper.aspx>>.
45. Macdonald, “Jamais,” *supra* note 1 at 119.
46. Justice Micheal Kirby, “Law Reform – Ten Attributes for Success” (Address presented to The Law Reform Commission of Ireland, Dublin, 17 July 2007), online: The High Court of Australia <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_17jul07a.pdf> [Kirby, “Ten Attributes”]; H. L. Awaseb, “Commentary on Sandra Petersson’s Paper Titled: ‘Law Reform Agencies – The Essential Requirements’” (Commentary presented at the Biennial Australasian Law Reform Agencies Conference, Wellington, New Zealand, 13-16 April 2004), online: NZLC <[http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/06a9e58f-befd-45d7-9df8-3ac07719aa76/Session 8B - Awaseb comment.pdf](http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/06a9e58f-befd-45d7-9df8-3ac07719aa76/Session%208B%20-%20Awaseb%20comment.pdf)>.
47. As Neave suggests, interest in and support for law commissions seems to go through cycles, and appears related to wider societal developments toward greater justice. Neave, “21st Century,” *supra* note 1. See also Weisbrot, “Annual Report,” *supra* note 37. For details about the decline of law reform agencies in Canada, Australia, New Zealand, and the United Kingdom, see Peter Handford, “The Changing Face of Law Reform” (1999) 73 *Austl. L.J.* 503.
48. This was the experience of the ALRC, according to its president. See Weisbrot, “Annual Report,” *ibid.*

At one time, commissions were informed only by legal considerations, developed projects identified by the legal profession (including judges), and consulted only the legal profession. Their projects were determined “more in response to lawyers’ dissatisfaction with the law and its processes than to the injustices felt by citizens.”⁴⁹ It can generally be said that this exclusive approach to law reform by standing law reform commissions is widely considered to be long outmoded. Rather, the spectrum of approaches to law reform today runs from “philosophy (informative, contemplative and foundational) [to] politics (immediately relevant and responsive).”⁵⁰ And some would argue that responding to the more immediate needs of government cannot be at the expense “of *not* taking things for granted; of questioning the conventional wisdom; of *not* accepting that our existing laws, structures and institutions are natural and inevitable—when in fact they are historically contingent.”⁵¹

To the extent that the mandate of law commissions, either explicitly or implicitly, is to enhance access to justice, they must decide whether or not they think of justice, unmodified, as not only a legal term, but also as a social concept that has—or that may require—a significant legal component. For law commissions to successfully engage with the broadest terrain of access to justice, they must adopt particular approaches to, and modes of analysis in, the work that they do.

III. WHAT DOES IT MEAN TO SAY THAT LAW REFORM COMMISSIONS SHOULD ADVANCE ACCESS TO JUSTICE?

From an initial emphasis on the narrow, focused, and often technical or black letter law questions that were the concern of earlier law reform bodies, law commissions have evolved into bodies that are also concerned with large social questions requiring multi/interdisciplinary empirical research and non-legal

49. Murphy, *supra* note 43.

50. Creative Symposium Report on the founding of the Law Commission of Ontario, 30 November 2006, cited in Law Commission of Ontario, “LCO Strategic Plan 2008-2012” (7 February 2008) at 5, online: <<http://www.lco-cdo.org/en/documents/LCOstrategicplan-final-april08.pdf>>.

51. David Weisbrot, “The Historical Necessity of Law Reform” (The Alex Castles Memorial Lecture in Australian Legal History, delivered at Flinders University Law School, 24 August 2006) at 6 [emphasis in original], online: ALRC <<http://www.alrc.gov.au/events/speeches/DW/20060824.pdf>> [Weisbrot, “Historical”].

expertise.⁵² They are well-suited to address a range of issues, including those at opposite ends of the spectrum of technical and social issues: “[t]hese include boring but essential tasks of statutory consolidation and revision; large tasks touching the interests of many governmental and private bodies; and projects necessitating consultation of the kind that the more traditional committees of the legislature and the Executive Government are ill-suited to perform,”⁵³ such as the impact of the law on biotechnology. The Australian Law Reform Commission (ALRC) has, in the words of its president, worked on projects “rang[ing] from the modernisation of old laws to such ‘over the horizon’ projects as gene patenting and the protection of human genetic information—where the ALRC worked with leading scientists and policy makers to identify innovative solutions to new and complex problems.”⁵⁴

Some law commissions have indeed conceived of access to justice ambitiously. The Law Reform Commission of Canada (LRCC) was instructed, when it was created in 1971, to consider “the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.”⁵⁵ This is a relatively broad mandate, and one that the LRCC addressed without hesitation in its early days. Its role, its first chairperson said, was to “take into account, articulate and help to shape [the] common values” that underlie the “shared morality” of the law and society, “by widespread public argument and by discussion in depth.”⁵⁶ But the LRCC’s approach, under different leadership, eventually became “more pragmatic and less broadly philosophic.”⁵⁷ Many years

52. On the function of early law reform bodies, see Neave, “21st Century,” *supra* note 1, noting that “[t]he early work of State law reform bodies [prior to the 1970s and 1980s] focused on repeal of antiquated laws and the reform of areas of ‘black letter’ law, which were unlikely to excite the interest of politicians or arouse community concerns.” See also Murphy, *supra* note 43, 2.1.4.

53. Kirby, “Law reform,” *supra* note 42 at 465. See also Justice Michael Kirby, “Law Reform & Human Rights – Scarman’s Great Legacy” (Lecture delivered to the Law Commission of England and Wales, Gray’s Inn, London, 20 February 2006) at 41, online: <www.lawcom.gov.uk/docs/kirby_lecture.doc>.

54. Weisbrot, “Annual Report,” *supra* note 37.

55. *Law Reform Commission Act*, R.S.C. 1969-70, c.64, s.11.

56. Hurlburt, *supra* note 7 at 183, quoting Law Reform Commission of Canada, *Third Annual Report 1973-1974: A True Reflection* (Ottawa: Information Canada, 1974) at 8-9.

57. Hurlburt, *ibid.* at 189.

later, the LRCC's successor, the Law Commission of Canada (LCC), was well known for its innovative approach to a far-reaching statutory mandate, which was reflected in its decision to jettison the usual categories of law in favour of relationships (*i.e.*, personal, social, economic, and governance relationships).⁵⁸

The LRCC's mandate, its practice in its early days (which is now thirty-five years ago), the LCC's mandate and practice, Macdonald (who was the major influence on the LCC's practice), and Neave all interpret the contemporary mandate of standing commissions as asking and answering difficult questions about the legal framework of our society, or how law interacts with other ways of ordering society. Often, this requires a law commission to approach a project with the willingness to ask the questions that will permit it to reveal the underpinnings of the law, to—in the words of Monture-OKanee and Turpel—go back to first principles, or to address the events behind the process, including the structures, the doctrines, and the language that Conklin identifies.⁵⁹

This means that law commissions will often make recommendations about policy issues arising from a particular project. While government ultimately determines its own policy direction—and, in the case of referrals to commissions, may frame the reference with an implicit policy direction—this does not mean that there will not be policy questions to consider. As two former members of the New South Wales Law Reform Commission observed, “[p]olicy analysis and development is something that law reform commissions do very well.”⁶⁰

58. The LCC explained that “[t]he Commission intends to pursue its strategic direction by structuring its research around four complementary themes: personal relationships; social relationships; economic relationships; and governance relationships. These Strategic Themes were distilled from ideas suggested by the broad spectrum of groups and individuals initially consulted by the Commission. They were then confirmed by the Advisory Council.” Online: <http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/about/strategic-en.asp#themes>.

59. Sometimes urgency or resources, for example, direct the law commission along a simpler route. And, sometimes, what is needed is not “the big complex project,” but the one that provides a useful service to practitioners and their clients by simplifying or clarifying the law in an area.

60. Justice Michael Adams & Peter Hennessy, “Law Reform Commissions: Is there a place for the principled study of criminal law issues?” (Paper presented to The International Society for the Reform of Criminal Law, 15th International Conference: Politics and Criminal Justice, Canberra, Australia, 26-30 August 2001), online: NSWLRC <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ph01>>.

In reality, even if they take a broad view of access to justice, most commissions prefer a mix of projects. They want to assure credibility with several different constituencies: the government, the legal community, disadvantaged groups, and the general public, each of whom may have different expectations of the law commission. It is important for commissions to produce final reports, and multi-dimensional projects do take time. Therefore, not only are shorter, technical projects useful in themselves, even if they address a narrower point of justice, but they may also help a commission maintain a longer, more complex strategic direction. A former president of the NZLC has said that the Commission's adherence to "a broad programme in such conventional areas as public law, commercial law, [and] criminal law [allows it] ... more readily ... to resist unfair criticism when engaging in more controversial topics, such as Treaty work."⁶¹

These different approaches to law reform take us back to different conceptions of access to justice. Just as the meaning of access to justice has expanded, so has the scope of the mandate of most law commissions. In neither case has the original view (the meaning of access to justice or the mandate of law commissions) disappeared. On the contrary, in both cases, the work contemplated by these traditional conceptions remains important, although how it is accomplished might be slightly different compared to the past.⁶² Even in these more narrowly defined contexts, there is a recognition that the centrality of law has diminished; nevertheless, its legitimacy and significance remains paramount.

The appeal to extra-legal considerations, whether in the framing of the question, the research, the analysis, or the commission's recommendations, does not mean ignoring law; rather, it directs attention to "the many legal consequences of how (and with whom) we order our lives" within particular contexts.⁶³ Law commissions are *law* commissions, and regardless of how broadly they conceive their mandate, they are about law. If they want to destabilize law, then it should be with the intent of transforming law to make it more equitable—that is, more responsive to all citizens and to everyday life. Yet commissions must operate with the knowledge that for law to have legitimacy, it must not

61. Baragwanath, *supra* note 1 at 13.

62. In both cases, at least some consideration will likely be given to the experiences and needs of various communities (*e.g.*, the poor, racial, gendered, disabled), but in both cases the results will be well within a legal paradigm.

63. Graycar & Morgan, *supra* note 34 at 400. Graycar and Morgan's example is family law.

only keep pace with changing societal conditions and norms, but must also, at times, lead those changes. Law must act as an agent of cultural change, as well as reflect the evolving culture of any society. In a liberal-democratic society, law reform is a deliberate, progressive activity that seeks to ensure that law is accessible and equitable. From this perspective, law reform is a normative activity. Thus, at its best, it goes beyond tinkering or ensuring that specific legislative provisions are not out of date (although it is also, of necessity, appropriately involved in such work); in its more ambitious projects, it contemplates the reconceptualization of legal frameworks and the integration of law with other disciplines.

IV. WHAT MUST LAW REFORM COMMISSIONS DO TO ADVANCE A LARGER APPRECIATION OF ACCESS TO JUSTICE?

Conklin's models of access to justice all fail to reveal the larger confluence that includes non-law (*i.e.*, social, economic, and political) dynamics. A law commission has the capacity to understand this confluence through its processes of consultation, research, and analysis. If citizens are to participate in the development of substantive law, and "multi-dimensional, integrated approaches"⁶⁴ are to be employed to achieve access to justice, there must be meaningful community participation in law reform. Similarly, multidisciplinary research, analysis, and advisory work that is directed at both legal and non-legal actors will help to build bridges between the legal and non-legal realms.

It has been said that "good law reform work presupposes that regard will be had to the way in which the law operates in practice; that is, how it impacts on people's lives and on society generally."⁶⁵ One might add that it is equally important to consider how societal influences affect law. Most law commissions studying the question of spousal abuse would not recommend longer jail terms for abusers without having developed an understanding of, *inter alia*, who commits abuse and who suffers it, why abuse occurs, whether imprisonment has an impact on the abusers, what options abused spouses believe they have, the message imprisonment sends about the phenomenon of spousal abuse, and how both the abused spouse and other members of society respond to increased prison sentences.

64. Bhabha, *supra* note 9 at 153.

65. Michael Tilbury, "Why Law Reform Commissions?: A Deconstruction and Stakeholder Analysis from an Australian Perspective" (2005) 23 Windsor Y.B. Access Just. 313 at 323.

But “good law reform work”⁶⁶ requires more. Researchers investigating the use of the legal system by abused women in immigrant communities, for example, found that cultural norms, language barriers, and “perceived racism in the criminal justice system and social service agencies” were only some of the extra-legal factors that discouraged women from exercising their legal rights.⁶⁷ Any attempt to increase access to justice for these women that considered the cost of access to the legal system, to forms of dispute resolution, and to specific recommendations (such as increased prison sentences), without taking these other factors into account, would fail in its objective and could create false impressions or expectations about the justice system. In making recommendations about access to justice in this context, it would also be necessary to address the other issues at stake. Factors external to law can make even “good” law inaccessible, and can make a mockery of law’s efforts to deal with a problem that has been framed as legal, but which is really about power relations, economic disadvantage, or some other “law and ...” issue.

Many commission studies address non-legal aspects of life that have an impact on how effective law can be. A minor example can be found in the NSLRC’s 1995 report on domestic violence, which recommended not only changes to the *Criminal Code* (as well as other legislation) and different court structures, but that there also be “safe and affordable housing” for women who are leaving a violent partner.⁶⁸ There is nothing particularly startling or novel about this, but in addition there are those who wonder what there is about housing in this context that makes it “law” and, thus, an appropriate law commission recommendation. Justice Ronald Sackville, who served with the ALRC and as a royal commissioner, appears to have a narrow conception of law commission work. In his view, it is not within the mandates of royal commissions to inquire into issues that are “well beyond the boundaries of law reform.”⁶⁹ He mentions that

66. *Ibid.*

67. Baukje Miedema & Sandra Wachholz, “A Complex Web: Access to Justice for Abused Immigrant Women in New Brunswick” (March 1998) at v (Executive Summary), online: Government of Canada Depository Services Program <<http://dsp-psd.pwgsc.gc.ca/Collection/SW21-24-1998E.pdf>>.

68. Law Reform Commission of Nova Scotia, *From Rhetoric to Reality – Ending Domestic Violence in Nova Scotia: Final Report* (Halifax: Law Reform Commission of Nova Scotia, 1995) at 89.

69. Justice Ronald Sackville, “Law Reform Agencies and Royal Commissions: Toiling in the Same

the recommendations of the Australian Deaths in Custody Commission contained “topics that would not ordinarily be found in reports of law reform agencies, such as proposals for improving housing and infrastructure for indigenous communities and strategies for minimising the social and health problems Aboriginal people experience in consequence of alcohol use.”⁷⁰

Sackville’s view represents neither the consensus nor the more desirable approach. Today, law commissions make recommendations directed not only at government, but also at industry, non-profit organizations, and other sectors.⁷¹ Usually, they recommend new legislation, amendments to legislation, or, less often, that there be no change to legislation. In addition, commissions propose the implementation of, *inter alia*, “new dispute resolution options; official standards and codes of practices; voluntary industry codes; education and training programs; [and] better coordination of governmental (and intergovernmental) programs.”⁷² Even though it does not challenge law conceptually,⁷³ this wider approach to recommendations may contribute to a broader understanding of access to justice, since it recognizes that changes to law alone are unlikely to

Field?” (Paper presented to the ALRC, 30th Anniversary Symposium, Darling Harbour, 9 June 2005) at 13, online: Federal Court of Australia <http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_sackvillej.html>. Another example that Justice Sackville cites is the Fitzgerald Inquiry in Queensland, which “made far-reaching recommendations designed to restore transparency and integrity to the Queensland electoral system and to the public administration of the State.” He adds that “[t]his is hardly a topic that is likely to be entrusted to a law reform agency” (at 13).

70. *Ibid.* at 14.

71. Recommendations in the ALRC’s report on the federal civil justice system, for example, were directed not only at the Attorney General, but also at the courts and tribunals, the Parliament, educational institutions, legal professional associations, and other bodies. See David Weisbrot, “What’s the Value of a Full Time Standing Law Reform Commission? (You mean besides independence, quality scholarship, extensive public consultation, corporate memory, cost effectiveness ... ?)” (Paper presented at the Australian Law Reform Agencies Conference (ALRAC), Darwin, 20 June 2002), online: <<http://www.alrc.gov.au/events/speeches/DW/20020620.pdf>> [Weisbrot, “Value”]; Australian Law Reform Commission, *ALRC Report 89: Managing Justice: A review of the federal civil justice system – Summary of Recommendations* (Sydney: JS McMillan, 2000), online: <<http://www.austlii.edu.au/au/other/alrc/publications/reports/89/sumrec.html>>.

72. Weisbrot, “Value,” *ibid.* at 42.

73. While the recommendations of this broader approach go beyond law (primarily, in the particular case, to private actors), they do not involve the establishment of new legal paradigms. Hence, there is no challenge to law at the conceptual level.

respond to the needs of many citizens. It does not, however, change the fundamental nature of a law commission's objective: to make the law more effective in advancing access to justice by placing the law and its operation in context, with respect to both determining the "real" problem and making recommendations to "solve" it.

The president of the ALRC, David Weisbrot, sees in the decline of law's centrality an opportunity for law commissions to engage, if not in a wholly new kind of law reform, then in reform that is far more in keeping with the dynamic and ambivalent nature of many contemporary societies. He has added, to what he describes as the "modernist" characteristics (permanent, full-time, independent, and authoritative), other characteristics that he describes as "post-modernist" and "essential to the success of a contemporary law reform agency": generalist, interdisciplinary, consultative, and implementation-minded.⁷⁴ These latter characteristics are among those commonly cited as necessary for a successful commission and, at the same time, among those that differentiate law commissions from the myriad bodies engaged in law reform. Thus equipped, commissions can respond to the "questioning of traditional authority"; to "a greater appreciation of the complexity of social institutions and problems" that lead to situations for which "no easy compromise or consensus solution is possible"; to recognition that power lies not only with government, but with other institutions; to the understanding that solutions to problems are found not only in government, but in the public, private, and "community-based" sectors; to an appreciation that not all disputes are "legal"; and to a greater desire for, and commitment to, "genuine public participation in civil society and public policy-making."⁷⁵

Not all welcome this challenge. For example, Weisbrot's compatriot at the NZLC, Sir Geoffrey Palmer, views these developments as a threat to law commissions. He describes "post-modernism" as "an infection" that "constitutes a serious challenge to law reform," because it is "marked by scepticism concerning

74. Weisbrot, "Historical," *supra* note 51 at 10-11. The "modernist" characteristics had been identified in 1970 as reflecting "the qualitatively new principle" of law reform that "the *whole* body of the law stood potentially in need of reform, and [that] there should be a *standing* body of appropriate professional experts to consider reforms continuously." See Geoffrey Sawyer, "The Legal Theory of Law Reform" (1970) 20 U.T.L.J. 183 at 183 [emphasis in original], cited in Weisbrot, "Historical" at 9.

75. Weisbrot, "Historical," *ibid.* at 10.

the foundations of knowledge, ... points out the insoluble difficulties in postulating coherent unitary texts or sets of legal principles,” and “denies that there is any independent authority in the law.”⁷⁶ Deconstructing texts, he believes, “suggests that everything is contingent and unstable,” as it “destabilise[s] binary oppositions.”⁷⁷ For him, these developments undermine trust in law and thus in legal solutions, and this is the opposite of the vision underlying the formation of law reform commissions as a means by which the law could be made more “accessible, understandable, coherent and administered fairly by institutions that are neutral and behave with integrity.”⁷⁸

As articulated by the presidents of the Australian and New Zealand law commissions, respectively, this debate goes to the heart of the capacity of law commissions to contribute to access to justice and to their willingness to travel beyond the legal realm to the “ought” that can be found only in the non-legal realm.

Sir Geoffrey Palmer’s view suggests that law can operate effectively in relative isolation and that it is sufficient for law to be perceived as being “correct” for it to be effective. We look only to the law in order to determine whether or not we have attained “justice,” and to measure “access to justice.” Access to justice may therefore be defined as “access to law” or “access to the legal system,” with an emphasis on making the law clearer or minimizing economic barriers to the use of the law. These are not insignificant goals, and reflect ongoing challenges that need to be addressed seriously. Focusing even on these issues would require resources and an understanding of who is affected negatively by, and who benefits from, complex laws and expensive proceedings.

The Weisbrot attitude reflects a different mindset: it does not fear that other influences will diminish law, but believes, rather, that law can be made more effective through “opening-up,” whether through consultation or through interaction with other disciplines.⁷⁹ This approach is inclined to view a law

76. Geoffrey Palmer, “Law Reform and the Law Commission in New Zealand After 20 Years – We Need to Try a Little Harder” (Address delivered to the New Zealand Centre for Public Law, Victoria University of Wellington, 30 March 2006) at 7-8, online: NZLC <<http://www.lawcom.govt.nz/SpeechPaper.aspx>>.

77. *Ibid.* at 8.

78. *Ibid.* at 11.

79. In Canada, the LCC’s governing statute most closely reflected the so-called “post-modern” model. It specified that the advice the “independent” commission was to provide would be

commission's "corporate identity" as consonant with a concept of access to justice that views legal justice as only part of the puzzle, and only part of the ultimate goal of broad societal changes. It encourages law commissions to develop the capacity to meet Conklin's challenge by including the extra-legal notions of justice and the impediments to justice that a blinkered focus on law will conceal. In other words, it will help commissions make recommendations that are more likely to enhance a broad concept of access to justice.

Public participation, multiple normative orders, and inter/multidisciplinary analysis are interrelated, and they are all crucial to taking a broader view of access to justice. The existence of multiple normative orders in a pluralist society, such as different sources of law or authority, requires a commission to engage with a far wider range of communities than ever before. Public participation is a form of research that reveals different methods of viewing and categorizing law, and the nature of the commission's analysis and recommendations must reflect that diversity in experience and knowledge, whether academic or experiential. As the first chairperson of the ALRC observed, there is a "need for a new legal beginning in the relationship between the ethnic majority of settlers and their descendants and the indigenous peoples of Australia."⁸⁰

One of the major sources of distinction between older law reform bodies and some contemporary entities engaged in law reform, including most law commissions today, is the nature of the consultation process, which involves who is consulted and how. The New Zealand *Law Commission Act 1985* is unusual in requiring the NZLC to "take into account te ao Maori (the Maori dimension)

based on the knowledge and experience of a wide range of groups and individuals; "the commission's work should be open to and inclusive of all Canadians and the results of that work should be accessible and understandable"; it should use a "multidisciplinary approach"; it should be "innovative" in its methodology, its "consultative processes," and all aspects of its work; and it should consider, along with cost-effectiveness, "the impact of the law on different groups and individuals in formulating its recommendations." See *Law Commission of Canada Act 1996*, S.C. 1996, c. 9, Preamble. Among other aspects of its mandate, it was enjoined, under s. 3, to advise on "the development of new approaches to, and new concepts of, law." The Act remains in force, although funding to the LCC was cut in 2006 and it is no longer able to operate.

80. Justice Michael Kirby, "Reforming Thoughts Across the Tasman" (Paper presented to the Law Commission of New Zealand, Twentieth Anniversary Conference: "What is Distinctive about New Zealand Law and the New Zealand Way of Doing Law?," 25 August 2006) at 11, online: NZLC <<http://www.lawcom.govt.nz/SpeechPaper.aspx>> [Kirby, "Tasman"].

and [to] also give consideration to the multicultural character of New Zealand society.”⁸¹ This requirement has been described as a “wide mandate” that “marked the new Commission out from virtually every other law reform agency.”⁸² There is a relationship between the answers to the questions raised and the reform body’s capacity to contribute to access to justice. Indeed, it has been argued that it is part of carrying out the law reform mandate in an ethical way.⁸³ On the other hand, the independence of the law commission is a *sine qua non* of its effectiveness and legitimacy, and this independence must be not only from government, but also from interest groups or particular communities. One aspect of this challenge has been articulated as follows:

The challenge for law reformers is to find a resolution of the tension between what is pragmatically achievable and what principle and integrity suggest. There is an ongoing challenge for us all in how we engage with politicians, the bureaucracy, the judiciary and the wider community without being captured by any of them. We cannot hope to be relevant or effective if we have an agenda which is unrelated to current needs, perceptions and aspirations. But law reform bodies must be alongside these other parts of the community and not submerged by them.⁸⁴

At the same time, there are inevitably gray areas, and one person’s “pragmatic” (good and sensible) may be another’s “political” (choosing the safe option or compromising independence to ensure continued support). Additionally, independence is not inconsistent with the obligation to be accountable to funders, since accountability takes the form of excellent work, rather than a willingness to accede to any requests from funders to make particular recommendations. It has to be recognized, however, that “[t]here is a very subtle and indeed complex balance between autonomy and accountability.”⁸⁵

Contemporary law commission inquiries that recognize the influence of the non-legal world require consultation with communities directly affected by the law that may have distinctive experiences with law and the legal system.⁸⁶ It

81. *Supra* note 3, s. 5(2)(a).

82. Kirby, “Tasman,” *supra* note 80 at 20. There is also a separate Maori Committee “available to advise and consult with the Commission.” See Robertson, “Law Reform,” *supra* note 38 at 8.

83. Neave, “Reform,” *supra* note 1.

84. Robertson, “Law Reform,” *supra* note 38 at 12.

85. Baragwanath, *supra* note 1 at 4.

86. Neave, “Reform,” *supra* note 1. The importance of consultation to the ALRC is explained by one of its commissioners. See Rosalind Croucher, “Law Reforming – the whys, wherefores and

should not be assumed, however, that these participants are not capable of also contributing to explanations about how they are affected by more technical areas of law, or that lawyers do not have something to say about broader issues. Although these consultations seek input from members of the communities affected by the law under study, they also perform other pragmatic functions. They may assist in correcting errors, pressuring government to respond to the law commission's report,⁸⁷ and promoting the "public ventilation of issues" to help develop consensus or at least "defuse lingering tensions" around issues.⁸⁸ This applies not only to community groups, but also to professionals; thus, "[s]ome commissions are also beginning to think about how to change the culture of institutions, such as courts and the police, to ensure that any legislative amendments work in the way intended."⁸⁹

It has been suggested, however, that public involvement goes beyond ensuring an excellent report, and extends to "deliberative democracy," the more direct involvement of the populace in decision making, or, put another way, the enhancement of civil society.⁹⁰ Neave suggests that law commissions can contribute to deliberative democracy by involving citizens who normally do not engage in public policy processes, including the development of policy, by in-

where-tos" (Address delivered to the Legal Studies Teachers Conference, Sydney, 24 August 2007) at 6, online: ALRC <<http://www.alrc.gov.au/events/speeches/RC/20070824.pdf>>. Professor Croucher quotes the agency's president as saying: "we do [public consultation] because we know it significantly improves the quality, the grass roots applicability, and (not surprisingly), the public acceptability of our recommendations." Even more narrowly defined projects directed at increasing access to the courts, tribunals, and other dispute resolution processes require the input of members of the public who have to deal with the system, not only that of lawyers and other legally trained individuals and groups.

87. Kirby, "Ten Attributes," *supra* note 46.

88. Weisbrot, "Value," *supra* note 71 at 13.

89. Neave, "Australia," *supra* note 6 at 361. Neave points out that "[l]ong before a formal report is published, the law reform process can identify problems, expose key people to critical perspectives and persuade them to participate in bringing about change."

90. Neave, "Reform," *supra* note 1. See also Kirby, "Ten Attributes," *supra* note 46; Robertson, "Tradition," *supra* note 39. Justice Robertson provides detail about the nature of the consultation paper and communication methods for a project on revising the New Zealand courts with the objectives of making the paper accessible to persons without a legal background and arranging meetings at the place convenient to the communities involved. This approach was not without criticism, since the plain writing of the paper was described by one person as "useful for explaining what I do to my granddaughter."

cluding them in discussions about their work. Citizen consultation, in various formats that promote accessibility, becomes an integral part of the law commissions' processes.⁹¹

A president of the LCC has even suggested that the most successful law commission would make itself redundant by convincing citizens that law reform is something that they should do themselves, and not through the law reform agency as intermediary. The "primary" role of law reform commissions "should be to educate and empower citizens to assume their role as law-makers," based on "a conception of law not as a series of rules enacted by government but rather as the normative infrastructure of society that emerges from quotidian human interaction."⁹² Thus, the LCC was "first and foremost an experiment in the democratization of law reform, notably through an enlargement and rebalancing of the actors involved in the process of law reform and a reconceptualization of research projects."⁹³

I do not go this far, because the disinterest, process expertise, and corporate identity of a commission allow for law reform projects that cut across subject areas and communities, as well as, one hopes, a continuing productive relationship with government. This seems a fair trade-off between the possibly extreme version of deliberative democracy and the continued output of law reform initiatives.

More basically, the importance of citizen involvement in law reform has been interpreted as meaning that the law reform agencies should have members who are not lawyers, judges, or law professors. The LCC had commissioners who were not trained in law. As one non-lawyer member of the NSLRC has explained, "non-lawyers serve to remind the Commissioners and staff of the public comprehension of what the law involves, the specific needs of some members of the public and the legally trained people needed to ensure the reforms are legally workable."⁹⁴ He noted that his questions encouraged commis-

91. Neave, "Australia," *supra* note 6 at 366.

92. Macdonald, "Jamaica," *supra* note 1 at 140-41.

93. Yves Le Bouthillier, "Introduction – Dossier: The Law Commission of Canada / La Commission du droit du Canada" (2007) 22:2 C.J.L.S. 113 at 114.

94. Dale Sylliboy, "Law and Social Policy: Representing Society and the Role of Non-Lawyers on Law Reform Commissions" (Paper presented to the Commonwealth Law Conference, August 1996) [on file with author].

sioners “to articulate their assumptions.”⁹⁵ On the other hand, Justice Michael Kirby⁹⁶ suggests that it is not necessary, particularly in smaller commissions, to appoint non-legally trained commissioners, “[b]ut that should not silence such viewpoints in the Commission’s deliberations.”⁹⁷ In one way or another, it is crucial to include non-legally trained persons in the process. This may occur through the retaining of consultants or advisors, and also through the inclusion of a wide variety of groups in the suggestions for projects or the consultation process. There must be a check on whether law commissions have challenged legal structures, processes, and language.

A commitment to community participation requires innovative means of communication or interaction, such as “talk-back radio,” “telephone ‘hotlines,’”⁹⁸ and the “new” media (*e.g.*, blogs or wikis) that may attract different people to the work of the law reform body. The ALRC has been innovative not only in initial consultation, but also in maintaining contact with various groups. For its big project on privacy, the ALRC developed a “Talking Privacy Website – Young People and Privacy,” which used flash multimedia technology and music, and included an on-line forum to enable users to comment on the project. It also developed on-line resources for teachers that assisted them in integrating materials about privacy and law reform into high school legal studies curricula.⁹⁹ In Canada, the LCC commissioned a documentary film about Canada’s Indigenous legal traditions for its project of the same name, ran contests for high school students that explored particular themes through essays, poems, artwork, and multimedia, and developed a discussion group kit and an on-line quiz for its project on electoral reform.¹⁰⁰

95. *Ibid.*

96. Former Justice of the High Court of Australia (1996 to 2009) and the inaugural chairperson of the ALRC.

97. Kirby, “Ten Attributes,” *supra* note 46 at 9. Perhaps it is not insignificant that he is *Justice Kirby*. For an overview of membership, see Murphy, *supra* note 43.

98. Weisbrot, “Value,” *supra* note 71 at 12. The NSWLRC has used similar techniques. See The New South Wales Law Reform Commission, “The Law Reform Process: a Step-by-step Guide,” online: <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_about1>.

99. David Weisbrot, “After Dinner Address” (presented to the Legal Studies Teachers Association, 22 March 2007), online: ALRC <<http://www.alrc.gov.au/events/speeches/DW/index.htm>>.

100. See online: <http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/partnership/default-en.asp>.

Law commissions must also be prepared to move outside the parameters of law in other ways, as well, if they are to make a significant contribution. They are particularly well-suited to carry out research and analysis, and propose recommendations that cut across traditional categories of law, of academic disciplines, and of understandings about what constitutes knowledge. One example of an area that dissolves categories is family violence: it “cuts across criminal law, family law, housing law, social security law, and administrative law (*inter alia*), and involves [in Australia] questions of State and Federal law, and court and tribunal processes.”¹⁰¹ It also cuts across disciplines, requiring the benefit of sociology, psychology, and other bodies of knowledge, and requires the involvement of those who have experienced family violence from all perspectives.

The benefit of this transboundary work can also be achieved through partnership with other organizations. The ALRC has undertaken projects with specialized federal agencies, such as a joint project on the use of human genetic information with the Health Ethics Committee.¹⁰² The LCC was encouraged to develop “cooperative efforts” with others; it “partnered” with the Canadian Law and Society Association, with whose members the LCC carried on “sustained dialogue ... in conferences, informal meetings and collaborative projects.”¹⁰³ It also collaborated with the British Columbia Treaty Commission to hold a treaty forum entitled “Speak Truth to Power” and to publish the papers delivered at that forum.¹⁰⁴

Recognition of the needs and experiences of excluded communities and an analysis informed by extra-legal factors and perspectives in a law commission’s discussion papers and reports may result in criticism of, and challenges to, the

101. Weisbrot, “Value,” *supra* note 71 at 10. I note here that, in a federal state, there may be questions about the extent to which a provincial law commission should tread on matters within federal jurisdiction. It will sometimes have to address the ramifications of federal law and policy for provincial law and policy, and there may be opportunities to suggest creative ways to address the relationship between the two. A federally established commission faces a similar challenge.

102. Brian Opeskin, “The ALRC and the Role of Law Reform” (Lecture delivered at Melbourne University, JD Program Guest Lecture Series, 4 April 2001), online: ALRC <<http://www.alrc.gov.au/events/speeches/BRO/20010404.htm>>. Opeskin discussed two efforts to co-ordinate with state law commissions in Australia that have not been successful.

103. Le Bouthillier, *supra* note 93 at 113.

104. Law Commission of Canada & British Columbia Treaty Commission, *Speaking Truth to Power: A Treaty Forum* (2001), online: <http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/partnership/treaty_main_toc-en.asp>.

government. A wise government will recognize that this will inform the issue at hand and facilitate effective recommendations. Some governments may be less receptive. The reality is that, without government recognition, a law commission can be a voice in the wilderness, and this is something that many commissions have felt themselves to be. In all cases, commissions are reliant on government both for their funding, or at least a part of it, and for their recommendations to be included on the legislative agenda. In many cases, commissions also rely on government for at least some of their projects and for approval of their programs and the reports thereof.¹⁰⁵

Well-intentioned governments, too, must recognize that they have an obligation to tread carefully in their interactions with law commissions if both parties are to preserve and benefit from their relationship. The relationship between a law reform agency and the government is a sensitive one. Despite the need to act independently and impartially, a law commission should know what is on the government's agenda and take note of the areas in which the government has an interest and those in which it does not. This is especially true for self-referential commissions. For a number of reasons, it is desirable that a commission have the authority to develop its own projects, even if not exclusively. The commission should be seen as an independent body and not merely as an agent of government. It should not treat itself as a mere extension of the government's policy or legislative branch. Instead, it should be able to address questions for the future and not be perpetually concerned with the government's agenda. It should be able to look at difficult questions that the government may wish to avoid, with the goal of influencing, if not government, then others interested in law reform. It should be able to use its resources most effectively, and not risk consuming them in a series of "quick and limited political job[s]"¹⁰⁶ or on narrow technical amendments that would be better done by bureaucrats.

105. The relationship with government must also include the bureaucracy, since that is where the work is actually done. Civil servants are more likely to know what is being done in their departments than are their political masters or even deputy ministers. See Murphy, *supra* note 43, 2.1.5. It is also helpful when not only the executive, but also the other parties and members of the legislature, are aware of the commission and its work. It may be more feasible for a commission to develop these relationships when at least part of its program is self-referred and it does not have to report to government before it can release its reports.

106. Kirby, "Tasman," *supra* note 80 at 33. Justice Kirby discusses the advantages of "self-starting" generally (at 33).

Community participation and multidisciplinary analysis informed by different normative orders help to unpack the assumptions beneath the surface of law—that is, what lies behind and beyond legal institutions, including process and language. Governments need to be tolerant of this expansive view of access to justice, which may show how government, in its role as legislator, interrelates with other actors and, indeed, relies on other actors for the success of its own legislative mission—a reality reflected in the commission’s recommendations. Governments make the decisions about the implementation of commission reports; they will pick and choose recommendations that will advance their own conception of justice. While commissions should acknowledge this reality and recognize that one of their major goals is to influence the reform of law (even if it is not always reconceptualized), they can also make contributions that bear fruit in the future or provide the basis on which others can more effectively advance the access to justice agenda.

It must be remembered that reports often have a value beyond implementation by the government (or even by other actors to whom the recommendations may be directed). In this regard, Justice Kirby counsels patience, recognizing that the impact of the commission’s work may be long-term and difficult to track specifically.¹⁰⁷ Even when recommendations are enacted, their success may be surpassed by the contribution that the commission has made to developing public interest in, and expectations about, law reform.¹⁰⁸

V. “GETTING IT RIGHT”: PUTTING LAW COMMISSIONS AND ACCESS TO JUSTICE IN PERSPECTIVE

Law commissions are not suited to all law reform activity. For example, some matters are more properly assigned to formal inquiries headed by retired or sitting judges, such as those where it is necessary to hear witnesses. This is not

107. Kirby, “Ten Attributes,” *supra* note 46 at 17. Justice Kirby points out here, and elsewhere, the importance of ensuring that the commission maintains some distance from government in order to be seen as a separate and independent institution, while at the same time working with government officials to maximize the implementation of its reports. Even if reports are never implemented, they may have an impact, as did the ALRC’s report on Aboriginal customary law which, in Justice Kirby’s view, “contributed to a change in the Zeitgeist of Australia concerning the relationship between Aboriginals and the law” (at 17).

108. Justice Michael Kirby, *Reform the Law – Essays on the renewal of the Australian legal system* (Melbourne: Oxford University Press, 1983) at 19, cited in Croucher, *supra* note 86 at 7.

something for which a law commission has the legal tools; it is quite simply not in the commission's mandate. Although other matters might properly be handled by law commissions, it is sometimes necessary to establish ad hoc bodies simply because of the time and resources required to deal with the matter adequately.

Law reform commissions do not have to do all of the law reform because, pragmatically, they cannot. They do, however, have the advantages of relating projects to each other. They develop an evolving expertise in the business and ethic of law reform. They establish connections with a wide range of professional and community groups that will be interested in a variety of projects. They link projects to contribute to an ongoing societal conversation about law reform. These are only some of the advantages of standing law reform commissions, and they are advantages that are particularly relevant to access to justice.

Even when it has not been successful in having its recommendations implemented, the benefits of a law commission are more likely to derive from a body that is permanent and is able to build on its previous work. For example, the value of the International Law Commission lies not in the number of conventions and protocols resulting from the Commission's work (although there have been those), but in its influence in consolidating international law. As one commentator notes, "more generally, its intellectual approach to establishing coherent bodies of rules in different areas has given an overall solidity to international law which was previously lacking."¹⁰⁹ Similarly, it has been suggested that "the overwhelming reason to have a law commission, and the hallmark against which we should determine whether one is effective, is whether, in all areas of the law and its manifestations, the fundamentally excluding attitudes and approaches are being challenged and sensible alternatives are being offered to them."¹¹⁰

To avoid getting lost in the crowded field of law reformers, law commissions must be prepared to attempt "the 'larger more profound' tasks"¹¹¹ that have the potential not only to improve access to justice, but also to redefine what it means. An Australian commissioner has commented that "[l]aw reform publications—

109. Keith, *supra* note 1 at 4, citing Sir Arthur Watts, *The International Law Commission, 1949-1998* (Oxford: Oxford University Press, 1999).

110. Robertson, "Law Reform," *supra* note 38 at 9-10.

111. Kirby, "Tasman," *supra* note 80 at 35, quoting Geoffrey Palmer, President of the New Zealand Law Commission. *Cf.*, however, Palmer's views on so-called "post-modernism," *supra* note 76.

especially the final reports—provide an enormous contribution to legal history, through the mapping of law as at a particular moment in history.”¹¹² This is a useful exercise, but law commissions must go further. They must also be prepared to map law as it relates to other normative orders and other disciplines as a means of showing how this interrelationship will increase access to justice in the particular case.

Law reform commissions can be good at law reform in all kinds of areas, and should not hesitate to undertake projects of all sizes and shapes in adverse areas. Where they can excel, however, is in the big projects that best achieve access to justice in the fullest sense. Law commissions that are concerned with the ultimate goal of making recommendations that enhance justice beyond law, by using law—albeit not always satisfying the goal—are most likely to show the value of permanent independent law commissions in comparison to other law reform bodies. The results of projects initiated by these commissions may be great—such as the reconceptualization of an area of law or a qualitative shift in how we understand entitlement to access justice—or they may be small, as even ostensibly minor amendments to legislation that can nevertheless have a big impact for particular communities. When done well, law commission reports can contribute significantly to the dialogue about what access to justice means and how it can be achieved. Ultimately, however, what a law commission really needs—as does any body responsible for law reform and any group that has been marginalized—is a culture to operate in that is committed to treating a broad understanding of increased access to justice as a natural element in its evolution.

112. Croucher, *supra* note 86 at 9.