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FOURTH ANNUAL REPORT

**THE LAW REFORM COMMISSION OF NOVA SCOTIA
FISCAL YEAR APRIL 1, 1994- MARCH 31, 1995**

The Law Reform Commission of Nova Scotia was established by the Government of Nova Scotia under the *Law Reform Commission Act*, in February 1991.

The Commissioners for 1994–1995 are:

William Charles, Q.C., President
Ronald Culley, Q.C.
Justice John Davison*
Theresa Forgeron
Jennifer Foster
Beverley Johnson*
Justice David MacAdam
Dawna Ring*
Dawn Russell
Dale Sylliboy

* These Commissioners' terms ended during the 1994 fiscal year.

The Commission staff are:

Dr. Moira McConnell, Executive Director
Anne Jackman, Legal Research Officer (on leave from January 1995)
Dr. Marilyn Preus, (term replacement starting January 1995)
Nancy Johnston, Administrative Assistant and provides text and Internet processing
Marian Gillis, Financial/Library Resources Assistant (part-time).

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The Commission reports are located on the Chebucto Community Net at cfn.cs.dal.ca at Government and Politics.

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THE LAW REFORM COMMISSION OF NOVA SCOTIA

ANNUAL REPORT - APRIL 1, 1994 - MARCH 31, 1995

A. OVERVIEW OF LAW REFORM COMMISSION AND ITS ACTIVITIES

The Law Reform Commission of Nova Scotia was created by the government of Nova Scotia by an *Act to Establish an Independent Law Reform Commission*, S.N.S. 1990 c.17 (known as the *Law Reform Commission Act*).¹ This law sets out both the mandate and composition of the Law Reform Commission. According to the *Law Reform Commission Act*, the Commission is an organization made up of between five and seven Commissioners, an Executive Director and legal research staff. The Commission reports to the public and elected representatives of Nova Scotia through the Minister of Justice for Nova Scotia but it is not a government department. The Commission currently has seven Commissioners who meet on a bi-monthly basis to review and make decisions on law reform recommendations. The seven part-time Commissioners come from differing sectors of the Nova Scotia community and their appointment process is set out in the *Act*. One represents the Judges of Nova Scotia; three community representatives; two representatives of the Nova Scotia Barristers' Society and one Law School representative. Under the *Law Reform Commission Act*, one of the Commissioners must not be a lawyer. Currently, two of the Commissioners are not lawyers. The President of the Commission is chosen by consensus. The Commissioners, along with the Commission staff, are responsible for carrying out the work of law reform in the province. The Law Reform Commission is described as an independent advisory agency of government. The independence of the Commission, which is achieved through its Commissioner selection, its relationship to government and its funding structure, is essential to its effective functioning as an advisor to government communicating the law reform needs of Nova Scotia in a non-partisan manner. Similar law reform organizations operate in other provinces in Canada, the United States and many other countries.

According to the *Law Reform Commission Act*, the Commission's job is to review the laws of Nova Scotia and to make recommendations for improvement, modernization and reform. This may involve either formulating new ideas and approaches to law, or proposing ways in which existing laws and the legal system can be made clearer or simpler to better serve the needs of the general public. For example, the Commission seeks to ensure that the laws which it examines are consistent with the *Human Rights Act* of Nova Scotia and the Canadian *Charter of Rights and Freedoms*.

One of the priorities of the Commission is to discuss any possible law reforms and the effect these changes might have with the general public – this is how the Commission can find out if the laws that now exist are truly serving Nova Scotians, or whether new or changed laws are needed. The Commission actively consults persons or groups concerned with specific reform projects being undertaken by the Law Reform Commission. The Commission also makes use of various media including electronic communication and computer information networks to inform Nova Scotians about its research, and to give the public an opportunity to respond to suggestions for reform. It is through a process of discussion and study that

¹The *Act* appointing the Commissioners is reproduced in Appendix I. Over the last few decades, there have been several advisory law reform agencies created by governments in Nova Scotia that did not, for a variety of reasons, stay in existence. There had been no law reform agency in Nova Scotia for over a decade when the current Commission was established.

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proposals for reform can be made. The Reports of the Commission include summaries in English, French and Mi'Kmaq and are freely available to the public either as a published form or on the electronic information system, the Chebucto Community Net.

The Commission does not make law in Nova Scotia – this task is performed by the government of Nova Scotia through the decisions of the political representatives in the Legislature. Law is also made through the decisions of judges and other appointed administrative decision makers in cases that come before them. The Commission's Reports and recommendations are formally presented to the Minister of Justice for Nova Scotia, who then discusses the Commission's Reports with the other parts of the government of Nova Scotia.

As of Spring 1995 the Law Reform Commission has developed 8 projects some of which have reached the Final Report stage while others are partially concluded. The projects that the Commission has undertaken cover a large range of concerns and areas of law. One of the projects is a Reference (a formal request) from the government of Nova Scotia. The other projects were chosen from suggestions to the Commission by the public, the judiciary and the legal community.

The projects that have been taken on by the Commission deal with:

1. Enforcement of Maintenance Obligations
2. Reform of the Jury System
3. Reform of the Laws dealing with Adult Guardianship
4. Reform of the legal system relating to Domestic Violence
5. Comprehensive reform of the Administrative Law System
6. Reform of the laws governing the Status of Children Born Outside Marriage
7. Reform of the legal system in relation to Human Rights
8. Reform of the law relating to Advance Health Care Directives (Living Wills)

The Commission usually prepares at least two publications during the course of a project. The first of these, the *Discussion Paper*, is intended to provide the people who do not have legal training with information about the project. It sets out suggestions for reform that the Commission is considering in relation to the issue. The purpose of the *Discussion Paper* is to encourage people to read and understand the issues and the values and principles that the Commission is identifying as the basis for its proposed reforms. The staff of the Commission spend time with media and groups discussing these proposals to encourage people to comment on the suggested reforms. The second document produced is a *Final Report* which is submitted to the Government for consideration. It contains the final recommendations of the Commission as well as more research and, in many cases, a draft law. The Commission's final recommendations take into account the responses it receives to the *Discussion Paper*. The *Final Reports* are intended to provide a basis for the government to consider and adopt the reform recommendations. Since many of the Commission's recommendations may relate to changing an administrative system as well as passing a law, the reform proposals must be reviewed by the government in light of its other responsibilities. The Commission has chosen as part of its mandate, the need to ensure that people who have not historically had a role in shaping the law are consulted with and that their needs and views are also taken

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into account. The work of the Commission is broad in its scope in that increasingly, the reform recommendations have involved considerations around the implementation of law as part of law reform and the administration of justice and not merely the statutes and regulations of the province.

As of Spring 1995 the Commission published:

- A *Discussion Paper* on Enforcement of Maintenance Obligations (July 1992)
- A *Final Report* on Enforcement of Maintenance Obligations (November 1992)
- A *Discussion Paper* of the Jury Reform System (May 1993)
- A *Final Report* on the Jury System (June 1994)
- A *Discussion Paper* on Violence in a Domestic Context (March 1993)
- A *Final Report on Domestic Violence* (February 1995)
- A *Discussion Paper* on the Status of the Child Born Outside Marriage (August 1993)
- A *Final Report* on Status of the Child (March 1995)
- A *Discussion Paper* on Adult Guardianship (September 1993)
- A *Discussion Paper* on Living Wills (November 1994)
- A *Final Report* on the Legal Status of the Child born Outside Marriage in Nova Scotia (March 1995)

An *Annual Report 1991-92*

An *Annual Report 1992-93*

An *Annual Report 1993-94*

An *Annual Report 1994-95*

B. THE LAW REFORM COMMISSION

1. The Operation of the Law Reform Commission

- **The Law Reform Commissioners**

Under the *Law Reform Commission Act*, the Commissioners may be part-time or full-time and are to be drawn from various sectors to ensure expertise and representation. The Commissioners are not employees of the Commission. They receive compensation under an Order-in-Council honorarium for services plus expenses incurred on behalf of the Commission. Currently the members of the Commission come from various locations in Nova Scotia and only six of the seven receive this compensation. Although this has an impact on expenses, it has been important in terms of ensuring their views are broadly representative. Under the *Law Reform Commission Act*, four of the seven Commissioners are nominated independently of government (the Bar Society (2), the Judiciary (1), the Law School (1)). In the 1994 the Commission saw three of its first Commissioners come to the end of their appointments. These Commissioners were replaced by five new Commissioners bringing the Commission to its full compliment of seven. *The Law Reform Commission Act* states that the Commission will be made up of:

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1. Two members of the Bar Society, appointed by the Bar Council of the Province;
2. A Judge appointed after consultation with the Chief Justice appointed by the Governor in Council;
3. One full-time member of the Faculty of Law at Dalhousie on the advice of the Dean appointed by the Governor-in-Council;
4. A person who is not a graduate in law appointed by the Governor-in-Council. In 1994 two people were appointed who are not lawyers;
5. The remaining Commissioner is appointed by the Governor-in-Council with no specific qualifications designated.

● **The Commissioners, 1994-1995**

Mr. William H. Charles, Q.C.

President (1991-1997)

Mr. Charles has served on the Commission since its creation in 1991 and has been President by consensus since that time. Aside from his work with the Law Reform Commission, Mr. Charles, B.A., LL.B. (Dal.), LL.M.(Harv.), LL.M.(Mich.), is a part-time member of the Faculty at Dalhousie Law School and was formerly Dean of Law at Dalhousie. He is also a member of the Alberta Society and the Nova Scotia Society and is involved in health and environmental agencies in the province.

Mr. J. Ronald Culley, Q.C.

Commissioner (1991-1996)

Mr Culley was nominated by the Bar Council of Nova Scotia and has served on the Commission since its creation in 1991. In 1972, Mr. Culley began private legal practice in the Province of Ontario. Since 1982, he has practised in the Province of Nova Scotia and is presently with the firm of Patterson Kitz in Halifax, enjoying membership in the Bars of both Provinces. His legal experience includes civil litigation and criminal law at both appellate and trial levels, plus commercial and administrative tribunal advocacy.

Mr. Justice John M. Davison

Former Commissioner (1991-1995)

Graduating with a B. Comm in 1956 and an LL.B. from Dalhousie in 1959, Justice Davison practised with the firm of McInnes Cooper & Robertson in Halifax for 28 years. In March of 1987, he was appointed to the Supreme Court of Nova Scotia. Justice Davison served the Commission since its creation in 1991 and his term ended in 1995.

Ms. Theresa Forgeron

Commissioner (1995-1998)

Ms. Forgeron is the Bar Council's representative nominated in March 1995. She is a resident of Sydney, N.S. and is in practice with the firm of H.F. MacIntyre and Associates. She has been involved in a number of community boards, a court reform study and has an extensive

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legal practice in the field of family law.

Ms. Jennifer Foster

Commissioner (1994-1997)

Ms. Foster was appointed to serve on the Commission in September 1994. A resident of Canning, she is a full-time student at Acadia University and brings to the Commission a long-standing involvement with public interest community boards dealing with housing, poverty, domestic violence and health issues.

Ms. Beverley Johnson

Former Commissioner (1991-1994)

Ms. Johnson was chosen as the first non-legal Commissioner and served on the Commission from its creation until her term ended in 1994. In addition to her duties as a part-time Commissioner, Ms. Johnson is Director of the Transition Year Program of Dalhousie University. A graduate of the Maritime School of Social Work, Ms. Johnson has had many years of professional experience in the areas of child advocacy and welfare, mental health, corrections and community development.

Mr. Justice David MacAdam

Commissioner (1995-1998)

Justice MacAdam was admitted to the Bar in 1966 and appointed to the Supreme Court of Nova Scotia. Prior to that, he practised with the firm of Burchill MacAdam and Hayman.

Ms. Dawna Ring

Former Commissioner (1991-1995)

Ms. Ring was chosen by the Bar Council as one of its first representatives on the Commission in 1991. She served on the Commission until her term ended in 1995. Graduating from Dalhousie University with a B.A.(Hon.) and an LL.B. (1980), Ms. Ring is in practice in the partnership of Buchan, Derrick & Ring, specializing in administrative law, human rights and employment law.

Professor Dawn Russell

Commissioner (1994-1997)

Professor Russell was appointed as the Law School representative and began serving on the Commission in September 1994. She is a full-time faculty member and has recently been appointed as Acting Dean of Dalhousie Law School. She is also associated in practice with the firm of Stewart McKelvey Stirling & Scales. Professor Russell teaches in the field of corporate law and international environmental law of the sea. She has served on numerous community and public service boards in Nova Scotia.

Mr. Dale Sylliboy

Commissioner (1994-1997)

Appointed by the government to the Commission in September 1994, Mr. Sylliboy is a resident of Truro. He is Executive Director of the Community Legal Issues Facilitation Demonstration Project (CLIF) an organization working on improving communication between Mi'kmaq people and the justice system.

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● Commission Staff

There are three full-time staff people employed by the Commission, the Executive Director, the Legal Research Officer and an Office Administrator. The Commission also has a part-time assistant for its accounting and library needs. Under the *Law Reform Commission Act*, the Executive Director has responsibility for the management, direction, control and administration of the day to day operation of the Commission. In addition, both the Executive Director and the Legal Research Officer are actively involved in the substantive aspects of each project including the design of the research methodology, reviewing the research, editing and/or writing reports, dealing with media, and meeting with public advisors. Under its *Act*, the Commission is permitted to hire consultants for its work. Since financial resources are not sufficient to take on the responsibility for more than the existing employees, the Law Reform Commission uses the services from time to time of legal researchers on short-term consulting contracts for specific research work on projects. This has ensured that there are a number of perspectives and a range of expertise for projects. It also enabled the Law Reform Commission to carry out a number of projects concurrently in its initial two years.

Dr. Moira L. McConnell

Executive Director

The Executive Director started on a part-time basis January 1992 as she had teaching responsibilities at Dalhousie until June of 1992. She began full time work in July 1992 and will continue her appointment until she returns to full time teaching at Dalhousie Law School. Dr. McConnell has a degree in English and History from the University of Victoria and an LL.B. from Dalhousie. She received her Ph.D. in Law from the University of Sydney (Aust.) in 1989 and was admitted to the N.S. Barristers' Society in 1990. As a full-time member of the faculty at Dalhousie Law School, she has researched, taught and published in the legal areas of international trade, business, environment, reproductive control, constitutional law, international human rights, decisionmaking processes, and marine affairs. Dr. McConnell is also actively involved in various public service organizations, particularly in the cultural industries sector.

Ms. Anne Jackman

Legal Research Officer

Ms. Jackman is the Commission's full-time Legal Research Officer. She has a B.Sc. (Hon.) from Memorial University of Newfoundland, an LL.B. from the University of New Brunswick and an LL.M. in health law from Dalhousie Law School. Prior to her work with the Commission, she practised litigation and specialized in family law at the firm of Patterson Kitz. Ms. Jackman works as a volunteer with the mentally-challenged and is also a member of public interest associations. Her particular research interest is public health law. In January 1995 Ms. Jackman took temporary term leave.

Dr Marilyn Preus

Legal Research Officer (Term appointment)

Dr. Preus began working at the Commission in late January 1995 as a replacement for Ms. Jackman and will remain with the Commission until Ms. Jackman's return. Dr. Preus has a Ph.D. in genetics from McGill and a Bachelor of Civil Law and LL.B. from McGill in 1989. She was admitted to the practising Bar of Nova Scotia in 1992. Her primary interest is in

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health law and bioethics fields.

- **Consultants**

The following people have provided legal research and other consultation services to the Commission in the 1994-95 fiscal year: J.Schlossberg (Research Brief, Family Law Services Delivery), R. Balcome (Administrative Law project), J. Marshall (translator), M. Marshall , (translator), B. Francis (translator); N. Bernard (translator), C. Majka (electronic information archival work).

2. Finances

The Commission's accounts are audited independently at the end of the fiscal year and a copy of the auditor's report is found at the end of this Report (in Appendix II) which is provided to the Legislature and to the public and also sent to the Minister of Justice and the Law Foundation of Nova Scotia.

The funding position of the Commission has been tenuous since its inception and remains so from year to year as its two funding sources, the Department of Justice and the Law Foundation, have each had to reduce their budgets. Although there is a provision for funding in the *Law Reform Commission Act* from the general revenue of the province, there is no specified budget. The Commission has been funded on a shared basis (50/50) by the Department of Justice and the Law Foundation of Nova Scotia (voluntarily). The latter, despite severe financial constraint in the last and current year, has continued to support the work of the Commission but in the fiscal year 1994-95 was forced to reduce the funding level to \$100,000 instead of \$150,000. The Commission's budget at its creation in 1991 was set at \$300,000 which covers all costs including staff salaries, Commissioners' fees, rental of offices, printing and distribution of publications, and telecommunications. When the Commission is publishing or carrying out new research, the average monthly cost for the Commission has proved over several years to be approximately \$25,000 per month. In months where either there were fewer Commissioners or reports were being prepared but not published then the costs were approximately \$19,000 - \$20,000 per month. Aside from variations relating to publishing periods and Commission meetings, then the costs of the Commission are, for the most part, fixed. The Executive Director has sought to allocate costs as much as possible to research and substantive work rather than operations. From time to time the Executive Director has also been able to generate small amounts of outside funding to enable this type of work where it has been seen as a useful or appropriate research work for the Commission. Most of this funding has been in the form of direct funding to offset the research consultancy fees (e.g., \$2,500).

The Commission initially ended its first year of operation (1991-92) with a surplus because it was not fully operational until half way through 1992. This "surplus" has been carried over from year to year along with other savings. The fact that the Commission did not have a full complement of Commissioners and had reduced meetings in the last half of 1993-94 and first half of 1994-95 has also created some savings. In June 1994, after receiving the funding from the Department of Justice, the Executive Director projected that there would be a carry forward or "surplus" amount of approximately \$26,000 at the end of the 1994-96 fiscal year. In January 1995, the Commission reported this to the Law Foundation and it was agreed that

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the Commission would be able to meet its financial commitment for the balance of 1994-95 with a grant of \$75,000 rather than \$100,000. However, the unused part of the 1994-95 grant (\$25,000) would be required by the Commission to meet its budget in 1995-96. It was agreed that the Law Foundation would retain the \$25,000 in its accounts, thereby generating interest for use on other projects and would, in effect, "carry over the surplus" into 1995-1996 for the Law Reform Commission. Consequently, the grant from the Law Foundation in 1995-96 will be in an amount up to \$125,000. The Law Reform Commission has also adopted a practice whereby it requests its funding from the Law Foundation in the latter half of the fiscal year in order to maximize the Law Foundation's ability to generate interest on its funds.

The Commission ended the 1994-95 fiscal year very close to its target with a small amount unexpended owing to the invoicing date of some publications.² The Executive Director has reduced the budget by approximately 10% which means that, if the Commission receives the combined revenues of \$275,000, it will still be able to operate, but with no surplus in the next year. Despite the reduced budget, it will be facing a deficit in the following year (1996-97). In responding to this likelihood and the recognition that in a period of economic restraint there is little room for increases, the Commissioners and the Executive Director have developed some alternative staffing structures which, assuming stable funding resources in the 1996-97 year, should be able to ensure that the Commission would still be able to operate at the same level in 1996-97 with either a very small or no deficit. This means that the Commission has to carefully evaluate costs on all projects to ensure that funds are in place. The uncertainty from year to year on funding does create additional problems relating to whether longer term projects should be started as well as employment commitment to staff. The issue of longer term funding has been raised in previous years and the Executive Director and the Commissioners developed a position regarding the matter of government funding and independence. In March 1993, they met with the then Deputy Ministers to discuss the work of the Commission in relation to the needs of all departments. At present, the Department of Justice provides the funding out of its budget. While sole funding from the government does not necessarily result in a lack of independence, there are obvious implications for credibility. However, experience to date has indicated that the independence of the Commission and its ability to actively liaise, communicate and advise from outside government, is an asset which is valued equally by the government and by the public. These are all issues which will require resolution in the next year to determine the future of the Commission.

²The Commission audit expenses as of year end were \$277,643 plus \$5,839 in amortization. It had a "surplus" of approximately \$10,430 of which \$2,504 was unreceived GST repayment and a prepaid expense.

C. IMPLEMENTING A LAW REFORM MANDATE AND STRATEGY

1. The Commission Process and Strategy

Under s. 4 of the *Law Reform Commission Act* the purpose of the Commission is to review the law and legal system in the Province and any matter relating to law in the Province and to make recommendations for the improvement, modernization and reform including recommendations for:

- (a) development of new approaches to, and new concepts to, law that serve the changing needs of society and of individual members of society;
- (b) clarification and simplification of the law;
- (c) removal of provisions of the law that are outdated;
- (d) improvement of the administration of justice;
- (e) review of judicial and quasi-judicial procedures.

Law reform, at whatever level of government, must now be based on broad consultation which explicitly discusses and considers the views of people who have not traditionally had any input into the formulation of the law. This is even more critical because the constituents of the lawmaking body in Canada, legislators and judges and senior administrators, are still, for the most part, drawn from the sector of the community which has historically formulated the laws and legal system.

An important role, then for any law reform agency, is to legitimate and give voice to the validity of pluralism and to provide models for law and legal writing which reflects this approach. This is a challenging mandate particularly in the context of communities and which can be based on many characteristics such as ethnicity, religion, gender, age, ability, or sexual orientation. There is an obligation to actively seek this participation. Affirmative consultation requires a number of things. It means recognizing that the Law Reform Commission is not only a public service but is, through its very existence, part of the law reform culture and that the way in which it acts also causes changes. In the case of the Commission it has meant translation of proposals into other languages, and recognizing that Nova Scotians live in a society served by technology which necessitates the use of radio and television media. It has also meant understanding that legal issues must be explained in a way that enables people to participate in a reasonably informed way. For example, having non-lawyer members of the Commission has been very helpful in reminding the lawyers involved with Commission of many of the assumptions held by people trained in the law.

The educational function of the Commission's work, as well as its role as a facilitator of change, is also an important aspect of reform work. This is particularly the case where in many instances, recommendations for reform, while endorsed in principle, may not be possible to implement for a period of time because of the fiscal or institutional restructuring required. The fact that the government and elected officials review and may accept or endorse only some parts of law reform proposals, is a critical aspect of the overall law

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reform process. Law reform necessarily requires that the democratic institutions charged with responsibility for making laws consider all factors before they make the final judgement as to when and how change will occur.

The Law Reform Commission of Nova Scotia is distinctive in Canada because of its express independence, and because the Commission has chosen to carry out projects which are currently relevant to large sectors of the community and may be perceived as "difficult" areas. These are often areas of law which require a great deal of consultation and balancing of interests and as a consequence, do not immediately or easily result in legislation. Historically the success of Law Reform agencies has been measured by the correlation between recommendations and legislation that is passed, however, the Law Reform Commission of Nova Scotia has already, in its short history, chosen projects which are challenging, and in one case has suggested that no new legislation is required. This reflects the importance the Commissioners have placed on ensuring that their recommendations are directed to creating actual reform or change in the legal system rather than simply adding to the law with no effective change being experienced. Indeed, if anything, the Commission's view is that where there is no corresponding allocation of resources or institutional reform to properly deliver the promise of the law then, although creating a law may have some educational value, it ultimately constitutes a disservice to the community. In addition, the Commission has focused on a cooperative and consultative approach to its research work. Where, possible every effort is made to ensure that the research carried out is made available to other agencies in both the governmental and non-governmental sectors to avoid duplication and to assist where other agencies have a similar interest in a research topic but may not have the resources to do the necessary research. It is the view of the Commission that its practice of creating public discussion and interest in the work of government and the legal system is a significant aspect of the contribution that law reform can make to developing a society which better addresses the needs of all people in the Province.

The Law Reform Commission of Nova Scotia has now been in operation for close to 4 years. As noted in earlier reports, the Commission has been able to set up its infrastructure, create and develop its decisionmaking process and mandate, develop effective working relationships with the public, media, government departments, the practising bar, academia, numerous interest/representative groups and begin to develop linkages with under-represented communities in Nova Scotia. The Commission has actively involved and sought the advice of government personnel, the practising Bar and diverse community and interested groups through Nova Scotia. The Commission has also developed a pro-active approach to media, governmental and academic relations. This has involved presentation of papers at conferences and exchange of information with other law reform and policy agencies. The central concern has been to try to seek a balance between research efforts and the need to ensure Reports are published and ideas are available for use while issues are being debated and the work is likely to be considered by decisionmakers.

The general process of the Commission is reflected in the following outline and in the Project Descriptions which follow in Part D. This process is still evolving but to date has generally adopted the following pattern:

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- ***Project Selection:***

The Commission selects a general topic for reform based on public suggestions, comments from the Bar, judiciary, media and government. The Commission uses its own criteria to determine priorities for eventual selection.

- ***Project Design:***

Staff prepares some preliminary research into the size and cost of a project to see if it is useful, viable and how it will relate to other work in the community.

- ***Research/Advisory:***

If a project is taken on, a Research Brief will be prepared for a Liaison Committee (comprised of one or more Commissioners, the researcher and the Executive Director), setting out some possible issues. These are presented to the Commissioners in the form of a Research Brief, with proposed recommendations for reform. Generally these recommendations are developed through specific consultations and advisory meetings between the liaison committee, affected people in the community and in the government.

- ***Discussion Paper/Consultation:***

Once the Commissioners have determined their initial position on the various issues, a Discussion Paper is prepared for public distribution. This is reviewed by the Commission as a whole then is circulated to between 1,200-2,000 people. The Commission has recently become accessible electronically and its papers are all available on the electronic networks (Chebucto Community Net). The Commission has a practice of providing a copy of the Discussion Paper to affected departments before it is released publically to enable the Department to respond in an informed way to the media. The Discussion Paper is specifically designed and written to ensure public communication with the non-legal public. A summary of the Paper is translated to the French and Mi'kmaq languages. There is usually a period of several months to allow for public response. During this time there is media communication to ensure public discussion as well as meeting with and making presentations to interest groups to provide information. For the most part, the Commission has focused on the electronic media for reasons related to 1) cost; 2) accessibility (most people watch or listen to electronic media); 3) many people have literacy problems or do not respond to "legal" documents.

- ***Final Report/Recommendations:***

The public submissions and comments are reviewed by the Commissioners and a Final Report with recommendations and if it is appropriate, draft legislation is provided to the Minister of Justice and affected Ministers. It is also publicly distributed to between 800-1,200 people.

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Some of the considerations that come up during the Commission's discussion on law reform projects are drawn from the *Human Rights Act* of Nova Scotia, the *Charter of Rights and Freedoms* as well as the findings and recommendations of the of the Royal Commission on the Donald Marshall Jr. Prosecution.

In addition, the economic impact of implementing recommendations in an era of scarce resources is a legitimate and appropriate consideration for the Commission. Ultimately, the issue for the Commission is identifying whether the problem being considered is one which can be addressed through a change in the law or in the implementation of the law. It has become apparent in the various projects that one of the more difficult issues to identify in making recommendations for change arises out of the need to go beyond merely recommending adoption of the language or law which it is assumed will create the change. In order to make recommendations which will create real change, there is a need to identify areas in which change has not occurred and, assuming political will for change, to attempt to determine which factors are blocking changes and how this resistance can be addressed. In many cases, change does not occur simply through law or even resource allocation but is a combination of motivation, incentives, attitude, resources and identifying areas in which there is agreement about change. Without these underlying factors, the passage of a law will cause some changes but, ultimately, will not create the change sought unless it is in accordance with the social values or needs of the time.

- As noted in the Overview, the projects that have been taken on by the Commission deal with:
 1. Enforcement of Maintenance Obligations
 2. Reform of the Jury System
 3. Reform of the Laws dealing with Adult Guardianship
 4. Reform of the legal system relating to Domestic Violence
 5. Comprehensive reform of the Administrative Law System
 6. Reform of the laws governing the Status of Children Born Outside Marriage
 7. Reform of the legal system in relation to Human Rights
 8. Reform of the law relating to advance Health Care directives (Living Wills)

As well, the Commission has prepared research (working) papers in connection with the Human Rights Project, Domestic Violence Project, the Status of the Child Project, the Juries Project and the Administrative Law Project. In addition, the Commission carried out a comprehensive survey of all ABCs in Nova Scotia to develop a data base for its research in the Administrative Law Reference. The Commission has prepared a comprehensive listing of all existing statutory/regulatory appeals and review process in Nova Scotia. The results of these research papers will be included in its Final Report.

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2. The Commission's Activities 1994-95-96

The Commission was pleased to see that its recommendations in the *Enforcement of Maintenance Obligations* Final Report have, to a large extent, been accepted by the government in the form of an *Act* which is in the last stages of approval by the Legislature. It is believed this will benefit many people in Nova Scotia and will ultimately reduce the cost to society of people failing to obey court orders to pay maintenance.

The Commission expects to publish a *Final Report* on the Adult Guardianship /Advance Health Care Directives project in the summer of 1995. A *Discussion Paper* will also be published regarding the Administrative Law project in the early part of the 1995-96 fiscal year. The *Final Report* on the Administrative Law Reference (a four part Reference) should also be ready for a *Final Report* in the 1995-96 fiscal year. The Commission is also working on developing a partnership with other equality organizations to publish Discussion and/or Study Papers on a range of issues under its umbrella project dealing with advancing human rights. This Commission is currently considering new project areas to begin work on as the original projects come to completion. Some of the areas being considered for projects are reform of matrimonial property law in Nova Scotia, reform of the law governing foreclosures on mortgages and possibly a project involving the impact to electronic information on law and legal practice.

The Commission has recently, in partnership with the Chebucto Community Net (CCN) put all its publications on the electronic information system. This has been something of a pioneer effort in Nova Scotia, since the CCN had not dealt with this volume of material before. In addition, this is the first time that the Mi'kmaq language has appeared on the electronic information system. The Commission has also included, as a public legal research service, linkages through its directory on the CCN to all decisions of the Supreme Courts of Canada and the United States and linkages to legal research and reform resources around the world. This information is free to electronic information users and will give greater access and commentary on the Commission work. The CCN system is growing in Nova Scotia with over 7,000 users currently registered on the system and new systems are being set up in other regions in the province. All of these users will have direct access to any Commission research document. In addition, there are over 40 million electronic information system users globally, all of whom may now access and respond to Law Reform Commission materials. The Law Reform Commission of Nova Scotia is undertaking a leadership role in providing information to the public in this format, which once installed, requires minimal services from the Commission since the viewer can access reports him or herself.

The Commission is now operating with its full complement of seven part-time Commissioners. Until 1994, the Commission had only five Commissioners which had meant that numbers were not sufficient to have decisionmaking meetings when more than one person was absent. In January 1994, two Commissioners' appointment's expired, although they remained on the Commission until the government made its appointments. In August 1994, the government appointed three new Commissioners and reappointed a fourth which brought the Commission to seven. In February and March 1995, two additional Commissioners were appointed to replace the judicial appointment and one of the Bar Society appointees who had ended their appointments. The Commissioners are now drawn from various locations in Nova Scotia, a fact which adds some cost to the operation of the

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Commission and ensures that its views and approaches of issues are more broadly representative of the public interest in Nova Scotia. The Commissioners have agreed to meet on a bi-monthly basis and numbers are sufficient so that work can proceed in the absence of one or more of the Commissioners at a meeting. In addition, each Commissioner may meet one or more times a month with an advisory group for a specific project he or she has special responsibility. This has been important for the work of the Commission in that, although staff research and write reports and make suggestions for recommendations based on advisory group meetings, the Commissioners make the final decisions as to the recommendations and policies contained in the Reports.

As the foregoing description suggests, the Commission has, in its relatively brief life, achieved a great deal of credibility with various sectors of the community in Nova Scotia. For example, we understand that the translation of summaries of the papers into Mi'kmaq and the consultation process with community groups has been viewed positively. In addition, the Commission has achieved recognition for its work at a national level, as its advice and substantive work is now requested by other law reform agencies both provincially, federally and internationally. The Executive Director of the Law Reform Commission is also Chairing a committee of the Uniform Law Conference of Canada, a national advisory agency, to develop guidelines for jury reform which can be used by all provinces and provide guidance for Federal reform. This request followed a Paper presented to the annual meeting of the Conference by the Executive Director. The Paper, while focusing on the need for uniformity in this matter, drew heavily on the Law Reform Commission's Discussion Paper *Juries in Nova Scotia*. The Commission's Papers have also been used by various academics as teaching materials for classes, by government, as well as other agencies to develop awareness of issues and focus discussions.

The Commissioners have spent some time determining how best to fulfill the role of an independent advisory body to government. The Commission has believed that it is important to maintain good communications and consultation with government departments who will be concerned with implementing any reforms while at the same time ensuring that it consults and considers the perspectives of people whose needs may not be met by the current system. The fact that the recommendations are made by part-time Commissioners and that part of the funding for the Commission, as well as the fact that it is physically separate and distinct from government, assists in the creating both the appearance and the reality of independence. The concerns of government regarding resources are considered and discussed but the Commission is not privy to, nor a participant of, internal departmental consideration. The Commission, in its brief existence, has through its papers, begun to develop its identity in the community as well as determining what values are to be pursued in all law reform efforts.

The projects that the Commission has taken on have all included issues of current social concern. None are easy topics and all involve issues that require a great deal of system-wide restructuring. These have not been easy to work with in terms of ensuring that all issues are considered and also in seeking recommendations that may be useful to society. In addition, the Commission has placed a great deal of emphasis on public communication and consultation process through electronic media, radio interviews and public talks as well as publishing materials. This has largely reflected the perspectives in the Commission that one

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of the components of law reform is to enable broader participation in the law/value shaping process. The Commission has seen as a necessary aspect of its research and recommendations, the process of providing information and communicating its ideas and the values it believes it is advancing to people who may wish to comment or express their views. The Commission includes in this communication mandate the need to broadly inform and communicate with all departments of government so that the government as an institution can also respond or comment on the Commission's views. Again, this is an aspect of independence from government which has been important.

The Commission spends a great deal of time when developing recommendations to considering initiatives that are currently underway and is seeking ways to ensure that its recommendations do not duplicate existing work but complements or draws together initiatives. This, in part, reflects the value the Commission has placed on accountability and a critical reflection on where law or the legal system intersects with a particular social or commercial problem.

The Commission's work in the last few years has tended to be in the area of equality. This, in part, reflects both an assessment of what the current problems facing society involve but it also reflects a view that economic development will not occur in the absence of equality and more effective justice system which addresses problems such as domestic violence or maintenance obligations or responses to decisionmaking needs for the people who may no longer be able to make decisions for themselves. Issues such as personal autonomy, substantive equality and the role of the state in relation to these matters are at the heart of most contemporary public policy debates.

The Commission's approach to law reform as articulated through its projects and practices will continue to advance goals such as participation, communication and recognition of the equality in the law and its delivery through legal and other systems. In this regard the Administrative Law Reference will probably be the most comprehensive large scale structural reform proposal prepared by the Commission. It is an important and challenging area in that many issues such as the relationship between government and decisionmaking, decision-making process, public rights and the nature of natural justice and structure of the administrative law system including appointment processes, independence and the relationship to the courts are all aspects of this project.

In addition to the consultation and communication work on specific projects, the Commission personnel and the Commissioners are actively involved in raising the awareness of law and law reform of Nova Scotia. This has involved meetings with the media, preparation and widespread distribution of Discussion Papers and Final Reports in the English, French and Mi'kmaq languages. The Executive Director and the Legal Research Officer and the Commissioners have also met with the various community leaders to discuss ways in which comments can be obtained for information and made available to law reform projects. The Executive Director and the Legal Research Officer have been involved in speaking engagements and educational sessions with many different sectors of the community. The use of advisory groups involving people who represent agencies or people who have an interest in the subject of a project has also assisted in circulation of information about the projects as a means of communication of issues and potential reforms through other community agencies. In addition, the Commission and its staff actively participate in

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other law and policy related organizations in the province and in Canada to ensure that there is communication of information and sharing of resources regarding work being done in Nova Scotia and elsewhere.

D. LAW REFORM PROJECTS UNDERTAKEN: 1992-1995

The Law Reform Commission has chosen eight areas for law reform. Except for two cases the projects were initiated in July 1992. After three full years of operation,³ the Commission has now fully completed four of the eight projects and is close to completion of the remainder of the projects. The four projects that have been totally completed are the Enforcement of Maintenance Orders, the Jury System in Nova Scotia, Domestic Violence and the Status of the Child Born Outside of Marriage in Nova Scotia. The projects that are close to being finished are Adult Guardianship/Advance Health Care Directives, Administrative Law Reference, and a paper under the Human Rights (Umbrella) Project.

The following outlines the general issues in each project and lists the specific recommendations of the Commission:

1. The Enforcement of Maintenance Obligations in Nova Scotia *(now resulting in legislation)*

This project provided recommendations and a draft *Act* to create a more automatic process of enforcing court orders for family maintenance obligations. The final report was submitted in the Fall of 1992. In November 1994 the government introduced legislation essentially adopting, with some alterations, the Law Reform Commission's draft *Act*. The new system will become operational in 1996. It is expected to result overall in lower cost to taxpayers, the courts and recipients of maintenance obligations. It is also expected that it will result in a more efficient administrative system for enforcing maintenance obligations. This reform will also operate to alleviate some problems arising in the context of family/domestic violence.

The Commission's recommendations in this project were:

1. The courts of Nova Scotia adopt guidelines to help provide consistent and equitable maintenance orders.
2. A Unified Family Court be created for Nova Scotia with all of the powers now available in Supreme Court.
3. An Office of Director of Maintenance Enforcement be established to assume sole responsibility for the enforcement of all maintenance orders in the province which are filed with the Director.
4. All court orders for maintenance contain a direction for the filing of the order with the Director of Maintenance Enforcement for automatic enforcement.
5. Individuals with court orders for maintenance made before the new program is implemented be permitted to file the orders with the Director for enforcement. This may be done by either person without the consent of the other party to the order.

³The Commissioners were involved in organizing the Commission in 1991 to 1992.

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6. All maintenance orders which are now enforced through Family Court be transferred to the Director of Maintenance Enforcement.
7. All maintenance recipients under an automatic system be treated equally.
8. Either party to an Agreement for maintenance may file for enforcement with the Director of Maintenance Enforcement. Once filed, the agreement is treated as an order of the court for the purposes of enforcement.
9. Parties to a court order for the payment of maintenance be permitted to "opt out" of the program if a written consent is signed by both parties.
10. Even if the parties to the maintenance order originally opted out of the enforcement program, either party will have the right to re-file a maintenance order at any time.
11. The court granting the original maintenance order will have discretion to prohibit opting out, if it is in the best interests of those affected by the order.
12. If a person misses a single maintenance payment, garnishment of any available income will automatically be imposed by the Director of Maintenance Enforcement without a default hearing.
13. Where an income source is not available, the Director may seize and sell assets under an execution order without a hearing or opportunity to explain a default.
14. Consequential changes should be made to the *Family Maintenance Act; Family Court Act; Testators' Family Maintenance Act; Workers' Compensation Act; Pension Benefits Act; Maintenance Orders Enforcement Act; and Family Orders Information Release Act* to fully implement the automatic enforcement system.
15. The recommendations contained in this Report be implemented by the adoption of a new law similar to the draft *Maintenance Enforcement Act* set out in the Commission report.

2. Reforms to the Jury System in Nova Scotia *(Final Report with the government)*

This project involved a review of jury selection processes which are administered by the province. The current system operates at great expense to individuals and society and is believed to have systemic discrimination problems. The changes to court systems including large geographical areas for court jurisdictions also provided additional challenges. The Final Report contained recommendations for a more automatic juror selection system which made use of technological advances and existing computerized systems. It also contained a draft *Juries Act* which reflected the principle of efficiency, inclusion and eliminated various areas in which discretion could be used to exclude or excuse people from jury service. It is believed that if implemented, this system would reduce the workload for the jury selection of officers and also provide a system where there was more opportunity for inclusion of more people through proper compensation and allowing for deferrals of jury service. The policies and principles underlying the proposed reforms were presented by the Executive Director at the meeting of the Uniform Law Conference of Canada in 1993 and it was suggested that many of the principles should be adopted in all provinces. In 1994, the Executive Director of the Commission Chaired an interprovincial Committee of the Uniform Law Conference to develop these principles which were considered at the 1994 annual meeting. This consideration will continue at the next meeting in 1995 of the Conference.

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The Commission's recommendations in this project were:

1. The Government of Nova Scotia adopt the draft *Juries Act*, the associated Forms and the Recommendations in this Report.
2. Reform of the jury system be based on principles of representativeness, impartiality and administrative efficiency for the participants and the Government in a multicultural society.
3. The principles of representativeness, impartiality and administrative efficiency in the context of the jury system should be achieved through random selection and removal of systemic and other discriminatory exclusions and exemptions rather than through selective representation.
4. Juries should continue to be available in Nova Scotia for criminal and civil matters.
5. The rules governing the availability of juries for civil trials should not be changed, however, all the rules regarding civil juries in Nova Scotia should be consolidated in a new *Juries Act*. The continued availability of peremptory challenges should be considered.
6. The voters' list should no longer be the only source from which Jury Lists are chosen, rather a more comprehensive computerized list such as the medical service insurance list be used.
7. Anyone who is concerned that his or her name might not be on any of the lists to be used should be able to register with the Court Administrator.
8. The twelve month residency requirement in a jury district should be removed.
9. Fewer categories of people should be disqualified or excused from serving as jurors.
10. The Majority of the Commission recommends that Canadian citizenship remain a qualification and that medical practitioners be automatically excused from service. Civil Procedure Rule 34.03 automatically excluding a pregnant woman should be repealed.
11. The Majority of the Commission recommends that the Governments of Canada and Nova Scotia should examine access to justice issues involved in recognition of the language rights of the Mi'kmaq people in Nova Scotia.
12. The Jury Committee should be eliminated and the Jury Panel list should be prepared by the Court Administrator based on a centralized computer generated selection process.
13. Disqualifications and excuses should occur at the time of Jury Panel selection and should be on the basis of a request by the Panelist recorded on the Juror Information Form.
14. A Jury Panelist should be able to be excused in advance of a trial by a Court Administrator with broader supervisory power to be exercised by the Courts. Jurors should be able to defer service.
15. The juries system and law should be reformed to ensure that its principles are implemented consistently with other Court structure and administration of justice reforms. In particular, the impact of Court reform in the context of the demography of the Province and the representativeness of Jury Panels should be considered.
16. The provisions concerning juror fees should be changed to use the resources more equitably and to ensure that systemic discrimination based on economic barriers is eliminated. In particular:
 - (i) the fees paid for service should be higher although no one will be paid for appearing for selection from a Panel. The amount of the fee should be set out in Regulations rather than legislation.
 - (ii) employers should not be required to continue to pay when employees serve however jurors who are paid should not get jury fees.

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17. There should be increased Public Legal Education regarding juries, particularly in schools.
18. A new *Juries Act* should reorganize and update the provisions in the existing *Juries Act* which are no longer applicable to current practice, including simpler Juror Summons and Juror Information Forms.

3. Domestic Violence *(Final Report with the government)*

The Final Report on this project, *From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia*, was released in February 1995. The chief issue considered in the project was determining the best and most effective provincial response to the crime of domestic violence. The problems identified by the Commission were social attitudes coupled with fundamental legal and structural problems in the legal system in Nova Scotia which posed a challenge to determining where law reform could best occur. The Report is important in that statistics for Canada and Nova Scotia suggest that Nova Scotia has the third highest rate of domestic violence in Canada and that it is a significant problem imposing large costs on society as a whole. The Report along with other studies complementing it have resulted in the government of Nova Scotia committing itself in its recent budget release to identifying the ending of domestic violence as a quality of life goal and a line item in the budget, although the specific targets and measurements are yet to be determined.

The Commission's Report reflects its view that progress in elimination of domestic violence will come through a combination of efforts and strategies to ensure policy compliance by the legal system, personnel and some changes to the laws to make them more useful to women who are assaulted.

The Commission's recommendations in the project were:

1. It is critical that the government of Nova Scotia make the eradication of domestic violence a priority to which it will target action and resources;
2. The legal response to domestic violence should include improvements both in the criminal and the civil law systems and their delivery;
3. The life-threatening nature of domestic violence, its immense social cost and the barrier to equality for women must be explicitly recognized in the legal and resources response;
4. The law must ensure that, in addition to protection of women, the fact that domestic violence is socially unacceptable must be communicated with clarity and certainty.
Develop system-wide inter-departmental Protocols for handling domestic violence cases;
5. Adopt as the central principle of the Protocols the protection and security of the woman and any other endangered people as the priority for all decisions;
6. Commit sufficient human, education and technical resources including modern communication systems to allow the Protocols to be effectively delivered;
7. Ensure that the existing system for monitoring cases of domestic violence is enhanced and that there is personal accountability for individuals involved in implementing the Protocols;
8. Require that an independent agency, such as the Advisory Council on the Status of Women, prepare and

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- publish an annual evaluation of the government's progress in the eradication of domestic violence.
9. The Supreme Court judiciary should develop clear sentencing guidelines to ensure that judicial discretion is exercised consistently throughout Nova Scotia in cases of domestic violence.
 10. The Minister of Justice for Nova Scotia should seek to create a unified family court in Nova Scotia with appropriate resources. At the same time, there must be resources and full consideration devoted to developing less adversarial methods of resolving family law disputes so that the court is a last resort.
 11. The majority of the Commission recommends that a unified family court should not have greater criminal jurisdiction than it already has, that is, ordering and enforcing peace bonds.
 12. The majority of the Commission recommends that rather than a specialized separate Family Violence Court, the existing system should be improved to ensure that legal services are delivered equally and fairly to everyone.
 13. There should be province-wide specially trained interdisciplinary teams of police and government and non-government support workers to respond to domestic violence cases.
 14. No court-ordered or sanctioned mediation of family law issues should be permitted where domestic violence is suspected.
 15. The definition of husband and wife contained in the *Family Court Act* should be changed to include same sex couples and couples who are in a spousal relationship regardless of the length of time involved to allow more people to apply for peace bonds in family court.
 16. There must be safe and affordable housing as transitional and long term alternatives for women escaping domestic violence;
 17. The *Matrimonial Property Act* should be changed in two ways: first, domestic violence should be considered when granting an order for exclusive possession of the matrimonial home; and second, orders for exclusive possession of a shared residence should be available to all common law couples, including same-sex couples. The *Act* should also include leasehold interests and provide authority to make orders regarding those interests.
 18. *Children and Family Services Act* should place a duty on an abusing parent to stop the abuse. The *Act* should also state that an abused parent will not lose custody of her children solely because she did not report the fact that she was being abused. However, this does not alter the responsibility of the child protection authorities to intervene and protect a child where circumstances require it.
 19. The *Family Maintenance Act* should be changed so that domestic violence is a determinative factor in custody and access decisions and settlements.
 20. There should be a presumption that it is not in the best interest of the child that an abusive spouse have joint custody or unsupervised access to the child.
 21. The provincial Minister of Justice should advocate to the federal Department of Justice for similar amendments to the access and custody provisions of the *Divorce Act*.
 22. There should not be mandatory reporting of domestic violence cases until the legal system is sufficiently developed to be able to guarantee the safety of women whose life may be endangered by unexpected police action or responses. Even in that case there should not be a requirement that support workers report domestic violence unless the woman agrees.

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23. The Minister of Justice recommend that the *Unemployment Insurance Act* be amended to allow a woman to leave her employment and obtain benefits if she has been subjected to domestic violence and has left her job to escape harassment from her spouse.
24. The Minister of Justice for Nova Scotia advocate changes to the *Criminal Code* to ensure that criminal law is reformed to respond more usefully to the crime of domestic violence. These changes should include the recommendations set out below in paragraphs 26-31.
25. The *Criminal Code* should be gender neutral and peace bonds should be available at the request of a person on behalf of another person;
26. Breach of peace bonds should be a hybrid offence with mandatory conditions prohibiting contact with the woman and possession of firearms in cases of domestic violence.
27. Police officers should be directed to exercise their powers of arrest and detention in cases of domestic violence to remove and detain the abuser until released with conditions or until trial. This can be achieved provincially through system-wide Protocols. In addition, the *Criminal Code* provision governing arrest and detention and judicial interim release should be altered to ensure that where the domestic violence has occurred, the police, prosecution and justices and judges are directed to arrest and detain the abuser in custody unless he obtains an interim judicial release. Justices giving release orders must be required to consider conditions prohibiting contact with the woman and possession of firearms and other conditions appropriate to the particular case including mandatory reporting. Breaches of these conditions must result in detention until trial.
28. The criminal offence of torture should be reviewed to make it available for use in domestic violence cases or alternatively a new crime of domestic violence should be created with similarly severe sanctions.
29. The majority of the Commission recommends that the sentencing provisions of the *Criminal Code* should be altered to require mandatory counselling specifically designed for abusive men in addition to any prison sentence. Alternatives to prison should only be allowed on a post-conviction basis and only where the woman has consented and the prosecutor, judge and the expert evidence conclude that it is appropriate;
30. Evidence giving practices should be reviewed to ensure that wherever possible, the woman should not have to testify if the crime can be established without her evidence. If the woman chooses to do so she should be able to testify behind a screen or through the use of video equipment, subject to the right of the defendant to cross-examine her.

4. The Legal Status of the Child Born Outside of Marriage in Nova Scotia *(Final Report with the government)*

This project, aimed at implementing the International Convention on the Rights of the Child, has been a matter of interest for a number of groups as it also included discussion of the customary adoption practices in the Mi'kmaq community, new reproductive technology and recognition of broader definitions of the family. It has been used by and is of interest to the Federal department responsible for Canada's international obligations. It is of interest also to practitioners in Nova Scotia in that it responds to the recent decisions of the Nova Scotia Supreme Court which found that legislation in Nova Scotia which distinguishes between children on the basis of the marital status of the child's parents was contrary to the *Charter of Rights and Freedoms*. Although the Commission reviewed the *Final Report* and draft *Act* at the end of 1994, owing to an editing decision, it was published at the end of March 1995. This project has become increasingly important in light of the Report of the Royal Commission New Reproductive Technologies at the end of 1993. While this Report

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recommended that the technology be regulated federally, it also recommended that provincial governments who have not done so, pass a law providing certainty for determination of parent child relationships in connection with sperm donors and ovum donations. The Final Report of the Law Reform Commission is consistent with these recommendations and legislation elsewhere in this matter.

The Commission's recommendation in this project were:

1. The law and legal system in Nova Scotia be reformed to abolish discrimination based on the marital status of the child's parents as required by the United Nations *Convention on the Rights of the Child* and the *Canadian Charter of Rights and Freedoms*.

The majority of the Commission recommended that:
2. The biological connection remain the foundation of the parent and child's legal relationship with specific exceptions.
3. The draft *Status of the Child Act* contain two exceptions to the principle that the biological parents of the child are the legal parents, namely legal adoption and assisted conception.
4. The government consider reform of the law on adoption and other matters governing children to take into account customary parenting practices.
5. Further study and research on law and policy be carried out to respond more comprehensively to the regulation of reproductive technology in Nova Scotia.
6. The government of Nova Scotia adopt the draft *Status of the Child Act* and the consequential amendments and principles recommended in this Report.
7. The presumptions of parentage set out in the draft *Status of the Child Act* be adopted.
8. The draft *Status of the Child Act* contain provisions enabling the use of genetic tests to establish parentage.
The *Family Maintenance Act* be amended to allow that genetic tests be admissible to provide confirmatory as well as exclusionary evidence.
9. The draft *Status of the Child Act* provide for declarations of parentage.
10. To provide for greater certainty, declarations of parentage made in Nova Scotia and out of province be filed in a public registry. These declarations would be treated as confidential.
11. A person who believes he or she may be a parent be able to register a unilateral declaration to that effect in the parentage registry. The declaration entitles the person to notification but does not constitute a determination of parentage or provide any other entitlements.
12. Limitation periods that currently exist in legislation for notice be maintained but be interpreted as extending to locating children born outside of marriage.
13. The *Children and Family Services Act* be amended to remove the distinction between children based in the marital status of the parents so that the biological father would be entitled to notice of adoption subject to the courts discretion to waive notice and consent requirements when it determines that it is in the best interest of the child and is consistent with the mother's view of the best interest of the child.
14. The *Children and Family Services Act* be amended to remove the distinction between children based on the marital status of their parents so that in cases involving child protection proceedings, notice be given to biological parents of a child and to people who are recognized in law and by custom as fulfilling a social role of parent to the child.

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15. The *Solemnization of Marriage Act* be changed to remove the distinction between children based on the marital status of their parents and the changes recommended in the draft *Status of the Child Act* be adopted.
16. The *Family Maintenance Act* be changed to remove the distinction between children based on the marital status of their parents and the specific amendments set out in the draft *Status of the Child Act* be adopted.
17. The draft *Status of the Child Act* apply to statutes and instruments retrospectively except for cases where rights have vested.
18. The *Intestate Succession Act* be amended to reflect case law which extends succession rights of the child born outside of marriage to include the father as well as the mother.
19. The search, notice, limitation periods and liability provision in the *Trustee Act*, *Probate Act* and *Public Trustee Act* be reviewed in light of the draft *Status of the Child Act*. In particular:
 - (a) There be a limitation period of six months for the search for heirs by executors or trustees. The search should include advertisement in a newspaper of wide circulation.
 - (b) There be statutory protection from liability for executors and trustees who have conducted a reasonable inquiry for heirs.
20. The *Vital Statistics Act* be amended to remove the distinction between children based on the marital status of their parents.
21. The *Change of Name Act* be amended to remove the distinction between children based on the marital status of their parents; and the changes set out in the draft *Status of the Child Act* be adopted.
22. The *Family Benefits Act*, the *Fatal Injuries Act*, the *Public Service Superannuation Act*, the *Settlement Act*, and the *Victims' Rights and Services Act* be amended to ensure that they are consistent with the principles in this Report, and the specific changes set out in the draft *Status of the Child Act* be adopted.

5. Adult Guardianship

(Discussion Paper published and comments being sought)

A Discussion Paper was issued in the Fall of 1993 and received extensive media and public commentary and has been well received by the judiciary and public. The project reviews the *Incompetent Persons Act of Nova Scotia* and the options available for assisting people who may not be able to make decisions for themselves. The issue affects a large number of people from all sectors and its policies are consistent with the overall trend in health law and policy which endorses personal autonomy and respect. The Advisory group for the project involved people who advocated on behalf of various interests and people who were responsible for implementing legislation. The group had recommended that the Commission extend its research to consider one specific alternative to adult guardianship, advance health care directives (more commonly known as living wills). The Commission considered this view and decided that it would be more useful to provide the government with a comprehensive Final Report which included both topics. Accordingly, the Commission began work on the Advance Health Care project. It plans to provide the government with a Final Report covering both projects in the Summer of 1995.

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The Commissioners' preliminary proposals for reform set out in the Discussion Paper are:

1. There should be a Nova Scotia law which allows for the appointment of a guardian for an adult who needs one.
 2. The law in Nova Scotia as it relates to adult guardianship is in need of reform. The *Incompetent Persons Act* should be repealed and replaced with a new adult guardianship law.
 3. The *Inebriates Guardianship Act* should be repealed.
 4. The law should recognize an adult's right to autonomy and self-determination.
 5. The law should presume that people are competent to make their own decisions.
 6. Adult guardianship should be used only as a last resort.
 7. A guardianship order should be the least restrictive one possible in the circumstances.
 8. The court should be required to inquire as to the wishes of the adult. A guardian should, as much as possible, respect the wishes of the adult when they are known.
 9. The law should provide for the separate appointment of a "guardian of the estate" and a "guardian of the person".
 10. Adult guardianship law should allow partial guardianship orders.
 11. A guardian should only be appointed if it is in the best interests of the adult and only if the adult is in need of a guardian. The adult should also be able to receive and evaluate information effectively and to make "reasoned" decisions. Only if they cannot do this will a guardian be appointed.
 12. The law should require clear and convincing evidence for guardianship applications.
 13. Adult guardianship law should require that the court be provided with a statement of intent or "plan" as to how a proposed guardian will provide support and assistance to an adult in need of a guardian.
 14. The law should list criteria which a court would use to evaluate a proposed guardian including:
 - that the proposed person is an adult who consents to the appointment;
 - that he or she will act in the best interests of the dependent adult and, as much as possible, respect the wishes of the adult when they are known;
 - that he or she will not be in a conflict of interest (for a reason other than the fact that he or she is a beneficiary or relative); and
 - is a suitable person able to act.
- There should not be a residency requirement for guardians, although in many cases residency may be preferable.
15. Formal assessments should be available to the court if there is insufficient information about the appropriate guardian or if there are issues raised about the needs and abilities of the person who is the subject of the application.
 16. A court should inquire as to the wishes of the person who is the subject of the application whenever this is possible.
 17. The language used to refer to a person found to be in need of a guardian should not include the terms "incompetence" or "incapacity". The Commission seeks advice on the language to be used.

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18. There should be limitations on what a personal guardian can consent to without the court's approval. The personal guardian should not be able to consent to the following:
 - consent to a procedure, the sole purpose of which is sterilization;
 - consent to an abortion authorized by law except where the continuation of the pregnancy would likely cause "danger to the life or health" of the dependent adult;
 - consent to the termination of the dependent adult's parental rights;
 - interference with the adult's exercise of religious practices, except to the extent that those practices threaten the dependent adult's health or safety; or
 - consent to the involuntary placement of the adult in a psychiatric facility.
19. The court should indicate an appropriate time for periodic review of guardianship orders with a requirement that a review occur at least every five years. An order should also be reviewable at any time on application.
20. A person subject to a guardianship application should have the right to a hearing.
21. A person subject to a guardianship application should have an opportunity to hire a lawyer for independent legal advice and if there is not enough money in the estate, a government sponsored or legal aid lawyer should be made available to the person.
22. An advocate should be required to visit the person who is the subject of the application to explain matters to the person.
23. Notice of a guardianship application should be given to the following:
 - nearest relatives of the person;
 - office of the Public Guardian/Trustee;
 - the administrator of a facility where the adult may be residing;
 - anyone appointed under an enduring power of attorney or a medical consent designation;
 - any other person residing with the adult in private accommodations;
 - any persons named in a testamentary document, if known, and
 - any other person with an interest in the application.
24. The most appropriate Office for the monitoring of estate guardians is the Office of the Public Trustee. Since there is also a need for monitoring personal guardians, a new Office of the Public Guardian should be established, in combination with the Public Trustee for the purpose of monitoring personal guardians.
25. The most appropriate body to provide personal guardianship services to those in need is a new Office of the Public Guardian Trustee.
26. The legislation should specifically allow for co-guardianship orders as well as for the appointment of alternate guardians.

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27. The discharge of a guardian should take place on application and a court should be satisfied that:

- the dependent adult is no longer in need of a guardian;
- the guardian is unable or unwilling to continue to act;
- the guardian refuses to act or to continue to act;
- the guardian has failed to act as guardian or act in accordance with a guardianship order;
- the guardian has acted in an improper manner or in a way that has endangered the well-being of the dependent adult; or
- the guardian is no longer a suitable person to act as guardian,

Residency should not, however, be the cause for discharge.

6. Advance Health Care Directives (Living Wills) *(Discussion Paper released and comments being sought)*

This project reviews and considers reforms to allow the use of a broader range of advance health care directives (Living Wills is the common name although technically it is only one form of advance health care directive). A *Discussion Paper* has been completed by the Commission on the project and was published in November 1994. It is an area of research which has resulted in legislation in other provinces and, as noted above, was seen by the Advisory group as an extension of the Adult Guardianship project. It is of interest to a broad range of groups including seniors and people representing those with a range of illness and other needs, all of whom are involved in the Advisory group. It is an area of law on which there is some uncertainty in the legal profession in Nova Scotia as to what options are available for clients. This project and draft legislation, if adopted, will serve to clarify these important issues. As noted in the Adult Guardianship description, the Final Report on this project will be part of the Adult Guardianship Final Report and is scheduled for completion in the Summer of 1995.

The Commissioners' preliminary proposals for reform set out in the Discussion Paper are:

1. That the law in Nova Scotia should be changed to allow various types of advance health care directives.
2. That three models of advance health care directives should be included in the law to allow for the appointment of a proxy or the execution of a living will or both. A statutory list model which allows for substituted health care decision-making should also be included in the law for people who have not made an advance health care directive.
3. That in order to make an advance health care directive a person should be 16 years of age and be mentally capable of creating a legal document.
4. That an advance health care directive should come into effect whenever the maker is incapable of health care decision-making.
5. A person must be competent in order to revoke an advance directive. A directive will be considered revoked if the person makes a later directive; if another document states that the earlier directive has been revoked; or if the person destroys the directive or tells someone else to destroy it.

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6. That a health care decision should include a consent to health care, a refusal of health care or, in some cases, a withdrawal of consent to health care. Health care should be defined as anything done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, including a course of treatment.
7. A proxy who is specifically selected by a person making an advance health care directive should have power to make personal decisions on behalf of the person and to act as a guardian of the person. These powers would only be given if the proxy is appointed by the person and not if he or she is made a proxy under the statutory list of health care decision-makers.
8. That a proxy should not be able to consent to the following health care procedures unless there is specific authorization from the maker of the advance health care directive:
 - Removing tissue from the maker of the advance health care directive while he or she is living, for transplantation or for medical education or research purposes;
 - Health care, the primary purpose of which is research; and
 - Sterilization that is not medically necessary to protect the person's health.
 - The Commission is unresolved at this time with respect to placement in a psychiatric facility and seeks specific public commentary on this issue.
9. That a person who has reached the age of 16 should be presumed capable of acting as a proxy. A proxy should also be required to be mentally capable of health care decision-making. There should not be any other restrictions on who can act as proxy, such as ones based upon whether or not the proxy will benefit under a will of the person.
10. That a person should be able to name any number of alternate proxies to replace a proxy if the proxy dies, refuses or is unavailable to act, or loses decision-making capacity. Joint proxies should not, however, be allowed and, where more than one proxy is named in a directive, they should be presumed to act successively.
11. A proxy selected by a person to make health care decisions should use a substituted judgment test with the person's specific instructions, either oral or in writing, providing evidence of the person's intentions. If there is no evidence of intention, the proxy will be required to act in the best interests of the person.
12. That there should not be a formal requirement for registration or notification with respect to the existence of an advance health care directive. The person making the advance health care directive should have responsibility for telling others of its existence. However, health care providers and health care facilities should also be required to ask about the existence of a directive.
13. Nothing in the law should compel a proxy to act as one if he or she refuses to do so. A proxy who wishes to resign as proxy must notify the maker of the advance health care directive.
14. A proxy should not be able to delegate decision-making authority to another person.
15. That a proxy should have all health care information available which is relevant to the decision to be made, subject to any limitations placed on the release of information by the maker. Also, a proxy should be required to keep the health care information confidential.
16. That health care providers should be protected from liability if they comply with a directive or if they fail to comply because they were not aware of the existence of the directive. The law should not contain additional sanctions against a health care provider who does not follow a directive and that the available common law remedies are sufficient.
17. A mandatory advance health care directive form should not be required but the law should include a sample document to show people the types of issues they should be considering.

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18. That an advance health care directive must be in writing.
19. That the directive should be signed by the maker and if the person is physically unable to sign he or she must direct that someone else sign on his or her behalf, but the person signing must not be the proxy or an alternate proxy. There should also be at least one witness to the signing by the maker.
20. That a person who has reached the age of 16 is presumed to be capable of witnessing an advance directive. The witness to an advance health care directive should not be the proxy or an alternate proxy named in the directive.
21. That although periodic renewal of an advance directive is desirable it should not be mandatory.

7. Reform of the Administrative Law System *(Research nearly completed)*

This project is a Reference from the Department of Justice requiring the Commission to draft legislation which essentially restructures the administrative law system in the province. The Reference requires that the Commission examine administrative review/appeals, uniform natural justice/hearing procedures, uniform powers for tribunals and provide for independence of decisionmakers. The Commission has carried out empirical research regarding all agencies making decision in the Province this year to determine who the statute would apply to and what procedures are now in place. The Commission also developed an Advisory/Resource group including the Chair of the Canadian Bar Association Administrative Law sub-section, practitioners who appear before various administrative boards, Chairs of two Boards/decisionmakers, academics and several government staff lawyers. In addition there is active and on-going communication with the two Chief Justices of the Supreme Court to ensure that the perspectives in the judiciary are considered in relation to recommendations on judicial review and appeals. This project is also of interest to the Federal Department of Justice and the Executive Council to the extent that it deals with structuring fair and open appointment processes. The Commission has also researched and will publish charts listing all appeal/review process that exist in the legislation including regulations. Aside from its educational function, this research is useful to determine whether a standardized appeal process should exist and whether there should be one or more generic administrative appeal boards to reduce the demands on the court system in Nova Scotia. The Advisory Group has now completed its review of the various issues and a Discussion Paper is being developed. It is expected that the Commissioners will review and publish this in the Summer or early Fall of 1995.

8. Advancement of Human Rights *(Research and consultation occurring)*

This has been one of the more challenging projects chosen by the Commissioners in that one of the concerns has been to avoid duplication of the work of the Human Rights and other equality and advocacy based Commissions. The Commission started by carrying out research to determine how change can be better effected in Nova Scotia in the human rights area and to what extent there has been responses to some of the recommendations in the Marshall Commission Report. A research brief was prepared by two consultants with the assistance of the Federal Department of Justice. Their research indicated that employment

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equity concerns are a matter of significant concern for people who fall within the discriminated against categories. It also indicated that many of the recommendations in the Task Force on Race Relations and the Marshall Commission have resulted in committees, education/training and policy development, although there is less evidence of significant structural changes. One of the underlying legal issues has been whether human rights are best achieved on an individual or collective basis (e.g., would it actually provide for change if more stringent sanctions existed involving court oriented prosecution). There are some possible reforms that could be recommended to the *Human Rights Act*. The Commission, after reviewing the overall project, has determined that the project is more appropriately understood as an umbrella topic under which it expects to issue a number of Discussion Papers, Reports and studies dealing with a range of issues including procedural reforms that might be required under the existing human rights legislation.

APPENDIX I

THE LAW REFORM COMMISSION ACT

APPENDIX II

***AUDITED FINANCIAL REPORT
FOR 1994-95 FISCAL YEAR***

APPENDIX III

PROJECT SUMMARIES IN ENGLISH, FRENCH AND MI'KMAQ

- **Final Report on Enforcement of Maintenance Obligations (November 1992)**
- **Final Report on Juries in Nova Scotia (June 1994)**
- **Final Report on From Rhetoric to Reality - Ending Domestic Violence in Nova Scotia (February 1995)**
- **Final Report on the Legal Status of the Child Born Outside of Marriage in Nova Scotia (March 1995)**
- **Discussion Paper on Adult Guardianship in Nova Scotia (April 1993)**
- **Discussion Paper on Living Wills in Nova Scotia (November 1994)**

APPENDIX III

SUMMARIES OF PROJECT RECOMMENDATIONS