2-1-1975

The Law Reform Commission of Canada

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Recommended Citation
The work of the Law Reform Commission of Canada prompts a reconsideration of our understanding of the meaning and process of law reform. After referring to one recent attempt in England to change the law of evidence in criminal cases, I will review certain misconceptions about the meaning of law reform and then consider the extent to which these misconceptions have been avoided by the Canadian commission.

1. The English Criminal Law Revision Committee

It is now some two years since the publication of that ill-starred exercise in law reform, the Eleventh Report of the Criminal Law

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1. The establishment, original membership, staffing, program and organisation of the commission are described by M. L. Friedland in "The Work of the Law Reform Commission of Canada" (1972), 6 Law Society of Upper Canada Gazette 58. A number of institutional points should be noted:

(1) The commission is a statutory body created by the Law Reform Commission Act, R.S.C., 1970, 1st. Supp. c.23. In theory the commission is independent of the government of the day and answerable only to Parliament. It is not a part of the Department of Justice but the Minister of Justice does exercise a number of controls over the commission.

(2) (a) The approval of the Minister is required for by-laws made by the commission "fixing the remuneration to be paid to part-time members of the Commission for attendance at meetings of the Commission, or meetings of any committees thereof that they are requested by the chairman to attend, and the travelling and living expenses to be paid to members." R.S.C. 1970, 1st. Supp. c.23, s.10(c). The amounts for remuneration and expenses paid by the Commission to temporary research personnel are also subject to the Minister's approval. R.S.C., 1970, 1st. Supp. c.23, s.7(2).

(b) For practical purposes the commission's budget needs to be approved by the Minister of Justice.

(c) The commission's program of proposed study must be laid before Parliament by the Minister but that program is subject to the Minister's approval. R.S.C., 1970, 1st. Supp. c.23, s.12(1) (c), (d), s.18. Reports on studies completed by the Commission must be submitted to the Minister who must then lay them before Parliament. R.S.C., 1970, 1st. Supp. c.23, ss.16,18. When laying a commission
program before Parliament the Minister must include "a statement indicating any item or items proposed by the Commission and not approved", and in the case of a report, "such comments, if any, as the Minister sees fit." R.S.C., 1970, 1st. Supp. c.23, s. 18. The Minister can insist that priority of study in a study program be given to a subject named by him. R.S.C. 1970, 1st. Supp. c.23, s.12(2). The approval procedure involved in the Act is criticised in an editorial in (1970-71), 13 C.L.Q. 133. However, the Act does not permit the Minister of Justice to control how the commission will work once its program and priorities are settled. Neither does it allow him to amend recommendations of the Commission.

(d) Section 17 of the Act requires the Commission each year to "prepare and submit to the Minister a report containing a summary of its activities under this Act for the immediately preceding year, in such form and containing such information with respect to any studies or other activities undertaken or directed by it as the Minister may direct."

3) Departments of the Government of Canada are required to provide advice and assistance requested by the commission. R.S.C., 1970, 1st. Supp. c.23, s.14.

4) The members authorised to be appointed by the Act have a fixed tenure not exceeding seven years for the four full-time members and three years for the two part-time members, and they can be removed only for cause. Three of the full-time commissioners as well as one of the part-time members must be members of the legal profession. R.S.C., 1970, 1st. Supp. c.23, s.4. Thus it is possible to appoint non-lawyers as members of the commission. Also, although the commission is a permanent body, its members may not be, thereby allowing for the injection of new energies and ideas by changes of personnel. However, "a member of the Commission is eligible to be reappointed in the same or another capacity." R.S.C., 1970, 1st. Supp. c.23, s.4(2).

5) The Act facilitates the involvement of the judiciary in the work of the commission by permitting the appointment of persons in receipt of a salary or annuity under the Judges Act without the need of their relinquishing judicial office. R.S.C., 1970, 1st. Supp. c.23, s.4(3).

6) Provision is made for representation in the membership of commission of both the common law and civil systems: R.S.C., 1970, 1st. Supp. c.23, s.4(3).

7) The commission may undertake joint projects with other law commissions in Canada. R.S.C., 1970, 1st. Supp. c.23, s.13. Clearly co-operative efforts with provincial commissions in fields such as family law and evidence are highly desirable in the Canadian system. In fact the only joint study undertaken is with the Manitoba Law Reform Commission on contempt of court.

8) The members of the Commission are named below. The staff of the commission consists of Mr. Jean Côté, Secretary, Judge René J. Marin, Special Assistant and Co-ordinator, Colonel (Retd.) H. G. Oliver, Director of Operations and, until recently, approximately twenty-five research personnel. The in-house research staff was originally divided into eight project groups: general principles of criminal law and regulated conduct, criminal procedure, sentencing and disposition, evidence, family law, administrative law, commercial law and expropriation. At any particular time, approximately fifty "outside" persons have been contracted to work on topics within the eight projects; these are mainly professors in law faculties but include judges, practising lawyers, officers of the Clarke Institute of Psychiatry in Toronto, professors of psychology and research officers. The former practice was for each study group to have an in-house project leader and two commissioners. The group's proposals when formulated would be submitted to all commissioners for consideration before publication. It is now understood that a reorganisation of the internal structure of the Commission may
Revision Committee, a report remarkable for provoking almost as much criticism of its research methods as of its substantive proposals. However, the evaluation of the work of a law reform committee involves more than an examination of its substantive recommendations. Apart from the merits of actual proposals, there are six questions to be considered: What were the aims of the committee? What are the merits of those aims? What was the method of achieving the aims? What are the merits of that method? What research technique was used? What are the merits of that technique?

Rupert Cross, a member of the Criminal Law Revision Committee, answered the first question in the course of a general reply to criticisms of the committee’s report:

I recognise that the Report contains some unsupported statements about the doings of sophisticated professional criminals and the extent to which the present rules of evidence lead to wrongful acquittals. I do not wish to deny this possibility, but I would now wish to stress the need for rationalising the law of evidence. I think most of the provisions of the Bill can be justified on this ground . . . . The prime beneficiary of the sort of law reform that comes from the Criminal Law Revision Committee is the lawyer of the future rather than the practitioner of the present who, whatever his age, is, like the writer, an old dog conscious of the difficulty of learning new tricks. It follows that I attach little, if any, importance to the charge that the committee did not commission any empirical research. Even if it were the case that the present rules of evidence produced no wrongful acquittals, I would still be in favour of most if not all of the committee’s recommendations for the simple take place. The proposal is to have fewer in-house research personnel, to eliminate the division into project groups and to hold general meetings at which all members and in-house research staff attend.

2. Evidence (General) Cmd. 4991 June 1972.
The Law Reform Commission of Canada 65

reason that their adoption would spare the judge from talking gibberish to the jury, the conscientious magistrate from directing himself in imbecile terms, and the writer on the law of evidence from drawing distinctions absurd enough to bring a blush to the most hardened academic fact." 4

The aim of the committee then was the modernisation, rationalisation and simplification of the written rules of evidence. The intended beneficiary was the law student, who would have available a body of rules easy to state and learn. In relation to the second question, namely, the aims of the committee, we can say that the aim of merely re-writing the rules involves the (familiar) positivist danger of believing that there is no more to a legal system than formal rules. This aim is not necessarily bad but it can be bad if accompanied by a narrow conception of the legal system.

The method of achieving the object was draft legislation. The danger of this method is that it may be accompanied by an underlying belief that the "law" of evidence is the "laws" or "rules" of evidence, that study of the rulebook is a study of the legal system, and that changing the rules is changing all. To this we could add that, since statutory rule-writing in common law systems has traditionally been poorly done, the tools with which the committee must implement its aims may be defective. It has in fact been suggested by E. C. S. Wade that legislation is a disincentive to effect change. "Another factor which makes lawyers hesitate to recommend radical change is the knowledge that such change can only be achieved by legislation." 5 Legislation may not be a means of change at all. Our modern conception of its function may have deluded us. In early times, legislation was an act of publication or promulgation of the details of existing practices and customs. 6 It was a means of communication, not of deliberate change. Only later did the idea develop that intentional changes would be made by writing new statutes.

Various research techniques of the committee drew fire 7: its part-time deliberations had apparently taken eight years; it had kept its ideas secret and experienced the embarrassment of a "leak"; it had failed to publish working papers indicating in advance the drift of its recommendations; it seemed to base its recommendations on

the personal reminiscences of eminent committee members and persons consulted by the committee; it did not use empirical research to justify its assumptions and recommendations; its consultations with outside bodies seemed to have been inadequate. A number of features of the report were unfortunate; for example, it referred occasionally to accused as criminals; most of its recommendations favoured the prosecution. The technique, then, was discussion in committee by eminent lawyers relying on common sense and their own assumptions as to what was needed. Few would argue that this is adequate given the availability of modern research techniques and our understanding of the nature and function of law.

Should law reform be the process of re-writing the rules? Until recently we thought so. We have assumed that there were only two ways of effecting law reform: judicial decision and statutory change. Since law reform by judicial decision suffered from certain familiar limitations, such as the doctrine of stare decisis, the indeterminacy and vulnerability of case law, dependency on the accidents of litigation, the pressure of individual interests, the fear of giving unelected judges power to make wide social and institutional changes, the inability of judges to engage in extensive research and consultation, we embraced the alternative possibility and assumed that statute-writing was the proper job for a commission\(^8\). Friedmann, however, has identified a number of “instruments of legal change”, namely, a strong social groundswell of habit and opinion, and the work of a determined group pursuing legal change in the face of governmental lethargy and indifferent public opinion.\(^9\) The objection might be taken that these are ways of bringing legal change about and that legal change only occurs when public feeling is embodied in court decisions or legislation. However, this objection is itself open to criticism: it derives, again, from a legalistic or positivist conception of law. When habit, official practice, and public opinion render a rule of law inoperative, a legal change is effected, for practical purposes. Why should we reserve the term “legal change” for the mere formal ratification which may follow? In this light, we can conceive of law

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commissions as social reformers or social innovators, as purveyors of new ideas. Why not conceive of a commission as Friedmann's "determined group" seeking to move public opinion?

The English Law Reform Commission was modelled in part on the English Law Revision Committee, 1934-1939, whose terms of reference were "to consider how far, having regard to statute law and judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the Committee require revision in modern conditions". Its work consisted in making technical revisions to the law. It was also modelled on the post-war English law reform committee and was designed largely to provide full-time staff and permanent facilities for systematic work on all aspects of the law. Today we are beyond the point of having to ask why we need permanent law reform agencies. We are now at the stage of considering how a law reform body should work in practice and what should be its philosophy and function.

Lord Gardiner is perhaps not quite right in saying of the English and Scottish law commissions "... that everybody would agree that [they] have been an unqualified success. They have won the confidence of the judiciary, the Bar, the Law Society, the academic lawyers and, I think, the general public." J. Munkman, for one,


was surprised that on the change of Lord Chancellor in 1970 the law commissions in Britain were not abolished.\textsuperscript{15} His thoughts on the utility of the commissions derive more from an aversion to statute law (in its traditional common law form) than from hostility to the principle of a permanent law reform agency. Similarly John P. Frank has criticised revisions which make the law more complex and litigation more costly. Commenting on planned revisions, he observes that \ldots every one of these additions to the judicial burden may be justified by considerations of justice, or of social welfare, or of revenue, or whatever. Whether justified or not, they all add to the load on the elephant." \textsuperscript{16} He recommends that technical planning is not enough and that we should evaluate a piece of reform \ldots both in terms of its primary objectives and in terms of its litigation consequences."\textsuperscript{16} A law commission, then, which resists the urge to think solely in terms revising the written rules avoids the charges of fossilising the law in a rigid code and adding statutory complication to the existing law. This should be an inducement to develop a fresh approach to law reform.

2. \textit{Law Reform Defined}

A commission which departs from the traditional aims of law reform meets the objection that it should have \ldots proposals\ldots that these proposals should be new rules, and that the implementation of the proposals should be by legislation. All reports of the commission, it is said, should include a convenient draft bill.\textsuperscript{16a} The annual report should chart recommendations for Parliament and the commission should be judged by its legislative pay-off rate. This is the new-rules-for-old approach. So, when the Law Reform Commission of Canada was established in 1971 the hope of the editor of the \textit{Criminal Law Quarterly} was that, \ldots before too long we will have a Criminal Code second to none."\textsuperscript{17} There was initial pressure on the commission to revise obsolete or unsatisfactory sections of the Criminal Code.

\textsuperscript{15} \textit{"Good and Bad Law Reform"} (1974), 124 New Law Journal 81. The importance of the form of legislation — the medium for law reform — is brought out by J. H. Farrar, \textit{op. cit.}, at ch. 5.
\textsuperscript{16a} Of course a draft bill is desirable if, after full study, it is resolved that legislation is the most suitable method of achieving the change. What is undesirable is the nearly-automatic assumption that legislation must be the method.
\textsuperscript{17} \textit{"National Law Reform Commission"} (1970-71), 13 C.L.Q. 133, 134.
From the traditional point of view, a law reform commission is seen as a government advisory agency whose duties, set out in an enabling statute, are to make studies and recommend changes in the law with a view to its modernisation, simplification and improvement. Such a commission has been conceived of as a mediator between the courts and the legislature, a body to which lawyers can send suggestions for reform, an agency that will persuade legislatures to accept its proposals. Such a commission is staffed exclusively by lawyers because, "it is difficult to believe that a lay commissioner could . . . usefully participate in the cut and thrust of Commission debate on legal technicalities." What would be the aims of this body? It would obviously be expected to rewrite the substantive rules of law and it might also be called upon to simplify judicial structures and procedures, secure effective administration in the machinery of justice, produce programs to create better judges and jurors, recommend improved clinical education in law schools or programs of training in judicial administration and adjudication. Indeed the Pakistan law commission was set up to concentrate on problems of procedure and administration, being required to study the efficiency of court proceedings, the introduction of conciliation and the extension of summary jurisdiction, legal aid, and ways of eliminating false pleas and perjuries. The importance of such work cannot be denied. As a process of law reform, however, it involves no fundamental reappraisal of the rule of law but rather a revision of procedures within the existing system.

To repeat a question asked earlier: is law reform a process of change through alteration of rules? A sample of views may be useful. Of particular interest, and clearly influential in the philosophy of the Law Reform Commission of Canada, is the opinion of the Honourable John M. Turner who, as Minister of Justice in 1970, introduced the bill to establish the national commission: "For law is not just a 'technical body of rules; it is the organising principle for the reconfiguration of society. Law is not just an agency of social control; it articulates the values by which men seek to live. The business of government, then, is the making of laws, and the process of law reform goes to the core of defining the kind of society we will have as a Canadian people and the kind

18. G. Sawer, op. cit., at 194.
of rights which we will enjoy as individuals.'"20 President Richard M. Nixon: "The ultimate object of changing the process of justice is not to put more people in jail or merely to provide a faster flow of litigation; it is to resolve conflict speedily but fairly, to reverse the trend towards crime and violence, to re-instill a respect for law in all of our people."21 J. N. Lyon: "Law reform is the process of identifying and clarifying standards of performance for the legal order and of finding and implementing ways of optimising achievement of those standards".22 Jean Beetz: "Reform does not necessarily mean change. It even implies some degree of conservation, since to reform presupposes the preservation of that which is being reformed, the modernisation and restoration of old systems with a view to saving them by adapting them to new circumstances."23 William F. Swindler: "The terms 'modernisation, revision and reform' have no precisely distinguished meanings in law dictionaries. In the context of this article, modernisation is used to suggest a movement primarily designed to streamline statutes or rules, usually by eliminating steps which the experience of many years has demonstrated to be superfluous and obstructive. Revision more specifically relates to a planned statutory overhaul of procedural or substantive law. Reform is a term which should be used sparingly, for it suggests, accurately, an attempt to introduce new concepts into existing law."24 J. N. Lyon: "Law reform may be essentially an educational process . . . having as its prime objective the release and direction of human potential."25 J. G. Kneipp: "Most law reform, it seems to me, has proceeded so far on the basis that the existing fundamentals of the subject in hand should be retained. I suppose either because they are thought to be satisfactory or because their reformulation would be too Herculean a task. In this setting, law reform of course becomes largely a matter of patchwork. It seems to me that the time has come to encourage at

a national level a more fundamental examination of our laws.

Lawrence M. Friedman: "The phrase, law reform, has no exact objective meaning. When one uses it, one is, first of all, referring to some program for changing the law. The word 'reform' implies that the change is for the better . . . ."

These views confirm that the end of law reform is the improvement of the law. They also recognize the need to take account of human values and official practices. But a further question is raised: does law reform imply only change within the existing system? It certainly allows for new concepts to be introduced into the system, but can a process abolishing or redesigning the system be styled "reform"? When we "re-form", must the shape in the end substantially resemble the shape at the start? The answer would appear to be "yes" in that approach to law reform which looks only to the revision of rules, procedures and institutions. Since we now accept that there is more to the legal system than the rules, we must also accept that no fundamental change will be made by changing the rules. Values and attitudes are fundamental to the system; rules and practices merely reflect these and it is only a change of values which will lead to a genuinely different system. If a law reform commission aims at reforming law by changing values, the consequence is that the new system may bear no resemblance to the old one. Is that law reform? Perhaps not, as we have traditionally understood the term; but should we understand the term traditionally?

Now another question. Should a law commission have a single aim as to what it is trying to change (rules, practices, attitudes or values) in respect of all its projects or should its object vary with the particular project? Take the projects of the Law Reform Commission of Canada: are administrative law, commercial law, evidence and expropriation more suited to change by change of the rules? Is changing the rules all that is required to achieve effective change in these areas? Do criminal procedure and sentencing call mainly for changes in official practices? Do criminal law and family law demand changes of values and attitudes? What body is best suited to pursue what changes and by what methods? Is there one

27. "Law Reform in Historical Perspective" (1968-69), 13 St. Louis L.J. 351.
function for which, for example, the Department of Justice is better suited and another for which the law commission is more appropriate?

3. Research Techniques

Whether the question be aim, method or agency, one thing is certain: a full understanding of the existing situation must be obtained before we can know what is needed. Even though we might suspect that certain topics are best handled by certain methods, we cannot know this until we have examined the problem in depth. And even if we should eventually decide to effect a reform by rewriting the rules, that revision itself should reflect the facts of the system and the popular attitudes on which it rests. Failure to take these precautions was the error of the Eleventh Report. Research technique, then, is crucial. It is in respect of its research technique that the Law Reform Commission of Canada has at times and in respect of some of its work been set apart from the traditional law reform agency. Four methods are discernible: (1) Philosophical Enquiry; (2) the Comparative Method; (3) Empirical Research; and (4) Public Consultation.

Philosophical Enquiry: Philosophical enquiry par excellence is the search for values. We have seen that it is only by a change of values that fundamental changes can be achieved. By what authority does the commission consider such matters? Section 11 of the Law Reform Commission Act includes among the objects of the commission "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."

The precise meaning of this section is less than clear but it can be interpreted as a statutory spur to innovate. It seems to give the commission a mandate beyond the technical revision of the law. Political encouragement to innovate also derives from the progressive picture of law reform held by John M. Turner. He saw the process as that "of defining the kind of society we will have as a Canadian people and the kind of rights which we will enjoy as individuals."

Given that he envisaged a philosophical approach, the appointment to the commission of persons sympathetic to that method was inevitable. So, the first chairman of the

Commission, Mr. Justice E. Patrick Hartt, before turning to the law, was a student of philosophy. In a series of speeches across Canada, he has explained his conception of modern law.

Hartt's approach is in the popular style of Charles A. Reich. The latter has written that "for one interested in basic change, law and political institutions are virtually irrelevant (except as theatres in which to stage exemplary battles of consciousness)." The rules and institutions, then, are relatively unimportant. Modern law may involve the official enforcement of certain values and attitudes which may not be shared by all sectors of society, with the possible imposition by the state of one consciousness on another consciousness. Thus Mr. Justice Hartt has castigated, as an elitist fiction, the idea that law can today embody mainstream thinking; it is a fiction, he believes, that the state can understand best the people's total generalised self-interest and can make laws to regulate society in accordance with it; it is a myth that the law can represent agreed public values. The following are major tenets of his philosophy:

Impatience, confrontation, multiplying pluralism, ephemeralisation, and institutional fragmentation are rapidly becoming accepted features of our society. We are, however, not dealing solely with a legal crisis, but rather with a breakdown of the underlying order upon which law is based. The social system associated with industrial society into which most of us were born is dying. It is all part of a much larger revolution; the shift to a new post-industrial society is taking place. And, whether we like it or not, we must accept that this new era will be radically different from the world with which we are familiar and which we would naturally like to see maintained. Instead, the new order will have fragmented value systems, new institutions, and different conceptions of reality and eternity. Our present legal institutions were designed to

31. The first Chairman of the Commission is the Honourable E. Patrick Hartt, a member of the Supreme Court of Ontario. The Honourable Antonio Lamer of the Superior Court of Quebec is Vice-Chairman. Mr. Justice Hartt's appointment was effective April 1st, 1971, and that of Mr. Justice Lamer December 1st. Both the Chairman and the Vice-Chairman were granted leaves of absence from their judicial duties in order to serve in these capacities. Dr. Martin L. Friedland of the University of Toronto and William F. Ryan, Q.C., former Dean of the Faculty of Law at the University of New Brunswick, were appointed as the full-time members. Dr. Friedland resigned as of July 1, 1972, in order to return to the University of Toronto. Dr. J. W. Mohr, a professor at Osgoode Hall Law School and the Department of Sociology, York University, was appointed to replace Dr. Friedland. Mme. Claire Barrette-Joncas, a member of the Bar of the Province of Quebec and Mr. John D. McAlpine, who practices in Vancouver, were appointed to serve as part-time members of the Commission, each for a period of three years. Mme. Barrette-Joncas was appointed on June 1st and Mr. McAlpine on December 1st, 1971. First Annual Report, 1971-72, 2-3.

serve a social order that, if not already dead, is dying. It is unrealistic to expect that, unchanged, they are capable of playing a significant role in the radically new world that is already upon us . . . . I believe that in many crucial instances the criminal law can no longer be an instrument by which we express our choice of one set of values over another. Rather, I see the law as providing the means by which multiple sets of values can co-exist and develop. Instead of transmitting mainstream values which no longer exist, the law must try to develop into an instrument of minimum intervention." "In such a world, what becomes of the law? A good law has two characteristics. First, it must genuinely have the capacity to regulate conduct: in other words it must be workable in real life. Secondly, it must be based on values shared by those it affects . . . . In the history of law, there have been many landmarks indicating that laws which react rather than respond to situations are a prime cause of alienation.

In our developing democratic society laws must be regarded as something more than an authoritative ordering of social relations. Rather, they should properly be looked upon as the ever-changing attempts by the state, through the rule-making power, to balance conflicting values in order to maximise the potential for all to live in the manner they choose free from unwarranted interference by the state or otherwise. In a free, pluralistic society every citizen should be free to adopt his own ethic, choose his own life style, and live his own life; provided that he does not fall below a minimum standard of acceptable public order.

The law of the future, then, will operate in a society where the rate of change will be intense and the amount of available knowledge enormous. Thus law reform must respond to the research techniques available and must focus on the legal process at work. Drawing its inspiration from realist and sociological jurisprudence, it must sound out popular attitudes, acquire factual bases for its assumptions, be keenly aware of the policies and functions of law in the community. The law that may be needed in the future may be quite unlike the law that we know today.

Does a philosophical approach also emerge in the publications of the commission? It was evident in the commission's study paper

37. See supra, n.28.
on obscenity, where an abstract statement of principles was presented. The Second Working Paper on Strict Liability can also be characterised as philosophical. It deals with principles, seeking to discover basic difficulties rather than concentrating on technical revision of the rules. Similarly, the Third Working Paper on Sentencing and Dispositions is a general outline of principles. This general approach is expressed and explained in the following passage from the Fourth Working Paper on Discovery in the Criminal Process: "Having fixed the importance of discovery in the criminal process and having determined that, in the main, it does not exist, the point has been reached at which something precise can be said about the kind of discovery procedure that our criminal law system ought to have. The emphasis here is on articulating principles of general application and on drawing the general contours of a discovery system. The exact details of a model that will faithfully achieve these principles and locate the boundaries of the system can be left until later." 38

No philosophical approach is evident in the publications on evidence. 39 There the paper begins with a textbook narration of the present law, concentrating on the details of the rules, followed by a listing of criticisms thereof, proposed reforms, the balancing of arguments, and, finally, draft legislation with explanatory notes. Why has there been no basic investigation of the nature and function of evidence? The subject is suited to such an inquiry, as is any subject. I suggest that the commission’s researches in evidence are incomplete. The proposed reforms to the rules may be desirable but we can only be confident that they will be a genuine improvement if all methods of inquiry are utilised.

The Comparative Method: Whilst a philosophical approach may be peculiar to the Law Reform Commission of Canada, the comparative method has long been recognised as a useful and valid method of research for the law reform agency. However, the Canadian bi-jural system makes such an approach more than desirable; it becomes essential. The Law Reform Commission Act

39. The first evidence study paper on Competence and Compellability was severely criticized in an editorial in (1972), 15 C.L.Q. 1: "Study Papers' is a somewhat pedantic title for what the Commission has released. 'Position papers with tentative recommendations' would be rather more accurate, for they contain no authorities, footnotes or references and evince rather more provocative stances and rather less study than one would expect . . . . There is a difference between sounding out public opinion and yielding to it."
reflects this by expressly including among the objects of the commission, "the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions."  

The Act possibly confuses aims with methods. The aim of law reform is improvement, not uniformity; consideration of other systems is a means of discovering what is a possible improvement; it is not an end of law reform. At the same time, the Act does not suggest that comparative research should be restricted to comparison of the Quebec system with the Canadian common law systems. The commission has studied methods throughout the common law and civil law worlds, including a study by the evidence project of the Israeli system of examining child witnesses by trained youth interrogators.  

The commission has recognised in particular the lessons to be drawn from the civil law method of drafting, thereby concentrating on "differences . . . in the expression . . . of the law." "An intriguing argument is made by Professor Clarence Smith of the University of Ottawa that if one drafts initially in French in the civilian style and then translates into English one can achieve more clarity than if one starts drafting in the traditional common law style in English."  

Some of the problems involved in effecting law reform by legislation could be overcome by improvement in legislative style; comparative study of the civil method affords the most likely means of making changes for the better.  

**Empirical Research:** The Second Annual Report of the commission declares that, "As a Commission we are committed to the principle of empirical research. Our first job is to discover the actual living law, the law that really governs Canadian people. For this it is not enough to rely on conventional wisdom, popular belief and traditional assumptions. Experiment, questionnaires, surveys and all the other weapons of the social scientists must be called into play." Perhaps to this Annual Report should have been added the note which appears on the commission’s study papers: "This report does not represent the views of the Commission."  

43. *Infra.*
The law reform commission's resort to empirical research has been sporadic. None of the published reports on evidence refers to such work being done. Similarly, with the papers on obscenity, fitness to stand trial, and criminal costs it is unclear whether factual investigations were made. The Second Annual Report\(^\text{44}\) does, however, detail empirical research in progress and, following the statement, "In the field of evidence empirical research is particularly necessary"\(^\text{45}\), states the need for information on the effect on juries of rules of evidence and describes an empirical inquiry into police questioning and confessions.\(^\text{46}\) Two of the later papers reveal the use of empirical research. The Second Working Paper on Strict Liability shows that statistics were compiled on the number of existing offences and the details of their enforcement\(^\text{47}\); these statistics were used to formulate general recommendations. In the Fourth Working Paper on Discovery in Criminal Proceedings a questionnaire was used to formulate the recommendations. Questionnaires were sent to prosecutors and defence counsel across Canada in order to determine the nature and extent of informal discovery practices.\(^\text{48}\)

Consultation with field workers has been extensive.\(^\text{49}\) Clearly the contribution of persons involved in the day-to-day operation of the legal system is vital to effective law reform. Limiting law reform deliberations to a judicial and administrative legal elite runs the risk of accepting unreal assumptions as to what happens and what is required. The commission has also engaged in one experiment, the East York project, described as follows in the First Annual Report:

The project has as its purpose the definition of situations that give rise to invocation of the criminal law sanction; the evaluation of the effectiveness of existing methods of crime prevention and control; and the development of alternative modes for the resolution of disputes. The demonstration project is being carried out in East York in the police patrol district near Danforth and Main Street designated as patrol area 5411, with the cooperation of the Metropolitan Toronto Police and with other specialized agencies. The project was discussed with the federal Department of Justice, the Ontario Department of Justice, the Toronto

\(^{44}\) Op. cit. at 21-22.

\(^{45}\) Ibid., at 22.

\(^{46}\) Printed as "policy" in the Report.


\(^{48}\) Op. cit., at 19-23. This questionnaire revealed considerable variation in the practices of Crown prosecutors through Canada. The result was that certain prosecutors inquired of the commission how they could improve their discovery methods, a good example of a commission educating officials to change their working behaviour.

\(^{49}\) Second Annual Report, 1972-73, 11, 22-23.
Police Commission and the Metropolitan Toronto Police before it was begun. The East York project is seeking answers to a wide variety of questions, including questions such as these: with what kinds of human and social problems are the police now dealing; are present definitions of crime adequate for the purposes of state intervention through the criminal process; how are the police discharging the increasing demands made upon them to perform tasks not strictly related to the enforcement of the criminal law; how effective is the criminal law in resolving disputes that exist between individuals or between an individual and a group; are there alternatives to the present adversarial system and can these alternatives work; is it possible in an urban community to develop better relations between the police and the people in the community; what is the best method of using the police to prevent as well as to detect crime; how well is the new Bail Reform Act working; and what are the economic and social costs of the criminal process? In seeking answers to these and others questions the project is cooperating with social agencies and individual volunteers in the community.\footnote{50}

The Second Annual Report explains that the commission will either do empirical research itself or rely on suitable work done elsewhere. The need for surveys and statistical information has, indeed, been recognized in England\footnote{51}, so that at a seminar held in All Souls College, Oxford in September 1972, "the principal positive conclusion of the seminar was that some improvement might be made in the use of the social sciences in the service of law reform."\footnote{52} The trend, then, is clear and the appointment to the Law Reform Commission of Canada of the sociologist Dr. Hans Mohr was a vital step. But, one must ask, why has the commission not fully practised what its Annual Reports preach? The answer is, because of the scale of possible operation of the commission, a theme to which I will return.\footnote{53}

\footnote{50. \textit{Op. cit.}, at 8-9.}

\footnote{51. "Our experience has caused us to give careful thought to ways and means of making greater use of the social sciences both in determining law reform priorities and in the preparation of proposals. It would be, in our opinion, dangerous to assume that the working paper technique, because it is indispensable, is, therefore, itself sufficient. During the year we introduced into the consultative phase of the Family Property inquiry a new feature — the publication of a statistical survey conducted at our request by the Social Survey Division of the Office of Population Censuses and Surveys into the attitudes and actions of married people in respect of their property. The report of this survey has added a new dimension to our study of the subject. We hope to evolve a standard procedure for harnessing the social sciences to law reform which will become as much a part of our method as the working paper procedure itself." The Law Commission (England), Seventh Annual Report, [1971-7], para.2.}

\footnote{52. The Law Commission (England), Eighth Annual Report, 1972-73, para. 76.}

\footnote{53. "Such an empirical approach to the whole of the criminal law lays a heavy}
Public Consultation: Section 12(1)(a) of the Law Reform Commission Act empowers the commission to "receive and consider any proposals for the reform of the law that may be made or referred to it by any body or person." Does this subsection derive solely from the Canadian tradition of federal-provincial consultation or are there other reasons why a law commission should consult the public? One view is that law commission consultation is merely an extension of Parliamentary consultation. Thus Norman Marsh of the English Law Commission states that the "Commission sees the ultimate object of the elaborate process of consultation as assisting Parliament on matters of often great technical detail which can seldom be adequately investigated in the course of Parliamentary debate. This assistance is ineffective unless the scope and nature of the consultation is clearly set out on the face of the Report." This process of consultation seems to be restricted to experts familiar with the technical aspects. It is also conducted on the understanding that change will be effected by legislation. In any event, there is a need for consultation even within the framework of law reform as rule revision by legislation.

Public consultation may be engaged in for the reason given by Arthur T. Vanderbilt: "We should welcome the co-operation of laymen who are interested in the law. The layman can ask questions that will jar the complacency of the legal mind . . . . We need laymen to remind us occasionally that the law is not the only angle from which to view life, that law is not the only means of burden on the Projects. It also makes reform a slow and long-term enterprise. On the other hand, it forms the only basis for rational reform . . . . Consultation, however, is a lengthy and time-consuming process, and the Commission is currently considering how to make the best use of its limited resources and how best to continue its dialogue with the public." Second Annual Report, 1972-73, 22-23.

55. Op. cit., at 279-80. J. H. Farrar, op. cit., at 122-123 criticises the English Commission for the narrow operation of its consultative methods: "... the present system of working papers seems on the whole to work well. Nevertheless consultation tends largely to be with pressure groups. In many cases this is inevitable but it is not necessarily so. In their latest report the Law Commission say they intend to use more social surveys presumably to explore social facts and popular values. Consultation might be extended on certain topics to follow the example of royal commissions, certain of the Canadian law commissions and American legislative committees in having public hearings. Law Commission staff could conduct these hearings. The Manitoba Law Commission advertises its proposals and solicits views by advertisements in laymen's language in the popular press."
maintaining the social order and of promoting individual welfare. Lay contribution may be valuable on all topics. Subjects appearing as unfathomable mysteries when expressed in the jargon of lawyers can easily be translated into social situations intimately affecting the lives of all, so that lay contribution becomes valuable. Consultation may also be carried on as a matter of "working politics". A commonly voiced objection to the institution of a permanent law commission was the fear that it would become a "brains trust" or "third house". A commission, then, must not become the over-powerful enclave of an elitist faceless few. Solely to overcome this charge it might engage in public consultation. A variety of reasons for consultation is offered by L. Scarman, former chairman of the English Law Commission:

... it enables the layman's voice to be heard in the process of law reform and it ensures that the Commission's first tentative proposals are subject to the criticism of those who know where the shoe pinches. But consultation offers other advantages. It helps to dispose of possible misconceptions regarding the possible effects of the Commission's proposals and thus improves the chance of our recommendations, when finally put forward, being acceptable to a large section of the informed public. Further, it helps to stimulate interest in law reform. And last, but not the least of the advantages of open consultation: it helps the legislature in the field of law reform. The Law Commission is an advisory body and if it is to render effective assistance to Parliament it must consult widely and set out in its final report the scope and nature of the consultation. It is surely of critical importance to the legislature to know, when legislation comes to be debated, what the balance of opinion is on a particular subject.

An historical argument leads to a more fundamental reason why consultation should occur. Law, government or state interference has now invaded areas of human activity which traditionally were regulated only by custom, market forces and social practices. As W. Friedmann puts it, "Today, the legislature is everywhere heavily at work, flanked by a multiplicity of administrative agencies on the one side and a variety of judicial institutions on the other side. It actively moulds and regulates the scope of business enterprise as well as the property relations of families and even breeding habits. Hire-purchase legislation strongly affects purchasing habits, while zoning and town planning legislation has a decisive influence on the

57. J. Stone and G. S. Pettee, op. cit., at 228.
58. (1972), 1 Anglo-Am. L.R. 31, 36.
pattern of land ownership and other property rights." The law, then, should be keenly aware that it is intruding on areas where there is a strong undercurrent of traditional practice, social attitude and custom. Discovery of the popular attitudes and values becomes essential. M. L. Friedland, speaking for the Law Reform Commission of Canada has explained the matter this way: "We are not attempting to engage in this dialogue with the public as a public relations gesture, but rather because the Commission feels that public participation is an integral part of effective law reform."

Public participation is an "integral part of effective law reform" for two reasons. First, because public opinion is an important part of law. Lord Tangleys has explained that:

In the last resort the state of the law must both reflect and depend on the state of public opinion. By public opinion I do not mean merely the whim of the moment but the convictions and beliefs, or even prejudices, upon which the members of any given society habitually act. These are the basic things by which a society holds together. Beliefs may be the result of conscious, deliberate and rational thought and argument. For the most part they are more likely to be the result of inherited experience, teaching and tradition. There will always be a mixture of prejudice and reason, of philosophic, economic and sociological experiment and investigation on the one hand and folklore and old wives' tales on the other. There will always be a cautious element which desires to hold on firmly to inherited or conventional thought which has proved its practical utility. There will always be questioning spirits attracted by and looking out for novelty. Were it not so society would become stagnant and decadent. On the other hand no society can safely indulge the soaring ambitions of its questioning spirits unless it feels sure enough of itself to be able to contain the new without fatal damage to the old. A society can only feel secure in this sense if there is in fact a strong enough body of accepted doctrine. No law can be effective for long unless it is in line with this accepted doctrine.

What should be these popular values which the law embodies? They should not be those personal to the law commissioners. By consulting the public, we avoid the danger of dictation by the few; do we open the door to dictation by the majority? The Second Annual Report, 1972-73, of the Law Reform Commission of Canada explains that "the values the Commission seeks are not simply values of its own preference, nor are they the values held currently by the majority of Canadians. They are those values which, in the light of general views current in Canadian society,

60. M. L. Friedland, *op. cit.*, at 60.
could best be rationally supported and defended."

The commission, then, is not dictating its own values, neither is it proposing the views now held by a majority as ascertained by opinion poll. It is seeking, and suggesting that the law should embody, views which are (a) held in society and (b) rationally defensible. If only rationally held views are sought, public consultation must include a process of public education. The attitudes on what law is needed must be based on reality not myth. They must be informed attitudes arrived at after full debate. Consultation, then, involves four stages: (i) discovering present attitudes; (ii) discovering the grounds for holding those attitudes; (iii) informing on the merits of the grounds and attitudes; (iv) discovering the attitudes of the informed public.

Public participation is an "integral part of effective law reform" because, secondly, the most fundamental means of achieving reform is by changing public opinion. Perhaps this is the only means of effecting reform. Such a suggestion contradicts the following passage from Lord Lloyd of Hampstead: "The history of law reform is not likely to be a very illuminating one if no move can be made, however desirable it may be demonstrated to be, until popular sentiment can be fully mobilized in favour of the change, lest the whole authority of the law be whittled away. Indeed, as we have seen, it is often only with the change in the law itself that popular opinion is gradually re-moulded to a more enlightened viewpoint." But this passage is, with respect, open to a number of objections: the suggestion that law and opinion are separate, the assumption that statutory change is the only means of reform, the assumption that statutory change is reform at all, and the belief that the content of the rulebook can cause opinion to change. Formal revisions may affect outward behaviour when there is no united and widespread feeling hostile to the revisions but their influence on popular attitudes is unlikely. To be sure, changes in opinions have followed revision of rules but the new sentiments have usually resulted from the general educational process. The legislative amendment may or may not give an initial spur to the educative forces; it is mainly important to the extent that it is a part of a learning process.

Of the various methods of achieving change, changing public opinion is the most difficult to achieve. Mr. Justice Hartt has

commented on the fragmentation of values and the breakdown of mainstream attitudes in contemporary society. Does this not make the task of effecting reform by mobilizing public opinion even more difficult? Probably not, if we distinguish attitudes on a particular issue and attitudes towards others holding different attitudes. After the educational stage required in the consultative process, there may be unanimous agreement on an issue so that an inevitable substantive change is achieved. Or, after the process, the parties may still differ but with appreciation of the opposing view. The law would either embody the consensus on the substantive question or a result reflecting the agreement to differ. In either case law reform has been achieved by changing attitudes. The second is perhaps the more desirable situation since it ensures a continuing dialogue on the law. The fragmentation of values emphasizes the need to consult the public since the state can no longer dictate, through the law, its conception of what society needs.

Whether we look at the situation from the point of view of what is being changed or the means of change, what is needed is a learning situation. Similarly, whether popular ideas are the method of change itself or are a source of ideas for statutory reform, those ideas must be properly formed. What has the Law Reform Commission of Canada done to create this learning situation, to see that popular views are informed views? How is the commission achieving its "sort of Open Forum on the law", a conception of its function which the Second Annual Report, 1972-73, declares that it is pleased to accept?

4. Changing Public Opinion

First, the commission recognises that the educative process should begin early: "For this reason the Commission is particularly anxious to encourage and improve courses on law in the schools. Preliminary steps are already being taken. The Commission is encouraging the preparation of a special course of a jurisprudential kind to enable high school students to grapple with the basic issues. And the Commission takes every opportunity to meet students either here at the Commission or in the schools themselves."

64. Supra.
teachers of law in high schools or elsewhere outside of universities. This conference was encouraged and supported by the commission and staff and members of the commission participated in its sessions. Secondly, the process of public consultation has been applied not only at the level of determining views on particular law reform proposals but also at the initial stage of determining what topics the commission should consider at all. The commission’s work on family law was begun in response to opinions received that it should be studied.67

Thirdly, the commission’s working procedure has been, first, the publication by a project group of a study paper (which does not express the views of the commission) inviting comments, then, of a commission working paper, written in the light of public reaction to the study paper and again inviting comment, and, finally, publication of a report to the Minister of Justice for his consideration and for tabling in Parliament.68 The publication of preliminary papers is a technique developed by the English Law Commission; it has not been widely adopted by other commissions, which publish only a final report. L. C. B. Gower believes that the distribution of preliminary papers is an improvement on the technique of inviting written memoranda which can be merely repetitious essays written in ignorance of what others are saying. “The working paper gives consultees something to get their teeth into and avoids unnecessary secrecy about the likely lines of the proposed reform. We regarded this practice as our major contribution towards the methodology of law reform and claimed the credit for its invention.”69 Until recently the Canadian commission’s method included the first stage of publication of a study paper, a procedure apparently peculiar to this commission. The idea of the study paper has been to allow the project group full freedom to suggest recommendations thought desirable. Study papers will continue to be produced on evidence and some other topics but in future the emphasis of the commission will be on the immediate production of working papers.70 The change in procedure has been caused by the delay — as much as one year — in receiving substantial feedback on study papers. The initiative in the preparation of immediate working papers will still lie with the

68. The Commission has not yet submitted a final report on a study topic.
69. L. C. B. Gower, op. cit., at 263.
70. See supra, n.28.
Fourthly, the recent style and presentation of the commission’s publications displays a concern to maximise readership. This can hardly be said of the early technical papers on evidence and criminal procedure. But the recent papers have appeared in popular soft-bound booklet form. Since 1973, commission publications have appeared in French, in newsheet form, as a supplement to Le Bureau 73 and, since 1974, in newsheet form, in English, as a supplement to The National, the newspaper of the Canadian Bar Association. Attached to Working Paper I on the Family Court was even a brochure, complete with cartoons, outlining the questions raised in the working paper, the newsheet working paper itself being illustrated by cartoons depicting scenes of marital strife. The concern of the working papers to evoke questions of principle rather than discussion of details no doubt attracts a wider readership. Working Paper II, “The Meaning of Guilt”, concerned with strict liability, is particularly deserving of appreciation. First, the title, “The Meaning of Guilt”, is well chosen to attract the layman; a title such as “The Problem of Strict Liability” would have been less successful. The paper is of manageable length: thirty-eight pages of English and forty-four of French, published as a small soft-bound book; seven pages of English as a newsheet. In style the paper is light and readable with technicality agreeably absent; at the same time it is not sensational but balanced and accurate. There is little citation of cases or statutes and few footnotes. The paper is so presented as to appeal to the widest market, but not for the sole reason that like all commission publications it is available free of charge.

Fifthly, the commission’s method of demystifying its publications is similar to its attempts to demystify statutes. Thus the process of making the statutes comprehensible to all is also part of the educative function of the commission. Sixthly, the commission has sponsored a series of weekly law reform discussions at the

71. The character of this paper can best be appreciated by comparing it with the equivalent English Law Commission publication, Published Working Paper No. 30, “Strict Liability and the Enforcememt of the Factories Act 1961” 2 June, 1970. This latter, which runs to 66 pages of foolscap, is a report prepared by members of the Sub-Faculty of Law of the University of Kent at Canterbury. Beginning with an outline of the Factories Act legislation and the enforcement procedure, the report then describes a survey made of enforcement practices from which it draws conclusions and makes specific recommendations.

72. Supra.
Glebe Community Centre in Ottawa. These sessions were advertised in the community newspaper with the heading "Law Reform is Your Business" and members of the public were invited to take copies of publications of the commission to study in advance of informal meetings addressed by representatives of the commission. The scheme, held from January to March 1974, was a pilot project designed to ascertain whether a more extensive program of citizen participation throughout Canada would be useful. In the words of the newspaper advertisement, the purpose of the meetings was "to facilitate informed participation by the public", with a view to providing citizens with an opportunity (a) "to learn something of legal philosophy and the views of their fellow citizens" and (b) "to contribute to wise and effective laws."

The meetings were small, with an average attendance of thirteen people. (The population of the Glebe district of Ottawa is fifteen thousand.) They attracted mostly men and women of the professional class. Greater numbers and a broader spectrum of people could be attracted by investment in radio or television broadcasting but the element of active participation might then be lacking. Given the present state of public understanding of the law, it was the learning-by-the-public function which was pronounced. The educative value of the meetings to the small numbers attending was undoubted and the meetings seemed useful for discovering topics of popular concern. (The activities of professional criminals and of practising lawyers were frequently expressed matters of complaint, as were delays in court proceedings, lack of uniformity of laws in Canada, infringements of civil liberties, and the undemocratic character of the law making process.) Criticisms were made of the substance and style of the commission papers: more empirical information was requested and the papers were also criticized for their generality. The value of the meetings to the commission "experts" seemed limited to ensuring that their proposals did not meet with strong opposition. It was unlikely that anything new would have emerged from the meetings after the commission had engaged in lengthy research, but the meetings served the useful purpose of ensuring that the commission's proposals were not completely alien to the values of a small sample of community members.73 The commission is now considering

73. I base my comments on observation of two meetings which were described as "successful" by the co-ordinator and on study of the co-ordinator's report.
whether to undertake a nationwide extension of the project and how such meetings can most productively be organised.

Generally, then, the law should reflect popular consciousness; however, the system that is sought can be is settled only after informed debate. In criminal law, for example, sound factual bases of the actual incidence of criminal behaviour must be the starting point for discussion; the classes of persons incarcerated and the typical situations leading to criminal conduct must be realised; the dubious utility of the vast anti-crime industry will only be perceived if the facts of its operation are known and understood. Thus philosophical, comparative and empirical research needs to be carried out in order to provide guidelines for the reformers and informing the public.

I remarked earlier that the Law Reform Commission of Canada has not always practised what its annual reports preached. Thus, certain research techniques had not on occasions been used and I suggested that this was because full enquiry was beyond the resources of the commission. Similarly the Second Annual Report, 1972-73, confesses to disappointment at the amount of public interest and discussion generated by the commission's study paper on obscenity. One might ask, is the public ever going to be moved to an interest in the law by the commission's present scale of operation? If public reaction was not forthcoming on such an apparently attractive subject as obscenity, what is the hope of sparking interest in some of the more technical or esoteric branches of our law? Jean Beetz has stated the problem as follows: "Old rules might also survive relatively unchanged for the simple reason that those who are advocating their repeal or amelioration have failed to get attention in the contemporary proliferation of suggested improvements and novelties. One may have recourse to various means of achieving this attention ranging from the techniques of advertising to the use of violence, but we may rapidly reach a saturation point where modern man's capacity for attention, pity or indignation has become glutted and where he puts his soul to sleep, from time to time, in a reflex to retain his sanity." 75

How can a law commission draw public attention to the problems of the law? "Our experience with participatory democracy has proved worthwhile, although somewhat disappointing. The com-

75. Jean Beetz, op. cit., at 131.
ments we have received — and there have been several hundred of them — have been articulate, intelligent and helpful. However, we did not get the widespread response that some of us hoped we would. Any of you who have had experience on any body seeking comment from the legal profession or the public know that perhaps the only thing that will get a strong response is the failure to ask for a response.' 76 Thus a commission might deliberately ignore the public or make outrageous suggestions in the certain knowledge that widespread public and press reaction will follow. The irony of the non-consultative work of the Eleventh Report of the Criminal Law Revision Committee is that it provoked a uniquely intense and widespread level of debate, with meetings, symposia, leading articles in the press 77 and a television documentary, much of the discussion being prompted by the political implications of the recommendations. 78 However, the suggestion that a law commission should deliberately inflame the public by ignoring it is clearly too devious to be publicly acceptable.

The solution must be an extension of the advertising, public relations and general operation of the Law Reform Commission of Canada. Would a vastly increased expenditure on law reform — allowing full empirical and consultative research — be publicly acceptable? It should be. Given that law is the structure for our political, economic and social existence — indeed, it is life in society itself — and given the traditional alienation of the people from "law" and lawyers, is the time not overdue to devote extensive energy and resources to questioning the fundamental assumptions of our present legal system and to putting the power of legal change back into the hands of all people in society where it belongs? In the fiscal year ending March 31, 1973, the total cost of the program of the Law Reform Commission of Canada was $1,200,000, the total cost of the Department of Justice's program being $33,837,000. 79 At the same time, the "budget for the

76. M. L. Friedland, op. cit., at 59-60.
78. To the irony that the Eleventh Report succeeded in arousing widespread public discussion can now be added the fact that it has inspired empirical research to question certain of the assumptions made by the Committee. See M. Zander, "Are too many professional criminals avoiding conviction? A study in Britain's two busiest courts" (1974), 37 M.L.R. 28.
administration of criminal justice for all jurisdictions in Canada has increased by 400% in the last ten years. At the present time the direct cost of dealing with crime in this country is approximately one billion, three hundred million dollars per year. This includes the cost of courts, judges, penitentiaries, police and correctional services but does not include indirect costs such as welfare for families of the incarcerated. The allocation for the criminal courts is estimated at one hundred million dollars or only 8% of that total budget.' 80 In this light, ought we not attempt to find out whether this immense anti-crime industry is necessary, desirable or productive and whether its winding up and liquidation would be popularly acceptable? G. Sawer's comment on the English position is also illuminating: "... the English investment in law reform — investment in skill and money — is microscopic compared with the investment in scientific and industrial research and development." 81 If the present scale of operation of the Law Reform Commission of Canada makes for difficulties in applying the necessary research methods is not a massive injection of further resources called for? The alternative of requiring the commission to assume the traditional role of rule reviser, a function which it could easily discharge within its present budget, seems negative, pessimistic and unproductive when seen in the long-term.

There is a need to recruit more questioning minds to the law reform process. It is apparent that so long as legal education in Canada is restricted to vocational training, no fundamental reappraisal of our law is going to occur. 82 Changes need to be made in the legal mind and outlook. "The lawyer must consider himself increasingly as part of a team, involved in the long-term planning processes in which systems analysis will require the integration of the lawyer's skill with those of the economist, the social worker, the scientist, the engineer, the industrial manager." 83 A revival of the teaching of jurisprudence would go some way to easing the situation. Stimulating the study of sociology of law would be even better. The process of law reform itself should become a focal point

80. Mr. Justice E. Patrick Hartt, "The Limitations of Legislative Reform", An address given to the Manitoba Law School Foundation, Winnipeg, Manitoba on November 6, 1973.
81. G. Sawer, op. cit., at 183.
82. "Any law school which lifts its sights beyond the traditional role of training law students and faces the problem of law reform is properly called a law centre." Arthur T. Vanderbilt, op. cit., at 155-6.
83. W. Friedmann, op. cit., at 520.
of study. As G. Sawer has observed, "I think we have now reached the stage where the continuous reform of the law should be a topic of study and instruction in law faculties." The Law Reform Commission of Canada's recent attempts to reappraise the meaning and technique of law reform would benefit from concentrated work on the subject in the law schools and elsewhere. The skills, experience and knowledge required of law reformers must expand to meet the challenge of the discipline and the proliferation of available information.

A commonly heard criticism of the Law Reform Commission of Canada is, "Why isn't it doing anything?" But the better question to ask is, how best can a national law commission operate? This question involves the discovery of a role for the Law Commission of Canada different from that of other existing agencies of so-called law reform or law revision, such as, royal commissions, ad hoc committees, university journals, government departments, and professional organisations. It also involves learning from the work of other commissions. The Law Reform Commission should settle on the role of educational catalyst seeking to ensure that the legal system operates in an informed environment. By establishing this environment, not by changing rules and institutions, a humane, just and responsive legal system will be achieved. "... there always seems to be an overlap between the period of thought and the period of legislation and subsequent practical development. By this I mean that the law and institutions of today naturally reflect the thought and necessities of a previous generation. It takes about a generation for thought to go through the inevitable process of propaganda, discussion and argument before there is a sufficient consensus to justify the acceptance or putting into effect of new ideas. Even then there has to be the spur of a widely-felt necessity." This is the time scale that genuine law reform requires.

85. Lord Tangley, *op. cit.*, at 1.