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APPENDIX "CODE-16"

SUBMISSION AND BRIEF

by

THE CANADIAN ASSOCIATION OF CHIEFS OF POLICE

For

THE HOUSE OF COMMONS STANDING COMMITTEE

ON JUSTICE AND THE SOLICITOR GENERAL

CONCERNING

THE FRAMEWORK DOCUMENT ON THE PROPOSED

NEW GENERAL PART OF THE CRIMINAL CODE

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TABLE OF CONTENTS

- I INTRODUCTION

- II PARTICULAR CONCERNS
 - 1. The Principle of Legality
 - 2. Omissions
 - 3. Culpability
 - 4. Corporate Liability
 - 5. Causation
 - 6. Defence of Lack of Control
 - 7. Immaturity
 - 8. Self Defence
 - 9. Intoxication
 - 10. Mental Disorder
 - 11. Mistake of Law
 - 12. Conspiracy

- III CONCLUSION

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The House of Commons Standing Committee on
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concerning
The Framework Document on the Proposed
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I INTRODUCTION

The 1990's are bringing a new and real appreciation within Canadian policing that the best work of "the State" is achieved only in response to community needs. The C.A.C.P. is particularly cognizant of that fact, and even more strongly than in 1987 (when the first Association response to the proposed General Part was made) now obliged itself to measure initiatives by that standard. The process of law reform is not exempt.

Although the natural appeal of a new, systematic and simplified legislative regime is compelling, there is little tangible assurance that that goal is met by the proposed General Part. Even during the intervening years since the original publication of Report 30 by the Law Reform Commission of Canada, there has been little attention to the pragmatic questions that the general community asks. For example, substantial inquiries remain concerning the application of the

proposed changes (see page 7, second paragraph, of the 1987 Brief), the definition of terms (see appendices I, II, and III of the 1987 Brief, and even the scope of the law proposed (for example, concerning immaturity). In this regard legislative simplification and legislative clarity should not be assumed to be the same thing.

While the C.A.C.P. tends to favour the on-going review of public legislative policy, we are increasingly concerned with the relatively narrow focus of formalized law reform. The emphasis upon comprehensive codification tends naturally to promote a paradigm that reinforces the primacy of controlling rules, and process. By itself this development is neither surprising nor especially desirable, particularly as it does encourage litigation to test the basic questions already identified here (application, definition, and scope). The basic concerns of the C.A.C.P., and it is suggested of the general community also, are circumscribed by these fundamental issues. It is therefore suggested that the draft General Part does not sustain the impression that it is more detailed, comprehensive, or superior to the present law. Substantial modifications are therefore required to amend these deficiencies, and to respond usefully to the real needs of the community.

II PARTICULAR CONCERNS

For the purpose of more fully and completely informing the Standing Committee a copy of the 1987 C.A.C.P. Brief concerning the draft General Part is included with this submission. The concerns expressed therein are now adopted once more insofar as few assurances have been

received in the interim to indicate that the original concerns of the C.A.C.P. have been addressed. Nevertheless, the following issues do deserve some particular comment:

1. The Principle of Legality

The C.A.C.P. is not so much concerned that section 3 is in conflict with the Charter of Rights, but that section 3 may be unjustifiably more restrictive than the Charter. Consequently it is desirable, if this principle is codified, that it be phrased in terms which are consistent with section 11(g) of the Charter. The least preferred option is to amend the existing draft section 3 by attempting to define the applicable crimes which may be incorporated by either international law or the general principles of law recognized by the community of nations.

2. Omissions

As stated in the 1987 Brief, the original draft of section 5 apparently criminalizes the mere creation of a risk whether or not that risk eventually produces damage, injury or death. It therefore operates to significantly expand the potential limits of liability that section 53 may be seeking to create. As this situation would probably be aggravated by the deletion of clause (a) that proposal is not supported. In this regard the relative certainty obtained by the New Zealand Bill is desirable.

3. Culpability

In the 1987 C.A.C.P. Brief (at pages 18-22) a number of significant issues were addressed concerning purpose, recklessness, and negligence. As noted in the framework document (at page 28) the Association has serious reservations about the mental element required to prove culpability. In particular, those concerns are expressed in functional terms by the following series of questions and observations:

- (a) Insofar as the definition of "purpose" in section 8 apparently connotes a more specific intention than is obliged to be proved as "general intent" pursuant to contemporary criminal law, does this mean that criminal sanctions will be less readily imposed pursuant to the General Part?
- (b) How is the current practice assisted by defining "recklessness" as conduct which is "engaged in recklessly..."? Similarly, does this imply that a finding of recklessness diminishes the quasi-objective standard presently understood by the law? In a complimentary fashion does the proposed methodology place undue emphasis on considering the actual state of mind of an accused (notwithstanding the assumption that the criminal law ought to be premised upon sound, public policy considerations)?
- (c) Does the definition of negligence in section 11(d) and (e) unduly import considerations of gross negligence into the criminal law?

A principal conclusion afforded by these inquiries is that the definitions proposed for the terms of culpability are not consistent with either simplicity or clarity. In contrast, there is now a clear understanding throughout all levels of the system of criminal justice of the proper meaning of general and specific intention. The draft culpability provisions of the General Part should therefore seek to be either more clearly defined, or more consistent with contemporary terminology. The inability to achieve either of these objectives will significantly affect police decision making, and promote extensive litigation.

4. Corporate Liability

The proposition attributed to the C.A.C.P. on page 43 of the framework document is not completely consistent with the submissions contained on pages 41 - 42 (particularly point #1 on page 42) of the 1987 Brief. Although the general principle of creating criminal corporate liability is endorsed, the C.A.C.P. would enhance that liability by further attention to the concept of furthering when there is a lack of overt corporate repudiation subsequent to knowledge of the conduct. In this regard the effect of organized criminal activity must be strongly deferred.

5. Causation

Section 7 may still be flawed owing to the apparent excuse or defence which may be available to an accused person if an "unforeseeable cause" intervenes. The draft wording suggests that any such intervention must inevitably accrue to the benefit of the accused. If so, this construction of section 7 requires an amendment to narrow its application in practice. The concerns of the Association are accurately reflected on page 47 of the framework document.

6. Defence of Lack of Control

Section 15 of the General Part is concerned with lack of control. Although the framework document (at page 54) attributes a C.A.C.P. submission with respect to this subject to be concerned only with automatism, the Association's interest is far wider than that. The original submission in 1987 (at pages 24 - 25) addressed this issue as one of provocation, as set out below:

"Although the current law recognizes sudden provocation only within the narrow confines of reducing murder to manslaughter, it is apparent that this defence may become applicable with respect to all criminal offences. Permitting the occasional "casual shoplifter" to plead that "he could not help himself" does not benefit the criminal law, nor does it enhance public protection. It is therefore suggested that the creation of such a broad and potential scope of application for the defence of provocation is inappropriate. The Minister is therefore requested to statutorily restrict the use of this defence by endorsing the status quo now embodied in section 215(1) (now section 232(1) of the Criminal Code) of the Criminal Code."

In other respects the C.A.C.P. does not agree that the common law defence of automatism needs to be codified as noted in the framework document (at the bottom of page 53), "the defence as proposed...is potentially a very broad one and it is uncertain what it includes". It is suggested that this statement clearly admits that it is premature to include automatism within the purview of the draft section 15.

7. Immaturity

The experience of members of the Association is that children are frequently "criminally mature" before the age of 12 years. Indeed, it is not uncommon for advantage to be taken of this immunity. It is therefore very strongly suggested that the establishment of this threshold (12 years of age) for criminal responsibility be reviewed, and lowered. In the alternative, it is suggested that "immaturity" could instead become a qualified defence that could be displaced where there is culpable liability for criminal conduct. As is stated on page 22 of the 1987 brief:

This Association has, on previous occasions, expressed dissatisfaction with the arbitrary designation of age 12 as the minimum age for criminal liability. It is suggested that this artificial limit is inappropriate and of little public benefit. Common experience and good sense reinforces the observation that the concept of "tender years" has been, in practice, largely diminished by contemporary society. It is therefore suggested that the public interest is equally served by protection from astute and "street-wise" offenders who only happen to be young in age.

8. Self Defence

The C.A.C.P. is naturally concerned with the ability of police officers to lawfully and fully protect themselves, and persons under their care. In this regard two principal matters have been identified which are not satisfactorily resolved within the draft General Part:

(a) A reasonable construction of sections 20(2), 23(2), and 21 leads to the conclusion that deadly force might never be lawfully applied. This issue is, of course, of substantial concern to police officers who regrettably may be obliged to use their firearms. The further resolution in 1989 of the Uniform Law Conference concerning section 25(4) of the Criminal Code, and subsequent government attention thereto, also concern this Association; and

(b) It is unclear if sufficient protection is given to police officers by the deference of resistance to arrest. Surely the wide availability of remedies for illegal arrest must be favoured over promoting physical resistance?

These issues, and others of a more technical nature, are dealt with in detail on pages 32 - 35 of the 1987 Brief. These issues are also summarized on pages 66 and 74 of the framework document.

9. Intoxication

The concerns of the Association are summarized on pages 85 - 86 of the framework document, and dealt with in detail on pages 25 - 27 of the 1987 Brief. For the reasons set forth in the latter, the C.A.C.P. preferred the simpler and alternative recommendation made by a minority of the Commissioners (see pages 28 - 29 of Report 30, Volume I).

10. Mental Disorder

The Association has significant concerns with the proposed section 14 of the General Part, all of which are identified on pages 23 and 24 of the 1987 Brief. However, the replacement for section 16 suggested by the Department of Justice (and reproduced on pages 89 - 90 of the framework document) does respond appropriately to those issues. The C.A.C.P. would therefore respond to the "issues for consideration" on page 92 of the framework document in the following fashion:

- (a) (Question # 1) as set forth in section 16(1) recommended by the Department of Justice;
- (b) (Question #2) Yes; and
- (c) (Question #3) Yes.

11. Mistake of Law

It is suggested that section 18(1) is unqualified, and therefore does not properly restrict this defence to those situations where the mistake is reasonable and bona fide. The C.A.C.P. is concerned that this oversight does not properly reinforce the benefits of public law and criminal sanctions for the good of the whole community. Similarly, personal responsibility for one's own conduct ought to be premised upon the quasi-objective norms of law, and not a subjective ignorance or lack of understanding. In this regard potential criminal liability should not be allowed to more frequently share those who are "well informed".

The C.A.C.P. is also at odds with the concept of a defence that is styled as an "officially induced error of law". The creation of this type of estoppel by section 18(2) invites abuse, mischief, and injustice. The Association (as stated on page 29 of the 1987 Brief) suggests that there is neither a need, nor justification, for this type of initiative.

Other significant issues are more fully addressed by the Association on pages 27 - 30 of the 1987 Brief.

12. Conspiracy

All across Canada police agencies are more frequently being challenged by organized crime that carries forth its illegal activities as a series of conspiracies. It is therefore very important that the legislative treatment of this concept recognize that illegal conspiracies represent a real threat to communities. The position of this Association is premised upon that basis.

As pointed out in the 1987 Brief (at pages 45 - 46) section 31 is inadvertently restrictive. Thus, according to the current draft, one may only conspire to commit a crime which is defined

in section 2(1) as "an offence that is liable to be punished by imprisonment...". Thus, it is legally impossible to conspire to commit an offence which:

- (a) is not a "crime"; or
- (b) is a breach of a federal statute that does not provide for the potential incarceration of offenders; or
- (c) is a provincial statute or municipal bylaw; or
- (d) is any other unlawful act, or lawful act to be committed by unlawful means.

It is therefore suggested that the scope of section 31 is too narrow and that it should be broadened to include those matters which are enumerated here.

III. CONCLUSION

Throughout the draft General Part we are reminded that a principal objective for this legislative initiative is to modernize and simplify the law, and systematically organize it. While this is a worthy and demanding objective, the Association is not yet convinced that the proposals made are as functional as the law which may be replaced. If this opinion is correct a "new uncertainty" will be injected into the system of criminal justice as all of the players seek to understand, interpret, and define the new rules. However, the general community of Canadians is already too tired of hearing that a new paradigm holds future promise. The certainty of that statement with respect to the General Part is not self evident.

The C.A.C.P. has extensively defined its concerns, principally in a brief prepared in 1987 in favour of the Minister of Justice. The Standing Committee is therefore urged to review that document, a copy of which is enclosed with this submission. As has already been strongly emphasized, there remain significant issues to be addressed arising out of the General Part: the application of the proposed changes, the definition of terms, and the scope of the proposed law. However, the Association cannot concede that an appropriate legislative clarity has been achieved.

The representatives of the Association will be pleased to make further submissions, and to respond to the inquiries of the Committee as may be required.